The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases

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I. INTRODUCTION

The use of the Freedom of Information Act[1] (FOIA) as a litigative tool in the immigration field began with the litigation involving John Lennon, the former Beatle.[2] Lennon and his artist wife, Yoko Ono, had come to the United States as visitors to fight contested custody proceedings concerning Kyoko, Ono's daughter by a prior marriage. While they achieved custody orders in their favor, they were unsuccessful in securing custody of the child because the child's father had absconded and was nowhere to be found. While under the pressure of the frustrating search for Kyoko, the Lennons were refused additional time as visitors to carry on their search and were subjected to deportation proceedings. Among the remedies that they sought was consideration for "nonpriority" status, another name for deferred action classification, based upon the severe hardship the removal proceedings placed on them. The nonpriority program itself was shrouded in secrecy and contained in unpublished portions of the operations instructions of the Immigration and Naturalization Service (INS). On behalf of Lennon, I carried on an extensive correspondence with the Bureau of Citizenship and Immigration Services (BCIS), then known as the INS,[3] from May 1, 1972 through August 1973, with no satisfactory results. Lennon also moved, in his deportation proceeding, to depose a government witness with knowledge of the program, but the immigration judge rejected his motion. The judge felt that the material was not of relevance to any issue before him in the deportation proceeding. Eventually, when all administrative attempts to secure the records of nonpriority cases were unavailing, Lennon filed an action in the District Court of the United States for the Southern District of New York requesting injunctive relief pursuant to section (a)(3) of the FOIA.[4] At the same time, a companion lawsuit was filed to determine whether certain government officials had conspired to prejudge his immigration case. Among the alleged wrongs

1. 5 U.S.C. § 552 (2000).

2. Lennon v. Immigration & Naturalization Serv., 527 F.2d 187 (2d Cir. 1975). For a description of the early issues presented in the case, see Leon Wildes, *United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1973).

3. The agency known as the INS has been incorporated into the Department of Homeland Security and renamed the BCIS. 6 U.S.C.A. § 271 (West Supp. 2003) (establishing the BCIS); *id*. § 291 (abolishing the INS). In this Article, BCIS and INS will be used interchangeably.

4. *Lennon*, 527 F.2d at 189.

was the government's unexplained failure to consider Lennon's request for nonpriority classification.

As a result of the litigation, Lennon was furnished with a record of all the approved nonpriority applications existing at the time, and the operations instruction was made available to the public for the first time. The original text of the *Operations Instructions*[5] was most helpful. It provided essentially the following:

> In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he *shall recommend* consideration for nonpriority. . . .
>
> When determining whether a case should be recommended for nonpriority category, consideration should include the following: (1) Advanced or tender age; (2) Many years' presence in the United States; (3) Physical or mental condition requiring care or treatment in the States; (4) Family situation in the United States—effect of expulsion; (5) Criminal, Immoral, or Subversive activities or affiliations—recent conduct.[6]

This beneficent operations instruction permitted two alternative interpretations, each of which was taken up by the federal courts. In the case of *Nicholas v. INS*,[7] the petitioner asked the Ninth Circuit Court of Appeals to overrule the district director's decision to deny his nonpriority status application.[8] The court determined that the operations instruction confers a "substantive benefit upon the alien, rather than setting up an administrative convenience,"[9] and thus is essentially a legislative rule requiring a strict standard of application, and not one allowing the INS a significant amount of discretion.[10] The Fifth Circuit held in *Soon Bok Yoon v. INS*[11] that the INS was not required to notify an alien that nonpriority status might be applicable.[12] Furthermore, the court defined the decision to grant nonpriority status as "within the particular discretion of the INS"[13] and held that the INS could use such a category for "its own administrative convenience without standardizing

5. INS, OPERATIONS INSTRUCTIONS § 103.1(a)(1)(ii) (as amended 1975).
6. *Id.* (emphasis added).
7. 590 F.2d 802 (9th Cir. 1979).
8. *Id.* at 805.
9. *Id.* at 807.
10. In a footnote to the Lennon case, the Second Circuit describes the nonpriority program as an "informal administrative stay of deportation." Lennon v. INS, 527 F.2d 187, 191 n.7 (2d Cir. 1975).
11. 538 F.2d 1211 (5th Cir. 1976).
12. *Id.* at 1212–13.
13. *Id.* at 1213.

the category."[14] The Eighth Circuit in *Vergel v. INS*,[15] although not addressing whether consideration for nonpriority status is a substantive right for all aliens, recognized that a humanitarian remedy where deportation would cause severe hardship to aliens and their families is available through the district director.[16] This recognition implies a belief by the court that the ability of an alien to request deferred action from the district director is a "right."[17]

The Supreme Court never got the opportunity to resolve the conflict in the circuit court cases. In 1981, the nonpriority operations instruction was revised to provide that "[a] Service director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases."[18] In addition, the procedure was streamlined in 1975, and the involvement of the central office of the INS is no longer required. The district director recommends a case for nonpriority classification by submitting a form G-312,[19] and the decision is reviewed at the regional commissioner's level. As a result, the records of nonpriority cases remain with the regional offices of the BCIS.[20]

Two earlier articles discussed the existence of this previously unknown nonpriority program, more commonly referred to as deferred action, a discretionary tool used by the BCIS.[21] This program enables the BCIS to defer deportation or removal of deportable aliens where no

14. *Id.*

15. 536 F.2d 755 (8th Cir. 1976).

