A SHORT DISCUSSION OF DACA, I-601AS AND "DACABALLY" AFTER THE PRESIDENT'S NOVEMBER 20, 2014 EXECUTIVE ACTION ANNOUNCEMENT

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INTRODUCTION

The President's Executive Action package is much bigger than just about anyone was expecting. It will not resolve all the immigration problems the system has. Indeed the parts of the package that affect the most people are temporary forms of relief, meaning most of the package just puts a bandaid on the problem. Nonetheless, it's a big bandaid. In this short discussion, I will only be going over a few of the highlights that fall within my area of practice. I will be discussing DACA, I-601As, Advance Parole and adjustment of status under Matter of Arrabally.

EXPANSION OF DACA

According to the USCIS website, the guidelines for the current DACA program are as follows:

"You may request DACA if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor,or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety."

It is valid in two year increments.

The program will be changed in the following ways:

1. The upper age limit is being eliminated, so there is no longer a requirement that the person be under age 31 as of June 15, 2012.
2. The continuous presence start date is being moved from June 15, 2007 to January 1, 2010.

It will also be valid in three year increments instead of two years. Applications are expected to be accepted commencing approximately February 20, 2015.

These changes will include a larger group of people, but other than that the changes don't fundamentally alter the character of the program. Moving forward, attorneys will be able to rely on their general familiarity with the program. The changes won't significantly impact the way attorneys handle the cases or how much they feel they need to charge.

CHANGES TO THE I-601A PROVISIONAL WAIVER PROGRAM

Currently the program is only available to those who were petitioned for by an immediate relative US citizen and can prove extreme hardship to an immediate relative US citizen (petitioner and qualifying relative do not have to be the same person, but usually is) and for whom the only ground of inadmissibility is simple unlawful presence. The term "extreme hardship" remains undefined. Sometimes attorneys complain that the term is not defined consistently from adjudicator to adjudicator and that this leads to uneven adjudication.

There are a few upcoming changes to the program. The program will be opened to "all statutorily eligible classes of relatives for whom an immigrant visa is immediately available." That's a direct quote from the memo, but it leaves some questions unanswered. Under the statute, anyone applying for an immigrant visa or adjustment of status – including employment-based cases and diversity visa lottery cases – who is inadmissible under INA 212(a)(9)(B) can apply for a waiver as long as he/she can prove that it would be an extreme hardship to his/her US citizen or permanent resident spouse or parent if the waiver is denied. So when the memo says, "eligible classes of relatives", does that mean that the person must be the beneficiary of an approved I-130? Or does it merely mean that the qualifying relative can now be an LPR and not just a USC? It's not clear.

The other changes are very interesting. The memo indicates that USCIS will come up with a definition of the term "extreme hardship" and that it will seek to determine circumstances under which "extreme hardship" would be presumed. Now, before the reader gets very excited about the latter aspect of this – that there will be circumstances under which "extreme hardship" would be presumed – keep in mind that unlawful presence waivers both have an "extreme hardship" element and a discretionary element. So even if a person meets the terms for presumed extreme hardship, the waiver application could still be denied as a matter of discretion if the person has significant negative factors, e.g. failure to pay child support, outstanding tax liens for failure to pay federal income tax, an excessive number of traffic tickets, etc. And while they are saying there will be circumstances under which "extreme hardship" will be presumed, there is not at this time reason to believe that USCIS will make such guidelines very broad. For example, while it is not beyond the scope of possibility that "extreme hardship" would be presumed whenever there are children involved, that might be a bit over-optimistic. It is more likely that extreme hardship would be presumed if the applicant's country is on the TPS list, if the US Peace Corps has determined that the country is unsafe for US Peace Corps volunteers, if the qualifying relative has been adjudged by the Social Security Department to have a current and ongoing disability, or if the applicant has continuously resided outside his/her home country since before age 12. Things of that nature. But in cases that meet this new standard for presumed extreme hardship, the attorney's job will get easier, which will allow the attorney to charge less for such cases.

