

ADMINISTRATIVE OPTIONS

1. Registration Program and Deferred Action for the Current Unauthorized Population or Selected Subsets

Maintaining the status quo with regard to the millions of illegal immigrants living in the United States¹ threatens our security and fuels the underground economy. To address these problems, DHS has long envisioned legislation establishing a broad-based legalization program to register and screen this population, excluding individuals who pose a security risk, and legalizing those who qualify and intend to stay here. To register and screen these applicants effectively, DHS has proposed a two-phase process. During Phase 1, eligible applicants would be registered, fingerprinted, screened and considered for an interim status that allows them to work in the U.S. Successful applicants would receive a biometric-enabled, tamper-resistant credential. During Phase 2, applicants who had fulfilled additional statutory requirements would be permitted to become lawful permanent residents.

In the absence of legislation, much of Phase 1 of the program could still be implemented, either by the Secretary of Homeland Security granting eligible applicants deferred action status² or the President granting deferred enforced departure. Such a "registration-only" program would require undocumented immigrants to register their presence in the U.S. in exchange for work authorization.² Individuals would have a strong incentive to register if this can be implemented because the simultaneous implementation of an simultaneously with an expanded E-Verify program that would drastically substantially curtail opportunities for unauthorized employment. On the other hand, they may be skeptical of registering because deferred action status is subject to revocation if there is a policy change, and it does not readily lead to LPR or another more secure status.

Registration would need to be completed quickly, in order to reduce incentives for individuals to enter the U.S. unlawfully in the hope of applying for the program. To create an operationally feasible application process, DHS would require up-front funding and sufficient time to a-ramp-up and the need for upfront funding may provide an opportunity for Congress to block this initiative if it objects.

If going forward with a larger registration program that reaches the entire potential legalization population is not possible, we could propose a more narrowly-tailored registration program for individuals eligible for relief under the DREAM Act, AgJOBS, or other specifically defined subcategories. This strategy has benefits and drawbacks. If public reaction is positive, it could galvanize the Department's efforts to execute a broader registration program in the future. A

¹ Although deferred action determinations are made on a case-by-case basis, the Department has periodically decided to grant deferred action to discrete classes of aliens, including victims of trafficking and certain other serious crimes.

² Aliens granted deferred action status must establish an economic necessity to obtain work authorization. 8 C.F.R. § 274a.12(c)(14).

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negative reaction could hinder the program and even affect future legislative efforts. Similar to the arguments made against piecemeal legislation, proposing a smaller registration program may generate the same level of opposition as the full registration program.

Pros

- A registration program can be messaged as a security measure to bring illegal immigrants out of the shadows. Screening, registering, and issuing biometric documents to those eligible for interim status would ~~allow help~~ law enforcement to ~~easily identify~~ and remove convicted criminals and others who pose a threat to national security or public safety.
- Providing work permits to this population will enable these workers to become full-fledged tax payers, therefore increasing U.S. tax revenues.
- Allowing successful applicants to work legally would create a level playing field for honest employers and all workers.
- Registration would reduce the use of fraudulent documentation and decrease identity theft.
- A bold administrative program would transform the political landscape by eliminating using administrative measures to sidestep the current state of Congressional gridlock and inertia.
- Up-front funds required to set up the registration program could potentially be reimbursed through fees collected from applicants.

Cons

- The Secretary would face criticism that she is abdicating her charge to enforce the immigration laws. Internal complaints of this type from career DHS officers are likely and may also be used in the press to bolster the criticism.
- Even many who have supported a legislated legalization program may question the legitimacy of trying to accomplish the same end via administrative action, particularly after five years where the two parties have treated this as a matter to be decided in Congress.
- Opponents of the registration program will characterize it as "amnesty." The same political effort necessary to achieve a legislative solution ~~may will~~ probably be required to promote and ~~implement defend~~ this administrative proposal.
- Critics of the administrative program would claim that it is being proposed to pander to Latino voters.
- A program that reaches the entire population targeted for legalization would represent use of deferred action on a scale far beyond its limited class-based uses in the past (e.g. for widows). Congress may react by amending the statute to bar or greatly trim back on deferred action authority, blocking its use even for its highly important current uses in limited cases.
- Congress could also simply negate the grant of deferred action (which by its nature is temporary and revocable) to this population. If criticism about the legitimacy of the program gain traction, many supporters of legalization may find it hard to vote against such a bill.

