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LEGAL AUTHORITIES FOR DACA AND SIMILAR PROGRAMS

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This memo summarizes (1) the statutory basis for deferred action generally; (2) the statutory basis for work permits generally; (3) the regulations that specifically authorize work permits for deferred action recipients; and (4) the court decisions that recognize deferred action, its purposes, and the broad administrative discretion whether and how to grant it. Those court decisions uniformly recognize deferred action programs that, like DACA, were implemented through a combination of general categorical criteria followed by individualized case-by-case consideration.

1. **Congress has expressly recognized deferred action, by name.** For example, INA § 237(d)(2), 8 USC § 1227(d)(2), says that if a person is ordered removed, applies for a temporary stay of removal, and is denied, that denial does not preclude the person applying for deferred action. In addition, INA § 204(a)(1)(D)(i)(II,IV), 8 USC § 1154(a)(1)(D)(i)(II,IV), specifically authorizes deferred action (and work permits) for certain domestic violence victims and their children. Deferred action also qualifies a person for a driver's license under the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, Div. B, § 202(c)(2)(B)(viii) (May 11, 2005). Since 1987, the DHS regulations have also expressly recognized deferred action, describing it as "an act of administrative convenience to the government which gives some cases lower priority." 8 CFR § 274a.12(c)(14), added by 52 Fed. Reg. 16221 (May 1, 1987).

2. **Congress has authorized the Administration to grant work permits to aliens who are not otherwise authorized to be employed.** INA § 274A(h)(3), 8 USC § 1324a(h)(3) (defining "unauthorized alien" to mean aliens who are not lawful permanent residents, authorized to be employed by the INA, or so authorized *"by the Attorney General"* [now the Secretary of Homeland Security, per the Homeland Security Act] (emphasis added).

3. **Since 1987, the DHS regulations have specifically authorized USCIS to issue work permits to recipients of deferred action, provided they demonstrate "economic necessity."** 8 CFR § 274a.12(c)(14), added by 52 Fed. Reg. 16221 (May 1, 1987).

4. **Since at least the 1970s, a long list of courts have expressly recognized deferred action (or, as it was previously called, "non-priority status") by name.** See, e.g., *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999); *Mada-Luna v Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987); *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976). In at least two other cases in which individuals did not qualify for any statutory relief but presented sympathetic facts, the court went further - temporarily staying their deportation orders specifically to give them a chance to request deferred action. See *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977); Vergel v. INS, 536 F.2d 755 (8th Cir. 1976).

These cases also make three specific and important points relevant to DACA and similar exercises of deferred action:

a. **Deferred action is "in large part for the convenience of the INS."** *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *Pasquini*, above, 700 F.2d at 662; *Soon Bok Yoon*, above, 538 F.2d at 1213. Quoting from the then-current (1981) version of the INS Operating Instructions, one court explained that deferred action is "an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases." The current regulations contain the same description, almost verbatim, as the one recognized by the court. 8 CFR § 274a.12(c)(14) (deferred action is an "act of administrative convenience to the government which gives some cases lower priority").

The Operating Instructions that the court quoted and applied in those cases make clear that deferred action is merely one form of prosecutorial discretion: "The deferred action category recognizes that the Service has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws." *Romeiro*, 773 F.2d at 1025. The publicly-posted DACA FAQs express the same message and rest on the same legal justification: "As the Department of Homeland Security (DHS) continues to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety, DHS will exercise prosecutorial discretion as appropriate to ensure that enforcement resources are not expended on low priority cases, such as individuals who came to the United States as children and meet other key guidelines." USCIS DACA FAQs, section I.A, available at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#what is DACA.

b. **The Administration has a very broad discretion in deciding whether and how to grant deferred action.** In *Reno*, above, 525 U.S. at 483-84, the Supreme Court was quite emphatic: "At each stage the Executive has discretion to abandon the endeavor [referring to the removal process], and at the time IIRIRA was enacted the INS had been engaging in a regular

practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." Other courts had expressed the same view: E.g., *Pasquini*, above, 700 F.2d at 662 (granting or withholding deferred action "is firmly within the discretion of the INS" and therefore can be granted or withheld "as [the relevant official] sees fit, in accord with the abuse of discretion rule when any of the [then] five determining conditions is present"); *Soon Bok Yoon*, above, 538 F.2d at 1213 ("The decision to grant or withhold nonpriority status therefore lies within the particular discretion of the INS").

As recently as 2012, the Supreme Court (while not using the phrase "deferred action") emphasized the breadth of the Administration's immigration enforcement discretion: "A principal feature of the removal system is the broad discretion exercised by immigration officials. … Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona v. United States*, 132 S.Ct. 2492, at 2499 (2012). The Court went on to elaborate on why this broad discretionary power is necessary:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations.

c. **The courts have consistently recognized the Administration's broad discretion to implement deferred action <u>by announcing general categorical criteria</u>. The courts were well aware of those categories; often they quoted them in their opinions. Indeed, there is no other way for an agency to guide its officers as to how to exercise that discretion.**

For example, the Second Circuit in Pasquini, above, 700 F.2d at 661, quoted the 1978 INS Operating Instructions' five criteria for officers to consider: "(1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States -- affect [sic] of expulsion; (5) criminal, immoral or subversive activities or affiliations." The court then noted the discretion of the INS district director. *Id*. at 662. The Ninth Circuit in *Nicholas*, above, 590 F.2d at 806-07, while reaching a different conclusion as to the reviewability of a deferred action denial, likewise quoted the then five general categorical criteria for deferred action. The Supreme Court in *Reno*, above, similarly quoted a treatise that listed the several general categorical criteria the INS was then instructing officers to consider in deferred action cases. 525 U.S. at 483-84, quoting from 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and

Procedure § 72.03[2][h]. The fact that the agency had laid out general categorical criteria did not prevent the court from recognizing the agency's use of deferred action.

DACA is similarly structured. To be sure, the general threshold criteria that USCIS lays out in the DACA FAQs provide somewhat greater specificity than those previous agency instructions. (For example, the DACA FAQs specify precise ages and precise periods of required residence, as opposed to simply saying that age and length of residence should be "considered"). Like previous instructions, however, the DACA FAQs make clear that these threshold criteria are only the start of the inquiry. "Individuals who can demonstrate through verifiable documentation that they meet these guidelines will be *considered* for deferred action. Determinations will be made *on a case-by-case basis* under the DACA guidelines." USCIS DACA FAQs, above, question 2 (emphases added). Assuming any future deferred action policies similarly entail general categorical criteria followed by individualized discretion, they too would be perfectly legal.