

Winter 2013

My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE

Shoba S Wadhia

MY GREAT FOIA ADVENTURE AND DISCOVERIES OF DEFERRED ACTION CASES AT ICE

SHOBA SIVAPRASAD WADHIA*

TABLE OF CONTENTS

INTRODUCTION	346
HIGHLIGHTS FROM DATA COLLECTED BETWEEN OCTOBER 1, 2011, AND JUNE 30, 2012	350
SUMMARY OF RECOMMENDATIONS	351
PROCEDURAL HISTORY	352
SCOPE OF DATA PROVIDED BY ICE	353
FINDINGS	356
<i>ICE processes more stays of removal than deferred action cases</i> .	356
<i>Humanitarian and adverse factors identified in deferred action cases</i>	356
<i>Composition of deferred action cases among field offices</i>	360
<i>Distribution of deferred action grants across field offices: Five field offices granted more than one-half of the 698 deferred action cases</i>	360
<i>Distribution of deferred action denials across field offices: Five Field offices had a significantly higher number of denials than the average denial rate at field offices</i>	369
<i>Disparities in the Outcome of Deferred Actions by Field Office</i> ..	370
<i>Composition of deferred action and stay of removal cases by nationality</i>	374
<i>Most Common Reasons For Grant/Denial By Nationality</i>	376

* Samuel Weiss Faculty Scholar, Clinical Professor of Law and Director of the Center for Immigrants' Rights at Pennsylvania State University Dickinson School of Law. I am grateful to government counsel for a successful collaboration and for providing me with the data that is the basis for this Article. I send my appreciation to Jaya Ramji-Nogales and Michael Olivas for their comments and/or support during the writing of this Article. I thank Penn State Law for supporting my scholarship and Stephen Coccorese and Mauhan M. Zonoozy for their diligent editing and graph making. Cheers to Hemal, Devyani and Neelesh—thank you for loving me unconditionally and keeping me on my toes! © 2013, Shoba Sivaprasad Wadhia.

<i>Age of the individuals processed for deferred action and stays of removal</i>	379
<i>Representation by counsel—Number of Cases Involving a Pro Se Applicant</i>	380
LESSONS FROM DACA	381
RECOMMENDATIONS	382
<i>Publish Statistics About Deferred Action Cases.</i>	383
<i>Expand Field Categories in Deferred Action Case Tracking</i>	383
<i>Centralize Processing for Deferred Action Cases</i>	383
<i>Extend Confidentiality Protections to Deferred Action Cases</i>	384
<i>Create a Policy About Treatment of Individuals in Removal Proceedings and Scope of Deferred Action</i>	384

INTRODUCTION

“Prosecutorial discretion” has been part of the immigration system for more than 40 years and is generally defined as an agency’s authority to decide whether and to what degree to enforce laws against a particular person or group of persons. There are at least 25 different forms of prosecutorial discretion that DHS may employ to protect a noncitizen from removal including: not bringing removal charges against a noncitizen, not arresting or detaining a noncitizen, and granting parole to a noncitizen. A memorandum issued by the former Immigration and Customs Enforcement Chief John Morton lists the following types of prosecutorial discretion:¹

- Deciding to issue or cancel a notice of detainer;
- Deciding to issue, reissue, serve, file, or cancel a Notice to Appear (“NTA”);
- Focusing enforcement resources on particular administrative violations or conduct;
- Deciding whom to stop, question, or arrest for an administrative violation;
- Deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- Seeking expedited removal or other forms of removal by means other than a form removal proceeding in immigration court;
- Settling or dismissing a proceeding;

1. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel (Jun. 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

- Granting deferred action, granting parole, or staying a final order of removal;
- Agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- Pursuing an appeal;
- Executing a removal order; and
- Responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

“Deferred action” is one form of prosecutorial discretion that can be granted at any stage of the immigration enforcement process and historically has been applied to individuals and groups who present compelling humanitarian circumstances.² Historically, the Immigration and Naturalization Service (“INS”) processed deferred action (previously called “nonpriority” status) cases by using a combination of positive and negative factors to determine if a person was worthy of protection. For example, the agency’s former policy, once known as the “Operations Instructions,” listed the following factors to consider: “(1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; and/or (5) criminal, immoral or subversive activities or affiliations—recent conduct.”³

The Department of Homeland Security (“DHS”) is a cabinet level department created by Congress after September 11, 2001.⁴ While immigration authority is shared by a number of federal agencies, DHS is charged with the administration and enforcement of immigration laws, and houses three key immigration units: Immigration and Customs Enforcement (“ICE”), Customs and Border Protection (“CBP”), and United States Citizenship and Immigration Services (“USCIS”).⁵ ICE, CBP, and USCIS all have the authority to grant deferred action and to implement other forms of prosecutorial discretion. A grant of deferred action allows an individual to reside in the United States in a tenuous legal status.⁶ The benefits associated with deferred action stretch beyond the immediate authorization to remain in the United States, as a grant can enable the noncitizen to apply for work authorization

2. See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 6-7 (2011).

3. (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

4. See Homeland Security Act of 2002, 6 U.S.C. § 111 (2012).

5. See *id.* §§ 411, 442, 451.

6. See Wadhia, *supra* note 2, at 11-15; Letter from Law Professors to President Obama (May 28, 2012), <http://lawprofessors.typepad.com/files/executiveauthorityfordreamrelief28may2012withsignatures.pdf>; Memorandum from the Cong. Research Serv. to Multiple Cong. Requesters (July 13, 2012), <http://www.scribd.com/doc/100527478/ExercisingProsecutorialDiscretion-Memo>.

and, in some cases, be eligible to receive a state driver's license and limited benefits if she can show economic necessity.⁷ If a person is denied deferred action, there is no mechanism for review by DHS or the Immigration Court, nor is there a guarantee that the person will receive a notification about DHS's decision.⁸

Seeking to manage its resources more effectively, ICE unveiled three enforcement priorities in a document titled "*ICE, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*" in 2010: (1) aliens who pose a danger to national security or a risk to public safety; (2) recent illegal entrants; and (3) aliens who are fugitives or otherwise obstruct immigration controls.⁹ In the following fiscal year, ICE removed a record 396,906 noncitizens.¹⁰ On June 17, 2011 and on the heels of these events, ICE published a memorandum (the "Morton Memo") titled "*Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*" enumerating the factors DHS would use to calculate the circumstances in which a favorable exercise of prosecutorial discretion is appropriate.¹¹ The Morton Memo identified no fewer than 19 factors for the agency's consideration,¹² and a series of characteristics that warrant "particular care and consideration":

- Veterans and members of the U.S. armed forces;
- Long-time lawful permanent residents;

7. See, e.g., Wadhia, *supra* note 2, at 8; Michael Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463; *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/childhoodarrivals> (last updated July 2, 2013).

8. While the most recent memorandum from DHS on prosecutorial discretion includes some additional procedures that would include a case to be initiated by the ICE officer, private attorney, or ICE agent, it does not appear to include a specific method for notifying the noncitizen when they have been denied deferred action or prosecutorial discretion more broadly. See Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel (Jun. 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

9. Memorandum from John Morton, Assistant Secretary, Immigration and Customs Enforcement, to Immigration and Customs Enforcement Employees (Jun. 30, 2010), <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>. This document was amended in March 2011 to clarify that the memorandum itself confers no substantive right or benefit.

10. See *ICE Total Removals Through February 20th, 2012*, U.S. Immigration and Customs Enforcement (Oct. 10, 2013), <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>. See also Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59 (2013).

11. See Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel (Jun. 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. For a detailed summary of the June 17 Morton Memo see Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER (July 20, 2011), <http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview>.

12. See Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel (Jun. 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

- Minors and elderly individuals;
- Individuals who have been present in the United States since childhood;
- Pregnant or nursing women;
- Victims of domestic violence, trafficking, or other serious crimes;
- Individuals who suffer from a serious mental or physical disability; and
- Individuals with serious health conditions.¹³

The Morton Memo on prosecutorial discretion also listed the following negative criteria as warranting particular consideration against a grant of prosecutorial discretion:

- Persons who pose a clear risk to national security;
- Serious felons, repeat offenders, or individuals with lengthy criminal records;
- Known gang members or other individuals who pose a clear danger to public safety; and
- Persons with egregious records of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.¹⁴

Immigration advocates and attorneys hailed the Morton Memo as a smart enforcement policy that protected individuals with particularly positive qualities from removal.¹⁵ Many of the favorable discretionary factors identified in the memo were consistent with previous guidance from the Immigration and Naturalization Service and, later, DHS.

Using the Morton Memo as a foundation, the DHS announced DACA on June 15, 2012, and began implementing the program two months later.¹⁶ DACA was announced by President Obama from the Rose Garden of the White House and was followed by publicity from the Administration, media outlets, the private bar, and advocates. Consequently, deferred action has become a popular term in the immigration policy debate.¹⁷

13. *Id.*

14. *Id.*

15. See Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER (July 20, 2011), <http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview>; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 11-15 (2011).

16. See *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD> (last updated July 2, 2013).

17. See, e.g., *Prosecutorial Discretion and Executive Action: A Resource Page*, AM. IMMIGRATION COUNCIL IMMIGRATION POLICY CTR. (Apr. 19, 2011), <http://www.immigrationpolicy.org/just-facts/>

This article describes my adventures in Freedom of Information Act litigation and analyzes deferred action data collected informally by 24 ICE Enforcement and Removal Operations (ERO) field offices between October 1, 2011, and June 30, 2012.¹⁸ This article also offers recommendations for data collection, recordkeeping, and transparency in deferred action cases. A deferred action request is normally filed with the ICE field office with jurisdiction over the individual applicant. In this way, deferred action cases are not distributed evenly to each of the ICE field offices but instead are based on the demand or volume of applications made in a particular jurisdiction.

While scholarship is rife with details about the history and evolution of deferred action in immigration law, the data regarding individuals who are processed for deferred action and transparency about the deferred action program by the agency has been lacking. This article reveals and examines deferred action data from ICE for the first time since DHS was created. Moreover, the enhanced tools USCIS has created for sharing information about DACA and steps taken by ICE to track deferred action cases offer a new paradigm through which to discuss why transparency matters.

HIGHLIGHTS FROM DATA COLLECTED BETWEEN OCTOBER 1, 2011, AND JUNE 30, 2012¹⁹

- ICE did not formally track deferred action case statistics prior to fiscal year 2012.
- ICE processed 4.5 times as many stays of removal²⁰ as deferred action cases.
- ICE processed 698 deferred action cases, of which 324 (46%) were granted between October 1, 2011, and June 30, 2012.

prosecutorial-discretion-and-executive-action-resource-page; *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, NAT'L IMMIGRATION LAW CTR., <http://www.nilc.org/FAQdeferredactionyouth.html> (last updated Mar. 5, 2013); *Deferred Action for Childhood Arrivals*, AM. IMMIGRATION COUNCIL IMMIGRATION POLICY CTR., (Aug. 13, 2012), <http://www.nationalimmigrationproject.org/community/Alert%20for%20DREAMers%20applying%20for%20Deferred%20Action.pdf>; Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463 (2012). Some beneficiaries of DACA could be eligible for the Development, Relief, and Education for Alien Minors Act (DREAM Act), a piece of legislation that has been introduced in several Congresses, and unlike DACA, provides a certainty of legal status and path of permanent residency. *See* Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong. (2011); Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (2011).

18. ERO's primary mission is to "identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts." *Enforcement and Removal Operations*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited Aug. 30, 2013).

19. *See* Shoba S. Wadhia, *Data from ICE on Deferred Action, Fall 2012* PENNSYLVANIA STATE UNIVERSITY, DICKINSON SCHOOL OF LAW http://law.psu.edu/_file/Wadhia/FOIA_FOD_Adjudicated_Deferred.xlsx (last visited Aug. 30 2013).

20. Unlike deferred action, a stay of removal is available to the noncitizen only after a removal order has been entered and may only be granted by ICE (as opposed to USCIS, *e.g.*).

- The composition of deferred action cases among field offices varied significantly. The field offices with the highest number of deferred action cases were New York City (104 cases, 50% granted), New Orleans (97 cases, 23% granted), Washington (76 cases, 86% granted), Miami (69 cases, 52% granted), and Newark (42 cases, 40% granted). More than one-half of the 698 deferred action cases granted were concentrated in the above five field offices.
- There were 78 nationalities (including “unknown”) represented in the deferred action cases covered in this study. The single largest country of citizenship represented in deferred action cases was Mexico, followed by Guatemala, Honduras, El Salvador, and Jamaica. Mexico also had the highest number of deferred action grants.
- The five primary humanitarian factors (excluding “other”) identified in granted deferred action cases were: presence of a United States Citizen (USC) dependent, presence in the United States since childhood, primary caregiver of an individual who suffers from a serious mental or physical illness, length of presence in the United States, and suffering from a serious mental or medical care condition.
- The single largest adverse factor contributing to a deferred action denial was “lack of compelling factors,” which occurred 207 times (55%). Only 69 cases (18%) were denied because of a criminal history.
- Individuals from different age groups were considered for deferred action, and not limited to the age group that qualifies for DACA, the very young, or the elderly. That said, the handful of individuals who were less than 10 years of age or more than 65 years of age were granted deferred action at a rate of 79%, substantially greater than the rate for the remaining age groups (45%).

SUMMARY OF RECOMMENDATIONS

- DHS should make statistics about all deferred action cases available to the public.
- DHS should expand the number of data points it collects on deferred action cases by defining more field categories.
- DHS should consider centralizing the processing of all deferred action cases at the USCIS.
- DHS should extend the confidentiality of information provided by noncitizens being considered for DACA to all deferred action cases.
- DHS should create a policy about treatment of individuals in removal proceedings and scope of deferred action.

PROCEDURAL HISTORY

Congress enacted the Freedom of Information Act (FOIA) in 1967 and added it to the Administrative Procedure Act.²¹ The purpose of FOIA was to prevent the agencies from developing and applying “secret law.”²² I filed several FOIA requests with DHS subcomponents beginning in 2009. I filed my first FOIA request to ICE in October 2009, asking for all records and policies involving prosecutorial discretion. The request was closed in December 2009 after an unsuccessful attempt to clarify my request. I filed a new request in March 2010 requesting specific information about all deferred action cases, and after corresponding with ICE about the status of my request on multiple occasions, I received a slim response in January 2011 in the form of a single chart (reproduced below) listing a handful of active deferred actions between the years of 2003 and 2010, without any further detail.²³ The chart itself lacked any detail about the deferred action process, the factors used by ICE to grant or deny deferred action, or any explanation to demonstrate that the universe of deferred action cases presented in the chart was in fact accurate.²⁴ Further, it raised serious concerns about whether or how ICE even tracked information about deferred action cases.²⁵

CHART 1: NUMBER OF ACTIVE CASES GRANTED DEFERRED ACTION STATUS
SINCE CY 2003

CY	Detained	Non Detained	Total
2003	0	117	117
2004	0	68	68
2005	0	62	62
2006	0	64	64
2007	0	71	71
2008	0	39	39
2009	2	34	36
2010	1	15	16
Total	3	470	473

21. See Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 43 (1976).

22. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138, (1975).

