

NOVEMBER 2014

HIGHLIGHTS OF THE NEW IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION

On November 20, 2014, President Obama announced his long-awaited executive action on immigration reform during a 15-minute primetime speech. Immigration Accountability Executive Action (IAEA) will bring three key changes in deferred action, enforcement and legal immigration. Below is a summary of these three policy shifts, but note that implementation (i.e., the ability to apply for benefits) and the details are 90 or 180 days or even further away.

Deferred Action

Deferred Action for Childhood Arrivals (DACA) was an executive action taken in 2012 that resulted in more than 500,000 children being able to obtain legal status, employment authorization, Social Security cards, driver's licenses and access to higher education in most states. DACA is for undocumented young people who came to the United States before the age of 16. With IAEA, program eligibility has been expanded to include individuals born before June 15, 1981, who have continuously resided in the United States since January 1, 2010. IAEA also expands the period of the DACA benefit from two to three years at a time. U.S. Citizenship and Immigration Services (USCIS) emphasizes that the expansion of the program is **not** yet available, but anticipates that it will be in about 90 days. Filing fees for DACA and Employment Authorization Document will continue to apply.

The more significant deferred action news is the introduction of Deferred Action for Parental Accountability (DAPA), which enables parents of U.S. citizens or permanent resident children born on or before November 20, 2014, to receive deferred action

status and employment authorization. DAPA is estimated to benefit a population of more than 4 million undocumented individuals. The USCIS advises that the ability to apply for this benefit will be available in approximately 180 days to benefit parents of U.S. citizens or permanent resident children born on or before November 20, 2014. Like DACA, DAPA will be adjudicated on a case-by-case basis and unavailable to parents who are an enforcement priority for removal. Parents of DACA recipients are not eligible. The DACA educational requirement will probably not apply, but filing fees for DAPA and Employment Authorization Documents will continue to apply.

Enforcement

President Obama announced new priorities for cracking down on illegal immigration at the border and "deporting felons, not families." As a [White House press release](#) describes it: "The president's actions focus on the deportation of people who threaten national security and public safety," including suspected terrorists, convicted felons, convicted gang members and people apprehended on the border.

The president also announced initiatives to unclog the immigration courts and speed up the processing of applications for immigrant visa petitions for those in removal. These initiatives will include expansion of the provisional waiver (I-601a) processing for children of U.S. citizens (FB-1 and FB-3) and spouses and children of permanent residents (FB-2). Additionally, pending proceedings will be reviewed, and, consistent with the enforcement focus, cases will be closed in an exercise of prosecutorial discretion.

The controversial state and local Secure Communities program will be replaced by the Priority Enforcement Program. This new program will focus on removal of those convicted of criminal offenses, rather than all noncitizens who come into police custody. It is unclear, however, whether the Secure Communities program will be discontinued completely.

Legal Immigration

Of particular interest are the initiatives announced relative to our “broken” legal immigration system. Most of these reforms will take the time required for the regulatory process of the Administrative Procedures Act to run its course, but they will potentially provide great relief to many businesses, entrepreneurs and students. DACA expansion, DAPA creation and prosecutorial discretion will add more legal workers to the workforce.

IAEA will further immigration reform to address the fact that beneficiaries of approved petitions, particularly in the EB-2 India and China categories, have years-long waits before they can take the final step to apply for permanent residency. During that time, spouses on temporary worker (H-4) visas are not eligible for employment authorization. The principal beneficiary of the employment-based visa is not eligible for “portability,” and in other words, must stay with the petitioning employer until a visa is available and the application for permanent residency is filed.

IAEA will further legal reform in the following areas:

- Employment Authorization for H-4 visa holders will be available. (It is anticipated that regulation will be finalized within the next one to two months.)
- Preregistration, if implemented with other regulatory fixes, would allow the beneficiary and dependent family members to secure the adjustment of status (I-485) benefits of employment authorization and advance parole, when the immigrant visa petition (I-140) has been approved but no priority date is available.
- Portability will be made easier so that highly skilled workers may progress professionally and change employers.

- The president has directed the relevant agencies to modernize the visa system, with a view toward making optimal use of the number of visas available under law. Issues such as whether derivatives should be counted and whether past unused visa numbers can be recaptured will be included in this effort.
- There are not enough H-1B skilled worker visas to begin with, and each year entrepreneurs and employers struggle with the fact that their application is subject to the chance of a lottery. The number of H-1B visas can only be increased by an act of Congress, but methods such as a “parole in place” for certain entrepreneurs and extension of the duration of STEM Optional Practical Training (OPT) for F-1 students would give additional opportunities to retain valuable and needed talent.
- The Department of Labor’s (DOL) modernization of the labor certification (PERM) process and DOL’s coordination with other agencies regarding worksite enforcement activities.
- USCIS’ provision of clear guidance of what “specialized knowledge” is for L-1B intracompany transfer purposes.
- DHS’ clarification and expansion of advance parole so that individuals in lawful status can travel to their countries of origin with less fear concerning their ability to return or be readmitted to the United States.

As we noted above, the implementation will take some time and may be either slowed by legal action or accelerated by Congress enacting immigration modernization, which would fix decades-old problems.

If you have any questions regarding this alert, please contact a member of the Fox Rothschild Immigration Practice.