

# NOTICE & COMMENT

A Blog from the Yale Journal on Regulation and the ABA Section of Administrative Law & Regulatory Practice

An Affiliate of the Law Professor Blogs Network


[Home](#)
[Bloggers](#)
[Series and Symposia](#)
[Tag Cloud](#)
[Popular Posts](#)

## The Aftermath of *United States v. Texas*: Rediscovering Deferred Action, by Shoba Sivaprasad Wadhia

by Guest Blogger — Wednesday, Aug. 10, 2016


[Share via E-mail](#)

On June 23, 2016, the Supreme Court issued a 4-4 ruling in the immigration case of *United States v. Texas*, blocking two “deferred action” programs announced by President Obama on November 20, 2014: extended Deferred Action for Childhood Arrivals (DACA Plus) and Deferred Action for Parents of Americans and Legal Residents (DAPA).[1] The 4-4 ruling by the justices creates a non-precedential non-decision, upholding an injunction placed by a panel of federal judges in the Fifth Circuit Court of Appeals.[2] While the future of these programs remains uncertain in the long term, the immediate effects are pronounced, as millions of qualifying young people (“Dreamers”) and parents who would have been able to request deferred action programs are unable to do so in the foreseeable future. The outcome of the ruling highlights the need for greater information about existing prosecutorial discretion tools, including a longstanding deferred action program on which DACA and DAPA are based.

This essay examines 185 deferred action cases processed by the United States Citizenship Immigration Services (USCIS), a unit within Department Homeland Security (DHS or Department).[3] While previous scholarship examines deferred action historically and in depth,[4] this is the first piece to review cases under the Department’s current enforcement policy. The author’s goal is to provide advocates and policymakers with accurate information about the deferred action program outside of DACA (and what would have been DACA Plus and DAPA) and to facilitate a dialogue about the possibilities of advancing a robust deferred action policy for Dreamers, parents and others who present humanitarian equities.[5] A second goal of this essay is to (re)address the continued transparency challenges faced by the deferred action program and recommendations for moving forward. Beyond the scope of this essay is an analysis of whether certain noncitizens may be currently eligible for relief outside of deferred action or a discussion on those who should qualify for immigration status under unrealized but critical legislative reforms.

### I. Deferred Action: A Short History

Deferred action is one form of prosecutorial discretion in immigration law.[6] The concept behind prosecutorial discretion is entrenched in the prioritization of limited government resources and compassion for individuals without a lawful immigration status who present strong qualities or equities. The first deferred action program was discovered in the early 1970s, when the Beatle attorney Leon Wildes engaged in Freedom of Information Act (FOIA) litigation to obtain deferred action (then called “non-priority”) records from the immigration agency (then called “Immigration Naturalization Service” or “INS”).[7] Since this time, deferred action has operated for decades. The Department of Homeland Security inherited the deferred action program from INS and in the last 15 years has granted deferred action in thousands of cases for largely humanitarian reasons.[8] While deferred action is only one among several forms of prosecutorial discretion, it is one of the most savored. Individuals granted deferred action are able to apply for employment authorization upon the showing of “economic necessity.”[9] Likewise, deferred action grantees are treated as “lawfully present,”[10] raising the possibility for other benefits like eligibility for a driver’s license.[11] Deferred action became a well-known political animal in the wake of President Obama’s 2012 announcement of a program aimed at protecting qualifying Dreamers from deportation through the tool of deferred action.[12] However, before 2012, deferred action was less understood and even today largely opaque outside the DACA program.[13]

### II. USCIS Data Set: Findings

The data set was provided to the author on January 19, 2016 in a 27 page PDF-format and in response to a Freedom of Information Act (FOIA) request.[14] The data set included 185 cases and is divided into four regions.[15] A fuller methodology can be found in Section III.

#### A. Reasons for a Deferred Action Grant or Denial: By Region

The data for each of the regions included a basis for a deferred action case in one or two words, most regularly “Family”, “Medical” or “Other.” The table below depicts the ratios of noncitizens granted deferred action based on different reason categories. For the Northeast Region (NER), 35% of noncitizens that applied for deferred action based on family support reasons were granted this form of relief. Further, 25.7% of noncitizens that applied for deferred action based on medical reasons were granted relief. No person was granted relief based upon another reasoning category. For the Southeast Region (SER), 0% of noncitizens that applied were granted

SEARCH

 

SUBSCRIBE TO OUR WEEKLY E-MAIL



RECENT POSTS

The Limits of Auer Deference, Cass-DeMuth-Walker Amicus Brief in Gloucester County v. G.G.

