

Achieving the DREAM: Extending Immigration Reform to Administrative Case Closure

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I. INTRODUCTION

“[T]he American dream [is] that dream of . . . opportunity for each according to . . . ability or achievement. . . . [A] dream [where] each man and each woman shall be able to attain to the fullest stature of which they are innately capable”¹

A chasm divides American citizens and undocumented immigrants who seek to fulfill James Truslow Adams’s *American dream*. The difference between them is that, unlike undocumented immigrants, American citizens can *continue* to live the American dream through the cultivation of meaningful careers, unimpaired by government regulation²

1. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931) (emphasis added). During the beginning of the Great Depression in 1931, Adams was credited with coining the term *American dream*. His analysis emphasized equality and self-fulfillment over wealth and materialism. *See id.* For a comparison of Adams’s writings with the fiscal crisis of President Obama’s first term, see Nicolaus Mills, *American Dream Is About Equality, not Wealth*, CNN (July 8, 2011, 2:45 PM), <http://www.cnn.com/2011/OPINION/07/08/mills.debt.dream/>.

2. Americans continue to believe that they can start from the bottom and work to the top, regardless of their situations or circumstances. *See* Katharine Q. Seelye, *What Happens to the American Dream in a Recession?*, N.Y. TIMES (May 8, 2009), <http://www.nytimes.com/2009/05/08/us/08dreampoll.html> (finding that although the percentage has

Many undocumented immigrants living in the United States hold onto dreams that they cannot attain because they lack the employment authorization to do so.³ Undocumented immigrants struggle with employment roadblocks that force them to maintain low-level job positions because high-level positions require a social security number.⁴

President Barack Obama's 2012 Deferred Action for Childhood Arrivals plan (DACA) made employment authorization possible for eligible undocumented immigrants.⁵ On June 15, 2012, President Obama

slipped, Americans still believe in the American dream despite the recession). Those in the millennial age group, consisting of people ages eighteen through twenty-nine, have fewer job prospects than the baby boomers but nevertheless optimistically believe that searching and holding out for the right job will pay off. See Louis Uchitelle, *A New Generation, An Elusive American Dream*, N.Y. TIMES, July 7, 2010, at A1. Statistics show that the people more likely to believe in the American dream are nonwhite, have higher incomes, are college-educated, and live in the West versus the Rust Belt. See Gregory Rodriguez, *The American Dream: Is It Slipping Away?*, L.A. TIMES (Sept. 27, 2010), <http://articles.latimes.com/2010/sep/27/opinion/la-oe-rodriguez-dream-20100927>.

3. See Lorelei Laird, *The Dream Bar*, A.B.A. J., Jan. 2013, at 50, 50–57 (explaining the circumstances of several undocumented immigrants who have graduated from law school and seek bar admission); see also Elise Foley, *Undocumented Immigrants Push for Military Service Under Deferred Action*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/01/25/immigrants-military-deferred-action_n_2553726.html (last updated Jan. 26, 2013, 10:50 AM) (stating that undocumented immigrants living in the United States wish to enlist in the military under President Obama's Deferred Action for Childhood Arrivals plan).

4. One undocumented woman went to college for two years but lost her financial stability and dropped out to clean houses for a living. See Erica Perez, *After College, Young Illegal Immigrants Face Low-Skill Jobs*, CAL. WATCH (July 27, 2011), <http://californiawatch.org/dailyreport/after-college-young-illegal-immigrants-face-low-skill-jobs-11732>. Gaby Pacheco, an undocumented immigration rights leader, hoped to become a special education teacher but could not achieve certification because she lacked citizenship papers. See Julia Preston, *Young Immigrants Say It's Obama's Time To Act*, N.Y. TIMES, Dec. 1, 2012, at A1. Other undocumented immigrants, such as the famous Filipino journalist Jose Antonio Vargas, simply check the citizenship box on the government form to secure a job and hope that no one will find out. See Jose Antonio Vargas, *Not Legal Not Leaving*, TIME, June 25, 2012, at 34, 41. Undocumented immigrants also buy false documents that allow them to immediately acquire more permanent forms of employment. See Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. TIMES, June 19, 2006, at A1.

5. See Press Release, Office of the Press Sec'y, U.S. Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>. For a list of the DACA requirements, see *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.usc>

announced that qualified immigrants under age thirty could apply for and receive temporary relief from deportation proceedings.⁶ This new plan affected part of the Development, Relief, and Education for Alien Minors Act (DREAM Act) by providing deferred action to young individuals collectively known as *DREAMers*.⁷ If they meet specific criteria, *DREAMers* can receive relief from removal for a two-year period, subject to renewal, with the opportunity to apply for work authorization permits.⁸

In the face of congressional gridlock, President Obama used prosecutorial discretion as a vehicle to spur immigration reform.⁹ President Obama explained that his administration will “focus [the] immigration enforcement resources in the right places” and that individuals who “do not present a risk to national security or public safety” are low priorities.¹⁰ DACA requires United States Citizenship and Immigration Services (USCIS) to defer action against low priority *DREAMers*, effectively “freezing” their cases.¹¹ In accordance with immigration regulations, an undocumented immigrant who has been granted deferred action may now apply for employment authorization.¹²

is.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process#guidelines (last updated July 2, 2013).

6. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/photos-and-video/video/2012/06/15/president-obama-speaks-department-homeland-security-immigration-an#transcript>.

7. See Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088697 (stating that the DREAM Act was a legislative proposal that would have provided amnesty for certain undocumented immigrants brought to the United States as children). Since 2001, advocates for the DREAM Act have unsuccessfully pushed Congress to pass versions of the Act. See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784, 789 (2013).

8. See Press Release, Office of the Press Sec'y, *supra* note 5.

9. See Delahunty & Yoo, *supra* note 7, at 789 (stating that the Senate rejected the Act in December 2010 and the Republicans controlled the House of Representatives in January 2011).

10. President Barack Obama, *supra* note 6.

11. See Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 482–83 (2012).

12. See 8 C.F.R. § 274a.12(c)(14) (2013). In 2011, roughly 11.1 million undocumented immigrants lived in the United States. See *U.S. Immigrant Population Trends*, PEW RES. CENTER (Feb. 13, 2013), http://www.pewhispanic.org/2013/02/15/u-s-immigration-trends/ph_13-01-23_ss_immigration_04_increase/. There are approximately 1.8 million undocumented immigrants living in the United States who are eligible for DACA. *Who and Where the DREAMers Are, Revised Estimates*, IMMIGR. POL'Y CENTER (Oct. 16, 2012), <http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are-revised-estimates>. During DACA's first six months, just under 500,000 undocumented

Although some undocumented immigrants have celebrated DACA, others who are legally permitted to remain in the United States under what is called *administrative closure* grapple with the procedure's caveat: they are not permitted to apply for employment authorization under section 274a.12(c)(14) of Title 8 of the Code of Federal Regulations.¹³ Administrative closure, a procedure applied in qualified immigration cases, allows low priority undocumented immigrants to remain in the United States for an undetermined period of time while their cases are closed.¹⁴

These individuals should have an avenue to gain lawful employment during the interim of removal proceedings because case closure bears a similar purpose and function to deferred action.¹⁵ It is irrational to treat two groups of undocumented immigrants differently under the regulation when the groups and their respective procedures share material factors.¹⁶ Further, the time is ripe for reform, as demonstrated by the 2013 announcements made by President Obama and a bipartisan group of senators regarding their blueprints for comprehensive immigration reform.¹⁷ This

immigrants between the ages of fifteen and thirty had their applications accepted for processing, which equates to forty-five percent of that age group. Wendy Feliz, *Reaching the Six-Month Mark on Deferred Action for Childhood 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/>.

13. See 8 C.F.R. § 274a.12(c)(14). The regulation in general lists classes of undocumented immigrants authorized to accept employment. See 8 C.F.R. § 274a.12 (2013). The undocumented immigrants who can apply to USCIS for employment authorization under subsection (c) include alien spouses; unmarried dependent children; nonimmigrant students; aliens seeking asylum; aliens who have filed for status adjustments; nonimmigrant business visitors; aliens with deportation orders who are released on supervision; aliens applying for temporary protected status; aliens with certain filed legalization applications; principal informants; and family members of a trafficking victim. See *id.* § 274a.12(c).

14. See *infra* Part II.C.

15. See *infra* Part IV.A–B.

16. See *infra* Part IV.B.

17. On January 28, 2013, a bipartisan group of eight senators unfurled a blueprint for comprehensive immigration reform. The plan requires stronger border security enforcement but would eventually allow undocumented immigrants to apply for permanent residency. See Julia Preston, *Senators Offer a New Blueprint for Immigration: A Bipartisan Proposal*, N.Y. TIMES, Jan. 28, 2013, at A1. The next day, President Obama revealed his executive reform plan. It also allows undocumented immigrants to apply for permanent residency but does not require security of the border prior to approving any applications, contrary to the bipartisan plan. Both blueprints allow undocumented immigrants to work in the United States if they pass background checks and pay back taxes. See *President Obama Makes Immigration Reform Push*, BBC NEWS, <http://www.bbc.co.uk/news/world-us->

presents the best opportunity for undocumented immigrants with administratively closed cases to expand the regulation's scope.¹⁸

Administrative closure defers prosecutorial action and is identical in many material respects to deferred action: the affected undocumented immigrants experience a limbo period comparable to that of deferred action recipients.¹⁹ Additionally, administrative closure cases do not require immediate attention from the courts, analogous to the low priority factor of deferred action.²⁰ The courts employ an efficiency mechanism that conserves their resources for cases that concern public interest and safety.²¹ The underlying purpose of this mechanism pertains to both deferred action and case closure.²² Applying policy, logic, and the objective of DACA, individuals whose cases have been administratively closed should receive employment authorization opportunities similar to those granted to DREAMers.

This Comment compares DACA to administrative case closure and argues that Congress or the President should grant employment authorization to individuals whose cases have been administratively closed. Part I describes the current interpretation of the employment authorization regulation and provides the background of administrative case closure. Part I highlights the disparate treatment that the regulation affords to undocumented immigrants facing deferred action and administrative closure—offering employment authorization to only deferred action recipients. Part II examines the history of deferred action in immigration cases and uses DACA as a framework to show how the scope of the employment authorization regulation should extend to encompass

canada-21248981 (last updated Jan. 29, 2013, 4:59 PM). The “Gang of Eight” senators presented their comprehensive plan to the Senate, and on June 27, 2013, the Senate passed the bill in a 68–32 vote. Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES, June 28, 2013, at A1. For additional information on the Gang of Eight bill, see *infra* Part V.B.

18. More undocumented immigrants are revealing their status and propagating change through major media channels, which in turn will help the entire issue of immigration reform by informing the public. For example, Terrence Park, an undocumented Asian student attending U.C. Berkeley, told his story in a BBC News video. See Matt Danzico & Peter Murtaugh, *In California, an Incomplete Dream for Undocumented Asian Students*, BBC NEWS, <http://www.bbc.co.uk/news/magazine-21761431> (last updated Mar. 12, 2013, 8:07 PM). Terrence was offered a graduate-level position with Yale University, but due to his undocumented status, he lacked access to the federal financial assistance that he needed. *Id.* In another instance, Jose Antonio Vargas, a famous journalist, revealed his undocumented status and wrote a featured article in *Time* magazine. Vargas, *supra* note 4.

19. See *infra* Part IV.A.2.

20. See *infra* Part IV.A.3.

21. See *infra* Part IV.A.1.

22. *Infra* Part IV.A.1.

administrative case closure. Part III analyzes the policies and logic underpinning deferred action and administrative case closure, arguing that case closure falls under the realm of “administrative convenience” and should receive equivalent treatment in light of DACA. Part IV then offers two solutions, proposing that the President extend DACA to cover case closure or that Congress amend the regulation.

II. THE PROBLEMATIC REGULATION AND BACKGROUND ON ADMINISTRATIVE CASE CLOSURE

Under the employment authorization regulation, undocumented immigrants can apply for employment authorization if they have received a grant of deferred action.²³ Deferred action is considered an act of administrative convenience because it defers removal proceedings for low priority undocumented immigrants and conserves resources to remove undocumented immigrants who pose concerns to public safety and national security.²⁴ Similarly, certain undocumented immigrants receive administrative case closure, where the court administratively closes their cases to preserve court resources and delay proceedings for low priority individuals.²⁵ Although administrative case closure parallels deferred action, undocumented immigrants with administratively closed cases cannot apply for employment authorization.²⁶

23. See 8 C.F.R. § 274a.12(c)(14) (2013).

24. See Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 823 (2004) (“Essentially, [deferred action] is an administrative stay of deportation that places the alien in the lowest possible priority for BCIS action.”); see also Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to All OPLA Chief Counsel 1 (Oct. 24, 2005), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092975-ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05.pdf/view?searchterm=william%20j.%20howard%20memo> (“[W]e must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets . . .”).

25. *In re Avetisyan*, 25 I. & N. Dec. 688, 692 (B.I.A. 2012) (“[A]dministrative closure may be appropriate to await an action or event that . . . may not occur for a significant or undetermined period of time.”); see also *In re Amico*, 19 I. & N. Dec. 652, 654 n.1 (B.I.A. 1988) (“The administrative closing of a case . . . [I]s merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations.”).

26. See 8 C.F.R. § 274a.12(c)(14). Under the regulation, an undocumented immigrant must also demonstrate an economic necessity for employment. *Id.*

From the first Notice to Appear to the immigration judge's ruling, an immigration case typically takes several years to wind its way through court.²⁷ During this period, an immigration agency can issue a favorable grant of prosecutorial discretion that defers further removal proceedings.²⁸ Additionally, the immigration court can administratively close an undocumented immigrant's case if the court deems it appropriate to postpone removal action to a later date.²⁹

A. *The Regulation's Nearsighted Application for Employment Authorization*

Undocumented immigrants may apply to work legally in the United States if they have been granted deferred action.³⁰ Under the employment authorization regulation, an individual may obtain employment authorization for the deferred action time period: "Aliens who must apply for employment authorization (14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment" ³¹ Deferred action is considered "an act

27. See Anna Marie Gallagher, *Prosecutorial Discretion in the Immigration Context*, IMMIGR. BRIEFINGS, Nov. 2012, at 1, 3. Removal proceedings begin with a Notice to Appear that charges the individual with a violation of immigration laws. *Id.* If the immigration judge issues an order of removal, the individual can appeal the order through the Board of Immigration Appeals (BIA or Board) or for certain decisions, through the federal courts. *Id.* Removal proceedings end with a final decision issued by an immigration judge, the Board, or a federal court. *Id.*

28. *Id.*; see also Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge & All Chief Counsel 3 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> ("ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR"). The Department of Justice's Executive Office for Immigration Review interprets and administers American immigration laws. *Executive Office for Immigration Review*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/> (last visited Mar. 25, 2014).

29. See *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 480 (B.I.A. 1996). The Board administratively closed the undocumented immigrant's case indefinitely pending her application for temporary protected status. See *id.* at 481.

