

The New Age of Prosecutorial Discretion and DACA

By Frances Valdez

On November 8, 2016, most immigration advocates and the immigrant community became anxious about expected changes to immigration law and policy. In the first few weeks of the Trump Presidency a number of executive orders were signed in regard to immigration that laid out a plan to build a wall between the U.S. and Mexico, restrict entry to refugees and to deport as many removable immigrants as possible. This article addresses the shift in approach to immigration enforcement has and will continue to affect prosecutorial discretion and DACA.

What is Prosecutorial Discretion?

Prosecutorial discretion is the ability of an officer or an agency to decide how to approach a case and when to prosecute or not prosecute a case. An agency has absolute discretion to decide when to prosecute or not prosecute a criminal or a civil case.¹

Prosecutorial Discretion as of April 2017?

On January 25, 2017, President Trump signed an executive order to increase interior enforcement of immigration called, “Enhancing Public Safety in the Interior of the United States”.² On, February 20, 2017, The Secretary of the Department of Homeland Security issued, “Enforcement of the Immigration Law to Serve the National Interest”, a memorandum that provides guidance to U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection about the implementation of President Trump’s executive order.³

The executive order and the memorandum make it clear that all "removable aliens" will become a priority for enforcement.⁴ Secretary Kelly's memorandum states, "all existing field directives memoranda, and field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded-to the extent of the conflict-including, but not limited to the November 20, 2014 memoranda entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” and “Secure Communities”.⁵ The memorandum “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (DACA) and the memorandum entitled

¹ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

² Presidential Executive Order, “Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), AILA Doc. No. 17012531.

³ Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

⁴ Presidential Executive Order, “Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), AILA Doc. No. 17012531.; Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

⁵ Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

“Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. Citizens or Permanent Resident” (DAPA) were exempted from rescission.⁶

“Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” issued by Former DHS Secretary Jeh Johnson acknowledged the inability of DHS to respond to all immigration violations or remove all undocumented people.⁷ As a result DHS needed to use limited resources wisely, to exercise discretion as early in the case as possible and consider a list of factors to be considered when DHS considered prosecutorial discretion. This approach differs greatly from Secretary Kelly’s directive to arrest or apprehend any alien who the immigration officer has probable cause to believe is in violation of the immigration laws.⁸ . DHS personnel may also initiate removal proceedings against any alien who is subject to removal under any provision of the INA and to refer cases for criminal priorities.⁹

In addition, DHS personnel should prioritize for removal individuals who fall under section 212(a)(2) [criminal and related inadmissibility grounds], (a)(3) [security and related inadmissibility grounds], and (a)(6)(c) [fraud, misrepresentation inadmissibility grounds], 235(b) [expedited removal of inadmissibility "arriving aliens" and other noncitizens apprehended in the interior] and (c) [expedited removal based on security and related grounds] and 237(a)(2) [criminal grounds of removal] and (4) [security related grounds of removal] of the INA.¹⁰

Regardless of the basis of removability Secretary Kelly directed DHS to prioritize immigrants who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.¹¹

Secretary Kelly does acknowledge that DHS personnel should still exercise prosecutorial discretion on a case by case.¹² However, practitioners must realize that the approach to

⁶ Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

⁷ Department of Homeland Security, “Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants” (Nov. 20, 2014), AILA Doc. No. 14112004.

⁸ Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

⁹ *Id.*

¹⁰ Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

¹¹ Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

¹² Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest” (Feb. 20, 2017), AILA Doc. No. 17021830.

prosecutorial discretion has shifted from DHS Secretary Johnson who stated that the U.S. cannot and should not deport everyone who is removable to DHS Secretary Kelly who has directed DHS to attempt to deport all removable individuals and use the law and resources to the fullest extent possible to accomplish this goal. The policy shifts have already led to increased fear in the immigrant community and stories of swift removals. Areas of concern include but are not limited to individuals who have any contact with law enforcement, individuals with an order of supervision, individuals with pending deferred action approvals issued by ICE, any immigrant with an unexecuted final order of removal, and any undocumented person living or traveling in the U.S.