16. *Id.* at 757–58.

17. *See* Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 103–04 (1979) [hereinafter Wildes, *Operations Instructions*].

18. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 769 (4th ed. 1998) (quoting the amended instructions). In their chapter on deportability and relief from removal, the authors explain that since the 1996 Act, this instruction was transferred to section X of a new publication, STANDARD OPERATING PROCEDURES FOR [INS] ENFORCEMENT OFFICERS: ARREST, DETENTION, PROCESSING, AND REMOVAL. *Id.*; *see also* Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, and the Regional and District Counsel (Nov. 17, 2000), *available at* http://www.uscis.gov/graphics/lawsregs/handbook/discretion.pdf (prescribing guidelines for the use of discretion).

19. This is an internal INS document not generally available to the public unless specifically requested through a FOIA request. *See* INS, *supra* note 5, § 103.1(a)(1)(ii) (prescribing form G-312 for nonpriority recommendations).

20. *See* Wildes, *Operations Instructions*, *supra* note 17, at 101 (detailing the change in procedure).

21. 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, 49–66 (1976) [hereinafter Wildes, *Nonpriority Program*]; Wildes, *Operations Instructions*, *supra* note 17, at 100–01.

other relief is available.[22] Essentially, it is an administrative stay of deportation that places the alien in the lowest possible priority for BCIS action. The status is granted for a temporary period and reviewed biennially as a means to prevent a recognizable or unconscionable hardship to either aliens or their families. Generally, deferred action cases are initiated by the BCIS[23] because aliens or their family members who have severe medical problems would suffer extreme hardship[24] or would expose the INS to negative publicity and attention. Occasionally, aliens or their attorneys may request to be considered in the deferred action category. Deferred action status is thus a discretionary remedy that has allowed criminals, drug dealers, and aliens who are mentally deficient or physically impaired to remain in the United States. In fact, often the very reason why an alien would be deportable is what underscores the granting of deferred action status.

The only source for the parameters of the deferred action program were the *Operations Instructions*[25] in the unpublished "blue sheets,"[26] available only to INS personnel. Because they were not found in the published "white sheets,"[27] deferred action policy was a little known

22. Deferred action is denied when other relief is available. Other forms of relief include the remedy of cancellation of removal or the granting of a preferred immigration status when a U.S. citizen relative petitions for preference.

23. The case reports furnished consisted of 499 forms G-312, the forms wherein the district director recommends deferred action status. In some cases, additional documents pertaining to biennial review or case recommendations were also included. The names, alien registration numbers, and other identifying data have been blacked out. The cases were received in nine file folders from the eastern region and one file folder from the central region. Accordingly, they have been indexed in the order in which they were received. For example, case E1-9 represents eastern region file folder E1, case 9. Central region cases were indexed separately and numbered in a similar manner. For example, case C-9 represents central region case 9. These cases are available from the author.

24. An interesting example of this is case C-81. This rather atypical case is one of a Swedish man who had entered the United States with his parents and five siblings when he was six years old. While the family had come to pursue their Mormon beliefs, the man's father was excommunicated for his radical beliefs and formed a cult of his own, wherein he molested his children and those of the cult members. The family became fugitives from the INS. The only relative known to this man is his older brother. The subject alien went to the INS to clarify his immigration status, at which point he was identified as deportable. Due to his cooperation with the INS, his troubled childhood, and his lack of cultural or familial connection to Sweden, the INS determined that extreme hardship would result from deportation.

25. INS, *supra* note 5, § 103.1(a)(1)(ii).

26. *See* Wildes, *Nonpriority Program*, *supra* note 21, at 17 (explaining the origins of the terms "blue sheets" and "white sheets").

27. *Id.*

internal procedure. In 1975, as a result of the Lennon FOIA litigation, the U.S. Attorney for the Southern District of New York ordered these provisions to be published, and thus the deferred action policy was clarified and formally placed in the public domain through publication in the white sheets.[28] Because this publication procedure revealed a previously secret policy, it may have violated the law. After all, before a remedy may be instituted, the law requires that a federal regulation be adopted via publication in the Federal Register as a "proposed" regulation.[29] The public is then allowed thirty days[30] to submit comments[31] on the regulation before the regulation can be formally adopted and republished as a final rule. The comments received may remain unpublished or may be summarized in the preamble to the final regulations when they are issued and codified by subject.[32] Furthermore, as a result of the time lapse between the issuance of proposed regulations and the publication of final regulations in the Federal Register, as well as other factors, not every proposed regulation will result in a final regulation.

