

1 CHAD A. READLER
Acting Assistant Attorney General
2 WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation
3 JEFFREY S. ROBINS
Assistant Director
4 U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
5 Washington, D.C. 20044
6 (202) 616-1246
Email: jeffrey.robins@usdoj.gov

7 Attorneys for Defendants
8

9 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
12

13 ALBERTO LUCIANO)
14 GONZALEZ TORRES,)
15)
16 Plaintiff,)
17 v.)
18 U.S. DEPARTMENT OF)
19 HOMELAND SECURITY, *et al.*,)
20 Defendants.)

Case No. 3:17-CV-01840-JM-(NLS)
**DEFENDANTS' EX PARTE
APPLICATION FOR ORDER
DISSOLVING PRELIMINARY
INJUNCTION AND PERMITTING
DEFENDANTS' TERMINATION
OF PLAINTIFF'S DACA TO TAKE
EFFECT THE DATE IT WAS
ISSUED.**

21)
22) **Courtroom: 5D**
23) **Judge: Jeffrey T. Miller**
24)
25)
26)
27)
28)

1 On December 21, 2017, USCIS issued a final decision that terminated Plaintiff's
2 reinstated DACA. *See* Dec. 21, 2017 Termination Notice, Exhibit A. That notice
3 acknowledges that, pursuant to this Court's September 29, 2017 Order, it cannot take
4 effect until further order of this Court. *Id.* at 3. Accordingly, Defendants respectfully
5 request that the Court issue an Order dissolving the Court's September 29, 2017 Order,
6 and alternatively issue a more limited order allowing Defendants' December 21, 2017,
7 Termination Notice to take effect.¹

8 "A party seeking modification or dissolution of an injunction bears the burden of
9 establishing that a significant change in facts or law warrants revision or dissolution of
10 the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000); *see also Southeast*
11 *Alaska Conservation Council v. U.S. Army Corps of Eng's*, 272 F.3d 1097, 1101 (9th Cir.
12 2006) (moving party must demonstrate facts have changed sufficiently since court issued
13 its order); *see also Rufo v. Inmates of Suffolk C'ty Jail*, 502 U.S. 367, 383 (1992) (Rule
14 60(b)(5) movants must show significant change in facts or law) and *Bellevue Manor*
15 *Associates v. United States*, 165 F.3d 1249, 1257 (9th Cir. 1999) (*Rufo* standard applies
16 to all Rule 60(b)(5) petitions brought on equitable grounds); *see also McMillen v. Las*
17 *Vegas Twp. Constable's Office*, No. 2:14-CV-00780-APG, 2015 WL 403563, at *7 (D.
18 Nev. Jan. 29, 2015), appeal dismissed (Sept. 15, 2015) ("That fee has now been waived,
19 and McMillen's due process claim is moot. These changed circumstances warrant
20 dissolution of the preliminary injunction."); *but see Sharp Healthcare v. Leavitt*, No. 08-
21 CV-0170 W POR, 2009 WL 790113, at *6 (S.D. Cal. Mar. 25, 2009) ("Plaintiffs are
22 entitled to amend their complaint and have expressed their desire to do so, and therefore
23 it is still possible that they will succeed on the merits.")
24
25
26

27 ¹ USCIS intends to issue a decision on Plaintiff's DACA renewal request in the next week.
28 That decision is contingent on the newly issued Termination Notice, and as such, a ruling
on this *ex parte* application is needed for both decisions to take effect.

1 Defendants' Termination Notice, and actions leading to that notice, are new facts
2 that warrant dissolution of the injunction because Defendants have complied with that
3 order. The Court's injunction consists of four provisions: (1) vacating Defendants' May
4 7, 2016 revocation of Plaintiff's DACA and enjoining enforcement of that revocation; (2)
5 vacating the termination of Plaintiff's employment authorization and enjoining
6 termination of employment authorization; (3) "that Defendants shall fully comply with
7 the DACA SOP should Defendants elect to reconsider Plaintiff's DACA status;" and (4)
8 "that Defendants accept Plaintiff's DACA renewal application." Dkt. No. 12 at 13-14.
9 Here, as a result of the Court's September 29, 2017 Order, USCIS reinstated Plaintiff's
11 DACA, accepted his DACA renewal request, issued Plaintiff a Notice of Intent to
12 Terminate (NOIT) his reinstated DACA, Dkt. Nos. 14-1, 14-2, & 14-3.1, and have now
13 issued a Termination Decision that terminates Plaintiff's DACA. *See* Ex. A. That
14 Termination Decision fully complies with the DACA SOP.²

