

The President's Immigration Accountability Executive Action of November 20, 2014: Overview and Issues

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Summary

On November 20, 2014, President Obama announced his Immigration Accountability Executive Action which revises some U.S. immigration policies and initiates several programs, including a revised border security policy for the Southwest border; deferred action programs for some unauthorized aliens; revised interior enforcement priorities; changes to aid the entry of skilled workers; the promotion of immigrant integration and naturalization; and several other initiatives the President indicated would improve the U.S. immigration system. The most controversial among these provisions will grant deferred action to as many as 5 million unauthorized aliens.

The President announced the executive actions through ten Department of Homeland Security (DHS) memoranda, two White House memoranda, and three Department of Labor (DOL) fact sheets. Together, they comprise the following initiatives:

- ***Border Security***: forming three new task forces as part of DHS's Southern Border and Approaches Campaign Strategy that integrates efforts not only *within* DHS's Customs and Border Protection (CBP) but also *among* other DHS agencies, such as Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and the U.S. Coast Guard;
- ***Interior Enforcement and Removals***: revising priorities for immigration enforcement and detention; ending the Secure Communities program and replacing it with the Priority Enforcement Program (PEP), collecting and disseminating improved metrics on removals, and reforming the employment structure for ICE Enforcement and Removal Office (ERO) agents;
- ***Expanded Deferred Action for Childhood Arrivals (DACA)***: increasing the population eligible for the DACA program by expanding the eligibility criteria, and extending the duration of DACA and its related work authorization from two to three years;
- ***Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)***: allowing parents of U.S. citizens and lawful permanent residents (LPRs) to request deferred action and employment authorization if they meet residency and other criteria and pass required background checks;
- ***Parole Rules***: revising conditions under which eligible family members of military personnel, persons traveling abroad, and certain entrepreneurs may receive parole;
- ***Provisional Unlawful Presence Waivers***: expanding the use of provisional unlawful presence waivers beyond spouses and minor children of U.S. citizens to also include the spouses and minor children of LPRs as well as the adult children of U.S. citizens, and clarifying the "extreme hardship" standard that must be met to obtain this waiver;
- ***High Skilled Workers***: ensuring that all statutorily available LPR visas are fully utilized, reviewing the labor certification program and its regulations to strengthen its integrity and responsiveness to workforce changes, providing foreign workers with greater flexibility to change jobs, expanding the use of national interest waivers to retain selected highly qualified workers, expanding opportunities for students to gain on-the-job training through administrative rule

changes, and clarifying the meaning of “specialized knowledge” to ensure U.S. workers are not being unfairly displaced;

- ***Immigrant Integration and Naturalization***: initiating an inter-agency task force to identify and promote both immigrant integration “best practices” within states and localities as well as facilitating steps that can be taken administratively within and among federal agencies, and encouraging eligible LPRs to naturalize through additional payment options and possible partial fee waivers;
- ***Immigrant Visa System***: providing recommendations to streamline, modernize, and improve immigrant and nonimmigrant visa processing;
- ***Labor Protection***: creating an inter-agency working group to promote effective and consistent enforcement of federal labor, employment, and immigration laws to protect all workers regardless of legal status; and
- ***Crime Victims***: expanding the DOL Wage and Hour Division’s role in supporting foreign national victims of human trafficking and other select crimes.

According to the President, the actions were taken in response to the absence of legislation addressing major problems within the immigration system. The President has stated that his actions are temporary, and that his successor can rescind them. Those opposed to the executive actions argue they were taken largely for political purposes. They contend that once granted, such temporary measures would be difficult to revoke. Separately, a debate has arisen as to whether the President has the legal authority to take such actions, with the Administration and others arguing the President’s actions fall within his authority, and many in Congress arguing the President has overstepped it. That debate and its attendant legal questions are beyond the scope of this report.

Because the President announced his executive actions relatively recently, little guidance is available to clarify policies and answer questions related to the revisions and initiatives they include. The two deferred action programs, both of which require petitioners to submit fees, are the only initiatives in the executive action supported by independent fee-supported funding. The rest rely largely on changes in rules and regulations and on the coordination and marshaling of existing administrative resources. As the Administration proceeds to implement the executive actions, some in Congress have vowed to halt some or all of them.

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Introduction

On November 20, 2014, President Obama announced his Immigration Accountability Executive Action which revises some U.S. immigration policies and initiates several programs, including a revised border security policy for the Southwest border; deferred action programs for some unauthorized aliens; revised interior enforcement priorities; changes to aid the entry of skilled workers; the promotion of immigrant integration and naturalization; and several other initiatives the President indicated would improve the U.S. immigration system. The most controversial among these provisions will grant deferred action to as many as 5 million unauthorized aliens.¹ The President announced the executive action through ten Department of Homeland Security (DHS) memoranda, two White House memoranda, and three Department of Labor (DOL) fact sheets.

According to the President, the actions were taken in response to the absence of legislation addressing major problems within the immigration system. The President has stated that his actions are temporary, and that his successor can rescind them. Those opposed to the executive actions argue they were taken largely for political purposes. They contend that once granted, such temporary measures would be difficult to revoke. Separately, a debate has arisen as to whether the President has the legal authority to take such actions, with the Administration and others arguing the President's actions fall within his authority, and many in Congress arguing the President has overstepped it.² That debate and its attendant legal questions are beyond the scope of this report. As the Administration proceeds to implement the executive actions, some in Congress have vowed to halt some or all of them.

Overview of Major U.S. Immigration Policy Issues

Policy makers and immigration observers widely agree that the U.S. immigration system is “broken,” but they disagree on measures to fix it. Underlying these different views are broader and more fundamental debates about how many temporary and permanent immigrants should be admitted into the United States, how those immigrants should be selected for admission (e.g., needed skills, relationship to U.S. residents), and the funding levels and appropriate mix of immigration enforcement measures, among other issues.³

Long-standing immigration-related challenges include: an estimated population of over 10 million unauthorized individuals, a large portion of whom have lived in the country for over a decade and have U.S. citizen and lawful permanent resident (LPR) children;⁴ increasing

¹ Migration Policy Institute, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program - With Existing DACA Program Included, Anticipated Actions Could Benefit More than 5.2 Million in Total — Nearly Half of U.S. Unauthorized Population*, Press Release, November 30, 2014. The press release is based upon analytic work presented in Randy Capps, Marc R. Rosenblum, and James D. Bachmeier, *Executive Action for Unauthorized Immigrants: Estimates of the Populations that Could Receive Relief*, Migration Policy Institute, Issue Brief No. 10, Washington, DC, September 2014.

² For more information on this debate, see CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia.

³ For example, see a discussion of broad immigration debates surrounding family-based immigration in CRS Report R43145, *U.S. Family-Based Immigration Policy*, by William A. Kandel.

⁴ CRS Report R41207, *Unauthorized Aliens in the United States: Policy Discussion*, by Andorra Bruno.

competition among more advanced nations for the “best and brightest” workers, including U.S. educated science, technology, engineering, and mathematics (STEM) graduates;⁵ a queue of 4.4 million individuals whose petitions for lawful permanent resident (LPR) status have been approved and who must wait, in some cases decades, for a numerically limited visa to immigrate;⁶ and ongoing border security and interior enforcement challenges.⁷

Broad Elements of Immigration Reform

For several years, some Members of Congress have favored “comprehensive immigration reform” (CIR), a label that commonly refers to omnibus legislation that includes increased border security and immigration enforcement, expanded employment eligibility verification, revision of nonimmigrant visas and legal permanent immigration, and legalization for some unauthorized aliens residing in the country. The omnibus legislative approach contrasts with incremental revisions of the Immigration and Nationality Act (INA) and other immigration laws that would address some but not all of these elements, and with sequential reforms that would tackle border security and interior enforcement provisions prior to revising legal immigration or enacting legalization pathways for the unauthorized population residing in the United States.

In 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), a comprehensive immigration reform bill. S. 744 contained provisions that, among other things, would have increased border security and interior enforcement, expanded employment eligibility verification and worksite enforcement, offered a conditional path to legal status for many unauthorized aliens, reformed permanent immigrant and temporary nonimmigrant visas, and revised humanitarian admissions. The House took a different approach to immigration reform. Rather than consider a single comprehensive bill, the House acted on separate bills that, among other provisions, would have increased border security and interior enforcement, expanded employment eligibility verification and worksite enforcement, and substantially revised nonimmigrant and immigrant visas.⁸

Summary of the President's Executive Action

The President's “Immigration Accountability Executive Action,” announced on November 20, 2014, includes initiatives covering the following policy areas:

- border security;
- interior enforcement and removals;

⁵ See archived CRS Report R42530, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, by Ruth Ellen Wasem.

