

were not ends in themselves, of course. They were a means to the end of CIR that were designed to address the concerns of those skeptical of border enforcement and the worthiness of the beneficiaries of legalization, in order to bring out much wider benefits for the millions of immigrants who would remain.

VI. EXECUTIVE ACTION 3: PROVISIONAL UNLAWFUL PRESENCE WAIVERS

Other executive moves benefited undocumented migrants directly. One of these moves, a sort of precursor to DACA, focused on families where one spouse lacked documentation to be in the United States. Though for many years undocumented spouses and children of U.S. citizens could adjust their immigration status relatively easily,⁵⁴ two of the many changes implemented in conjunction with IIRAIRA made such adjustment much more difficult. The first change required undocumented individuals with a citizen spouse or parent to prove that the citizen relative would experience “extreme hardship” as a result of the individual’s deportation in order to receive a waiver granting pardon for their illegal presence in the country.⁵⁵ That waiver was necessary to override the second change: automatic bars to reentry into the United States for individuals who had been illegally present in the United States for six months to a year (three-year bar) or more than one year (ten-year bar).⁵⁶ Without the waiver, these immediate relatives of U.S. citizens would be required to wait out the full three or ten years before being able to apply for legal immigration status and reentry into the United States.⁵⁷

While there is no specific definition for extreme hardship to the citizen relative, early legal decisions identified certain factors to be particularly relevant: citizen family ties to the United States; citizen ties (or lack thereof) to family outside of the United States; the conditions of the country to which the citizen would relocate; the financial impact of departure; and significant health conditions of the citizen that could not be addressed properly in the country of relocation.⁵⁸ Barring other causes for inadmissibility, individuals who prove extreme hardship and are granted

pr_1281457837494.shtm. For information on Secure Communities, see *Secure Communities Presentations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 4 (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf.

54. See Fernando Colon-Navarro, *Familia e Inmigración: What Happened to Family Unity?*, 19 FLA. J. INT’L L. 491, 505–08 (2007); see also Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT’L MIGRATION REV. 397, 410–12 (2001).

55. See, e.g., Julia Preston, *Tweak in Rule to Ease a Path to Green Card*, N.Y. TIMES, Jan. 6, 2012, http://www.nytimes.com/2012/01/07/us/path-to-green-card-for-illegal-immigrant-family-members-of-americans.html?_r=0.

56. 8 U.S.C. § 1182 (1990).

57. See, e.g., Preston, *supra* note 55.

58. See, e.g., Cervantes-Gonzalez, 22 I. & N. Dec. 560 (B.I.A. 1999); see also *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).

unlawful presence waivers can apply for legal permanent residency in the United States and be admitted to the United States immediately after receipt of the visa.⁵⁹

In order to adjust their immigration status and apply for legal permanent residency, however, undocumented immigrants must attend visa interviews in their countries of origin (visa overstayers can be interviewed within the United States).⁶⁰ The reentry bar has made this travel to home country embassies for visa interviews extremely risky. If the waiver is denied, the bar remains in force and these immediate family members of U.S. citizens have to wait out the length of their penalty before they can reapply for a visa.⁶¹ As undocumented immigrants and their U.S. citizen family members became aware of this catch-22, many decided that remaining illegally in the United States and risking deportation at some future date was a more viable option than voluntarily leaving the United States to attend the visa interview without knowing whether or not their petition for a waiver would be granted.

The Obama administration, which recognized that this contradiction in the law was impacting many immigrants and their relatives who are voting-age citizens, remedied the issue through executive action. On March 30, 2012, the U.S. Citizenship and Immigration Services (USCIS) announced a proposed rule change "that would reduce the time U.S. citizens are separated from their spouses, children, and parents . . . who must obtain an immigrant visa abroad to become lawful permanent residents of the United States."⁶² Once the rule change took effect in March 2013, immediate relatives of U.S. citizens could apply for a provisional waiver before leaving the United States for their visa interviews, reducing separation time by months or years.⁶³ While receiving the waiver before leaving the country does not guarantee that the individual will receive a visa, it significantly decreases the risk of long-term separation from family in the United States. Similarly, individuals who

59. *Provisional Waiver I-601A*, CONSULATE GEN. OF THE U.S. CIUDAD JUAREZ, MEXICO, <http://ciudadjuarez.usconsulate.gov/provwaiver.html>. For more information, see *Overview: Immigrant Visa Processing at the NVC*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/immigrants/info/info_5161.html. See also *Step 7: After You Receive Your Visa*, CONSULATE GEN. OF THE U.S. CIUDAD JUAREZ, MEXICO, http://ciudadjuarez.usconsulate.gov/iv_steps7.html.