15
16 ² Even if Plaintiff seeks to challenge the substance of Defendants' new Termination
17 Notice, the dissolution of the present injunction is warranted where Defendants' actions
18 subsequent to the injunction render the entirety of Plaintiff's complaint moot. Claims for
19 injunctive relief become moot once subsequent events have made clear the conduct
20 alleged as the basis for the requested relief "could not reasonably be expected to recur,"
21 *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017), and also where
22 "interim relief or events have completely and irrevocably eradicated the effects of the
23 alleged violation." *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir.
24 1985) (quoting *Los Angeles C'nty v. Davis*, 440 U.S. 625, 631 (1979)). While Defendants
25 acknowledge that courts must construe a complaint in the light most favorable to the
26 plaintiff, *see* Dkt. No. 29 at 3, n.1, citing *Concha v. London*, 62 F.3d 1493, 1500 (9th Cir.
27 1995), *cert. dismissed*, 116 S. Ct. 1710 (1996), such construction is limited to motions to
28 dismiss under Fed. R. Civ. P. 12(b)(6). Here, Defendants contend that Plaintiff has
received all the relief requested in his complaint and that the final agency action
challenged there – the May 7, 2016 DACA revocation – no longer exists. Defendants
intend to move to dismiss Plaintiff's complaint on these 12(b)(1) grounds on or before
December 29, 2017, if Plaintiff does not amend his complaint before then. *See, e.g.*,
Elder v. Nat'l Conference of Bar Examiners, No. C 11-00199 SI, 2011 WL 4079623, at

1 First, USCIS’s Notice of Decision specifically quotes the SOP provision on which
2 it is based:

3 If after *consulting with ICE*, USCIS determines that exercising prosecutorial
4 discretion after removal has been deferred under DACA is not consistent with
5 the Department of Homeland Security’s enforcement priorities, and ICE does
6 not plan to issue an NTA, the officer should refer the case to HQSCOPS
7 [Headquarters Service Center Operations], through the normal chain of
8 command, to determine whether or not a NOIT [Notice of Intent to Terminate]
9 is appropriate. If it is determined that the case warrants final termination, the
officer will issue DACA 603 - Termination Notice [Enforcement Priority, Not
Automatically Terminated] from the Appendix I.

11 See Ex. A at 2 (emphasis added), quoting Dkt. No. 2-9 at 15. Second, USCIS’s
12 Termination Notice demonstrates adherence to all the procedural steps in the SOP
13 guidelines above: consultation with ICE; consideration of whether continuing DACA is
14 inconsistent with DHS’s enforcement priorities; and USCIS’s consideration of Plaintiff’s
15 response and the agency’s voluntary consideration of his supplemental response to that
16 NOIT. *Id.* In short, the USCIS termination decision states that after consultation with
17 ICE and considering Plaintiff’s response to the NOIT and the totality of the
18 circumstances, USCIS “finds that continuing to exercise prosecutorial discretion to defer
19 removal action against you is not consistent with DHS’s enforcement priorities.
20 Therefore USCIS does not find that you merit a favorable exercise of prosecutorial
21 discretion and will not continue to defer DHS removal action against you under DACA.”

22 Ex. A at 3.

23 //

24 //

27 *6 (N.D. Cal. Sept. 12, 2011) (“The Court finds that the issues between the parties are
28 moot. Plaintiff has received all of the relief he sought in his complaint. Therefore, the
bond should be dissolved and the case DISMISSED.”).

1 USCIS has *consulted with U.S. Immigration and Customs Enforcement (ICE)*
2 and has *determined that exercising prosecutorial discretion to defer removal*
3 *action in your case is not consistent with DHS's enforcement priorities.* ICE
4 informed USCIS that it considers you an enforcement priority, and that ICE
5 did not plan to issue an NTA because CBP already issued an NTA to you on
6 May 7, 2016, and that ICE was actively prosecuting your removal based on
7 the CBP-issued NTA, and ICE's determination that you are an enforcement
8 priority, in immigration court in accordance with INA § 240.

9 Subsequent to issuing you the NOIT, the immigration proceedings that were
10 initiated against you by CBP on May 7, 2016 were terminated on November
11 17, 2017; however, ICE once again confirmed it still views you as an
12 enforcement priority and issued you a new NTA on December 8, 2017
13 demonstrating that ICE is actively pursuing your removal. DHS records show
14 that you have a master calendar hearing date with an Immigration Judge
15 scheduled for March 20, 2018.