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- The proposed timeline would require a rapid expansion of USCIS's current application intake capacity. Significant upfront resources would be needed for hiring, training, facilities expansion and technology acquisition, and the only realistic prospect of a source of funding may be a new appropriation. Agencies involved in other parts of the process would also require additional resources and personnel.
- Some immigrant advocates may view this program as a way to gather information on illegal workers without ensuring them any permanent legal status. The lack of a guarantee of permanent status may deter some individuals who would be eligible for interim status from coming forward to register.
- Immigration reform is a lightning rod that many Members of Congress would rather avoid. An administrative solution could dampen future efforts for comprehensive reform and sideline the issue in Congress indefinitely.
- ~~Unilateral action by the Administration could be viewed as an end-run around Congress, angering both Republicans and Democrats.~~
- ~~Legal challenges are possible and could halt implementation of the program.~~
- ~~Congress may disagree with the deferred action policy and seek to undermine it through legislation or by using its appropriations authority to prohibit the expenditure of funds on such a program.~~

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Clearing Family-Based Visa Backlogs

The following options would enable DHS to promote family reunification by removing certain barriers that could otherwise delay or prevent the immediate relatives/family of U.S. citizens and legal permanent residents ~~latives~~ from adjusting their status. They operate on a smaller scale than the previous option, but would provide full legal status, not just deferred action, for many undocumented individuals with the strongest equities.

2. Waiver of Inadmissibility for Spouses, Sons and Daughters of U.S. Citizens and LPRs Subject to Three and Ten-Year Bars

Section 212(a)(9)(B)(i) of the Immigration and Nationality Act ("INA") renders inadmissible certain persons who have been unlawfully present in the U.S. and thus prevents them from adjusting to permanent residence status. An individual who has been unlawfully present in the U.S. for more than 180 consecutive days but less than one year and voluntarily departs the U.S. prior to the commencement of removal proceedings is barred from readmission for 3 years upon re-entry. Those who are unlawfully present for at least one year and voluntarily depart are barred from readmission for 10 years.

Under the INA, DHS has sole discretion to waive the above-referenced grounds of inadmissibility for spouses, sons and daughters of U.S. citizens and lawful permanent residents (LPRs) in cases where the refusal to admit such aliens would result in extreme hardship to the qualifying relative (i.e. the U.S. citizen or LPR spouse or parent). The "extreme hardship" standard ~~tends to be has to date been~~ strictly construed, thereby limiting the number of persons

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who apply for such relief.³ As a result, individuals who could otherwise become permanent residents, but who are subject to the 3 and 10 year bars, are afraid to leave the U.S. and go through consular processing because if their waiver applications are denied they are barred from reuniting with their families for up to 10 years.

DHS could take administrative action to address this problem by issuing guidance specifying a lower evidentiary threshold for "extreme hardship." The former INS took comparable action when they created a presumption of extreme hardship for individuals applying for permanent residence under the somewhat similar provision in the Nicaraguan Adjustment and Central American Relief Act of 1998. (Nonetheless issuing guidance setting a low threshold would require careful legal groundwork, which could well be subject to question, to distinguish this particular waiver standard from other portions of the INA where "extreme hardship" is also used as a standard.) Making the possibility of obtaining a waiver more likely would encourage many more spouses and sons and daughters of U.S. citizens and LPRs illegally here to return to their home countries for consular processing and reenter the U.S. as permanent residents. (Overstays granted a waiver—in contrast to entrants without inspection (EWIs)—could probably adjust status without leaving the U.S. EWIs could also have that possibility if option 3 is adopted.) Decisions and other actions regarding waivers are not subject to judicial review.

Pros

- This option would prevent the dissolution of families, which is a goal that many Members of Congress from both parties support.
- By promoting family unity, the Administration could advance one of the central goals of immigration reform.
- The individuals who would be affected represent a relatively small cross-section of the undocumented population, and are all persons who would eventually have qualified for LPR status anyway based on their family relationship, thus blunting the "amnesty" charge.

Cons

- The Administration could be criticized for its uncharacteristically expansive interpretation of "extreme hardship" to facilitate legalization of the undocumented.
- Critics might characterize this proposal as a partial amnesty.
- Because of statutory limits on the waiver, this measure does not reach the parents of U.S. citizen children. It would primarily benefit those who have married a citizen or LPR and many LPR spouses would still have a lengthy wait because of quota-based backlogs.
- A change in regulation may be needed to permit application for the waiver in advance of consular processing.

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3. Parole Immediate Relatives of U.S. Citizens Who Entered Without Inspection and Would Otherwise be Eligible for Adjustment of Status

³ To satisfy the high evidentiary threshold regarding the impact of his or her non-admission on the qualifying relative, an applicant must submit extensive evidence. Relevant factors include the qualifying relative's age, family ties in the U.S. and abroad, length of residence in the U.S., health/medical conditions, financial status and community ties.

