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AILA's Take on President Obama's "Immigration Accountability Executive Action" Plan

On November 20, 2014, President Obama announced a package of immigration reforms called the Immigration Accountability Executive Action. These reforms will impact all major parts of the immigration system, and include:

1. A deferred action program for part of the unauthorized population living in the United States
2. Changes to border security and enforcement
3. Improvements to the adjudication of business and family petitions

This document provides a summary of the President's plan, background on why the various reforms are needed, and preliminary analysis of the impact these reforms will have. The President's announcement and the accompanying agency memoranda, as well as AILA resources, can be found at [AILA Resources on Administrative Reform](#). Also, visit the [American Immigration Council Resource Page on Executive Action](#). For more information, contact [Greg Chen](#), [Bob Sakaniwa](#), or [Karen Lucas](#).

Why is it necessary for the President to act now?

Almost two decades have passed since a major reform was enacted to the country's immigration laws. In the absence of reform, the immigration system has become increasingly broken and is failing American families, businesses and communities. Nationwide polling has shown that Americans want major reform. In network exit polls from the November 2014 election, 57 percent of voters preferred that "illegal immigrants working in the U.S." be offered legal status instead of deportation.

An estimated 11.5 million people are living in the country without legal status. Most have families and jobs, but cannot work legally and must exist in the shadows. Such a large unauthorized population is not good for the country's society or economy. These individuals are also subject to immigration enforcement and deportation. In the past several years, the Department of Homeland Security (DHS) has deported hundreds of thousands of parents of U.S. citizens—approximately 23 percent of all deportations—causing painful separations of families.

The President's announcement has already engendered partisan debate and controversy, with many alleging that his actions amount to a grant of amnesty and will prevent any opportunity to enact immigration reform in the upcoming years. AILA supports the enactment of major reform

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legislation, the only way to provide lasting change. In recent years, however, Congress has not been able to pass a bill, and there is little indication that the new Congress will achieve success. It would be irresponsible for the President to wait and do nothing while American families, businesses, and communities languish under the current system.

Deferred Action - Temporary Relief from Removal

The President's announcement offers deferred action—a temporary reprieve from enforcement—for two distinct categories of people. Though it does not cover the entire unauthorized population of approximately 11.5 million, the program has the potential to register and bring out of the shadows an estimated population of up to 4.4 million people. To qualify, applicants for deferred action will have to demonstrate that they meet stringent eligibility criteria, submit biometric information, and pass a background check. They will be eligible to apply for work authorization. Applicants will be excluded if they fall within DHS's enforcement priorities announced on November 20, 2014.

Legal Authority for Deferred Action

The executive branch's authority to grant deferred action is derived from the federal immigration statute and regulations as well as the long-standing principle of prosecutorial discretion used by every law enforcement agency. With finite enforcement resources, DHS cannot possibly deport everyone who is living unauthorized in the United States. Such a mass deportation would also be an unwise policy choice as it would gravely fracture American society and hurt the economy.

Over the past 50 years, Republican and Democratic presidents have designated various groups of people for temporary relief from immigration enforcement. In 1990, President Bush provided blanket protection from deportation for up to 1.5 million unauthorized spouses and children of immigrants, about 40 percent of the total unauthorized population at the time. Others have designated temporary protection to victims of domestic violence, the family members of military service members, widows and widowers, as well as people from specific countries or regions such as Cuba, Haiti, Southeast Asia or the Persian Gulf.

Risks of Applying

Each application will be decided on a case-by-case basis, and those who are denied deferred action could be at risk of deportation. Whether DHS chooses to pursue enforcement against individuals denied deferred action will depend on whether that individual is an enforcement priority.

Deferred action does not confer legal status. The grant is temporary, so those granted the status could be at risk of deportation if the status expires. A new president technically has the authority to revoke deferred action status or to discontinue the program. Information provided in a deferred action request by an individual who is not considered an enforcement priority is protected from disclosure to Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP).

Deferred Action for Parental Accountability (DAPA)

DHS will establish a deferred action program for the unauthorized parents of a U.S. citizen or lawful permanent resident (LPR) child born on or before November 20, 2014. To qualify individuals must have lived in the United States continuously since before January 1, 2010 (more than five years). They must also demonstrate they were in the United States on November 20, 2014 and on the date they apply. Deferred action will be granted for three years. Over four million people are estimated to be eligible to apply for this program. U.S. Citizenship and Immigration Services (USCIS) should be ready to receive DAPA applications within 180 days of the announcement.

Expansion of Deferred Action for Childhood Arrivals (DACA)

DHS will expand the pool of DREAMers (people brought to the United States as children) eligible for the DACA program that was first created in June 2012. Under the expanded program, individuals are eligible if they entered the country before January 1, 2010, can demonstrate continuous presence in the United States since then, and were under the age of 16 at the time they entered. When first established, DACA required that individuals be under the age of 31 at the time of application, but the new program has no current age limit.