⁶ CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by William A. Kandel.

⁷ CRS Report R42969, *Border Security: Understanding Threats at U.S. Borders*, by Jerome P. Bjelopera and Kristin Finklea; CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*, by Lisa Seghetti; CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Lisa Seghetti; CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

⁸ In the 113th Congress, House committees reported or ordered to be reported the following immigration bills: Border Security Results Act of 2013 (H.R. 1417); Strengthen and Fortify Enforcement (SAFE) Act (H.R. 2278); Legal Workforce Act (H.R. 1772); Agricultural Guestworker (AG) Act (H.R. 1773); and Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas (SKILLS Visa) Act (H.R. 2131).

- Deferred Action for Childhood Arrivals (DACA);
- Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA);
- parole;
- provisional unlawful presence waivers;
- high-skilled foreign workers;
- immigrant integration and naturalization;
- immigrant visa system;
- labor protection; and
- crime victims.

This report reviews each component of the President's executive action based on currently available information. The report is broken out by broad policy areas. Each section begins with a discussion of the context of existing policy, describes the related executive action, and summarizes how the action addresses current immigration policy challenges.

Border Security

Security along U.S. borders has been an ongoing subject of congressional interest since the 1970s, when illegal immigration emerged as a serious national problem. The terrorist attacks of September 11, 2001 (9/11) spurred concerns about border security, a core part of DHS's effort to control unauthorized migration. The United States Border Patrol (USBP, Border Patrol) spearheads this effort as the lead agency along most of the borders. The USBP focuses on the regions between ports of entry (POEs).⁹

In addition to Border Patrol agents, other law enforcement personnel work in U.S. border regions. These include Customs and Border Protection (CBP) officers at POEs; Immigration and Customs Enforcement (ICE) agents; U.S. Coast Guard (USCG) personnel; additional federal law enforcement officers from agencies such as the Drug Enforcement Administration, U.S. Marshals Service, and Department of Agriculture; state and local police; and on occasion, the National Guard. Complementing this array of personnel are CBP's land-based surveillance assets,¹⁰ air and marine surveillance assets,¹¹ and fencing and physical infrastructure.¹²

⁹ For more information, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Lisa Seghetti.

¹⁰ These include a network of ground sensors, agent-centric mobile surveillance equipment, integrated fixed towers, agent-portable tripod-mounted surveillance systems, vehicle-mounted mobile surveillance systems, truck-mounted mobile vehicle surveillance systems, tower-mounted remote video surveillance systems, and air-based surveillance systems, all of which are linked, to varying degrees, to centralized control rooms where personnel monitor the border, alert field agents to potential incursions, and coordinate the response. In recent years, the Border Patrol's focus with respect to surveillance technology has shifted from fixed towers and other static resources to more mobile and dynamic systems. From CRS discussions with U.S. Border Patrol, December 17, 2012 and August 26, 2014; also see U.S. Border Patrol, *2012-2016 Border Patrol Strategic Plan*, Washington, DC: 2012.

¹¹ CBP houses much of this capacity in its "Office of Air and Marine. . . [which] is the world's largest aviation and maritime law enforcement organization, a critical component of CBP's layered enforcement strategy for border (continued...)"

USBP has experienced large-scale growth since 2004, and DHS Secretary Johnson and the Obama Administration have argued that the Southwest border is more secure than ever.¹³ Yet, some Members of Congress and others have called on the Administration to do more to secure the border. Border security has been a recurrent theme in Congress's debate about comprehensive immigration reform since 2005, and some Members have argued that Congress should not consider additional immigration reforms until the border is more secure.¹⁴

USBP is responsible for enforcing U.S. immigration law and other federal laws along the border and for preventing all unlawful entries into the United States, including entries of terrorists, unauthorized aliens, weapons of mass destruction, illicit narcotics, and other contraband. In discharging its duties, USBP patrols roughly 7,500 miles of U.S. international borders with Mexico and Canada and the coastal waters around Florida and Puerto Rico.

Along the border, USBP's staffing has grown from 9,511 in FY2004 to 18,611 in FY2013, with a slight dip to 18,127 in FY2014 (**Figure 1**). At the same time, apprehensions at the Southwest border have declined with an uptick in recent years partly due to a rise in the number of unaccompanied children crossing illegally. It is unclear how the expansion in USBP personnel has influenced unlawful migration, but the Obama Administration and DHS Secretary Johnson have touted these two numbers as indicative of improved security along the Southwest border.¹⁵

In recent years, CBP and USBP have developed border security plans. In May 2012, CBP released the most recent iteration, the "2012-2016 Border Patrol Strategic Plan." It shifts attention from resource acquisition and deployment to the strategic allocation of resources by "focusing enhanced capabilities against the highest threats and rapidly responding along the border."¹⁶ From an operational perspective, this plan emphasizes the collection and analysis of information about evolving border threats; integration of Border Patrol and CBP planning across different border sectors and among the full range of federal, state, local, tribal, and international organizations involved in border security; and rapid Border Patrol response to specific border threats.¹⁷

(...continued)

security. [The Office of Air and Marine has] 1,200 federal agents, more than 250 aircraft and over 280 marine vessels operating from 83 locations in the United States and Puerto Rico. See <http://www.cbp.gov/border-security/air-sea>.

¹² This includes items such as fencing and lighting along the border. In addition to fencing and other infrastructure in the immediate border region, DHS deploys a variety of checkpoints and forward operating bases to enhance border security. Checkpoints, including permanent and "tactical" (or roving) checkpoints, are located at some distance from the linear border, usually within 100 miles of the border.

¹³ See for example, Jeh Charles Johnson, Secretary, Department of Homeland Security, "Border Security in the 21st Century," public remarks delivered at the Center for Strategic and International Studies, Washington, D.C., October 9, 2014. Hereafter Johnson, "Border Security in the 21st Century." White House, "Fixing the Immigration System for America's 21st Century Economy."

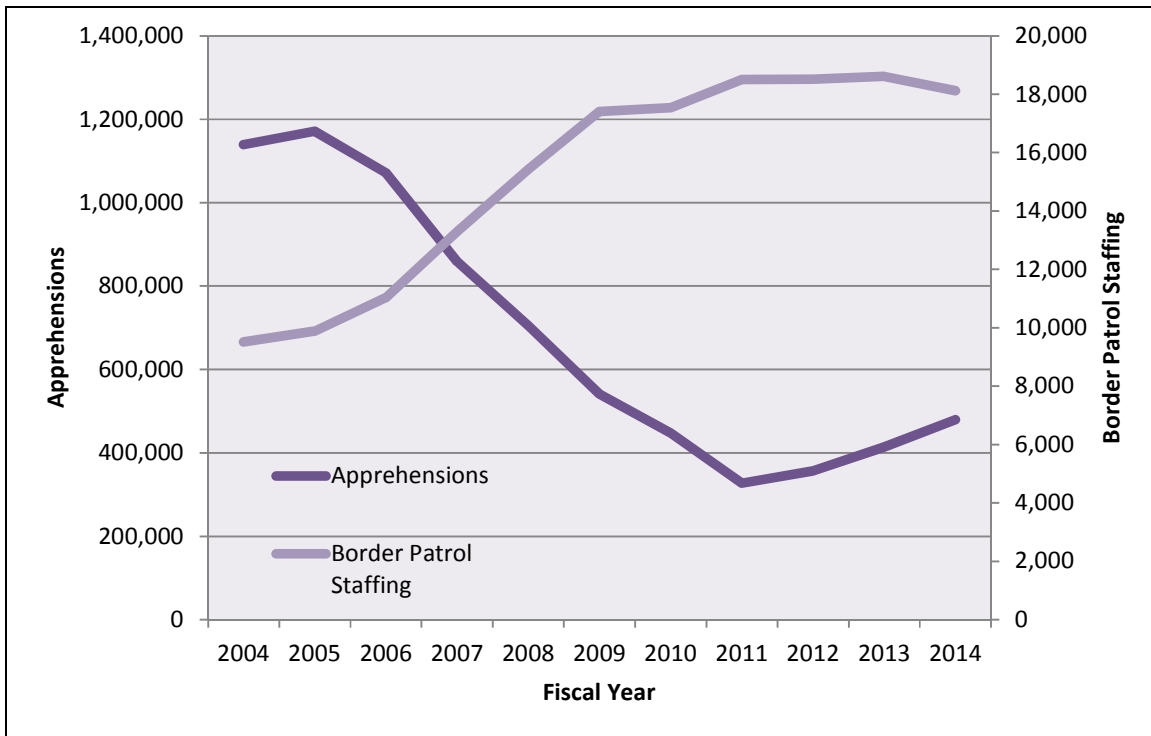
¹⁴ See, for example, Tom Howell, Jr., "Senate Republicans: Immigration Reform Must Deal First with Border Security," *Washington Times*, November 19, 2014; Alan Gomez, "Border Security Quandary Could Kill Immigration Bill," *USA Today*, April 2, 2013.

