29 April 2014

Hon. John J. Goger
Judge, Fulton County Superior Court
136 Pryor Street, Room 8A
Atlanta, GA 30303

RE: Immigration Professor Amicus Curiae Brief: DACA Beneficiary Georgia College Students v. University System of Georgia’s Board of Regents, Case No: 2014 CV 243077

Dear Judge Goger:

The undersigned immigration professors have signed this letter in their personal capacities, and their institutional affiliations are solely for identification purposes, not endorsement purposes. All views expressed herein are their own. None have received compensation in this matter, and none are formally involved in the Olvera litigation, except in this amicus role.

The University of Georgia Board of Regents (BOR) Response to the legitimate claims of Deferred Action for Childhood Arrivals (DACA) recipients has been to cite selectively from its Manual, ignoring the material reclassification of these would-be students, and denying that DACA has conferred the requisite “Lawful Presence” upon them. By this legerdemain, Georgia hopes that the Court will not read the entirety of the Frequently Asked Questions (FAQ) that the USCIS has issued and that set out the predicate federal classification that all states, including Georgia, must employ when determining the eligibility of non-citizens for residency status or reclassification. The BOR concedes that its Policy Manual governs the classification and reclassification of these intending students, but it
mischaracterizes and misunderstands the exact legal transformation that USCIS has allowed student recipients by conferring DACA, which has reconstituted their formerly-undocumented status to the Board’s own requirement—LAWFUL PRESENCE. It accomplishes this sleight of hand by tiptoeing up to the appropriate language but not citing it in its entirety, and then denies that the exact legal character of these students meets the durational/domiciliary test for Georgia residency, provided that they have resided in the state with this status for 12 months. In addition, it diminishes the real import of DACA by suggesting that it is neither relevant nor applicable.

Here is the BOR response (at 3-4):

The Board of Regents has adopted a Policy Manual to govern the operations of both the Board and the member institutions of the University System of Georgia. Defendants have properly determined that the decision by USCIS to delay deportation proceedings against an individual for a two year term does not alter the lack of legally recognized immigration status of the Plaintiffs, nor does the exercise of prosecutorial discretion confer any rights, privileges, or recognition upon the Plaintiffs other than an acknowledgement that deportation will be delayed by a period of up to two years from the date of issuance of the I-797. The deferred action granted under the auspices of the two intra-agency employment memoranda issued within the Department of Homeland Security ("DHS"), the parent agency of USCIS, does nothing more than acknowledge that an individual can delay deportation proceedings if an individual meets certain criteria established by DHS, the prosecutorial agency. See DHS, FREQUENTLY ASKED QUESTIONS ABOUT DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2012), available at http://www.dhs.gov/deferred-action-childhood-arrivals (Q 1: Answer-Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.). The decision to exercise prosecutorial discretion does not grant any rights, privileges, or status to Plaintiffs beyond the determination that neither USCIS nor DHS will actively seek the deportation of an individual granted deferred action during the two year period [4] from the date of issuance of the I-797. ld. (Q7: Answer- Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.).
However, the entire FAQ No. 1 is inconveniently specific for the BOR position, as the Board mistakes lawful STATUS—not mentioned or anticipated by Georgia law or BOR Policies—with lawful PRESENCE, which is the language of its residency policy, as conceded by the Board in its response Brief. Reading the entire FAQ makes short work of the Board’s position (bolded in red), and makes it clear that is does much more than the de minimis effect the Board contends DACA confers (it contends that DACA “does nothing more than acknowledge” delay of deportation):

Q1: What is deferred action?
A1: Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon unlawful presence, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by the Department of Homeland Security (DHS) to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

Nowhere in its reply brief does the BOR acknowledge this bolded language, which is the proper and controlling nomenclature—in DACA and in the Georgia regulation 4.3.4 (Verification of Lawful Presence). The BOR appears to anticipate that others will not read the full DACA information, or even its first point, and that others will also confuse the different status designations “lawful status” with “lawful presence.” However, the requirement is clear, and simply wishing it were otherwise does not make that difference disappear. Here is the actual and full requirement, taken from the BOR Policy Manual:

4.3.2.3 Non-Citizens

A non-citizen student shall not be classified as in-state for tuition purposes unless the student is legally in this state and there is evidence to warrant consideration of in-state classification as determined by the Board of Regents. Lawful permanent residents,
refugees, asylees, or other eligible noncitizens as defined by federal
Title IV regulations may be extended the same consideration as
citizens of the United States in determining whether they qualify for
in-state classification. . .(emphasis added)

4.3.3 Tuition Differential Waivers

See Section 7.3.4 of this Policy Manual for instances in which an
institution may waive the differential between in-state and out-of-state
tuition.

4.3.4 Verification of Lawful Presence

Each University System institution shall verify the lawful presence
in the United States of every successfully admitted person
applying for resident tuition status, as defined in Section 7.3 of this
Policy Manual, and of every person admitted to an institution
referenced in Section 4.1.6 of this Policy Manual.