23. NO. OF ACTIVE CASES GRANTED DEFERRED ACTION STATUS SINCE CY 2003 (U.S. Customs & Immigration Enforcement CD-ROM) (on file with author); see also Wadhia, *supra* note 2, at 34-38.

24. See Letter from author to Assoc. Gen. Counsel, Dep’t of Homeland Sec. (Mar. 29, 2011) (on file with author) (appealing adverse decision in FOIA matter 2011FOIA1845).

25. See Wadhia, *supra* note 2, at 35-37.

Concerned in part that ICE did not make a complete search, I filed an appeal with ICE on March 29, 2011, hoping to receive more data.²⁶ ICE denied the appeal on September 27, 2011, concluding that, even after a further search, there were no records responsive to my request.²⁷

After some deliberation, I filed a FOIA complaint with the United States District Court for the District of Columbia seeking agency records concerning deferred action.²⁸ The lawsuit sought all records by ICE concerning prosecutorial discretion and deferred action.²⁹ In a response dated June 12, 2012, ICE conceded to most of the procedural history detailed in my complaint but denied that I was entitled to any relief under FOIA.³⁰ Thereafter, the Department of Justice (DOJ), ICE, and I conferred on the lawsuit and on June 25, 2012, filed a joint briefing schedule in the District Court with the goal of reaching a settlement.³¹ Between June 2012 and September 2012, the DOJ and ICE attorneys assigned to my case and I discussed the nature of the records I was requesting and the limitation that ICE had in providing records for deferred action cases prior to fiscal year 2011, or for producing entire case files for deferred action cases in any year.³² Ultimately, we were able to settle the case without a trial and it was dismissed on October 1, 2012.³³ Notably, ICE also confirmed that prior to fiscal year 2012, “ICE did not formally track deferred action statistics and, as such, no accurate, retrievable statistics on deferred action are available from ICE databases.”³⁴

SCOPE OF DATA PROVIDED BY ICE

As part of the settlement, ICE provided me with deferred action data collected from all 24 of ICE’s ERO field offices.³⁵ ICE Headquarters

26. See Letter from author to Assoc. Gen. Counsel, Dep’t of Homeland Sec., (Mar. 29, 2011) (on file with author).

27. Letter from Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Sep. 27, 2011) (on file with author) (regarding matter number OPLA-181, 2011).

28. Complaint for Declaratory and Injunctive Relief, *Wadhia v. Dep’t of Homeland Sec.*, No. 12 Civ. 231 (D. D.C. Jan. 3, 2012).

29. *Id.* at 1.

30. Answer to Complaint, *Wadhia*, No. 12 Civ. 231 (D. D.C. June 12, 2012).

31. Joint Dispositive Motion Schedule, *Wadhia*, No. 12 Civ. 231 (D. D.C. June 25, 2012).

32. See series of e-mails between author and DOJ/ICE attorneys (June 2012 through Sept. 2012) (on file with author).

33. *Wadhia*, No. 12 Civ. 231 (D. D.C. Oct. 1, 2012).

34. Letter from Catrina M. Pavlik-Kennan, FOIA Officer, to author (Sept. 26, 2012) (on file with author).

35. See Letter from Catrina M. Pavlik-Kennan, FOIA Officer, to author (Sept. 26, 2012) (on file with author). The 24 field offices are distributed across the United States and cover certain jurisdictional areas, usually more than one state. The field offices are located in the following locations: Atlanta, GA; Baltimore, MD; Boston, MA; Buffalo, NY; Chicago, IL; Dallas, TX; Denver, CO; Detroit, MI; El Paso, TX; Houston, TX; Los Angeles, CA; Miami, FL; Newark, NJ; New Orleans, LA; New York, NY; Philadelphia, PA; Phoenix, AZ; Salt Lake City, UT; San Antonio, TX; San Diego, CA; San Francisco, CA; Seattle, WA; St. Paul, MN; and Washington, DC. See *Enforcement and*

collected the data from each field office. The data gathered included cases processed between October 1, 2011, and June 30, 2012. ICE also provided data on applications for “stays of removal” from all 24 ICE ERO field offices.³⁶ An administrative stay of removal is a form of prosecutorial discretion and, like its deferred action cousin, enables a noncitizen without legal status to apply for protection from removal and possible work authorization.³⁷ However, unlike deferred action, a stay of removal is available to the noncitizen only after a removal order has been entered and may only be granted by ICE.

While some of the data about prosecutorial discretion sometimes conflates the statistics between stays of removal and deferred action,³⁸ the documents I received from ICE as part of the lawsuit disaggregates the data and provides related data for each ERO field office in a separate sheet within the same Excel document. Below is a list of each ERO office and the jurisdiction it covers.³⁹

As part of the settlement agreement, ICE collected seven data points from each field office:

1. Applicant’s birth date (as collected from the ENFORCE database)
2. Applicant’s citizenship country (as collected from the ENFORCE database)⁴⁰
3. Whether the applicant was represented by counsel⁴¹ (as provided from the GEMS database)
4. Whether the applicant applied for deferred action or a stay of removal
5. Whether the application was granted
6. The date a decision was made
7. The reason the application was granted or denied

Removal Operations, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/contact/ero/> (last visited Dec. 21, 2012).

36. See Letter from Catrina M. Pavlik-Kennan, FOIA Officer, to author (Sept. 26, 2012) (on file with author).

37. See *U.S. Immigration and Customs Enforcement*, Form I-246, Application for a Stay of Deportation or Removal, <http://www.ice.gov/doclib/news/library/forms/pdf/i246.pdf>; 8 C.F.R. § 241.6 (2013).

38. See Shoba Sivaprasad Wadhia, *Reflections on Prosecutorial Discretion One Year After the Morton Memo*, 2012 EMERGING ISSUES 6417, (June 2012), available at <http://www.lexisnexis.com/Community/immigration-law/blogs/blogs/archive/2012/06/21/reflections-on-prosecutorial-discretion-in-immigration-context-1-year-after-the-morton-memo.aspx>.

39. *Enforcement and Removal Operations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, www.ice.gov/contact/ero/ (last visited Nov. 14, 2012).

40. Though the country of citizenship can differ from nationality, I will use both terms interchangeably for purposes of this article.

41. Pavlik-Kennan, *supra* note 36 (explaining that the field for counsel is a “non-mandatory” one and therefore may be inconsistently filed by ICE counsel).

CHART 2: ICE ERO FIELD OFFICES

ERO Field Office	Area of Responsibility
Atlanta	Georgia, North Carolina, South Carolina
Baltimore	Maryland
Boston	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island
Buffalo	Upstate New York
Chicago	Illinois, Indiana, Wisconsin, Missouri, Kentucky, Kansas
Dallas	North Texas, Oklahoma
Denver	Colorado, Wyoming
Detroit	Michigan, Ohio
El Paso	West Texas, New Mexico
Houston	Southeast Texas
Los Angeles	Los Angeles Metropolitan Area (Counties of Los Angeles, Orange, Riverside, San Bernardino), and Central Coast (Counties of Ventura, Santa Barbara, and San Luis Obispo)
Miami	Florida, Puerto Rico, U.S. Virgin Islands
Newark	New Jersey
New Orleans	Alabama, Arkansas, Louisiana, Mississippi, Tennessee
New York	The five boroughs and the following counties: Dutchess, Nassau, Putnam, Suffolk, Sullivan, Orange, Rockland, Ulster, and Westchester
Philadelphia	Delaware, Pennsylvania, West Virginia
Phoenix	Arizona
Salt Lake City	Utah, Idaho, Montana, Nevada
San Antonio	Central South Texas
San Diego	San Diego and Imperial County
San Francisco	Northern California, Hawaii, Guam
Seattle	Alaska, Oregon, Washington
St. Paul	Iowa, Minnesota, Nebraska, North Dakota, South Dakota
Washington, D.C.	District of Columbia, Virginia

Although the data is detailed and allows for meaningful analysis, it does have some limitations. First, there are several data points about the applicant that were not contained in the spreadsheets; among these: who initiated the case, gender, number of family members, level of education, whether work authorization was granted, whether the individual was detained, what stage of enforcement the individual was at when her deferred action case was processed (pre-removal, post-detention, post-removal, etc.), and length of stay in the United States, and others. Moreover, the data contains no information about the background of the individuals making decisions about

the deferred action or stay of removal cases.⁴² Likewise, the data appears to be limited to cases that have been decided, ignoring those that are pending or were abandoned. Such records can be useful for determining the universe of cases on the agency's docket during a given time period.

Similarly, each entry on the spreadsheet is subject to human error when entering the data. This can result in inconsistencies and questionable entries. For example, one entry states that the applicant's stay was denied, but then in the comments column it says that a stay was granted. The number of these questionable entries is very limited, and the data is reported "as is" for purposes of this article.

Since the data provided by ICE lacks identification markers for each individual applicant (such as an alien registration number), I cannot verify if a single applicant submitted multiple applications for deferred action or submitted an application for both deferred action and a stay of removal. It was a challenge to review voluminous data from the USCIS in 2011, as some local offices appeared to have duplicate information for the same case in their deferred action logs.⁴³ Despite these limitations and in light of the deliberations leading to settlement of the lawsuit and the careful research conducted by ICE to create the data leading to such settlement, my analysis assumes that most, if not all, of the 3,837 cases are separate cases.

FINDINGS

ICE Processes more Stays of Removal than Deferred Action Cases

The data yielded a total of 3,837 cases, 698 of which were deferred action cases while 3,139 were stay of removal cases. Of the 698 deferred action cases, 324 were granted. Of the 3,139 stay of removal cases, 1,957 were granted. While this article focuses on deferred action cases, I have included below a few raw numbers on stay of removal cases.

Humanitarian and Adverse Factors Identified in Deferred Action Cases

Many of the factors from the Morton Memo were identified in the 698 cases granted deferred action. While the data provided by ICE contains a field titled "Reason for Grant/Denial," each field contains only one factor for each entry. Therefore, the total number of reasons given (including "other") is exactly equal to the total number of cases reported. The five primary factors (excluding "other") identified in granted cases were:

42. Insight about the background and experience of adjudicators has contributed to a rich analysis in other immigration studies. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

43. See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 38-44 (2011).

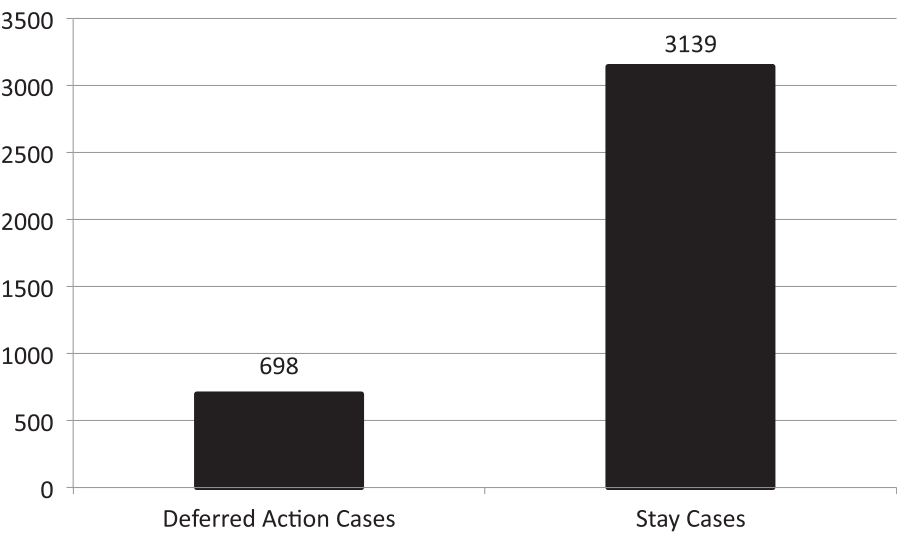


FIGURE 1: Total Deferred Action vs. Stay of Removal Cases

- Presence of a USC dependent;
- Presence in the United States since childhood;
- Primary caregiver of an individual who suffers from a serious mental or physical illness;
- Length of presence in the United States; and
- Suffering from a serious mental or medical care condition.⁴⁴

The instant data fails to identify the factors leading to the greatest number of deferred action “grants” (“Other”), which raises procedural questions about whether ICE should be including additional fields in its data collection. Notably, only 30 cases, or 9%, were identified as based on the individual’s “serious mental or physical illness”—that number appears low in contrast to the types of cases that have historically involved this factor. Overall, however, the identified reasons for deferred action grants are consistent with the types of cases that have been granted historically. As an illustration, deferred action data collected by Leon Wildes in the early 2000s indicated that 89% of the 499 deferred action cases furnished to Wildes were granted, and based on the following seven specific categories: (1) separation of family; (2) medically infirm; (3) tender age; (4) mentally incompetent; (5) potential negative publicity; (6) victims of domestic violence; and

44. Note that the ICE data differentiates between whether the *applicant* suffered from a serious mental or physical illness and whether the applicant was the *primary caretaker* of someone who suffered from a serious mental or physical illness. The same is true for whether the applicant was a minor or elderly individual, or just the caretaker of a minor or elderly individual. Moreover, though the data from ICE identified “length of presence in the U.S.” as the fourth most common factor (excluding “other”) for why a deferred action case was granted, the data does not include the length of time each individual has been present in the U.S.