30. See 8 C.F.R. § 274a.12(c)(14).

31. *Id.* (emphasis omitted). The entire regulation lists restrictions on employment authorization:

(c) Aliens who must apply for employment authorization. An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.

of administrative convenience” because the Department of Homeland Security (DHS) favorably exercises prosecutorial discretion to defer removal proceedings against undocumented individuals who are otherwise harmless in relation to DHS’s highest enforcement priorities.³² These immigrants rank in the bottom tier of removal enforcement because they have not committed significant immigration violations in relation to the high priority national security and criminal alien dockets.³³ With the provision of increased resources for border and interior immigration enforcement, the courts face an overwhelming volume of immigration cases that exceeds the capacity of cases they can prosecute.³⁴ Prosecutorial discretion conveniently makes the crowded immigration courts more available to prosecute high priority cases that affect the safety and public interest of Americans.³⁵

Administrative case closure is materially comparable to deferred action in two respects. First, similar to the preservation of resources initiative under

....
(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.

Id. (emphasis omitted).

32. See Wildes, *supra* note 24, at 822. DHS classifies cases involving sympathetic humanitarian circumstances as low priority, and these cases tend to receive favorable grants of prosecutorial discretion. See Memorandum from William J. Howard, *supra* note 24, at 6. Examples include an undocumented immigrant with a citizen child who has a serious medical condition or disability and an undocumented immigrant or close family member who is undergoing treatment for a serious disease in the United States. *Id.*

33. DHS prioritizes such cases involving human rights abusers, spies, traffickers in narcotics and people, sexual predators, and other criminals. See Memorandum from William J. Howard, *supra* note 24, at 8.

34. See *id.* at 1. The Office of the Principal Legal Advisor (OPLA) is an office within DHS that represents the United States in exclusion, deportation, and removal proceedings. It has twenty-six offices and chief counsel spread throughout the country. See *infra* note 45 and accompanying text. In 2005, OPLA handled 300,000 cases in immigration courts and 42,000 appeals in front of the BIA. The office litigated these cases with only 600 attorneys. Due to the unbalanced ratio of attorneys to cases, the attorneys averaged twenty minutes of preparation per case. Additionally, the caseload was increasing because Congress provided more resources for border and interior immigration enforcement. Memorandum from William J. Howard, *supra* note 24, at 1.

35. See Memorandum from William J. Howard, *supra* note 24, at 1 (explaining that stretched resources and the increasing caseload necessitate prioritizing the cases to focus on national security and criminal alien issues). Howard’s memorandum emphasized that in determining whether to litigate, lower priority cases require balancing “the cost of an action versus the value of the result.” *Id.* at 8.

deferred action, an immigration judge may administratively close a case as part of an administrative convenience that allows the court to focus its resources on readily solvable issues.³⁶ Second, administrative case closure and deferred action both involve temporary delays of removal proceedings for low priority undocumented immigrants.³⁷

Despite the similarities, the existing regulation allows only deferred action recipients to apply for and obtain employment authorization.³⁸ Based on the current interpretation of the regulation, low priority undocumented immigrants who are not recipients of deferred action but have received administrative case closure do not qualify for employment authorization.³⁹

B. *The General Life Cycle of an Immigration Case*

Immigration cases do not typically receive case closure or deferred action until later in the development of the proceedings. Court actions, appellate reviews, and administrative hearings fall under the operation of the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice.⁴⁰ The EOIR has more than 235 immigration judges who preside over removal proceedings and determine whether an undocumented immigrant can remain in, or be ordered removed from, the United States.⁴¹ Proceedings first begin when DHS, in the form of the agencies USCIS, Immigration and Customs Enforcement (ICE), or Customs and Border Protection (CBP), charges an undocumented immigrant with a violation of immigration law and serves a Notice to Appear.⁴² After it receives the Notice to Appear, the immigration court

36. See *In re Avetisyan*, 25 I. & N. Dec. 688, 695 (B.I.A. 2012); see also *In re Amico*, 19 I. & N. Dec. 652, 654 n.1 (B.I.A. 1988) (stating that administrative closure “is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations”).

37. Compare *In re Avetisyan*, 25 I. & N. Dec. at 695 (“[A]dministrative closure does not result in a final order.”), and *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 480 (B.I.A. 1996) (stating that case closure temporarily removes a case from the court’s calendar or docket), with Wildes, *supra* note 24, at 823 (explaining that deferred action is a temporary “administrative stay of deportation” that is reviewed biennially).

38. See 8 C.F.R. § 274a.12(c)(14) (2013).

39. Petition for Writ of Mandamus at 3–4, *Victoria v. Napolitano*, No. 12CV01827 (JAH) (MDD) (S.D. Cal. July 24, 2012) (stating that after an immigration judge administratively closed the petitioner’s case, USCIS denied the petitioner’s application for employment authorization based on a lack of evidence of deferred action status).

40. See *Executive Office for Immigration Review*, *supra* note 28.

41. *EOIR at a Glance*, U.S. DEP’T JUST. (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

42. *Id.*

schedules a removal hearing before an immigration judge.⁴³ The process begins with a master calendar hearing, where the judge confirms the individual's understanding of the alleged violations and right to counsel.⁴⁴ The judge then schedules an individual hearing, where counsel for the undocumented immigrant and DHS argue the merits of the case.⁴⁵ Most individuals admit they are removable but apply for relief from removal under one of the available defenses afforded by immigration law.⁴⁶ If the immigration judge issues a final order of removal, the individual may appeal the decision to the Board of Immigration Appeals (BIA or Board).⁴⁷ Federal courts of appeals also have jurisdiction to review certain decisions issued by the BIA.⁴⁸

Several years can pass between the time an individual receives a Notice to Appear and the judge's ultimate decision, allowing the appropriate

43. *Id.*

44. *Id.*; see also 8 U.S.C. § 1362 (2012) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented . . . by such counsel, authorized to practice in such proceedings, as he shall choose.").

45. See *EOIR at a Glance*, *supra* note 41. OPLA is an ICE leadership office and is also the largest legal program under DHS. OPLA attorneys represent DHS and the United States in removal proceedings. See *Office of the Principal Legal Advisor (OPLA)*, ICE, <http://www.ice.gov/about/offices/leadership/opla/> (last visited Mar. 25, 2014). For a general overview of immigration proceedings, see Gallagher, *supra* note 27, at 3.

46. See *EOIR at a Glance*, *supra* note 41. Forms of relief fall under two categories: (1) discretionary and (2) administrative and judicial relief. Undocumented immigrants may qualify for discretionary relief once they undergo proceedings and DHS finds them to be removable. Types of discretionary relief available during a hearing include voluntary departure, cancellation of removal, asylum, and adjustment of status. After a hearing, undocumented immigrants may qualify for administrative and judicial relief in the form of a motion to reopen or reconsider, a stay of removal, an administrative appeal, or judicial review by the federal courts. See *Fact Sheet: Forms of Relief from Removal*, U.S. DEP'T JUST. (Aug. 3, 2004), <http://www.justice.gov/eoir/press/04/ReliefFromRemoval.pdf>.

47. See Gallagher, *supra* note 27, at 3. DHS can also appeal to the BIA if it disagrees with the immigration judge's decision. See *EOIR at a Glance*, *supra* note 41. The BIA hears appeals largely involving orders of removal and applications for relief from removal. It usually conducts "paper reviews" of cases and rarely hears oral arguments. See *Board of Immigration Appeals*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/biainfo.htm> (last updated Nov. 2011).

48. Individuals who receive unfavorable decisions from the BIA may file an appeal for federal court review, but DHS cannot do so. See *EOIR at a Glance*, *supra* note 41. "BIA decisions are binding on DHS officers and immigration" judges, unless the Attorney General or a federal court judge overrules or modifies the decision. See *Board of Immigration Appeals*, *supra* note 47.

agency to exercise a favorable grant of prosecutorial discretion at any time during the process.⁴⁹ Any immigration agency within DHS can exercise discretion, but generally, USCIS and ICE manage and grant requests for deferred action.⁵⁰ Immigration judges and the BIA lack the authority to exercise prosecutorial discretion to grant requests for deferred action.⁵¹

C. An Overview of Administrative Case Closure

Immigration judges and the BIA—collectively immigration courts or the courts—have the option to administratively close a case when they deem it appropriate to postpone further action for a certain period of time.⁵² Immigration courts use administrative case closure as a regulatory tool: to promote the efficient use of court resources, case closure temporarily removes a case from the judge’s calendar or court docket.⁵³ The court may exercise case closure when it anticipates that a relevant event or action will not occur for a lengthy and determinate period of time.⁵⁴ A court will grant case closure only under circumstances where the parties and the court lack control over the relevant event or action.⁵⁵ The

49. See Gallagher, *supra* note 27, at 6 (stating that DHS can exercise discretion “from the time when a noncitizen falls out of status or enters the United States without inspection until the time when he or she is ordered removed and ICE begins the process to execute removal”); see also Memorandum from John Morton, *supra* note 28, at 3 (“ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts . . .”).

50. Gallagher, *supra* note 27, at 8.

51. See *id.* (“An immigration judge cannot grant deferred action.”); see also Johnson v. INS, 962 F.2d 574, 579 (7th Cir. 1992) (“Deferred action status is granted as a matter of prosecutorial discretion; such authority has not been delegated to immigration judges or to the Board.”).

52. See *In re Avetisyan*, 25 I. & N. Dec. 688, 692 (B.I.A. 2012). Federal courts employ administrative closure in a variety of situations under different names. See, e.g., *id.* at 690 n.2; see also St. Marks Place Hous. Co. v. U.S. Dep’t of Hous. & Urban Dev., 610 F.3d 75, 80–81 (D.C. Cir. 2010) (finding that the district court’s order that the case was closed did not indicate it was a final, appealable decision); Ali v. Quarterman, 607 F.3d 1046, 1049 (5th Cir. 2010) (stating that administrative closure is “equivalent to a stay”).

53. See *In re Avetisyan*, 25 I. & N. Dec. at 694.

54. *Id.* at 692 (“[A]dministrative closure may be appropriate to await an action or event that . . . may not occur for a significant or undetermined period of time.”).

55. See, e.g., *id.* at 697. For example, in *In re Avetisyan*, the BIA looked to whether the respondent had control over her husband’s visa petition in its analysis of the judge’s decision to administratively close the case. The BIA upheld the judge’s decision because it was not the respondent’s fault that the petition had not yet been adjudicated by DHS. *Id.*

grant of administrative closure is not a final order, and DHS may move to reinstate the case at any time.⁵⁶

To determine whether administrative closure is appropriate, the court weighs a number of factors related to the efficient management of court resources.⁵⁷ Until recently, an immigration court could not administratively close a case if either party opposed the proceeding.⁵⁸ In *In re Avetisyan*, the Board overruled its previous decisions and found that it could grant administrative closure after independently evaluating the relevant factors, even if a party opposed the proceeding.⁵⁹ The Board recognized that its decision did not encroach on DHS authority because DHS could still

56. See *id.* at 695 (listing methods that DHS can utilize to pursue further proceedings, including recalendaring it before the judge, reinstating the appeal before the Board, or filing an interlocutory appeal of the judge's decision).

57. See *id.* at 696. Such factors include, but are not limited to,

(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

Id.

58. *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 480 (B.I.A. 1996) ("A case may not be administratively closed if opposed by either of the parties.") (citing *In re Lopez-Barrios*, 20 I. & N. Dec. 203 (B.I.A. 1990)); see, e.g., *In re Peugnet*, 20 I. & N. Dec. 233, 234 n.1 (B.I.A. 1991); *In re Munoz-Santos*, 20 I. & N. Dec. 205, 207 (B.I.A. 1990).

59. *In re Avetisyan*, 25 I. & N. Dec. at 692–94 (expressing that the holding in *In re Gutierrez-Lopez* produced troubling interpretations because it "invest[ed] a party, typically the DHS, with absolute veto power over administrative closure requests"). The Board considered the same factors it uses for motions to reopen and requests for continuances, concluding that the same analysis could be adapted to fit administrative closure. *Id.* at 696. The Board also recognized that it had discussed administrative closure only in reference to *in absentia* cases, and the Board revised its analysis to incorporate cases where the undocumented individual was present. *Id.* at 692, 696. For an example of an *in absentia* case, see generally *In re Amico*, where the BIA found that the immigration judge inappropriately granted case closure because the defendant received adequate notice and failed to attend the proceeding without reasonable cause. 19 I. & N. Dec. 652, 654 (B.I.A. 1988). Although the defendant was absent from the proceeding, the BIA stated that the judge should have held an *in absentia* hearing and issued a final order. *Id.* The Board reasoned that if the immigration judge grants administrative closure under these circumstances, a defendant could circumvent deportation by merely failing to appear. *Id.*

pursue further proceedings and exercise prosecutorial discretion.⁶⁰ Applying its new multifaceted analysis, the Board listed several nonexhaustive examples of appropriate case closure, such as case closure for an immigrant with an approved visa petition filed by a spouse undergoing naturalization.⁶¹

III. TRACING DEFERRED ACTION TO PROSECUTORIAL DISCRETION: MOVING BEYOND JOHN LENNON AND THE DREAM ACT TO THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS PLAN

The development of deferred action highlights its comparable function and policy to administrative case closure. Prosecutorial discretion persisted as a secret procedure in immigration matters until the 1970s, when John Lennon's litigation exposed the public to the procedure.⁶² Prosecutorial discretion has remained a special tool in the pockets of immigration agencies because it allows them to choose not to enforce the law against an undocumented immigrant.⁶³ This defers further removal action against the individual and allows the immigration agencies to focus their resources on more compelling matters.⁶⁴ Favorable grants of deferred

60. *In re Avetisyan*, 25 I. & N. Dec. at 694 (“Although administrative closure impacts the course removal proceedings may take, it does not preclude the DHS from instituting or pursuing those proceedings and so does not infringe on the DHS’s prosecutorial discretion.”).

61. *See id.* at 696. The Board listed an additional example of appropriate case closure where an alien has properly appealed from the denial of a prima facie approvable visa petition and the appeal has not yet been forwarded to the Board for adjudication. *Id.* Case closure is not appropriate when the individual bases the request on a speculative action, such as (1) a change in the law; (2) an event that will occur but not within a reasonable time period; or (3) “an event . . . that may or may not affect the course of an alien’s immigration proceedings (such as a collateral attack on a criminal conviction).” *Id.*

62. *See infra* notes 75–82 and accompanying text.

63. *See* Memorandum from Doris Meissner, Comm’r, U.S. Immigration & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel 2 (Nov. 17, 2000), available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00> (“The ‘favorable exercise of prosecutorial discretion’ means a discretionary decision not to assert the full scope of the INS’ enforcement authority as permitted under the law.”). DHS can favorably exercise prosecutorial discretion in a variety of contexts, including “granting a temporary stay of removal, joining in a motion to terminate removal proceedings, granting an order of supervision, cancelling a Notice to Appear, or granting deferred action.” *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 7 (2012).

64. *See* Wildes, *supra* note 24, at 823 (“[I]t is an administrative stay of deportation that places the alien in the lowest possible priority for BCIS action.”); Memorandum from William J. Howard, *supra* note 24, at 1–2.

action permit undocumented immigrants to stay in the United States temporarily and enable these immigrants to apply for employment.⁶⁵ Immigration agencies typically grant deferred action to undocumented immigrants with low priority status and compelling life circumstances that warrant the individuals' stay in the United States.⁶⁶

The DREAM Act would have provided a route to citizenship for qualified undocumented immigrant students, but it repeatedly failed to garner enough support for passage in Congress.⁶⁷ The Act's goal was to permit undocumented immigrants, brought to the United States as children, to graduate from college and attain legal status.⁶⁸ Then, in June 2012, DHS Secretary Janet Napolitano announced the institution of DACA, which provides deferred action and employment authorization to eligible undocumented immigrants with DREAM-like characteristics.⁶⁹ President Obama's Administration used prosecutorial discretion to create DACA, a plan resembling the DREAM Act, to avoid enforcing removal portions of the Immigration and Nationality Act (INA).⁷⁰

65. See Wildes, *supra* note 24, at 823; see also 8 C.F.R. § 274a.12(c)(14) (2013) (“An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority . . .”).

66. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees 3 (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (directing officers not to expend detention resources on “aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest”).

67. See Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–37 (2011). Congress failed to pass versions of the DREAM Act in 2001, 2005, 2006, 2007, 2008, and 2010. See *id.* at 632–36.

68. 147 CONG. REC. 15361 (2001) (statement of Sen. Orrin Hatch). Senator Hatch (R-Utah) first introduced the Act to Congress in 2001. See *id.*

69. See Press Release, Office of the Press Sec'y, *supra* note 5.

70. See Delahunty & Yoo, *supra* note 7, at 783–84. The INA provides the basic framework of immigration law. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (current version in scattered sections of 8 U.S.C.). Before DACA, an individual could generally seek relief from the court's removal decision only by filing an appeal with the BIA. See Ilana E. Greenstein, *Board of Immigration Appeals and Federal Court Review of Deportation and Removal Decisions*, in 2 IMMIGRATION PRACTICE MANUAL § 18.1, § 18.2 (Michael D. Greenberg & Alan M. Pampanin eds., 2012). The filing of an appeal resulted in the automatic stay of the execution of the removal order. *Id.* (citing 8 C.F.R. § 1003.6(a) (2012)). Contrary to filing an appeal with the BIA, filing a petition of review with the federal courts of appeals did not automatically

A. *The Function of Prosecutorial Discretion in Immigration Law*

Prosecutorial discretion equips a law enforcement agency with the authority to use its discretion in enforcing or not enforcing the law against an individual.⁷¹ It is commonly used in immigration matters to focus the country's resources on removing high risk, high priority individuals, such as those who threaten national security or public safety.⁷² A law enforcement agency can choose to favorably exercise prosecutorial discretion by *not* enforcing removal proceedings for low risk, low priority individuals, such as those who came to the United States as children and have not otherwise violated the law.⁷³ A cost efficiency analysis supports

stay an order of removal. *Id.* Instead, a separate request for a stay of the execution of the removal order was required. *Id.*

71. See Memorandum from Doris Meissner, *supra* note 63. In discussing prosecutorial discretion, Andrew Lorenzen-Strait, ICE's public advocate in 2012, described it as "not new, but rather . . . a basic tenet in any field of law enforcement." See *Teleconference Recap: A Conversation with the U.S. Immigration and Customs Enforcement (ICE) Public Advocate*, U.S. DEP'T HOMELAND SECURITY, <http://www.dhs.gov/teleconference-recap-conversation-us-immigration-and-customs-enforcement-ice-public-advocate> (last visited Mar. 25, 2014).

72. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244–45 (2010) (arguing that both monetary and humanitarian reasons drive prosecutorial discretion); Memorandum from John Morton, *supra* note 66. Due to the 2013 Boston bombings, many Americans have a renewed focus on developing a better method that shields dangerous immigrants from coming into the country. See Trip Gabriel, *Bombing Suspects' Immigration Story Adds Layer to Debate on Overhaul*, N.Y. TIMES, Apr. 21, 2013, at A15. Some conservatives have changed direction on immigration reform, focusing more on border security and potential terrorists entering the country and less on humanitarian concerns. *Id.* One critic ponders that in light of the Boston bombings, allowing Hispanic immigrants to remain in the United States appears less of a concern than allowing in illegal immigrants from Muslim countries. See Chris Stirewalt, *Boston Bombings May Doom Immigration Deal*, FOX NEWS (May 2, 2013), <http://www.foxnews.com/politics/2013/05/02/boston-bombings-may-doom-immigration-deal/>. In reference to the 2013 Gang of Eight comprehensive immigration reform plan, however, the same critic states that increased security should not come at the price of an "immigration bargain." *Id.* By contrast, Senator Patrick Leahy, a Democrat and the Chairman of the Senate Judiciary Committee, looked at the larger picture, stating that "[I]et no one be so cruel as to try to use the acts of two young men last week to derail the dreams and futures of millions of hardworking people." See Jordan Fabian, *Sen. Leahy Smacks Down Effort To "Exploit" Boston Bombing*, ABC NEWS, http://abcnews.go.com/ABC_Univision/Politics/immigration-democratic-senators-rebuke-attempt-exploit-boston-boming/story?id=19015185 (last updated Oct. 14, 2013, 11:35 AM) (internal quotation marks omitted).

73. See Wadhia, *supra* note 63, at 6. ICE has limited resources and can remove only less than four percent of the population of undocumented immigrants. *Id.* (citing Memorandum from John Morton, *supra* note 66); see also Elise Foley, *Immigration and Customs Enforcement Frees Detainees as Sequester Looms*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/02/25/immigration-and-customs-enforcement-sequester_n_2761941.html (last updated Feb. 27, 2013, 1:00 PM) (expressing that due to looming

the process of prosecutorial discretion in immigration: ICE receives a high volume of immigration violations but limited funding, which forces the agency to prioritize its resources and limit its scope of enforcement.⁷⁴

Before the 1970s, prosecutorial discretion and the nonpriority program remained secret CIA procedures until John Lennon's legal battle revealed the concepts to the public.⁷⁵ In 1971, John Lennon and Yoko Ono came to the United States to resolve a custody battle over Ono's daughter.⁷⁶ When the couple received custody, Ono's ex-husband kidnapped their daughter and disappeared.⁷⁷ Lennon searched for Ono's daughter in the United States and subsequently stayed past his visa expiration date.⁷⁸ When Lennon learned of his pending deportation, he asked for "nonpriority status," but it was not considered.⁷⁹ Under the Freedom of Information Act (FOIA), he made several unsuccessful requests to obtain the nonpriority

federal budget cuts, immigrants were released from detention facilities after ICE reviewed its "detained population to ensure it is in line with available funding" (internal quotation marks omitted)).

74. Memorandum from John Morton, *supra* note 66, at 1 ("In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its . . . removal resources to . . . promote the agency's highest enforcement priorities . . ."). High enforcement priorities include national security, public safety, and border security. *Id.*

75. See Wadhia, *supra* note 72, at 246 (citing Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979) [hereinafter Wildes, *The Operations Instructions*]). For a detailed overview of the Lennon case, see 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, 43–49 (1976) [hereinafter Wildes, *The Nonpriority Program*]. Wildes actually represented Lennon throughout his litigation, which included three district court suits and one petition for review to the Second Circuit. *Id.* at 42 n.**, 43 n.4. Lennon had a conviction for possession of marijuana, and this conviction was a deportable offense. See Leon Wildes, *Not Just Any Immigration Case*, CARDOZO LIFE, Spring 1998, at 23, 24–25 [hereinafter Wildes, *Not Just Any Immigration Case*]. Lennon's legal battles lasted for several years until he was allowed to remain in the United States. See *id.* at 29.

76. Wildes, *The Nonpriority Program*, *supra* note 75, at 44–45.

77. *Id.* at 45.

78. See *id.*

79. *Id.* The nonpriority program was "a humanitarian program that was not a part of the statute or regulations, and simply a matter of secret law." Wildes, *Not Just Any Immigration Case*, *supra* note 75, at 29. The program allowed fully deportable aliens to remain in the United States due to extreme hardship, including aliens with convictions for serious drug offenses, murder, and rape. See *id.*

procedures.⁸⁰ Eventually, he learned that the procedures were listed in a private Immigration and Naturalization Service (INS) Operations Instruction.⁸¹ As a result of the litigation, the INS published the procedures in the publicly available “White Sheets,” “signifying the newly public nature and existence of the program.”⁸² Lennon’s case was moot once he obtained a green card, but in *Lennon v. INS*, the Second Circuit labeled nonpriority status as an “informal administrative stay of deportation.”⁸³ The court described the status as a suspension of the deportation order that could be executed at any time.⁸⁴

After the *Lennon* litigation, the INS published instructions on its operations manual and provided details about deferred action.⁸⁵ The manual advocated for deferred action when deportation would be “unconscionable” because of “appealing humanitarian factors.”⁸⁶ For the next twenty years,

80. See Wadhia, *supra* note 72, at 247. The FOIA was enacted in 1966 and established the public’s right to access information held by the executive branch. See *Freedom of Information Act Guide*, U.S. DEP’T JUST. (May 2004), <http://www.justice.gov/oip/introduc.htm>. Its purpose was to foster government openness and accountability. See *id.* Through the FOIA, Wildes discovered that President Nixon’s Administration was selectively prosecuting Lennon for political reasons. See Wildes, *Not Just Any Immigration Case*, *supra* note 75, at 27.

81. Wadhia, *supra* note 72, at 247–48. The instructions were concealed inside the secret “Blue Sheets,” a series of INS internal regulations not available to the public. Wildes, *The Nonpriority Program*, *supra* note 75, at 43.

82. Wadhia, *supra* note 72, at 248 (citing Wildes, *The Nonpriority Program*, *supra* note 75, at 47).

83. *Id.* (quoting *Lennon v. INS*, 527 F.2d 187, 191 n.7 (2d Cir. 1975)) (internal quotation marks omitted).

84. *Lennon*, 527 F.2d at 191 n.7. The BIA also found Lennon ineligible for permanent residency. *Id.*

85. Wadhia, *supra* note 72, at 248. One news critic described Lennon as an original DREAMer because of the changes that his case made for the undocumented immigrant population in the United States. See Katelyn Polantz, *You May Say He’s a DREAMer: John Lennon’s Immigration Case*, PBS NEWSHOUR (Dec. 14, 2012, 7:25 AM), <http://www.pbs.org/newshour/rundown/2012/12/you-may-say-hes-a-dreamer-john-lennons-immigration-case.html>. Lennon wanted to publicize his case so that other eligible undocumented immigrants—those who could not afford the services of lawyers such as Wildes—could apply for nonpriority status. See *id.*

86. Wadhia, *supra* note 72, at 248 (quoting (LEGACY) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, O.I. § 103.1(a)(1)(ii) (1975)). The humanitarian factors include “(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 effect of expulsion; (5) criminal, immoral or subversive activities or affiliations recent conduct.” *Id.* (quoting (LEGACY) IMMIGRATION AND NATURALIZATION SERVICE, *supra*, § 103.1(a)(1)(ii)) (internal quotation marks omitted). Ironically, many undocumented immigrants received nonpriority status for the very reason they were classified as deportable, such as those immigrants deemed mentally incompetent. *Id.* at 250 (citing Wildes, *The Nonpriority Program*, *supra* note 75, at 57).

the INS encountered considerable litigation involving its Operations Instruction, and in 1996, it published new Standard Operating Procedures.⁸⁷ Congress amended the INA in 1996, however, which rescinded some of the Standard Operating Procedures, and enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).⁸⁸ IIRAIRA tightened immigration opportunities and created a confusing gray area concerning prosecutorial discretion.⁸⁹

In response to the new amendments and their consequences, the former INS General Counsel, Owen “Bo” Cooper, issued a memorandum that aimed to provide a legal foundation for future prosecutorial discretion.⁹⁰ Former INS Commissioner, Doris Meissner, added her own memorandum to Cooper’s publication, and the combined product became the modern

87. See *id.* at 248–51; see also *Nicholas v. INS*, 590 F.2d 802, 807 (9th Cir. 1979) (treating deferred action as a rule versus a guideline); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (*per curiam*) (describing nonpriority status as an act of administrative convenience); *Vergel v. INS*, 536 F.2d 755, 757–58 (8th Cir. 1976) (using humanitarian reasons to grant deferred action).

88. See *Wadhia*, *supra* note 72, at 252; see also *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 8 U.S.C. § 1103 (2012); *Antiterrorism and Effective Death Penalty Act of 1996*, 8 U.S.C. § 1105 (2012).

89. See *Wadhia*, *supra* note 72, at 252–53. IIRAIRA limited the availability of nonpriority status for undocumented immigrants previously eligible for relief. *Id.* at 252 (quoting Letter from Robert Raben, Assistant Attorney Gen., to Barney Frank, Representative, U.S. House of Representatives (Jan. 19, 2000)). For example, it eliminated deportation relief for certain immigrants classified as “arriving” or involved with particular criminal activities. *Id.* These immigrants were also incarcerated without bond. *Id.* The Act expanded the category of crimes classified as aggravated felonies and applied the expansion retroactively. *Id.* Due to IIRAIRA, grants of prosecutorial discretion by the INS remained the only available means of averting the extreme consequences stemming from deportation cases. *Id.* at 252–53 (quoting Letter from Robert Raben to Barney Frank, *supra*). The Assistant Attorney General at the time, Robert Raben, recognized that prosecutorial discretion was an inadequate tool to deal with the harsh changes to the American immigration policy. *Id.* at 253 (quoting Letter from Robert Raben to Barney Frank, *supra*).

90. Memorandum from Bo Cooper, Gen. Counsel, U.S. Immigration & Naturalization Serv., to The Commissioner 1 (July 11, 2000), available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf/view> (“It is our opinion that the INS has prosecutorial discretion to place a removable alien in proceedings, or not to do so.”). The Cooper memorandum identified criminal law as a leading source behind prosecutorial discretion and described immigration officers as enjoying “broad prosecutorial authority over enforcement decisions.” *Wadhia*, *supra* note 72, at 254 (citing Memorandum from Bo Cooper, *supra*).

operations manual for prosecutorial discretion.⁹¹ The Meissner memorandum revealed the government's purposes behind prosecutorial discretion and discussed both a cost efficiency and humanitarian analysis.⁹² It listed examples of factors that immigration officers should consider in their decisions, including, but not limited to, criminal history; length of residence in the United States; humanitarian concerns, such as family ties to the United States, medical conditions, whether the individual came to the United States at a young age, extreme youth or old age, and home country conditions; immigration history; and service in the United States military.⁹³

Following the September 2001 terrorist attacks, the executive branch made substantial changes to federal immigration agencies and devoted more resources to border security and protection.⁹⁴ DHS replaced the INS and divided immigration into services and enforcement units.⁹⁵ USCIS controls immigration services and processes affirmative applications.⁹⁶ The enforcement unit consists of two divisions: CBP and ICE.⁹⁷ CBP inspects and makes arrests at United States borders and customs checkpoints,

91. See Wadhia, *supra* note 72, at 254. The Meissner memorandum expanded upon the concepts behind the Cooper memorandum by identifying a variety of possible actions, including deferred action, to which prosecutorial discretion could apply. *Id.* (citing Memorandum from Doris Meissner, *supra* note 63, at 7–8).

92. See Memorandum from Doris Meissner, *supra* note 63, at 4 (“Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. . . . A U.S. Attorney may properly decline a prosecution if ‘no substantial Federal interest would be served by prosecution.’”); see also Mike Warley, Current Developments, *Dream Deferred: Prosecutorial Discretion Allows Deferred Action for Childhood Arrivals*, 26 GEO. IMMIGR. L.J. 461, 462–63 (2012) (“Prioritizing more dangerous or less productive aliens increased the efficiency of immigration enforcement by only prosecuting cases that led to a tangible benefit when a person was removed from the country.” (citing Memorandum from Doris Meissner, *supra* note 63, at 4–5)). Meissner went for a totality of the circumstances approach. See *id.* at 463.