The deferred action policy has been placed in an unpublished, reserved section of the Code of Federal Regulations[33] and was never subject to public comment before it was officially adopted. Furthermore, its amended form was never published until, in 1975, the wording was changed to assure that no alien could claim that the provision was more than a pure exercise of prosecutorial discretion.[34] Although this lack of public input violates democratic legal norms and procedural safeguards, it may have been the means by which deferred action was subsequently preserved as a potential humanitarian remedy for otherwise deportable aliens. Chances are that it would have been a more liberal provision if it had been subject to public debate. However, if it had been subject to such public scrutiny, it may have become subject to the strictures of legislative changes adopted in 1996 and been even further narrowed in scope. In that year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[35] That Act includes more severe criminal penalties for immigration-related offenses and undertook

28. *See* INS, *supra* note 5, § 103.1(a)(1)(ii).
29. 5 U.S.C. § 553(b) (2000).
30. *Id*. § 553(d).
31. *Id*. § 553(c).
32. *See* GEORGE WASHINGTON UNIV., JACOB BURNS LAW LIBRARY, LOCATING FEDERAL REGULATIONS (1994) (describing Federal Register publication procedures), *available at* http://www.aallnet.org/sis/ripssis/federal. html (last visited Feb. 18, 2004).
33. 8 C.F.R. § 242.1(22) (2003) (reserved).
34. *See* Wildes, *Operations Instructions*, *supra* note 17, at 101; *see also* Wildes, *Nonpriority Program*, *supra* note 21, at 72.
35. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

a comprehensive reorganization of the removal process for inadmissible and deportable aliens, including a provision for the expedited removal of inadmissible aliens arriving at ports of entry.[36] All these provisions severely limit the discretionary remedies available to alien respondents in removal proceedings,[37] especially in cases involving aliens convicted of criminal offenses. However, the revised deferred action program, based on an operations instruction and hidden from congressional action, was not affected by the multitude of legislative and regulatory restrictive changes to the discretionary remedies available in removal proceedings.

My most recent article on deferred action was published in 1979.[38] This Article seeks to update the current categories within which deferred action status is currently possible. Pursuant to the guidelines set forth by the FOIA, requests were made of all three of the BCIS regional offices to obtain the records of all cases where deferred action status has been granted. Records were received from the Central Regional Office based in Dallas, Texas and from the Eastern Regional Office located in Burlington, Vermont. Although numerous attempts were made to contact the Western Regional Office in Laguna Niguel, California, no files were ever received. Thus, the analysis that follows tracks only the cases from the eastern and central regions.[39]

In addition to the records that indicate what factors contributed to

36. *See* INS, U.S. DEP'T OF JUSTICE, ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996: SUMMARY (1997) (highlighting the increased enforcement procedures created by the 1996 Act), *available at* http://uscis. gov/graphics/publicaffairs/factsheets/948.htm (1997).

37. *See* case E1-10, a case regarding the deferred action request of a Jamaican man suffering end stage renal failure. Included within the file is a memorandum from the Assistant Eastern Regional Director expressing a clear frustration with the new legislation:

> [T]he instant request is before us due to the fact that IIRAIRA legislation prohibits ongoing extension of voluntary departure. The restriction of voluntary departure has resulted in an increase in the number of cases for which deferred action is now the only option for remaining in the United States. This office has petitioned for guidance from Headquarters on how to handle these cases, but as of this writing, has received no response.

Memorandum from Thomas M. Baranick, Assistant Eastern Regional Director, to Michael G. Devine, Acting Eastern Regional Director (Feb. 18, 1999). In this case, the concern was that detaining the alien or enforcing his removal would burden the INS with enormous medical bills due to his need for regular dialysis. Deferred action was deemed to be the best option. Case E1-10.

38. *See* Wildes, *Operations Instructions*, *supra* note 17 (analyzing court decisions and their legal effect on the INS deferred action program).

39. *See supra* note 23 (providing information on the cases analyzed for this Article).

placement in the deferred action category, several cases were received in which deferred action was denied or discontinued. Because the earlier articles were based only upon cases granted on three levels of review, this Article's reliance on analysis of approved and denied cases may provide a more nuanced understanding of how deferred action status is determined.[40] Aside from the records of cases recently approved, removed, and denied deferred action status, sixty-three cases that were approved between 1959 and 1991 were included in the files. These old cases contained forms indicating that a biennial review had taken place and that the statuses of the cases remained the same; thus, it was determined that the cases should be maintained in deferred action classification.

A major shortcoming of the current data is that it contains fewer cases, only 332 from the eastern region and 167 cases from the central region, as opposed to the 1843 cases nationwide analyzed in the original 1976 article.[41] Of the 332 eastern cases, 8 were denied deferred action status[42] and 28 were removed[43] from the category entirely, meaning that approximately 89% of the cases were granted.[44] None of the cases from the central region were removed. However, 19 were denied.[45] Thus, approximately 89% of those cases were granted.[46] Neither of the regions indicated how many aliens originally applied to the district director or were considered for deferred action and rejected by the district director. Without this information, it is impossible to be sure why the central region reported fewer deferred action cases. On the one hand, it is

40. Case C-43, one that was denied deferred action, offers some insight into the rationale underlying the granting of status. In this case, it was determined that due to a lack of emergent reasons or serious medical conditions, there were insufficient humanitarian factors to make deportation unconscionable or to require deferred action. Case C-43.