¹⁵ Johnson, "Border Security in the 21st Century."

¹⁶ CBP, *2012-2016 Border Patrol Strategic Plan*, Washington, DC: 2012, p. 7.

¹⁷ Ibid.

Figure 1. Apprehensions and Border Patrol Staffing along the Southwest Border
FY2004-FY2014



Source: Jeh Charles Johnson, DHS Secretary, “Border Security in the 21st Century,” slides from presentation delivered at the Center for Strategic and International Studies, Washington, DC, October 9, 2014.

Coordinating Border Security

In one project to enhance the coordination of complex border security and inspection efforts, CBP developed the Arizona Joint Field Command (JFC). The JFC emerged in 2011 as “an organizational realignment” bringing together the Border Patrol with CBP’s other key components,¹⁸ “under a unified command structure to integrate CBP’s border security, commercial enforcement, and trade facilitation missions to more effectively meet the unique challenges faced in the Arizona area of operations.”¹⁹ The JFC includes more than 6,700 CBP employees and covers the entire state of Arizona and parts of California.

DHS has announced coordination measures that appear to go much further than the JFC. Secretary Johnson first revealed the development of such border-security plans in May 2014. In written congressional testimony he describes a “Southern Border and Approaches Campaign” planning effort devised to create

¹⁸ Office of Air and Marine and the Office of Field Operations (CBP officers at POEs).

¹⁹ Joint written testimony of Custom and Border Protection’s U.S. Border Patrol Chief Michael Fisher, (then) Office of Air and Marine Assistant Commissioner Michael Kostelnik, Office of Technology Innovation & Acquisition Assistant Commissioner Mark Borkowski, and (then) Office of Field Operations Acting Assistant Commissioner Kevin McAleenan for a House Committee on Appropriations, Subcommittee on Homeland Security hearing on The President’s Fiscal Year 2013 budget request for CBP, February 29, 2012.

a strategic framework to further enhance security of our Southern border. Plan development will be guided by specific outcomes and quantifiable targets for border security, approved by me, and will address improved information sharing, continued enhancement and integration of sensors, and unified command and control structures as appropriate. The overall planning effort will also include a subset of campaign plans focused on addressing challenges within specific geographic areas.²⁰

Discussion

On November 20, 2014, DHS Secretary Johnson expanded on the campaign by “commissioning” three Joint Task Forces.²¹ Unlike the Arizona JFC, which brings together elements *within* CBP, the three Joint Task Forces will bring together personnel from CBP as well as *other* DHS agencies—the U.S. Coast Guard, Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services (USCIS). The Joint Task Forces will also “integrate capabilities of the remaining [DHS] components as needed.” According to Secretary Johnson, “two of these task forces will be geographically based and one will be functionally focused.” Joint Task Force East will cover “the Southern maritime border and approaches.” Joint Task Force West will have responsibility for the southern land border and the West Coast, while an entity dubbed Joint Task Force Investigations “will focus on investigations in support of the geographic Task Forces.” The memo lays out broad missions and objectives and sets a 90 day timeframe to “realign personnel and stand up headquarters capabilities within each Joint Task Force.”

Thus far, more details about the Joint Task Forces are scarce, and several key questions loom:

- Will DHS alter its command and control structures—as well as those of its component agencies—to accommodate these new bodies?
- What authority will each Joint Task Force leader²² have over Task Force personnel, immediate priorities, and budgets? Will such authority supersede the authority of component leadership in DHS?
- What metrics will be used to assess the effectiveness of the Joint Task Forces?
- How will jurisdictional disputes between Joint Task Forces and issues related to competing mission priorities be settled?

²⁰ U.S. Department of Homeland Security, Memorandum to R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Admiral Paul F. Zukunft, Commandant, U.S. Coast Guard, Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, W. Craig Fugate, Administrator, Federal Emergency Management Agency, and Alan D. Bersin, Acting Assistant Secretary for Policy, from Jeh Charles Johnson, Secretary of Homeland Security, *Southern Border and Approaches Campaign*, November 20, 2014.

²¹ Ibid.

²² According to the November 20, 2014 memo, the Task Forces “should adopt a supported-supporting component model. Among the Components of this Department [DHS], CBP will be the supported component in Joint Task Force West, the USCG will be the supported component in Joint Task Force East, and ICE will be the supported component in Joint Task Force Investigations.”

Enforcement Priorities, Secure Communities, and Pay Reform

Since its enactment in 1952, the Immigration and Nationality Act has given the Attorney General and more recently the DHS Secretary discretion to exercise the power to remove foreign nationals. Since at least 1975, a series of policy memorandums published by the former Immigration and Naturalization Service (INS) and DHS has provided guidance to immigration officers who institute removal proceedings against an alien. The guidance noted which categories of foreign nationals to prioritize for removal (i.e., prosecutorial discretion).²³

ICE Enforcement and Removal Operations (ERO) is chiefly responsible for locating removable aliens, managing custody of aliens undergoing removal procedures, and ensuring that aliens directed to depart from the United States do so (either by witnessing their removals or by physically removing the aliens). In addition, certain other DHS personnel may initiate a removal process against an alien.²⁴

On November 20, 2014, the DHS Secretary announced new department-wide policies for enforcement priorities and the apprehension, detention, and removal of aliens.²⁵ This guidance is effective on January 5, 2015. In addition, Secretary Johnson announced a review and actions to overhaul the pay scale for immigration officers in ERO.²⁶

Enforcement Priorities

Secretary Johnson wrote in the November 20, 2014 memorandum on enforcement priorities:

Due to limited resources, DHS and its components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every

²³ In the civil immigration enforcement context, the term “prosecutorial discretion” applies to a broad range of discretionary enforcement decisions including issuing or canceling notices to appear (NTAs) which start the removal process, allowing other forms of removal (e.g., voluntary departure), rather than instituting a standard removal proceeding in immigration court, granting deferred action and deciding whom to arrest for a violation of civil immigration law. Prosecutorial discretion may be exercised at any stage of an enforcement proceeding, but policy states that it should generally be exercised as early in the case as possible to preserve government resources.

²⁴ DHS personnel who are authorized to initiate removal procedures include U.S. Customs and Border Protection (CBP) officers and U.S. Border Patrol agents (within CBP), asylum and examination officers in U.S. Citizenship and Immigration Services (USCIS), and detention officers and other agents in U.S. Immigration and Customs Enforcement (ICE); see 8 C.F.R. §239.1(a).

²⁵ U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Alan D. Bersin, Acting Assistant Secretary for Policy, from Jeh Charles Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, November 20, 2014; and U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, Megan Mack, Officer, Officer of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Secretary, Intergovernmental Affairs, from Jeh Charles Johnson, Secretary of Homeland Security, *Secure Communities*, November 20, 2014.

²⁶ U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, and Catherine Emerson, Chief Human Capital Officer, Department of Homeland Security, from Jeh Charles Johnson, Secretary of Homeland Security, *Personnel Reform for Immigration and Customs Enforcement Officers*, November 20, 2014.

other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities.²⁷

The memorandum states that prosecutorial discretion should apply to initiating or suspending a removal proceeding as well as other enforcement decisions, such as deciding who to stop, question, arrest and detain; whether to continue to pursue a removal case; and whether to grant deferred action, parole, or a stay of removal. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, the policy states it is preferable to do so as early as possible to conserve government resources.