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INA § 245(a) permits immediate relatives (i.e. spouses, minor children and parents) of U.S. citizens to adjust their status only if they have been inspected, admitted or paroled into the country. If such individuals entered the U.S. without inspection, they are normally ineligible for adjustment of status⁴ and must return to their home countries for consular processing of their applications, which can take years because of the application of the 3- and 10-year bars, which are triggered by a departure after a period of unlawful presence in the U.S.

Such individuals could, however, be paroled into the U.S. for purposes of applying for adjustment of status. Under INA § 212(d)(5)(A), parole is a discretionary act exercised on a case-by-case basis for "urgent humanitarian reasons" or where a grant would result in a "significant public benefit." Parole is expressly limited to aliens applying for admission to the United States. Traditionally, it has been applied only to arriving aliens, but since a legal change in 1996, it technically also is available to aliens who entered without inspection.⁵ To date parole has been used quite sparingly for EWIs, but wider application is permissible, which includes individuals who entered without inspection.⁶ To render immediate relatives of U.S. citizens eligible for parole, DHS could issue guidance establishing that family reunification constitutes a "significant public benefit." Parole would only be available under this option only to individuals who are the beneficiaries of approved immediate relative petitions.

Use of the parole authority in this way need not lead to an increased risk to public safety or national security, or otherwise open the door to fraud. Before parole is granted, the parole applicant would be vetted via security and criminal checks, as is done with parole applicants in an existing parole program for Cubans. Current national security and fraud vetting mechanisms – like requiring DNA testing where there are indications of fraud, and standard biographic and biometric checks run against State, Department of Justice, and DHS databases – currently used in immigrant visa processing could be duplicated in the parole context.

In cases where such individuals are already subject to the three or ten-year bars, because of a prior departure and return, this option alone will not suffice to provide status to them (with limited individual exceptions who can obtain the "extreme hardship" waiver). But if this measure is combined with option 2, they could be accommodated. An advance waiver of inadmissibility would be necessary to enable them to reenter the country. This could be accomplished by issuing guidance that establishes a presumption of hardship for the intended beneficiaries.

Pros:

- This initiative promotes family unity by allowing immediate relatives of U.S. citizens to pursue adjustment of status in the United States, instead of their home countries.

⁴ INA § 245(i) permits adjustment of status for aliens who entered the U.S. without inspection and filed a family or employment-based visa petition on or before April 30, 2001.

⁵ See INA § 235(a)(1); *Authority to Parole Applicants for Admission Who are Not Also Arriving Aliens*, No. 98-10 (Aug. 21, 1998).

⁶ See INA § 235(a)(1); *Authority to Parole Applicants for Admission Who are Not Also Arriving Aliens*, No. 98-10 (Aug. 21, 1998).

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- Except for those barred by other grounds~~Barring any grounds of inadmissibility, the beneficiaries would eventually have been admitted to the United States~~able to gain LPR status in the U.S. This fact provides a strong basis ~~to~~ counter to charges of amnesty.
- The pool of potential beneficiaries is limited to those with approved immediate relative petitions.

Cons:

- The exercise of parole authority in this manner is not common and would be subject to criticism from opponents. It could trigger legislative efforts to curtail parole, and the curtailment might go beyond simply negating these EWI adjustment cases.
- This exercise of parole authority would probably bring pressure on DHS to parole EWIs in other settings, in order to facilitate work authorization or access to some other public benefits.
- USCIS would require significant additional personnel and resources to process parole applications.

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4. Allow Beneficiaries of Approved Family-Based Visa Petitions To Wait in the U.S.

The INA requires beneficiaries of family-based preference petitions to apply for and be issued an immigrant visa before they can immigrate to the U.S. With the exception of immediate relatives of U.S. citizens (discussed above), who are not subject to numerical limitations, visas for family-based preference petitions are subject to annual caps.⁷ According to the current visa bulletin,⁸ no family preference category is current:

<u>PREFERENCE CATEGORY:</u>	<u>PRIORITY DATES NOW BEING PROCESSED:</u>
1 st Preference – Unmarried sons and daughters of a USC	01JUN04
2A Preference – Spouse and children of a LPR	01MAR06
2B Preference – Unmarried sons and daughters of a LPR	01JAN02
3 rd Preference – Married sons and daughters of a USC	22MAY01
4 th Preference – Brothers and sisters of a USC	15NOV99

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As discussed above, INA § 212(d)(5)(A) authorizes the Secretary to parole certain individuals into the U.S. temporarily “for urgent humanitarian reasons or significant public benefit.” This

⁷ See INA § 201(c), 202(a), 203.

