UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JESSICA M. COLOTL COYOTL,	)	**Case No. 1:17-cv-1670-MHC**
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN F. KELLY, Secretary, Department of Homeland Security; MARK J. HAZUDA, Director, Nebraska Service Center, U.S. Citizenship and Immigration Services; JAMES McCAMENT, Acting Director, U.S. Citizenship and Immigration Services; THOMAS D. HOMAN, Acting Director, U.S. Immigration and Customs Enforcement; SEAN W. GALLAGHER, Atlanta Field Office Director, U.S. Immigration and Customs Enforcement.	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

The government now concedes that Ms. Colotl has no felony conviction for immigration purposes. *See* Opp. 17 n.10. Yet it does not contest that it revoked her Deferred Action for Childhood Arrivals ("DACA") on precisely that mistaken ground. The government also concedes that its DACA policies have not changed. It does not suggest that any facts relevant to Ms. Colotl's DACA eligibility have changed. Yet it has never provided an explanation for its abrupt change in position. Indeed, the government never disputes that its decision to strip Ms. Colotl of DACA was arbitrary, capricious, and contrary to law.

Instead, the government asks this Court to avoid the merits on jurisdictional and other grounds. It mischaracterizes Ms. Colotl's claims as challenges to removal. It also incorrectly portrays those claims as challenges to the agency's ultimate exercise of discretion, rather than to nondiscretionary eligibility determinations, which are routinely reviewed under the Administrative Procedure Act ("APA").

Ms. Colotl's request for relief is straightforward: this Court should restore the status quo by temporarily enjoining the revocation of Ms. Colotl's DACA—an adjudication that is wholly distinct from her removal proceedings—pending an eligibility determination that complies with the APA and due process.

ARGUMENT

I. NO STATUTE PRECLUDES JUDICIAL REVIEW.

The government contends that 8 U.S.C. §§ 1252(g) and 1252(b)(9)—each of which purports to limit jurisdiction over certain challenges relating to removal proceedings—bar this court from exercising jurisdiction.[1] Neither contention is correct. None of Ms. Colotl's claims seek to challenge the validity of any removal order, the adequacy of any removal proceedings, or even the initiation of any such proceedings. *See INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (emphasizing "the strong presumption in favor of judicial review of administrative action").

As the Supreme Court has explained, the purpose of § 1252(b)(9) is "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only '[w]ith respect to review of an order of removal under subsection [1252] (a)(1).'" *Id.* at 313 (citation omitted) (quoting 8 U.S.C. § 1252(b)). Critically, § 1252(b)(9) *does not* apply to matters that are "*not* subject to judicial review under § 1252(a)(1)"—which governs judicial review of removal orders. *Id. Accord Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) ("Because section 1252(b)(9) applies only '[w]ith respect to review of an order of removal,' and this case does not involve review of an order of removal, we find that section

[1] The government apparently concedes that 8 U.S.C. § 1252(a)(2)(B) does not preclude review here. *See* Opp. 12 n.5.

1252(b)(9) does not apply to this case.") (citation omitted). Thus, § 1252(b)(9) is intended to ensure that issues that can be adjudicated in a deportation proceeding are resolved there, rather than in piecemeal, separate litigation.

Here, § 1252(b)(9) is inapplicable because Ms. Colotl's challenge is collateral to, and independent of, any removal proceedings. Indeed, the government takes the position that "[d]eferred action does not . . . provide any defense to removal," and "[a]n individual with deferred action remains removable at any time." Opp. 2, 3. Although noncitizens with DACA or other types of deferred action generally will not be placed in removal proceedings so long as the deferred action grant has not been terminated or revoked, as the government's assertions reflect, the granting of deferred action has no formal impact on removal proceedings. A noncitizen who is in removal proceedings can apply for DACA separately and simultaneously.[2] If that application is granted, the removal proceedings nevertheless continue unless the immigration judge ("IJ") closes or terminates the proceeding. Notably, an IJ has no power to grant or deny deferred action, or to review or reverse the immigration agency's decision to deny deferred action. A noncitizen seeking to challenge the denial of a deferred action application could not do so in immigration court. *See* DACA Memo at 2-3; *Matter of*

[2] Declaration of Charles H. Kuck ("Kuck Decl.") ¶ 12, Ex. 11 at 2 (Janet Napolitano, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children ("DACA Memo") (June 15, 2012)).