93. Memorandum from Doris Meissner, *supra* note 63, at 7–8 (declaring that managers should maximize the likelihood of identifying serious offenders and deemphasize issuing Notices to Appear for every case where an alien may be removable). Meissner advocated for a totality of the circumstances approach to allow undocumented immigrants who were sympathetic, productive, and nonthreatening to remain in the United States. See Warley, *supra* note 92, at 463.

94. See Wadhia, *supra* note 72, at 256–57. Besides creating new agencies and funneling resources into new areas, the changes also provided for a zero tolerance policy on security checks, personal liability for immigration adjudicators, and an increase in delays and denials of labor certifications. See Sheela Murthy, *Impact of September 11, 2001 on U.S. Immigration*, MD. B.J., Mar./Apr. 2004, at 2, 4.

95. See Homeland Security Act of 2002, 6 U.S.C. § 111 (2012).

96. See Wadhia, *supra* note 72, at 257; see also *About Us*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/aboutus> (last visited Mar. 25, 2014) (“[USCIS] is the government agency that oversees lawful immigration to the United States.”).

97. Wadhia, *supra* note 72, at 257.

while ICE manages interior-related immigration, including deportation actions.⁹⁸ Nevertheless, prosecutorial discretion, as outlined in the Meissner memorandum, endured the departmental changes.⁹⁹ In October 2005, William J. Howard, the former ICE Principal Legal Advisor, issued a memorandum that emphasized the limited resources behind ICE and described situations where prosecutorial discretion should be favorably exercised.¹⁰⁰ Howard advised government attorneys to ensure that a case is “truly worth litigating” and stated that it is not “wise or efficient” to place an undocumented immigrant into removal proceedings if the intent is for the immigrant to remain in the United States.¹⁰¹ Further, Howard encouraged government attorneys to take advantage of both case closure and termination if it was “no longer in the government interest” to continue the case due to a change in circumstances or an improvidently issued Notice to Appear.¹⁰² Howard’s statements illustrate that the same efficiency

98. See *id.*; see also *About CBP*, CBP, <http://www.cbp.gov/xp/cgov/about/> (last visited Mar. 25, 2014) (stating that CBP secures borders and enforces immigration laws); *Overview: Mission*, ICE, <http://www.ice.gov/about/overview/> (last visited Mar. 25, 2014) (“ICE’s primary mission is to promote homeland security and public safety . . .”).

99. See Wadhia, *supra* note 72, at 259. Subsequently issued memoranda outlined the importance of making every charging decision in accordance with the Meissner memorandum. *Id.*

100. See Memorandum from William J. Howard, *supra* note 24 (stating that low priority cases sometimes require balancing the action with the value of the result). Congress has reorganized immigration services and agencies throughout the past ten years, but due to the high population of undocumented immigrants, prosecutorial discretion has persisted as a valuable tool. See Warley, *supra* note 92, at 463. With deferred action, however, immigration agencies were reluctant to publish information about it well into the late 2000s. *Id.* at 463–64. In a 2007 memorandum, USCIS Director Emilio Gonzalez stated,

Deferred action is a discretionary action initiated at the discretion of the agency or at the request of the alien, rather than an application process. Since deferred action requests are reviewed on a case-by-case basis and granted only in extraordinary circumstances, USCIS does not believe that general information about the deferred action process would be a meaningful addition to the website.

Id. (quoting Memorandum from Emilio T. Gonzalez, Dir., U.S. Citizenship & Immigration Servs., to Prakash Khatri, Ombudsman, U.S. Citizenship & Immigration Servs. 1 (Aug. 7, 2007), available at http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf).

101. Memorandum from William J. Howard, *supra* note 24, at 3 (“In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it is important that we all apply sound principles of prosecutorial discretion . . .”).

102. *Id.* at 5. Howard stated that filing a Notice to Appear does not prevent exercising prosecutorial discretion: “We must be sensitive, particularly given our need to

mechanism drives both deferred action and case closure, underlining the government's recommendation to initiate either procedure when the immigrant would most likely remain in the United States.

B. The Interplay of Deferred Action Under Prosecutorial Discretion

Immigration agencies employ prosecutorial discretion as a means to defer removal action under the INA against lower priority undocumented immigrants.¹⁰³ Deferred action is a discretionary remedy where an officer may “recommend deferral of (removal) action, an act of administrative choice to give some cases lower priority and in no way an entitlement.”¹⁰⁴ Immigration authorities evaluate deferred action requests on a case-by-case basis, as opposed to a formal application process.¹⁰⁵ If granted, deferred action “serves merely to ‘freeze’ the case, and does not remove or reconstitute the underlying adjudication of the alien’s deportability.”¹⁰⁶ Once deferred action is granted, an individual is eligible to apply for employment authorization for the period of deferred action.¹⁰⁷

Deferred action is one of the most widespread manifestations of prosecutorial discretion.¹⁰⁸ In his 2004 analysis of USCIS deferred action records, Leon Wildes found that humanitarian reasons played a major role in deferred action decisions.¹⁰⁹ In March 2011, John Morton, Director

prioritize our national security and criminal alien cases, to whether prosecuting a particular case has little law enforcement value to the cost and time required.” *Id.* at 5 n.2. For information on the issuance of a Notice to Appear, see *EOIR at a Glance*, *supra* note 41.

103. See *supra* notes 72–75 and accompanying text.

104. See Wildes, *supra* note 24, at 822 (quoting THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 769 (4th ed. 1998) (internal quotation marks omitted)).

105. See Olivas, *supra* note 11, at 483–84 (explaining that deferred action requests are not freely given and immigration authorities consider the unique circumstances behind each case).

106. *Id.* at 483 (citing Wildes, *supra* note 24, at 823).

107. See 8 C.F.R. § 274a.12(c)(14) (2013). The USCIS website sets out the process and requirements to apply for deferred action. See *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 5.

108. Wadhia, *supra* note 72, at 246. One critic describes American immigration policy today as retaining a gap between “*formal* deportability” and “*normative* deportability,” where the executive branch affirmatively does not want to deport those immigrants who are formally deportable but not thought deserving of deportation. See Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 57. He describes the gap as a “pervasive” part of the American “‘illegal immigration’ system.” *Id.*

109. See Wildes, *supra* note 24, at 830. The majority of decisions included cases where a deportation action would separate a family or impact an individual with an existing medical condition. *Id.*; accord Wadhia, *supra* note 72, at 261 (stating that Wildes examined 499 cases under the deferred action program and found that family

of ICE, issued a memorandum projecting that ICE had only enough resources to remove 400,000 undocumented immigrants per year, less than four percent of the estimated American undocumented immigrant population.¹¹⁰ Morton's memorandum declared that, as a general rule, resources should not be used for aliens with medical issues, those who primarily take care of children, or those "whose detention is otherwise not in the public interest."¹¹¹ The top removal priorities include undocumented immigrants who "pose a danger to national security or a risk to public safety," such as terrorists and especially violent criminals.¹¹²

separation and illness were major factors in favorable grants of deferred action). For some cases, the fear of substantial negative publicity spurred the INS to grant deferred action. Wildes, *supra* note 24, at 835. One case involved a nineteen-year-old Mexican individual who grew up without a stable home or family but excelled in school, athletics, and social settings. *Id.* Due to substantial community support for the individual to remain in the United States and attend college, the report cited to "significant adverse publicity" as the only reason for recommending deferred action. *Id.*

110. See Memorandum from John Morton, *supra* note 66, at 1.

111. *Id.* at 3. Morton's memorandum expanded upon Meissner's "laundry list" of factors for immigrant officials to consider in their decisions to grant deferred action, including whether immigrants are pregnant or nursing women, minors, veterans, or victims of domestic violence. See Warley, *supra* note 92, at 464 & n.27 (citing Memorandum from John Morton, *supra* note 28, at 5). In 2009, Secretary Napolitano allowed widows of United States citizens to apply for and receive deferred action. Press Release, Office of the Press Sec'y, U.S. Dep't of Homeland Sec., DHS Establishes Relief for Widows of U.S. Citizens (June 9, 2009), available at http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm. One critic thought the policy laid out actual rules for deferred action. See Warley, *supra* note 92, at 464. He argued that Secretary Napolitano's announcement "broke with the Meissner and Morton traditions" because it indicated a willingness to highlight the path toward deferred action. *Id.*

112. See Memorandum from John Morton, *supra* note 66, at 1-2. The principal priorities also include undocumented immigrants suspected of espionage, participants in organized criminal gangs, and undocumented immigrants subject to outstanding criminal warrants. *Id.* Morton recommended classifying the top removal priorities according to three levels. *Id.* at 2. Level one qualifies as a top removal priority because offenders have been convicted of aggravated felonies or two or more felonies. *Id.* Level two qualifies as an intermediate removal priority because offenders have been convicted of one felony or three misdemeanors. *Id.* Level three qualifies as a lower removal priority because offenders have been convicted of misdemeanors. *Id.* Following the top priorities, priority two includes recent illegal entrants, and priority three includes fugitives and individuals who obstruct immigration controls. *Id.*

C. DACA Partially Realizes the DREAM Act

1. The DREAM Act and Its Catalytic History

The DREAM Act provided the foundation for DACA and first emphasized why an immigrant with lower priority status warrants deferred action from removal proceedings.¹¹³ The 2011 DREAM Act would have offered qualified individuals the opportunity to earn legalized status.¹¹⁴ The Act required that (1) the person have been fifteen years old or younger when brought to the United States; (2) the person have lived continuously in the United States for at least five years prior to the date of enactment; (3) the person have been of good moral character; and (4) the person have earned a high school diploma or GED or have been admitted to an institution of higher education in the United States.¹¹⁵ If qualified individuals completed within six years either (a) two years of higher education or (b) two years of military service with honorable discharge, then they could earn permanent resident status.¹¹⁶

The DREAM Act intended to “allow children who have been brought to the United States through no volition of their own the opportunity to fulfill their dreams, to secure a college degree and legal status.”¹¹⁷ The Act enjoyed bipartisan support at first, but it more recently became a discordant measure illustrative of the contrasting positions on immigration held by the Republican and Democratic parties.¹¹⁸ During the push for

113. Cardinal Roger M. Mahony, *The Dream Act: We All Benefit*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 459, 459, 461 (2012). Cardinal Mahony describes the DREAM Act as a “gift of hope” for all DREAMers to live up to their fullest potential. *Id.* at 461.

114. See Delahunty & Yoo, *supra* note 7, at 788–89. Twenty-two senators signed a letter addressed to President Obama in support of the 2011 DREAM Act and suggested a consistent process for evaluating individual cases. See Letter from Harry Reid et al., Senators, U.S. Senate, to President Obama (Apr. 13, 2011), available at <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c>.

115. DREAM Act of 2011, S. 952, 112th Cong. § 3 (2011).

116. See *id.* §§ 4, 5.

117. 147 CONG. REC. S8581 (daily ed. Aug. 1, 2001) (statement of Sen. Orrin Hatch). Undocumented immigrants cannot develop higher-skilled careers because they cannot work legally and must resort to jobs that pay in cash. See John Otis, *Following Her Dream, and Hoping for the Dream Act*, N.Y. TIMES (Nov. 26, 2012), http://www.nytimes.com/2012/11/26/nyregion/pursuing-dream-of-us-citizenship-colombia-native-applies-to-stay.html?_r=0.

118. See Barron, *supra* note 67, at 631–38. “Two Republicans first introduced the Act in 2001: Senator Orrin Hatch (R-Utah) and Congressman Chris Cannon (R-Utah).” *Id.* at 631. Senator Richard Durbin (D-Ill.) backed the Act in 2005, and it continued to have bipartisan support until 2009. *Id.* Congress failed to pass versions of the Act in 2001, 2005, 2006, 2007, 2008, and 2010. See *id.* at 632–36. Critics posit that President Obama’s deferred action plan was a political move propelled to gain Hispanic voters in light of the 2012 presidential election. See Helene Cooper & Trip Gabriel, *Obama’s*

the 2010 DREAM Act, the Senate's behavior and erratic voting pattern foreshadowed the future difficulties in congressional immigration reform.¹¹⁹ When the Act failed to overcome the Senate filibuster in December 2010, critics believed that it epitomized the Obama Administration's unsuccessful attempt to commit to immigration reform.¹²⁰

In light of the criticism, President Obama referred to DREAMers in his 2011 State of the Union address, where he emphasized the importance of keeping "talented, responsible young people" so that the nation has a brighter future.¹²¹ Shortly after, a draft of an internal memorandum leaked to the public, describing a new strategy that exercised widespread prosecutorial discretion amidst congressional gridlock.¹²² The memorandum

Announcement Seizes Initiative and Puts Pressure on Romney, N.Y. TIMES, June 16, 2012, at A16. After Governor Mitt Romney's defeat in the 2012 presidential election, Republican lawmakers announced a comparable plan to the DREAM Act called the ACHIEVE Act. See *Republicans Counter Immigration DREAM with Achieve Act*, FOX NEWS LATINO (Nov. 27, 2012), <http://latino.foxnews.com/latino/politics/2012/11/27/republican-propose-immigration-counter-to-dream-act-achieve-act/>. For a more detailed description of the ACHIEVE Act, see *infra* Part V.B.

119. See Barron, *supra* note 67, at 636. Although the Act passed in the House on December 8, 2010, by a vote of 216–198, the Democrats delayed the December 9 vote in the Senate to garner more support to reach the sixty votes needed for passage. *Id.*

120. See Joyce Adams, Current Developments, *The DREAM Lives On: Why the DREAM Act Died and Next Steps for Immigration Reform*, 25 GEO. IMMIGR. L.J. 545, 545–46 (2011) (stating that on December 18, 2010, the Act "fell [just] five votes short of the sixty votes needed for a cloture motion" to end the Senate filibuster, due to several Democratic senators who "broke rank" and formerly supportive Republican senators who declined to support the Act). The Senate can overcome a filibuster by passing a cloture motion that limits the time constraint of the consideration of a bill. See STEVEN H. GIFIS, *DICTIONARY OF LEGAL TERMS* 85 (4th ed. 2008). The Obama Administration tightened border control and deported record numbers of undocumented immigrants but could not institute alternative reform methods, such as the passage of the DREAM Act. See Barron, *supra* note 67, at 637; see also Lisa Mascaro & James Oliphant, *Dream Act Was Key to Bigger Plan*, L.A. TIMES, Dec. 19, 2010, at A27 ("[T]he Obama administration and Senate Democrats assured activists that immigration reform was a top priority, only to see it never find any real legislative momentum.").

121. President Barack Obama, State of the Union Address (Jan. 25, 2011), in 157 CONG. REC. H459 (daily ed. Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

122. See Memorandum from Denise A. Vanison et al., Policy & Strategy, U.S. Citizenship & Immigration Servs., to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigration Servs. 1, 10, available at <http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>. The memorandum recommended increasing grants of deferred action to reach its goal of protecting groups from threats of removal. *Id.* at 10. The memorandum is labeled "DRAFT" and does not contain a date,

expressed that deferred action is “an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time.”¹²³ It discussed the idea of tailoring deferred action to the select group of DREAMers, instead of applying it as amnesty for “hundreds of thousands” of people.¹²⁴ Further, in June 2011, John Morton issued a second memorandum that provided additional guidelines for ICE personnel in the exercise of prosecutorial discretion, emphasizing ICE’s case priorities.¹²⁵ The memorandum listed numerous factors for ICE personnel to consider in their exercise of prosecutorial discretion, including DREAM-like characteristics.¹²⁶ Specifically, the memorandum identified that “individuals present in the United States since childhood” warrant “particular care and consideration” for the earliest review possible.¹²⁷

2. DACA and the Public’s Reaction

On June 15, 2012, Secretary Napolitano announced that DHS would grant deferred action to “certain young people who were brought to this country as children and know only this country as home.”¹²⁸ The secretary

but evidence indicates that it was issued in 2011. *See* Delahunty & Yoo, *supra* note 7, at 790 n.39 (stating there is “internal evidence” that the draft was issued in 2011).