For USCIS to clearly define "extreme hardship" will probably not change things all that much. USCIS has already been generous with the definition, compared to what the case law implies that the definition might be. The definition will probably match closely the types of cases they already approve. There no indication that the new definition will increase approval rates. Indeed it is just as likely that the new definition will cause some cases that are now

approved to instead be denied. Recall again that a case can still be denied as a matter of discretion even if extreme hardship is found. As there is no appeal or Motion to Reconsider for denied I-601A cases, one may find difficulty arguing that the adjudicator erred in his/her application of the new definition. Frankly, I'm not that excited that USCIS is trying to clarify the definition of extreme hardship.

DACABALLY (ADJUSTMENT OF STATUS UNDER MATTER OF ARRABALLY AFTER ENTERING ON ADVANCE PAROLE)

While the President did not mention Advance Parole nor Matter of Arrabally in his speech or written descriptions of his relief package, there was a short memo issued on November 20, 2014 regarding these two elements of immigration law and procedure. In the short memo, the Secretary of Homeland Security states that he is directing DHS General Counsel to issue a legal memo clarifying that "which will clarify that *in all cases* when an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a "departure" within the meaning of section 212(a)(9)(B)(i) of the INA" (emphasis added). It appears that the Secretary wants to be sure that USCIS and the courts recognize that the application of Arrabally will not be limited to those who were eligible for adjustment of status before they departed on Advance Parole and will not be limited to those who sought Advance Parole based on a pending I-485. Indeed, it appears that the President (through the Secretary) wants to make sure that those obtaining Advance Parole based on DACA, DAP and TPS status are able to subsequently adjust status after a trip abroad.

Matter of Arrabally, 25 I&N Dec. 771 (BIA 2012) was a case in which the applicant was eligible to adjust status through INA 245(i) based on an approved I-140. He had previously entered on a visitor's visa, but had a long gap in status before applying to adjust status. After filing the I-485, he and his wife (whose last name was Yerrabelly and whose name sometimes appears alongside Arrabally's when the case is cited) obtained Advanced Parole, departed and returned. When their I-485 was adjudicated, the immigration officer found that they had triggered the ten year bar under INA 212(a)(9)(B) and did not have a qualifying relative for the waiver. Their I-485s were denied. They were placed in removal proceedings where they were again denied. On appeal, the BIA found that because Advance Parole was meant to be humanitarian relief, it was contrary to the nature of humanitarian relief to effectively punish someone for taking advantage of such relief. The BIA found that for purposes of INA 212(a)(9)(B), a person who leaves on Advance Parole and returns does not trigger the three and ten year bars. Many attorneys were excited by the 2012 Arrabally decision and felt that it was a work-around for INA 245(a) for those who were in valid TPS status or DACA status. INA 245(a) states that in order to adjust status, the applicant must have been admitted or paroled. Neither TPS nor DACA instantly resolves that problem. Even though the person has gained lawful status, if the most recent entry was without inspection, the person still cannot adjust status. With an eye to Arrabally, attorneys theorized that if the TPS or DACA recipient could get Advance Parole, leave and come back, the person could then adjust status (presuming there was a petitioning relative or employer) because the Advance Parole would resolve the problem under INA 245(a) and Arrabally meant that no unlawful presence bar was triggered under INA 212(a)(9)(B). The problem is that in the Arrabally case, in discussing Congressional intent, the BIA states, "We do not believe that Congress intended an alien to become inadmissible under

section 212(a)(9)(B)(i)(II) and, by extension, ineligible for adjustment of status solely by virtue of a trip abroad that … was requested solely for the purpose of *preserving* the alien's eligibility for adjustment of status." [page 778] (emphasis in original) This very strongly implies that the BIA only meant for Arrabally to apply to cases where Advance Parole was based on a pending I-485 and where the applicant was eligible to adjust prior to the departure on Advance Parole. After the case was published, USCIS promised a memo describing the applicability of Arrabally. The memo never materialized. Many local USCIS offices announced that they were "holding" adjustment of status cases relying on Arrabally until the memo was published. But eventually, sometimes after more than a year of waiting, local USCIS offices began adjudicating an approving I-485s where the applicant previously entered without inspection, gained DACA or TPS status, obtained Advance Parole, departed, returned and filed an adjustment of status application. Some attorneys call such cases "Dacabally". The short memo published on November 20, 2014 clarifies that the President wants Arrabally to apply anytime a person leaves on Advance Parole and returns.