DACA

As mentioned in the Secretary Kelly's February 20, 2017 memorandum, DACA remains in effect.¹³ DACA allows for protection from deportation and work authorization if an individual can establish the following requirements:

"were under the age of 31 as of June 15, 2012; came to the United States before reaching your 16th birthday; have continuously resided in the United States since June 15, 2007, up to the present time; were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS; had no lawful status on June 15, 2012; are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety."¹⁴

Risks

Despite Secretary Kelly's continuation of DACA, the fact that all undocumented and removable immigrants have become a priority for enforcement raises a lot of questions of how DHS will treat DACA recipients. President Trump campaigned on a promise to end DACA and the political nature of the issue, makes advocates and DACA recipients insecure about the future of the program.

DACA eligible individuals can still file first-time and renewal applications and both continue to be approved. The difficulty lies in the questions applicants have about the risks of applying. President Trump could end the program at any time. Individuals risk losing their filing fee if their application is not approved before the program is ended. Given the harsh anti-undocumented immigrant rhetoric espoused by President Trump, we also have no assurance that if DACA is one day rescinded that the information provided by DACA applicants would not be used for enforcement purposes.

Other areas of concern are raised when DACA recipients come within the new priorities. What happens to a DACA applicant who is arrested but not convicted? What happens to a DACA applicant who has been convicted of a crime but remains eligible for DACA? What happens to DACA recipients with final orders of removal?

¹³ Department of Homeland Security, "Enforcement of the Immigration Laws to Serve the National Interest" (Feb. 20, 2017), AILA Doc. No. 17021830.

¹⁴ Department of Homeland Security, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012), AILA Doc. No. 12061544.

Despite these concerns, many advocates feel comfortable telling renewal applicants that it is safe to apply. Renewal applicants have already shared information with DHS. For first time applicants, it is extremely important that they understand the risks of applying and they make an informed and voluntary decision.

Case Studies

Unfortunately, DACA recipients have been arrested and detained by ICE. Daniela Vargas a 22-year-old living in Mississippi was arrested after speaking out against ICE's arrest of her brother and father during a raid of their home.¹⁵ Daniela's DACA renewal was pending. She spent two weeks in detention and was ultimately released on an order of supervision due to immense public pressure. Daniel Ramirez was arrested during a raid at his home where ICE was looking for his father.¹⁶ Daniel explained to ICE that he was a DACA recipient and was still arrested. Daniel was recently released after six weeks in detention. ICE attempted to justify the arrest and detention through an allegation of gang activity that has yet to be proven.¹⁷

Daniel and Daniela's cases are just a few of many examples of how DACA recipients are being treated by ICE. ICE's practice of home raids have shown that DACA would not stop them from arresting an individual. Individuals with pending DACA renewals should also be careful. DACA recipients with criminal arrests or charges (even without a conviction), any criminal conviction, fraud related to a government agency (such as use of a false social security number); or individuals who have been deported or been ordered deported from the United States must be extremely cautious when applying or reapplying for DACA.¹⁸ Individuals who previously applied for DACA, were approved and divulged a prior criminal issue should consider all possible consequences before renewing.¹⁹

DACA and Advance Parole

USCIS continues to accept and approve applications for advance parole under DACA. A number of individuals have successfully left the U.S. and returned. However, individuals who travel on advance parole must make an educated and voluntary decision before they decide to travel. Individuals with previous criminal arrests or charges (even without a conviction); any type of criminal conviction; any history of fraud related to a government agency (such as use of a false social security number); or been deported or been ordered deported from the U.S. should not travel on advance parole.²⁰

Conclusion

The President has the authority to make policy decisions regarding immigration. In an era with a President who ran a campaign on increased immigration enforcement, immigrant

¹⁵ Ari Shapiro, *Dreamer Daniela Vargas Released By Immigration Officers*, NPR, Mar. 14, 2017; Ray Sanchez, *Dreamer Daniela Vargas released, immigration group says*, CNN, Mar. 10, 2017.

¹⁶ Rick Anderson, *'Dreamer' Threatened with Deportation in Seattle is Released After Weeks of Detention*, Los Angeles Times, Mar. 29, 2017.

¹⁷ *Id.*

¹⁸ Immigrant Legal Resource Center, "DACA Current Status and Options" (Mar. 01, 2017).

¹⁹ *Id.*

²⁰ Immigrant Legal Resource Center, "DACA Current Status and Options" (Mar. 01, 2017).

advocates must closely monitor the ever-changing landscape of prosecutorial discretion and DACA. Our responsibility in the next four years will be to remain zealous advocates for the rights of immigrants.