Is Barney Frank Right about the President’s Power to Remove the CFPB Director?, by Aditya Bamzai & John F. Duffy  
Screwing Congress

D.C. Circuit Review – Reviewed: Eighth Circuit Edition

AALS Panel Today: Administrative Law’s Hidden Dynamics

POPULAR POSTS

Trump’s Broad Powers to Revoke Tax Regulations Issued By the Obama Administration

The Trump Hotel Isn’t Unconstitutional  
Bureaucratic Resistance from Below, by Jennifer Nou

The Administrative Law Originalism of Neil Gorsuch

Should Congress Impeach Obama for His Emoluments Clause Violations?

The President’s Removal Power and the PHH Litigation, by Aditya Bamzai

Esquivel-Quintana v. Lynch: The Potential Sleeper Case of the Supreme Court Term, by David Feder

The first thing we do, let’s kill all the lawyers.  
Why is Judicial Biography So Hard To Write?

D.C. Circuit Review – Reviewed: The Frank Easterbrook Edition Redux

deferred action based upon family support reasons, while 64% were granted deferred action based on medical reasons. Despite the low amount of data produced by USCIS, 75% of noncitizens that applied for deferred action in the Central Region (CRO) were granted this form of relief and 57% of noncitizens who applied based on medical reasons were also granted deferred action. Finally, the only case from Western Region (WRO) was not granted deferred action. With more data from the regions or even more data from other years, one could draw richer conclusions on which reasoning is more likely to be granted deferred action. Notably, with respect to the medical reasons, the trend seemed to be that the more severe and permanent the medical injury, the more likely the noncitizen was to be granted deferred action. [See Table 3]

**TABLE 1. Reasons for Deferred Action Grant or Denial: By Region**

Reason	NER		SER		CRO		WRO	
	#	Granted	#	Granted	#	Granted	#	Granted
Family Support	34	12	19	0	8	6	0	0
Medical	70	18	39	25	7	4	1	0
Other	7	0	—	—	—	—	—	—
<b>Total</b>	<b>111</b>		<b>58</b>		<b>15</b>		<b>1</b>	

*B. Reasons for a Deferred Action Grant or Denial: By Field Office*

Deferred action requests to USCIS are often made to a field office and thereafter subject to review by the USCIS District Director and USCIS Regional Director.[16] Within each region are “field offices” that fall under the jurisdiction of a particular region. Table 2 breaks down the 2016 data set by field office.

TABLE 2. Reasons for Deferred Action Grant or Denial: By Field Office

Reason	NER		SER		CRO		WRO	
	#	Granted	#	Granted	#	Granted	#	Granted
Family Support	34	12	19	0	8	6	0	0
Medical	70	18	39	25	7	4	1	0
Other	7	0	—	—	—	—	—	—
<b>Total</b>	<b>111</b>		<b>58</b>		<b>15</b>		<b>1</b>	

deferred action. [See Table 3]

**TABLE 1. Reasons for Deferred Action Grant or Denial: By Region**

Reason	NER		SER		CRO		WRO	
	#	Granted	#	Granted	#	Granted	#	Granted
Family Support	34	12	19	0	8	6	0	0
Medical	70	18	39	25	7	4	1	0
Other	7	0	—	—	—	—	—	—
<b>Total</b>	<b>111</b>		<b>58</b>		<b>15</b>		<b>1</b>	

*B. Reasons for a Deferred Action Grant or Denial: By Field Office*

Deferred action requests to USCIS are often made to a field office and thereafter subject to review by the USCIS District Director and USCIS Regional Director.[16] Within each region are “field offices” that fall under the jurisdiction of a particular region. Table 2 breaks down the 2016 data set by field office.

TABLE 2. Reasons for Deferred Action Grant or Denial: By Field Office

Reason	NER		SER		CRO		WRO	
	#	Granted	#	Granted	#	Granted	#	Granted
Family Support	34	12	19	0	8	6	0	0
Medical	70	18	39	25	7	4	1	0
Other	7	0	—	—	—	—	—	—
<b>Total</b>	<b>111</b>		<b>58</b>		<b>15</b>		<b>1</b>	

“Humanitarian” reasons as an all-encompassing category, while the Southeast Region and Central Region provide detailed summaries of the cases that could also be categorized as humanitarian. While the regional logs contain a range of factors and notes in the summary column, what is unquestionable is the humanitarian element that overrides deferred action requests and the real possibility that Dreamers and parents of Americans share the qualities that have been important to a deferred action grant more recently and as described in earlier work.[18]

TABLE 3. Reasons for Deferred Action Grant or Denial: By Field Office

Reason	NER		SER		CRO		WRO	
	#	Granted	#	Granted	#	Granted	#	Granted
Humanitarian	34	12	19	0	8	6	0	0
Medical	70	18	39	25	7	4	1	0
Other	7	0	—	—	—	—	—	—
<b>Total</b>	<b>111</b>		<b>58</b>		<b>15</b>		<b>1</b>	

