

PUBLICATION

Obama Legalizes Undocumented, Tweaks EB Categories

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On November 20, 2014, President Obama announced a bold series of measures to change removal priorities, temporarily legalize and grant work authorization to millions of undocumented persons, and make some other changes to employment-related immigration processes. The changes, summarized at <http://www.uscis.gov/immigrationaction>, were implemented primarily through a set of memos from the Secretary of Homeland Security and include the following:

1. **Expanded Deferred Action.** Two different groups of applicants can apply for "deferred action," meaning they will be protected from removal, and receive work authorization, in three-year increments, even if previously removed or ordered removed. Employers will need to be prepared to deal with verification challenges when legalized workers present new identities with work authorization documents.

A. **Childhood arrivals.** Expands [prior program](#). Apply after February 19, 2015, and show the applicant:

- Came to the United States under the age of 16;
- Has "continuously resided" in the United States since before January 1, 2010;
- Currently is in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Has not been convicted of a "felony" offense, a street gang offense, a "significant misdemeanor" offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and/or
- Is age 15 or older to request deferred action affirmatively from U.S. Citizenship and Immigration Services (USCIS) (as opposed to those facing removal action by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP), who apparently can apply even if under age 15).

B. **Parents of U.S. Citizens (USCs) or Lawful Permanent Residents (LPRs).** Apply after May 16, 2015, and show they:

- Have a son or daughter who is a U.S. citizen or lawful permanent resident born on or before November 20, 2014;
- Have continuously resided in the U.S. since before January 1, 2010;
- Were physically present in the U.S. on November 20, 2014, and when applying;
- Had no lawful status on November 20, 2014; and
- Are not an "enforcement priority" (have not been convicted of a "felony" offense, a street gang offense, a "significant misdemeanor" offense, multiple misdemeanor offenses, have been ordered removed after January 1, 2014, or otherwise pose a threat to national security or public safety).

2. **Prioritized Removal Efforts.** Enforcement agents are directed to focus resources more strictly on national security threats, serious criminal offenders, and people ordered removed only after January 1, 2014. While the "Secure Communities" program is terminated, some approximation of it will be restored but with only

"notification" by local police when they are about to release someone of interest, not "detainer" except in specific instances.

3. Provisional waivers of unlawful presence. Waivers will be expanded by regulation from "immediate relatives" only to beneficiaries of any family-based immigrant petition. This is a technical solution for people who would qualify for green cards except for having overstayed or violated their status, allowing them to apply for a waiver within the U.S. without first having to leave the country.

4. Advance parole solution. Department of Homeland Security (DHS) will clarify that people who depart the U.S. under DHS-granted "advance parole" will not be considered to be "departing" the U.S., so that they do not trigger a bar on reentry, and so that their return can essentially cure a single prior "entry without inspection" and might make them eligible for the procedural benefit of completing any permanent residence process within the U.S. rather than through a visa abroad. Apparently this will allow some of the people gaining "deferred action" above to obtain green cards over time under otherwise normal rules.

5. EB Tweaks. These tweaks liberalize certain employment-based visa categories and processes, including development of agency guidance or regulations to:

- Re-vamp how permanent visa backlogs are administered so that no limited numbers are wasted (seemingly stopping short of recapturing visa numbers previously wasted, as previously discussed);
- Clarify when certain job changes for longstanding applicants for "adjustment of status" are considered in the "same or similar occupation" so that the worker still qualifies (apparently not allowing adjustment applications to be filed before a visa number becomes available);
- Clarify the standard by which a national interest waiver may be granted to foreign inventors, researchers and founders of start-up enterprises;
- Authorize parole, on a case-by-case basis, to eligible inventors, researchers and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research (which is a procedurally radical unilateral creation of a de facto visa category not approved by Congress);
- Allow work authorization to spouses of H-1B professional workers who have reached certain stages of employment-based sponsorship to green card;
- Allow further extensions, beyond 29 months, of F-1 "Optional Practical Training" for graduated college students in science, technology, engineering and mathematics fields;
- Clarify the meaning of "specialized knowledge" for L-1 transferees within a multinational business;
- Revise the "PERM" permanent labor certification process in unspecified ways; and
- Expand the crimes for which alleged victims may obtain T and U status for cooperation with the Department of Labor in workforce abuse investigations. Employers may need to consider compliance programs and other steps to guard against abuse of these incentives.

Note: President Obama apparently chose NOT (yet) to declare that family members not count against employment-based immigrant visa allocations, which would have had the effect of nearly tripling visas.

6. Family Members of Enlistees. Allow parole-in-place and deferred action for certain family members of enlistees and the availability of deferred action to undocumented family members of U.S. military members and veterans who were inspected and lawfully admitted.

7. Naturalization. Allow more flexible payments for naturalization applications, such as through credit card, and promote citizenship education.

All of these measures will require further agency action to administer. Meanwhile, Senate and House representatives may either seek to block the measures through appropriations or other processes or to complement them with more comprehensive legislation.