At the Law Office of William Jang, PPLC, our Austin lawyers want to help people fully understand the immigration and citizenship opportunities that are available to them. As such, this article is meant to clarify, explain, and update information regarding the recently adopted Deferred Action Process for some young individuals who are in the United States illegally, which some individuals are mistakenly calling the DREAM Act (Development, Relief, and Education for Alien Minors Act).

The June 15, 2012 Memorandum on “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” is not the DREAM Act. The DREAM Act is a bill that has been periodically introduced in Congress that would have eventually provided permanent residency (green card) to individuals that qualify. The requirements of the DREAM Act have changed each time it was introduced in Congress, but the main focus was to eventually give permanent residency to individuals who entered the U.S. as a minor and met certain educational requirements. Of course, each version of the bill also had other requirements that varied.

Unfortunately, as of today, the DREAM Act has not passed and therefore is not law.

Instead, under the direction of President Obama, the Director of the Department of Homeland Security issued a Memorandum which provides for “an exercise of prosecutorial discretion” for individuals that meet the following requirements:

1) came to the US under the age of 16;

2) has continuously resided in the US for at least 5 years before the order was signed;

3) is currently in school, graduated from high school, obtained a GED, or was honorably discharged from the U.S military;

4) has not been convicted of a felony or significant or multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and

5) is under the age of 30.

While the requirements are similar to those present in some of the versions of the DREAM Act, this memorandum is otherwise very different from the DREAM Act. First, the memorandum does not provide a means to obtain permanent residency (green card.). And equally important, this memorandum is not a statute. It is an order given by the President of the United States to the executive branch. Because it is not a statute, it can be repealed or changed at any time by the President without any notice. This is very important because we will have an election soon to elect the next President of the United States. Because the memo reflects President Obama’s order, it is highly unlikely that President Obama would repeal or significantly change the order. But if Governor Romney wins the election, this memo could be repealed. Governor Romney has expressed that he supports a policy of “Self Deportation.” While clarification was not given in terms of what this means, political analysts have indicated that such a policy would be geared towards making opportunities very difficult for individuals who are in the United States illegally thereby encouraging these individuals to leave the Unite States on their own. It seems that this memorandum is contrary to such a policy.

Also note that at this time, there is nothing to file. The memorandum is just three pages and does not provide a lot of detail.  The only other official sources of information are the “Official DHS Frequently Asked Question on the Napolitano Memo”, DHS Press Release, and remarks from the President regarding this memo.

The DHS FAQ, in summary, states the following:

1. Individuals who qualify for the Deferred Action Process may apply for and may obtain employment authorization.
2. The grant of deferred action does not provide permanent lawful status or a pathway to obtaining permanent lawful status.
3. The deferred action will be granted in two year increments that may be extended.
4. Each time the deferred action is granted, the individual must reapply for an extension of employment authorization.
5. Individuals who are subject to a final order of removal may also apply for deferred action.
6. If an individual is about to be removed, he/she should contact the Law Enforcement Support Center’s hotline at 1-855-448-6903.
7. ICE and CBP should exercise their discretion to prevent individuals who meet the requirements of this memo from being apprehended, placed into removal proceedings, or removed. Individuals in these situations should call either the Law Enforcement Support Center’s hotline at 1-855-448-6903, the ICE Office of the Public Advocacy’s hotline at 1-888-351-4024, or e-mail at EROPublicAdvocate@ice.dhs.gov.
8. An individual who accepted an offer of administrative closure may still receive deferred action.
9. An individual who declined an offer of administrative closure may still receive deferred action.
10. An individual who was not offered administrative closure may still receive deferred action.
11. DHS personnel responsible for making decisions regarding qualification under this memo will receive “special training.”
12. Individuals who apply will be subject to background checks. The applicants will undergo biographic and biometric background checks prior to receiving deferred action.
13. Documentation sufficient for an individual to demonstrate that he or she came to the United States before the age of 16 includes, but is not limited to: financial records, medical records, school records, employment records, and military records.
14. Documentation sufficient for an individual to demonstrate that he or she has resided in the United States for at least five years immediately preceding June 15, 2012 includes, but is not limited to: financial records, medical records, school records, employment records, and military records.
15. Documentation sufficient for an individual to demonstrate that he or she was physically present on June 15, 2012, the date the memorandum was issued, includes, but is not limited to: financial records, medical records, school records, employment records, and military records.
16. Documentation sufficient for an individual to demonstrate that he or she is currently in school, has graduated from high school, or has obtained a GED certificate includes, but is not limited to: diplomas, GED certificates, report cards, and school transcripts.
17. Documentation sufficient for an individual to demonstrate that he or she is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States includes, but is not limited to: report of separation forms, military personnel records, and military health records.
18. An individual who knowingly makes a misrepresentation to USCIS or ICE, or knowingly fails to disclose facts to USCIS or ICE, in an effort to receive deferred action or work authorization in this new process will be treated as an immigration enforcement priority to the fullest extent permitted by law, subjecting the individual to criminal prosecution and/or removal from the United States.
19. Individuals who have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct are not eligible to be considered for deferred action under the new process.
20. A felony is a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year.
21. A significant misdemeanor is a federal, state, or local criminal offense punishable by no more than one year of imprisonment or even no imprisonment that involves: violence, threats, or assault, including domestic violence; sexual abuse or exploitation; burglary, larceny, or fraud; driving under the influence of alcohol or drugs; obstruction of justice or bribery; unlawful flight from arrest, prosecution, or the scene of an accident; unlawful possession or use of a firearm; drug distribution or trafficking; or unlawful possession of drugs.
22. An individual who is not convicted of a significant misdemeanor but is convicted of three or more other misdemeanors not occurring on the same day and not arising out of the same act, omission, or scheme of misconduct is not eligible to be considered for deferred action under this new process.
23. If the background check or other information uncovered during the review of an individual’s request for deferred action indicates that the individual’s presence in the United States threatens public safety or national security, he or she will be ineligible for an exercise of prosecutorial discretion. Indicia that an individual poses such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.
24. Even if the individual does not qualify under this memo, the individual may still qualify under the ICE June 2011, Prosecutorial Discretion Memorandum.
25. Both ICE and USCIS will develop protocols for supervisory review as part of their implementation of the new process.
26. Individuals may not appeal a denial by ICE or USCIS of their request for an exercise of prosecutorial discretion.
27. The new process is available only to those who satisfy the eligibility criteria. As a result, the immediate relatives, including dependents, of individuals who receive deferred action pursuant to this process are not eligible to apply for deferred action as part of this process unless they independently satisfy the eligibility criteria.
28. For individuals whose requests for deferred action are denied by USCIS, USCIS will apply its existing Notice to Appear guidance governing USCIS’s referral of cases to ICE and issuance of notices to appear. Under this guidance, individuals whose requests are denied under this process will be referred to ICE if they have a criminal conviction or there is a finding of fraud in their request.
29. Individuals who are not in removal proceedings should not place themselves in removal proceedings to apply for the deferred action. These individuals should, instead, wait for the procedure to be set up to apply with the US CIS.
30. The Government has not yet decided whether the grant of deferred action will allow travel outside of the United States.
31. Brief and innocent absences undertaken for humanitarian purposes will not violate the requirement that an individual must have resided in the United States for at least five years preceding June 15, 2012.
32. If an individual meets the eligibility criteria and has been served a detainer, he/she should immediately contact either the Law Enforcement Support Center’s hotline at 1-855-448-6903 or the ICE Office of the Public Advocate either through the Office’s hotline at 1-888-351-4024 or by email at EROPublicAdvocate@ice.dhs.gov.
33. A grant of deferred action is a form of prosecutorial discretion that does not confer a path to citizenship or lawful permanent resident status. Only the Congress, acting through its legislative authority, can confer these rights.

Neither the press release nor the President’s remarks provide any further detail.

The Government is supposed to provide further guidance, rules, and procedure within 60 days of the memo (the memo was issued on June 15, 2012).  Furthermore, a Stakeholder Conference Call Meeting is scheduled for July 9, 2012. Further information may follow this meeting. Therefore, we should know more about it soon.

For now, I recommend that individuals thinking about applying for the temporary benefit provided in the memo consult with a qualified attorney to review their case and make a well informed decision as to whether to apply, after considering all the positives (benefits) and the negatives (risks) involved with such an application. Also, just in case such an individual will apply under this memo, (or perhaps under the DREAM Act if and when it passes), the individual should start gathering evidence to show that they meet all the requirements.

In addition to the documents listed in the FAQ, a copy of their passport and I-94 could be used to provide evidence that the individual entered the United States before the age of 16.

Furthermore in addition to the documents listed in the FAQ, other documents showing the applicant’s name and an address in the U.S. (including: letters and envelopes, identification cards, utility bills, bank statements, phone bills, church documents, mailed advertisements, affidavits from people that know the individual, etc.) should be gathered as evidence to show residence for at least a five year period and physical presence on the date that the memo was passed.

Again, at this time there is not much government guidance, and no procedure or even an application form to file. Therefore we can't yet file anything.  But soon, we should be able to do so.  Therefore, for now, start by making an informed decision and by gathering the required evidence and contacting an experienced Austin immigration lawyer.