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## **Deferred Action for Childhood Arrivals**

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On June 15, 2012, United States President Barack Obama announced an executive action that will halt the deportation of undocumented aliens who were brought to the U.S. as children and allow them to apply for work authorization. This policy could affect as many as 800,000 young people, whom President Obama said “are Americans in their heart, in their minds, in every single way but one: on paper.”

The new policy directs the Department of Homeland Security and its sub-agencies to exercise its existing prosecutorial discretion powers in cases with qualifying individuals. A June 15, 2012 memorandum from the Secretary of Homeland Security, Janet Napolitano, to the heads of CBP, ICE, and USCIS articulated the policy of prosecutorial discretion in enforcing the immigration laws against “certain young people who were brought to this country as children and know only this country as home.”

### **Who Qualifies for Prosecutorial Discretion Under the New Policy:**

The June 15, 2012 memo from Secretary Napolitano and subsequent publications from USCIS set clear guidelines for which individuals qualify. In order to qualify, the individual must:

1. Have come to the United States while under the age of sixteen;
2. Have continuously resided in the United States for at least five years preceding June 15, 2012 and must have been present in the United States on June 15, 2012 and when applying for deferred action;
3. Have been under the age of 31 as of June 15, 2012;
4. Be currently in school, have graduated high school, have obtained a general education development certificate (GED), or be an honorably discharged veteran of the Coast Guard or United States Armed Forces;
5. Have not been convicted of a felony offense, a significant misdemeanor offense, three or more misdemeanor offenses, or otherwise pose a threat to national security or public safety; and

For the purposes of this deferred action program, a “significant misdemeanor” is a misdemeanor as defined by federal law, for which the term of imprisonment is greater than 5 days and less than one year. Additionally, the “significant misdemeanor” must be a crime of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, OR an offense for which the sentence is for time in custody of more than 90 days. Time in custody does not include a suspended sentence.

To be considered “currently in school” under the guidelines, the individual must be enrolled in school on the date they submit a request for consideration of deferred

action. The guidelines are crafted to target the sympathetic group of children and young adults who were not responsible for being brought into the United States in violation of its immigration laws. The reasoning behind targeting this group is that prosecutorial discretion is especially justified in these cases. However, individuals meeting these qualifications are not automatically granted deferred action, and the Department of Homeland Security applies prosecutorial discretion on a case by case basis.

### **The Circumstances in Which the New Policy is Applied**

The June 15, 2012 memo from Secretary Napolitano identifies three general types of cases for which the policy applies. The first group encompasses individuals encountered by ICE, CBP, or USCIS who meet the above qualifications and would otherwise be issued a notice to appear. The new policy instructs ICE and CBP to “immediately exercise their discretion” to prevent these “low-priority individuals” from being removed from the United States or placed in removal proceedings. This policy is carefully aligned with the prosecutorial discretion memorandum released by ICE Director John Morton on June 17, 2011. The June 17, 2011 Morton memo cited ICE’s limited resources and instructed the agency to focus its enforcement efforts on high-priority individuals such as criminal aliens or aliens who pose a threat to national security. The Morton memo of June 17, 2011 specifically mentions veterans and individuals present in the United States since childhood as particularly deserving consideration for prosecutorial discretion. The June 15, 2012 memo from Secretary Napolitano is a continuation of this policy.

The second group to whom the June 15, 2012 memo applies is aliens who are in removal proceedings but not yet subject to a final order for removal. Secretary Napolitano instructs ICE to exercise prosecutorial discretion on an individual and case by case basis by deferring action for a period of two years. The two year period will then be subject to renewal. ICE is also charged with using its Office of the Public Advocate to institute a clear and efficient process for individuals who believe they qualify to identify themselves. With regard to qualifying individuals whose cases have already been identified through a review of pending cases before the Immigration Courts, ICE has been instructed to immediately start the process of deferring action.

The third group identified by the memo is aliens who are not currently in removal proceedings and meet the qualifying criteria. The Department of Homeland Security will allow them to apply for a renewable two-year period of deferred action with USCIS affirmatively if they are above 15 years of age and pass a background check. USCIS will also make the affirmative application process available to all qualifying aliens subject to a final order of removal, regardless of their age.

### **What the New Policy Does and Does Not Grant**

The relief granted by the new policy for all three groups of qualifying individuals is the same: deferred action for a period of two years, subject to renewal. Deferred action is a discretionary act of administrative choice not to prosecute or deport an individual

alien. It constitutes neither an entitlement nor a form of relief that can be granted by an Immigration Judge, but rather an administrative agency's decision that the case has a lower enforcement priority than others. This decision falls under the agency's prerogative to efficiently allocate its resources.

The June 15, 2012 memo by Secretary Napolitano also states that USCIS "shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action." USCIS has since confirmed that persons granted deferred action under this program will be eligible for work authorization, upon showing an economic necessity for employment. Your immigration attorney can help you prepare the documentation necessary to show that economic necessity.

**Even if you are not a "DREAMer" or do not qualify under the above guidelines, deferred action may still be available, and you should consult an immigration attorney.** The Morton memorandum of June 17, 2011 established a long list of factors that are to be considered for deferred action. These factors are not limited to persons who came into the United States as children, but apply far more broadly. The Morton Memo instructs ICE to broadly consider a person's immigration and criminal history, their length of stay in the United States, ties to their community and family in the United States, their need to care for disabled or ill relatives in the United States, and whether they otherwise qualify for other forms of immigration relief, among other factors.

What is most important to note is that the prosecutorial discretion policy articulated by Secretary Napolitano and President Obama in no way creates a substantive right, immigration status, or path to United States Citizenship. It is beyond the power of the President to create these rights, as the legislative authority to do so is vested in the United States Congress. However, the executive branch of government is tasked with enforcement of the immigration laws, and pursuant to those laws has the power to exercise discretion in their enforcement.

## **Conclusion**

This new "DREAM" policy constitutes a short-term, stopgap solution to the problem of children who have been raised in the United States and have no legal status. **There is no appeal process for a denied or improperly prepared application, so it is important that you work with a competent immigration attorney to get it right the first time.** Because it is discretionary, the policy could be changed by a new Presidential administration or even by the current administration. **If you believe you may qualify, you should meet with an immigration attorney as soon as possible to discuss your options and take advantage of this new deferred action program.**