123. *See* Memorandum from Denise A. Vanison et al., *supra* note 122, at 10. The memorandum described situations where USCIS has granted deferred action to nonimmigrants, including victims of Hurricane Katrina, applicants for interim relief under the U visa program, and qualified military dependents. *Id.*

124. *Id.* at 10, 11 (“While it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, not to mention expensive.”)

125. *See* Memorandum from John Morton, *supra* note 28, at 2.

126. *See id.* at 4. According to the memorandum, “ICE officers . . . should consider all relevant factors, including, but not limited to,” ICE’s enforcement priorities; the length of stay in the United States; the circumstances and manner of the person’s entry into the United States; the person’s pursuit of education; military service; criminal history; immigration history; whether the person raises national security or public safety concerns; community ties to the United States and home country; the person’s age; whether a family member has citizenship or permanent resident status; whether the person is a primary caretaker for another; whether the person or spouse is pregnant or nursing; severe or mental illness; nationality that renders removal unlikely; whether the person is likely to receive relief from removal; and whether the person has cooperated with law enforcement authorities. *Id.*

127. *Id.* at 5.

128. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. One critic suggests that DACA illustrates “normative deportability” because instead of not enforcing deportation due to a lack of enforcement resources, President Obama labeled DACA as “the right thing to do.” Cox,

addressed the purpose behind the act of prosecutorial discretion and declared that enforcement resources should be “appropriately focused on people who meet [DHS’s] enforcement priorities.”¹²⁹ The main requirements for a DACA application include (1) coming to the United States before age sixteen; (2) continual residence in the United States for five years prior to June 15, 2012; (3) current enrollment in school, graduation from high school, receipt of a general education developmental certificate, or an honorable discharge from the armed forces or Coast Guard; (4) no felony, serious misdemeanor, or multiple misdemeanor convictions; and (5) a maximum age restriction of thirty.¹³⁰

President Obama’s Administration used prosecutorial discretion as a means not to enforce specific removal provisions of the INA, and what

supra note 108, at 57 (quoting President Barack Obama, *supra* note 6) (internal quotation marks omitted). The executive branch’s actions show the compliance “gap between immigration law on the books and immigration law in practice.” *Id.* at 58. On the same day of Secretary Napolitano’s announcement, USCIS Director John Morton issued a memorandum directing ICE agents and officers to follow Secretary Napolitano’s memorandum and immediately exercise discretion for low priority individuals. *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Employees, U.S. Immigration & Customs Enforcement 1 (June 15, 2012), *available at* <https://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf>.

129. Memorandum from Janet Napolitano, *supra* note 128, at 1. In addition to providing eligibility to formally apply for deportation relief, DACA provides employment authorization and photo identification. *See* Alicia Triche, *Who Is a Dreamer? The Criteria, History, and Legal Authority of “Deferred Action for Childhood Arrivals,”* FED. LAW., June 2013, at 20, 20.

130. Memorandum from Janet Napolitano, *supra* note 128, at 1. Secretary Napolitano expanded on the functions and purposes behind American immigration law: “Our Nation’s immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived” *Id.* at 2. In addition to these requirements, the DACA application also requires a \$465 fee and a background check conducted through a fingerprinting process. Triche, *supra* note 129, at 20 (citing *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#education> (last updated Jan. 18, 2013)). Significant misdemeanors include DUIs, violent offenses, and those offenses that carry a prison sentence exceeding ninety days but do not include minor traffic offenses. *Id.* The most recent DREAM Act would have taken more comprehensive steps toward immigration reform than DACA because it allowed eligible undocumented immigrants to apply for conditional permanent residency. *See* Warley, *supra* note 92, at 462. Although DACA provides a temporary deferral of removal proceedings, the DREAM Act would have provided a long-term pathway to citizenship after ten years. *Id.*

remained was a glossed version of the 2011 DREAM Act.¹³¹ After Secretary Napolitano's announcement, President Obama emphasized the humanitarian reasons behind the new deferred action plan and the positive effects of granting employment authorization, including meaningful career development.¹³² President Obama addressed prosecutorial discretion and justified the focus on removing "criminals who endanger communities rather than students who are earning their education."¹³³ In September 2012, USCIS approved the first group of deferred action applicants.¹³⁴ By the six-month mark in February 2013, roughly 423,000 applications had been accepted for processing and 199,460 of those had been approved.¹³⁵ By July 2013, 400,562 applications had been approved while only 5383 applications had been denied.¹³⁶

Critics have hotly debated the legality of President Obama's DACA plan and commonly posit that he overstepped his executive powers by entering into a realm of presidential lawmaking.¹³⁷ Although prosecutorial

131. See Delahunty & Yoo, *supra* note 7, at 783–84 ("By [executing DACA], the Obama Administration effectively wrote into law 'the DREAM Act,' whose passage had failed numerous times." (footnote omitted)).

132. See President Barack Obama, *supra* note 6. President Obama expressed the humanitarian reasons why students should not be subject to removal:

[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans—they've been raised as Americans; understand themselves to be part of this country—to expel these young people who want to staff our labs, or start new businesses, or defend our country simply because of the actions of their parents—or because of the inaction of politicians.

Id. One specific example is an undocumented Asian student immigrant, who is a math genius, researching cancer modeling. Without DACA, he would not be able to work in his field of applied mathematics. See Danzico & Murtaugh, *supra* note 18.

133. See President Barack Obama, *supra* note 6.

134. Alicia A. Caldwell, *Obama Administration Approves First Group of Deferred Action Applicants*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/09/11/deferred-action-applicantsapproved_n_1875841.html (last updated Sept. 11, 2012, 11:23 PM).

135. See Feliz, *supra* note 12.

136. See U.S. CITIZENSHIP & IMMIGRATION SERVS., DEFERRED ACTION FOR CHILDHOOD ARRIVALS: JULY 2013 (2013), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-7-12.pdf>. Mexico leads the countries of origin with 408,759 DACA applicants, followed by El Salvador, then Honduras. *Id.* California leads the states with 152,855 DACA applications, followed by Texas, then Illinois. *Id.*

137. Compare Delahunty & Yoo, *supra* note 7, at 784 (finding that there is "no general presidential nonenforcement power"), with Love & Garg, *supra* note 7 (listing two opposing conclusions about the action and narrowing it down to whether there was an evident baseline level of enforcement that President Obama failed to reach), and Charles Krauthammer, *Naked Lawlessness*, WASH. POST, June 22, 2012, at A17 (arguing that the plan is a "fundamental rewriting of the law"). In *Crane v. Napolitano*, a group of nine ICE agents filed suit on August 23, 2012, against President Obama's Administration in the United States District Court for the Northern District of Texas. Triche, *supra* note 129, at 20–21. The agents wanted a preliminary injunction, claiming

discretion is not a new executive tool, the discretion in this case applies categorically versus individually and appears to serve a more legislative function.¹³⁸ In her announcement, however, Secretary Napolitano stated that qualified individuals would be evaluated on a case-by-case basis, indicating that DHS would not perform a sweeping application of deferred action.¹³⁹ Additionally, just two weeks before the DACA announcement, President Obama received a letter signed by roughly one hundred law professors who defended the idea of deferred action for a collective group of people.¹⁴⁰ Specifically, the letter cited to the Secretary of Homeland Security's authority to enforce immigration laws, as well as the Supreme Court's consistent interpretation that the executive branch has sole control over initiating and terminating enforcement proceedings.¹⁴¹

that President Obama overstepped his authority to institute DACA under federal law and that the program requires them to break the law by providing relief to apprehended undocumented immigrants. *See id.* at 21. On April 23, 2013, Judge Reed O'Connor declined to issue an injunction but found that "DHS cannot implement measures that are incompatible with Congressional intent." *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422, at *12 (N.D. Tex. Apr. 23, 2013). Judge O'Connor declined to make a final ruling and requested additional supplemental briefs. *Id.* at *20. On July 31, 2013, Judge O'Connor dismissed the ICE agents' case without prejudice because the court did not have subject matter jurisdiction to address their claims. Order at 7, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. July 31, 2013). The court found that the Civil Service Reform Act governed the dispute because it acts as a remedial scheme that reviews personnel action taken against federal employees. *Id.* at 3. Because the ICE agents were federal employees asserting claims against the federal government, the court held that the Act applied. *Id.* at 5-6. The court acknowledged, however, that the ICE agents were "likely to succeed on the merits of their claim challenging the Directive and Morton Memorandum as contrary to the provisions of the Immigration and Nationality Act." *Id.* at 6.

138. *See Delahunty & Yoo, supra* note 7, at 795 ("[T]he Constitution appears to give the President no discretion to set Congress's policies aside. . . . '[P]rosecutorial discretion,' if carried to an extreme, can distort the lawmaking process . . .").

139. *See* Press Release, Office of the Press Sec'y, *supra* note 5.

140. *See* Letter from Hiroshi Motomura et al., Professor of Law, UCLA Sch. of Law, to President Barack Obama (May 28, 2012), *available at* <http://lawprofessors.typepad.com/files/executiveauthorityfordreamrelief28may2012withsignatures.pdf>.

141. *Id.* at 2. The letter also referred to historical authority in support of categorical deferred action. *Id.* In 2009, President Obama's Administration granted deferred action to widows and children of American citizens while they waited for pending legislation. *Id.*

3. *The Ties Between DACA and Administrative Case Closure*

At the beginning of her DACA announcement, Secretary Napolitano directly commented on administrative closure: “As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is *already offering administrative closure to many of them.*”¹⁴² Her statement reveals that individuals with DREAM-like characteristics regularly received grants of administrative case closure.¹⁴³ Most significantly, her statement’s inclusion of *already* implies that many individuals have previously received administrative case closure. Therefore, her statement denotes that deferred action was the next sensible step toward the delay of removal proceedings for undocumented immigrants with DREAM-like characteristics.

IV. THE FRATERNAL TWINS: BOTH ADMINISTRATIVE CASE CLOSURE AND DEFERRED ACTION DELIVER ADMINISTRATIVE CONVENIENCE THAT PLACES UNDOCUMENTED IMMIGRANTS IN LOW PRIORITY STATUS

Administrative case closure and deferred action share three similar features. First, both procedures are acts of administrative convenience because they allow for the preservation of resources.¹⁴⁴ Case closure enables the immigration courts to concentrate on current, compelling matters with reasonable end dates.¹⁴⁵ Similarly, deferred action allows DHS to pursue removal proceedings for high priority individuals, which then provides the courts with more serious proceedings to adjudicate.¹⁴⁶ Second, both procedures freeze removal proceedings but do not represent final orders, so DHS may reopen the proceedings at any time.¹⁴⁷ Third, humanitarian factors play a role in the decisions to grant case closure and deferred action.¹⁴⁸

142. Memorandum from Janet Napolitano, *supra* note 128, at 1 (emphasis added).

143. *See, e.g., In re Rosales-Mundo*, No. A098 660 021, 2012 WL 3911776, at *1 n.1 (B.I.A. Aug. 14, 2012) (reopening the respondent’s proceedings in light of DACA).

144. *See supra* notes 54, 110–12 and accompanying text.

145. *See supra* notes 55–56 and accompanying text.

146. *See supra* notes 105, 112 and accompanying text.

147. *See supra* notes 56, 106 and accompanying text.

148. *See supra* notes 93, 111 and accompanying text.

A. *Administrative Case Closure Is Analogous to Deferred Action for Purposes of the Regulation*

1. *Administrative Convenience Applies to Both Administrative Case Closure and Deferred Action*

Administrative convenience lies at the forefront of both deferred action and administrative case closure.¹⁴⁹ In deferred action situations, DHS favorably exercises prosecutorial discretion to defer removal proceedings against undocumented individuals who reside illegally in the United States but are otherwise harmless in relation to DHS's highest enforcement priorities.¹⁵⁰ These cases clutter the already congested immigration courts with insignificant immigration violations and push out the critical cases that affect the safety and public interest of Americans.¹⁵¹

The administrative closure of removal proceedings intends to conserve immigration court resources, analogous to the deferred action process.¹⁵² Administrative case closure is an administrative convenience granted by a judge or the BIA.¹⁵³ Just as deferred action focuses the court's limited resources on cases involving key DHS policy goals, administrative case closure allows the immigration courts to pragmatically focus their resources on immediately resolvable matters.¹⁵⁴ Comparable to deferred action,

149. See Wildes, *supra* note 24, at 821–22. After the June 2011 Morton memorandum, DHS reviewed pending cases to determine whether any met the low priority enforcement criteria to qualify for prosecutorial discretion. See *EOIR Notice Regarding Prosecutorial Discretion and Administrative Closure*, U.S. DEP'T JUST. (July 23, 2012), http://www.justice.gov/eoir/press/2012/PD_Notice_July2012.htm. If a case met the criteria, then DHS could request administrative closure of the proceedings. *Id.* But cf. *Petition for Writ of Mandamus*, *supra* note 39, at 5 (stating that when the judge closed the petitioner's case, the petitioner was effectively placed in deferred action status because she received a favorable grant of prosecutorial discretion and her removal proceedings were thus deferred).

150. See Memorandum from William J. Howard, *supra* note 24, at 8.

151. See *id.* at 1 (describing the large immigration caseload and directing prosecutors to place the highest priority on removing national security violators and serious criminals).

152. Compare *In re Avetisyan*, 25 I. & N. Dec. 688, 695 (B.I.A. 2012) (reasoning that administrative closure depends on factors that affect the efficient management of court resources), with *Wadhia*, *supra* note 72, at 254–55 (citing the Meissner memorandum and its cost-related arguments for conserving INS resources to focus on the serious offenders).

153. See *In re Avetisyan*, 25 I. & N. Dec. at 692; *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 480 (B.I.A. 1996).

154. Compare *In re Avetisyan*, 25 I. & N. Dec. at 692 (reasoning that closure is appropriate to await an action or event that is expected to take a lengthy time to resolve),

administrative case closure “may be appropriate to await an action or event that is relevant to immigration proceedings,” where the court or parties lack control over the event and its timeline is uncertain.¹⁵⁵ Both processes are discretionary tools and work in an identical fashion to relieve the courts of unnecessary and resource-draining backlog.¹⁵⁶

In re Avetisyan presents a strong example of the utility of administrative case closure for cases that stretch out for extended periods of time.¹⁵⁷ The respondent was an Armenian native and citizen who came to the United States in March 2003 as a J-1 nonimmigrant exchange visitor.¹⁵⁸ She stayed in the United States longer than the length of her program, and in April 2004, she received a Notice to Appear that deemed her removable for failing to comply with the conditions of her visa.¹⁵⁹ At her November 2006 hearing, the respondent informed the judge that she had recently married and her husband planned to file a visa petition on her behalf once he became a naturalized citizen.¹⁶⁰ The judge continued the hearing to wait for proof of the husband’s naturalization application and visa petition.¹⁶¹

with Wadhia, *supra* note 63, at 6 (stating that DHS policy goals are both economic and humanitarian) (citing Memorandum from John Morton, *supra* note 28, at 1).