41. Wildes, *Nonpriority Program*, *supra* note 21, at 49.

42. Of the denied cases, four were determined eligible for other types of relief, three could be treated for illness in the native country, and one was not thought to suffer hardship from removal.

43. Of the cases removed, twelve had died or were assumed dead, seven were deemed eligible for alternate forms of relief, and five were removed because they became naturalized citizens or legal permanent residents. Only four were actually deported upon removal from the program; one had an extensive criminal history and three cases involved alien family members who had been caring for an ill minor or elderly person. The minor child had since reached the age of majority and the elderly person had died; thus, the dependence requiring the aliens to remain had ceased to exist.

44. The calculation assumes that all relevant cases, whether approved, denied, or removed by the two regions, were released and forwarded to the Author.

45. Of these nineteen denials, six cases involved a history of drug and criminal convictions, five were found ineligible because no final order of deportation had been entered, thus deferred action could not yet apply, five were denied because other relief was available, and three were denied because inadequate humanitarian factors existed.

46. *See supra* note 44.

possible that the central region received fewer applications for such relief. On the other hand, perhaps the district directors of the central region used a more rigorous discretionary standard in determining eligibility for deferred action and thus fewer cases were sent on for review to the regional level.

II. WHICH CATEGORIES OF ALIENS ARE ELIGIBLE FOR DEFERRED ACTION STATUS?

I have carefully examined the 499 deferred action decisions that constitute the entire body of approved cases as of April 8, 2003 by these two regions. As long as a final order of removal has been issued and no other available relief seems possible,[47] if deportation would for any reason cause a grave injustice to the alien, deferred action is considered. An alien is eligible for deferred action status regardless of factual or statutory reasons underlying deportability or excludability. Deferred action has even been granted to those excludable upon entry, such as the insane,[48] the feebleminded,[49] and the medically infirm.[50] Furthermore, aliens with drug convictions[51] and other serious crimes[52] have been allowed to remain under this provision. Table 1 provides a breakdown of some of the major categories of aliens granted deferred action status

47. Examples of other available relief include the possibility under the former Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c), of suspending removal, having a family member petition for citizenship, or accessing other legal remedies.

48. Federal law provides that an alien who is "likely at any time to become a public charge" is inadmissible. *Id.* § 1182(a)(4). For an example of such a situation, see case E1-32, wherein a mother, schizophrenic at the time of her arrival from Germany, was not deported due to the hardship it would cause her two minor permanent resident children.

49. Case E4-10, because the alien had no relatives in her country of origin and would be separated from her parents and her eight siblings, although she is diagnosed as mentally retarded and described as excludable because of feeblemindedness subject to 8 U.S.C. § 1182(a)(1), she was approved for the program.

50. Federal law provides that an alien suffering a "communicable disease of public health significance" is inadmissible. 8 U.S.C. § 1182(a)(1)(A). However, see case E1-36, in which a Portuguese man, assumed to have been a leper upon entry and thus inadmissible was allowed to remain in the United States because he was more likely to recover in the United States than if he were to return to his native country. See also case E5-22, where a Haitian alien excludable both because he was afflicted with leprosy upon entry and because he entered on a fraudulently attained visa was allowed to remain because treatment was unavailable in Haiti and because he had several family members who lived in the United States as permanent resident aliens.

51. *See infra* notes 81, 95–97 and accompanying text.

52. *See infra* note 94 and accompanying text.

as reported by both regions based on the grounds of removal. Table 2 reports the differences in the breakdown between the eastern and central region on the same basis.

TABLE 1

Ground for Deportability or Excludability	Number of Cases	Percentage
Overstay[53]	294	47.2%
Physical Health[54]	158	25.4%
Entry Without Inspection	100	16.0%
Insanity[55]	54	8.7%
Immigrant Without Immigrant Visa	17	2.7%
TOTAL	623[56]	100%

53. Overstaying an authorized admission includes violations of both 8 U.S.C. § 1227(a)(1)(B) and § 1230(a)(1)(B) (2000). The majority of these cases, 220 out of the 294 cases, were aliens who originally entered with visitors' visas. Other visa types violated included F-1 student visas, J-1/J-2 exchange visas, O-1 extraordinary alien visas, and other categories, though all in fewer numbers.

54. There is some overlap between the cases of those physically ill and those who have overstayed their visas. This represents a category of aliens removable for multiple reasons. Additionally, many of the aliens suffered from multiple diseases. The infirmities included in this category are twenty-four cases of genetic and developmental disorders, twenty-three cases of cancer, twenty-two cases of HIV, ten cases of renal failure, nine cases of seizure disorder, eight cases of heart problems, and forty-eight miscellaneous or multiple disorder sufferers.

55. Insanity includes cases where an alien's mental condition would prevent legal immigration, for example, where an alien is feeble-minded, has a class A mental defect, has schizophrenia, or is likely to become a public charge within five years after entering the United States. Those suffering from mental illness included eleven cases remaining in deferred action from before 1991 that were merely examples of the biennial review procedure.

56. Although only 499 actual cases were analyzed because over 100 of the cases were deportable for multiple reasons, this total is greater than the actual number. The percentages for this table are calculated out of 623 cases in order to insure that totals do not exceed 100%.