16 USCIS received your response to the NOIT on December 18, 2017. Pursuant
17 to your request, although USCIS was not required to do so, we allowed you
18 to submit a supplemental response on December 19, 2017 to address the ICE-
19 issued NTA on December 8, 2017 that you claimed you had not received.

20 In your response to the NOIT, you provided information concerning your
21 perspective on your encounter with border patrol agents on May 7, 2017. In
22 review of the record as a whole, USCIS notes the following derogatory
23 information with respect to your case

24 Ex. A at 2 (emphasis added).

25 For the above stated reasons, the Court should dissolve the Court's September 29,
26 2017 Order, and issue a allow Defendants' December 21, 2017, Termination Notice to
27 take effect as of the date on that notice.

28 //

//

1 Dated: December 22, 2017

Respectfully submitted,

2 CHAD A. READLER
3 Acting Assistant Attorney General

/s/ Jeffrey S. Robins
JEFFREY S. ROBINS

4 WILLIAM C. PEACHEY
5 Director
6 District Court Section
7 Office of Immigration Litigation

Assistant Director
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 616-1246
jeffrey.robins@usdoj.gov

8 *Attorneys for Defendants*
9

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

December 21, 2017

U.S. Department of Homeland Security
U S Citizenship and Immigration Services
P O Box 82521
Lincoln, NE 68501-2521



U.S. Citizenship
and Immigration
Services

ALBERTO LUCIANO GONZALEZ TORRES

[REDACTED]

[REDACTED]

LIN [REDACTED]

RE: I-821 D, Deferred Action for Childhood Arrivals

[REDACTED]

A [REDACTED]

TERMINATION NOTICE

This notice is to inform you that USCIS is terminating your Deferred Action for Childhood Arrivals (DACA), which was valid until December 22, 2017. The reasons for this termination are described below.

On October 17, 2014, you filed Form I-821D, Consideration of Deferred Action for Childhood Arrivals. United States Citizenship and Immigration Services (USCIS) approved your Form I-821D on December 23, 2014, deferring your removal from the United States through December 22, 2017. On May 7, 2016, U.S. Customs and Border Protection (CBP), an immigration component of the Department of Homeland Security (DHS or the Department), issued you a Notice to Appear (NTA). An NTA issued by DHS, once filed with the appropriate Department of Justice immigration court, commences removal proceedings against an alien.

Consistent with DHS and USCIS policy, your deferred action under DACA automatically terminated when CBP issued you an NTA. On May 23, 2016, USCIS issued you a courtesy notice of action informing you that your deferred action as a childhood arrival and your employment authorization terminated automatically as of the date your NTA was issued.

However, pursuant to a court order issued by the U.S. District Court for the Southern District of California on September 29, 2017, *Gonzalez Torres v. DHS*, No. 3:17-cv-01840 (S.D. Cal.), on October 3, 2017, USCIS reopened your Form I-821D and Form I-765, withdrew the termination, and reinstated your deferred action and employment authorization through December 22, 2017.

The court order states in pertinent part:

“That Defendants’ shall fully comply with the DACA SOP should Defendants elect to reconsider Plaintiff’s DACA status.”

After USCIS reinstated your DACA, USCIS again reviewed your deferred action and the record as a whole, pursuant to procedures outlined in the USCIS DACA Standard Operating Procedures (SOP) regarding DACA Termination. USCIS issued you a Notice of Intent to Terminate (NOIT) on November 13, 2017, pursuant to procedures outlined in the USCIS DACA SOP regarding DACA

Termination. As noted in the NOIT, page 138 of the DACA SOP states:

If after consulting with ICE [U.S. Immigration and Customs Enforcement], USCIS determines that exercising prosecutorial discretion after removal has been deferred under DACA is not consistent with the Department of Homeland Security's enforcement priorities, and ICE does not plan to issue an NTA, the officer should refer the case to HQSCOPS [Headquarters Service Center Operations Directorate], through the normal chain of command, to determine whether or not a NOIT [Notice of Intent to Terminate] is appropriate. If it is determined that the case warrants final termination, the officer will issue DACA 603 – Termination Notice [Enforcement Priority, Not Automatically Terminated] from the Appendix I[1]

USCIS consulted with ICE and determined that exercising prosecutorial discretion to defer your removal is not consistent with the DHS's enforcement priorities. ICE informed USCIS that it considers you an enforcement priority, and that ICE did not plan to issue an NTA because CBP already issued an NTA to you on May 7, 2016, and that ICE was actively prosecuting your removal based on the CBP-issued NTA, and ICE's determination that you are an enforcement priority, in immigration court in accordance with INA § 240.