The memorandum lays out the following enforcement priorities:

- *(Highest) Priority 1: threats to national security, border security, and public safety*
 - aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a threat to national security;
 - aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
 - aliens convicted of an offense that involves participating in a criminal street gang,²⁸ or aliens who are 16 years or older who intentionally participated in an organized criminal gang to further illegal activity of the gang; and
 - aliens convicted of felonies.²⁹
- *Priority 2: misdemeanants and new immigration violators*
 - aliens convicted of three or more misdemeanors³⁰ or a “significant misdemeanor,”³¹
 - aliens who are unlawfully present and were not physically present before January 1, 2014; and
 - aliens who have significantly abused the “visa or visa waiver programs” (i.e., terms of admittance).
- *Priority 3: aliens issued final orders of removal after December 31, 2013.*

²⁷ U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Alan D. Bersin, Acting Assistant Secretary for Policy, from Jeh Charles Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, November 20, 2014, p. 2.

²⁸ Criminal street gang is defined in 18 U.S.C. §521(a).

²⁹ Felonies include any offense classified as a felony in the convicting jurisdiction, and any aggravated felony as defined in INA §101(a)(43).

³⁰ This excludes traffic offenses.

³¹ Significant misdemeanor is defined as an offense of domestic violence, sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or one for which the individual was sentenced to time in custody for 90 days or more.

According to the memorandum, unless certain circumstances are met, aliens described in *Priority 1* must be prioritized for removal, those in *Priority 2* should be removed, and those in *Priority 3* should generally be removed.³²

The President's executive action issued on November 20, 2014, revises enforcement priorities and rescinds and supersedes related policies issued in 2011 and 2012 by then-ICE Director John Morton.³³ The previous priority levels were (1) aliens who pose a danger to national security or a risk to public safety; (2) recent entrants; and (3) aliens with final orders of removal (i.e., fugitives or absconders) or who otherwise obstruct immigration controls. The most substantive change in enforcement priorities between the newly issued policy and policies from earlier years³⁴ is that an alien who was issued a final order of removal prior to 2014 is no longer an enforcement priority, provided he or she is neither a criminal nor a national security concern.³⁵ Other changes include increasing the priority level of aliens apprehended at or between ports of entry while attempting to illegally enter the country, and providing more specificity on the types of misdemeanor offenses that make an alien a focus for removal.

Detention Priorities

As with the previous Morton policy memorandum on detention and removal priorities,³⁶ the November 20, 2014, memorandum on enforcement priorities specifies that as a general rule, detention resources should be used to support enforcement priorities noted above or for aliens subject to mandatory detention under the law.³⁷ In keeping with earlier policy, the memorandum also states that, absent extraordinary circumstances or the statutory requirement of mandatory detention, ICE should not detain aliens who are

³² The policy leaves room for discretion among DHS personnel, even with *Priority 1* aliens. The policy states that an alien should be prioritized for removal unless he or she may be eligible for relief from removal or factors exist that, in the judgment of DHS personnel, indicate the person should not be an enforcement priority. Notably, *Priority 1* requires "compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority," while *Priority 3* requires "the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority."

³³ John Morton, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement, Washington, DC, March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Department of Homeland Security Immigration and Customs Enforcement, Washington, DC, June 17, 2011; and John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, U.S. Department of Homeland Security Immigration and Customs Enforcement, Washington, DC, June 17, 2011.

³⁴ Although the immigration agencies have issued guidance regarding enforcement priorities since at least 1975, analysis of the evolution of enforcement priorities is beyond the scope of this report.

³⁵ Aliens who have been issued final orders of removal but who have not departed from the United States are known as absconders or fugitive aliens. Since FY2002, there has been a concerted effort to remove absconders. In 2003, Congress mandated that the names of absconders be added to DOJ's National Crime Information System. See archived CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin, and CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

³⁶ John Morton, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement, Washington, DC, March 2, 2011.

³⁷ Under statute, those subject to mandatory detention include criminal aliens, national security risks, certain arriving aliens, and select persons with final orders of removal. For more on mandatory detention, see CRS Report RL32369, *Immigration-Related Detention*, by Alison Siskin, and CRS Report WSLG524, *How "Mandatory" Is the Mandatory Detention of Certain Aliens in Removal Proceedings*, by Michael John Garcia.

- known to be suffering from serious physical or mental illness;
- disabled, elderly, pregnant, or nursing;
- primary caretakers of children or infirm persons; or
- not in the public interest to detain.

Removal Statistics

ICE and the Office of Immigration Statistics (OIS) both report removal statistics, but immigration observers have raised questions about their accuracy.³⁸ In addition, removal statistics are used to evaluate DHS's adherence to stated policies on enforcement priorities.³⁹ Through the executive action, DHS Secretary Johnson directs OIS, with the cooperation of CBP, ICE, and USCIS, to create the capability to collect and maintain data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS. He further directs that these statistics be made publically available on an annual basis.

Secure Communities/Interoperability

Secure Communities was the original name given to an information sharing program that uses biometric data to screen for removable aliens as people are being booked into jails. The program began in late 2008 in about a dozen jurisdictions and since FY2013 has been operational in all state and local law enforcement jurisdictions in the country. As early as 2011, DHS began referring to this program as *interoperability* between local law enforcement, the Federal Bureau of Investigation (FBI), and DHS.⁴⁰

Secure Communities/interoperability is not an enforcement unit. When law enforcement agencies book (take custody of) someone and submit the person's fingerprints to the FBI for criminal background checks,⁴¹ the fingerprints are also automatically checked against DHS's Automated Biometric Identification System (IDENT) database.⁴² If the person is matched to an immigration record in IDENT, ICE is notified and determines whether any action is necessary or appropriate

³⁸ For example, see Mark Hugo Lopez, Ana Gonzalez-Barrera, and Seth Motel, *As Deportations Rise to Record Levels, Most Latinos Oppose Obama's Policy*, Pew Research Hispanic Trends Project, Washington, DC, December 28, 2011, Appendix A.

³⁹ For example, see Jessica Vaughan, *Deportation Numbers Unwrapped: Raw Statistics Reveal the Real Story of ICE Enforcement in Decline*, Center for Immigration Studies, Washington, DC, October 2013; and Brian Bennett, "High Deportation Figures are Misleading," *LA Times*, April 1, 2014, p. 1.

⁴⁰ Chuck Wexler et al., *Taskforce on Secure Communities Findings and Recommendations*, Homeland Security Advisory Council, Washington, DC, September 2011, p. 11; and ICE, *Congressional Budget Justification FY2014*, p. 57.

⁴¹ DOJ's Integrated Automated Fingerprint Identification System (IAFIS) conducts criminal and terrorist background checks in response to requests from federal, state, and local law enforcement agencies by checking fingerprints against the IAFIS database of fingerprints, criminal histories, photographs, and biographic information. See Federal Bureau of Investigation, "Integrated Automated Fingerprint Identification System," http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis.

⁴² The IDENT database is DHS's primary department-wide biometric database, and includes photographs, fingerprints, biographic name, personal identifier data, citizenship and nationality, and derogatory information, if applicable. See DHS, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)*, Dec. 7, 2012.

based on the agency's enforcement priorities.⁴³ Aliens identified for removal are placed in removal proceedings by ICE agents, typically from the Criminal Alien program (CAP).⁴⁴

As part of the President's executive action, Secretary Johnson directs ICE to discontinue Secure Communities.⁴⁵ However, the data interoperability between DOJ and DHS created under the name Secure Communities is not being discontinued. Instead, the program is being renamed and enforcement priorities changed for those identified as possibly removable aliens through the interoperability process. Consistent with the policy memorandum on enforcement priorities, the policy memorandum on Secure Communities specifies that ICE should only seek a transfer for an alien in state or local custody if he or she has been convicted of a *Priority 1* offense or of multiple or significant misdemeanors. Under the revised priorities, unless aliens pose a demonstrable risk to national security, enforcement actions will only be taken against those convicted of specifically enumerated crimes. The new program will be called the Priority Enforcement Program (PEP).

The Secure Communities memorandum also addresses the issue of "immigration detainers." These are documents in which ICE advises law enforcement agencies of its interest in individuals whom these agencies are detaining, and to take actions (such as holding the alien temporarily) to facilitate their removal.⁴⁶ The increased use of immigration detainers under Secure Communities has raised legal questions regarding their use.⁴⁷ Under the revised policy, ICE will replace requests for detention with requests for notification (i.e., that state or local law enforcement notify ICE of an alien's pending release from custody). Under special circumstances, a detention request may be issued if the person is subject to a final order of removal or if sufficient probable cause exists to find the person removable.