TABLE 2

Ground for Deportability or Excludability	Percentage of Eastern Cases[57]	Percentage of Central Cases
Overstay	45.6%	51.0%
Physical Health	24.7%	27.4%
Entry Without Inspection	16.3%	15.5%
Insanity	11.9%	0.0%
Immigrant Without Immigrant Visa	1.5%	6.0%
TOTAL	100%	99.9%

III. WHY IS DEFERRED ACTION STATUS RECOMMENDED?

For many of the cases, there is not one clear reason for why deferred action status was recommended. Unfortunately, most of the cases included only a brief statement as to why deferred action status should be granted. Those cases that did have an accompanying memorandum explaining the rationale for the application of deferred action did not always clearly indicate which, if any, was the most influential factor considered when the determination of whether or not to grant status was made. In fact, the language of the G-312[58] and any supporting memoranda[59]

57. The percentage of eastern cases was calculated out of 455 total cases in order not to exceed 100%. Although only 332 cases were reported, as in Table 1, there is much overlap between some of the categories, requiring that percentages be tabulated out of number of cases in the categories.

58. *See* case E9-3. This case involves an elderly infirm, Costa Rican woman who will be supported and cared for by her U.S. citizen daughter. In the "other factors" section of the G-312, the INS seems to apply rather systematically the provisions of the deferred action program, stating that the factors considered in her case are the following:

1. Age and physical condition of the subject affecting ability to travel.
2. There is no likelihood that Cuba or Costa Rica will accept her.
3. She may be eligible in the near future to obtain an Immigrant Visa. Her daughter is a naturalized U.S. citizen.
4. The likelihood that because of sympathetic factors in the case, a large amount of adverse publicity will be generated which will result in a disproportionate amount of Service time being spent in responding to such publicity or justifying the Service's actions.
5. Subject is not an individual who is a member of a class of excludable/deportable aliens whose removal has been granted a high enforcement priority.

Case E9-3.

59. *See* case C-12. The memorandum from the district director from Houston,

seemed merely to rigidly conform to the linguistic structure of the INS's operations instruction governing deferred action.[60] For this reason, many of the cases analyzed were coded as having several reasons for deportability and stated multiple considerations in recommending deferred action status. Furthermore, this rigid application of the deferred action provision suggests that it is being applied not as a flexible discretionary standard but rather as a tightly controlled program.[61] Table 3 provides a breakdown of some of the major factors leading up to a recommendation for deferred action, as reported by both regions. Table 4 compares the differences in how these factors are distributed in the eastern and central regions.

TABLE 3

Factors	Number of Cases	Percentage
Separation of Family/Hardship	145	29.1%
The infirm	116	23.3%
The young	101	20.3%
The mentally incompetent	54	10.7%
Potential negative publicity	39	7.8%
Victims of Domestic Violence	30	6.0%
The elderly	14	2.8%
TOTAL	499	100.0%

Texas to the regional director of the central region includes the facts of the case and then quotes the general guidelines of the deferred action policy that apply to the facts in question. Memorandum from the Houston Office of the District Director, to Mark K. Reed, Central Region Director (Mar. 6, 1998). The case involves the deportation of the parents of a five-year-old U.S. citizen born with severe birth defects whose health would be jeopardized in Ethiopia without the care available to her in the United States. *See also* case C-17 (including a memorandum from the Houston district director quoting the guidelines).

60. *See* case E2-28 (containing a document entitled "Immigration Law and Procedure at 242.1," which is a citation of the Operation Instruction 242.1(a)(22)(A)–(D) and delineates the same provisions as those cited *supra* note 58 without applying them to a specific case).

61. This type of program implementation contradicts the INS's claim that the deferred action program is not a substantive right for the alien but merely an intra-agency guideline or matter of prosecutorial discretion because it seems to be applied uniformly. For further discussion of this issue, see Wildes, *Nonpriority Program*, *supra* note 21, at 72 (arguing that an analogy with criminal prosecutorial discretion is faulty).

TABLE 4

Factors	Percentage of Eastern Cases[62]	Percentage of Central Cases
Separation of family/hardship	29.2%	22.4%
The infirm	26.3%	29.6%
The young	15.4%	28.2%
The mentally incompetent	14.4%	0.0%
Potential negative publicity	5.9%	12.5%
Victims of Domestic Violence	5.3%	6.6%
The elderly	3.5%	.7%
TOTAL	100.0%	100.0%

The 1976 study illustrates that separation of family was a major factor in the consideration of granting deferred action status.[63] In fact, it applied in almost one-third of the 1843 cases analyzed in that study. In the current 499 cases, 145 cases—almost thirty percent—were granted deferred action status based on claims of extreme hardship to the family or separation of the family. This factor was the only one that was more prevalent than physical illness as a reason for deferring deportation.[64]

A. Physical Ailments

In the current 499 cases, over half the aliens were unable to leave the country because they suffered from a physical ailment or had close family members with such a problem. Aliens claimed that they could not receive proper medical care,[65] treatment, or medication in their respective native countries[66] and thus that deportation would place them

62. Statistics are calculated out of a total of 376 eastern cases and 152 central cases. See Table 1 and Table 2 for explanation.