Quintero, 18 I. & N. Dec. 348, 350 (BIA 1982). *See also Aguilar v. ICE*, 510 F.3d 1, 11-12 (1st Cir. 2007) (explaining that § 1252(b)(9) does not preclude "claims that cannot effectively be handled through the available administrative process").[3]

Section 1252(g) also does not apply because Ms. Colotl is not challenging any decision to "commence" or "adjudicate" removal proceedings. As the Supreme Court explained in *Reno v. American-Arab Anti-Discrimination Committee*, ("*AADC*"), "what § 1252(g) says is" quite "narrow[]." 525 U.S. 471, 482 (1999). "The provision applies *only* to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* (first emphasis added). *See also id.* (§ 1252(g) does *not* preclude review of "many other decisions or actions that may be part of the deportation process").

Notably, Ms. Colotl's removal proceedings were initiated in 2010—long before she first received DACA in 2013—and were reopened in 2016 notwithstanding her DACA status. Accordingly, when the government terminated her DACA status earlier this year, that termination in no way "commence[d]" any removal proceedings against her. And under the government's position, "[d]eferred action does not . . . provide any

[3] Thus, even assuming the case was decided correctly, *JEFM v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), is inapposite because the determination at issue here is entirely independent of the immigration court process.

defense to removal" (Opp. 2), so if Ms. Colotl is able to obtain readjudication of her DACA status, that would have no necessary impact on her removal proceedings.

Although *AADC* indicated that § 1252(g) was "designed to give some measure of protection to 'no deferred action' decisions and similar *discretionary* determinations," 525 U.S. at 485 (emphasis added), Ms. Colotl does not challenge any discretionary decision not to defer action. *See Madu*, 470 F.3d at 1368 (explaining that § 1252(g) "does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"). Rather, she challenges the government's legally erroneous determination that her criminal history constitutes a felony conviction, its failure to provide a reasoned explanation for its change in position, and its failure to afford her adequate process. *See Texas v. United States*, 787 F.3d 733, 755 (5th Cir. 2015) (holding that § 1252(g) was inapplicable to states' APA challenge to 2014 deferred action program because the challenge "does not 'aris[e] from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien'") (quoting 8 U.S.C. § 1252(g)). Thus, § 1252(g) does not preclude review of Ms. Colotl's challenge.[4]

[4] Although Ms. Colotl has requested a temporary prohibition of her arrest or detention, that request for equitable relief aims to preserve the status quo. None of her claims are aimed at challenging the government's ultimate authority to arrest or detain her.

Indeed, applying the jurisdictional provisions of § 1252, the Eleventh Circuit has held that APA challenges to the Department of Homeland Security's ("DHS") denials of affirmative discretionary benefits that are collateral to a noncitizen's removal proceedings may be brought in district court. For example, in *Mejia Rodriguez v. DHS*, 562 F.3d 1137 (11th Cir. 2009) (per curiam), the Court permitted a noncitizen's APA challenge to denial of Temporary Protected Status ("TPS"), even though the noncitizen had also been placed in removal proceedings. The Eleventh Circuit explained that "[t]he majority of the provisions of § 1252" did not apply to preclude review in that case because they "concern limitations on and procedures governing judicial review of final orders of removal," and "[t]he denial of an application for TPS is not a final order of removal." *Id*. at 1145 n.15. Similarly, in *Perez v. USCIS*, the Eleventh Circuit affirmed the district court's jurisdiction over an APA challenge to the denial of an adjustment of status application even though the noncitizen had been placed in removal proceedings. 774 F.3d 960, 965-67 (11th Cir. 2014). *See also id.* (noting that "the IJ lacked jurisdiction to adjudicate or to readjudicate Perez's application for adjustment of status" and "the [Board of Immigration Appeals] also lacked jurisdiction"). Neither of the courts in *Mejia Rodriguez* or *Perez* would have had jurisdiction over the noncitizens' APA challenges if either § 1252(g) or § 1252(b)(9) precluded review. Defendants have no response to

these controlling Eleventh Circuit cases, which concluded that the multiple jurisdiction stripping provisions of 8 U.S.C. § 1252 did not preclude the noncitizens' APA challenges to denials of immigration benefits.[5]

II. THE ELIGIBILITY DETERMINATION IS REVIEWABLE UNDER THE APA, AND THE GOVERNMENT DOES NOT CONTEST THAT ITS DETERMINATION WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

A. This Court Must Evaluate the Government's Actions Based on Its Contemporaneous Rationale, Which the Government Now Concedes Was Mistaken.