155. *In re Avetisyan*, 25 I. & N. Dec. at 692.

156. Both are discretionary tools, albeit one is administrative and the other is regulatory. Compare *In re Avetisyan*, 25 I. & N. Dec. at 695 (“[T]he decision to administratively close proceedings . . . involves an assessment of factors that are particularly relevant to the efficient management of the resources of the Immigration Courts and the Board . . .”), with Wildes, *supra* note 24, at 822 (describing deferred action as a discretionary, administrative tool) (citing Wildes, *The Nonpriority Program*, *supra* note 75, at 49–66; Wildes, *The Operations Instructions*, *supra* note 75, at 100–01).

157. 25 I. & N. Dec. at 688.

158. *Id.* at 689. A J-1 nonimmigrant classification fosters an educational and cultural exchange that permits an exchange visitor to visit the United States for the length of the exchange visitor’s academic program. See *J-1 Visa Exchange Visitor Program: Common Questions*, U.S. DEP’T ST., <http://j1visa.state.gov/basics/common-questions/> (last visited Mar. 25, 2014).

159. *BIA Rules IJs and BIA May Administratively Close Removal Proceedings Even when a Party (in This Case DHS) Objects*, 89 INTERPRETER RELEASES 302, 302 (2012); see also 8 U.S.C. § 1227(a)(1)(C)(i) (2006) (“Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.”).

160. *BIA Rules IJs and BIA May Administratively Close Removal Proceedings Even when a Party (in This Case DHS) Objects*, *supra* note 159, at 302. At the time of the hearing, the respondent and her husband had just had a baby, and her husband’s naturalized citizenship application was pending. *Id.*

161. *Id.*

Over the next year, the judge granted eight continuances for the adjudication of the naturalization application and visa petition.¹⁶² In April 2008, the respondent requested that the judge administratively close her case while she awaited the status of her visa petition.¹⁶³ At this point, the respondent's proceedings had continued for almost eighteen months, during which the parties had met for ten separate hearings.¹⁶⁴ The judge eventually granted case closure, overruling an objection by DHS, and the BIA affirmed the decision on appeal.¹⁶⁵ The BIA found that the circumstances warranted administrative case closure because the respondent's visa petition was prima facie approvable and through no apparent fault of the respondent, DHS took an inexplicably lengthy amount of time to process her visa petition.¹⁶⁶ As with deferred action, the immigration courts can use administrative case closure as an administrative convenience to better utilize the court's resources.

2. Administrative Case Closure and Deferred Action Temporarily Delay Removal Proceedings

The function of deferred action and case closure is to postpone action for a certain period of time.¹⁶⁷ In both situations, deferred action and case closure serve as temporary delays in removal proceedings and do not

162. See *id.* at 302–03. The respondent's husband became a naturalized citizen in June 2007. *Id.* at 302. Throughout her hearings, the respondent provided evidence that her visa petition was filed and she was awaiting its adjudication. See *id.*

163. *Id.* at 303.

164. See *id.* at 302–03. From November 15, 2006, through April 15, 2008, the parties met for ten hearings regarding the respondent's visa petition and her husband's naturalization application. *Id.* During the fourth hearing, the respondent presented proof of her husband's new status as a citizen, but the hearings continued while her visa petition was pending. *Id.* at 302.

165. *Id.* at 303. After three additional hearings, the immigration judge administratively closed the respondent's case. *Id.* DHS objected to case closure and requested an additional continuance, but the judge denied the request. *Id.*

166. *Id.* at 304. The Board rejected DHS's objection that the visa petition was still pending and stated that DHS had not identified any impediment to the approval of the respondent's petition or to her ability to apply for a successful change of status once she received approval. *Id.* Further, the Board stated that an adjustment of status would result in the termination of the respondent's proceedings, thereby making the case moot. See *id.*; see also *In re Avetisyan*, 25 I. & N. Dec. 688, 697 (B.I.A. 2012) (“We [the Board] therefore agree with the Immigration Judge that the circumstances in this case support the administrative closure of proceedings.”).

167. See *In re Avetisyan*, 25 I. & N. Dec. at 692; Olivas, *supra* note 11, at 473.

represent final orders or construe an immigration status upon the individual.¹⁶⁸ If an individual has not contributed to any current delay in the proceedings and satisfies several of the additional *In re Avetisyan* factors, the court is inclined to grant administrative case closure while the parties wait for the outcome of the delayed event.¹⁶⁹ The proceedings are frozen until circumstances warrant further action, either when the time period for deferred action ends or when administrative closure is no longer appropriate.¹⁷⁰

Accordingly, at any time, DHS can exercise prosecutorial discretion and reinstate removal proceedings for individuals whose cases have been administratively closed.¹⁷¹ Unlike the termination of a removal proceeding, which results in a final order, case closure simply removes the case from the judge's active calendar or the Board's docket due to some relevant event that may not occur for a prolonged or determinate period of time.¹⁷² If DHS chooses to pursue the removal process, the agency can move to

168. See Press Release, Office of the Press Sec'y, U.S. Dep't of Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), *available at* <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

169. See *In re* Laudelino, No. A088 268 610, 2012 WL 5473625, at *1 (B.I.A. Oct. 3, 2012). In the cited case, the BIA granted administrative case closure because the delay in the respondent's third pending labor certification was beyond his control. *Id.* The court in that case also valued that the respondent "has resided in the United States since 1988, has family ties in this country, and has exercised diligence in pursuing labor certifications over the years." *Id.*

170. See *supra* note 147 and accompanying text. Due to a pending visa petition, the Board granted administrative case closure in *In re* Korbieh. No. A099 121 745, 2012 WL 5473658, at *1 (B.I.A. Oct. 11, 2012). Seven months later, the Board received the record of the visa petition and reopened the case for further action. *Id.*

171. See *In re* Avetisyan, 25 I. & N. Dec. at 694–95 (stating that DHS has various methods it can utilize to pursue further proceedings).

172. *Id.*; see also *In re* Ali, A094 077 195, 2012 WL 3911625, at *2 (B.I.A. Aug. 9, 2012) (finding that because the respondent had already obtained a final removal order, administrative closure was not appropriate). The court can choose to terminate a removal proceeding, which acts as a final order and bars future removal proceedings. *In re* Avetisyan, 25 I. & N. Dec. at 695; see also Memorandum from William J. Howard, *supra* note 24, at 5 & n.2 ("Although we lack the authority to sua sponte cancel NTAs, we can move to dismiss proceedings . . ." (citation omitted)). The courts have three methods for terminating proceedings. The first is ruling on the merits. The court can terminate a proceeding on the merits when it determines that "the respondent is not removable as charged in the notice to appear." *In re* Avetisyan, 25 I. & N. Dec. at 695 n.6. The second is conviction of a crime. An immigration judge can terminate if the individual was convicted of a particular crime and is subject to removal under 8 U.S.C. § 1228 (2012). See *Hanggi v. Holder*, 563 F.3d 378, 384 (8th Cir. 2009). The third is pending application. A judge can terminate proceedings where the undocumented immigrant has a pending application or petition for naturalization. 8 C.F.R. § 1239.2(f) (2013).

recalendar the case before the judge or reinstate the appeal before the Board.¹⁷³

3. Judges Look to Humanitarian Reasons for Support To Administratively Close a Case and Grant Deferred Action

Deferred action and administrative case closure involve lower priority cases that do not require immediate prosecution and removal. Immigrants eligible for deferred action, such as DREAMers, cannot have a criminal record or pose a threat to national security or safety.¹⁷⁴ President Obama and Secretary Napolitano emphasized the humanitarian fact that these individuals were brought to the United States as young children through no fault of their own.¹⁷⁵ Similarly, immigrants whose cases have been administratively closed logically possess a sufficient low priority status to prevent DHS from reinstating removal proceedings during the closure period. For example, in William Howard's October 24, 2005, memorandum, he encouraged the Office of the Principal Legal Advisor (OPLA) attorneys to consider "[a]ppealing [h]umanitarian [f]actors" as a basis for recommending case closure to the governing entity.¹⁷⁶ Furthermore, in *In re Avetisyan*, the BIA described two situations where administrative case closure would be an appropriate measure, both of which involved

173. See *In re Avetisyan*, 25 I. & N. Dec. at 695; see also Memorandum from William J. Howard, *supra* note 24, at 6 ("Proceedings can be reinstated when the situation changes."). Federal, state, and local law enforcement may want an undocumented immigrant serving as an asset or confidential informant to remain in the United States to assist with investigation or testify at trial. Memorandum from William J. Howard, *supra*

6. The Howard memorandum states that some officers may prefer administrative case closure for these situations because it allows the immigrant to remain in the United States and law enforcement to recalendar the proceedings. *Id.* This provides more control for law enforcement and possible enhanced cooperation from the undocumented immigrant. *Id.*

174. See Memorandum from Janet Napolitano, *supra* note 128, at 1.

175. See *id.* at 1–2; President Barack Obama, *supra* note 6.

176. See Memorandum from William J. Howard, *supra* note 24, at 6. Such examples include an undocumented immigrant who has an American citizen child with a serious medical condition or disability or an undocumented immigrant or family member who is undergoing serious medical treatment for a potentially life threatening disease. *Id.* If the undocumented immigrant's situation is expected to last for a relatively short time period, the memorandum suggests administrative case closure or staying removal after entry of an order if the benefits would exceed case termination. *Id.*

visa petitions.¹⁷⁷ Following from the Board's examples, it appears *more* appropriate to grant employment authorization for these individuals because they have pending visa petitions, which would allow them to gain lawful employment once processed.¹⁷⁸ By refusing to permit employment authorization for individuals with administratively closed cases, DHS may be delaying the inevitable for certain cases.¹⁷⁹

Critics may reach varying conclusions about whether administrative case closure parallels deferred action and cite to differences between deferred action recipients and administrative case closure recipients. For example, DACA applies to young immigrants brought to the United States as children by their parents through no fault of their own.¹⁸⁰ Administrative case closure recipients, on the other hand, intended to violate the law by entering the United States as adults and may be suited to different treatment.¹⁸¹ They lack the type of childlike innocence that drives the humanitarianism behind DACA.¹⁸² Further, Americans may be less

177. See *In re Avetisyan*, 25 I. & N. Dec. at 696. Visa petitions will not be granted in cases where undocumented immigrants are ineligible. See *Immigrant Visa for a Spouse of a U.S. Citizen*, TRAVEL.STATE.GOV., http://travel.state.gov/visa/immigrants/types/types_2991.html#14 (last visited Mar. 25, 2014). Ineligibilities include, but are not limited to, involvement in drug trafficking activities, submitting fraudulent documents, and overstaying a previous visa. *Id.*

178. In one case, the respondent waited over four years for the adjudication of his labor certification application, and the BIA eventually closed his case. See *In re Laudelino*, No. A088 268 610, 2012 WL 5473625, at *1 (B.I.A. Oct. 3, 2012).

179. The respondent in *In re Laudelino* would have had permission to work once he received approval of his third pending labor certification application. See

180. See Memorandum from Janet Napolitano, *supra* note 128, at 1–2; President Barack Obama, *supra* note 6.

181. See Memorandum from Janet Napolitano, *supra* note 128, at 1 (“[T]hese individuals lacked the intent to violate the law” and “were brought to this country as children”).

182. See President Barack Obama, *supra* note 6 (“[B]ecause we are a better nation than one that expels innocent young kids.”). But see Ted Hesson, *House Republicans Vote To Defund Immigrant Program*, ABC NEWS, http://abcnews.go.com/ABC_Univision/Politics/immigration-reform-hopeful-criinge-house-gop-votes-defund/story?id=19341352 (last updated Oct. 14, 2013, 1:42 PM). Some Republican Party members believe DREAMers should not be treated differently than their parents who brought them into the United States. See *id.* Representative Steve King from Iowa, for example, advocated defunding DACA because he saw it as providing amnesty to undocumented immigrants. *Id.* On June 6, 2013, the House of Representatives passed an amendment by a vote of 224–201 that would cut off funding to process DACA applications. Ellyn Fortino, *House Amendment Could Lead to Deportation of DREAMers, Immigrant Advocates Say*, PROGRESS ILL. (June 7, 2013, 12:45 PM), <http://www.progressillinois.com/quick-hits/content/2013/06/07/house-amendment-could-lead-deportation-dreamers-immigrant-advocates-sa>. Representative King was the sponsor behind the amendment. *Id.* As of the time this Comment went to print, the Senate had not come to a conclusion on the amendment.

inclined to view undocumented immigrant children as usurpers of the comparatively well-paying jobs and benefits in the United States.¹⁸³

The two groups of immigrants, however, do share a substantial number of qualities in the context of the purposes behind deferred action and administrative case closure. First, courts evaluate requests for deferred action and administrative case closure on a case-by-case basis under the totality of the circumstances, using lists of nonexhaustive factors.¹⁸⁴ Although deferred action primarily relies on humanitarian factors to warrant a favorable exercise of prosecutorial discretion, humanitarian factors also play a role in a grant of administrative case closure.¹⁸⁵ Specifically, in the decision to grant case closure in *In re Laudelino*, the BIA's analysis accounted for the respondent's family ties to the United States, his length of residence in the United States, and his diligence in pursuing labor

183. See Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1716 (2012). Professor López believes that in response to the needs and goals of the linked political economies, the United States and Mexico *together* contributed to the mass Mexican migration movement. *Id.* at 1718. Republican Party members against the comprehensive reform bill believe that it provides amnesty for undocumented immigrants who broke the law to live in the United States. Ashley Parker & Jonathan Weisman, *G.O.P. in House Resists Overhaul for Immigration*, N.Y. TIMES, July 11, 2013, at A1. Yet, one Republican Party leader suggested that Americans need to discuss what amnesty means instead of “throw[ing] around the word . . . like it has one definition.” Roxana Tiron, *Republican Road to Immigration Law Needs Amnesty Defined*, BLOOMBERG (July 10, 2013, 11:12 AM), <http://www.bloomberg.com/news/2013-07-10/republican-road-to-immigration-law-needs-amnesty-defined.html>. The “rising stars” of the Republican Party—Senators Marco Rubio of Florida, Kelly Ayotte of New Hampshire, Rand Paul of Kentucky, and Ted Cruz of Texas—show their range of immigration support, from complete backing of the comprehensive bill to vehement opposition of it. Frank James, *Senate's New GOP Stars Show Party's Range on Immigration*, NPR (June 11, 2013, 7:32 PM), <http://www.npr.org/blogs/itsallpolitics/2013/06/11/190756906/senates-new-gop-stars-show-partys-range-on-immigration>.

184. Compare *In re Avetisyan*, 25 I. & N. Dec. 688, 696 (B.I.A. 2012) (stating that “each situation must be evaluated under the totality of the circumstances of the particular case” using the helpful but nonexhaustive factors the court provided), with Memorandum from Janet Napolitano, *supra* note 128, at 2 (stating that the immigration laws “are not designed to be blindly enforced without consideration given to the individual circumstances of each case”), and Memorandum from John Morton, *supra* note 28, at 4 (listing a myriad of factors for ICE officers to consider when exercising prosecutorial discretion).