60. See *Provisional Unlawful Presence Waivers*, DEP'T OF HOMELAND SEC. U.S. CITIZEN AND IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (May 6, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=bc41875decf56310VgnVCM100000082ca60aRCRD&vgnnextchannel=bc41875decf56310VgnVCM100000082ca60aRCRD>; see also Preston, *supra* note 55.

61. See Preston, *supra* note 55.

62. *USCIS Proposes Process Change for Certain Waivers of Inadmissibility*, U.S. CITIZEN AND IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (Mar. 30, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=e784875decf56310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

63. *Id.*

are denied the waiver know they will be subject to the automatic bar if they leave the country and can make their plans accordingly.

Though the new rule only went into effect recently, early reports show the limits that executive changes often face and reveal that few individuals have been able to benefit from the change.⁶⁴ Still, the policy change was not a failure. As one of a handful of “immigrant-friendly” policy changes announced by the administration in 2011 and 2012, this policy—or, rather, its premise as a policy to reduce separation times of family members—helped contribute to the pro-immigrant image the administration hoped to project during the 2012 election and secured much needed votes from the immigrant community.⁶⁵

VII. EXECUTIVE ACTION 4: DEFERRED ACTION FOR CHILDHOOD ARRIVALS

After a few years of experimentation with executive forays into immigration policy, the Obama administration appeared to have exhausted its options. Activists, however, who were disappointed by the 2010 DREAM Act failure in Congress, continued to press for action to allow the targets of that bill (“Dreamers”) to stay in the United States and work legally.⁶⁶ In the spring and summer of 2012, a group called the United We Dream Network (“Network”), along with other immigrant advocacy groups, advocated on behalf of the young immigrants who would benefit

64. Of nearly 24,000 applications submitted during the first six months of the program, about 25% were rejected in the initial review phase for missing information. Susan Schreiber & Charles Wheeler, *Update from the NBC on Provisional Waivers*, CATHOLIC LEGAL IMMIGR. NETWORK, INC. (Oct. 1, 2013), <https://cliniclegal.org/news/update-nbc-provisional-waivers>. Of the remaining 18,000 applications, 5,789 have received decisions, with a rejection rate of 39%. *Id.* The initial rejection rate was much higher because of a broad interpretation of the “reason to believe” provision of the new policy, which states that if reviewers have a reason to believe that the applicant could be found inadmissible for some reason other than unlawful presence, the application should be denied. *Id.* Controversy surrounding this policy, and the high rejection rate that accompanied it, has led to a suspension of adjudication of applications affected by this issue while the policy is reevaluated, suggesting that the current acceptance rate of 59% overestimates the true success rate of applicants. *Id.* Given the low success rate of early applicants, many attorneys are discouraging their clients from applying for the waiver, at least until USCIS releases further clarifications to the policy, which are anticipated in late 2013. See Chip Mitchell, *Attorneys Steer Undocumented Clients Away From a Citizenship Path*, CHI. PUB. MEDIA (Mar. 4, 2013), <http://www.wbez.org/news/attorneys-steer-undocumented-clients-away-citizenship-path-105891>.

65. See, e.g., Sophia J. Wallace, *It's Complicated: Latinos, President Obama, and the 2012 Election*, 93 SOC. SCI. Q. 1360 (2012); see also Mirela Iverac, *Obama, Romney Differ in Approach to Immigration Problems*, WNYC NEWS (Oct. 15, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/oct/15/obama-and-romney-promise-fix-immigration-system/>.