The government now concedes that Ms. Colotl's diversion agreement is not a conviction for immigration purposes. Opp. 17 n.10. Yet the government's previous, incorrect conclusion that that diversion agreement *was* a conviction was its contemporaneous explanation for finding Ms. Colotl ineligible for DACA. *See* Second Kuck Decl. ¶ 3, Ex. 2 (ICE Statement to Press). This Court should vacate that determination as arbitrary, capricious and contrary to law.

It is black letter law that courts review agency action according to the contemporaneous reasons given by the agency, and disregard post hoc rationalizations

[5] Rather than grapple with these controlling cases, the government cites inapposite cases concerning challenges to removal orders or the initiation of removal proceedings. Opp. 12-14. It also cites two unpublished, non-precedential decisions holding conclusorily that where a noncitizen challenges his removal based on potential eligibility for DACA, the court has no jurisdiction to review the claim. Opp. 13-14 (citing cases). However, Ms. Colotl's claims do not seek to block any removal order.

presented during litigation. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943). Here, DHS announced publicly that Ms. Colotl's DACA had been rescinded because she had been convicted of a felony. *See* Br. 9; Kuck Decl. ¶¶ 26-30, Exs. 25-29. In fact, the government specifically and incorrectly announced to the press that "Ms. Colotl's DACA was terminated on May 3, 2017, after verification of her felony admission. Under INA 101(a)(48)(A) and 8 USC 1101(a)(48)(A) Ms. Colotl's admission of guilt to a felony offense is considered a conviction for immigration purposes." Second Kuck Decl. ¶ 3, Ex. 2. Indeed, the government does not contest that it found Ms. Colotl ineligible for DACA on this ground.[6]

The government has conceded that its only contemporaneous explanation for revoking Ms. Colotl's DACA was mistaken, has not denied that it previously relied on that explanation, and has offered no other explanation. The government also concedes that neither its DACA policies nor Ms. Colotl's facts have changed. The government fails to explain why applying the same DACA policies to the same facts has resulted

[6] DHS' statement in its termination notice that Ms. Colotl's DACA was "not consistent with [DHS's] enforcement priorities" reinforces that the agency determined that her supposed felony conviction made her an enforcement priority. *See* Kuck Decl. ¶ 11, Ex. 10 at 6; *see also* Opp. 6-7 (noting DHS' position that Ms. Colotl's "criminal history ma[de] her an enforcement priority").

in an opposite conclusion. It is therefore unsurprising that the government does not contest that, if Ms. Colotl's claims are reviewable, the government's reversal is arbitrary, capricious, and contrary to law.[7]

B. The DACA Eligibility Determination Is Not Committed to Agency Discretion by Law Because the Eligibility Criteria Provide Law to Apply.

The DACA eligibility criteria provide law to apply, and the government's contention that that determination is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is therefore incorrect. "The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (per curiam).

Here, the government does not dispute that the DACA memorandum, Frequently Asked Questions, and Standard Operating Procedures ("SOP")[8] govern the

[7] Furthermore, the government's account of DHS's actions is questionable. The government asserts that Ms. Colotl's DACA was terminated on May 3, 2017 and her renewal application was denied five days later, on May 8, 2017. *See* Opp. 7. That decision purports to deny Ms. Colotl's renewal application on the grounds that because her DACA was recently terminated, she no longer "warrants a favorable exercise of prosecutorial discretion." Walker Decl. ¶ 6, Ex. E.3. However, according to the DHS website, Ms. Colotl's renewal application was denied on *May 2, 2017*—one day *prior* to the termination of her DACA status. Second Kuck Decl. ¶ 2, Ex. 1.