Subsequent to issuing you the NOIT, the immigration proceedings that were initiated against you by CBP on May 7, 2016 were terminated on November 17, 2017; however, ICE once again confirmed it still views you as an enforcement priority and issued you a new NTA on December 8, 2017 demonstrating that ICE is actively pursuing your removal.[2] DHS records show that you have a master calendar hearing date with an Immigration Judge scheduled for March 20, 2018.

USCIS received your response to the NOIT on December 18, 2017. Pursuant to your request, although USCIS was not required to do so, we allowed you to submit a supplemental response on December 19, 2017 to address the ICE-issued NTA on December 8, 2017 that you claimed you had not received.

In your response to the NOIT, you provided information concerning your perspective on your encounter with border patrol agents on May 7, 2017. In review of the record as a whole, USCIS notes the following derogatory information with respect to your case:

According to the initial Form I-213, Record of Deportable/Inadmissible Alien, on May 7, 2017, Border Patrol Agents, along with San Diego Police Officers, observed what appeared to be a smuggling event at 3740 47th Street, San Diego, California. You engaged with the officers and asked if they had a warrant. You informed them that you were unable to give consent for them to enter the home. The officers noted you were visibly nervous. When the property owner arrived at the premise, you told the Border Patrol Agents that you were at the residence to look after two dogs. Upon searching the house with the homeowner's permission, twelve individuals were found hiding in the attic of the home and were arrested and charged with being illegally present in the United States. You were also arrested for harboring illegal aliens.

The explanation that you provided in your response and supplemental response stated that you were outside of the home when officers discovered the illegal aliens and you were not questioned about their presence prior to their discovery. This is because Officers stopped speaking with you since you were not the owner or lawful renter. According to the I-213, you were inside the home when the Officers arrived, and were peering through a window. You immediately asked if the Officers had a warrant and appeared to be very nervous. At that time, officers stopped speaking with you and waited for the homeowner to grant them permission to enter the home. After the homeowner realized the rightful renter was not present at the home, the owner informed you that you needed to exit the house and that is why you were outside of the house when the twelve individuals were found in the attic. You stated

in your NOIT response, that you were unaware of the twelve individuals' presence in the house, yet three of the illegal aliens were still able to identify you in photo lineups. You presume that the remaining nine individuals were not able to identify you; however the I-213 records for all the individuals detained for being present in the United States without admission do not indicate that all 12 individuals were asked to identify you in the photographic line-up.

Even so, your claim that you were unaware of their presence in the home is not credible when you were present in the house and three individuals did identify you in connection with their smuggling.

The I-213 for one individual found in the attic states that "as they waited in the room, [two individuals] came into the room and instructed them to go into the attic and hide." This same individual was shown a six-pack photographic line up and identified a picture of you as resembling one of the individuals who instructed them to go into the attic.

Another I-213 narrative for an individual found in the attic identified you and another individual as the stash house care-takers. According the I-213, this individual further stated that you, "instructed all of [sic] individuals at the house to enter the attic."

An I-213 for a third individual states that at the house, "he and the group were cared for by two male Hispanics." This individual identified you and the other individual encountered at the house as the stash house care-takers.

The record clearly demonstrates that you and another individual were the two individuals inside the house when DHS agents alongside uniformed San Diego Police Officers knocked on the door. You and this same individual later exited the house when told to by the property owner.

You note that you have not been charged criminally or in immigration court for any crime related to the events of May 6, 2016. The fact that immigration charges were not listed on the NTA does not prevent USCIS from considering the events on May 6, 2016 in making its discretionary determination regarding continuation of your DACA. USCIS does not rely solely on the grounds listed in the charging document as it may not reflect all derogatory information and/or the assessment of whether or not you are considered an enforcement priority. You claim to meet all other DACA criteria; however, USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case.

After considering the totality of circumstances in your case, including your record as a whole, your response to the NOIT, and all of the factors and information you raised in your supplemental response, USCIS finds that continuing to exercise prosecutorial discretion to defer removal action against you is not consistent with the DHS's enforcement priorities. Therefore, USCIS does not find that you merit a favorable exercise of prosecutorial discretion and will not continue to defer DHS removal action against you under DACA.

Deferred action is not a form of protection from removal; rather it is merely an acknowledgement that DHS does not, at that present time, intend to pursue removal. Deferred action may be terminated at any time at the Department's discretion.

