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DHS Offers Deferred Action: How Long Will the "DREAM" Last?

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The President and the Secretary of the U.S. Department of Homeland Security (DHS) have announced a policy for DHS to grant "deferred action" and work authorization to certain relatively young people who otherwise might be removable from the U.S. This is a real, but very limited, step that has opened a vigorous national discussion about the proposed Development, Relief and Education for Alien Minors Act (DREAM Act).

Both political parties have considered but never passed legislation to legalize young people who have lived most of their lives in the U.S. but lack lawful status. The arguments in favor have included the importance of providing hope and opportunity to those who had little or no choice in having grown up in the U.S. Arguments against the legislation have focused on rewarding the parents' illegal activity and spurring more rounds of illegal entries.

The operative document is a memorandum from DHS Secretary Janet Napolitano, instructing the immigration agencies in DHS to implement the policy to "defer action" against, and grant work authorization to, certain relatively young people in the U.S. who otherwise would be deportable. DHS also has issued a question and answer document about the policy and its implementation, but many questions remain.

Eligibility

The DHS announcement states that people will qualify for "deferred action" if they meet all of the following criteria. Applicants must:

- Have come to the United States under the age of 16;
- Have continuously resided in the United States for at least five years preceding the date of this memorandum and are present in the United States on the date of this memorandum;
- Currently be in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety;
- Not be above the age of 30; and
- Be age 15 or older to request deferred action affirmatively from U.S. Citizenship and Immigration Services (USCIS) (as opposed to those facing removal action by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP), who apparently can apply even if under age 15).

Uncertainties about Eligibility

The DHS announcements mention that the policy is for persons "brought to the United States through no fault of their own as young children," but the actual requirements announced so far do not include any proof about how one was brought to the U.S. Proof about how one physically came to the U.S. would be difficult to obtain, and it might implicate others who could be inadmissible for "smuggling" unauthorized aliens into the U.S.

"Continuous residence" in other immigration laws and rules generally has allowed for some limited absences – sometimes with very specific guidelines such as 90 days at a time or 180 days total, but broken by service of removal papers or by departure under threat of removal. DHS seems to have chosen the term intentionally to allow people to qualify for deferred action even if they were physically absent for limited periods during the five years of "continuous residence" in the U.S., but DHS will need to articulate any bright line rules for deferred action.

It does not appear that normal rules of inadmissibility will apply except concerning criminal convictions and national security issues. This means applicants will not need to show how they can support themselves, and it won't matter how long they have been "unlawfully present" or even if they made misrepresentations in immigration matters. Apparently applicants can qualify even if they have left the country and returned or claimed to be a U.S. citizen (two normally nasty bars to legal status).

It is not clear if someone who has dropped out of school could obtain a GED after June 15, 2012 and still qualify. The military alternative to qualification is narrower than one might think. The law does not allow unlawfully present aliens to enlist voluntarily in the military or Coast Guard except in extremely limited circumstances, and there is no mandatory military draft underway, so someone could not now enlist to become eligible for deferred action. People who actually served in and were honorably discharged from the military recently are thereby eligible to apply directly for U.S. citizenship and would not need to bother with deferred action.

It is not clear whether someone otherwise eligible who turns age 30 will lose deferred action automatically or be eligible for extensions of deferred action.

Evidence

The process for applying for deferred action has not been identified yet, but the types of documents one may need are already known, and hopeful applicants should begin to assemble them. Most importantly are those that show arrival before age 16, five years' continuous residence and physical presence on June 15, 2012. Applicants should gather documents such as travel records, financial records, medical records, school records, employment records and military records. Proof of age and education (or military service) also should be gathered.

Sworn statements by people with knowledge of circumstances may be helpful, but those are best used to make sense of raw documents that are harder to falsify, and not very convincing on their own. Previous amnesty programs have generated many forged and false documents, and this phenomenon will pose a challenge to DHS.

Application Process

Someone eligible for deferred action who is already in the process of being removed from the U.S. or is about to be deported can immediately bring the matter to the attention of ICE or CBP to stop the removal. Otherwise, it would be best to give DHS officers time to develop clearer eligibility and process arrangements, which were not developed earlier because only White House and very top DHS leaders were involved in developing the announcement.

People facing removal may contact the ICE Office of the Public Advocate at EROPublicAdvocate@ice.dhs.gov, the ICE hotline at 1.888.351.4024, or the Law Enforcement Support Center's hotline at 1.855.448.6903.

People not in removal proceedings (including those subject to an outstanding order of removal that is not actively being enforced by ICE) will need to file a paper application to (USCIS) using procedures that will not

be available for at least 60 days from the June 12 announcement. USCIS most likely will designate a lockbox facility to receive and scan applications (probably Forms I-131 and I-765, with supporting proof), process filing fees (amounts not yet known), and forward to USCIS offices to schedule biometrics intake (for background screening against DHS and FBI databases) and possibly local interview and USCIS offices. Applicants may call the USCIS hotline at 1.800.375.5283 for limited information. We do not know how long USCIS will take to process applications, but we expect DHS to announce that people with receipt notices should not be removed by enforcement officers before adjudication of their deferred action applications.

Results of Approval of Deferred Action

Approval of deferred action only means that the government has consciously chosen for the moment, in its complete discretion, not to seek to remove someone, and it allows the person to obtain a work authorization card (Form I-766). As a practical matter, approval will allow someone to live, travel and work anywhere in the U.S. during the period of deferred action.

DHS will approve deferred action and work authorization for two years at a time. Those approved will be able to apply for extension if the government in its complete discretion decides to consider such applications. This presents some interesting issues for the upcoming presidential election.

Unless DHS develops policy to "parole" those with deferred action (possibly after a special application to USCIS), they should not travel because of the unlikelihood of being re-admitted to the U.S. Normally deferred action does not allow return from international travel.

Deferred action will not automatically benefit any family member of the applicant – not parents who may have brought the person here and may be taking care of the person, not anyone the person may have married and not children the person might have obtained. Deferred action has always been available for extremely compelling individualized circumstances, and relatives may choose to make their own application outside the new policy.

DHS has stated that it will not use information from a denied deferred action application to pursue the person for removal or prosecution unless fraud or criminality is revealed.

The Administration chose some bright line standards for eligibility for deferred action, and the media will tend to identify and publicize cases that fall just outside the standards: someone who entered the day after turning 16, someone who entered four years and 11 months before June 15, 2012, or someone who has just reached 30.

The question of what to do about people who have grown up in the U.S. unlawfully has long been an important political topic, but the new DHS policy will greatly intensify the discussion and possibly lead to more action.

If you have questions about deferred action and how it affects you or others, please contact any of our Immigration attorneys.