Some contend that the Secure Communities program has led to unfair treatment of selected individuals (e.g., a person is arrested rather than just given a warning or ticket because of his or her perceived immigration status) as well as some improper arrests and unlawful detention (e.g., a person is arrested on a false charge because he or she is perceived to be unlawfully present).⁴⁸ In the Secure Communities memorandum of November 20, 2014, the DHS Secretary directs the Office of Civil Rights and Civil Liberties to develop and implement a plan to monitor state and local law enforcement agencies participating in the transfer of foreign nationals to ICE.

⁴³ Chuck Wexler et al., *Taskforce on Secure Communities Findings and Recommendations*, Homeland Security Advisory Council, Washington, DC, September 2011, p. 10.

⁴⁴ The Criminal Alien Program (CAP) is an umbrella program that includes several different systems for identifying, detaining, and initiating removal proceedings against criminal aliens incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens that have been released into communities after serving their sentences. Immigration and Customs Enforcement, Enforcement and Removal Operations, *Criminal Alien Program*, Fact Sheet, Washington, DC, <http://www.ice.gov/criminal-alien-program>. See also CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

⁴⁵ U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, Megan Mack, Officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs, from Jeh Charles Johnson, Secretary of Homeland Security, *Secure Communities*, November 20, 2014.

⁴⁶ ICE and its predecessor, the Immigration and Naturalization Service (INS), have used detainers as one means of obtaining custody of aliens for removal proceedings since at least 1950. CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

⁴⁷ See CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

⁴⁸ Chuck Wexler et al., *Taskforce on Secure Communities Findings and Recommendations*, Homeland Security Advisory Council, Washington, DC, September 2011, p. 26.

Personnel Reform

As part of the President's executive action, DHS also announced a recalibration of the workforce and pay structure for ICE Enforcement and Removal Operations (ERO) personnel.⁴⁹ The related memorandum directs ERO and the DHS Office of the Chief Human Capital Officer to review the job series and premium pay coverage for ERO officers and determine any changes that may be required. The Administration will then pursue and prioritize regulations and legislation necessary to achieve the desired changes. According to the Administration, ERO's enforcement strategy and initiatives have shifted toward investigations, identification, location, arrest, prosecution, and removal of criminal aliens and other aliens who pose risks to national security. However, ERO's personnel structure lags behind other law enforcement agencies and other components of ICE, harming morale and presenting management challenges.⁵⁰ Some observers contend that personnel issues related to pay structure have existed for years at ERO, and that the reforms within the President's executive actions were timed for political purposes.⁵¹

Discussion

Since 2002, DHS has made concerted efforts to locate and remove absconders.⁵² The President's executive action of November 20, 2014 no longer makes such aliens enforcement priorities if they were issued final orders of removal prior to 2014 and are neither criminals nor national security concerns. At the start of FY2014, ICE reported a backlog of 469,151 fugitive aliens who had not been apprehended.⁵³ The Administration stated it is undertaking this policy to allow DHS to focus its limited resources on higher enforcement priorities. It is not known, however, how many fugitive aliens would qualify for the President's deferred action initiatives, but some overlap between the two programs can be expected. Time will be required to measure the impact of the new enforcement priorities on the types of aliens who are located and removed.

In addition, until implemented it remains unclear exactly what the effect of the new PEP program will be, compared to the former and in some ways comparable Secure Communities program it replaced. The enforcement priorities memorandum of November 20, 2014, suggests that ICE will issue fewer detainers with state and local law enforcement, focusing only on higher priority cases. It is also unclear how well the new requests for notification will effectuate the transfer of aliens to ICE custody, given that not all jurisdictions currently accept ICE requests for detention.

⁴⁹ U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, and Catherine Emerson, Chief Human Capital Officer, Department of Homeland Security, from Jeh Charles Johnson, Secretary of Homeland Security, *Personnel Reform for Immigration and Customs Enforcement Officers*, November 20, 2014, p. 2.

⁵⁰ Ibid, p. 1.

⁵¹ Dan Cadman, *Analysis of Obama's Executive Amnesty Scheme: ICE Personnel Reform*, Center for Immigration Studies, Washington, DC, December 2, 2014.

⁵² Aliens who have been issued final orders of removal but who have not departed from the United States are known as absconders or fugitive aliens. In 2003, Congress mandated that the names of absconders be added to DOJ's National Crime Information System. See archived CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin, and CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

⁵³ ICE, *Congressional Budget Justification FY2015*, pp. 52-53.

Deferred Action, Parole, and Provisional Inadmissibility Waivers

How to address the unauthorized alien⁵⁴ population in the United States has arguably been the most divisive issue in recent discussions about immigration reform. Proposals to enable unauthorized aliens to become U.S. lawful permanent residents (LPRs) have been key flash points in the congressional debate. Various legalization proposals have been introduced in recent Congresses, but none have been enacted. One key difference among these proposals has been their scope. Some bills have been targeted at particular segments of the unauthorized population. For example, legislation known as the Development, Relief, and Education for Alien Minors (DREAM) Act has proposed to enable certain unauthorized aliens who arrived in the United States as children to obtain LPR status through a two-stage process.⁵⁵ Other more controversial measures, such as the major Senate immigration reform bill considered in the 113th Congress,⁵⁶ have aimed to provide LPR status more broadly.

While only legislative action can bestow legal immigration status, the Obama Administration has used other mechanisms to enable unauthorized aliens to remain in the United States. The Administration has also taken steps to address the impact of provisions in the Immigration and Nationality Act (INA) that make aliens who have been unlawfully present in the United States for more than 180 days and then depart, inadmissible to the country for a specified period of time. These provisions are known as the 3- and 10-year bars. Through a recent set of executive actions, the Obama Administration is providing eligibility for two forms of temporary immigration relief—deferred action and parole—for certain segments of the unauthorized population, as well as expanding the availability of certain types of waivers of the unlawful presence grounds of inadmissibility in the INA.⁵⁷

Deferred Action

DHS defines deferred action as “a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.”⁵⁸ In 2012, in the absence of congressional action on DREAM Act legislation, DHS issued a memorandum announcing that certain unauthorized individuals who were brought to the United States as children and meet other criteria would be

⁵⁴ *Alien* is a term in U.S. immigration law that is synonymous with *foreign national* and *noncitizen*.

⁵⁵ See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno.

⁵⁶ Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744). See CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, by Ruth Ellen Wasem. CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia.

⁵⁷ For a discussion of related legal issues, see CRS Report R43798, *The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers*, by Kate M. Manuel; and CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia.

⁵⁸ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>. For additional information on prosecutorial discretion and deferred action, see CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia, and CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

considered on a case-by-case basis for deferred action for two years, subject to renewal.⁵⁹ The eligibility criteria established for this initiative, known as deferred action for childhood arrivals, or DACA, were similar to those for relief in DREAM Act bills. Among the DACA criteria were (1) being under age 16 at time of entry into the United States; (2) residing continuously in the United States since June 15, 2007; and (3) being below age 31 on June 15, 2012. The DACA initiative is administered by DHS's U.S. Citizenship and Immigration Services (USCIS). Aliens apply for employment authorization at the same time that they submit their applications for consideration of DACA.⁶⁰

On November 20, 2014, DHS Secretary Johnson announced an expansion of the original DACA initiative and the establishment of another DACA-like process to exercise prosecutorial discretion for another subgroup of unauthorized aliens in the United States.⁶¹

Expansion of Eligibility for DACA

The 2014 DHS memorandum on prosecutorial discretion directs USCIS to make specified changes to the DACA initiative that expand the pool of potential beneficiaries, as follows:

- elimination of the “below age 31 on June 15, 2012” requirement;
- advancement of the required starting date of continuous residence from June 15, 2007, to January 1, 2010; and
- extension of the initial grant and renewal periods for DACA and accompanying employment authorization from two to three years.

In the memorandum, DHS directs USCIS to begin accepting applications under the expanded DACA parameters in 90 days.

Establishment of the New Deferred Action Process

In the memorandum, the DHS Secretary further directs USCIS to establish a DACA-like process for exercising prosecutorial discretion toward another group of unauthorized individuals—parents of U.S. citizens or LPRs—who meet specified criteria. In addition to not having a lawful immigration status on November 20, 2014, a potential beneficiary must:

- be the parent of a U.S. citizen or LPR;
- have resided continuously in the United States since before January 1, 2010;

⁵⁹ U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012*.

⁶⁰ See CRS Report R43747, *Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions*, by Andorra Bruno.

⁶¹ U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, from Jeh Charles Johnson, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents*, November 20, 2014.