185. See Memorandum from John Morton, *supra* note 28, at 4; see also *infra* text accompanying note 196.

certifications.¹⁸⁶ Additionally, efficiency considerations favorably influence decisions for undocumented immigrants in both procedures.¹⁸⁷

Second, although innocence drives the fundamental policy behind DACA,¹⁸⁸ it is not a requirement for the program.¹⁸⁹ “[N]o one factor is

186. See *In re* Laudelino, No. A088 268 610, 2012 WL 5473625, at *1 (B.I.A. Oct. 3, 2012) (referring to the respondent’s ties and character in explaining why the respondent’s proceedings were administratively closed).

187. Compare *In re Avetisyan*, 25 I. & N. Dec. at 695 (reasoning that a judge’s decision to administratively close a case “involves an assessment of factors that are particularly relevant to the efficient management of the resources of the Immigration Courts and the Board”), with Memorandum from John Morton, *supra* note 28, at 1, 5 (expressing that enforcement resources should be “focused on the agency’s enforcement priorities” by particularly considering national security risks and serious criminals).

188. See Memorandum from Janet Napolitano, *supra* note 128, at 1 (“[T]hese individuals lacked the intent to violate the law . . .”). President Obama made multiple references to the innocence of undocumented immigrant children in his initial remarks about DACA:

This morning, Secretary Napolitano announced new actions my administration will take to mend our nation’s immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called “Dreamers.”

These are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they’re undocumented until they apply for a job or a driver’s license, or a college scholarship.

Put yourself in their shoes. Imagine you’ve done everything right your entire life—studied hard, worked hard, maybe even graduated at the top of your class—only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you may not even speak.

. . . .
[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans . . . simply because of the actions of their parents

[W]e are a better nation than one that expels innocent young kids.

President Barack Obama, *supra* note 6.

189. See Memorandum from Janet Napolitano, *supra* note 128, at 1–2. Some opponents of DACA view children and adults as equally culpable and believe deferred action will reward those who broke the law. See Stacey Teicher Khadaroo & Amanda Paulson, *Obama’s New Program for Young Illegal Immigrants: How Is It Going?*, MINNPOST (Oct. 9, 2013), <http://www.minnpost.com/christian-science-monitor/2012/10/obamas-new-program-young-illegal-immigrants-how-it-going>. Ira Mehlman, a spokesperson for the Federation for American Immigration Reform, stated that “[i]f you reward illegal behavior, even if you do so indirectly, through the children of the people who broke the law, you encourage people to do it.” *Id.* (internal quotation marks omitted). Mehlman believes DACA will produce the same effects as the 1986 Immigration Reform and Control Act, which legalized three million immigrants and led to substantial fraud. See Gloria Goodale, *Immigration Reform: Will ‘Amnesty’ Produce More Illegal Immigration?*, CHRISTIAN SCI. MONITOR (Jan. 28, 2013, 8:35 PM), <http://www.csmonitor.com/USA/2013/0128/Immigration-reform-Will-amnesty-produce-more-illegal-immigration>. Representative

determinative” for deferred action, and the main factors supporting the DACA program do not necessarily govern other grants of deferred action as a whole.¹⁹⁰ ICE evaluates the distinct facts of each case and favorably grants prosecutorial discretion in the form of deferred action when the totality of the circumstances reaches “the goal of conforming to ICE’s enforcement priorities.”¹⁹¹ Moreover, when an individual appears likely to *remain* in the United States, the courts and DHS are more inclined to grant case closure and deferred action, respectively.¹⁹²

B. Because Administrative Case Closure Is Materially Similar to Deferred Action, the Regulation Should Expand To Allow Individuals with Closed Cases To Apply for Employment Authorization

Because the procedures possess substantial similarities, this Comment recommends that the employment authorization regulation expand to allow individuals with case closure the opportunity to apply for employment authorization. Individuals who stand to benefit from the regulation’s expansion would have greater opportunities to develop their careers during the interval for adjudication of the action that premised the case closure.¹⁹³ Immigrants with pending prima facie approvable visa petitions and subsequently closed cases will contribute more to American society by

Lamar Smith, a Republican from Texas, refers to DACA as amnesty and is worried that “[s]uch a quick turnaround for these amnesty applications raises serious concerns about fraud and a lack of thorough vetting.” Khadaroo & Paulson, *supra* (internal quotation marks omitted). Supporters of DACA, however, view it as temporary relief from deportation and an opportunity to work toward a higher career aspiration. *Id.*

190. Memorandum from John Morton, *supra* note 28, at 4 (stating that the list of factors is nonexhaustive and ICE affiliates must exercise prosecutorial discretion on a case-by-case basis).

191. *Id.*

192. See *In re Avetisyan*, 25 I. & N. Dec. at 696. *In re Avetisyan* calls for the court to weigh the likelihood that an individual will succeed on the pending petition or application outside of proceedings before granting case closure. *Id.* Courts appear more likely to administratively close cases when the individuals seem likely to win their pending petitions or applications. See *In re Abdulkadar*, No. A093 318 931, 2012 WL 3911875, at *2 (B.I.A. Aug. 30, 2012) (“[I]n the absence of evidence suggesting a reasonable likelihood of success on the merits of their legalization applications, reopening for the purpose of administratively closing the respondents’ proceedings is not appropriate.” (emphasis added)); see also Memorandum from William J. Howard, *supra* note 24, at 3 (“It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain . . .”).

193. See *supra* notes 3–4, 132 and accompanying text.

lawfully gaining employment earlier in the process while they await approval for their petitions.¹⁹⁴ Further, the proposed expansion of the regulation constitutes a narrow change that applies only to case closure and not to any other type of removal relief.¹⁹⁵ Case closure incorporates a narrow category of undocumented immigrants because the courts analyze each set of circumstances on a case-by-case basis using multiple factors.¹⁹⁶

Since the 2012 presidential election, immigration reform has steadily spiraled into the mainstream of American politics and presents a significant issue that requires a solution.¹⁹⁷ Because this issue has garnered considerable media attention, the time is ripe for undocumented immigrants to strongly push for their cases, in light of the recent state immigration rulings.¹⁹⁸ In

194. Because a proceeding could remain closed for an indefinite period of time, an undocumented immigrant with an economic need will inevitably end up working for cash or using false documents to obtain a job. The current regulation perpetuates this problem because it affords a prolonged period of time where the immigrant can stay in the United States but cannot legally obtain employment. For an example of a college student who had to drop out and clean houses to support herself, see Perez, *supra* note 4. One success story illustrates how legal employment authorization can improve the American economy. See Lorraine Woellert, *Amnesty for Illegal Immigrants Has Economic Benefits*, BLOOMBERG BUSINESSWEEK (Mar. 14, 2013), <http://www.businessweek.com/articles/2013-03-14/amnesty-for-illegal-immigrants-has-economic-benefits>. In 1986, Alejandrino Honorato came to the United States as an undocumented immigrant and was given amnesty as part of the Immigration Reform and Control Act. *Id.* He later used his savings to buy a tortilla-making machine and opened a restaurant. *Id.* Today, he employs sixty people and owns two restaurants and a small grocery store in Florida. *Id.*

195. For this Comment's remedies, see *infra* Part V. If the executive branch expanded the employment regulation to include case closure, this Comment suggests that it use direct language to ensure that only deferred action and case closure recipients can apply for employment authorization.

196. See *infra* Part IV.B.2.

197. See Brian Bennett et al., *Translating Votes to Action: Latinos' Election Role Puts Focus on Immigration Reform*, L.A. TIMES, Nov. 8, 2012, at A1 (stating that Latino voters in the 2012 election have spurred immigration reform). In June 2012, *Time* magazine published a large editorial about undocumented immigration. See Vargas, *supra* note 4. The cover depicted thirty-five undocumented immigrants, and the article featured Jose Antonio Vargas and his experiences as a secret undocumented immigrant living in the United States. *Id.* Additionally, undocumented immigrants cannot use DACA's benefits if they need to drive a car to school or work but lack driver's licenses. See *Proposed Design of NC Illegal Immigrant Licenses Sparks Concern*, FOX NEWS (Feb. 24, 2013), <http://www.foxnews.com/politics/2013/02/24/pink-stripe-proposal-for-nc-illegal-immigrant-licenses-sparks-debate/>. Although states such as Arizona are denying driver's licenses to DACA recipients, North Carolina started a process for DACA recipients to obtain driver's licenses. *Id.* The North Carolina license says "no lawful status" in big bold letters, and its design has caused some concern over carrying that type of identification card. See *id.*

198. For example, see *Arizona v. United States*, where the Supreme Court upheld a portion of Arizona's law allowing law enforcement to check the immigration status of individuals when making traffic stops. 132 S. Ct. 2492, 2497, 2510 (2012). In a more

the context of the June 2012 exercise of prosecutorial discretion for DACA, undocumented immigrants will have an easier time promoting the expansion of the regulation for case closure.¹⁹⁹ Further, the Senate's support for the "Gang of Eight's" comprehensive immigration reform plan will pave the way for a more receptive immigration approach in Congress.²⁰⁰

These individuals deserve to have the opportunity to gain lawful and meaningful employment because case closure may last for an extensive and undetermined period of time, similar to the indefinite timeframe for deferred action.²⁰¹ It defies common sense to make these individuals wait for lawful employment until they receive approval of their pending actions, especially because the courts grant case closure only if it is

recent example, the Supreme Court held in *Chaidez v. United States* that its decision in *Padilla v. Kentucky* did not apply retroactively to final cases on direct review. See 133 S. Ct. 1103, 1112 (2013). The Court in *Padilla v. Kentucky* held that the Sixth Amendment requires defense counsel to alert a defendant to any deportation risks associated with a guilty plea. See 559 U.S. 356, 373–74 (2010).

199. If both deferred action and administrative case closure qualify as acts of administrative convenience, then support for DACA recipients should also yield to case closure recipients. The procedures are too similar to treat them differently under the employment regulation. In light of the Obama Administration's widespread exercise of prosecutorial discretion for DACA, promoting a narrow expansion of the regulation appears less problematic. Further, on April 17, 2013, a group of eight bipartisan senators unfurled a comprehensive immigration reform plan. Mike Pearson & Ben Brumfield, *Senators Formally File Immigration Bill*, CNN, http://www.cnn.com/2013/04/17/politics/immigration-bill/index.html?hpt=hp_t3 (last updated Apr. 17, 2013, 8:18 AM). The plan would allow for permanent residence status pending increased border security measures. *Id.* On June 27, 2013, the Senate passed this plan with a final vote of 68–32, with the support of fourteen Republicans. Jim Avila et al., *Senate Passes Immigration Reform*, ABC NEWS (June 27, 2013), http://abcnews.go.com/Politics/senate-vote-immigration-today/story?id=19506151#.UdD0G_bTVEA. As of this Comment's publication, the House of Representatives had yet to vote on the plan. On October 2, 2013, the House Democrats unveiled their own bill that parallels that of the Senate, but it includes more specifics on border security. Elise Foley, *House Democrats Introduce Immigration Bill with Little Chance of a Vote*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/10/02/house-democrats-immigration-bill-_n_4030024.html (last updated Oct. 4, 2013, 11:24 AM).

200. *But see* Elise Foley, *Obama: Senate Immigration Reform Bill Would Pass House if It Came Up for a Vote*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/08/09/obama-immigration-reform_n_3733869.html (last updated Aug. 9, 2013, 6:47 PM). President Obama believes that the House of Representatives would pass the Gang of Eight's bill if not for "internal Republican caucus politics." *Id.* (internal quotation marks omitted).

201. See *supra* Part IV.A.2; *supra* notes 178–79 and accompanying text.

likely that the individuals will succeed in their actions outside of removal proceedings.²⁰² Additionally, individuals with administratively closed cases should have the same requirement as deferred action recipients regarding the demonstration of economic necessity for employment.²⁰³ If the law requires these individuals to establish economic necessity, it will make greater sense to approve them for lawful employment so that they can support their families.²⁰⁴ Employment authorization would allow these individuals to gain more meaningful employment than they could achieve without the proper paperwork, thus contributing to the overall strength of the American workforce.

1. *Why It Is Necessary for the Regulation To Expand*

Notwithstanding these similarities, individuals whose cases have been administratively closed cannot apply for employment authorization.²⁰⁵ The regulation states that “[a]n alien who has been granted deferred action” may apply for employment authorization.²⁰⁶ The regulation also includes a clause that further defines *deferred action* as “an act of administrative convenience to the government which gives some cases lower priority.”²⁰⁷ The regulation’s text suggests that those individuals who have experienced an act of administrative convenience may apply for employment authorization. Because the label *administrative convenience* describes both deferred action and administrative case closure procedures, the regulation should expand to allow administrative case closure recipients to apply for employment authorization.

The procedures also share additional humanitarian similarities that suggest equal treatment for the purpose of employment authorization under the regulation.²⁰⁸ By expanding the scope of the employment authorization

202. See *supra* note 192 and accompanying text.

203. See 8 C.F.R. § 274a.12(c)(14) (2013) (requiring individuals to establish economic necessity before applying for employment authorization). Under an expansion of the employment regulation, the treatment of both procedures should remain as equal as possible. Thus, undocumented immigrants in both categories should be required to establish economic necessity for employment.

204. In closing an undocumented immigrant’s proceedings, the court evaluates the *In re Avetisyan* factors and determines that closure is more appropriate than continuing the proceedings. See 25 I. & N. Dec. 688, 696 (B.I.A. 2012). The court will recognize that the adjudication of the pending outside action is beyond the immigrant’s control. See *id.* Thus, appealing to humanitarian factors, this Comment suggests that it would be appropriate to allow the immigrants to work, especially when they have demonstrated an economic need.

205. See 8 C.F.R. § 274a.12(c)(14).

206. See *id.*

207. *Id.*

208. See *supra* Part IV.A.3.

regulation, individuals with administratively closed cases could obtain employment authorization to work during the interim of their delayed proceedings. The expansion of the regulation would foster meaningful employment because cases tend to remain closed for a lengthy and undetermined amount of time, providing individuals with the opportunity to create ties to their workplace and to develop within a job position.²⁰⁹ For instance, DACA spans two years and includes a renewal function.²¹⁰ DHS interpreted this time span as sufficiently lengthy to warrant employment authorization applications.²¹¹ DACA encourages the individual to grow within a position because it provides a buffer of consistency: an individual relies on the lawful two-year work period to develop a career. If the regulation expands to permit employment authorization for administratively closed cases, the same buffer of consistency will apply.

Moreover, this Comment suggests that employment authorization would strengthen the American workforce. In a conference report on the Immigration Act of 1990, Senator Dodd stated that the bill “streamlines and extends the employment base part of the immigration system” and supports American “economic well-being and competitiveness.”²¹² In his speech regarding DACA, President Obama suggested that this immigration reform is a positive step forward for the American economy and referenced the societal contributions that young undocumented immigrants will make in the form of starting new businesses.²¹³ These ideas support the presumption that consistent employment may bolster

209. See *supra* Part IV.A.2.

210. See *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 5 (stating that DACA recipients can request two-year extensions, which are considered on a case-by-case basis).

211. It appears that DHS encourages greater commitments than two years because of the renewal option.

212. 136 CONG. REC. 35,613 (1990) (statement of Sen. Chris Dodd).