As can be readily seen, there is linkage between 4.3.2.3 and the core 4.3.4,
which cites law presence, such as that conferred by DACA. The examples of
refugees and asylees is helpful, as neither of those categories is a lawful permanent
resident and the unmentioned Deferred Action criteria are specifically elaborated
in 4.3.4. Other groups that might plausibly fit into this lawfully present grouping
would be refugees, asylees, Temporary Protected Status persons (such as Somalis,
at the present), and others with Advanced Parole and the like—all permanently
residing while in that status, under color of law. While Georgia might not have
anticipated that there would ever be large numbers of DA recipients, its Policy
language clearly allows them to form the requisite intent and residence.
We urge the Court to read this in its clear and intended meaning and characterize these students properly as holding the DACA lawful presence. Should they not be renewed (which the Board makes a big point, although the Obama Administration has already begun to set out the renewal process), their eligibility would also expire, the same way that students who received residency and then moved to Florida and continued school enrollment would lose their residency status: once earned, Georgia residence would only continue as long as they continued to hold all the earmarks of residency. The chimerical removal of DACA from DACA participation would, like any other disqualifying characteristic, render them ineligible. That this might occur—a concededly unlikely executive action, once granted—cannot be used as a scare tactic to refuse to extend their Georgia residential status in the first place.

In a nutshell, DACA recipients who can meet the durational requirement while in DACA status are clearly qualified to receive resident tuition status. It is not federal law that grants them this eligibility, but Georgia law and policy on their face. We urge the Court to order their eligibility, as applied. This is simple arithmetic, and the only fair reading possible.

Sincerely,

Michael A. Olivas
William B. Bates Distinguished Chair in Law
University of Houston Law Center
Stephen Lee
Assistant Professor of Law
University of California, Irvine

Rachel E. Rosenbloom
Associate Professor
Northeastern University School of Law

Wendi Adelson
Clinical Professor and Director, Medical Legal Partnership
Florida State University College of Law

Careen Shannon
Adjunct Professor of Law
Director, Immigration Law Field Clinic
Benjamin N. Cardozo School of Law

Rev. Craig B. Mousin
Adjunct Faculty
DePaul College of Law

Alan Hyde
Distinguished Professor and Sidney Reitman Scholar
Rutgers University School of Law, Newark

Stephen Yale-Loehr
Adjunct Professor
Cornell Law School

Kit Johnson
Associate Professor of Law
University of Oklahoma College of Law
Jaya Ramji-Nogales
Associate Professor of Law
Co-Director, Institute for International Law and Public Policy
Temple University, Beasley School of Law

Victor C. Romero
Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law
The Pennsylvania State University, Dickinson School of Law

Joseph Rosen
Adjunct Professor
John Marshall Law School, Atlanta

Karen Musalo
Bank of America Foundation Chair in International Law
Professor & Director, Center for Gender & Refugee Studies
U.C. Hastings College of the Law

Kristina M. Campbell
Associate Professor of Law
Director, Immigration and Human Rights Clinic
University of the District of Columbia David A. Clarke School of Law

David Abraham
Professor of Law
University of Miami School of Law

Cecilia Rios-Aguilar
Associate Professor
School of Educational Studies
Claremont Graduate University
Geoffrey A. Hoffman
Clinical Associate Professor and Director, Immigration Clinic
University of Houston Law Center

Pratheepan Gulasekaram
Associate Professor
Santa Clara University School of Law

Michael J. Wishnie
William O. Douglas Clinical Professor of Law and
Deputy Dean for Experiential Education
Yale Law School

Linus Chan
Director of the Detainee Rights Clinic
Center for New Americans
University of Minnesota School of Law

Ediberto Roman
Professor of Law & Director of Citizenship and Immigration Initiatives
Florida International University College of Law

Shoba Sivaprasad Wadhia
Samuel Weiss Faculty Scholar and Clinical Professor of Law
Director, Center for Immigrants’ Rights
Pennsylvania State Dickinson School of Law

Geoffrey Heeren
Assistant Professor
Valparaiso University Law School
Denise Gilman  
Clinical Professor and Co-Director, Immigration Clinic  
University of Texas at Austin School of Law

Michael J. Churgin  
Raybourne Thompson Centennial Professor in Law  
University of Texas at Austin School of Law

Andrew F. Moore  
Associate Professor of Law  
University of Detroit Mercy School of Law

Richard A. Boswell  
Professor of Law  
U.C. Hastings College of the Law

David B. Thronson  
Associate Dean for Academic Affairs and Professor of Law  
Michigan State University College of Law

Daniel M. Kowalski  
Editor-in-Chief, Bender's Immigration Bulletin (LexisNexis)

Laura A. Hernandez  
Associate Professor  
Baylor Law School

Susan Hazeldean  
Assistant Clinical Professor of Law  
Director, LGBT Clinic  
Cornell Law School
Anna Williams Shavers
Cline Williams Professor of Citizenship Law
University of Nebraska

Dina Francesca Haynes,
Professor of Law and Director,
Human Rights and Immigration Law Project
New England School of Law

Jonathan Weinberg, Professor of Law
Wayne State University School of Law