⁸ US Department of State, *Visa Bulletin*, February 2010, http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4611.html, last accessed February 3, 2010.

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authority could be used to allow beneficiaries of approved family-preference petitions who are waiting for immigrant visas to do so in the U.S. A precedent exists in the above-referenced parole program for Cubans, in which DHS permits beneficiaries of approved family-based immigrant visa petitions to be paroled into the ~~United States~~U.S. instead of waiting for an immigrant visa number to become available. As you know, DHS is currently considering a similar program for Haitians.

The parole program could make parole available to all beneficiaries of approved family-preference petitions or it could limit availability to: (1) beneficiaries with priority dates that ~~are have~~ less than two- or three-year waits for the cases to be current; (2) beneficiaries in certain preference categories (e.g., only to spouses and minor children of LPRs); or (3) some combination of these options. Keeping program availability open to all beneficiaries of approved petitions would help the greatest number of persons. However, limiting the potential pool of parolees would minimize the costs associated with such a program, as parolees are eligible to receive a variety of public benefits once in the ~~United States~~U.S., and so reduce likely political objections.

Pros:

- This initiative promotes family unity by allowing beneficiaries of family-based preference petitions to await adjustment of status in the ~~United States~~U.S. instead of their home countries (or gives work authorization and documentation (via parole) to those family members already here as EWIs assuming option 2 is adopted).
- The targeted population already has approved preference petitions and is only awaiting current visa numbers to immigrate to the ~~United States~~U.S.
- The pool of potential beneficiaries is limited to those with approved petitions.

Cons:

- The exercise of parole authority in this manner is not common and would be subject to criticism from opponents.
- USCIS would require significant additional personnel and resources to process parole applications, though this cost would eventually be covered by fees.

Expanded E-Verify

The administrative measures described above to provide interim legal status to illegal immigrants and enable certain categories of immigrants to become permanent residents would likely need to be proposed in conjunction with either administrative or legislative enforcement measures. Expansion and improvement of the E-Verify program are the enforcement-related measures that would give us the most political space to propose significant benefits-related administrative changes. Without legislation, DHS cannot make employer participation in this program mandatory. However, the Department can undertake certain initiatives to significantly encourage more employers to use E-Verify, address implementation problems, and identify other improvements to the program.

By conducting hundreds of I-9 audits over the last several months, ICE has redoubled its efforts to ensure that employers comply with employment eligibility verification laws. Those

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employers found to have violated the law by hiring unauthorized workers may be subject to both civil and criminal penalties. By providing safe harbor for employers who properly use E-Verify, DHS could give employers a significant incentive to participate in the program.

Employers with a legal workforce are more likely to sign up for E-Verify. Registering illegal workers would encourage and accelerate employer use of E-Verify, especially in industries, like agriculture, with a large illegal workforce where there has been the greatest reluctance to use the program.

DHS could also step up efforts to expand the ongoing E-Verify outreach campaign, which is intended to demystify the process and promote voluntary enrollment by all sectors of U.S. employers in the E-Verify program. The initial messaging, which focused heavily on employer enrollment, highlighted the program's ease of use and benefits to employers. More recently, outreach has been expanded to encompass three distinct areas: awareness/education/enrollment, rights information and information solicitation. These areas are meant to target small to mid-size employers, employee associations and immigration advocacy groups, and federal contractors, respectively. The program is also set to allocate the largest media funding and resource allocation to target small to mid-size businesses.

Meanwhile, DHS should continue its efforts to address fraud and identity theft. Since June 2009, E-Verify users have been subject to routine monitoring through database analysis. Fraud is monitored by searching for multiple uses of a single Social Security number. USCIS has plans to undertake additional fraud detection efforts, including development of a Data Analytics System that will routinely search for violations and provide an automated solution; "locking" Social Security numbers (SSNs) that appear to be subject to fraudulent use, and allowing identity theft victims to lock their own SSNs. DHS could also establish an internal ICE/CIS anti-fraud task force for the purpose of developing additional recommendations for combating identity fraud in E-Verify.

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Additional strategies should also be considered. The existing Photo Screening Tool can be expanded without legislation. It is currently used only for DHS-issued documents (i.e. resident alien cards and employment authorization documents). It will soon be expanded to include U.S. passport photos, but ~~greater efforts need to be made to include DMV-issued driver's licenses and possibly state identification cards have thus far been met with great resistance by the states.~~ Overcoming this resistance should be prioritized if this option is pursued, however, it may require legislation to convince states to participate. In addition, individuals should have the ability to verify their own employment eligibility data. ~~If resources permit, the Social Security Administration should consider adopting a more secure social security card.~~

Pros

- Employers will have a strong incentive to participate in E-Verify and comply with the rules of the system.

