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Expert Analysis

President's Immigration Accountability Executive Action: a Real Step 'Forward'

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The spirit and promise of President Barack Obama's 2012 re-election campaign slogan "Forward" finally became a reality for those impacted most severely by congressional inaction on U.S. immigration reform on Nov. 20, 2014, during the president's prime time television address which announced the use of his executive authority on U.S. immigration policy. The president's inspirational, and at times aspirational, speech announced numerous specific executive actions that will provide temporary relief from imminent deportation and issuance of temporary work authorization to certain qualified individuals. The president's speech also included well-intentioned but more amorphous plans to overhaul certain areas of family- and employment-based U.S. immigration law and policy.

Since the unveiling of his long-awaited plans to address the country's broken immigration system, the president's moral and constitutional authority to act unilaterally on immigration reform has come under significant fire. The contentious nature of the public rhetoric on this deeply felt issue continues to rage unabated on all sides. It is anticipated that over four million people may benefit from the most concretely laid out parts of the president's push forward, namely the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the newly created Deferred Action for Parental Accountability (DAPA) program.

Maligned as an "amnesty" by opponents who continue to stoke fears of destruction of the American fabric of life and rule of law and pushed to go further by advocates of U.S. immigration reform to protect more of the estimated 11 million undocumented aliens living and working in the United States, Obama's actions appear to create a tentative middle ground, while the reality of actual implementation is months away.

While the debates on this polarizing issue continue on in new and traditional media, in Congress, at water coolers, schools and churches around the country and are watched by our allies and enemies around the world, a lawsuit has already been filed and joined by a coalition of 17 U.S. states to block implementation of the executive actions. More lawsuits are threatened by congressional Republicans while the latest federal $1.1 trillion spending bill passed by Congress, and awaiting Obama's signature as of the writing of this article, only funds the Department of Homeland Security (DHS) until the end of February 2015. DHS is the agency tasked with implementing most of the programs and wish list items announced by the president.

For those of us on the front lines of this issue, namely immigration law attorneys and accredited service providers, social service organizations, religious organizations and the various government agencies devoted to policy, benefits and enforcement, and the documented and undocumented populations we serve, this is the largest step forward in a generation for modernizing U.S. immigration law and policy and brings the renewed hope that real and sensible permanent reform may be on the horizon. This article will highlight a number of the programs announced by President Obama on Nov. 20, 2014, that impact both undocumented and documented individuals.

Expansion of DACA

The programs receiving the most attention, and are most likely the trigger for the current and threatened litigation against the Obama administration, are the expansion of DACA and the creation of a similar program modeled on the precepts of DACA which expands the segment of the undocumented population that can

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benefit, namely parents of U.S. citizens and lawful permanent residents. DACA and DAPA are standardized grants of deferred action for applicants who meet specific qualifications determined by DHS and administered by USCIS. Deferred action is a type of administrative relief from deportation used for decades by the executive branch and is only authorization for a non-citizen to remain in the United States for a temporary period of time. Deferred action is not status in the U.S., nor does it confer any special benefits beyond temporary work authorization or provide an underlying basis for eligibility for U.S. permanent residence or U.S. citizenship.

Once an individual has been granted deferred action he or she may apply for an employment authorization card for the period of stay authorized by DHS. Prior to Obama's announcement the grants of DACA were issued in two-year increments; it has now been expanded to three years.

DACA, first announced by Obama on June 15, 2012, has generally been heralded as a success by immigrant groups and the government in execution, except for those individuals who were over 31 years old at the time the program was created. This roadblock has now been removed as the age limit to apply has been lifted. To qualify for DACA or renew a DACA application, an individual must have entered the U.S. before reaching their 16th birthday; have continuously resided in the United States since Jan. 1, 2010; have been physically present in the U.S. on Nov. 20, 2014; have no lawful status as of the date of application; be a current student, or have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety. The expansion of DACA is set to begin on Feb. 20, 2015, 90 days from the date of Obama's announcement.

DAPA appears to be very similar to DACA but has been expanded to allow the parents of U.S. citizens and lawful permanent residents who have been continuously present in the U.S. since Jan. 1, 2010, to request deferred action and employment authorization for three years. To qualify the U.S. citizen or permanent resident child of the applicant must have been born on or before Nov. 20, 2014.

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The parent is not an enforcement priority for removal from the United States, pursuant to the updated Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum, also released as part of Obama's executive action announcements on Nov. 20, 2014. The new DHS memorandum clearly states the government's enforcement activity should be focused on national security threats, serious criminals and recent border crossers, and that it will direct all its enforcement resources at pursuing these highest priorities for removal.

Implementation of DAPA is set to begin May 20, 2015, no later than 180 days after President Obama's announcement. At this time there are no further details on the specifics of implementation of DAPA; however, most immigration practitioners and advocacy groups expect the process, procedure and documentation to establish eligibility to mirror DACA.