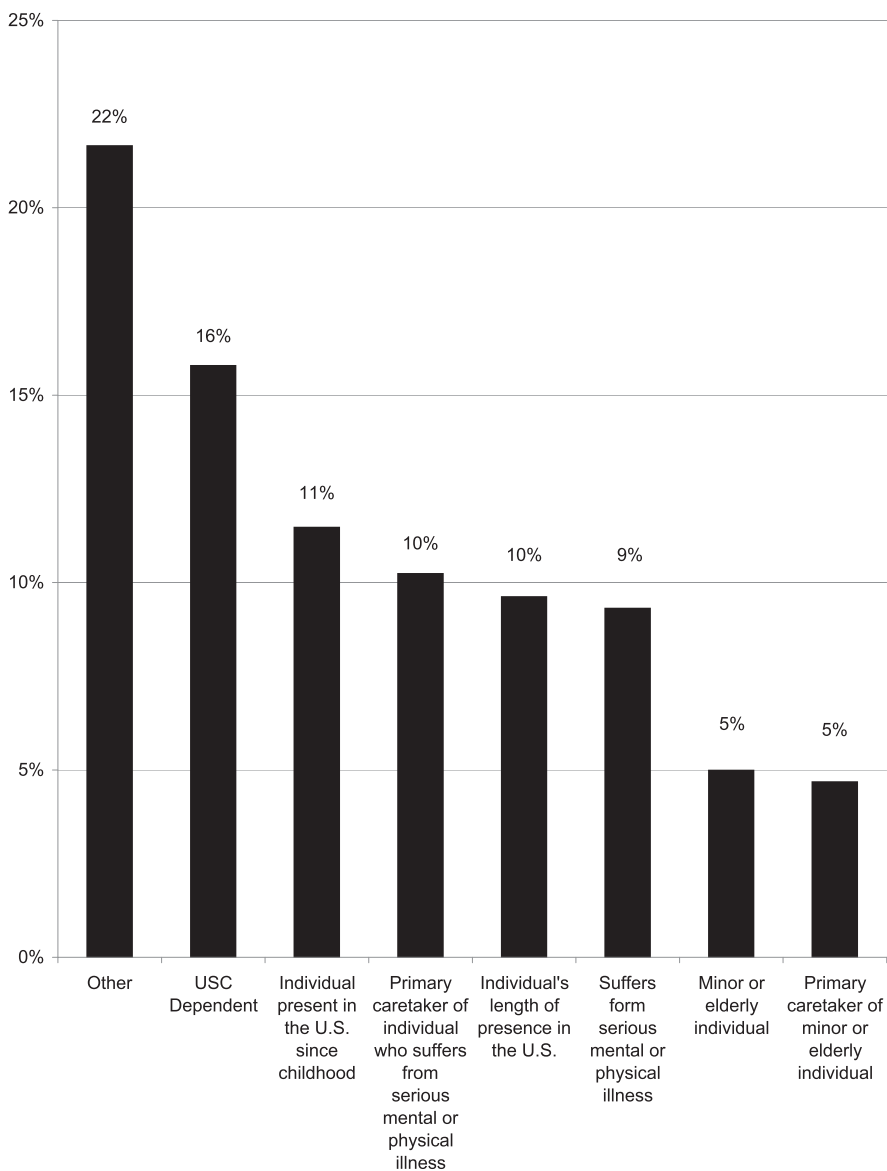


FIGURE 2: Most Common Reasons For Deferred Action Grant⁴⁵

(7) elderly age.⁴⁶ Similarly, in my analysis of 107 deferred action cases approved, pending, or unknown furnished by USCIS in 2011, 50 (46.7%)

45. Note that the total displayed in Figure 2 does not add up to 324 because there were 15 additional reasons for a deferred action grant, totaling 36 occurrences, which were omitted from the graph.

46. See Wadhia, *supra* note 2, at 32-34 (citing Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819, 830 (2004)).

involved a serious medical condition, 19 (17.8%) involved cases in which the applicant had USC family members, 22 (21.5%) involved persons who had resided in the U.S. for more than 5 years, and 32 (29.9%) cases involved persons with a tender or elder age. Many of these cases (27.1%) involved more than one “positive” factor.⁴⁷

The data provided by ICE confirms that field officers are required to identify a factor in denying deferred action, but the fields themselves (e.g., “Lack of compelling factors”) are not detailed enough to allow for a meaningful analysis about why a particular case was denied. As illustrated by the instant data, 69 among the 374 denials were based on a criminal history, while 207 cases were denied because of a “lack of compelling factors.”⁴⁸ Looking at the data provided by ICE, the most common factors (excluding “other”) for denials of deferred action were:

- (1) Lack of compelling factors;
- (2) Criminal history; and
- (3) Egregious record of immigration violations.

Notably, the primary reason for denial appears to rest not on one of the negative factors identified by the Morton Memo but rather on a lack of positive “compelling” factors. While it may first appear inconsistent that ICE would deny deferred action in cases that fall outside one of ICE’s key enforcement priorities, it may also be true that such cases are better suited for, or as a practical matter handled through, other prosecutorial discretion tools. Looking at the history of deferred action and the agency’s particular focus on “compelling” equities, not just “low priorities,” it is not surprising that several cases denied in the data set I received from ICE were based on a “lack of compelling factors” without regard to whether or not the case was a high or low priority.⁴⁹

The ICE data lacks consistent information about whether another form of prosecutorial discretion (i.e., cancellation of a notice to appear) was exercised in a case denied for deferred action or a clarification of whether ICE took an enforcement action against a denied case that was both low priority and unexceptional. I have argued elsewhere that deferred action is a special category in contrast to other forms of prosecutorial discretion and as a legal matter should be treated as a substantive benefit worthy of rulemaking rather than one of administrative convenience that can be relegated to a revocable policy document.⁵⁰

47. See *id.* at 42.

48. In a handful of deferred action cases, the “Comments” column included a note about the individual’s criminal history or another factor even though the “Reason” column was marked as “Lack of compelling factors.”

49. See, e.g., Wadhia, *supra* note 2, at 18-21.

50. See, e.g., Wadhia, *supra* note 2, at 9-11.

Composition of Deferred Action Cases among Field Offices

There was a significant variance in the number of deferred action and stay of removal cases processed among field offices. Field offices processed anywhere from 38 to 720 deferred action and stay of removal cases during the time period covered. For example, the data shows that the Miami office processed a far greater number of deferred action and stay of removal cases in contrast to the other 23 field offices. The field offices with the highest number of such cases included the following: Miami, Florida (720 cases); Newark, New Jersey (342); New York City, New York (276); Washington, D.C. (253); and San Francisco, California (203).

An explanation for why ICE processed a far greater number of stays over deferred action cases is elusive at best but may be explained by the fact that stays of removal enjoy more predictability and accessibility for the ICE employee. Unlike deferred action, a stay of removal is grounded in the immigration regulations and furthermore includes a form and a fee that is likely easier for ICE to track and for the employee to justify. Likewise, a stay of removal is a form of relief granted only after a final order of removal is entered, whereas the deferred action remedy may be considered at any stage of the enforcement process and therefore may be viewed as a riskier decision from the viewpoint of ICE, especially early in the enforcement process. Finally, a stay may be viewed as more “temporary” in nature than deferred action because the optics of “deferred action” are more politically controversial.

Looking just at deferred action cases, the composition of deferred action cases among field offices also varied significantly. The field offices with the highest number of deferred action cases were as follows: New York (104 cases, 52 (50%) granted), New Orleans (97 cases, 22 (23%) granted), Washington (76 cases, 65 (86%) granted), Miami (69 cases, 36 (52%) granted), and Newark (42 cases, 17 (40%) granted). The Washington field office had the highest percentage of deferred action cases that were granted among the field offices that had more than 15 cases.

Distribution of Deferred Action Grants Across Field Offices: Five Field Offices Granted more than One-half of the 698 Deferred Action Cases

Certain field offices had a higher volume of deferred action applications as well as granted cases.⁵¹ This subsection offers data on the field offices with the highest volume of grants and denials, and suggests a disparity in the distribution and outcomes of deferred action cases. These differences might be explained by the fact that deferred action requests to ICE are normally made to the field office that lies within the jurisdiction of the applicant’s

51. See Figure 3, *infra*.

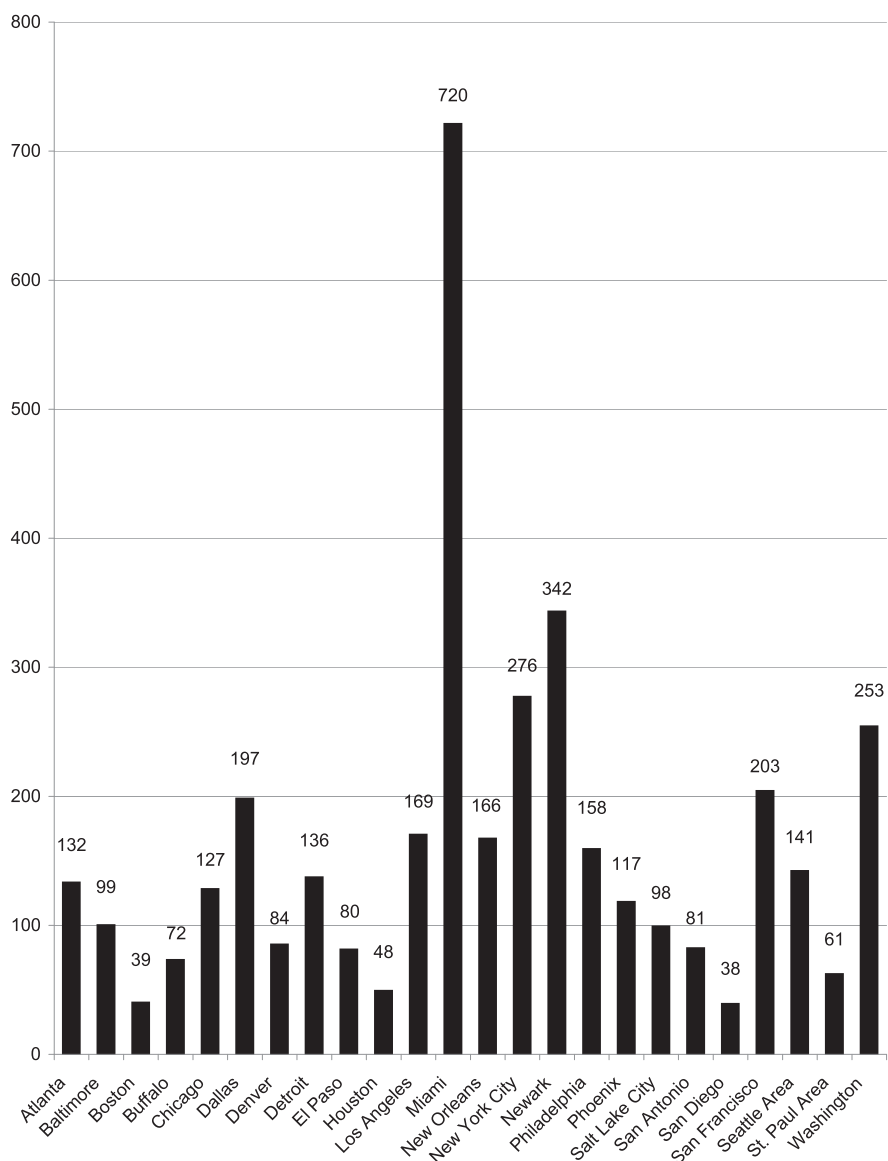


FIGURE 3: Total Cases (Deferred Action and Stay of Removal) by Field Office

residence and that potential applicants for deferred action are concentrated in specific locations. Notably, the jurisdictions covered by the Washington, New York, and Miami field offices have large unauthorized immigrant populations.⁵² An additional explanation for these differences is that deferred

52. See Michael Hoefer, Nancy Rytina, and Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, UNITED STATES DEP'T OF

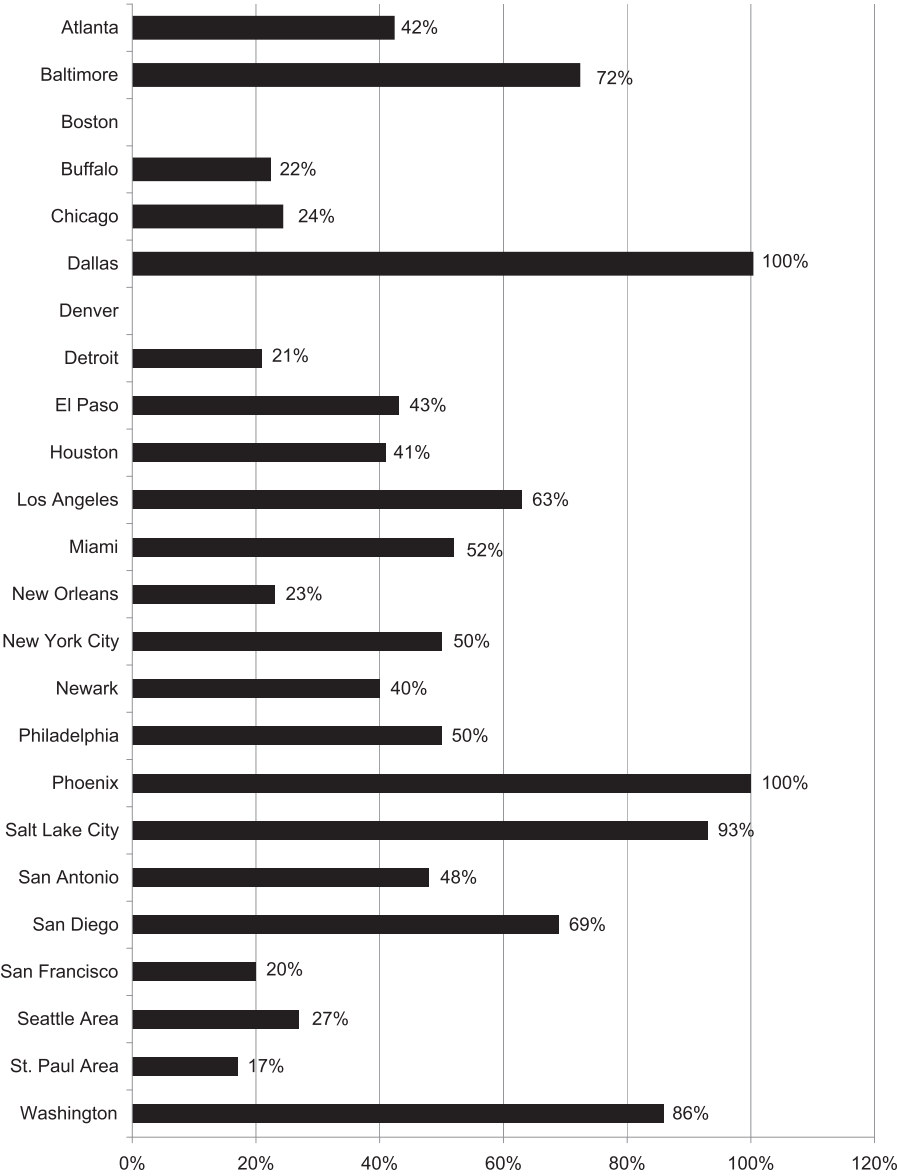


FIGURE 4: Deferred Action Grant Rates by Field Office

action cases are more successful with ICE when the noncitizen is represented or assisted by an attorney. Also, there may be a higher rate of deferred action grants in areas where there are higher concentrations of immigration attorneys.

HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 5 (Mar. 2012), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

The Washington field office had the highest number of grants for deferred action by a field office. Specifically, Washington granted deferred action for 65 of its 76 cases. The most common factors identified for grants at the Washington field office were: (1) primary caretaker of an individual who suffers from a serious mental or physical illness; (2) USC dependent; and (3) individual present in the U.S. since childhood.

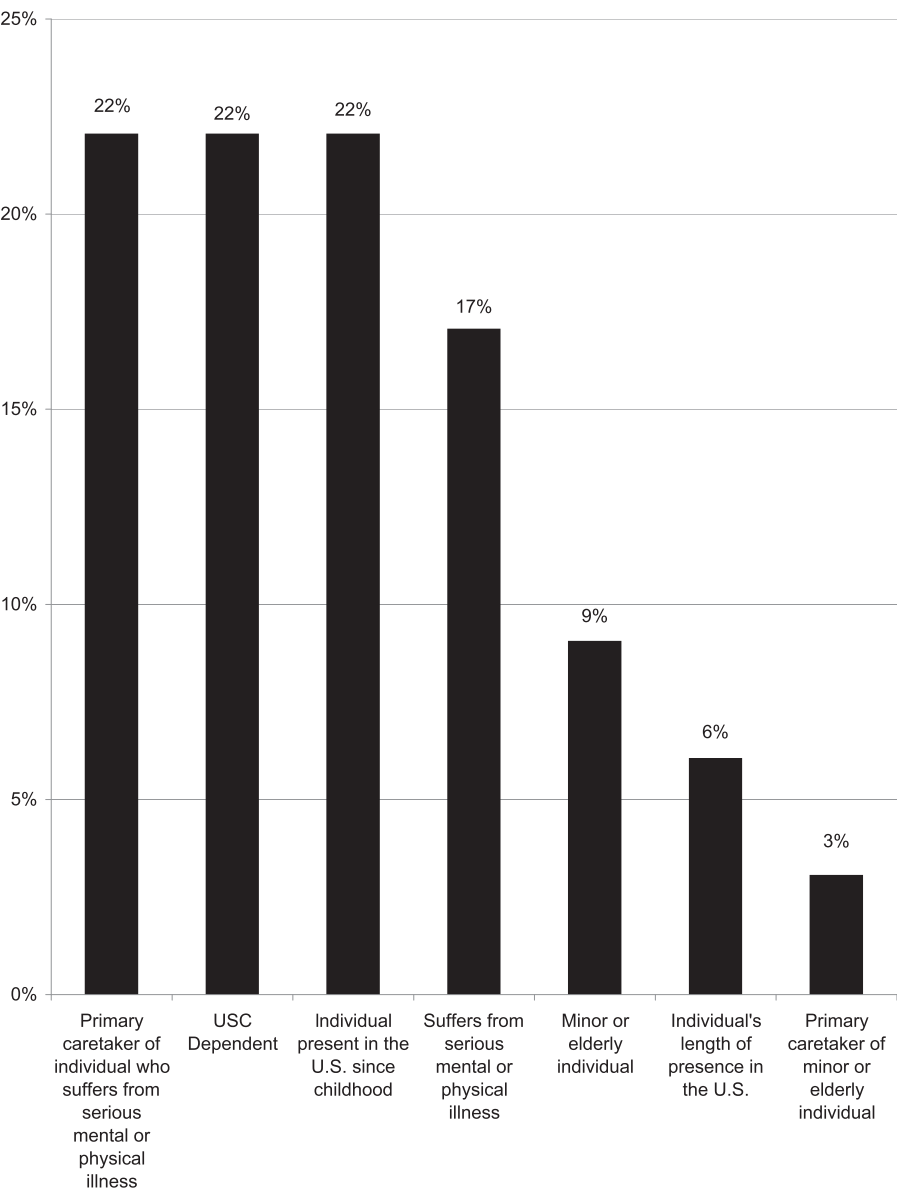


FIGURE 5: (Washington) Most Common Reasons for Deferred Action Grant

The second highest volume of grants took place in the New York City field office. Specifically, 52 of the 104 deferred action cases were granted in New York City. The most common factors identified for New York were: (1) Other; (2) USC dependent; and (3) individual’s length of presence in the United States. Notably, none of the deferred action cases granted in New York were identified as based on a serious mental or physical illness, which historically has driven many deferred action grants.

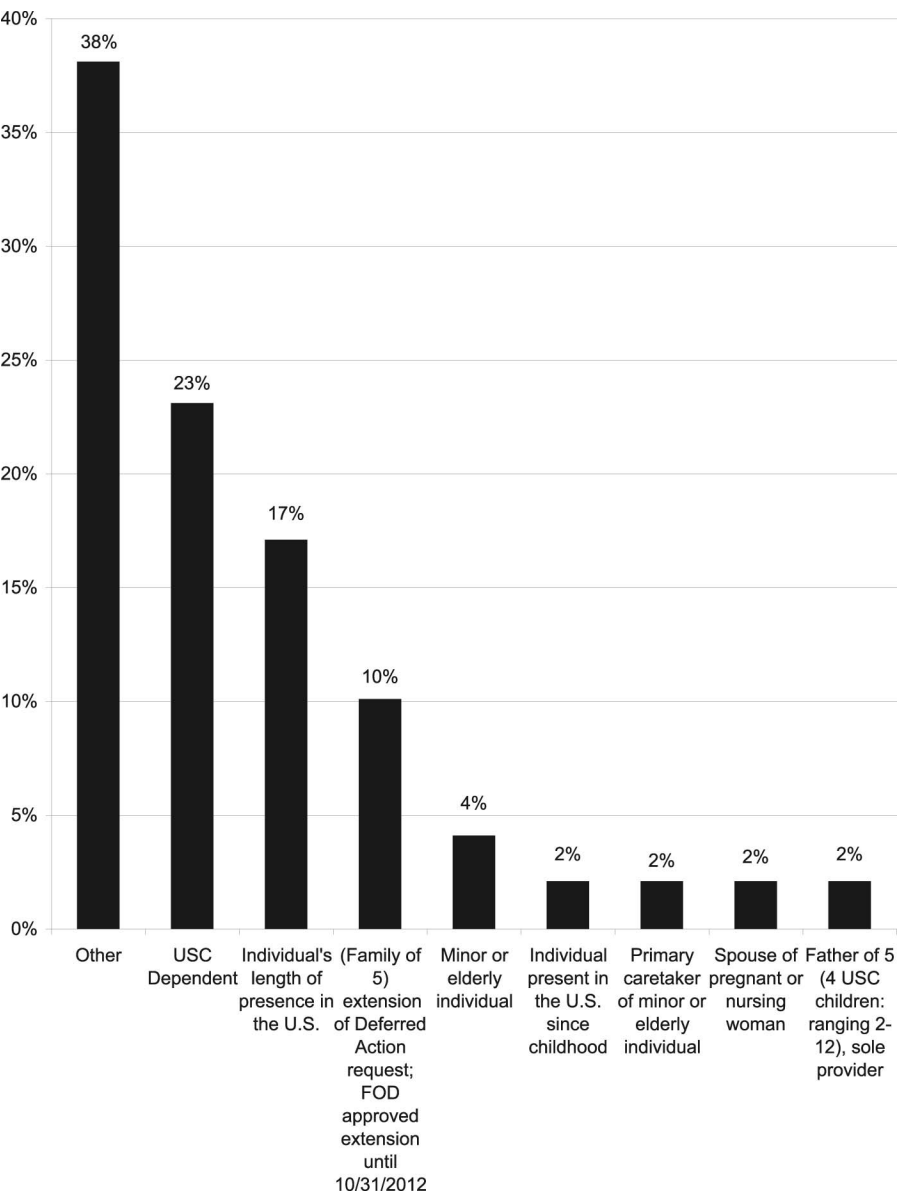


FIGURE 6: (New York) Most Common Reasons for Deferred Action Grant

The third highest volume of deferred action grants took place in the Miami field office, which granted 36 out of 69 cases. Like the New York field office, the most common reasons identified for the granted cases were: (1) individual's length of presence in the United States; (2) Other; and (3) USC dependent.

The gap between the grant rates at the top three field offices and the remaining field offices is apparent. The New Orleans field office had the fourth highest number of deferred action grants, having granted deferred

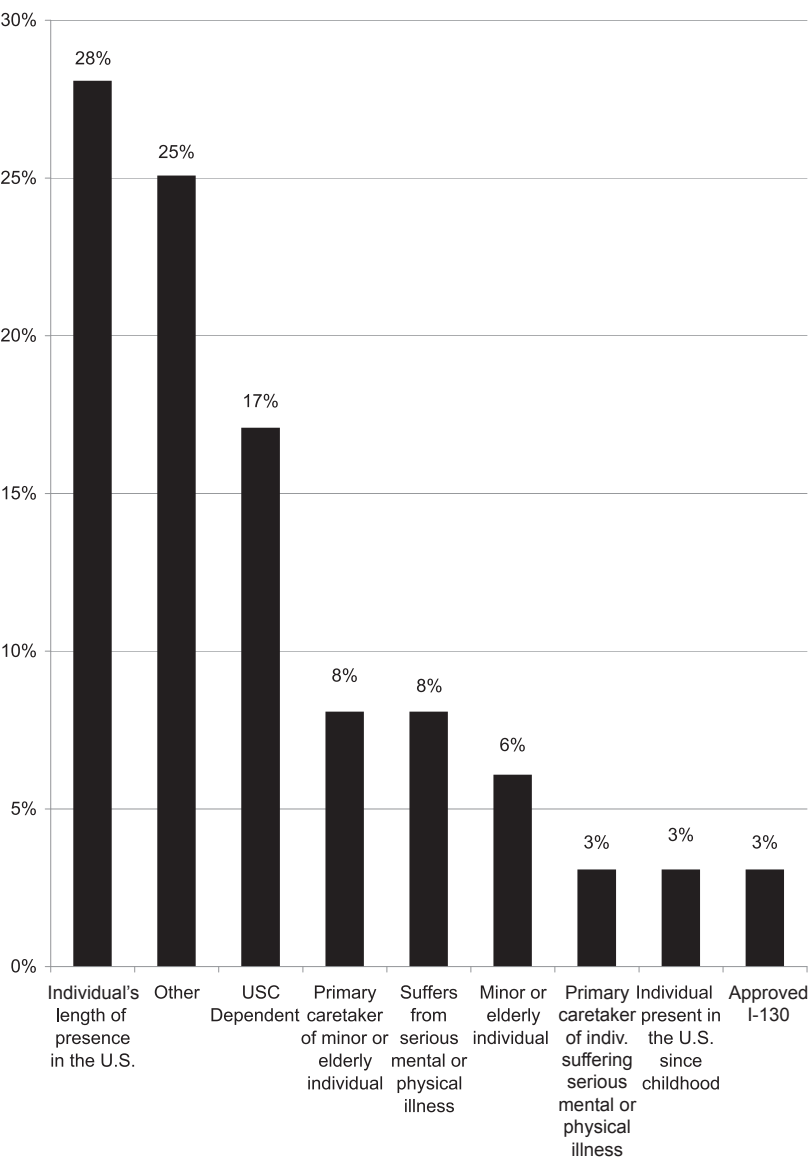


FIGURE 7: (Miami) Most Common Reasons for Deferred Action Grant

action for 22 of 97 cases.

Tied in fifth place for the field office with the highest number of deferred action grants were the Newark field office (17 out of 42 cases granted) and the Philadelphia field office (17 out of 34 cases granted). The reasons listed for Philadelphia include some unique markers such as “PD for those who came to the US as children.” Such cases indicate a decision date of late June

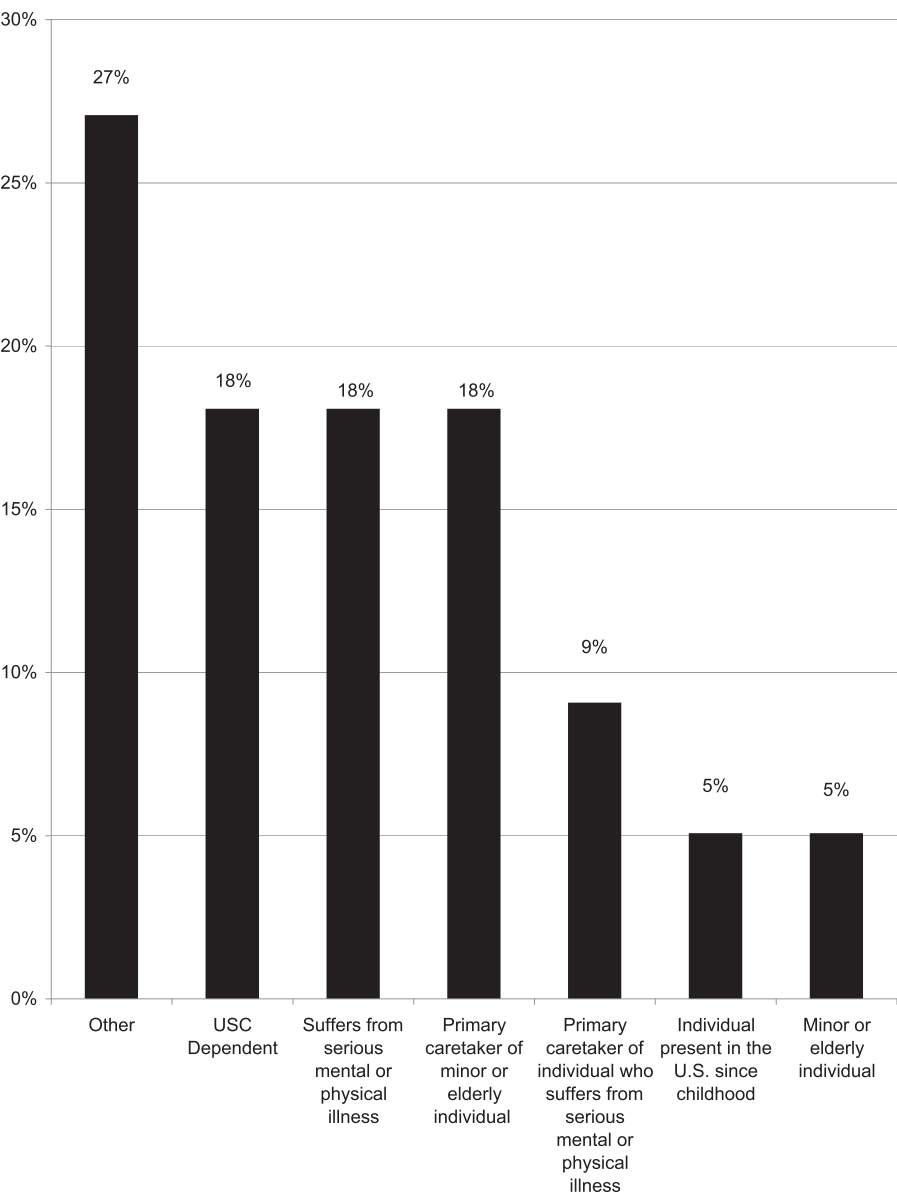


FIGURE 8: (New Orleans) Most Common Reasons for Deferred Action Grant

2012, days after the Obama Administration announced the DACA program but prior to the actual August 15, 2012 implementation date of the program. Perhaps the Philadelphia field office chose to grant deferred action to DACA-eligible cases processed before USCIS formally began processing cases.