213. President Obama stated, “CEOs agree with me” on passing comprehensive immigration reform. President Barack Obama, *supra* note 6; see also Matt Lynley, *Why Steve Jobs Was Disappointed in Obama*, BUS. INSIDER (Oct. 24, 2011), www.businessinsider.com/president-obamas-lack-of-resolve-frustrated-steve-jobs-2011-10 (revealing that Steve Jobs’s biography mentions a discussion between Jobs and President Obama regarding visa petitions for foreign engineers and the unfriendly American business environment). For the full conversation, see WALTER ISAACSON, STEVE JOBS 544–47, 555–56 (2011).

the welfare of the American workforce by providing a strong internal foundation of capable and skilled workers.²¹⁴

Applying this premise to deferred action, it logically follows that individuals living in the United States because of deferred action should have the opportunity to become productive, contributing members of American society. Because DACA allows qualified undocumented immigrants to *lawfully* remain in the United States for a two-year period, those immigrants can apply for employment authorization.²¹⁵ Thus, immigrants who are *lawfully* allowed to remain in the United States due to administrative case closure should also have the opportunity to become productive, contributing members of society. Immigrants with pending prima facie approvable visa petitions and subsequently closed cases will likewise contribute more to American society by lawfully gaining employment earlier in the process while they await approval of their petitions. As evidenced by stories of undocumented student immigrants who must either work off the books or perform low-wage jobs below their abilities, the current situation perpetuates lower-level employment for those individuals who must earn a livelihood while their cases are closed.²¹⁶

214. For a study on the economic contributions of immigrants in Arizona and the economic consequences of mass deportation, see RAÚL HINOJOSA-OJEDA, CTR. FOR AM. PROGRESS, *THE CONSEQUENCES OF LEGALIZATION VERSUS MASS DEPORTATION IN ARIZONA* (2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/08/Arizona-2.pdf>. The results indicate that Arizona immigrants substantially contribute to the state's tax revenue and gross state product and help maintain the wage level. *Id.* at 2, 8.

215. See 8 C.F.R. § 274a.12(c)(14) (2013); *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 5.

216. See Danzico & Murtaugh, *supra* note 18 (depicting a math genius studying cancer modeling who, because he was undocumented, will have to work under the table after he graduates from college); Ted Hesson, *50 DREAMers Who Prove Deportation Relief Was Smart*, ABC NEWS (June 15, 2013), http://abcnews.go.com/ABC_Univision/Politics/dreamers-talk-daca-deportation-relief-program-year/story?id=19405456; Laird, *supra* note 3, at 51–57 (describing the plight of an undocumented immigrant who graduated from law school and passed the California State Bar exam but is performing work as a beekeeper); Perez, *supra* note 4 (telling of an undocumented immigrant who had to drop out of college and clean houses to stay financially afloat). Fifty young undocumented immigrants described their lives after receiving deportation relief from DACA. Hesson, *supra*. Most of them have begun to pursue higher-level careers using their high school or college degrees. *Id.* One woman described the experience as “hav[ing] options . . . that I never had. . . . Instead of graduating and returning to work in the same restaurant that I had been working in since I was 15, I could apply for work that let me continue to help my community and my family.” *Id.* Another woman graduated with a bachelor's degree from U.C. Berkeley but worked for years as a waitress. *Id.* After receiving approval for DACA, she completed a master's degree program and was able to “finally work with both . . . degrees.” *Id.*

2. *The Remedy Has a Narrow Application*

After acknowledging that deferred action and administrative case closure recipients share similar characteristics, some critics may argue that the regulation should not expand to provide the same employment authorization remedy to recipients of both procedures. The expansion of the scope of the regulation would apply in a narrow fashion, however, because it would affect only undocumented immigrants with administratively closed cases. Providing employment authorization would not grant amnesty or provide an eventual path to citizenship for these individuals, as those opposed to the DREAM Act and DACA have argued.²¹⁷ The employment regulation authorizes immigrants to apply only for employment and does not confer any type of legal status on the individuals.²¹⁸

Because courts grant administrative case closure on a case-by-case basis, expanding the regulation would not result in sweeping, widespread reform.²¹⁹ As the *In re Avetisyan* court theorized, various situations may arise where it would be inappropriate to grant case closure.²²⁰ Since *In re Avetisyan*, the courts have denied requests for case closure in situations such as those based on a speculative event or action.²²¹ The courts deny case

217. See Barron, *supra* note 67, at 634–38 (“Opponents of the DREAM Act have been consistent in their criticism . . . since its introduction in 2001. The broadest objection is to the general notion of ‘amnesty’ for illegal immigrants, and concerns that [it] would reward illegal behavior and result in a flood of illegal immigration.”); see also *300,000 Undocumented Immigrants Have Applied for Deportation Reprieve*, FOX NEWS LATINO (Nov. 20, 2012), <http://latino.foxnews.com/latino/politics/2012/11/20/300000-undocumented-immigrants-have-applied-for-obama-administration> (“Those who oppose DACA and the DREAM Act say they amount to amnesty that rewards law breakers.”).

218. See 8 C.F.R. § 274a.12(c)(14). Deferred action is a temporary mechanism that does not eliminate removal action, but merely defers it, and thus does not confer any legal status on the recipient. See Olivas, *supra* note 11, at 483–84.

219. See *In re Avetisyan*, 25 I. & N. Dec. 688, 696 (B.I.A. 2012) (stating that “each situation must be evaluated under the totality of the circumstances of the particular case” using the nonexhaustive factors the court provided).

220. See *id.* (stating that it would be inappropriate for the immigration courts to administratively close proceedings “if the request is based on a purely speculative event or action”).

221. See *In re Diaz-Amezcuca*, No. A088 635 404, 2012 WL 6968973, at *2 (B.I.A. Dec. 6, 2012) (finding that the respondent’s desire to wait for the passage of the DREAM Act did not warrant a continuance because the passage of the Act was based on speculation); *In re Desire*, No. A035 208 749, 2012 WL 1495537, at *1–3 (B.I.A. Apr. 5, 2012) (denying the respondent’s request for case closure based on his pursuit of postconviction relief from a conviction for possession of cocaine); *In re Rivera-Espino*, No. A077 131 190, 2012 WL 1495498, at *1–2 (B.I.A. Mar. 23, 2012) (stating that

closure because they are skeptical about the individual's success rate in the action and the time the action would take to resolve.²²² Moreover, as with deferred action recipients, the recipients of administrative case closure would have to demonstrate an economic need for employment, thus curtailing any concerns about a recipient's financial background.²²³

V. EXPANDING THE SCOPE OF THE EMPLOYMENT AUTHORIZATION
REGULATION TO REMEDY ITS UNEQUAL APPLICATION OF
EMPLOYMENT AUTHORIZATION

A. *Executive Change*

The immigration agencies—with the power to exercise prosecutorial discretion—should use their discretion not to enforce the specific part of the employment authorization regulation that refers to grants of deferred action.²²⁴ The regulation's current literature is flawed because it lacks specifics about additional forms of administrative convenience that serve purposes and functions identical to deferred action. As an alternative, the agencies should interpret the words *an act of administrative convenience* to include immigrants whose cases have been administratively closed.²²⁵ Following from these similarities, the agencies should logically treat deferred action and case closure in the same manner and interpret the regulation to provide employment authorization in both circumstances.

If the agencies decide not to heed these solutions, this Comment argues that administrative lawmakers should narrow the regulation in question by omitting the words *an act of administrative convenience*. This phrase implies that other acts of administrative convenience may qualify the affected individual to receive employment authorization. Alternatively, the agencies may wish to define and distinguish more clearly administrative case closure from deferred action. As it currently stands, the procedures are similar in material respects and warrant identical treatment under the employment authorization regulation.

administrative closure was not proper because the respondent had a pending collateral attack on his criminal conviction).

222. See *In re Abdulkadar*, No. A093 318 931, 2012 WL 3911875, at *2 (B.I.A. Aug. 30, 2012) (denying the respondents case closure because of the “absence of evidence suggesting a reasonable likelihood of success on the merits of their legalization applications”).

223. See 8 C.F.R. § 274a.12(c)(14).

224. See *id.*

225. See *id.*

B. Legislative Change

With an estimated 22.5 million noncitizens currently living in the United States, comprehensive immigration reform seems inevitable.²²⁶ The 2012 presidential election may have acted as the catalyst to spur both political parties into crucial discussions about immigration issues. With seventy-one percent of the Latino votes in the 2012 presidential election cast for President Obama, the voter composition may precipitate comprehensive immigration reform.²²⁷ Once the parties unite, Congress will have the power to pass long overdue measures to provide more permanent immigration solutions.²²⁸

After President Obama's announcement of DACA in June 2012, the Republicans responded with the ACHIEVE Act in November 2012.²²⁹ This Act would allow undocumented immigrants with DREAM-like characteristics to obtain employment authorization after obtaining a bachelor's, associate's, or advanced degree, or after serving in the military.²³⁰ In January 2013, a bipartisan group of eight United States Senators announced a new plan that would provide eventual amnesty for undocumented immigrants, tighter border security, and a method to track

226. See ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 tbl.1 (2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

227. See Julia Preston, *Republicans Reconsider Positions on Immigration*, N.Y. TIMES, Nov. 10, 2012, at A12 (stating that after the 2012 presidential election, the Republican Party quickly regrouped to support legislation for immigration reform).

228. One *Arizona Law Review* note posits that President Obama's actions "are likely to have little lasting effect in the absence of further legislative action" and argues that the legislative branch must first "define and confer" benefits to a class of persons before the executive branch can grant those benefits. See Daniel A. Arellano, Law & Policy Note, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 ARIZ. L. REV. 1139, 1139 (2012). President Obama expressed frustration over the Republican House of Representatives' attitudes toward the Gang of Eight's bill. See Foley, *supra* note 200. The Republican House Speaker, John Boehner, refuses to bring the Senate bill to the floor of the House because a majority of Republicans oppose it. *Id.* Despite Boehner's stance on the bill, supporters believe it could pass the House with the required 218 votes. *Id.*

229. See *Republicans Counter Immigration DREAM with Achieve Act*, *supra* note 118.

230. See *ACHIEVE Act*, AILA INFONET (Nov. 27, 2012), <http://www.aila.org/content/default.aspx?docid=42258>. The main difference with the ACHIEVE Act is that it does not provide a green card but offers "permanent nonimmigrant status" to a narrower group of immigrants. *Id.*

visitors with temporary visas who leave the United States.²³¹ The plan calls for a “tough but fair path” to citizenship but prevents individuals from starting the process until the United States borders are considered secure.²³² The day after the bipartisan senators announced their plan, President Obama revealed his blueprint that also provided a path to citizenship: an individual could achieve citizen status after thirteen years.²³³ His blueprint differs from the bipartisan plan because it lacks the border security measure.²³⁴ Both proposals would allow undocumented immigrants to legally live and work in the United States as long as they passed background checks and paid back taxes.²³⁵

On April 17, 2013, the Gang of Eight group of senators unfurled the bill for their comprehensive immigration reform plan.²³⁶ The bill encompasses a range of immigration, border security, and employment issues.²³⁷ It would provide a path to citizenship after an extensive application process spanning a total of thirteen years.²³⁸ The key component of the bill is its border security initiative, requiring DHS to monitor one hundred

231. *Immigration Reform: U.S. Senators in Bipartisan Deal*, BBC NEWS, <http://www.bbc.co.uk/news/world-us-canada-21233355> (last updated Jan. 29, 2013, 4:42 PM). The plan first allows for permanent residency, then leads to eventual citizenship. *Id.* In June 2013, the blueprint passed in the Senate. *See* Avila et al., *supra* note 199.

232. *Id.*

233. *See President Obama Makes Immigration Reform Push*, BBC NEWS, <http://www.bbc.co.uk/news/world-us-canada-21248981> (last updated Jan. 29, 2013, 4:59 PM). President Obama announced his blueprint to a high school in Nevada. *Id.* His blueprint calls for the renovation of the American immigration system and similar to the bipartisan plan, allows for permanent residency first, with an eventual path to citizenship. *Id.*

234. *Id.* Although President Obama’s blueprint proposes stronger border security, it does not make this a requirement before undocumented immigrants could begin the citizenship process. *Id.*

235. *Id.*

236. Kevin Kepple et al., *Senate ‘Gang of Eight’ Releases Immigration Bill*, USA TODAY (Apr. 17, 2013), <http://www.usatoday.com/story/news/politics/2013/04/17/senate-files-immigration-bill/2089879/>. The bill spans 844 pages and provides an eventual path to citizenship for the 11 million undocumented immigrants living in the United States. *Id.* The Gang of Eight includes four Republicans and four Democrats, respectively: John McCain, Arizona; Lindsey Graham, South Carolina; Marco Rubio, Florida; Jeff Flake, Arizona; Charles Schumer, New York; Dick Durbin, Illinois; Robert Menendez, New Jersey; and Michael Bennet, Colorado. *Immigration Reform: U.S. Senators in Bipartisan Deal*, *supra* note 231.

237. *See generally* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), *available at* <http://www.cnn.com/interactive/2013/04/politics/immigration-bill/>.

238. *See* Kepple et al., *supra* note 236. The bill allows for undocumented immigrants who arrived in the United States before December 31, 2011, to apply for temporary legal status. *Id.* After ten years, most of these immigrants could apply for a green card, and three years after that, they could apply for citizenship. *Id.* To get a green card, the applicants would have to pay \$2000 in fines, plus back taxes and fees. *Id.*

percent of the Southwest border with Mexico.²³⁹ On June 27, 2013, the Senate passed the Gang of Eight's bill with broad Democratic support and moderate support from the Republicans.²⁴⁰ Thus, if Congress can compromise on the Gang of Eight's bill, individuals with administratively closed cases would have the opportunity to legally work in the United States, as long as they meet the respective plan's qualifications.

VI. CONCLUSION

This Comment argues that individuals with administratively closed cases should receive employment authorization so that they can legally support themselves and contribute to this country. If deferred action recipients continue to receive support, it makes rational sense to provide equivalent support to undocumented immigrants who undergo case closure. The United States should seek to grow a lawful and legitimate workforce with members who positively impact the gross domestic product and pay their fair share of taxes.²⁴¹ DACA allows young individuals to lawfully live and work in the United States during a two-year limbo period, which promotes this objective. Likewise, undocumented immigrants with closed cases who do not fit within DACA's parameters should have the opportunity to lawfully join the American workforce. While both groups await their fate in limbo periods, often persisting for an

239. *Id.* The bill also requires DHS to intercept ninety percent of the people trying to cross the Southwest border into the United States. *Id.* If DHS does not meet this goal within five years, a new border commission would take over the plan. *Id.* In August 2013, President Obama believed that the bill could pass in the House of Representatives, if not for Republican Party politics. *See* Foley, *supra* note 200. Democrat Representative Luis Gutierrez from Illinois believed that forty to fifty GOP members would support a comprehensive approach if presented to the House. *Id.* Despite Republican Party members' concerns over border security and enforcement, President Obama stated that the bill "actually improves the situation on every issue that they say they're concerned about." *Id.* (internal quotation marks omitted). He additionally noted that laws do not solve problems one hundred percent, but "[t]hat doesn't make them bad laws"; rather, "[i]t just means that there are very few human problems that are 100 percent solvable." *Id.*

240. *See* Parker & Martin, *supra* note 17. The Senate passed the bill with sixty-eight votes in favor of the bill and thirty-two votes in opposition. *Id.* As of this Comment's printing, the House of Representatives had not yet reviewed the bill.

241. *See* HINOJOSA-OJEDA, *supra* note 214. For example, if undocumented immigrants living in Arizona achieved legal status, they would contribute \$1.8 billion in total wages and \$540 million in tax revenue. Legalization would also create 39,000 new jobs. *Id.*

undetermined and lengthy amount of time, they should receive employment authorization to develop careers and bolster the United States' economic recovery.