Summary Regarding Executive Branch Authority to Grant DREAMers Temporary Relief

To: Interested Parties

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Background

Some 65,000 undocumented students graduate from high school each year. They constantly fear deportation, and despite their talent and potential to contribute to the country, they face bleak prospects in both employment and education. Without legal status, they cannot drive or work legally. They cannot qualify for most college scholarships and loans and only a few states offer in-state tuition for these students. Not surprisingly, many must leave higher education due to prohibitively high costs.

The DREAM Act provides a promising solution. Legislation pending in Congress would offer these students greater access to higher education and a reasonable path to citizenship. In addition to allowing immigrant youth to assimilate more fully in American society , the bill would substantially benefit states and communities across the country.

The DREAM Act would stop the colossal brain drain that occurs when ambitious youth are deported or blocked from achieving their full potential as doctors, scientists, academics, entrepreneurs, and military officers. Unleashing their talents will allow them to earn, spend, and invest more in the American economy. At a time when employers increasingly demand highly-skilled "knowledge workers" to compete in a global economy, legalizing bicultural and multilingual youth will pay enormous dividends.

U.S. Senator Marco Rubio (R-FL) is working on a bill that would offer undocumented youth a nonimmigrant visa that could be renewed indefinitely. It would not provide a pathway to citizenship. Yet Congress does not have to pass Senator Rubio's bill in order to allow the government to grant relief to undocumented youth. The U.S. Department of Homeland Security (DHS) already has the discretionary power to grant DREAMers temporary legal status that can be renewed indefinitely and would allow them to work and drive legally.

Until Congress can pass the DREAM Act (S. 952), DHS should create a program allowing DREAM Act eligible youth to apply for provisional status on a case-by-case basis. This program would allow immigrant youth to pursue their dreams while contributing their considerable talents to the country they love and consider home.

Immigration Law and Policy

A DHS program offering DREAMers temporary authorization to remain in the country would provide more benefits than a bill, such as Senator Rubio's proposal, that confers similar relief. While neither would offer an opportunity to adjust to legal permanent residency directly, a law easily could transform into a permanent fix that was never intended and dilute or preempt future campaigns for immigration reform, both for undocumented youth and for the population as a whole.

In the American legal system, law enforcement agencies have the fundamental authority to exercise discretion in deciding which cases to investigate and prosecute under existing criminal and civil laws, including immigration law.

The Executive Branch has long exercised this power in immigration law and policy. This memo summarizes the scope of this power, demonstrating how the government has employed it in the past.

This memo is based in large part on an April 29, 2011, memo from former AILA Executive Director, Jeanne Butterfield, Esq.; Former INS General Counsel, Bo Cooper, Esq.; Center for American Progress, Director of Immigration Policy, Marshall Fitz, Esq.; American Immigration Council, Executive Director, Benjamin Johnson, Esq.; Former INS General Counsel, Paul Virtue, Esq.; and AILA Executive Director, Crystal Williams, Esq.

Exercising Executive Authority

The Supreme Court has held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney 470 U.S. 821, 831 (1985).

In the immigration context, ICE exercises prosecutorial discretion at every stage in the enforcement process, from deciding whom to arrest and whom to release on bond to whom to bring forth for removal proceedings or criminal prosecution.

Despite Congress' decision to allocate substantial resources to immigration enforcement, funding has its limits, and ICE must determine its prosecutorial priorities. Indeed, the President has repeatedly announced that interior enforcement prioritizes prosecuting and removing noncitizens that have committed serious crimes.

Once individuals come into contact with law enforcement, authorities can exercise prosecutorial discretion on a case-by-case basis. The government may also exercise this authority and allow individuals from certain groups not within its enforcement priorities to request favorable relief affirmatively.

DHS and INS have issued numerous memorandums over the years that outline agency priorities and provide their officers with clear guidance for carrying out these priorities. The challenge often lies in ensuring that officers on the frontlines of immigration enforcement understand and follow such guidance.

ICE Director John Morton's June 17, 2011, memorandum on prosecutorial discretion focuses on low enforcement priorities and which factors to consider on a case-by-case basis when deciding to close a case administratively. Individuals cannot qualify for work authorization solely because they have received administrative closure. The government can exercise prosecutorial discretion favorably in pending cases, whether the noncitizen is detained or not, though in most cases that ICE has closed administratively since June, the noncitizen was not detained.

