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For DACA Recipients, The Dream Remains Alive, For Now

Nearly 800,000 DACA recipients have been left in limbo while the federal government wrestles with their status. DACA, or Deferred Action for Childhood Arrivals, was implemented in 2012 through an Obama-era Executive Order and granted protection from deportation and work authorization to an estimated 800,000 young immigrants who were brought to the States as children. While not “legal status,” DACA registration allowed recipients to obtain Employment Authorization Documents (EADs) which satisfied I-9 requirements for work authorization as a List A document (identity plus work authorization). DACA registration also allowed them to live in the States without fear of being deported.

In September 2017, however, the Trump administration found that the Executive Order creating the DACA program was an unlawful overreach of executive authority, similar to the failed Obama program for Deferred Action for Parents of Americans (DAPA). In essence, the Trump administration found that the DACA program circumvented the administrative process by creating a class of people free from prosecution for their “illegal” status without the requirements of notice and comment period associated with the issuance of agency regulations. Thus, the Trump administration began phasing out the DACA program in 2018. The administration’s contemporaneous overture to Congress to come up with a legislative solution did not produce any meaningful result.

In January 2018, however, a U.S. District Judge in California issued a nationwide injunction preventing the administration from phasing out the DACA program. Following that ruling, the government asked the U.S. Supreme Court to hear the case without it first going through the Ninth Circuit Court of Appeals. The Supreme Court declined that invitation, and the case proceeded to the Ninth Circuit.

On November 8, 2018, the Ninth Circuit affirmed the District Court, keeping in place the nationwide injunction, and clearing a path to the Supreme Court. *Regents of the Univ. of Calif. v. U.S. Dept. of Homeland Security*, No. 18-15086 (9th Cir. Nov. 8, 2018). In doing so, the Ninth Circuit ruled that the plaintiffs were likely to succeed on the merits of their Equal Protection Clause arguments that the DACA rescission “disproportionately impacts Latinos and individuals of Mexican heritage” who make up nearly 90 percent of DACA beneficiaries.

The three-member panel of the Ninth Circuit also rejected the administration’s argument that the program was a legislative rule that would require a public notice and comment period. Citing the drastic increase in visa denial rates after the Trump administration took office, the Ninth Circuit found, instead, that the DACA program created discretionary relief on a case-by-case basis, and that such relief is key since the agencies enforcing the immigration laws “do not have the resources to deport every single person present in the country without authorization” The court noted:

In a world where the government can remove only a small percentage of the undocumented noncitizens present in this country in any year, deferred action programs like DACA enable DHS to devote much-

needed resources to enforcement priorities such as threats to national security, rather than blameless and economically productive young people with clean records.

This is the latest judicial roadblock challenging the administration's restrictionist policies toward immigration. It will be very interesting to see how the current Supreme Court addresses this case. In the meantime, 800,000 immigrants are breathing a momentary sigh of relief.

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