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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ISIDRA VAZQUEZ VICTORIA,

Plaintiff,

vs.

JANET NAPOLITANO, Secretary of  
Homeland Security, et. al.,

Defendants.

CASE NO. 12cv1827-GPC(MDD)

**ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFF'S CROSS  
MOTION FOR SUMMARY  
JUDGMENT**

[Dkt. Nos. 19, 20.]

On March 22, 2013, Defendants filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 19.) On April 5, 2013, Plaintiff filed a cross motion for summary judgment and an opposition to Defendants' motion for summary judgment. (Dkt. Nos. 20, 21.) On April 18, 2013, Defendants filed an opposition to Plaintiff's cross-motion for summary judgment and reply in support of Defendants' motion for summary judgment. (Dkt. No. 22.) On May 2, 2013, Plaintiff filed a reply in support of her motion for summary judgment. (Dkt. No. 23.) The motions are submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). After a review of the briefs, supporting documentation, and applicable law, the Court GRANTS Defendants' motion for summary judgment and DENIES Plaintiff's cross motion for summary judgment.

1 **Background**

2 The factual facts are undisputed and are derived from Defendants’ Statement of  
3 Undisputed Facts. (Dkt. No. 19-1, Ds’ Statement of Undisputed Facts.) Plaintiff Isidra  
4 Vazquez-Victoria is a citizen and national of Mexico. On July 29, 2011, the  
5 government served her with a Notice to Appear (“NTA”) and placed her in removal  
6 proceedings. The NTA charges that Vazquez is removable because she entered the  
7 United States without having been admitted and inspected by an immigration officer.  
8 On October 11, 2011, Vazquez’s attorney sent a letter to the Office of Chief Counsel  
9 at U.S. Immigration and Customs Enforcement (“ICE”) requesting that ICE exercise  
10 its prosecutorial discretion under the June 17, 2011 memorandum issued by ICE  
11 Director John Morton entitled Exercising Prosecutorial Discretion Consistent with the  
12 Civil Immigration Enforcement Priorities of the Agency for the Apprehension,  
13 Detention, and Removal of Aliens. Specifically, Vazquez’s attorney requested  
14 cancellation of the notice to appear.

15 ICE agreed to the request, and provided Vazquez’s attorney with a Joint Motion  
16 to Dismiss without Prejudice as a Matter of ICE’s Prosecutorial Discretion. In the  
17 motion, the parties requested that the immigration court dismiss the proceedings  
18 against Vasquez as a matter of prosecutorial discretion. Vazquez’s attorney filed the  
19 joint motion on October 20, 2011. On October 31, 2011, an immigration judge entered  
20 an order terminating Vazquez’s removal proceedings without prejudice in light of the  
21 joint motion for prosecutorial discretion.

22 On November 21, 2011, Vazquez filed a Form I-765, Application for  
23 Employment Authorization, requesting permission to accept employment in the United  
24 States. In her application, Vazquez claimed that she was eligible under 8 C.F.R. §  
25 274a.12(c)(14). On February 14, 2012, U.S. Citizenship and Immigration Services  
26 (“USCIS”) sent a Request for Initial/Additional Evidence (“RFE”) to Vazquez’s  
27 attorney, requesting documentation that either ICE or USCIS had placed Vazquez on  
28 deferred action status. The RFE also requested evidence of Vazquez’s economic

1 necessity for employment authorization. Responding to the RFE, Vazquez sent a copy  
2 of the immigration judge’s order granting the joint motion to dismiss the proceedings.  
3 In her response, Vazquez argued that the immigration judge’s order terminating  
4 proceedings based on the joint motion qualified as deferred action under 8 C.F.R. §  
5 274a.12(c)(14). Accordingly, Vazquez argued that she was eligible for employment  
6 authorization. Id. USCIS denied Vazquez’s application on May 21, 2012, because she  
7 failed to establish that she was eligible under 8 C.F.R. § 274a.12(a) or (c). Specifically,  
8 USCIS denied Vazquez’s application because the materials that she submitted in  
9 response to the RFE did not establish that she was in deferred action status.

10 On July 24, 2012, Vazquez filed this lawsuit against Janet Napolitano, Secretary  
11 of the Department of Homeland Security; Emilio T. Gonzalez, Director of U.S.  
12 Citizenship and Immigration Services (“USCIS”); and Robert Cowan, Director of  
13 USCIS National Benefits Center alleging a violation of 8 C.F.R. § 274a.12(c)(14);  
14 violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702; and a writ of  
15 mandamus compelling Defendants to reopen Vazquez’s employment authorization  
16 application on the ground that it was improperly denied on the basis that Vazquez  
17 failed to provide evidence that she had been placed in deferred action status and  
18 seeking the court to exercise its discretion to adjudicate her application for employment  
19 authorization. (Dkt. No. 1, Pet. at 6-7.)

### 20 Discussion

21 The cross motions for summary judgment concern the legal issue of what  
22 constitutes “deferred action” as set forth in 8 C.F.R. § 274a.12(c)(14). That provision  
23 provides:

24 (c) Aliens who must apply for employment authorization. An alien  
25 within a class of aliens described in this section must apply for work  
26 authorization. If authorized, such an alien may accept employment  
27 subject to any restrictions stated in the regulations or cited on the  
28 employment authorization document. USCIS, in its discretion, may  
establish a specific validity period for an employment authorization  
document, which may include any period when an administrative  
appeal or judicial review of an application or petition is pending.

