



**Homeland  
Security**

## Recommendation from the CIS Ombudsman to the Director, USCIS

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To: Dr. Emilio T. Gonzalez, Director, USCIS  
Cc: Michael P. Jackson, Deputy Secretary, DHS  
From: Prakash Khatri, CIS Ombudsman  
Date: April 6, 2007  
Re: Recommendation to USCIS that it 1) post general information on deferred action on its website; 2) maintain statistics on the issuance and denial of deferred action requests; and 3) designate a headquarters official to review grants and denials of deferred action requests on a quarterly basis to ensure that like cases are decided in like manner.

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### I. RECOMMENDATION

Recommendation to USCIS that it 1) post general information on deferred action on its website; 2) maintain statistics on the issuance and denial of deferred action requests; and 3) designate a headquarters official to review grants and denials of deferred action requests on a quarterly basis to ensure that like cases are decided in like manner.

### II. BACKGROUND

Deferred action is a discretionary form of relief provided for by the District Director's recommendation to the Regional Director.<sup>1</sup> There is no statutory basis for deferred action, but the regulations reference this form of relief and provide a brief description: "[D]eferred action, an act of administrative convenience to the government which gives some cases lower priority...."<sup>2</sup> Where USCIS grants a request for deferred action, the foreign national is provided employment authorization.<sup>3</sup> According to informal USCIS estimates, the vast majority of cases in which deferred action is granted involve medical grounds.<sup>4</sup>

Deferred action cannot be granted by the Immigration Judge. *Johnson v. INS*, 962 F.2d 574, 579 (7<sup>th</sup> Cir. 1992). There is no judicial review of decisions concerning deferred action. *Reno v. American Arab Anti-Discrimination Comm.*, 119 S.Ct. 936 (1999).

USCIS also grants deferred action relief in the U visa context, where the individual has suffered substantial physical or mental abuse as a result of having been a victim of a crime or similar

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<sup>1</sup> USCIS response to Ombudsman (Dec. 18, 2006).

<sup>2</sup> 8 C.F.R. §274a.12(c)(14).

<sup>3</sup> *Id.*

<sup>4</sup> *See supra* note 1.

activity involving rape, torture, trafficking, incest, and/or domestic violence.<sup>5</sup> All approved self-petitioners not in proceedings are eligible for deferred action and work authorization, including abused spouses and children of lawful permanent residents.<sup>6</sup> Deferred action for battered spouses and children, established in statute, is not within the scope of this recommendation. This recommendation addresses deferred action not provided for by statute or in regulations.

Deferred action arises in other immigration contexts. USCIS provided deferred action to Hurricane Katrina-impacted foreign academic students. The USCIS press release stated the following:

A grant of deferred action in this context means that, during the period that the grant of deferred action remains in effect, DHS will not seek the removal of the foreign academic student or his or her qualified dependents...Deferred action requests are decided on a case-by-case basis...A grant of deferred action does not provide an individual any legal immigration status in the United States.<sup>7</sup>

For these foreign students, USCIS made clear the general purpose, criteria, and limitations for deferred action relief, as well as where individuals were to file.

Although operations instructions for deferred action were withdrawn June 24, 1997, the relief continues to be available.<sup>8</sup> Individual deferred action requests are recommended by District Directors to Regional Directors for approval. Under the withdrawn instructions, the following were factors for the District Director to consider:

- 1) The likelihood of ultimately removing the alien;
- 2) The presence of sympathetic factors;
- 3) The likelihood that because of sympathetic factors a large amount of adverse publicity will be generated; and
- 4) Whether the individual is a member of a class of deportable aliens whose removal has been given high enforcement priority (*e.g.* terrorists, drug traffickers).

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<sup>5</sup> 8 U.S.C. §1101(a)(15)(U); Memo, Cronin, Acting Assoc. Comm., Office of Programs (HQ 204-P) (Dec. 22, 1998).

<sup>6</sup> 8 U.S.C. §1184(o)(3)(A).

<sup>7</sup> USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005); *see also* 70 Fed. Reg. 70992-70996 (Nov. 25, 2005).

<sup>8</sup> Deferred action is “an act of administrative choice to give some cases lower priority and in no way an entitlement...” former O.I. §242.1(a)(22). *See also* Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X.; Meissner, Comm, Memo, HQOPP 50/4 (Nov. 17, 2000) [Regarding prosecutorial discretion].

The USCIS website provides information on humanitarian parole but not on deferred action.<sup>9</sup>

Customers and stakeholders have inquired with the CIS Ombudsman as to where to submit a request for deferred action. Customers report instances in which they were told erroneously by USCIS that it does not have jurisdiction to provide this relief and were also told by officials from Immigration and Customs Enforcement that it only considers requests for deferred action that involve a compelling law enforcement nexus and/or where the individual is in removal proceedings.

### **III. JUSTIFICATION**

USCIS should provide basic information on deferred action, including 1) general criteria for relief; 2) what information to include with the submission, and 3) where to submit a request. A minimum level of transparency is appropriate even for extraordinary, discretionary relief such as deferred action.

Currently, USCIS does not maintain statistics or otherwise track the number of requests received and approved or denied for deferred action. USCIS also does not review deferred action grants or denials between regions. Thus USCIS can only estimate the number of requests and provide anecdotal information on the types of requests received and granted or denied. Such an ad hoc approach may in part be necessary and appropriate because deferred action is extraordinary relief not based in statute or regulations. However, minimal measures, including tracking requests for deferred action and regular review by USCIS headquarters of the requests and the determinations made, would help to ensure that there is no geographic disparity in approvals or denials of deferred action requests and that like cases are decided in like manner.

### **IV. BENEFITS**

#### **A. Customer Service**

This recommendation seeks to improve customer service by making basic information on deferred action requests clear to the public: where to submit a request, what to include with a submission, and the general criteria for requests to be approvable. Implementation of this recommendation would prevent customers from having to guess where and what information to submit. It also would prevent officers in the field from providing misinformation about where a request for deferred action should be submitted. This recommendation also seeks to ensure that over time and in different regions, cases are similarly decided.

#### **B. USCIS Efficiency**

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<sup>9</sup><http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b04596981298d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=828807b03d92b010VgnVCM10000045f3d6a1RCRD> (Last visited February 12, 2007).

If implemented, this recommendation would make USCIS more efficient by tracking requests for deferred action and helping to ensure consistency in adjudications.

### **C. National Security**

This recommendation has no national security impact. This recommendation does not seek to change the criteria under which deferred action is granted or otherwise to effect the grant of status. This recommendation would not expand an immigration program and would make no changes to current USCIS security screening procedures.