DACA eligibility determination and in particular, whether Ms. Colotl has a felony conviction. The D.C. Circuit has explained that "judicially manageable standards by which to judge the agency's action . . . may be found in formal and informal policy statements and regulations as well as in statutes." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (citation and internal quotation marks omitted); *accord Padilla v. Adm'r., FAA*, 662 Fed. Appx. 743, 745 (11th Cir. 2016). The DACA memo and accompanying materials are, at a minimum, "informal policy statements" that provide law to apply, and the government never suggests otherwise.

The proposition from *Heckler v. Chaney*, 470 U.S. 821 (1985), Opp. 22, that an agency's nonenforcement decisions are presumptively committed to agency discretion is uncontroversial but inapposite: Ms. Colotl challenges her DACA *eligibility determination*, not any enforcement decision in removal proceedings. *See* Br. 11-19. Indeed, in *Heckler*, the Court noted that even enforcement decisions are reviewable

[8] The SOP that Plaintiff included with her Motion was dated April 2013, and was produced in April 2014 in response to a Freedom of Information of Act ("FOIA") request. *See* LexisNexis Legal Newsroom Immigration Law, DACA SOP (April 2013), https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2014/04/03/daca-sop-april-2013.aspx?Redirected=true; *Wolf Lake Terminals, Inc. v. Mut. Marine Ins. Co.*, 433 F. Supp. 2d 933, 944 (N.D. Ind. 2005) (government's production of documents via FOIA authenticates those documents under Fed. R. Evid. 902(5)). Curiously, the SOP filed by the government is dated August 2013, but was never produced publicly despite the FOIA request, raising questions about its operative nature. The government should be required to produce the entire version of the SOP to Plaintiff, rather than selectively disclosing only those portions it deems helpful.

where they are governed by "clearly defined factors" like the DACA eligibility criteria. 470 U.S. at 834 (citation and internal quotation marks omitted). And the Fifth Circuit expressly found that the DACA memorandum created nondiscretionary eligibility standards. *See Texas v. United States*, 809 F. 3d 134, 170-73 (5th Cir. 2015); *see also* Br. 12.[9]

In sum, the government fails to address the simple reason why the DACA eligibility determination—not the ultimate DACA decision—is reviewable under the APA: the eligibility criteria provide the "meaningful standard against which to judge the agency's exercise of discretion" required by *Heckler*, 470 U.S. at 830.

C. The Government's Change in Position Is Arbitrary and Capricious.

The government has conceded that its contemporaneous reason for terminating Ms. Colotl's DACA was mistaken. *See* Point II.A, *supra*. Yet the government has not even provided a post hoc rationalization of its eligibility determination. The government instead relies on its boilerplate statement that continuing Ms. Colotl's DACA "is not consistent with the Department of Homeland Security's enforcement

[9] Even if the government were to contend that it deemed Ms. Colotl an "enforcement priority" for a reason other than its mistaken conclusion that her diversion agreement constituted a conviction, the decision was still an eligibility determination: noncitizens who fall within the enforcement priorities are *ineligible* for DACA. DACA Memo at 2 (noting that DACA is intended for "low priority" cases); *Texas*, 809 F.3d at 175 n.140. In any case, the government has not provided even a post hoc explanation of why Ms. Colotl is an enforcement priority here.

priorities." Opp. 17; Kuck Decl. ¶ 11, Ex. 10. Yet as the government itself asserts, there has been no "change in policy or . . . in the DACA guidelines," Opp. 23, and the DHS Memorandum announcing the agency's new enforcement priorities on February 20, 2017 expressly did not alter DACA. *See* Br. 4; Kuck Decl. ¶ 14, Ex. 13 ("Q22: Do these memoranda affect recipients of Deferred Action for Childhood Arrivals (DACA)? A22: No."). The government therefore could only revoke Ms. Colotl's DACA pursuant to the existing criteria. Under those criteria—as the government twice before concluded when presented with the same facts—Ms. Colotl is not an enforcement priority.

In sum, the government now concedes that its previous determination that Ms. Colotl has a felony conviction was contrary to law, and has provided no explanation whatsoever for its change in position. There is no question that the government has violated the APA. Accordingly, this Court should remand Ms. Colotl's DACA application to the agency for readjudication under the correct criteria.