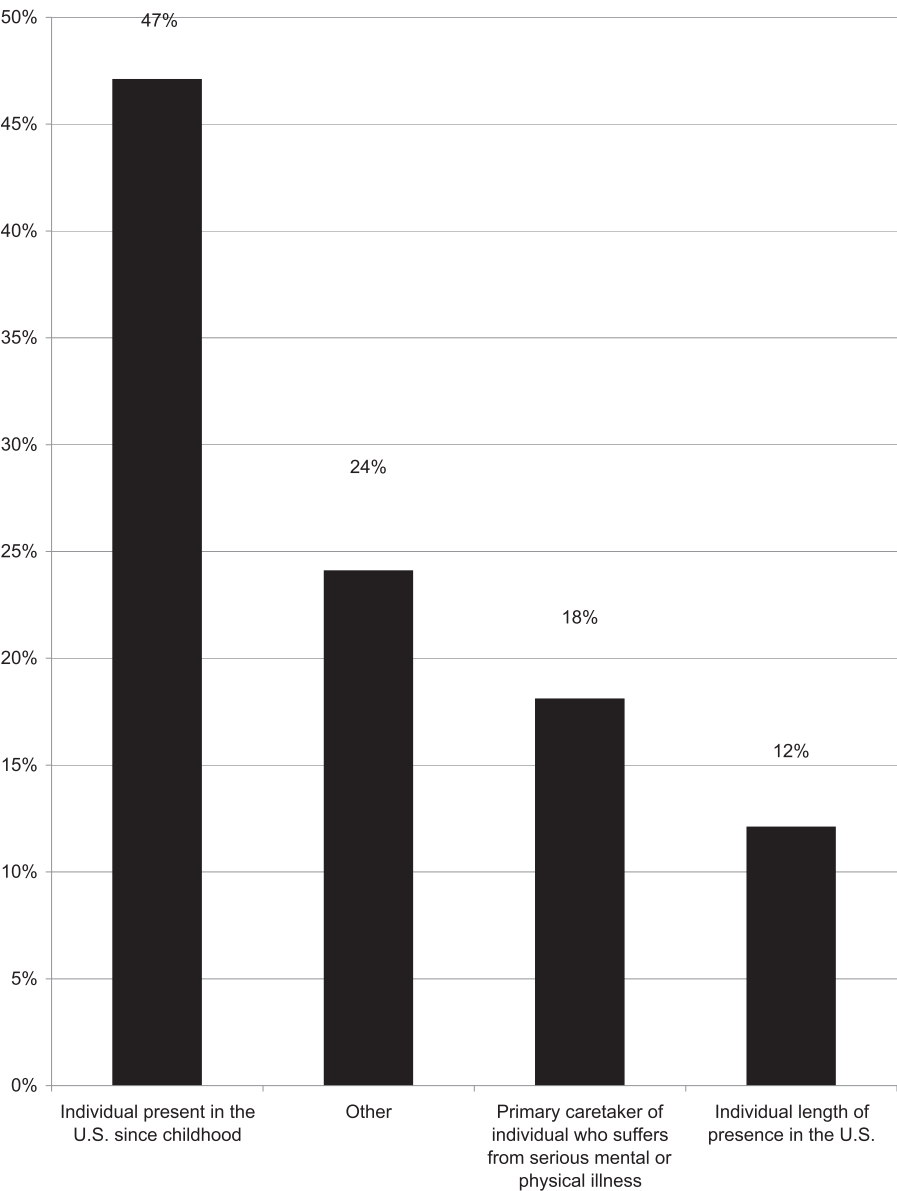


FIGURE 9: (Newark) Most Common Reasons for Deferred Action Grant

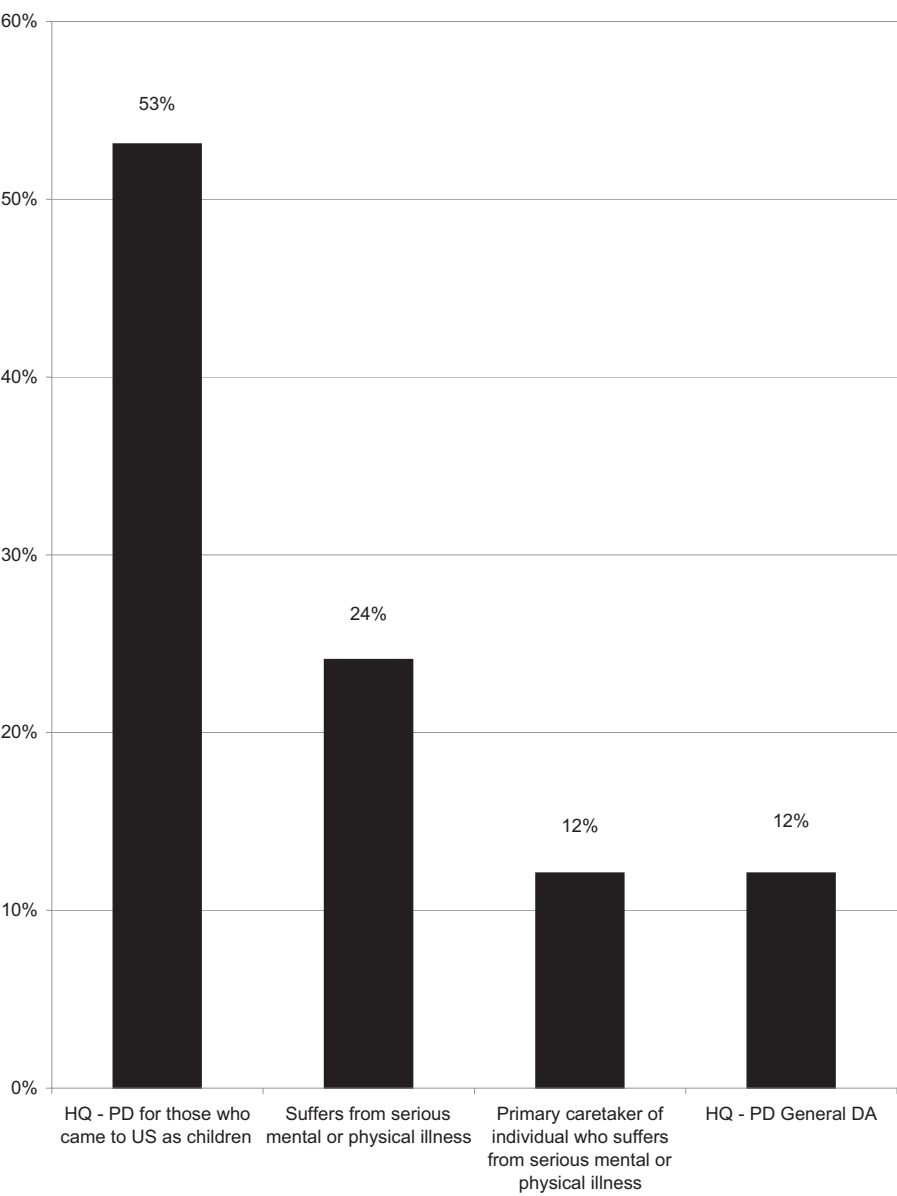


FIGURE 10: (Philadelphia) Most Common Reasons for Deferred Action Grant

The findings outlined above improve transparency by providing potential applicants and attorneys who are working on deferred action cases with information about “how office A handles cases involving a serious medical condition.” These findings also reveal that ICE has limited ways in which the information about deferred action cases is sorted as there is no explanation for what factors contribute to the “Other,” which appears to be the largest

basis for a deferred action grant. There is also no explanation for what constitutes a “lack of compelling factors,” which appeared to be the single greatest basis for a denial in deferred action cases.

Perhaps more importantly, the findings do not include an analysis about how a negative factor interacts with a positive one. For example, how does ICE treat someone who has a criminal history and a USC dependent? This kind of information is vital as it contributes to the public understanding about whether having a criminal history is fatal or just a factor behind a deferred action determination. Based on the information that we do have, the basis for a grant appears to rest more on the positive equities of the individual, many of which have served as the basis for deferred action historically. To recap, the most common reasons given for a deferred action grant in the 324 cases include: having a USC dependent; being an individual in the United States since childhood; and, being a primary caregiver of an individual who suffers from a serious mental or medical illness or long time presence in the United States.

Distribution of Deferred Action Denials across Field Offices: Five Field Offices had a Significantly Higher Number of Denials than the Average Denial Rate at Field Offices

The data provided by ICE shows that the New Orleans field office had the highest number of cases denied deferred action—75 out of 97 cases. The most common factors identified in the New Orleans data were: (1) lack of compelling factors; and (2) criminal history.

Though the New York City field office was identified as the location with the second highest number of deferred action grants, it also came in as yielding the second highest number of denials (52 out of 104 deferred action cases were denied). The most common reason for the cases denied in New York City was a lack of compelling factors. Notably, only one of the denials was identified as having been based on a criminal history.

The field office with the third highest volume of denials was the Miami Field Office, which had 33 cases denied out of a total 69. Like with New Orleans and New York City, the most common reason for denial in the Miami field office was a lack of compelling factors. Five of the cases were identified as being based on a criminal history.

The fourth highest volume of denials took place at the Detroit Field Office where 26 out of 33 deferred action cases were denied. This means that 79% of all cases were denied deferred action at the Detroit Field Office. The most common reason for the denial was due to a lack of compelling factors, only one case was denied because of criminal history.

The fifth highest volume of denials took place at the Newark Field office where 25 out of 42 cases were denied deferred action, again largely due to a lack of compelling factors. Notably, 5 of the 25 (20%) cases denied were due to a criminal history. It is worth noting that while I have limited the graphs to

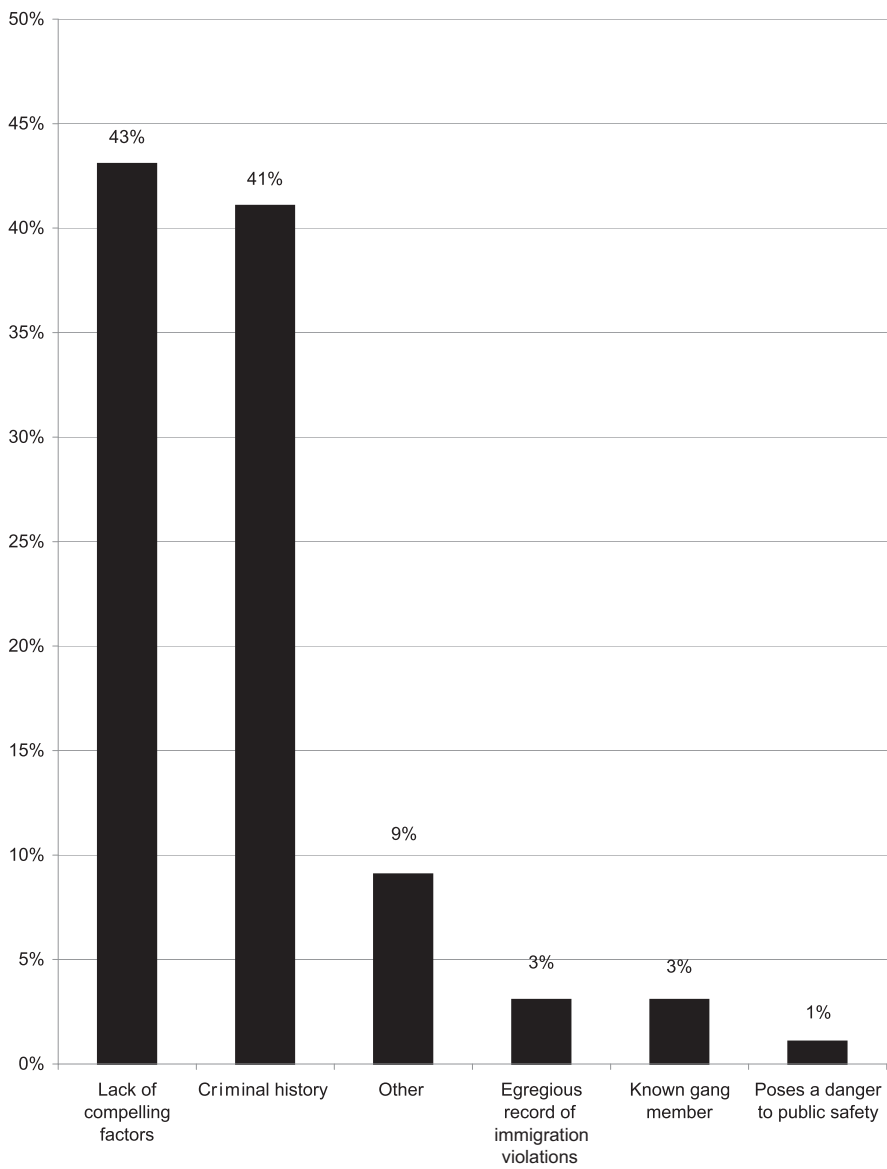


FIGURE 11: (New Orleans) Most Common Reasons for Deferred Action Denial

the “Top 5” field offices, the office with the sixth highest number of denials, Seattle, was just one case shy of Newark, with 24 cases denied.