63. *Id.* at 53.

64. However, it should be noted that these two categories contain overlapping cases. In fact, frequently when children of aliens were the ones who were ill, the case may have been classified as one of family separation, rather than one of physical illness.

65. In cases such as case E4-8, where medical treatment is shown to be available in the native country, deferred action is denied and removal takes place once the appropriate treatment can be secured.

66. *See* case C-41 (providing that a Pakistani woman suffering from Sjoren-

in life-threatening situations[67] or possibly hasten death.[68] Cancer was the most common disease, listed in twenty-three cases.[69] The second most prevalent ailment was HIV, listed in twenty-two of the cases.[70] Furthermore, these cases also mentioned other humanitarian concerns for HIV patients, such as the "severe prejudice against people with HIV" in the native country that would lead to the alien's family being "verbally and physically persecuted" if forced to return.[71] In light of the fact that these cases involve alien spouses who are completely reliant on public assistance and receive state-funded medical care, it is striking that the government approved them for deferred action status. This fact exemplifies that the humanitarian goal of deferred action takes precedence over the usual concerns of the INS, which removes aliens who have become a burden upon United States resources and thus have become subject to the public charge provision,[72] another distinct ground of removal. A few cases of rare disorders explained that treatment in the United States was in the public interest because the aliens could serve as prime research subjects.[73]

In the 1976 study, age was a predominant factor in determining who would receive deferred action status. In 820 of the 1843 cases (44.5%),

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Larrson Syndrome would be unable to receive the numerous necessary drugs and treatment in her home country).

67. *See, e.g.*, case E1-8 (describing the consequences of the unavailability of treatment as "serious illness or death is a distinct possibility.").

68. *See* case E1-2 (explaining that because treatment is unavailable for the child's rare disorder in the parent's native country, Senegal, it is "unlikely that the family will opt to depart . . . nor would it be humane of the Service to insist that they do"). Furthermore, see case E8-4, which describes the native medical care by citing a State Department report indicating that Guyana, the alien's native country, has the second worst medical care in Latin America.

69. The most common type of cancer listed was leukemia, reported in twelve of the twenty-three cases.

70. Several of the HIV cases stated that a return to the native country would result in "fatal consequences." *See, e.g.*, case E1-41.

71. *See* cases E8-1 & E8-2. These cases use the same language in defining the problem as it exists for both aliens, one who would be returned to Mexico and the other to Haiti.

72. *See* 8 U.S.C. § 1227 (a)(5) (2003) ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."). For an example of such a situation, see case E3-24, which involves a child suffering from a congenital disease that caused her to be hospitalized and to become a public charge within from years of entry into the United States. Negative publicity for the service and family unity issues were the basis for her acceptance into deferred action status.

73. *See* cases C-18, C-19 & C-23 (including multiple copies of the same memorandum approving deferred action for a Turkish family of four whose youngest child is afflicted with an extremely rare bone disease). The memorandum states that the subject is a "test case in a research project which might assist U.S. citizens with said disease in the future." Memorandum from INS, U.S. Dep't of Justice, to Applicant for Deferred Action (Feb. 23, 1998).

the person's age was a factor in determining whether or not to grant deferred action status.[74] The more recent data contains only fourteen cases and suggests that although age was taken into consideration, it was rarely the sole factor. Thus, in the case of a parent of a young child, family separation issues were explored, and in the case of an elderly alien, age was relevant as it compounded medical problems.[75]

B. Mental Illness

There were fifty-four cases where an alien's mental condition hampered any attempt at deportation. The fifty-four cases fell within three categories: mental retardation (twelve), schizophrenia (nineteen), and depression and psychosis (twenty-three). All of the nineteen cases of schizophrenia were from the years 1959 through 1970.[76] In one case of schizophrenia, the INS attributes mental illness with a similar risk to that of physical illness where worsening of symptoms leading to death is considered by recommending deferred action because removal proceedings "may induce a recurrence of mental difficulties."[77] Query whether the lack of new cases suggests that the BCIS is currently averse to granting deferred action status to cases involving mental illness, especially cases of schizophrenia. This may indicate that there is a greater stigma to the mentally ill than to those physically infirm. On the other hand, it may merely reflect a reality that physical ailments are easier to assess and treat than mental problems; as such, mental patients might be harder to rehabilitate into productive members of society. Furthermore, any concern as to such aliens who are excludable at entry has been diminished because it may be easier to enforce excludability due to the restrictions imposed by the IIRIRA, whereby borders and ports of entry have become more secure, thus preventing these new potential cases

74. Wildes, *Nonpriority Program*, *supra* note 21, at 53.

75. *See* cases E3-6 (stating "[a]dvanced age compounds medical problems"), case E8-7 (same) & case E8-8 (same); *see also* case C-80 (stating that "[a]s subject is an elderly man, it does not appear that any of these [health] conditions will improve and [it] would likely be in the best interest of the Immigration and Naturalization service to allow the subject to remain in the United States").