The expanded DACA program will now grant deferred action for three years. Previously DACA granted deferred action for two year periods. Initial DACA applicants and those renewing their status will be eligible for a three-year grant of deferred action and work authorization. About 300,000 individuals will be eligible for this expanded version of DACA. USCIS should be ready to receive applications under the new DACA program within 90 days of the announcement.

ICE and CBP Role in the DACA and DAPA programs

ICE and CBP must immediately begin to identify people in their custody who meet the expanded DACA or DAPA criteria. ICE must also review all pending removal cases, find people who meet these criteria, close their removal cases and refer them to USCIS for determination of eligibility. ICE will also establish a process to allow individuals in removal proceedings to identify

themselves as possible candidates for deferred action. ICE has posted guidance on their website for those currently in removal proceedings who feel they may qualify for prosecutorial discretion, including for DACA and DAPA.

Enforcement-Related Reforms in Executive Action

In March 2014, the President asked the DHS Secretary Jeh Johnson to identify ways to make the immigration enforcement system fairer and more humane. It is unclear whether the reforms announced on November 20 will accomplish this goal.

Border

The President's announcement calls for additional border security measures at a time when the border has never been more secure. In the past decade, DHS has deployed unprecedented amounts of personnel, resources, and technology to secure the nation's borders. The rapid growth has come at a substantial cost, in particular a lack of accountability within CBP.

The President's plan calls for the creation of new joint task forces as part of the Southern Border and Approaches Campaign Plan. DHS will continue the surge in resources to the border that began this summer in response to the spike in families and unaccompanied children fleeing violence in the Northern Triangle in Central America – a resource surge that included a massive expansion in family detention in gross violation of U.S. asylum and humanitarian law. In addition, the President's announcement asks Congress to provide funding for 20,000 additional Border Patrol agents without providing justification for the need for such resources.

The President's announcement, as of yet, includes nothing to address the grave and long-standing concerns about the lack of oversight and accountability of Border Patrol. Reports persist of Border Patrol abuses—including the use of lethal force—deplorable detention conditions, racially motivated arrests, coercive interrogation tactics, and the denial of access to asylum and the right to counsel. Thousands of additional agents will likely exacerbate these problems and waste taxpayer dollars.

Secure Communities and Detainers

Under the new policy, Secure Communities will no longer exist, though fingerprints will still be automatically shared with DHS. In place of Secure Communities, DHS will create a new program: the Priority Enforcement Program (PEP). The Secure Communities program, begun in 2008, is a federal/state immigration enforcement partnership whereby fingerprints taken by police at arrest are automatically shared with DHS. Based on the information received, ICE or

CBP can then lodge a “detainer” that asks local law enforcement to keep that individual in jail for an additional two to five days.

Secure Communities and detainers have been sharply criticized because they blur the line between local authorities and immigration enforcement. This undermines the trust that individuals place in the police, making everyone more afraid to report crimes and thus the whole community less safe. They are also criticized for picking up mostly low-level offenders—even people who had been arrested but never convicted of anything—into the deportation pipeline.

Detainers have also been legally challenged, and this year, several federal courts found that they do not provide the legal authority to detain someone. Local law enforcement agencies that were holding people in their jails on the basis of an ICE detainer alone suddenly faced liability for constitutional violations. Counties began abandoning detainers in droves.

With respect to detainers, the new policy states that instead of requesting that police *detain* someone (as detainers do now) ICE will generally request that the local law enforcement *notify* them before the individual is released from their custody. ICE can continue to request detention in “special circumstances” when a person has a prior removal order or when other probable cause exists to believe that the person is a removable noncitizen.

The new policy also states that except where someone presents a national security risk, enforcement actions through the new program will only be taken against individuals who are convicted of specifically enumerated crimes (though there is some ambiguity about whether notification requests are similarly limited). Local law enforcement collaboration with federal immigration enforcement will not go away with this announcement, but will continue under PEP and through other programs. However, although these other programs have also been sharply criticized for generating fear and mistrust in immigrant communities and for engendering racial profiling, the President’s plan does not address them.

