Criminal Convictions and Eligibility for Administrative Relief from Removal
September 25, 2014

Summary of the Problem

As the Obama Administration considers eligibility requirements for a new program for administrative relief from removal in late 2014, it may look to provisions of the Deferred Action for Childhood Arrivals (DACA) program and S. 744. Both the Frequently Asked Questions (FAQ) document accompanying DACA and the provisions of S. 744, which passed the U.S. Senate with bipartisan support, acknowledge that criminal convictions based upon immigration violations should not bar relief. However, neither of those documents fully accounts for the ways in which state criminal convictions may be based essentially upon immigration violations. Thus, adopting either approach for a new administrative relief program would be certain to bar many applicants who are deserving of administrative relief, and would be at odds with positions that the Administration has taken in litigation and in its immigration enforcement policies. Many state criminal convictions—even under statutes that, on their face, do not concern immigration offenses—have been deployed by local law enforcement and prosecuting agencies to target undocumented immigrants and conduct that arises essentially from lack of lawful immigration status. Thus, barring individuals with such criminal convictions from accessing any avenue for administrative relief would inherently conflict with the goal of providing relief to undocumented immigrants who do not pose a public safety risk.

Background and Analysis

The DACA program provides that certain criminal histories will bar eligibility for deferred action. However, the DACA FAQ document specifically provides that "[i]mmigration-related offenses characterized as felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors" under the DACA program.

Similarly, S. 744 provided that certain criminal convictions would bar access to the legalization provisions in that bill. However, those provisions recognized that some criminal convictions have been imposed because of the applicant's immigration status; thus, S. 744 expressly excluded from the disqualification provision criminal convictions for "a State or local offense for which an essential element was the alien's immigration status, or a violation of this Act." S. 744 § 2101(a). This provision was intended to avoid penalizing noncitizens who have been the targets of zealous immigration enforcement efforts by certain state or local governments acting out of disagreement with federal immigration policies. *See*, *e.g.*, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (addressing unconstitutional state criminal laws penalizing immigration-related conduct); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (same); *United States v. South Carolina*, 840 F. Supp. 2d 898 (D.S.C. 2011) (same); *Georgia Latino Alliance for*

Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012) (same); *Melendres Ortega v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (injunction against local sheriff's department's practices of racial profiling and illegal seizures arising out of immigration enforcement policy); *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959 (D. Ariz. 2011) (same); *United States v. Maricopa County*, No. 10-1878-LOA (D. Ariz. compl. filed Sept. 2, 2010) (U.S. Department of Justice lawsuit challenging same policies of sheriff's department).

The carve-outs in both DACA and S. 744 for immigration-related convictions, however, are incomplete and, if adopted in any form of administrative relief, would lead to the disqualification of intended beneficiaries, assuming the Administration's intent not to disqualify persons who have criminal convictions only or essentially because of immigration violations. Even setting aside the problem of persons who have been selectively targeted for arrest or prosecution because of their actual or suspected immigration status, the adoption of a criminal disqualification like that in DACA or S. 744 would encompass many state criminal convictions that, on their face, do not to appear to rest upon immigration status violations, but in fact do so.[1]

Examples of commonly prosecuted state crimes with a hidden immigration status basis include the following:

- Criminal traffic offenses: In many states, undocumented immigrants who are stopped for traffic violations are prosecuted for the criminal offense of **driving without a license**. This happens with great frequency where local law enforcement agencies have a pattern and practice of targeting suspected undocumented immigrants for traffic stops. *See United States v. Maricopa County*, *supra*. Immigration status is not an element of the offense. However, immigration is central to such prosecutions, as undocumented immigrants are not permitted to obtain driving privileges in the vast majority of states. In general, excluding traffic offenses from a criminal disqualification provision would avoid

[1] This memorandum addresses solely the issue of state criminal convictions that are incident to immigration status, but are not obtained under a statute that explicitly includes immigration status as an element. This memorandum does not address the separate issue of state or federal criminal convictions that are obtained under a statute that explicitly includes immigration status as an element, such as illegal entry under 8 U.S.C. § 1325 or illegal re-entry under 8 U.S.C. § 1326, or state criminal statutes such as those held preempted under federal law in *Arizona v. United States*, 132 S.Ct. 2492 (2012). We assume that the Administration will adopt the approach in both S. 744 and DACA that such explicitly immigration status-related offenses should not bar eligibility for relief.

This memorandum also does not address state or federal criminal convictions that result from racial or ethnic profiling related to immigration enforcement practices. This is a well-documented problem, which the Department of Justice has addressed in litigation (e.g., *United States v. Maricopa County*, No. 12-981-LOA (D. Ariz. compl. filed Sept. 2, 2010). While this memorandum does not address this problem in detail, the ACLU urges the Administration to adopt a process that permits consideration of individual equities in order to prevent the disqualification of individuals who have been convicted of non-violent or non-serious crimes, or who have suffered criminal convictions because of unconstitutional seizures or racial profiling.

entangling the administrative relief program with illegal police practices like racial profiling and selective targeting of immigrants.[2]

- Working without authorization: Undocumented immigrants are often prosecuted for the felony offenses of **forgery, identity theft, criminal impersonation or similar fraud offenses**, for using fictitious identity information or using another person's identity information for purposes of obtaining and maintaining employment (including for payment of taxes). For example, the Maricopa County Sheriff's Office has a regular practice of conducting worksite raids on local businesses and arresting undocumented immigrants on such charges. Advocates in Texas have also reported similar prosecutions for identity theft.
- Other offenses relating to lack of a state-issued identity document: Undocumented immigrants have been prosecuted under **state criminal statutes that include an element of failure to have a state-issued license or permit**. In Alabama and North Carolina, for example, undocumented immigrants have been prosecuted for **fishing without a license** or **driving a vehicle with expired or improper license plates**.
- Trespassing: On occasion, undocumented immigrants have been convicted of **trespassing** when working without authorization (on the theory that he or she is on the employer's premises without legal authorization), or simply for being present in a state or a locality as a person without lawful presence in the United States.
- Related offenses: Offenses that relate to any of the foregoing—such as conspiracy to commit one of the foregoing offenses, or failure to appear to answer for one of the foregoing offenses— should also be omitted from any disqualification provision.

These examples demonstrate that when a local law enforcement agency's mission is to detect and to penalize undocumented immigrants, they often deploy state criminal laws of general applicability that do not have immigration status as an element, and prosecute individuals for offenses incident to their status.

Recommendations

The Administration should take steps to avoid inadvertently disqualifying deserving applicants who meet the eligibility requirement, but who have suffered a criminal conviction incident to their immigration status:

- The simplest and most efficiently administrable measure would be to exclude the foregoing types of criminal convictions from any criminal bar to administrative relief.
- Alternatively, for offenses that might encompass conduct incident to immigration status but also other criminal conduct (e.g., identity theft or forgery as described

[2] The DACA FAQs state that a "minor traffic offense," including driving without a license, is not considered a misdemeanor that could lead to disqualification, but that nonetheless such a conviction may be considered as part of an applicant's "entire criminal history."

above), if the Administration is not inclined to implement a categorical carve-out, it should at a minimum permit an applicant to present evidence that the conviction was in fact incident to immigration status. For example, such evidence might consist of proof that a false identity document was not used in furtherance of another crime, but only in an employment application or for purposes of paying income or payroll taxes. If an applicant does present such evidence, the conviction should not disqualify the applicant.

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