66. Miriam Jordan, *Anatomy of a Deferred-Action Dream: How Undocumented Youth Brought Their Cause to the Country*, WALL ST. J., Oct. 14, 2012, <http://online.wsj.com/article/SB10000872396390443982904578046951916986168.html>.

if the DREAM Act passed.⁶⁷

The Network made little headway with the Obama administration despite protests and meetings in 2011 as the administration maintained that it could not act without Congress. However, it gained new momentum in April 2012, when Senator Marco Rubio (R-FL), who was then being discussed as a possible vice presidential candidate, came out in support of his own proposal to confer temporary legal status on persons eligible for the DREAM Act.⁶⁸ The young activists met with Rubio, and then met with key DREAM Act supporter Senator Dick Durbin (D-IL) and Obama aides Valerie Jarrett and Cecilia Muñoz, who warned them not to support Rubio's plan.⁶⁹ However, activist Gaby Pacheco said, "We're not married to the Democratic or Republican parties. We're going to push what's best for the community."⁷⁰ More protest actions followed, including some at Obama campaign offices, and on May 25, aides to Secretary Napolitano began to discuss ways to use executive discretion to help the Dreamers.⁷¹

The Dreamer activists then conferred with law professor Hiroshi Motomura, a member of the Board of Directors of the National Immigration Law Center,⁷² who was advising the activists.⁷³ Motomura immediately sprang into action. On May 28, he drafted a letter explaining the various legal bases of executive discretion described above, and used a listserv of immigration law professors to recruit ninety-five of them to co-sign the letter before sending it to the White House.⁷⁴ Pacheco and other Dreamers brought the letter to a meeting with White House counsel, and said that if there was no White House response by mid-June that they would "escalate."⁷⁵

With this new political pressure and a legal roadmap provided by Motomura and the law professors, the White House finally agreed on June 11 to take its strongest executive action yet.⁷⁶ On June 15, Secretary Napolitano announced the

67. See Julia Preston, *Students Press for Action on Immigration*, N.Y. TIMES, May 30, 2012, <http://www.nytimes.com/2012/05/31/us/students-press-for-action-on-immigration.html>.

68. See, e.g., Peter Wallsten, *Marco Rubio's Dream Act Alternative a Challenge for Obama on Illegal Immigration*, WASH. POST, Apr. 25, 2012, http://www.washingtonpost.com/politics/marco-rubios-dream-act-alternative-a-challenge-for-obama-on-illegal-immigration/2012/04/25/gIQA5yqxhT_story.html.

69. Jordan, *supra* note 66.

70. Wallsten, *supra* note 68.

71. See Jordan, *supra* note 66.

72. *Board of Directors*, NAT'L IMMIGR. L. CTR., <http://www.nilc.org/boardofdirectors.html> (Nov. 12, 2013).

73. Bertrand M. Gutierrez, *Law Professors' Letter May Have Swayed Obama*, WINSTON-SALEM J. (June 26, 2012), http://www.journalnow.com/news/local/article_f5df40ee-138f-53d3-aef1-a4d0b0923cf5.html.

74. See *id.*

75. See Jordan, *supra* note 66.

76. See *id.*

administration's new policy of Deferred Action for Childhood Arrivals (DACA).⁷⁷ Specifically, DACA targeted undocumented immigrants thirty-one years old or younger who had been in the United States for at least the previous five years.⁷⁸ They had to be younger than sixteen when they arrived; be in, have graduated high school, or served honorably in the Coast Guard or Armed Forces; and have no significant criminal record.⁷⁹ While it would not help all 11 million undocumented immigrants living in the United States at the time,⁸⁰ an estimated 1.8 million undocumented youth and young adults were potentially eligible for DACA relief.⁸¹

The Obama administration's DACA policy announcement ended the protests and pressure from the activists.⁸² However, certain opponents, primarily hailing from right-wing groups and the Republican Party, have remained vocal in their opposition to the policy throughout the first year since its announcement. Other Republican leaders have criticized the program saying, "[W]e probably shouldn't reward the children for the sins of the parents."⁸³ Well into 2013, House Representative Steve King (R-IA), a long-time opponent of DACA, continued to attempt to dismantle the policy, this time by cutting funding for the administration of the DACA program through his amendment to a DHS appropriations bill.⁸⁴ A lawsuit brought forward in Texas charges that the Obama administration never had the authority to implement the DACA policy change, and a preliminary statement from the judge ruling in the case indicated he was likely to agree that the policy change was illegal.⁸⁵ A handful of states have also acted against DACA;⁸⁶ Arizona has changed its laws in order to prohibit DACA recipients from receiving driver's licenses even though they should now qualify for them.⁸⁷

77. See, e.g., *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZEN & IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (Jan. 18, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

78. *Id.*

79. *Id.*

80. See, e.g., Obama & Biden, *supra* note 1.

81. See *Who and Where the DREAMers are, Revised Estimates*, IMMIGR. POL'Y CTR. (Oct. 16, 2012), <http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are-revised-estimates>.