New Enforcement Priorities and Prosecutorial Discretion Guidance

A memorandum that goes into effect January 5, 2015 lays out new categories of enforcement priorities for both ICE and CBP: (1) apprehension at the border, national security threat, conviction for or intentional participation in gangs, and conviction for a felony or an “aggravated felony”; (2) conviction for a “significant misdemeanor” or three or more misdemeanors not arising out of the same incident, as well as “recent” illegal entry or reentry (after 1/1/14), and significantly abused the visa or visa waiver program; and (3) issuance of a final order of removal on or after January 1, 2014. This memorandum also provides guidelines for when individuals

who fall into each of these three priorities must and/or should be removed absent certain factors. Prosecutorial discretion decisions remain individualized determinations based on the totality of the circumstances. Many of the details of this policy and how it will be implemented are still unclear, especially with respect to individuals who fall within the enforcement priorities but also have strong equities or are in need of protection, such as asylum seekers or people who have long resided in the United States. Moreover, this will be the first time that CBP is expected to implement a prosecutorial discretion policy, and given the ever-increasing role that CBP arrests and expedited removals play in immigration enforcement, proper implementation by this agency will need vigilant monitoring.

Improvements to the Adjudication of Employment and Family Petitions

I-601A Provisional Waiver Expansion

Currently a significant number of immediate relatives of U.S. citizens who are present in the United States are not eligible to apply for lawful permanent resident (LPR) status in the United States because they entered the country unlawfully. Instead, such individuals must depart the United States and request waivers of inadmissibility due to their prior unlawful presence, which often results in a lengthy separation from their family members in the United States. Because of the heavy toll of separation and the uncertainty in the process, many immediate relatives of U.S. citizens forego the process of applying for LPR status and remain in the shadows.

In 2013, USCIS published a regulation creating a provisional waiver that improved the process by which individuals can seek a waiver of inadmissibility due to their prior unlawful presence. The provisional waiver process allows eligible individuals to seek “pre-approval” of an unlawful presence waiver while in the United States. If approved, the applicant departs the United States, attends a visa interview at the U.S. Consulate in his or her home country, and if the State Department determines the applicant is not subject to any grounds of inadmissibility other than unlawful presence, the applicant is generally granted an immigrant visa without delay. The provisional waiver decreased the amount of time that individuals are separated from their family members and has encouraged more family members to seek an immigrant visa who are otherwise reluctant to travel abroad for an unknown period of time. To obtain a waiver, an applicant must show that the bar to admission would impose an “extreme hardship” to a U.S. citizen or LPR spouse or parent.

The President’s reforms direct USCIS to issue new regulations to expand the categories of family members who are eligible to apply under the “Provisional Unlawful Presence Waivers” rule, to

include spouses and children of lawful permanent residents and sons and daughters of U.S. citizens. The new policy will significantly expand the number of individuals who are able to take advantage of the process. USCIS is also directed to provide additional guidance on the definition of hardship, including that it should clarify the factors adjudicators should consider in determining whether the standard should be met.

Reforms to the Employment Visa System

Many of the Administration's proposed immigration changes have the potential to make our immigration system work much more effectively for the nation's businesses by increasing access to needed workers. These actions will also increase the productivity of American workers, in part by allowing undocumented workers to come out of the shadows and fully participate in the economy. The business immigration reforms that President Obama has chosen to focus on hold the promise of significantly improving business' ability to grow our economy. According to an analysis by the President's Council of Economic Advisers, the President's executive actions on immigration would boost economic output by an estimated 0.4 to 0.9 percent over ten years, corresponding to increases in GDP of \$90 billion to \$210 billion in 2024.

Below are some of the key administrative reforms that the President has put forth:

Foreign Entrepreneurs

The innovative contributions of alien entrepreneurs are critical to the continuing recovery and advancement of the U.S. economy. Unfortunately there are no clear pathways for many foreign entrepreneurs to come to the United States. Furthermore, current USCIS guidance effectively requires an entrepreneur to create a corporate board structure in order to use visas that might be available. Giving up autonomy to a corporate board is not the typical business model for an entrepreneurial undertaking and discourages and dissuades many who might otherwise bring their ideas and innovations to the United States.

While details are still not settled, the President's program will allow certain inventors, researchers, and founders of start-up enterprises to be "paroled" into the United States (or be granted "parole in place" if already in the United States) if they show they have a certain amount of investment funding. DHS will also issue a new regulation or guidance clarifying that inventors, researchers, and founders of start-up enterprises are eligible to obtain a national interest waiver and, as a result, green cards. Both of these ideas have the potential to create new and better pathways for people who will create new jobs in the United States.

Improvement of Adjustment of Status Process

Significant backlogs exist in the employment-based green card system even as U.S. businesses face a variety of skill needs. Depending on their country of birth, some of these skilled workers are facing years long wait times to be able to file for adjustment of status, the final step in order to get a green card, once one is available. If that worker is waiting in a temporary nonimmigrant status, such as an H-1B, they are essentially locked into the same job position and title where they started. Under the current system, the spouse is not allowed to work. Many H-1B holders wait a decade to obtain a green card.

The President's proposal will allow individuals with approved employment-based petitions, who are waiting for word that their visas can now be issued, to file an adjustment of status application as long as their category is not considered unavailable. This fixes a major problem under the current system that prevents individuals with an approved employment-based immigrant petition (EB petition) from filing for adjustment of status until a green card is ready to be issued.