(14) An alien who has been granted deferred action, an act of

1 administrative convenience to the government which gives some cases  
2 lower priority, if the alien establishes an economic necessity for  
employment.

3 8 C.F.R. § 274a.12(c)(14).

4 Deferred action is not provided in any statute or regulation but found in the  
5 agency's Operations Instructions § 103.1(a)(1)(ii). Matter of Quintero, 18 I. & N. Dec.  
6 348, 349 (Nov. 16, 1982). Deferred action is an "informal administrative stay of  
7 deportation which is granted only where the District Director, with the Regional  
8 Commissioner's approval, finds it to be warranted." Id. It is the "result of an  
9 administrative policy to give low priority to the enforcement of the immigration laws  
10 in certain cases [and] . . . the prosecutorial discretion exercised in granting deferred  
11 action status is committed exclusively to the Service enforcement officials." Id. at 350  
12 (citations omitted). Therefore, neither the immigration judge nor the Board can grant  
13 deferred action or review a decision of the District Director to deny it. Id.

14 'Deferred action' refers to an exercise of administrative discretion by  
15 the INS district director under which the INS takes no action "to  
16 proceed against an apparently deportable alien" based on a prescribed  
17 set of factors generally related to humanitarian grounds. 6 C. Gordon,  
18 S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* §§  
72.03 [2][a] & [2][h] (1998). The INS may "decline to institute  
proceedings, terminate proceedings, or decline to execute a final order  
of deportation." Id. 'A case may be selected for deferred action  
treatment at any stage of the administrative process.' Id.

19 Barahona-Gomez v. Reno, 236 F.3d 1115, 1119 n.3 (9th Cir. 2001); see also Matter of  
20 Quintero, 18 I.& N. Dec. 348 (noting that deferred action status, giving a person  
21 permission to remain in the United States indefinitely, is a matter of prosecutorial  
22 discretion.) A request for deferred action status must be made to the DHS. See id.

23 In addition, the decision whether an alien's application for employment  
24 authorization under 8 C.F.R. § 274a.12(c) is within the sound discretion of the director  
25 of the USCIS. See Chaganti v. Chertoff, No. 08 C 5768, 2008 WL 4663153, at \*2  
26 (N.D. Ill. 2008) (court lacked subject matter jurisdiction to speed up the pace at which  
27 the USCIS approved their renewal applications). "Congress stripped the federal courts  
28 of their jurisdiction to intrude upon and to review decisions made by a delegate of the

1 Attorney General pursuant to § 274a.12(c).” Id.

2 Plaintiff argues that USCIS’s denial of Plaintiff’s application for employment  
3 authorization (Form I-765) is based on the legally erroneous ground that dismissal of  
4 deportation proceedings did not constitute deferred action under 8 C.F.R. §  
5 274a.12(c)(14). She contends that the prosecutorial discretion by ICE on October 20,  
6 2011 to dismiss Plaintiff’s deportation proceedings and to continue exercising that  
7 discretion not to seek Plaintiff’s removal from the United States constitutes deferred  
8 action under 8 C.F.R. § 274a.12(c)(14). Defendants contend that they never provided  
9 Plaintiff with deferred action, and therefore, she is ineligible for employment  
10 authorization under 8 C.F.R. § 274a.12(c)(14). They assert that Plaintiff sought  
11 cancellation of the notice to appear proceedings under the exercise of prosecutorial  
12 discretion under 8 C.F.R. § 1239.2(c), not deferred action under 8 C.F.R. §  
13 274a.12(c)(14).

14 In this case, Plaintiff sought a request for prosecutorial discretion on October 11,  
15 2011. (Dkt. No. 20-4; Malek Decl., Ex. G at 3.) In that request, Plaintiff sought a  
16 favorable exercise of prosecutorial discretion pursuant to a memorandum issued by the  
17 Director concerning “Exercising Prosecutorial Discretion Consistent with the Civil  
18 Immigration Enforcement Priorities of the Agency for the Apprehension, Detention,  
19 and Removal of Aliens” dated June 17, 2011. (Dkt. No. 1 at 27.) The memo stated that  
20 the term “prosecutorial discretion” applied to a wide range of discretionary  
21 enforcement decisions such as cancellation of a notice to appear and granting deferred  
22 action. (Id. at 28-29.) Specifically, Plaintiff sought the exercise of prosecutorial  
23 discretion of cancellation of the notice to appear, not deferred action. (Dkt. No. 20-4  
24 at 4.) In October, the parties filed a joint motion requesting that the immigration judge  
25 grant the joint motion to dismiss without prejudice. (Dkt. No. 20-4 at 7-8.) The joint  
26 motion sought dismissal on the basis of prosecutorial discretion and also pursuant to  
27 8 C.F.R. § 1239.2(c). (Id.) On October 31, 2011, the immigration judge issued an  
28 order dismissing the proceedings without prejudice. (Dkt. No. 1 at 20.)