- be physically present in the United States on November 20, 2014, and at the time of making a request for consideration of deferred action with USCIS;
- not be an enforcement priority; and
- not present any other factors that make the grant of deferred action inappropriate.

The memorandum specifies that, as under DACA, applicants will apply for employment authorization at the same time that they submit their applications for consideration of deferred action. Grants of deferred action and accompanying work authorization under this process will be valid for a three-year period. In the memorandum, the DHS Secretary directs USCIS to begin accepting applications under the new deferred action process within 180 days.

Deferred action is also addressed in another DHS memorandum where the DHS Secretary directs USCIS to consider granting deferred action to unauthorized family members of U.S. military service members and veterans who are not eligible for parole-in-place (see “Parole”).⁶²

Parole

The INA authorizes the DHS Secretary to “parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States.”⁶³ Parole does not constitute formal admission to the United States; an individual granted parole is still considered an applicant for admission. Although parole is used most often to allow an alien who is outside the United States to enter the country, it also has been granted to unauthorized aliens who are physically present in the United States but who have never been lawfully admitted.⁶⁴ Parole granted to those present in the United States is known as *parole-in-place*. Another procedure, *advance parole*, may be authorized by USCIS to enable an alien in the United States to travel abroad and, upon return, be considered for parole.

Expansion of Use of Parole-in-Place for Military Families

Ongoing DHS policy makes certain family members of U.S. military service members and veterans eligible for parole-in-place. Covered family members are spouses, children, and parents of active duty members—and former members—of the U.S. Armed Forces and the Selected Reserve of the Ready Reserve.⁶⁵ In his November 20, 2014 memorandum, the DHS Secretary reports that the Department of Defense (DOD) has requested that DHS expand the application of

⁶² U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, from Jeh Charles Johnson, Secretary of Homeland Security, *Families of U.S. Armed Forces Members and Enlistees*, November 20, 2014.

⁶³ INA §212(d)(5)(A).

⁶⁴ Individuals previously lawfully admitted to the United States, even if no longer in a lawful immigration status, are not considered eligible for parole. For this reason, as discussed above, the memorandum directs USCIS to consider the availability of deferred action for unauthorized family members of military service members and veterans who were previously lawfully admitted to the United States.

⁶⁵ See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)*, November 15, 2013.

its military parole-in-place policy to cover family members of U.S. citizens and LPRs who seek to enlist in the U.S. Armed Forces.⁶⁶ In the memorandum, the Secretary directs USCIS to issue new policies on the use of parole-in-place for certain spouses, children, and parents of U.S. citizens and LPRs seeking to enlist.

Advance Parole

The November 20, 2014, DHS memorandum *Directive to Provide Consistency Regarding Advance Parole* addresses a Board of Immigration Appeals (BIA)⁶⁷ decision concerning advance parole and one of the grounds of inadmissibility in the INA related to unlawful presence.⁶⁸ In the *Matter of Arrabally*, the BIA decided that “individuals who travel abroad after a grant of advance parole do not effectuate a ‘departure . . . from the United States’ within the meaning of [INA] section 212(a)(9)(B)(i).”⁶⁹ Under INA §212(a)(9)(B)(i)(1), an alien who has been unlawfully present in the United States for more than 180 days but less than one year, voluntarily departs, and seeks admission within three years is inadmissible (3-year bar); and under INA §212(a)(9)(B)(i)(2), an alien who has been unlawfully present in the United States for one year or more and seeks admission within 10 years of such alien’s departure or removal date is inadmissible (10-year bar). If, in accordance with the *Arrabally* decision, travel on advance parole does not constitute a departure, then the 3- and 10-year bars on admissibility would not be triggered in such cases. In the DHS memorandum, the DHS Secretary provides notice that he has asked the DHS General Counsel to issue legal guidance clarifying that “in all cases when an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a ‘departure’ within the meaning of section 212(a)(9)(B)(i) of the INA.”

Provisional Unlawful Presence Waivers

The INA provides for specified family members of U.S. citizens or LPRs and specified categories of workers to be admitted to the United States for permanent residence as LPRs. The process of becoming an LPR through either the family-based or employment-based route has multiple steps.⁷⁰ In most cases, the sponsoring family member or employer must file an immigrant visa petition on behalf of the alien with USCIS.⁷¹ Among the general requirements for obtaining a visa

⁶⁶ U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, from Jeh Charles Johnson, Secretary of Homeland Security, *Families of U.S. Armed Forces Members and Enlistees*, November 20, 2014.

⁶⁷ The Board of Immigration Appeals in the Department of Justice is the highest administrative body for interpreting and applying immigration laws. BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court.

⁶⁸ The INA enumerates grounds of inadmissibility—grounds upon which aliens are ineligible for visas and admission to the United States. For an overview of the INA grounds of inadmissibility, see CRS Report R43589, *Immigration: Visa Security Policies*, by Ruth Ellen Wasem, p. 5.

⁶⁹ U.S. Department of Homeland Security, Memorandum to Stevan E. Bunnell, General Counsel, Office of the General Counsel, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, from Jeh Charles Johnson, Secretary of Homeland Security, *Directive to Provide Consistency Regarding Advance Parole*, November 20, 2014.

⁷⁰ See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by William A. Kandel.

⁷¹ There is no statutory restriction on submitting a visa petition on behalf of an alien who is in the United States without (continued...)

or gaining lawful admission to the United States is that an individual must be admissible to the country. In other words, the individual cannot be inadmissible under the enumerated grounds of inadmissibility in the INA (see “Advance Parole”). Some grounds of inadmissibility are subject to exceptions and waivers.

Unauthorized aliens in the United States with approved immigrant visa petitions may face difficulties in obtaining LPR status. The process of becoming an LPR from within the United States is known as *adjustment of status*. The main adjustment of status provision in the INA⁷² applies to aliens who have been inspected and admitted, or paroled, into the United States or who qualify for classification under the Violence Against Women Act (VAWA) and who meet other specified requirements. These requirements include that (1) the alien is the beneficiary of an approved immigrant visa petition; (2) an immigrant visa is immediately available;⁷³ and (3) the alien is admissible to the United States. Except for VAWA cases, unauthorized aliens who entered the United States without inspection are ineligible to adjust to LPR status under the main INA adjustment of status provision. Unauthorized aliens who initially were admitted or paroled into the country are generally ineligible to adjust status unless they qualify for an exception.⁷⁴

The alternative to adjusting status in the United States is for the alien to travel to his or her home country to apply for a visa at a U.S. embassy or consulate once a visa number becomes immediately available. If a visa is issued, the alien can use it to gain lawful admission to the United States as an LPR. If, however, an unauthorized alien returns home to apply for a visa, the Department of State (DOS) consular officer who is considering the visa application may find that the alien is inadmissible to the United States for 3 or 10 years based on the alien's prior unlawful presence in the United States, and thereby ineligible for a visa (see “Advance Parole”).

A prospective immigrant who is found to be ineligible for a visa by DOS based on his or her prior unlawful presence may be eligible for a waiver. Under INA §212(a)(9)(B)(v), DHS has discretionary authority to grant an alien a waiver if the alien is the spouse or son or daughter of a U.S. citizen or LPR, and it is established that refusal of admission to the alien would result in extreme hardship to the citizen or LPR spouse or parent. Until recently, an alien had to wait until he or she received an ineligibility finding from DOS during the overseas immigrant visa process before applying for a waiver, if eligible.

In 2013, USCIS issued a new rule that made changes to the unlawful presence waiver application process for certain spouses and minor children of U.S. citizens by establishing a provisional unlawful presence waiver. Under the rule, a beneficiary of an approved immigrant visa petition can apply for and receive a provisional waiver of the unlawful presence ground of inadmissibility

(...continued)

a lawful immigration status.

⁷² INA §245(a).

⁷³ Spouses and minor children of U.S. citizens and parents of adult U.S. citizens, designated as “immediate relatives” under the family-based immigration system, do not have to wait for a visa number to become available. Other family-based immigrants are subject to a complex set of preference categories and numerical limits, and must wait for an immigrant visa number to be immediately available before they can apply for a visa.