USCIS is terminating your DACA, which was valid until December 22, 2017.^[3] Pursuant to the Court's preliminary injunction order, the termination will take effect as of the date of this notice upon further order of the Court, at which time you must immediately return your Employment Authorization Document (EAD) to USCIS. Continued use of your EAD after authorization for employment has been terminated is considered fraudulent use of your EAD. Such fraudulent use of

your EAD could result in a referral to law enforcement. Send a copy of this notice and your EAD to:

Nebraska Service Center
PO Box 82521
Lincoln NE 68501-2521

Deferred action is a discretionary determination to defer removal of action of an individual as an act of prosecutorial discretion. An appeal or motion to reopen/reconsider this decision may not be filed on behalf of the requestor.

[1] USCIS, DACA Standard Operating Procedures [hereinafter "DACA SOP"], 138. Headquarters Service Center Operations (HQSCOPS) is the author of the DACA SOP, and interprets its own guidance on page 138 of the DACA SOP as an option to determine "whether or not" a NOIT is appropriate, or to issue a notice terminating DACA without first issuing a NOIT. HQSCOPS instructed that a NOIT be issued in this case.

[2] You will have an opportunity to contest your removal in Immigration Court. *See* INA § 240.

[3] The Court denied your Motion to Modify the Preliminary Injunction on December 15, 2017. Therefore, your DACA and EAD expire on December 22, 2017 regardless of any Court order regarding this termination notice.

Sincerely,



Kristine R. Crandall, Acting
Director
Officer: 0996

1 CHAD A. READLER
 Acting Assistant Attorney General
 2 WILLIAM C. PEACHEY
 Director, District Court Section
 3 Office of Immigration Litigation
 JEFFREY S. ROBINS
 4 Assistant Director
 U.S. Department of Justice
 5 P.O. Box 868, Ben Franklin Station
 Washington, D.C. 20044
 6 (202) 616-1246
 7 Email: jeffrey.robins@usdoj.gov

8 Attorneys for Defendants

9 UNITED STATES DISTRICT COURT
 10
 11 SOUTHERN DISTRICT OF CALIFORNIA

13	ALBERTO LUCIANO	)	Case No. 3:17-CV-01840-JM-(NLS)
14	GONZALEZ TORRES,)	
15	Plaintiff,	)	DECLARATION OF JEFFREY S.
16		)	ROBINS IN SUPPORT OF
17	v.	)	DEFENDANTS' EX PARTE
18	U.S. DEPARTMENT OF	)	APPLICATION FOR ORDER
19	HOMELAND SECURITY, <i>et al.</i>,	)	DISSOLVING PRELIMINARY
20	Defendants.	)	INJUNCTION AND PERMITTING
21		)	DEFENDANTS' TERMINATION
22		)	OF PLAINTIFF'S DACA TO TAKE
23		)	EFFECT THE DATE IT WAS
24		)	ISSUED.

24 //
 25 //
 26 //
 27 //
 28

1 I, Jeffrey S. Robins, pursuant to 28 U.S.C. § 1746, hereby declare:

2 1. I am employed as an Assistant Director for the Department of Justice, Civil
3 Division, Office of Immigration Litigation, and have been assigned as counsel for
4 Defendants in *Gonzalez v. DHS et al.*, Case No. 3:17-cv-1840-JM-(NLS). As such,
5 I have personal knowledge of the following facts and could testify regarding these
6 facts if called to do so.

7 2. Today, pursuant to Local Rule 7.1(g)(2), I informed Plaintiff's counsel by e-
8 mail that Defendants would be filing this *ex parte* application for an order dissolving
9 the preliminary injunction and permitting Defendants' termination of Plaintiff's
10 DACA to take effect. Counsel responded that they "plan to oppose this filing and
11 may seek other relief of the termination order."

12 3. Defendants believe that Plaintiff should submit a response by December 26,
13 2017; Plaintiff has expressed that he should have until December 29, 2017, to
14 respond.

15 4. I declare under penalty of perjury that the foregoing is true and correct and
16 that this declaration was executed under the laws of the United States on this 22nd
17 day of December, 2017, in Washington, D.C.

18
19 /s/ Jeffrey S. Robins
20 JEFFREY S. ROBINS
21 Assistant Director
22 U.S. Department of Justice
23 P.O. Box 868, Ben Franklin Station
24 Washington, D.C. 20044
25 (202) 616-1246
26 jeffrey.robins@usdoj.gov

27 *Attorneys for Defendants*

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, along with the referenced exhibits, was served electronically through the CM/ECF to the registered participants.

/s/ Jeffrey S. Robins
JEFFREY S. ROBINS
Assistant Director