Disparities in the Outcome of Deferred Actions by Field Office

I was interested in looking at how field offices fared in contrast to the overall mean or average rate of denial and grant in deferred action cases. There was a significant deviation from the mean at several field offices. Of

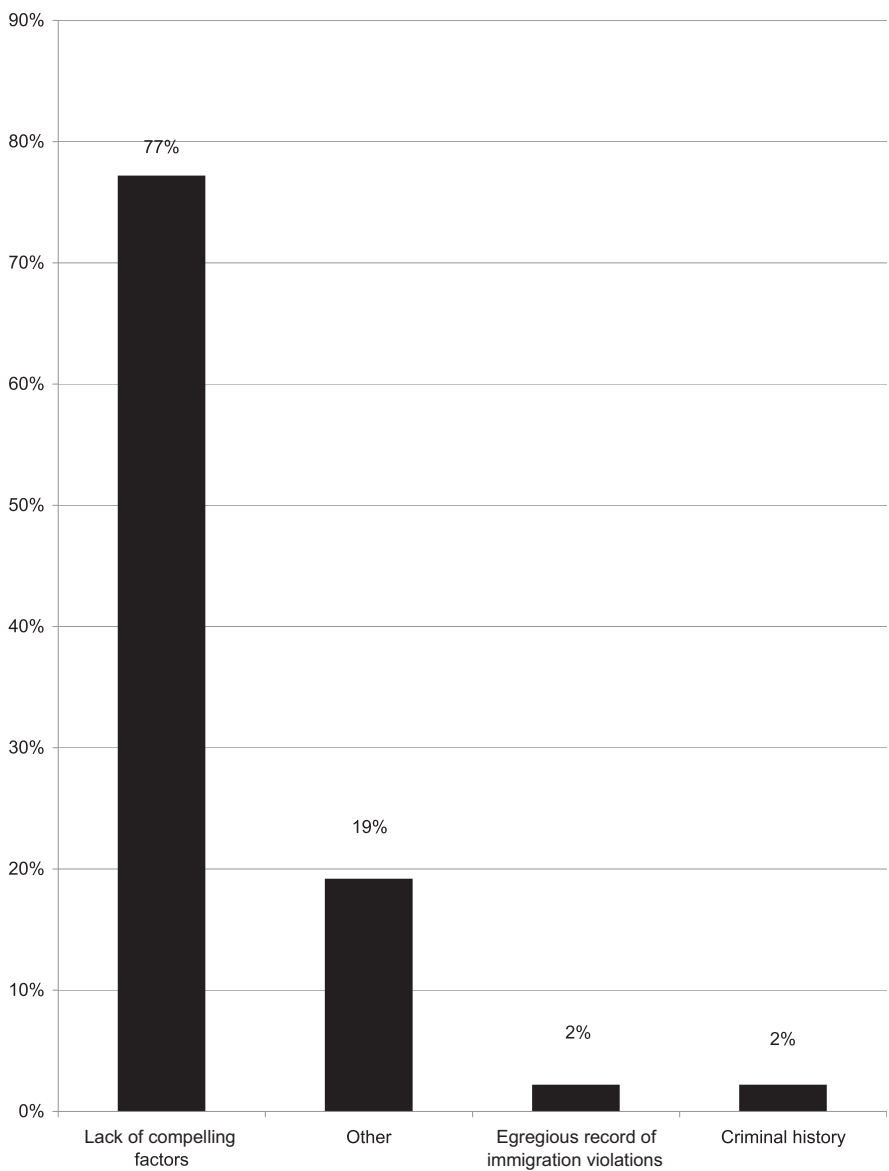


FIGURE 12: (New York) Most Common Reasons for Deferred Action Denial

the 649 deferred action cases at field offices with at least 15 deferred action cases, the mean grant rate was 44.5%, while the mean rate of denial was 55.5%. While 15 cases is a rather small sample size, the disparity is notable: eight offices deviated from the mean by more than 20%.

The variance in deferred action cases among field offices signals disparity and challenges the quality of the program. Administrative law designs have been traditionally examined under values like efficiency, consistency, accuracy and acceptability. When deferred action decisions are disparate, this

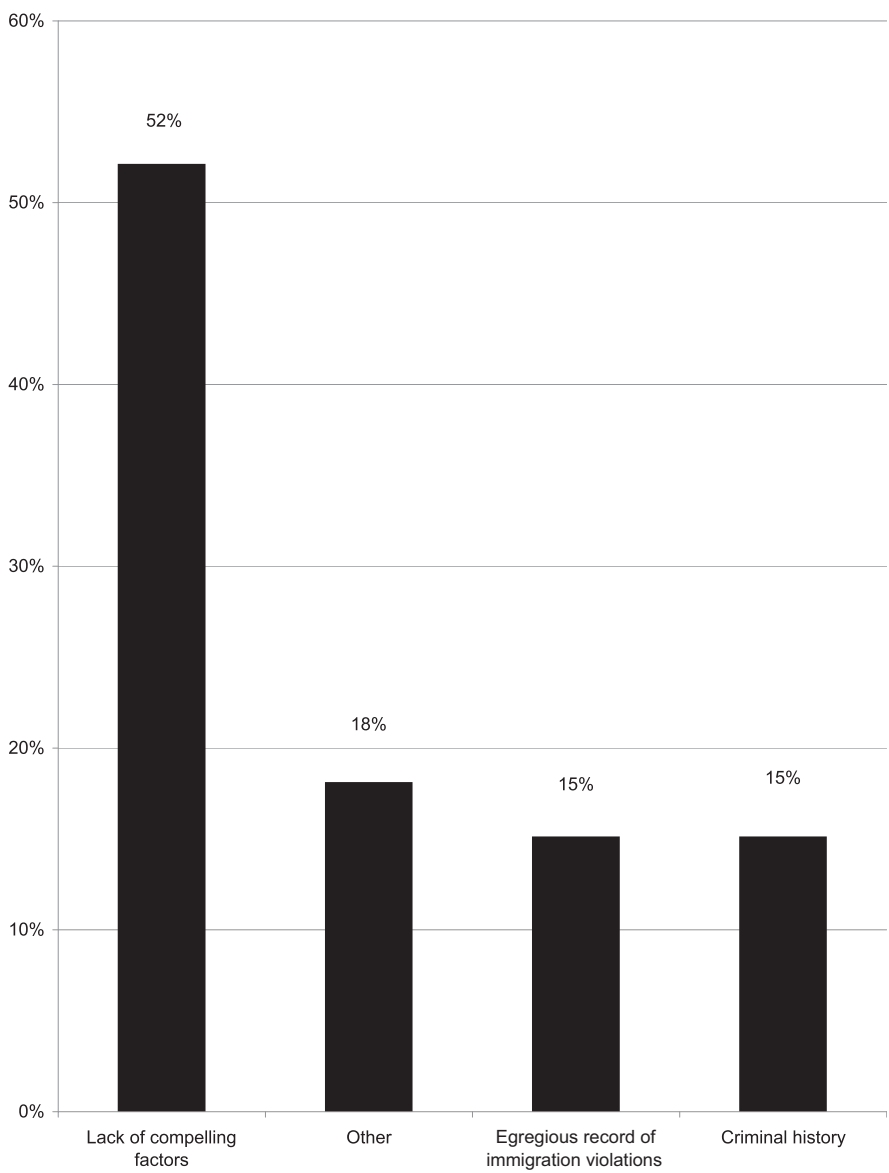


FIGURE 13: (Miami) Most Common Reasons for Deferred Action Denial

leads to uncertainty about whether decisions are achieving these values.⁵³ In particular, the disparity in an agency’s decisions about people who have similarly relevant facts is viewed as unfair and perhaps an abuse of discretion. One complexity, and there are many, is pinning down whether such

53. See e.g., Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1963); see also Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 11-15 (2011).

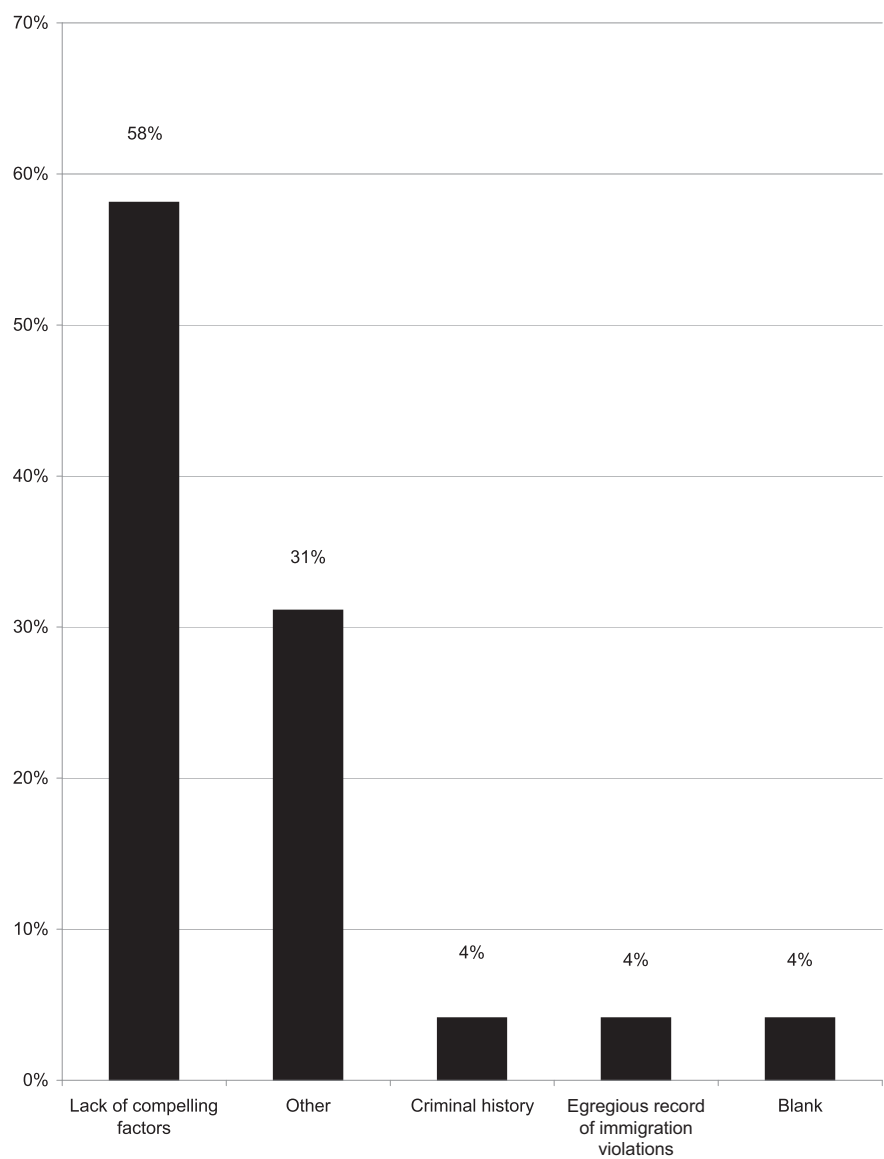


FIGURE 14: (Detroit) Most Common Reasons for Deferred Action Denial

disparity reflects an abuse of discretion or whether the difference in outcome falls within the range of acceptable legal discretion. Likewise, there may be additional variables in each field office that are contributing to different outcomes. For example, it may be that the cases being handled in the Washington Office include ones where the facts are stronger, the compelling equities are greater, and the negative points or criminal histories are lower.⁵⁴

54. For an argument in favor of subjecting some acts of prosecutorial discretion to judicial review under the “arbitrary and capricious” standard of the APA, see Shoba Sivaprasad Wadhia, *Sharing*

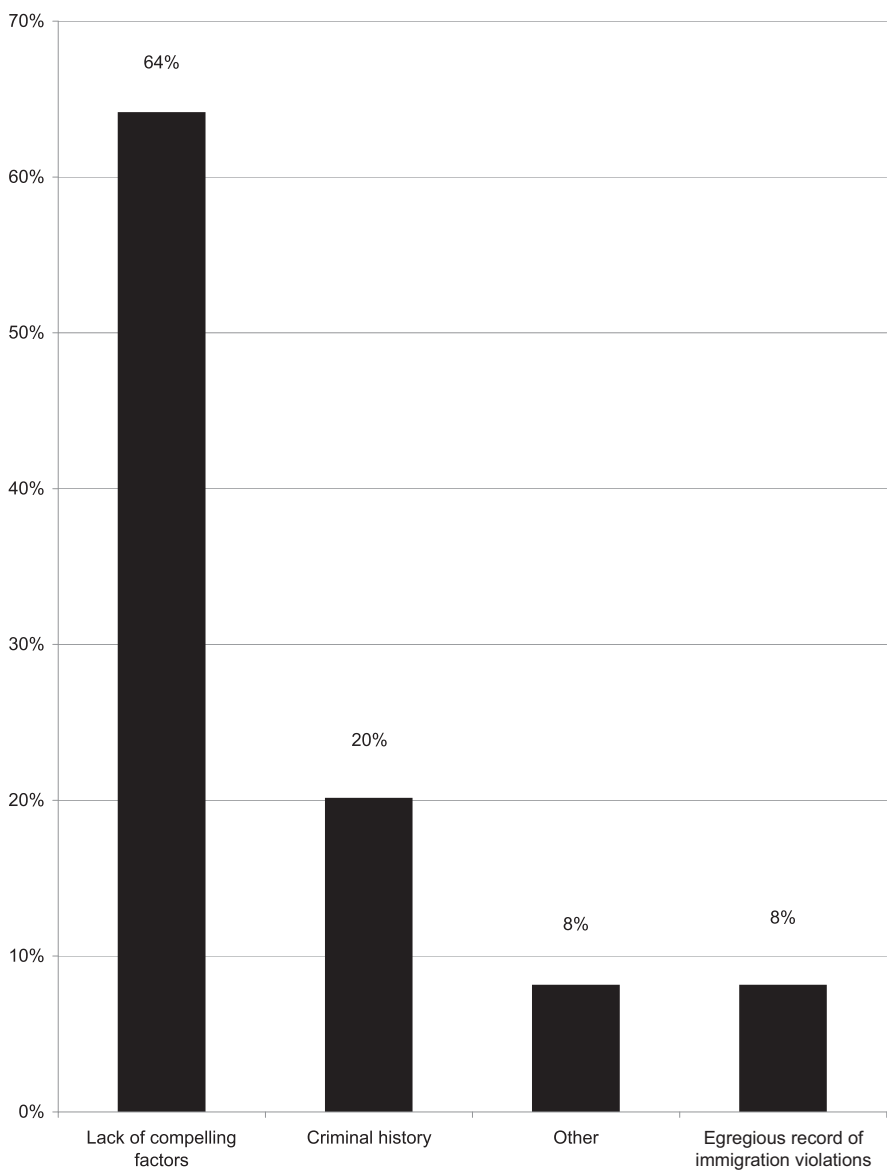


FIGURE 15: (Newark) Most Common Reasons for Deferred Action Denial

Composition of Deferred Action and Stay of Removal Cases by Nationality

There were 78 nationalities (including “unknown”) represented in the deferred action cases collected by ICE as part of the settlement. Mexican nationals were denied deferred action 60% of the time (107 denials out of 177

Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U.N.H. L. REV. 1, 11-15 (2011). Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39 (2013).

