

DEFERRED ACTION COMES TO THE WORKPLACE

by RICHARD M. GREEN

On November 20, 2014, President Obama announced that, in the absence of legislation, his administration was exercising its authority under the Immigration and Nationality Act (INA) to expand the Deferred Action program to include undocumented foreign nationals who are the parents of U.S. citizens or Lawful Permanent Residents (LPR).

Known as Deferred Action for Parental Accountability (DAPA), undocumented foreign nationals who meet the certain criteria may apply to U.S. Citizenship & Immigration Service (USCIS) for a grant of Deferred Action status. To qualify, applicants must:

- Have continuously resided in the United States since January 1, 2010;
- Be the parents of U.S. citizens or LPR who were born before November 20, 2014;
- Not have a significant criminal history; and
- Not be a national security risk.

This article will examine the effect President Obama's expansion of Deferred Action will have on employers and their counsel. Put more simply, this article will examine what employers

should expect to see when DAPA beneficiaries apply for work.

Deferred Action is nothing more than a promise from the executive branch of the government not to remove or deport an individual from the United States. 8 U.S.C. § 103(a) (2014). The most significant benefit that arises from a grant of Deferred Action is employment authorization. 8 CFR § 274a.12(a)(12) (2015). Deferred Action beneficiaries are granted employment authorization documents (EAD cards) and may lawfully work in the United States for three years.

With an estimated five million potential DAPA beneficiaries, it is fair to predict that employers should anticipate seeing applicants presenting DAPA-based EAD cards as evidence of their right to work in the United States. Employers and counsel should be prepared to handle those who present this card as their basis for employability. Specifically, employers need to track the expiration date of their employees' EAD cards, and anticipate that some of their present employees may change their names, employment authorization status, and/or Social Security numbers as a result of a grant of a DAPA EAD card.

The INA prohibits the employment of

unauthorized foreign nationals. 8 U.S.C. § 1324a (2014). The INA requires all employers to collect and examine documents that establish a potential employee's authorization to work in the United States. 8 USC § 1324a(b)(1) (2014). Unlike most documents employees present to establish employment authorization, employers must carefully *track* the expiration date of EAD cards, and *terminate* an employee upon expiration of the card, if it is not renewed.

When asked to produce identity and employment authorization documents, U.S. citizens and LPR usually present driver's licenses, Social Security cards, U.S. passports, and Alien Registration Cards (Green Cards). Employers need not concern themselves with the expiration date of these documents because a person's citizenship or permanent resident alien status does not expire with these documents. 8 C.F.R. § 274a.12(a)(1) (2015). However, an EAD card is different. It is only a temporary grant of employment authorization, and the expiration of the EAD card represents the expiration of the employee's employment authorization. 8 C.F.R. § 274a.14(a)(1)(i) (2015). A company that continues to employ a staff member after the expira-



tion of the EAD card will be found to have employed an unauthorized foreign national.

An employer that withdraws an offer of employment to an individual who presented a DAPA-based EAD card as proof of employment authorization may encounter difficulty from the U.S. Department of Justice and/or the applicant. With rare exception (such as government employers or defense contractors), employers are not allowed to discriminate on the basis of citizenship or national origin. 8 U.S.C. § 1324b(a)(1) (2014). Additionally, employers are not permitted to tell prospective employees which documents they will accept as evidence of employment eligibility. 8 U.S.C. § 1324b(a)(6) (2014). Only after an offer is made, and within the first three days on the job, an employer and employee must complete an I-9 form from the Department of Homeland Security, which publishes a list of acceptable documentation for use with an I-9 form through The Bureau of Citizenship & Immigration Services. 8 C.F.R. § 274a.2(b)(1)(ii)(A) (2015).

Employers who withdraw an offer based on the documentation provided are committing an immigration-related unfair employment practice. 8 U.S.C. § 1324b (2014). The U.S. Department of Justice's Office of Special Counsel will investigate and prosecute immigration-related unfair employment practices.

Additionally, a recent change to the California Labor Code permits an employee to stand in the shoes of the U.S. Attorney General and press claims of federal immigration-related unfair employment practices in the superior court. Cal. Lab. Code § 1019 (West 2015). An employer who is found to have committed an immigration-related unfair employment practice may have business and operating licenses suspended and their doors closed for a minimum of fourteen days. Additionally, an employer may be ordered to pay the attorney's fees of the employee or complaining party.

Finally, DAPA may result in newly documented employees informing their current employers that they have

changed their name, Social Security number, and/or employment eligibility status. Previously undocumented employees who falsely claimed to be employment authorized and/or presented false documentation to their employer on their date of hire may attempt to "come clean" and present their DAPA issued EAD card to the employer. Employers in this situation have two rather unappealing options:

1. They may terminate the employee, or
2. They may amend the employee's records to reflect the changes to their personal information.

[T]he one relatively simple task of verifying the employment authorization of a newly hired employee will become increasingly more complicated.

Terminating the employee could result in litigation in the superior court. Recent changes in the California Labor Code forbids an employer from terminating, retaliating, or taking any adverse action against an employee because the employee updates, or attempts to update, his or her personal information based on a lawful change of name, Social Security number, or federal employment authorization document. Cal. Lab. Code § 1024.6 (West 2015). While no court has addressed the issue, the legislative history behind this amendment makes it abundantly clear that the legislature intends to protect undocumented immigrants that obtain legal status against retaliation from their employer.

An employer that amends employee

records to reflect their newly acquired employment authorization status runs the risk of litigation with U.S. Immigration and Customs Enforcement (ICE), following an I-9 audit. While the INA has safe harbor provisions for employers who follow the law, ICE would likely take the position that the employer knowingly hired an unauthorized alien from the original date of hire to the date of the amendment. 8 U.S.C. § 1324a(a)(3) (2014). ICE, then, would assess fines—in the thousands of dollars—per employee. Employers and counsel should be prepared to defend their decision to amend their records to an administrative law judge and/or a judge in federal district court.

As Congress and the current administration continue to spar over immigration law and policy, the one relatively simple task of verifying the employment authorization of a newly hired employee will become increasingly more complicated.



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