The success of DAPA and the expansion of DACA will depend on a number of factors. It is crucial qualified applicants feel safe enough to come out of the shadows and apply for deferred action and temporary status. It is equally important the government agencies tasked with implementing the new programs work in concert to educate, identify and process the millions of individuals who may benefit including individuals who may already be in immigration custody or have been released while in removal proceedings. Finally, immigration lawyers and accredited service providers must continue to work to protect individuals from being victimized by notarios and other for-profit organizations seeking to prey on immigrant groups during a time of uncertainty on the exact details of many of the new programs.

Provisional Waiver

Also included in Obama's executive action plans was a call for USCIS to issue new regulations to expand the Provisional Unlawful Presence Waivers rule to include the spouses and children of lawful permanent residents and children of U.S. citizens. The provisional waiver process, also referred to as "stateside processing," allows qualified applicants to apply for a waiver of inadmissibility while still physically present in the United States.

Under the previous rule, issued in 2013, only a U.S. citizen or permanent resident spouse or parent could qualify for the process, which included pre-filing of a waiver application to cure periods of unlawful presence in the U.S. prior to leaving the U.S. and applying for an immigrant visa at a U.S. Embassy or Consulate outside of the U.S. with the Department of State.

Prior to the creation of the rule in 2013 and the expansion announced last month, a significant number of immediate relatives of U.S. citizens who were present in the United States remained ineligible to apply for a green card while remaining in the U.S. because

they entered the country unlawfully or remained unlawfully and then left the U.S. and returned, triggering a three- or 10-year bar after readmission.

Pre-filing and having the certainty of an approval of the provisional waiver before leaving the U.S. brings peace of mind to families who fear permanent separation and keeps families together during the long waiver and adjudication process both with USCIS and the State Department. It was also meant to provide some consistency and transparency to what had previously been a Kafka-like ordeal for U.S. citizens and permanent residents who could not be sure their immigrant family member would return to the U.S. after departure.

Eligible applicants for the provisional waiver must demonstrate their absence from the U.S. will cause "extreme hardship" to the qualifying U.S. citizen or permanent resident relative. It is hoped the expansion of the provisional waiver rule policy will significantly expand the number of individuals who are able to take advantage of the process. In addition, USCIS has been directed to publish additional guidance on the definition of hardship, including clarifying the factors USCIS should consider when determining whether the hardship standard has been met.

Employment and Family

President Obama also announced a series of commonsense reforms to our employment-based immigration system directed toward individuals who have remained in lawful status in the U.S. or wish to come live and work in the U.S. under the auspices of our current employment-based immigration scheme. The heading of this section of Obama's announcement is instructive and fits in with the overall theme of his remarks that immigrants have made and continue to make positive contributions to U.S. society and that "modernizing, improving and clarifying immigrant and nonimmigrant programs" will grow the U.S. economy and create jobs.

Among Obama's wish list for changes to employment- and family-based immigration are:

• Expansion of the period of time Science Technology Engineering and Math (STEM) students can be granted work authorization after graduation from U.S. colleges and universities, along with an expanded list of fields of study which will qualify for STEM classification;

• Permission for certain spouses of H-1B nonimmigrants to be issued work authorization while in the U.S. in H-4 derivative status;

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• The publishing of long-promised guidance for L-1B intracompany transferee adjudications intended to clarify the definition of "specialized knowledge";

• Directing the State Department and USCIS to overhaul the immigrant visa system to insure that all available immigrant visas are issued in each fiscal year, including the possible creation and implementation of a system of pre-registration for adjustment of status for those applicants that are subject to per country visa delays under the current visa allocation system;

• Encouraging the greater use of the National Interest Waiver immigrant visa category for entrepreneurs, researchers, inventors and founders of companies;

• Issuing regulations or policy guidance to provide more certainty regarding retention of green card qualification for beneficiaries of approved visa petitions who wish to accept promotions with their current employers or change employers; and

• Modernizing the Program Electronic Review Management (PERM) labor certification program.

All of the aforementioned reforms, however, need to be implemented by regulation or require issuance of policy guidance and have no clear timeline for becoming a reality any time in the near future, unlike the specific deadlines for expansion of DACA and the creation and start of acceptance of DAPA applications.

While immigration lawyers and their clients alike are very pleased by the announced employment- based immigration reform wish list, our community continues to cautiously wait to see whether any will actually come to fruition before Obama leaves office, or if any of the filed or threatened litigation will be sustained by the judicial branch, washing away all the forward momentum finally felt after the president's speech on Nov. 20.

Conclusion

Since the failure of immigration reform to pass in June 2007, the U.S. immigration law community has waited for Congress to once again pick up the mantle on this crucial issue and for President Obama to live up to his campaign promises and make serious inroads in fixing our broken immigration system. While Congress continues to make no forward progress in this area, the president has finally delivered a set of well-reasoned reforms that if fully implemented will positively change the lives of millions of individuals. Future articles will focus in more detail on the specific provisions and requirements for eligibility for what the U.S. immigration law community hopes will truly be a step "Forward."