⁷⁴ For example, there is an exception for the spouses and children of U.S. citizens and the parents of adult U.S. citizens (INA §245(c)). Another provision (INA §245(i)), which was last updated in 2000, enables aliens who entered the United States unlawfully to adjust status provided they meet other requirements. Among the requirements, the alien must be the beneficiary of a petition or application filed by April 30, 2001.

while still in the United States, if the alien meets all the applicable requirements, including demonstrating that a U.S. citizen spouse or parent would experience extreme hardship if the alien were denied admission to the United States. A recipient of a provisional waiver can then depart the United States to attend an immigrant visa interview with a DOS consular officer abroad. If the consular officer determines that the applicant, given the approved waiver, is admissible to the United States and eligible for a visa, the officer may issue the immigrant visa, which the individual can present at a port-of-entry to gain lawful admission to the United States.

Expansion of Eligibility for Provisional Unlawful Presence Waivers

As noted, DHS has statutory discretionary authority to grant an unlawful presence waiver to an alien who is the spouse or son or daughter of a U.S. citizen or LPR. Under current regulations, however, eligibility for a provisional waiver is limited to spouses and minor children of U.S. citizens. As part of the President's executive action, the DHS Secretary directs USCIS to expand eligibility for provisional unlawful presence waivers to all statutorily eligible groups for whom an immigrant visa is immediately available.⁷⁵ The additional classes to be covered are adult children of U.S. citizens; and spouses, minor children, and adult children of LPRs.

Clarification of Extreme Hardship Standard

In order to receive an unlawful presence waiver under INA §212(a)(9)(B)(v), an applicant must demonstrate that refusing to admit him or her to the United States would result in extreme hardship to a citizen or LPR spouse or parent. The term *extreme hardship* is not defined in the INA. In the *Expansion of the Provisional Waiver Program* memorandum, the DHS Secretary directs USCIS to clarify the factors it considers in making a determination about extreme hardship and “to consider criteria by which a presumption of extreme hardship may be determined to exist.”

Discussion

This set of executive actions offers different types of immigration relief to different subgroups of the unauthorized population. The beneficiary groups reflect the general priority the U.S. immigration system gives to preserving the unity of the immediate families of U.S. citizens and LPRs. None of the executive actions directly grant beneficiaries a lawful immigration status – only congressional action can confer immigration status.

The expansion of the provisional unlawful presence waiver program to specified relatives of U.S. citizens and LPRs—spouses and minor children of LPRs and adult children of U.S. citizens and LPRs—with approved immigrant visa petitions could help facilitate these individuals' acquisition of LPR status. Beneficiaries of approved immigrant petitions who are unable to adjust status in the United States would still need to return to their home countries in order to pursue LPR status. Before leaving the United States to apply for a visa abroad, however, an eligible individual could apply for and receive a provisional unlawful presence waiver. During the overseas visa process, if a consular officer determines that the individual is subject to a 3- or 10-year bar on admission—

⁷⁵ U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, from Jeh Charles Johnson, Secretary of Homeland Security, *Expansion of the Provisional Waiver Program*, November 20, 2014.

and that no other grounds of inadmissibility apply—the individual could use the waiver to obtain a visa and gain admission to the United States as an LPR.

The executive action on advance parole also addresses the 3- and 10-year bars, but in a different way. It effectively would make the 3- and 10-year bars inapplicable in cases in which an individual leaves the United States after being granted advance parole and then seeks to return.

The expansion of the military parole-in-place program would enable eligible spouses, children, and parents of U.S. citizens and LPRs who seek to enlist in the U.S. Armed Forces to be granted parole. Although parole is not considered an immigration status, an individual with parole can adjust to LPR status in the United States provided that he or she meets the applicable requirements (see “Provisional Unlawful Presence Waivers”).

The expansion of eligibility for DACA and the establishment of a new deferred action process for the unauthorized parents of U.S. citizens and LPRs who meet specified requirements could enable individuals in the newly covered groups to remain in the United States and, if granted employment authorization, to work legally. During the period of deferred action, these individuals would have protection from removal. They would be in a period of stay authorized by DHS and would be considered to be lawfully present for admissibility purposes. As such, during the period of deferred action, they would not accrue unlawful presence for admissibility purposes (which is relevant for application of the 3- and 10-year bars). Individuals granted deferred action would not be provided with a pathway to a lawful immigration status, however, and DHS has the discretion to terminate the grant of deferred action at any time.

High-Skilled Workers

A key principle underlying U.S. immigration policy is facilitating the permanent and temporary entry of foreign nationals with needed skills. Admitting professional, managerial, and skilled foreign workers raises a series of policy tensions as the United States attempts to compete internationally for the most talented workers without negatively impacting wages and working conditions of native workers and students entering the U.S. labor market.⁷⁶

Permanent Employment-Based Immigration⁷⁷

Immigrant admissions and adjustments for LPR status are subject to a complex set of numerical limits and preference categories that give priority for admission on the basis of family relationships, needed skills, and geographic diversity. The current employment-based LPR visa system consists of five numerically limited preference categories:

- *first preference*: priority workers who are persons of extraordinary ability in the arts, the sciences, education, business, or athletics; outstanding professors and researchers; and certain multinational executives and managers;

⁷⁶ CRS Report R43745, *Temporary Professional, Managerial, and Skilled Foreign Workers: Legislation in the 113th Congress*, by Ruth Ellen Wasem.

⁷⁷ This section is adapted from archived CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.

- *second preference*: members of the professions holding advanced degrees or persons of exceptional ability;
- *third preference*: skilled workers with at least two years training, professionals with baccalaureate degrees, and unskilled workers in occupations in which U.S. workers are in short supply;
- *fourth preference*: special immigrants who largely consist of religious workers, certain former employees of the U.S. government, and undocumented juveniles who become wards of the court; and
- *fifth preference*: investors who invest at least \$1 million (or less money in rural areas or areas of high unemployment) to create at least 10 new jobs.

Employers who seek to hire prospective immigrant workers petition USCIS. Employers who seek to hire prospective employment-based immigrants through the second and third preference categories also must petition the U.S. Department of Labor (DOL) on behalf of the alien (see “Labor Certification” below).⁷⁸

High-Skilled Temporary Worker Visas⁷⁹

Temporary visas for professional, managerial, and skilled foreign workers have become an important gateway for high-skilled permanent immigration to the United States.⁸⁰ The Administration contends that employers use temporary worker visas to retain workers as they wait for LPR visa numbers to become available. If workers’ nonimmigrant visas expire before their permanent visas become available, such workers must leave the country.⁸¹

Over the past two decades, the number of visas issued for temporary employment-based workers has more than doubled, from just over 400,000 in FY1994 to over 1 million in FY2013.⁸² Notably, policy makers and advocates have focused on two visa categories in particular: H-1B visas for professional specialty workers and L visas for intracompany transferees. These two nonimmigrant visas epitomize the tensions between the global competition for talent and possible adverse effects on U.S. workers.

⁷⁸ Certain second preference immigrants whose admittance is deemed to be “in the national interest” are exempt from labor certification.

⁷⁹ This section is adapted from CRS Report R43735, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*, by Ruth Ellen Wasem.

⁸⁰ Temporary visas are issued for an expressed purpose and a specific period of time. In most cases, the foreign national must demonstrate they have a “home they have no intention of abandoning” in their native country. For more background on temporary visas, see archived CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

⁸¹ U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, from Jeh Charles Johnson, Secretary of Homeland Security, *Policies Supporting U.S. High-Skilled Business and Workers*, November 20, 2014, p. 2.

⁸² While the data include some unskilled and low-skilled workers as well as accompanying family members, visas for managerial, skilled, and professional workers dominate the trends. These data understate the trends in professional, managerial, and skilled foreign workers, because the State Department does not issue visas to nonimmigrants that change status within the United States. For example, a foreign national residing in the United States as a student may convert their status to a temporary nonimmigrant worker without going abroad to obtain a new visa. Bureau of Consular Affairs, *Report of the Visa Office*, U.S. Department of State, Table XVI, multiple years.