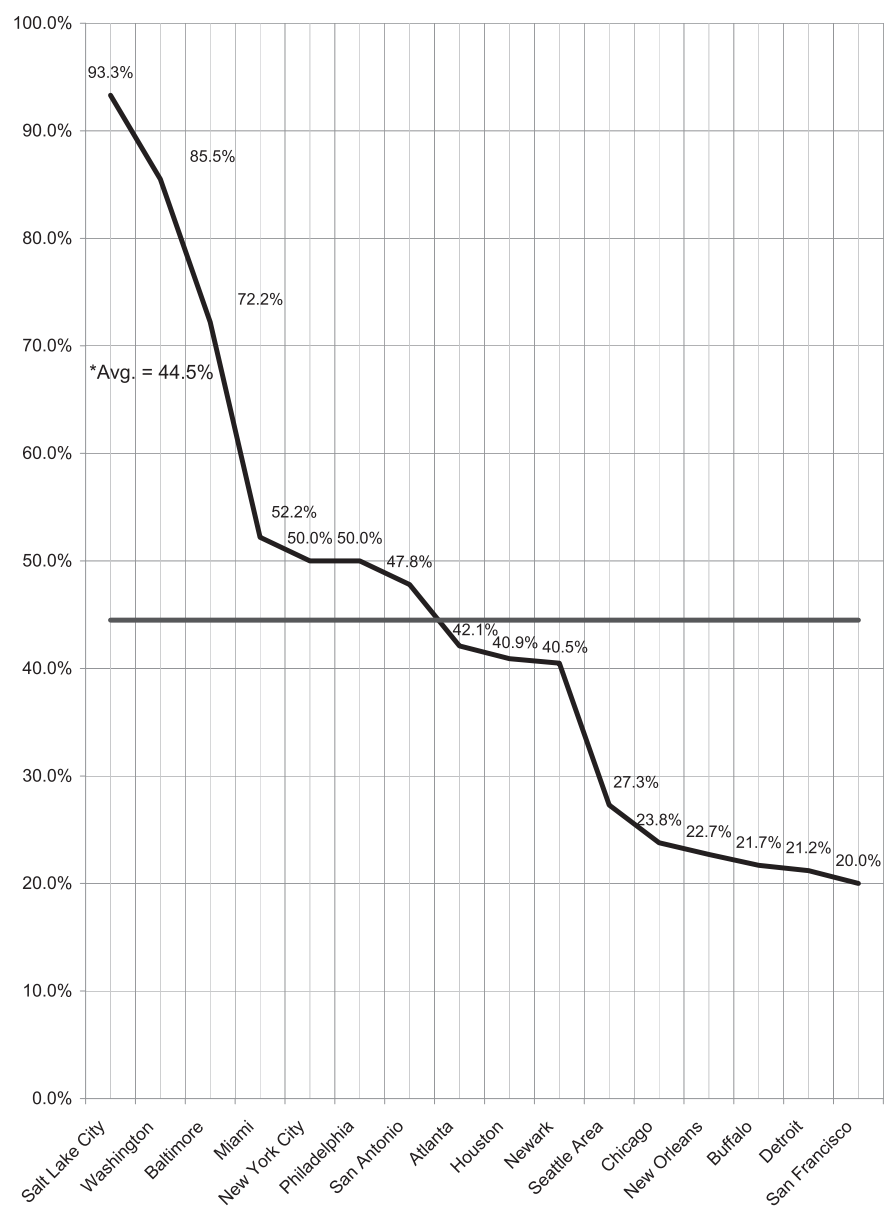


FIGURE 16: Deferred Action Grant Rate by Field Office vs. National Average

applications), while other top contributing countries had lower denial rates: Guatemala’s denial rate was 53% (26 denials out of 49 applications), El Salvador was 43% (18 denials out of 42 applications), Honduras was 49% (23 denials out of 47 applications), and Peru was 19% (3 denials out of 16 applications). The average denial rate was 51%. On the other hand, nationals from Indonesia, China, India, Bangladesh, and Venezuela were denied deferred action at least 80% of the time.

Most Common Reasons For Grant/Denial By Nationality

In addition to categorizing the deferred action outcomes by field office to examine whether trends differed by location, I wanted to see if there was any relationship between the outcome and nationality involved in a particular deferred action case. Notably, the most common reason for a deferred action grant varied among nationalities. The top four nationalities in terms of the number of deferred action grants were Mexico (with 70), Honduras (24),

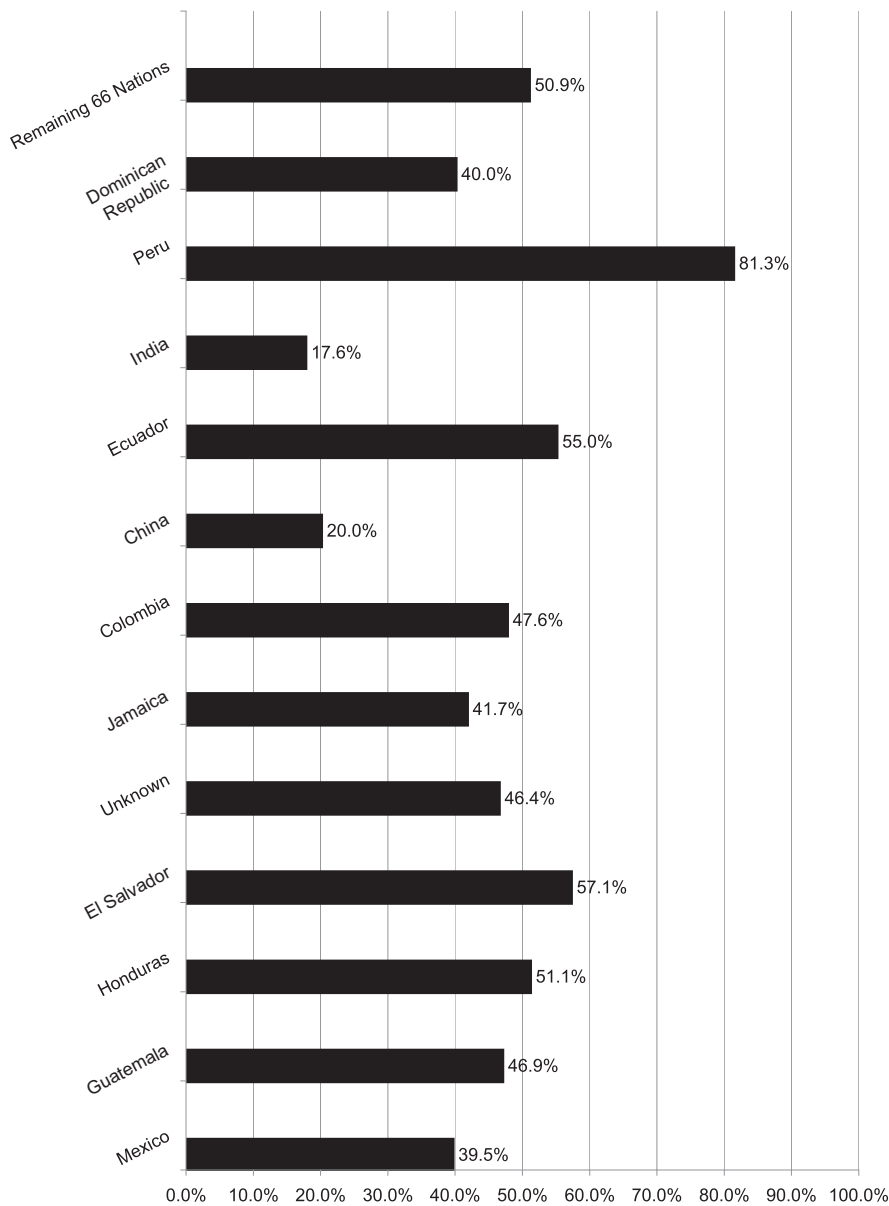


FIGURE 17: Deferred Action Grant Rates by Nationality

El Salvador (24), and Guatemala (23). Aside from these high-volume countries, three other nationalities with more than 15 deferred action cases varied significantly from the average grant rate: India (17.6%), China (20%), and Peru (81.3%).

Mexico had the highest number of cases and also the highest number of grants. Specifically, 70 out of 177 deferred action cases involving individuals

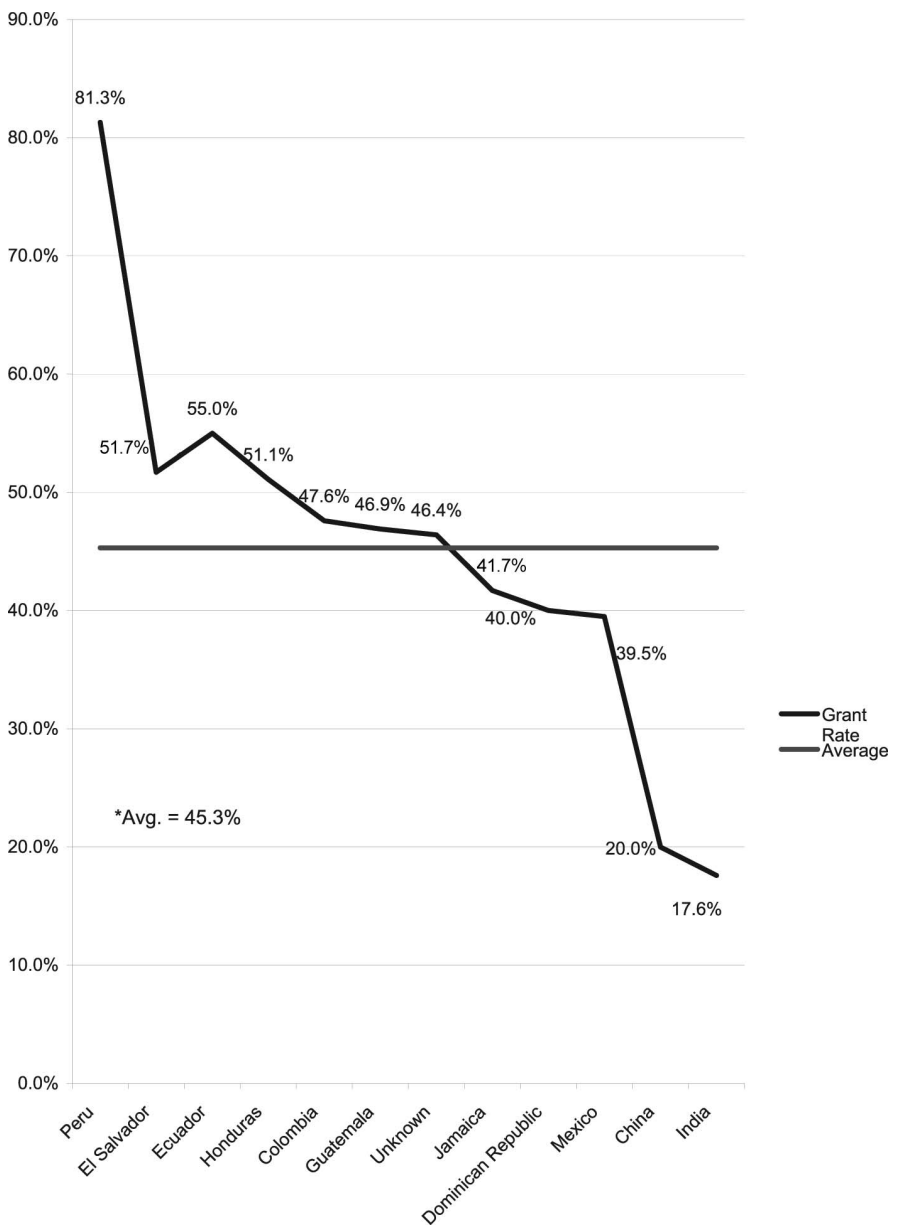


FIGURE 18: Deferred Action Grant Rate by Nationality vs. National Average

born in Mexico were granted. There was great variety in the reason for the grant, as shown by the graph below.

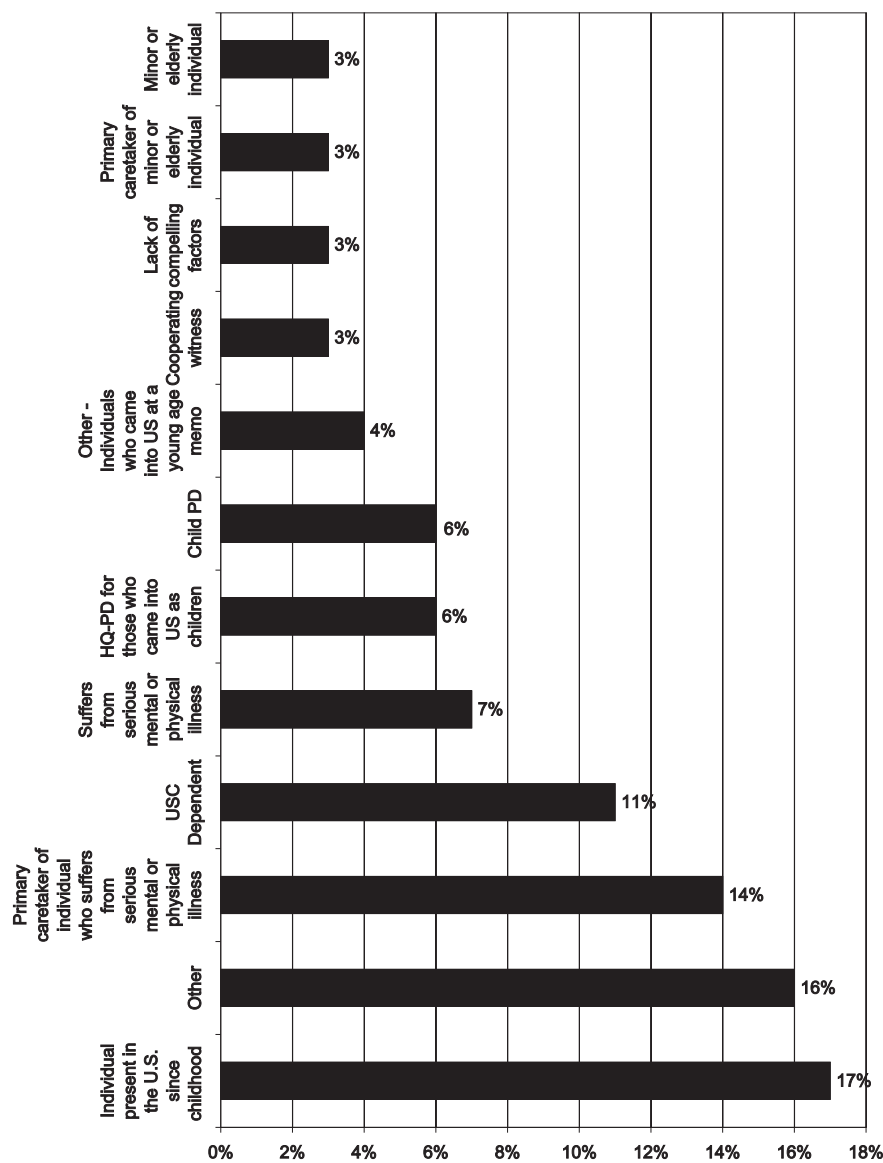


FIGURE 19: (Mexico) Most Common Reasons for Deferred Action Grant⁵⁵

The variance seen in Mexico was borne out in the next three highest countries by volume. For Honduras, the most common reason (albeit for only

55. Note that not every reason for a deferred action grant could fit in the graph. Therefore the totals displayed do not add up to 70.