ARCHIVES

- January 2017
- December 2016
- November 2016
- October 2016
- September 2016
- August 2016
- July 2016
- June 2016
- May 2016
- April 2016
- March 2016
- February 2016
- January 2016
- December 2015
- November 2015
- October 2015
- September 2016
- August 2016
- July 2016
- June 2016
- May 2016
- April 2016
- March 2016
- February 2016
- January 2016
- December 2015
- November 2015
- October 2015
- September 2014



The data set included 185 cases and was divided into four regions.<sup>[24]</sup> The data set included the following information for each deferred action case:

- Region

Importantly, the data set of 185 deferred action cases is illustrative and does not represent the universe of deferred action cases processed since November 20, 2014. It is impossible to draw conclusions about what the total number might be because of inconsistent tracking of deferred action cases within field offices and across regions as well as the absence of regular and publicly available statistics. Also, the data received by the author was not in the form of a spreadsheet so each of the numbers had to be calculated manually.<sup>[25]</sup> The author is not a stranger to tabulating data on deferred action by hand as DHS and formerly INS have historically only provided information in a PDF format.<sup>[26]</sup> Also, USCIS was unable to provide the internal form (G-312) used by USCIS when processing deferred action cases. According to the FOIA officer at USCIS: "I have found out that the form G-312 is an internal form and isn't tracked in any system. To get a copy of the form for each case would mean pulling it from the file which we are not able to do without the consent of the person that the file belongs to."<sup>[27]</sup> Furthermore, in the data set analyzed for this essay, the information provided for each region was inconsistent. For example, the Southeast, Western, and Central Regions included specific details about the reasons for a grant or denial of deferred action, whereas the Northeast Region did not include this field.

Likewise, it was difficult to produce a comprehensive analysis about the nationalities of those requesting deferred action because only two of the four regions captured this information.<sup>[28]</sup> Though this data does not include the nationalities of those requesting deferred action from the larger NER or SER (not available), it may show a corollary to what the overall 2015 deferred action data based on nationality would demonstrate. The data we do have indicates that most applicants in the California region were nationals of Mexico or Guatemala.<sup>[29]</sup> Still, the disparity in how information is collected from one region to the next raises important questions about consistency.<sup>[30]</sup>

Finally, and as shown in Table 4, a good number of deferred action cases are labeled as "No Action" without specific information for what this means. This label might be a literal or metaphoric message about the uncertainty and opaqueness of the deferred action program. The transparency challenges faced by the deferred action outside of DACA are historic.

### CONCLUSION

This essay shows that USCIS continues to process and grant deferred action cases across several field offices and at all four regions and also highlights the humanitarian reasons that influence outcomes. Immigrant communities and advocates who serve them must consider the option of deferred action for those affected by the Texas litigation and others who present sympathetic factors.<sup>[31]</sup>

This essay also shows how the deferred action program continues to lack transparency, raising the possibility of inconsistency between similarly sympathetic cases, limited access for individuals without attorneys familiar with the program, and concern about the integrity of program moving forward. Overcoming the transparency challenge in deferred action cases is not a simple task and it is further complicated by the politics faced by the 4-4 tie in *United States v. Texas* and the Presidential election year, but the need for deferred action reform is critical. These reforms include: 1) centralization of all deferred action cases at USCIS; create a paper form for individuals to make a deferred action request; 2) codification of deferred action as a regulation; 3) greater communication from the government to attorneys and noncitizens after a deferred action request is made; and 4) publication of statistics about the number of and outcome in deferred action cases among others.<sup>[32]</sup>

---

Shoba Sivaprasad Wadhia is the Samuel Weiss Faculty Scholar and Founding Director of the Center for Immigrants' Rights Clinic at Penn State Law: University Park. The author thanks Meaghan McGinnis ('17) and Vienna Vasquez ('16) for their diligent research assistance.

[1] See *United States v. Texas*, 579 U.S. \_\_ (2016) (per curiam); see also Shoba Sivaprasad Wadhia, *Symposium: A meditation on history, law, and loss*, SCOTUSblog (Jun. 23, 2016, 2:08 PM).

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

[3] U.S. Citizenship and Immigr. Services Website (last updated June 16, 2016).

[4] See, e.g., Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 1-87* (New York University Press 2015) [hereinafter *Beyond Deportation*]; Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 Am. U.L. Rev. 1285 (2015); Shoba Sivaprasad Wadhia, *Relics of 'deferred action'*, The Hill (Nov. 20, 2014, 5:00 PM); Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 San Diego L. Rev. 819 (2004); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 San Diego L. Rev. 42 (1977).