While this change in the green card process does not give individuals lawful permanent status, it places them in the position of having filed an adjustment application. The benefits of having made such a filing include the ability of the individual to change jobs if certain criteria are met and allowing the ability to be promoted without concern for having to go back and start the entire process over. In addition, dependent family members would qualify for interim work authorization and travel documents while waiting for the visas to become available for issuance. This would also allow USCIS to more accurately account for the number of individuals who are qualified for permanent residence who are lawfully in the United States.

H-4 (Spouses accompanying H-1Bs)

The President's announcement will allow certain spouses of persons in H-1B status to work in the United States. Current regulations do not allow spouses to work. This lack of work authorization for H-4 dependent spouses gives rise to personal, professional and economic hardship for these families making the United States a less attractive option for foreign high skill workers. Since May 2014, spouses have been awaiting finalization of a DHS-proposed rule allowing for employment authorization for certain H-4 dependent spouses but only in cases where the H-1B worker is in the latter stages of obtaining a green card. Whether the President's November 20 announcement will further improve upon the May 2014 proposed rule remains unclear. A finalized rule is expected in early 2015.

Intracompany transfer visas (L-1B)

In the United States, businesses often use the L-1 visa category to facilitate intracompany transfers. The L-1B visa is used for employees who possess specialized or advanced knowledge specific to the employer. The L-1B visa provides the mechanism for companies to manage their international workforce and enhance business productivity in the United States.

Unfortunately, there has been an ever growing disconnect between adjudications by USCIS and the statutory and regulatory definition of the term “specialized knowledge” leading to an increase in unfavorable adjudications of L-1B petitions.

For the past couple of years, DHS, in consultation with the State Department, has been drafting updated guidance on the definition of “specialized knowledge” in the context of the L-1B visa. There is indication now that the new L-1B guidance will be released soon and if such guidance reverses the trend of narrowly applying key terms that define “specialized knowledge” such guidance will be helpful to businesses and provide needed predictability for employers trying to develop and grow their U.S. operations.

Optional Practical Training (OPT)

OPT is a period during which students who have completed or have been pursuing their degrees are permitted to engage in hands-on practical training to complement their field of studies. OPT is an important tool to help foreign students who are educated in the United States to remain temporarily in the United States to gain experience in their field of study. Some of these students, especially those in the fields of science, technology, engineering and math (STEM) are highly sought after by employers for their skills. The President’s reforms are expected to help employers retain these promising students by extending the length of time a STEM graduate can remain in the United States in OPT status as well as expand the number of degree programs eligible for OPT. A change in regulations is necessary to implement this reform.

Visa Modernization

One of the more interesting potential reforms involves a Presidential Memorandum (PM) directing the agencies to look at modernizing the visa system, with a view to making optimal use of the numbers of visa available under current law. It is well past the time for the United States to address our outdated permanent immigration system and eliminate the multi-year backlogs for family-based and employment-based green cards. By revising the way the government accounts for the issuance of green cards, the current green card backlogs in both the family- and employment-based systems can begin to be significantly reduced. The details of this planned modernization have not been decided. Two ideas that may be considered to help reduce the

green card backlogs include the retention of unused green cards from prior years (recapture) and exempting spouses and children for visa counting purposes (by excluding derivatives). The Departments of State, Commerce, Education, Agriculture and Homeland Security, along with the Small Business Administration, will be involved in this agency-wide effort.

Permanent Labor Certification (PERM)

A full rulemaking will be undertaken to modernize the PERM program.

Job portability

“Same or similar” will be clarified when making determinations for eligibility of employees applying for an employment-based green card to change jobs while their applications are pending.

Miscellaneous reforms

Pending Proceedings There will be a review of cases currently under proceedings to see who is *prima facie* eligible for the relief measures announced. Those cases will be closed.

Immigration Court Reforms There will be a package of immigration court reforms that will include qualification of accredited representatives and ineffective assistance of counsel issues.

U/T Visas Three more types of offenses will be added to the list of offenses for which DOL can certify for U status.

Worksite Enforcement DOL will coordinate with other agencies regarding worksite enforcement activities.

Advance Parole There will be a new advance parole memo that will address the issues raised in Matter of Arrabally-Yerrabelly and make clear that CBP should honor the advance paroles issued by USCIS.

Parole in Place The parole in place policy will be expanded to include families of individuals in the process of enlisting in the armed forces.

Integration A second Presidential Memorandum will establish a Task Force on New Americans.

ICE Personnel Changes To accompany the new enforcement priorities, ICE is directed to review the job classification structure and to determine what changes may be required to compensate ICE employees adequately and equitably for the work they perform.