25% of the grants issued) was that the noncitizen was a primary caretaker for a person with a serious mental or physical illness. This was matched by the number of grants allotted to Hondurans based on “other” factors. For nationals of El Salvador, USC dependent was the most frequent cause (42%), while Guatemalan nationals were most often granted deferred action because they were present in the United States since childhood (26%). Just as in the overall data, “lack of compelling factors” was the primary reason provided for denials in all of the top four nationalities by volume.

The nationalities with outlier grant rates included Peru, India, and China. The particular countries may explain the deviance in rate from the mean. With most other countries (as shown in Figure 19) accounting for more than 15 cases approaching the average grant rate, there seems to be little other variance by country. Notably, 16 out of the 20 cases (80%) involving Chinese nationals were denied and none of these denials were based on a criminal history. Instead, 14 of these cases were denied because of a “lack of compelling factors” and 2 of these cases were denied because of “Other” reasons. It is difficult to offer a rationale for why Peru, India and China were outliers, but at least in the case of China, the lack of information behind “lack of compelling factors” and “other” is evident and demonstrates the importance of improving transparency in deferred action cases.

Age of the Individuals processed for Deferred Action and Stays of Removal

The age of the individuals processed for deferred action and stays of removal was calculated by reviewing the birth date of the individual and the date of the decisions. The graphs below offer an overview of the age groups for the data collected by ICE between October 1, 2011, and June 30, 2012. The age of applicants was distributed almost in a bell curve, which is not entirely surprising given the sample size of 3,837.

Looking specifically at the age groups for deferred action cases, the data below shows that individuals between the ages of 20 and 24 (98 cases or 14%) were processed at a greater rate than any other age group. Similarly, the highest numbers of cases were processed for individuals who were between the ages of 20 and 44 (429 cases or 61%). The data illustrates that individuals from different age groups are considered for deferred action, and that it is not limited to the age group that qualifies for DACA, the very young, or the elderly. The diversity of the age groups in this sample size contrasts the historical attention the agency has given to individuals who are of a “tender” or “advanced” age.

On the other hand, it may also be the case that the agency treats “tender age” with a broad lens looking less at the age of the applicant at the time of the decision, for example, and instead at the age at the time of entry. The data

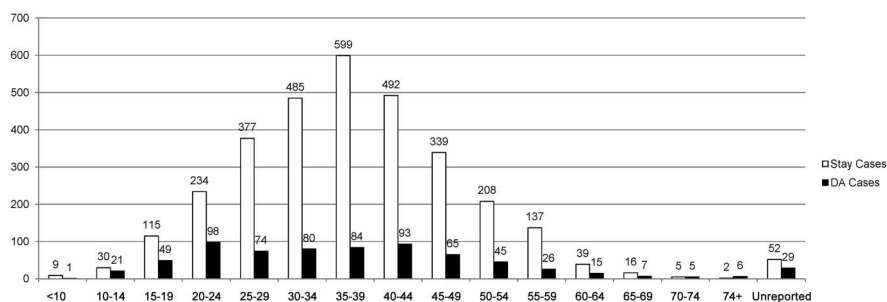


FIGURE 20: Cases by Age Group

provided by ICE does not contain a field for the date of entry or for the number of years the individual has resided in the United States. As such, it is not possible to determine whether there are more individuals of “tender” or “advanced” age at the time of entry. Also of note is the possibility that many of the cases were granted deferred action because of a “USC dependent” who was a family member of “tender” or “advanced” age even if the recipient of deferred action was not labeled as such. It would be optimal if ICE could allow officers to include more than one factor driving a deferred action grant, or to expand the category of “USC dependent” so that an officer could indicate if the dependent was of “tender” or “advanced” age.

Looking at whether age played a role in the outcome of a deferred action case, the data reveals a diverse distribution of grants and denials among age groups, with two exceptions: individuals who were less than 19 years old and over the age of 65 at the time of the decision were granted at a higher rate (78%) than the average (58%). This suggests that in these extreme cases, individuals with a “tender” or “advanced” age actually are treated more favorably by the agency.

Age Group	<10	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65-69	70-74	74+	Unreported
Grant	1	18	36	55	31	28	26	35	27	18	14	7	6	3	5	14
Denied	0	3	13	43	43	52	58	58	38	27	12	8	1	2	1	15
% Granted	100	86	73	56	42	35	31	38	42	40	54	47	86	60	83	48

FIGURE 21: Grants/Denials by Age of Applicant (Deferred Action)

Representation by Counsel—Number of Cases Involving a Pro Se Applicant

According to the data, only 30 out of the 3,837 cases involved a pro se applicant. Out of these 30 pro se cases, three out of eight (38%) deferred action cases were granted, while fourteen out of twenty-two (64%) stay cases

were granted. The sample size is too small to reach a conclusion about whether individuals proceeding without counsel are more or less likely to prevail in a deferred action case. The data was limited because the actual field ICE uses to record whether an applicant is pro se or proceeding without counsel is a “non-mandatory” field.⁵⁶ Therefore, it is possible that while only eight (out of 698) deferred action cases were marked as “pro se” in the data provided by ICE, that the number could be much higher. By the same token, it is conceivable that the vast majority of individuals who are processed for deferred action are represented by counsel, as deferred action has historically been an elusive remedy available only to those individuals with compelling equities and an attorney familiar enough with how the agency handles such cases.⁵⁷ One data point ICE was unable to provide was whether a stay or deferred action case was initiated by ICE or by the applicant (or his attorney).

LESSONS FROM DACA

Beginning in August 2012, the USCIS began processing DACA requests.⁵⁸ In its current form, DACA is a program that enables certain people to apply for deferred action status and work authorization with the USCIS if they meet the following requirements: entered the United States before their 16th birthday; have continuously resided in the United States since June 15, 2007; were in unlawful status and physically present in the United States on June 15, 2012, and at the time of application for DACA; are currently in school or have already graduated; and have not been convicted of a felony, significant misdemeanor, or three other crimes, and are not otherwise a threat to public safety or national security.⁵⁹ Like with traditional deferred action, a DACA grant provides an individual with protection from removal and a favorable grant of prosecutorial discretion.⁶⁰ Unlike traditional deferred action, USCIS has sole jurisdiction over most DACA requests, has created a separate form, and adjudicates the work authorization application simultaneously.

56. Letter from Catrina M. Pavlik-Kennan, FOIA Officer, to author (Sept. 26, 2012) (on file with author).

57. See generally Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1 (2011).

58. See *Consideration of Deferred Action for Childhood Arrivals Process*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 18, 2013) <http://www.uscis.gov/portal/site/uscis/menu.item.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD> (last visited Aug. 28, 2013).

59. See *id.*

60. See *id.*; Michael Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. (Dec. 2012); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LAT. L. REV. (Spring, 2013).

USCIS has been remarkably transparent about its processing of DACA cases and in a never-before-seen format hosted teleconferences to answer questions attorneys and advocates had about the data or future of DACA.⁶¹ Moreover, USCIS has been collecting and posting data about DACA on a monthly basis.

As of August 2013, USCIS has approved more than 430,000 applications and received more than 500 applications per day.⁶² The data also breaks down DACA requests by nationality, state residence, and case status.⁶³ Like the data provided by ICE as a result of my research on the broader deferred action program, the largest nationalities represented in the DACA program are Mexico, El Salvador, Guatemala, and Honduras.⁶⁴ Absent from the data provided by USCIS are the number of cases denied, the reasons for approval or denial, and information about whether the individual has representation, among others. Within 24 hours of the USCIS publication of the data on DACA, news outlets, advocacy groups, and attorneys were quick to report on and analyze the data. USCIS information was republished and outlets highlighted the total number of cases received and approved.⁶⁵ While the data on DACA is by no means comprehensive, these efforts are groundbreaking and provide an opening for considering the ways in which the agency can and should track data about deferred action more generally.

RECOMMENDATIONS

The recommendations below are tied to specific challenges and opportunities I encountered in obtaining and analyzing deferred action cases from ICE. They are aimed at improving the transparency and quality of the deferred action program.

61. See, e.g., *Data on Individual Applications and Petitions*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1b52d725f5501310VgnVCM100000082ca60aRCRD&vgnextchannel=1b52d725f5501310VgnVCM100000082ca60aRCRD> (last visited Dec. 2, 2012).

62. See *Deferred Action for Childhood Arrivals*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-9-13.pdf> (last visited Oct. 15, 2013). <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA%20MonthlyDEC%20Report%20PDF.pdf>.

63. See *id.*

64. See *id.*

65. See, e.g., Ted Hesson, *Fewer DREAMers Applying for Deferred Action in November*, ABC NEWS (Nov. 16, 2012), http://abcnews.go.com/ABC_Univision/News/fewer-dreamers-applying-deferred-action-november/story?id=17742665; Ben Winograd, *BREAKING: DACA Approvals Surpass 50,000*, IMMIGRATION IMPACT (Nov. 16, 2012), <http://immigrationimpact.com/2012/11/16/breaking-daca-approvals-surpass-50000/>; Danielle L. C. Beach-Oswald, *Bloggings: Effectiveness of DACA Blocked by Fears*, ILW.COM (November 12, 2012, 11:11 AM), <http://blogs.ilw.com/immigrationlaw-blogs/2012/11/bloggings-effectiveness-of-daca-blocked-by-fears-by-danielle-l-c-beach-oswald.html>.

Publish Statistics About Deferred Action Cases

DHS should make statistics about all deferred action cases available to the public. At a minimum, DHS should provide information about the number of deferred action cases processed; nationality of the individuals processed; whether such cases are initiated by the applicant or the agency; number of cases granted and denied; whether the individual was represented by counsel; reasons for the grant or denial in such cases; and whether work authorization was granted. This data will enable the agency to identify disparities and trends in cases, instill trust by the public about what the government is doing and reduce the number of FOIA requests filed to obtain such information.

Expand Field Categories in Deferred Action Case Tracking

DHS should expand the number of data points it collects on deferred action cases. My experience shows that the information collected by ICE and USCIS is not only inconsistent (and sometimes incoherent) but also incomplete. The agency should track deferred action cases and note several points, including the stage of enforcement at which the individual being processed is; whether the individual is represented by counsel; and descriptions about the factors driving a grant or denial of deferred action. For example, if a case is denied because of a “lack of compelling factors” the agency should track what factors were lacking and/or provide a short summary of the facts so that supervisors and others reviewing the information can interpret the data in a meaningful way. Finally, DHS should consider collecting biographic information about the officers adjudicating deferred action cases. These changes will improve the quality of the information DHS provides, enable individuals and attorneys to further understand the impact of particular factors to an outcome, provide more insight about the people who are making deferred action decisions and, importantly, elevate the quality of the information collected about deferred action to the level that one should expect from the government and that is provided with respect to other programs such as asylum.⁶⁶

Centralize Processing for Deferred Action Cases

DHS should consider centralizing the processing of all deferred action cases at the USCIS to promote consistency, uniformity, and efficiency. As in its processing of DACA cases, the USCIS should process all deferred actions at regional service centers and create a form that can be filed concurrently with an application for work authorization. Similarly, the USCIS should provide a written notification of receipt and outcome to each applicant or his

66. See Andrew I. Schoenholtz, Philip G. Schrag & Jaya Ramji-Nogales, *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security* (2014).

attorney. Centralizing deferred action processing will enable the agency to publish statistics and track cases more efficiently and consistently.

After this article was completed but days prior to its publication, I received a data set from the USCIS detailing the more than 17,000 deferred action cases that had been processed for a work authorization permit pursuant to this program. While the details of the response will be the subject of a future piece of research, the evidence speaks volumes to the “volume” of cases USCIS already handles when individuals apply for a work permit and the benefits of redirecting such cases to USCIS from the beginning. The lessons from DACA reveal that USCIS is not only capable of processing a large volume of deferred action cases but that it has the finesse and ability to carry it out in a way that promotes transparency and maintains integrity. Ultimately, much of the tension surrounding deferred action appears to rest on the decision to treat it as a substantive benefit worthy of a regulation or a non-binding policy that operates in a slightly secretive way. This tension is not so much a challenge for ICE to resolve but rather a challenge to the Administration as a whole. Placing deferred action processing exclusively within the jurisdiction of USCIS is a sensible solution for improving transparency and pushing the Administration to rethink how deferred action might operate as a substantive rule.

Extend Confidentiality Protections to Deferred Action Cases

DHS should extend the confidentiality of information provided by noncitizens being considered for DACA to all deferred action cases. Specifically, USCIS should specify that enforcement action would not generally be taken against an individual or his family because of information provided in a deferred action application or a denial of such application.

Create a Policy About Treatment of Individuals in Removal Proceedings and Scope of Deferred Action

DHS should issue a policy that allows ICE attorneys to join noncitizens in motions to terminate, administratively close, or continue (depending on the circumstances of the case) removal cases if a deferred action case is being processed by the DHS. Additionally, the policy should clarify that one can apply for deferred action at any stage of the enforcement process. These policy changes will promote uniformity in the handling of deferred action cases in removal proceedings across the country and achieve many of the administrative law design values identified earlier in this article.

This article began with a procedural history about my quest for data with ICE for information about cases processed for deferred action. I then analyzed the specific humanitarian factors that led to a deferred action grant; possible negative factors that led to a deferred action denial; and further studied whether residence, nationality, or age influenced the outcome. My

hope is that this article provides never-before-available information to attorneys and individuals potentially seeking deferred action and furthermore inspires DHS to consider how the program's integrity can be improved with greater transparency and implementation of the recommendations outlined above.