Prior to the November 20, 2014 memo, the authors of this article urged caution to other attorneys who were planning Dacabally cases as the threat of a memo meant that the rug could be pulled out from us in the middle of a case if the memo stated that Arrabally applied only to cases where the applicant was eligible to adjust status before he departed. The assurances of the November 20 memo now free attorney to pursue Dacabally cases without those concerns. Indeed, one may argue that the President wants applicants to pursue Dacabally adjustments as a way to parlay DACA or DAP into a permanent resolution of their immigration status.

Despite the promises that Dacabally holds, the process is not free from potential pitfalls. As the BIA accurately points out in its footnotes on the Arrabally case,

> "Nothing in the foregoing discussion is intended to suggest that a grant of parole into the United States following a trip abroad is ever guaranteed. Rather, we acknowledge that at the time of the returning alien's application for admission, the DHS possesses discretionary authority under section 212(d)(5) of the Act to determine whether parole is appropriate. See Eligibility of Arriving Aliens in Removal Proceedings To Apply for Adjustment of Status and Jurisdiction To Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585, 27,586 n.1 (May 12, 2006) ("[A] decision authorizing advance parole does not preclude denying parole when the alien actually arrives at a port-of-entry, should DHS determine that parole is no longer warranted."). A grant of advance parole before the alien's trip abroad simply provides him with a practical expectation that, so long as circumstances do not meaningfully change and the DHS does not discover material information that was previously unavailable, the DHS's discretion to parole him at the time of his return to a port of entry will likely be exercised favorably."

Ok, what does that mean? It means that despite what Arrabally says, allowing someone to enter on parole is within the discretion of CBP and a CBP agent can still deny someone entry even if that person holds an Advance Parole document if he/she feels that parole is not warranted. And if CBP tells an intending immigrant at the port of entry that he/she cannot enter, there are very limited venues to argue against that decision. There's no really a "next step" if CBP turns the person away. Arrabally only applies if the person manages to get let back in. It does not apply if CBP refuses entry and the person has to go apply for a visa at the consulate. Note that because Arrabally is only in regard to the unlawful presence ground of inadmissibility, it could be that CBP may decide to refuse entry to those with other grounds of inadmissibility, such as prior

removal orders, misrepresentation or criminal history. Yes, it is true that the purpose of Advance Parole is to allow someone in despite any ground of inadmissibility, that discretion on the part of CBP is still there and Advance Parole is not a guarantee that the person will be let back in. Indeed CBP could potentially use the popularity of Advance Parole as a way to entice people to self-deport. USCIS and CBP could collude to grant Advance Parole to those with prior removal orders and other "undesirables" and then not allow them back in the country, thereby ejecting people from the country at no cost to the taxpayer in lieue of going through the expensive and time-consuming removal process. There is the potential for hundreds of thousands of people to be 'tricked' into self-deporting. People who are granted TPS, DACA or DAP may feel that eligibility for Dacabally is determined and the remaining steps of the Dacabally case will only be formalities, but that will be a mistake. TPS, DACA and DAP can be granted despite various other grounds of inadmissibility, such as prior removal orders, for example. But those other grounds of inadmissibility could be a problem at the border when CBP is decided whether to honor Advance Parole and they will be a problem when the person goes to adjust status after a successful return on Advance Parole. Each of these elements of the Dacabally process has its own eligibility requirements and getting past the first step is not a guarantee that the person will succeed in the remaining steps.