



DOJ Likely Has Strong Appeal In Executive Action Case

By Allissa Wickham

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A federal district court judge temporarily blocked policies created by the president's immigration executive actions late Monday night, but the battle is far from over, with some legal experts saying the U.S. Department of Justice has a strong case for its appeal to the Fifth Circuit.

In reaction to U.S. District Judge Andrew S. Hanen's ruling — which blocked both the expansion of the Deferred Action for Childhood Arrivals program and a new program for immigrant parents called Deferred Action for Parents of Americans and Lawful Permanent Residents — experts said the consensus is that the federal government will likely succeed at the appellate level.

“[I] think that most people who look at these issues carefully and from a legal standpoint, rather than a political standpoint, are confident that the federal government will prevail on this issue, and that DAPA and the expanded DACA will ultimately be fully implemented,” said Marketa Lindt, a partner at Sidley Austin LLP.

Although the injunction itself wasn't surprising, the narrowness of the ruling was, Lindt said, because Judge Hanen didn't really dive into the legality of the president's immigration actions. Instead, he stuck to an alleged procedural violation of the Administrative Procedure Act, finding that DAPA should have been subjected to the rule-making process.

Stephen W. Yale-Loehr, an immigration law expert and adjunct professor at Cornell University Law School, said he believes Judge Hanen “got it wrong” on the APA claim because a body of case law says that an agency is free to interpret an existing program without “notice and comment” rule-making. Yale-Loehr noted that “deferred action,” or delayed deportation, is a concept that has been used by presidential administrations dating back to Eisenhower.

“I think that the administration probably has a strong argument that it is not required to go through the Administrative Procedure Act on notice and comment rule-making,” Yale-Loehr said. “And they may win on that point.”

Even if the federal government doesn’t win on that claim, it could simply issue proposed and final rules down the road, according to Yale-Loehr. He noted that the Fifth Circuit will also need to consider whether the states bringing the case have standing to sue, but he wasn’t sure how the appeals court would come down on that.

The U.S. Department of Justice said Tuesday it will file an appeal of Judge Hanen’s ruling, although it’s unclear as to whether the department will seek an emergency stay of the injunction. Yale-Loehr told Law360 he thinks the federal government will seek a stay, which could allow the new policies to move forward.

In the meantime, the Obama administration, which probably wasn't caught by surprise, will likely continue to encourage immigrants to get ready to apply to the programs, in case the decision is overturned, said Laura Foote Reiff of Greenberg Traurig LLP. Reiff added that hopefully the decision will spur Congress to pass actual immigration legislation.

“I’m really hoping it will defuse tensions, if possible, and maybe get [U.S. Department of Homeland Security] funding through — and let us focus on getting immigration legislation done,” Reiff said.

Immigration activists on Tuesday criticized the decision, with advocacy group America’s Voice accusing the states of having “judge-shopped” their case for a friendly court. The group’s executive director, Frank Sharry, asserted that the decision won’t be upheld as it heads through the appeals process.

But at the preliminary injunction stage, it’s unlikely the U.S. Supreme Court will get involved, according to Yale-Loehr.

“They've got a very busy docket, and they normally only take cases that have been decided on the merits below ... so I don’t think that the Supreme Court is going to step in at this point in the litigation and rule on whether the preliminary injunction should stay in effect,” he said.