Deferred Action

While the Administration has primarily exercised its discretion through administrative closure, deferred action can also achieve this end.

The Executive Branch, through the Secretary of the Department of Homeland Security (DHS), can decide not to prosecute a case, granting "deferred action" to removable persons. The former Immigration and Naturalization Service (INS) had "Operations Instructions" regarding deferred action. *See* (Legacy) Immigration and Naturalization Service, Operations Instructions, 0.1 § 103.1(a) (1) (ii) (1975). Currently, deferred action is considered "a discretionary action initiated at the discretion of the agency or at the request of the alien." Http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf.

This relief allows a person to remain temporarily in the U.S. and is "an act of administrative convenience to the government which gives some cases lower priority." (*See* 8 C.F.R. §274a.12(c)(14). DHS says that officers should consider sympathetic or compelling factors when deciding whether to grant deferred action. The government could terminate this relief at any time, though it rarely chooses to terminate deferred action status. While in deferred action, beneficiaries can apply for employment authorization. With an employment authorization document, they can apply for a driver's license in states that require applicants to have legal status.

In AI Justice's experience, deferred action is granted only to DREAMers with final orders of removal whose deportation is imminent, even though the government could grant them deferred action at any time throughout removal proceedings. Typically, deferred action status is valid from 12 to 18 months; beneficiaries must requests renewals when their status is close to expiring. ICE has recently shied away from granting deferred action and has instead released DREAMers with orders of supervision (can apply for work permit) or stayed their removal (not eligible for work permit). ICE frequently requires in-person reporting for individuals under orders of supervision.

While ICE generally makes deferred action decisions on a case-by-case basis, these decisions can affect discrete classes of noncitizens. Each case, however, is reviewed individually. In June 2009, for example, Secretary Napolitano granted deferred action to widows of U.S. citizens who could not adjust status due to a statutory restriction. In 2010, DHS granted deferred action to nearly 12,000 VAWA applicants whose cases were on hold awaiting new DHS regulations. After Hurricane Katrina, USCIS granted deferred action to non-immigrants affected by the disaster. Certain military dependents for whom a visa number was not current and ineligible for Parole-in-Place were also granted deferred action.

USCIS, ICE, and CBP all have the authority to grant deferred action. Deferred action may be extended indefinitely. There is no application form or filing fee required at this time, although if USCIS significantly increases the use of this exercise of prosecutorial discretion they could require a separate appropriation or independent funding stream. Another option is for USCIS to design and seek expedited approval of a dedicated deferred action form and require a filing fee.

Finally, Nicaraguans present in the United States in the early 1990's were eligible for temporary relief under the Nicaraguan Review Program, pursuant to regulation. They were also eligible for work permits. The program was terminated in June 1995. *See* 60FR31168. Some Nicaraguans affected by termination of the NRP were eligible to apply for suspension of deportation pursuant to INA Section 244, 8U.S.C. 1254 and INS extended the transitional work permit until June 12, 1997.

Deferred Enforced Departure (DED)

Prior to the enactment of Temporary Protected Status (TPS), the Attorney General provided relief by suspending enforcement of immigration laws against a particular group of individuals. One of the two most common discretionary procedures to provide relief from deportation has been deferred departure or deferred enforced departure (DED).

The President has the authority to grant DED to a class or group of foreign nationals pursuant to his foreign relations and prosecutorial discretion powers. The Attorney General has therefore provided that under certain conditions persons who have not been legally admitted to the United States may remain in the country either temporarily or permanently. *See* §240 of INA (8 U.S.C. § 1229a); §240B (8 U.S.C. §1229c).

The discretionary procedures of DED are used to provide relief the Administration feels is appropriate. The executive branch's position is that all blanket relief decisions require a balance of judgment regarding foreign policy, humanitarian, and immigration concerns.

DED can be granted for any specific amount of time and typically comes with a work permit. Unlike TPS, there is no application fee and persons who benefit from DED do not necessarily register for this status with USCIS, but protection is triggered when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work permit from USCIS.