III. THE GOVERNMENT PROVIDES NO RESPONSE TO MS. COLOTL'S DUE PROCESS ARGUMENT THAT ALTHOUGH DACA IS DISCRETIONARY, ONCE GRANTED SHE IS ENTITLED TO A FAIR PROCESS FOR REVOCATION.

The government fails to address Ms. Colotl's argument, based on a controlling line of cases, that even absent a claim of entitlement, once an important benefit is *conferred*, recipients have a protected property interest that requires a fair process

before the government may take that benefit away. *See* Br. 20 (citing, *inter alia*, *Bell v. Burson*, 402 U.S. 535, 539 (1971)). Thus, even though DACA is ultimately discretionary, *once granted*, the government cannot take it away without due process.

The government makes no attempt to refute this principle. Instead, it cites a series of cases holding that, as a general matter, a discretionary benefit does not give rise to a protected property interest. *See* Opp. 19, 20-21 (citing cases). But Ms. Colotl never makes that contention, and none of those cases involve the *revocation* of a discretionary benefit that has *already* been conferred.

The government further argues that the DACA guidance does not give rise to a protected interest, *see* Opp. 19-21, but again this argument is a red herring. Ms. Colotl does not argue that the DACA program itself establishes a protected interest. Nor does she argue that she has a substantive right to a grant of DACA or work authorization. *Compare, e.g.*, *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); Opp. 8 (suggesting that Plaintiff asserts a "due process right to the receipt of DACA"). Instead, she argues only that, having previously granted her DACA, the government may not strip her of it without a fair procedure.

Finally, the government does not even attempt to suggest that its actions satisfied due process. Indeed, the government could not since—as it concedes, *see* Opp. 4-5—Ms. Colotl was stripped of DACA without any process whatsoever. This is

especially true given that DHS *already* provides a procedure whereby DACA recipients are afforded a reasoned explanation of DHS' actions and an opportunity to present arguments and evidence. *See* Br. 21-22; Kuck Decl. ¶ 15, Ex. 14 at 3, 8-9.

In sum, the termination of Ms. Colotl's DACA status in the absence of a fair process violates her due process rights.

IV. THE REMAINING INJUNCTION FACTORS FAVOR PLAINTIFF.

The government fails to refute Ms. Colotl's showing of irreparable harm.

First, contrary to the government's assertions, *see* Opp. 25, Ms. Colotl has not suffered a mere loss of income. She has also suffered the "loss of opportunity to pursue her chosen profession" as a paralegal, develop professional experience, and work toward her ultimate goals of attending law school and becoming an immigration attorney. *See Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011); *see also* Br. 23-24. This "productive time irretrievably lost" constitutes irreparable harm—as does her emotional distress in the interim. *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709-10 (9th Cir. 1988). The government does not even address these harms, much less refute them. *Second*, the government seeks to dismiss the threat of Ms. Colotl's detention as "speculative." Opp. 24. However, the

government essentially concedes that she could be taken into immigration custody in the near future. *See id.*[10]

Finally, the government does not dispute that requiring it to comply with the APA and the Constitution would serve the public interest. *See* Br. 25. Nor does it dispute the interests of Ms. Colotl's friends, clients, family, coworkers, and community in the proper adjudication of her DACA application. *See* Br. 24-25. Nor does the government explain how re-adjudicating Ms. Colotl's DACA application under its own standards would cause the agency harm—especially when it has such review procedures already in place.[11] *See* Br. 24. And although the government certainly has an interest in the enforcement of the immigration laws, the agencies administering those laws are required to act lawfully. In sum, the remaining factors support a temporary restraining order.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a temporary restraining order should be GRANTED.

[10] Should the government provide assurances to the Court that Ms. Colotl will not be detained during the pendency of these proceedings, then Plaintiff would agree that the threat of detention is "speculative."

[11] The government cites no authority for the sweeping proposition that the last two factors merge when it is the defendant. Opp. 25. That would render the final two injunctive factors a nullity in any case involving a federal agency.

Dated: June 5, 2017

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B for documents prepared by computer.

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I hereby certify that on June 5, 2017, I electronically filed the foregoing with the Clerk of the Court Using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

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