STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 23, 2015

Opinion No. 15-81

Effect of Invalidation of Federal DACA or DAPA Programs on H.B. 675/S.B. 612

Question

Would a court ruling invalidating the federal Deferred Action for Childhood Arrivals ("DACA") program or Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program have any effect on H.B. 675/S.B. 612, which would establish an exemption from paying out-of-state tuition for certain unlawful immigrants who attest that they have applied to legalize their immigration status or intend to do so once they are eligible?

Opinion

No. The federal DACA and DAPA programs provide a means for certain unlawful immigrants to obtain lawful presence in the United States, but those programs do not confer lawful immigration status. A court ruling invalidating either DACA or DAPA would not directly affect H.B. 675/S.B. 612 because that legislation requires unlawful immigrants to attest that they have applied for lawful status, not merely for lawful presence.

ANALYSIS

During the 2015 session of the Tennessee General Assembly, legislation was introduced that would exempt certain students from payment of out-of-state tuition at state institutions of higher education. *See* H.B. 675, 108th Gen. Assem. (2015); S.B. 612, 108th Gen. Assem. (2015). As relevant here, an unlawful immigrant who attends high school in Tennessee for three years immediately prior to graduation; obtains a high school diploma or equivalent degree; and resides in Tennessee for at least one year immediately prior to enrolling in a state institution of higher education would be eligible for the exemption provided he or she "files an affidavit with the state institution of higher education stating that the individual has filed an application to legalize the individual's immigration status, or shall file an application as soon as the individual is eligible to do so."

In 2012, the U.S. Department of Homeland Security ("DHS") implemented the DACA program to allow certain unlawful immigrants who arrived in the United States as children to request consideration for deferred action with regard to deportation. *See Texas v. United States*, No. 15-40238, 2015 WL 6873190, at *1 (5th Cir. 2015). In 2014, DHS expanded the DACA program and also created a new program called DAPA to allow certain unlawful immigrants who are parents of U.S. citizens or lawful permanent residents to request consideration for deferred action. *See id.* If deferred action is granted, the individual is permitted to be lawfully present in the United States for a prescribed time period.

The Secretary of DHS has stated that, "although deferred action does not confer any form of legal status in this country, much less citizenship, it does mean that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States." *Id.* (alterations and internal quotation marks omitted) (emphasis in original). In other words, an individual who is granted deferred action under DACA or DAPA obtains "lawful presence," but that individual's immigration status is not legalized.

In 2014, twenty-six states, including Tennessee, filed a lawsuit to enjoin the federal government from expanding DACA or implementing DAPA. *See id.* at *1-2. That litigation remains pending.

You have asked whether a court ruling invalidating either DACA or DAPA would have any effect on H.B. 675/S.B. 612. That legislation would require an unlawful immigrant who wishes to obtain an exemption from out-of-state tuition to attest that he or she has applied to "legalize [his or her] immigration status" or will do so once eligible. An individual who receives deferred action under either DACA or DAPA obtains only *lawful presence* in the United States, not lawful immigration status. Because neither DACA nor DAPA confers lawful immigration status, an unlawful immigrant could not satisfy the affidavit requirement of H.B. 675/S.B. 612 by stating that he or she has applied for DACA or DAPA or intends to do so once eligible.

In short, the DACA and DAPA programs are not relevant to the requirements of H.B. 675/S.B. 612 because an individual who requests consideration for those programs has not applied to "legalize the individual's immigration status" as required by the bill. Accordingly, a court ruling invalidating the DACA program or the DAPA program would have no direct effect on H.B. 675/S.B. 612.

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