Immigration attorneys weigh varying options for DACA clients

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As the country waits to learn what, if any, legislative deal might be struck in order to preserve the Deferred Action for Childhood Arrivals program in light of President Donald Trump’s decision to rescind it, immigration law attorneys say they are looking for ways to advise their clients on how to plan for their futures.

For Lisa Koop, associate director of legal services for the National Immigrant Justice Center, that means pointing clients whose DACA status is set to expire outside of the presidentially mandated deadline toward other possible immigration visas they could apply for to remain in the country. Similarly, Valparaiso University Law School professor Geoff Heeren, who oversees the school’s immigration law clinic, said he reached out to clients shortly after Attorney General Jeff Sessions announced the rescission decision to inform them of the Oct. 5 deadline to apply for renewal of their DACA status. That deadline applies only to “Dreamers” whose status will expire between now and March 5.

The Trump administration’s decision to rescind DACA didn’t come as a shock to Koop or Heeren in light of the president’s campaign promises to end the program and implement extensive immigration reform. But the move was still an emotional blow to them and their Dreamer clients, whom Heeren described as the future of the country. And from a legal perspective, neither he nor Koop saw a legitimate reason for rescinding the program.
Though there is much controversy surrounding the question of whether President Barack Obama had the
authority to implement DACA through an executive order, both Koop and Heeren said the former president’s
decision was legally backed by the concept of prosecutorial discretion. From their perspective, the DACA
executive order was simply a declaration that youth who were brought into the country illegally by their parents
were, as a group, a low priority for immigration enforcement officials.

But according to Robert Law, an attorney and director of government relations for the Washington, D.C.-based
group Federation for American Immigration Reform, the implementation of DACA could not be considered
prosecutorial discretion because it imposed an affirmative benefit, rather than merely declining to enforce
immigration laws against a certain class of people. That benefit was Dreamers’ ability to stay in the country and
obtain a work permit, he said. Further, Law said U.S. Citizenship and Immigration Services had limited
discretion to deny a DACA application as long as the applicant met the outlined standards, another benefit to
Dreamers.

Koop, however, said the ability to recognize a certain class of people as a lower priority for law enforcement is
“well within the authority of the executive” branch. She also noted legal scholars have found DACA to be
constitutional.

However, the U.S. Supreme Court has yet to rule on the constitutionality of DACA. Instead, the high court
deadlocked in a June 2016 decision that ultimately kept in place a ban on Obama’s proposed Deferred Action for
Parents of Americans and Lawful Permanent Residents program. But now that Justice Neil Gorsuch has joined
the high court, Heeren said he could provide the vote SCOTUS needs to officially render an opinion on the
matter.

Several attorneys general from conservative-leaning states had threatened legal action against the Trump
administration if it refused to rescind DACA, but now that the decision has been made, attorneys general in
liberal-leaning states have filed suit to the opposite effect. Lawsuits filed in the federal courts in New York and
California allege the U.S. government and Department of Homeland Security violated the Administrative
Procedure Act by rescinding DACA without providing notice or the opportunity to comment, and also violated
Dreamers’ due process and equal protection rights.
Heeren said he understood the APA argument, noting the rule that agencies such as DHS cannot change course without proving they underwent a deliberative process. Law, however, scoffed at the alleged APA violation and said that when DACA was initially implemented, the Obama administration did not provide notice or the opportunity for comment. Thus, it is hypocritical for the Trump administration’s decision to be challenged on those grounds, he said.

Heeren also said he can see some legitimacy to the equal protection violation allegations in light of statements the president made during his campaign about Mexican citizens.

“(Trump’s statements) create a legal question that would not have existed if he were the type of person not prone to making those statements,” Heeren said. “He has made some incredibly objectionable statements in the past concerning Mexican immigrants, and that does create a legal question of discriminatory animus. But it’s difficult to prove intentional discrimination.”

While those issues are pending in the courts, immigration attorneys are focusing their attention on discerning how the decision to rescind DACA will affect their clients. Likewise, employers are also trying to determine what the decision means for their Dreamer employees.

Employers will likely become aware of an employee’s expiring DACA status through their obligation to reverify each employee’s employment eligibility, said Jenifer Brown, vice chair of Ice Miller’s Labor, Employment and Immigration Practice Group. Foreign nationals who wish to work in the United States must identify the expiration date of their work-related visa or permit, such as their DACA status, when they fill out an I-9 form, and employers must reverify those visas or permits on or before the date of expiration, Brown said.

If an employer discovers one of their employees’ eligibility will expire due to the DACA rescission, Koop said the NIJC is encouraging them to help their employees determine if they are eligible for an alternative immigration status. Additionally, Brown stressed the importance of eligible Dreamers applying for DACA renewal by the Oct. 5 deadline. Locally, the Neighborhood Christian Legal Clinic is offering services to help Dreamers apply for renewal on Sept. 23 and 25 in Indianapolis.

Colleges and universities likewise must be cognizant of whether their employees or student employees were hired under the DACA program, as their employment status would also be affected by the rescission, Brown said. Though there is usually nothing in the college application or admissions process that would alert a school to a student’s DACA status, the Ice Miller attorney said universities are likely beginning to contemplate the possibility of immigration agents coming to their campuses. To that end, she said it is important for schools and all employers to understand their rights and responsibilities with respect to law enforcement appearing at places of work.

DACA students themselves are also having to contemplate the implications of the DACA rescission on their lives. Allan Griffey, a 3L and president of the Hispanic Law Society at the Indiana University Robert H. McKinney School of Law, said that while he is not a Dreamer, he came to the United States when he was 6 years
old and has lawfully remained in the country ever since.

Thus, Griffey said he can relate to Dreamers’ concerns about being sent back to their home country when they no longer speak the language or understand the culture. He hopes to go into immigration law to help other immigrants like himself become American citizens.

Griffey also expressed hope about the possibility of Congress creating a legislative answer to the DACA rescission, as did the immigration law attorneys. They noted that there has been bipartisan support for Dreamers, particularly in the Senate.

However, Brown also said there is uncertainty about when that legislation might be passed, what form it will take and whether there will be any DACA recipients excluded by gaps in the legislation. Each of those questions, as well as other immigration-related policy negotiations, must be answered and addressed within the six-month timeframe the president has given Congress to act.