76. The statistics for schizophrenics are most striking. However, the other three categories also show a similar trend. Of the twelve cases of mental retardation, six were from this time period, and of the twenty-three cases of psychosis and depression, only eleven were from this period.

77. Case E3-17.

from entry.[78]

C. Separation of Family

Although the separation of family factor is mentioned in 145 of the cases, it is often combined with several other factors being considered before deferred action would be warranted. For example, issues of family separation would be relevant to consideration of the deportation of the parent of a minor U.S. citizen child who is ill.[79] This case would be viewed as one where both illness and family unity issues are relevant. Further complications in this category arise from the fact that the cases often do not elaborate as to the family situation and why the hardship would be so great if the alien parent were deported. The majority of these cases involve a physically ill minor child or a child who is a U.S. citizen who would unduly suffer physical, emotional, and financial hardship if one[80] of the child's parents were deported. In one case, the parent was convicted of a drug offense but nevertheless approved for deferred action status because the alien was the sole provider for the family.[81] One example of how this factor applies without other confounding factors is that of the Polish man whose mother and stepfather are permanent resident parents.[82] The report notes that if he were returned to Poland, he would be "deprived of a loving relationship with the members of his immediate family."[83] Implicit in this categorization for approval is the negative publicity the INS fears it will have to endure if it were to separate the parents from the child.

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78. *See supra* notes 35–36 and accompanying text.

79. See case C-82, where even though medical treatment may have been available for the child in Mexico, the fact that the child would be separated from one of his parents was described as the primary consideration.

80. See case E1-18, where an abused mother received no support from the legal permanent resident father of her two U.S. citizen children. Thus, if deported, her children would have no provider in the United States. The G-312 form indicates that the mother, because she was a victim of abuse, was entitled to petition for permanent resident status. Thus, it was determined that deportation would cause undue hardship to her and her children. A similar consideration is made if both parents are deportable, in which case the fact that the U.S. citizen child would become the responsibility of the state would also be taken into account. See case E1-11, in which a Russian grandmother was not deported because no other family member was willing to take custody of her three grandchildren. Both of these cases also illustrate the humanitarian concern for minors that is considered in granting deferred action status to their guardians.

81. Case E2-49.

82. Case C-88.

83. *Id*. For a similar case, see case C-34 where, aside from being deprived of a loving relationship, the subject was described as subject to homelessness if deported.

D. Potential Negative Publicity

An interesting factor, listed mostly in combination with other factors, was the fear of unfavorable media attention to the INS that would result in embarrassment and in an inordinate amount of time defending government action to the public. This was especially true in the cases where the alien was either physically or mentally crippled or where the alien had received media or governmental attention.[84] In several cases, publicity was listed as the only reason for why action should be deferred. For example, in case C-16, the report describes the following:

> A nineteen-year-old Mexican adopted at age three and then shuffled among several families from the age of six. . . . In fact, for one extended period as a young child he lived alone in an abandoned house next to a large family with fourteen children who gave him food but had no room for him to live with them. During another period of time he lived alone in a storage shed on a large ranch where he worked in the fields. . . . In the fifth grade his "foster" mother reclaimed him . . . she abandoned him shortly thereafter. . . . He has had several years of perfect school attendance, achieved outstanding grades, distinguished himself as an athlete and leader who inspires others, and acquired a craft at which he has become very proficient and by which he has supported himself for long periods of time. . . . Given the number and breadth of persons in our communities who support this young man's opportunity to remain in the U.S. and attend college, INS may be assured of SIGNIFICANT ADVERSE PUBLICITY if some form of relief is not found. No other form of relief is known.[85]

IV. THE EFFECT OF LEGISLATION CHANGES

Of the 1843 cases adjudicated prior to December 1974 and considered in my 1976 article, the most common deportation grounds wherein deferred action status was applied were "no immigrant visa" and "overstay."[86] In the more recent cases, the "no immigrant visa" category accounts for only seventeen cases, less than three percent, compared to almost thirty-five found in the 1976 study.[87] This may be a function of statutory changes in the grounds of exclusion and deportation enacted in 1996.

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84. *See* case E8-13 (involving an alien's U.S. citizen child that had extensive medical problems and would be unable to secure adequate medical treatment in Romania). Further, there would be significant anti-INS press, as well as unfavorable congressional and community reaction, if the noncitizen parent were deported.

85. Case C-16.

86. Wildes, *Nonpriority Program*, *supra* note 21, at 51.

87. *Id.* at 51 n.34.

A. The Violence Against Women Act

The Violence Against Women Act (VAWA)[88] created a new category of petitioners for lawful permanent residence (LPR) status. The Act enabled battered spouses and children of U.S. citizens or LPRs to self-petition to obtain lawful permanent residency, allowing certain battered aliens to file for immigration relief without the abuser's assistance or knowledge, in order to seek safety and independence from the abuser.[89] Thirty of the 499 cases listed VAWA as the humanitarian basis for granting deferred action. Of those cases, most included, in form G-312, a note explaining that the applicants would "face extreme hardship"[90] if returned to the home country. This hardship was evaluated pursuant to the terms set out in a memorandum dated May 6, 1997, providing "supplemental guidance" by the BCIS Office of Programs.[91] Also, several of the cases suggested that women were afraid to return to homes abroad because abusers were there,[92] because they would be unable to support their families in their native countries,[93] or because they were witnesses in cases in the United States against the abusers.