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- More pervasive use of E-Verify would reduce unauthorized employment, shrink the underground economy and eventually decrease the future flow of undocumented workers.
- Undocumented workers will have an added incentive to do whatever they can to regularize their status or, alternatively, leave the country.
- DHS's outreach campaign is already underway.
- USCIS has already made substantial progress on many ~~some~~ of the proposed enhancements to address fraud/identity theft.
- Since the issuance of the federal contractor rule, the program has increased.
- Congress has already authorized funding for the self-verification function.

Cons

- Without legislation, employers cannot be required to participate in E-Verify, and nationwide coverage is therefore unlikely.
- Proponents of legalization will consider anything less than a full legalization program with a path to citizenship an unfair tradeoff to expanded or mandatory E-Verify.
- Immigrant advocates may call for stronger protections for employees who receive erroneous non-confirmations or experience discrimination. It would be difficult to add these measures without legislation.
- Some state privacy laws prohibit the sharing of DMV-issued driver's license information, which would prevent expanding the Photo Screening Tool to include this information. Again, legislation would be required to mandate that all ~~incentivize~~ states to comply and ensure adequate privacy protections are in place.

Political Considerations

Done right, a combination of benefit and enforcement-related administrative measures could provide the Administration with a clear-cut political win. If the Administration loses control of the message, however, an aggressive administrative proposal carries significant political risk. Key points in this strategy are as follow:

More modest administrative measures could be announced around the March 21st event. But more ambitious measures would have to be carefully timed. We would need to give the legislative process enough time to play out to deflect against charges of usurping congressional authority. In an effort not to preempt or impede legislative action, announcement of such measures would have to wait until it was evident that no legislative action on CIR was possible in the current Congress. This is likely to mean that the right time for administrative action will be late summer or fall—when the midterm election season is in full-swing.

The Administration would have to boldly drive the narrative. President Obama and the Administration would assert that they are stepping into the breach created by congressional gridlock and moving aggressively to solve a vexing problem that three consecutive Congresses have tried but failed to fix. Flanked by Secretaries Napolitano, Solis, Locke, Holder, and Vilsack, the President could make the case that the nation's economic and national security can wait no longer for Congress. Administrative action is necessary to restore rule of law by ending illegal hiring, requiring individuals who are unlawfully present to pass background checks or get

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deported, and guaranteeing that all employers and workers are paying their fair share of taxes. Clearing backlogs of family-based visas would be an added bonus.

This message would have to be carefully crafted to avoid being met with hostility by Democratic members of Congress who are trying to defend their seats in the midterm election. A potential strategy to sell the most ambitious administrative proposal would be to combine them with a call for a vote on mandatory E-Verify. The President could join with Reid and Pelosi to challenge Congress to enact such legislation. This legislative strategy would give Democrats who fear the administrative amnesty charge the opportunity to say they disagree with the President on amnesty, but as legislators are ready to crackdown on illegal workers. It would also help insulate Democrats from the charge of being a "do-nothing Congress" on this issue. This also places Republicans in a difficult position: a vote for enforcement helps endorse the President's overall strategy while a vote against is a vote for the status quo.

In this scenario, the Administration and Congressional leadership would be viewed as breaking through the Washington gridlock in an effort to solve tough problems. Giving nervous Members of Congress something tough to vote for while providing Latino voters with something they could support would be a win-win for all.

On the other hand, Congress is likely to be particularly sensitive in the months leading up to the elections to an effort that could be perceived as reinforcing the narrative that Congress cannot get anything done. Republican members may react by pushing back strongly that this is a political ploy intended to pander to the Latino vote. Reform opponents will also likely criticize the Administration for giving amnesty to illegal immigrants and letting them compete for American jobs when unemployment is still high. Critics may also question why this drastic action is necessary immediately before an election and will suggest that the new Congress deserves a chance to try and solve this problem. There is also a risk that the immigrant advocacy community may fear how the information will be used and be unwilling to accept a registration scheme that could be revoked in the future. If this is the case, the Administration could be left with a proposal that no one supports.

If the American public reacts poorly to an administrative registration effort, Congress could be motivated to enact legislation tying the Administration's hands. This could result, in the worst case scenario, in legislation that diminishes the Secretary's discretion to use parole or deferred action in other contexts. A heated fight could also poison the atmosphere for any future legislative reform effort.

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