Executive authority granting Deferred Enforced Departure was also exercised by President George H.W. Bush for Chinese nationals in the wake of Tiananmen Square events. *See Executive Order 12,711, April11, 1990, at* http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-30133/0-0-0-39631/0-0-0-39863.html and by President Clinton for certain Haitian nationals. *See "Deferred Enforced Departure for Certain Haitian Nationals," December 23, 1997, at* http://www.ice.gov/doclib/foia/dro_policy_memos/deferredenforceddepartureforcertainhaitiannationals12231997.pdf. President George W. Bush granted DED to certain Liberian nationals in 2007. *See "Fact Sheet: Liberians Provided Deferred Enforced Departure (DED," September 12, 2007, at* http://www.dhs.gov/xnews/releases/pr_1189693482537.shtm *; see also "Deferred Enforced Departure" at*

http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=fbff3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=fbff3e4d77d73210VgnVCM100000082ca60aRCRD. President Obama extended this relief in 2009.

Humanitarian Parole or Parole-in-Place

The Executive Branch, through the Secretary of Homeland Security, has the authority to "parole" persons for "urgent humanitarian reasons or significant public benefit." (See INA§212(d)(s)(A). If that person is in the United States and has not already been admitted or paroled, this relief is called "Paroled in Place (PIP). PIP has been granted by USCIS without requiring the filing of any form or fee, but that could be altered.

For years, USCIS has granted PIP on a limited basis. Under the Clinton Administration, PIP was granted to Cuban boat persons who made it to dry land (dry foot/wet foot policy). More recently a broader use of PIP was approved for certain qualified military dependents to, among other things, preserve family unity and address Department of Defense concerns about soldier safety and readiness for duty. Parole has also been granted to Cuban beneficiaries of I-130 relative petitions (renewed recently). Workers in the N. Mariana Islands also have benefited from this relief.

Persons who were lawfully admitted to the U.S. but whose authorized period of admission is about to expire or has expired are not eligible for PIP. Since many DREAMers arrived with their parents who had valid visas, PIP is not a practical solution. However, USCIS can increase the use of deferred action for these persons.

In Sum

While the Administration may be concerned that exercising prosecutorial discretion to grant DREAMers provisional status would be controversial, it clearly has the authority to do so. In 2010, USCIS wrote a memo, "Administrative Alternatives to Comprehensive Immigration Reform," detailing ways in which the Administration could provide relief options to promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain persons present in the U.S. without authorization. This memo was leaked, some Republicans accused the Administration of trying to bring about "back door amnesty" and the Administration quickly retreated.

More recently, an April 26, 2012 Washington Post article, "Shift on Executive Power lets Obama bypass Rivals," discusses President Obama's desire "to more aggressively use executive power to govern in the face of Congressional obstructionism." Aides say President Obama coined a "We Can't Wait" slogan at a recent meeting, where reportedly dozens of new ideas were rolled out. In February 2011, President Obama directed the Justice Department to stop defending the Defense of Marriage Act. As Jack Goldsmith, the former head of DOJ's Office of Legal Counsel, has said: "You can't be in that (President's) office with all its enormous responsibilities…and not exercise all the powers that accrued to it over time."

We continue to see DREAMers in ICE detention. Shamir Ali, a bright 25 year old from Bangladesh came to the U.S. when he was age 7. In November 2011, he was detained and initially denied relief by ICE despite a compelling case and widespread public support. AI Justice learned of his case and submitted a renewed request, which thankfully led to his release. Yet DREAMers like Shamir too often end up in ICE detention. Currently we know of at least one DREAMer who is detained at the Broward Transitional Center in Pompano, Florida.

Countless DREAMers have been deported. Currently, only those whose deportation is imminent have an opportunity to get temporary legal status and a work permit. The vast majority of DREAMers, therefore, remain in legal limbo. These DREAMers have been patiently waiting years for Congress to pass the DREAM Act.

The Administration needs to give DREAMers who would be eligible for relief under S.952 a lifeline, and should do so now. There is no doubt that the Administration has the authority to do so. It's also the moral imperative and the smart thing to do. According to a White House Fact Sheet as well as many studies, DREAMers would contribute important economic and other benefits if afforded legal status. Even with provisional status, the economic benefits would be significant.

The only question is whether the Administration has the will to do this. Tens of thousands of DREAMers and millions of U.S. Latinos are hoping and praying the answer is yes.