[5] See generally Shoba Sivaprasad Wadhia, *Beyond Deportation: Prosecutorial Discretion Requests after U.S. v. Texas*, ACSblog (June 28, 2016); Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 54-87*, 146-156 (New York University Press 2015).

[6] *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. Citizenship and Immigr. Services (last updated Jan. 4, 2016) ("Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status."); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 Am. U.L. Rev. 1285 (2015); Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 54-87* (New York University Press 2015).

[7] See Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 14-32* (New York University Press 2015); see also Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in*

*Immigration Law*, 10 U.N.H. L. Rev. 1 (2012) [hereinafter *Sharing Secrets*].

[8] See, e.g., Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 54-87 (New York University Press 2015); Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 *Geo. Immigr. L.J.* 345, 347-58 (2013) [hereinafter *My Great FOIA Adventure*].

[9] See *Classes of aliens authorized to accept employment*, 8 C.F.R. § 274a.12(c)(14) (2016); Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 *Colum. J. Race & L.* 1 (2016).

[10] See, e.g., Memorandum from Donald Neufeld, Acting Associate Director, Lori Scialabba, Associate Director, and Pearl Chang, Acting Chief, on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009).

[11] Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 *Geo. Immigr. L.J.* 345, 347-48 (2013).

[12] Office of the Press Secretary, *Remarks by the President on Immigration*, The White House (June 15, 2012, 2:09 PM).

[13] See, e.g., Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 134-145 (New York University Press 2015).

[14] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (on file with author).

[15] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (unpublished FOIA response enclosed) (on file with author).

[16] Shoba Sivaprasad Wadhia, *Standard Operating Procedure for Deferred Action (non-DACA)* (2015). Importantly, but outside the scope of this essay, is an examination of deferred action cases at ICE. For one study of deferred action cases at ICE, see Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 *Geo. Immigr. L.J.* 345, 347-48 (2013).

[17] See, e.g., *Ombudsman Recommendation: Recommendation on USCIS Deferred Action Processing*, U.S. Dep't of Homeland Sec. (July 11, 2011) (last visited July 13, 2016) (noting that equities are included in a Form G-312, *Deferred Action Case Summary*, which "outlines the individual's biographical information, familial history, grounds of inadmissibility and deportability and physical and mental conditions requiring treatment in the United States" and is typically completed at the local office).

[18] See, e.g., Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 54-87 (New York University Press 2015); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 *Am. U.L. Rev.* 1285 (2015).

[19] The outcome for the one noncitizen in the SER that was not granted a renewal is possibly due to the fact that fraud was suspected ("claims child has heart disease, fraud is suspected"). See Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (unpublished FOIA response enclosed) (on file with author).

[20] See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1 (2012); Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 54-87 (New York University Press 2015); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 *Am. U.L. Rev.* 1285 (2015).

[21] DHS FOIA Request Submission Form (October 14, 2015) (on file with author); see also Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (on file with author).

[22] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (on file with author); see also Email from Kathleen Vogel, U.S. Citizenship and Immigration Services, to author (Dec. 25, 2015) (on file with author).

[23] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (unpublished FOIA response enclosed) (on file with author).

[24] *Id.*

[25] *Id.*

[26] See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1 (2012); Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 134-145 (New York University Press 2015).

[27] See Email from Kathleen Vogel, U.S. Citizenship and Immigration Services, to author (Dec. 25, 2015) (on file with author).

[28] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (unpublished FOIA response enclosed) (on file with author).

[29] *Id.*

[30] See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1 (2012); Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 134-145 (New York University Press 2015).

[31] See, e.g., Shoba Sivaprasad Wadhia, *Beyond Deportation: Prosecutorial Discretion Requests after U.S. v. Texas*, ACSblog (June 28, 2016).

[32] See Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 152-155 (New

York University Press 2015).

This entry was tagged immigration.

**Cite As:** Guest Blogger, *The Aftermath of United States v. Texas: Rediscovering Deferred Action*, by Shoba Sivaprasad Wadhia, YALE J. ON REG.: NOTICE & COMMENT (Aug. 10, 2016), <http://yalejreg.com/nc/the-aftermath-of-united-states-v-texas-rediscovering-deferred-action-by-shoba-sivaprasad-wadhia/>.

← Review: Pasachoff's The President's Budget as a Source of *Altera v. Commissioner*: Heads the IRS Wins, Tails the Taxpayer Agency Policy Control, by Jim Tozzi [Loses? →](#)

One thought on “The Aftermath of United States v. Texas: Rediscovering Deferred Action, by Shoba Sivaprasad Wadhia”



Luis Plascencia

August 11, 2016 at 6:37 pm

The second and third table are not legible

Reply ↓

### Leave a Reply

Your email address will not be published. Required fields are marked \*

Comment

Name \*

Email \*

Website

Post Comment