82. Jordan, *supra* note 66.

83. Hansi Lo Wang, *Deferred Action: A Bird in Hand for Young Immigrants*, NAT'L PUB. RADIO (Apr. 23, 2013), <http://www.npr.org/blogs/codeswitch/2013/04/23/178669698/Deferred-Action-A-Bird-In-Hand-For-Young-Immigrants>.

84. See Patrick Taurel, *Happy Birthday DACA!*, IMMIGRATION IMPACT (June 17, 2013), <http://immigrationimpact.com/2013/06/17/happy-birthday-daca/>.

85. See *id.*

86. Corey Dade, *New Immigration Battle: Driver's Licenses*, NAT'L PUB. RADIO (Dec. 28, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/12/28/168214192/new-immigration-battle-drivers-licenses>.

87. See Wendy Feliz, *Reaching the Six-Month Mark on Deferred Action for Childhood*

Despite ongoing opposition, DACA appears to be a policy success. Through June 2013, 557,412 applications had been submitted, with only 19,750 rejected. Over 400,000 applications have already been approved, representing nearly 25% of all individuals who could potentially qualify under current policy requirements and nearly half of all individuals immediately eligible for DACA relief.⁸⁸ USCIS has accepted an average of 2,455 applications per day since the program was implemented on August 15, 2012, though the majority of those applications (with over 100,000 applications submitted in September and October of 2012) were submitted in the first few months of the program.⁸⁹ By June 2013, monthly submissions had dropped to just 17,506.⁹⁰ Perhaps most crucially for Obama, before the presidential election in 2012, USCIS had already received 274,015 applications and approved nearly 30,000 (rejecting only a small fraction of those applications), demonstrating to Latino voters across the nation that the Obama administration was sincere in its efforts to effect immigration reform, whether or not Congress was willing to participate in the effort.⁹¹

VIII. OBAMA WINS LATINO VOTE AGAIN

~~Securing a supermajority of Hispanic votes proved even more essential for Obama in 2012 than in 2008. In early 2012, such support appeared unlikely, with~~

Arrivals (DACA), IMMIGR. IMPACT (Feb. 20, 2013), <http://immigrationimpact.com/2013/02/20/reaching-the-six-month-mark-on-deferred-action-for-childhood-arrivals-daca/>.

88. Only individuals age fifteen and older who are currently in high school or have a high school degree are eligible for DACA relief. *See, e.g.*, TOM K. WONG, ANGELA S. GARCÍA, MARISA ABRAJANO, DAVID FITZGERALD, KARTHICK RAMAKRISHNAN & SALLY LE, CTR. FOR AM. PROGRESS, UNDOCUMENTED NO MORE: A NATIONWIDE ANALYSIS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, OR DACA 2 (Sept. 2013), <http://www.americanprogress.org/wp-content/uploads/2013/09/DACAReportCC-2-1.pdf>. Given these requirements, only an estimated 53% of the estimated 1.8 million undocumented youth who could potentially qualify for DACA can immediately apply for relief. *E.g.*, *Who and Where the DREAMers are, Revised Estimates*, *supra* note 81, at 2. An additional 426,000 children between the ages of five and fourteen will become eligible at some future point if DACA remains in place, and 401,000 young adults between the ages of fifteen and thirty can become eligible for relief if they earn a GED. *Id.* One group that has remained underrepresented in DACA applications thus far is rural-dwelling undocumented youth who, among the first 150,000 applicants, represented less than 1% of submitted applications. *E.g.*, Taurel, *supra* note 84. Accessing and informing this rural population, as well as helping them and other qualified individuals cover the costs of application, should over time help the remaining 400,000 immediately qualifying individuals submit their applications.

89. U.S. CITIZENSHIP & IMMIGR. SERVS., STATISTICS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (July 10, 2013), <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-7-12.pdf>.

90. *Id.*

91. *See id.*