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DAPA/Expanded DACA Programs Blocked:
A New Strategy for President Obama and immigrant communities.[1]

President Obama has tried his hand at administrative reform primarily by issuing two programs to give some immigrants temporary "deferred action status" and work permits for two to three years if they have U.S. citizen children and have resided here since January 2010 (DAPA),[2] or if they were brought here as children (DACA and expanded DACA).[3]

Implementation of DAPA and expanded DACA has been blocked by the U.S. District Court[4] and now by the U.S. Court of Appeals for the Fifth Circuit.[5] While the White House has vowed to appeal further to the U.S. Supreme Court, as explained below, the appeal will have little chance of success. Simply put, the Supreme Court is likely to agree that the DAPA/Expanded DACA program should have been issued as formal regulations, not just as a "policy" of the Department of Homeland Security. Ironically, we have argued from the start that these programs should have been issued as formal regulations because this would have greatly strengthened the rights extended to immigrants granted benefits under DAPA/Expanded DACA. A simple "policy" can be changed overnight by any Administration, while rights extended by a formal federal regulation have the force of

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[1] Report by Peter Schey, President, Center for Human Rights and Constitutional Law (Los Angeles, CA). The positions that follow are based upon many years of successfully litigating major class action cases in the federal courts, including the U.S. Supreme Court, involving millions of immigrant class members.

[2] The Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) was announced by DHS Secretary Johnson on November 20, 2014, and grants "deferred action status" and temporary work permits for three years to most parents of U.S. citizens and lawful permanent residents provided they have lived in the United States continuously since January 1, 2010, and pass required background checks.

[3] In 2012, the Deferred Action For Childhood Arrivals program (DACA) was implemented by then DHS Secretary Janet Napolitano. The program permits young adults born outside the United States, but raised in this country, to apply for "deferred action status" (temporary legal status) and work permits for two years. On November 14, 2015 DHS Secretary Johnson announced a policy expanding the population eligible for the DACA program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years.

[4] *See Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

[5] *See Texas v. United States*, decision filed Nov.9, 2015, Case No. 15-40238.

law and can only be amended if the Government goes through formal "rule-making" procedures, including inviting public comment and considering those comments, a process that can take about a year to complete. Immigrants granted DAPA/Expanded DACA would also have been able to argue that once granted, the benefit could not be withdrawn until the benefit actually expired.

It seems the Administration insisted it did not wish to create the DAPA/Expanded DACA programs by formal regulation solely because entrenched forces within USCIS and USICE have as long as I can remember opposed granting immigrants rights through formal regulations. These officials much prefer to extend benefits through informal "policy" which the agencies can easily and quickly modify or retract. Now, it is precisely the reluctance to grant DAPA/Expanded DACA benefits by formal regulation, and the policy's failure to grant USCIS officers with greater discretion to grant to deny benefits, that gave the federal courts the basis for blocking enforcement of these programs.[6] It is highly unlikely the Obama Administration can be convinced to change course, issue DAPA/Expanded DACA as proposed regulations, somewhat expand the discretion officers would have to grant or deny benefits, consider public comments, and then issue the programs as formal regulations. While nothing is certain in high-profile litigation, it is obviously likely that given the make-up of the Supreme Court, it will agree with the Court of Appeals. *The question becomes, what can the Obama Administration do before it leaves office to extend legal rights to hundreds of thousands of immigrants?*

> "Advance parole" would grant thousands of long-term resident immigrants the ability to obtain lawful permanent resident status

President Obama should promptly issue a policy or adopt regulations allowing all immigrants eligible for family or employment-based visas under existing law to apply for and be granted "advance parole" (permission to travel abroad and return to the U.S. through a port of entry) for personal or business purposes.[7]

This is a sensible "border enforcement" proposal. It is well known that undocumented immigrants, including immigrants with pending or approved visa applications, who are playing by the rules and are "in the system," travel abroad to see

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[6] The Court of Appeals points out that "[a] binding rule is not required to undergo notice and comment [i.e. publication as a proposal regulation] if it is one 'of agency organization, procedure, or practice.'" Case No. 15-40238 at page 50, quoting 5 U.S.C. § 553(b)(A). "[T]he substantial impact test is the primary means by which [we] look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation [i.e. publication as a formal regulation]." *Id*. "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Id*.

[7] "Parole-in-place" has been used from time to time to create the fiction that the immigrant departed the U.S. and returned lawfully (wiping out a previous illegal entry) even though the immigrant never actually left the U.S. I do *not* recommend "parole in place" because it is a legal fiction and would likely generate a political and legal backlash that may be avoided by granting traditional "advance parole" to immigrants "already in the system" as recommended in this report.

family and for other personal reasons. When they return to their residences in the U.S., they do so without inspection, crossing mountains and deserts with the help of human smugglers. The journey is dangerous and diverts the limited resources of the Customs and Border Protection agency (CBP). Allowing these immigrants to return through normal ports of entry can be accomplished with "advance parole." This would remove the dangers of returning illegally and preserve CBP's limited enforcement resources. Simply put, these immigrants would return through a normal inspection process rather than traveling across the Southern border entering with the help of human traffickers.

To accomplish this, the Administration need only widen the group of immigrants to whom it extends "advance parole." Right now, immigrants with sick or dying relatives or other family emergencies (or business reasons) can seek and obtain "advance parole." This benefit could easily be extended to any immigrant who has applied or been approved for issuance of a permanent resident visa and who wishes to travel abroad for lawful reasons (for example visit family). *This modification in policy could be accomplished in about one or two sentences in a DHS policy memo or amended regulation*.

When these immigrants return to the United States with "advance parole," they become eligible for the first time for "adjustment of status." *It is precisely their long-past "illegal" entries barring them from "adjustment of status" even if they have an approved family-based visa petition*.

Because of these illegal entries from many years ago, the vast majority of these immigrants (probably over 90%) cannot adjust their status in the U.S. and must return to their home countries for ten years before obtaining lawful resident status because they have lived in the U.S. for more than one year in undocumented status (so-called "ten year bar"). However, once they enter with "advance parole" they could be granted lawful permanent resident status.

Those who have fought for comprehensive immigration reform should swiftly initiate advocacy urging the Administration to expand the availability of "advance parole." The policy change required is minimal and easily accomplishable.

Advocates representing immigrants with visa petitions pending who are ineligible for adjustment of status because of old "illegal" entries, should work with their members and clients to prepare applications for advance parole even without a liberalization of policy, and make every effort possible to have their members/clients granted "advance parole" to visit family members abroad and return to the U.S. with "advance parole."

The Center for Human Rights and Constitutional Law is available to provide unions, non-profit groups, churches, legal aid programs, etc. with technical assistance to prepare applications for "advance parole" for members and clients.

This is one way in which organizations with immigrant members or clients can deliver a service of major significance that will result in transforming thousands of immigrants from undocumented to fully documented status.[8]

[8] For technical support email pschey@centerforhumanrights.org and crholguin@centerforhumanrights.org