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# Despite Stay, Similar Ruling A Good Omen For Obama Policy

By **Allissa Wickham**

*Law360, New York (April 08, 2015, 8:55 PM ET)* -- A Texas federal judge Tuesday refused to lift the block on two immigration policies created by the president's executive actions, but attorneys say the Fifth Circuit's axing of another suit over a similar deportation policy on the same day may bode well for the government's injunction appeal.

On Tuesday evening, U.S. District Judge Andrew Hanen declined to stay his Feb. 16 injunction against two delayed deportation policies stemming from the executive actions: the expansion of the Deferred Action for Childhood Arrivals program and the creation of a new program for certain immigrant parents.

But some attorneys say that another ruling issued the same day by the Fifth Circuit — which is also currently weighing a request to lift Judge Hanen's block — has made them cautiously optimistic that the appeals court won't uphold the February injunction.

"I think it's very close to writing on the wall for Judge Hanen's opinion," Andres Benach, an attorney with Benach Ragland LLP, said of the Fifth Circuit's ruling.

In that case, several U.S. Immigration and Customs Enforcement agents and the state of Mississippi challenged the original DACA program established in 2012, which allows certain immigrants who entered the country as children to delay deportation and work in the U.S. for at least two years.

Although Mississippi claimed that DACA recipients could cost the state money in education, health care and law enforcement, the Fifth Circuit panel found the state's claimed fiscal harm was "purely speculative." The panel also found the ICE agents lacked standing as they hadn't alleged sufficient injuries.

Standing is also a key issue in the case being presided over by Judge Hanen, in which 26 states are challenging the expanded DACA program and a new program for parents, referred to as DAPA.

The judge ruled that the plaintiff states, or at least Texas, had standing because they'd shown that DAPA recipients could cost the states money if they applied for driver's licenses. Texas would bear a $174.73 cost per applicant, adding up to "millions of dollars," the judge said.

But it remains to be seen whether this alleged injury will be enough for the Fifth Circuit to find standing in the federal government's appeal of the injunction.

Greg Siskind of Siskind Susser PC said that he wasn't sure if the Fifth Circuit would agree that the expense of driver's licenses is really that much of a burden on Texas and that the state would will need to show that it would be damaged in a much different way than Mississippi.

"I'm fairly optimistic that the Fifth Circuit will take the same view when they look at the Texas case," Siskind said. "If you don't buy that Mississippi was damaged by DACA, I'm not sure how you buy that Texas is damaged in a much different way [and] therefore that they would have standing."

However, Paul Virtue, a partner with Mayer Brown LLP, pointed out that Mississippi's evidence in its case was quite dated as the state had relied on a 2006 study conducted by its own officials, which pegged the financial burden of unauthorized immigration at $25 million each year.

David Coale of Lynn Tillotson Pinker & Cox LLP agreed that Texas is in a better position than Mississippi but said it was clear from the Fifth Circuit's ruling on Tuesday that the appeals court is not going to let the plaintiffs challenging the new executive action policies off easy when it comes to standing.

"Texas is certainly not dead in the water, but it's clear from this that the court is going to enforce the standing requirements," said Coale, a top appellate lawyer in Texas. "It's not going to just give it a pass just because it's an important issue."

Interestingly, the Fifth Circuit's ruling against the ICE agents also touched on another core issue in the injunction appeal: whether the deferred deportation policies allow for case-by-case discretion.

In his February injunction order, Judge Hanen said that nothing in DAPA genuinely allows U.S. Department of Homeland Security employees to exercise discretion, even though the DHS said in its memo that each request should be evaluated on a case-by-case basis.

In finding that DAPA heavily restricts agency discretion, the judge ruled that the policy wasn't just guidance but rather a substantive rule that should have undergone a comment process under the Administrative Procedure Act.

But in its ruling against the ICE agents, the Fifth Circuit panel pointed out that the 2012 DACA memo made it clear the the agents should exercise deferred action discretion on a case-by-case basis, thereby rejecting their claim that they're always required to grant the benefit.

The issue of discretion could therefore pop in the Fifth Circuit's assessment of whether the injunction was prudentially granted because, as Siskind noted, DACA and DAPA are procedurally very similar.

It's unlikely that the court would rule dramatically differently in two opinions so close together, he said, even though a different panel of judges could end up hearing the injunction case.

The Fifth Circuit judges who heard the ICE agents case were an ideologically mixed bag of Republican and Democratic appointees, Coale noted.

He added that he wasn't surprised with the Fifth Circuit's ruling, given the appeals court's traditional aversion to judicial intervention.

"The Fifth, historically, has always been a politically conservative court in the sense that it sees a fairly limited role for judicial power," Coale said. "[It] does not surprise me to see three judges from different

places in their careers and ideological spectrums see it the same way."

The Fifth Circuit is slated to hear oral arguments on the federal government's request to lift the stay during the appeals process on April 17. Coale said the court will likely reveal who will be sitting on that panel on its website about a week before arguments.

The cases are Texas et al. v. U.S. et al., case number 1:14-cv-00254, in the U.S. District Court for the Southern District of Texas; and Christopher Crane et al. v. Jeh Johnson et al., case number 14-10049, in the United States Court of Appeals for the Fifth Circuit.

--Editing by Katherine Rautenberg and Christine Chun.

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