B. Drugs

The 1976 study found that, of the aliens who received deferred action status, almost ten percent had criminal convictions, and nearly eight percent had drug convictions. That statistic is relatively high compared with the more recent 499 cases, in which there were only six criminal cases[94] and seven drug cases,[95] a total of only approximately 2.5%.

88. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

89. 5 U.S.C. § 1154(a)(1)(iii) (2000).

90. *See*, *e.g.*, case C-5 (approving deferred action in both cases) & case C-6 (same).

91. 74 INTERPRETER RELEASES 971–77 (1997). The memorandum encourages using deferred action to provide work authorization for self-petitioning battered spouses until they are able to receive status as lawful residents. *Id.* at 973.

92. *See* case C-26 (noting that "[s]ubject believes that if she returns to Mexico her husband will follow her and attempt to kill her"). Although this case was one where the husband's assault was never formally charged due to fear that it would exacerbate the situation, deferred action status was still granted. *Id.*

93. *See* case C-27 (approving deferred action).

94. Of these cases, only one was granted after the IIRIRA was enacted. *See* case E3-3. The case involved a seventy year-old Mexican man who had recently served eighteen months in prison for gross sexual misconduct. *Id.* The applicant claimed to have mental and physical problems and asserted that deportation would pose great hardship on his family. *Id.* Thus, this case involved a balancing of the applicant's conviction with health and familial factors. The one complication was that the disposition of the case was unclear. The district director recommended deferred action, while the regional director recommended denying deferred action status due to insufficient proof in the file of medical and mental need; however, there was no final vote. *Id.*

While it cannot be claimed that none of the aliens who received deferred action status had a criminal history, the percentages are now significantly lower. In all these cases, which ranged from 1976 to 1996, there were family issues or medical reasons for the grant of deferred action status.

One 1995 case involved a mother who had been convicted of selling cocaine. However, she was granted deferred action classification because she was the sole parent to her daughter, and as an inmate she had become a model citizen, earning both bachelor's and master's degrees.[96] Thus, there was a great risk of adverse publicity, especially because the White House was monitoring her case.[97]

The most interesting drug cases received emanated from the central region. Cases C-121 and C-122 show the importance of family separation in determining the disposition of deferred action cases. The first case is that of a single mother with numerous drug charges, who testified against fellow drug traffickers as a government witness.[98] Because she still resides in the town where those she implicated had previously resided, there is no clear indication that she has terminated her associations with them or protected herself from them.[99] Nevertheless, because of the risk of adverse publicity and because she was a single mother, her case was granted deferred action status.[100]

On the other hand, case C-122 involves a two-parent family, one of whom has a drug charge. This charge is seen as aberrant behavior for the particular alien, unlike the preceding case of the mother who may still have ties to the drug underworld.[101] Nevertheless, this alien is deemed deportable in light of his charge, and the issues of family separation are not deemed sufficient to warrant his grant of deferred action status.[102] As illustrated by these two cases, complex considerations are undertaken before the BCIS grants deferred action status. In fact, these cases suggest that the discretion involved in granting deferred

95. None of the drug cases come from the period after IIRIRA was enacted.
96. *See* case E6-20.
97. A similar case can be seen in case E4-3, in which a father convicted of the possession and sale of narcotics was granted deferred action status. The recommendation of deferred action status relied on the fact that the applicant was needed to care for his sick wife and children. Thus, despite his crimes and the fact that his record suggested that he held numerous jobs "off the books," he was approved for deferred action status.
98. Case C-121.
99. *Id.*
100. *Id.*
101. *Id.*
102. Case C-122.

action status may lead to counterintuitive decisions, wherein seemingly eligible applicants are denied and less worthy cases are granted deferred action status.

V. CONCLUSION

Since deferred action status was brought to the attention of the general public, it has been amended and seriously watered down. It no longer requires three levels of approval; now the regional director is the highest required review. The BCIS continues to classify most deferred action recipients as deportable due to overstay or expired status. The major change is that those with criminal or drug charges and convictions are no longer being granted deferred action status at the rate they were once granted this status. However, because the 1976 study did not include denied or removed cases, there is no definitive way to know that those convicts who received deferred action status then were not merely part of a much larger pool who were denied or removed. Furthermore, the current smaller sample size may contribute to some of this lower representation. There were also no Communist or prostitution cases in the recent cases, but those groups were never highly represented; in 1976 each one represented less than one percent of the total cases.[103] The deferred action program seems to stress its nature as a humanitarian tool rather than merely a way to deprioritize the deportation of certain aliens.[104] It is a fitting tribute to the memory of John Lennon that the program that his litigation succeeded in making available to others is still useful for that humanitarian purpose.

103. *See* Wildes, *Nonpriority Program*, *supra* note 21, at 51 n.34 (showing Communist cases as .9% and prostitution cases as .5%).

104. This reality is also evidenced by the fact that the BCIS has ceased to refer to the program as the nonpriority program and instead refers to it as the deferred action program.