Changes to Current Policy

On November 20, 2014, the DHS Secretary released a policy memorandum stating that USCIS will be producing new regulations and policies designed to “grow our economy and create jobs” by attracting and retaining highly skilled immigrants.⁸³ The policy changes will affect employment-based LPR visas; optional practical training (OPT) for foreign students; the L visa category for intracompany transfers; and select foreign nationals who are inventors, researchers, and founders of start-up enterprises.⁸⁴ In addition, the Secretary announced that he will be publishing a final rule to incentivize employers of current temporary workers to sponsor them for LPR status. Concurrently, DOL announced a review of the policies and regulations related to labor certification.⁸⁵

Preventing Visa Retrogression⁸⁶

As discussed above, a complex set of numerical limits and preference categories dictate how many and which persons may become LPRs in a given year. DOS is responsible for allocating the visas based on family- and employment-based preference categories and uniform per-country limits. DOS must calculate when a visa number is available for a specific foreign national with an approved immigrant petition, allowing that foreign national to adjust to LPR status if they are in the United States or receive their LPR visa if they are outside the country. Several years ago, “accounting problems” between USCIS’s processing of LPR adjustments of status in the United States and Consular Affairs’ processing of LPR visas abroad became apparent.⁸⁷ This difference unexpectedly lengthened the wait for a visa for some foreign nationals with approved LPR applications (i.e., visa retrogression).⁸⁸

In the High-Skilled Memorandum, the Secretary states that USCIS should continue to work with DOS to make sure that all immigrant visas are allocated when there is demand for such visas, and improve the system for determining when visas become available. DOS reportedly has agreed to modify the visa bulletin to clarify when a person’s visa number will become available.

⁸³ U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, from Jeh Charles Johnson, Secretary of Homeland Security, *Policies Supporting U.S. High-Skilled Business and Workers*, November 20, 2014 (hereafter, “the High-Skilled Memorandum”).

⁸⁴ Previously, the Administration announced other policies with the goal of retaining high-skilled workers. For example, in May 2014, DHS published a proposed rule to grant work authorization to spouses of H-1B visa holders with approved petitions for LPR status. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Employment Authorization for Certain H-4 Dependent Spouses,” 79 *Federal Register* 26886-26901, May 12, 2014.

⁸⁵ Department of Labor, *Department of Labor to Pursue Modernized Recruitment and Application Requirements for the PERM Program*, Fact Sheet, Washington, DC, November 20, 2014.

⁸⁶ This section is adapted from CRS Report R42048, *Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings*, by Ruth Ellen Wasem.

⁸⁷ Ibid.

⁸⁸ Visa retrogression occurs when visa priority dates moved backward in time rather than forward in time. Most recently, in October 2014, a visa retrogression occurred in the second employment-based preference category for India. See Department of State, *Visa Bulletin, Immigrant Numbers for November 2014*, Washington, DC, October 9, 2014.

Labor Certification

The INA bars the admission of prospective immigrants who seek to enter the United States to perform skilled or unskilled labor, unless the Secretary of Labor certifies to the Secretaries of State and Homeland Security that such foreign workers will not displace or adversely affect the working conditions of U.S. workers.⁸⁹ All labor certification applications (LCAs) for aliens seeking LPR status are processed through DOL's Program Electronic Review Management (PERM) labor certification system.⁹⁰ In FY2014, employers reportedly submitted over 70,000 PERM applications requesting foreign workers, and the majority of the job openings were for professional occupations in Information Technology and Science.⁹¹ Under the President's executive action, DOL will review the PERM program and relevant regulations, with the goal of making the program more responsive to changes in the national work force.⁹²

Changing Jobs

Currently, employees with pending employment-based LPR visa applications may change jobs without jeopardizing their application only if the new job or position is in a "same or similar" occupational classification. Reportedly, workers often will not accept promotions or change employers due to fear of invalidating their applications.⁹³ Under the High-Skilled Memorandum, USCIS was directed to consider amending regulations to ensure that long-standing visa petitions are not invalidated in cases where the employee seeks to change jobs or employers. Specifically, the DHS Secretary directed USCIS to issue a policy memorandum that provides guidance on the definition of "same or similar" occupational classification.

National Interest Waiver

Generally, foreign nationals attempting to immigrate under the second and third employment-based preference categories must be sponsored by an employer, who must certify that the foreign national is not displacing U.S. workers. Under the INA, certain foreign nationals with advanced degrees or exceptional ability may apply for LPR status without an employer sponsor if it is in the

⁸⁹ INA §212(a)(5). *Labor certification* generally refers to the process in which employers must *document* in the application that certain conditions have been met, including that the employer has attempted to recruit of U.S. workers. As part of this process, the employer must also document the wages, working conditions, and benefits to be provided to foreign workers, thereby permitting DOL to certify that those conditions have been met. *Labor attestation* refers to a process in which employers *attest* that such conditions have been met but do not have to submit documentation with the application. Employers instead must retain documentation showing that the necessary conditions have been satisfied. For more information, see CRS Report R43223, *The Framework for Foreign Workers' Labor Protections Under Federal Law*, by Margaret Mikyung Lee and Jon O. Shimabukuro.

⁹⁰ The Program Electronic Review Management (PERM) regulations were published on December 27, 2004, after initially being proposed in May 2002. The stated goals of PERM are to streamline the labor certification process and reduce fraudulent filings. *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, p. 77325.

⁹¹ Department of Labor, *Department of Labor to Pursue Modernized Recruitment and Application Requirements for the PERM Program*, Fact Sheet, Washington, DC, November 20, 2014.

⁹² Specifically DOL will seek input on: options for identifying labor force shortages and surpluses and methods for aligning domestic worker recruitment requirements with demonstrated shortages and surpluses; methods to modernize the U.S. worker recruitment requirement; processes to clarify employer obligations to insure PERM positions are fully open to U.S. workers; ranges of processing times and possibilities for premium processing; and the application submission and review process. *Ibid.*

⁹³ The High-Skilled Memorandum, p. 5.

national interest.⁹⁴ This is known as the “national interest waiver.”⁹⁵ According to the Administration, the waiver is underutilized and limited guidance exists on its use. In the High Skilled Memorandum, the DHS Secretary directs USCIS to issue guidance or regulations clarifying the circumstances under which the national interest waiver can be used.

Start Up Visas

Some have criticized the fifth-preference employment-based (EB-5) visa category for not allowing its applicants, who generate business ideas and obtain investor backing to launch them, to petition for LPR status.⁹⁶ In the 113th Congress, House-passed H.R. 2131 and Senate-passed S. 744 would have, under certain circumstances, allowed foreign nationals who received investment money from qualified investors to apply for LPR status.

The DHS Secretary, through the High-Skilled Memorandum, directs USCIS to create a program using the “significant public benefit” parole authority⁹⁷ to allow certain high-skilled foreign nationals to enter or remain in the United States. The program would grant parole on a case-by-case basis to investors, researchers, and founders of start-up enterprises who may not qualify for the public interest waiver or EB-5 status, but who have secured “substantial” financing from U.S. investors or who “otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of ‘cutting edge’ research.”

According to the memorandum, the grant of parole would temporarily allow these foreign nationals to pursue research, new ideas, and businesses in the United States rather than abroad, and give them time to secure temporary or permanent immigration statuses. Regulations to implement this program must include income and resource requirements. In addition, those who receive parole under this program will, reportedly, be ineligible for federal public benefits⁹⁸ and premium tax credits under the Affordable Care Act.⁹⁹

Optional Practical Training (OPT)

During or after completing their undergraduate or graduate studies, foreign students on F-1 visas are permitted to participate in employment known as Optional Practical Training (OPT).¹⁰⁰ OPT is temporary employment that is directly related to an F-1 student’s major area of study.

⁹⁴ INA §203(b)(2)(B).

⁹⁵ Because no statutory or regulatory definition of “national interest” exists, USCIS relies on a 1998 Administrative Appeals Office precedent decision setting forth a three-prong test for evaluating requests for a national interest waiver. See *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Comm’r 1998) (“NYSDOT”). U.S. Citizenship and Immigration Services, *National Interest Waiver*, Washington, DC.

⁹⁶ For an example of this argument, see Amar Toor, “Can Obama’s immigration reform stop Silicon Valley’s brain drain?,” *The Verge*, January 30, 2013. Under the EB-5 category, the money invested by the foreign national must be legally owned by the investor. *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm’r 1998).

⁹⁷ INA §212(d)(5).

⁹⁸ See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by Alison Siskin.

⁹⁹ See CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*, by Alison Siskin and Erika K. Lunder.

¹⁰⁰ For more on OPT, see archived CRS Report R42530, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, by Ruth Ellen Wasem.

Generally, an F-1 foreign student may work up to 12 months in OPT status. In 2008, DHS expanded the OPT work period to 29 months for F-1 students in STEM fields.¹⁰¹

The High-Skilled Memorandum directs USCIS and ICE to develop regulations to expand the number of degree programs eligible for OPT, and to extend the time period and use of OPT for STEM students and graduates. The new policy will also require the OPT program to have stronger ties to degree-granting institutions to ensure that a student's OPT furthers his or her course of study in the United States. In addition, the new policy is to be consistent with U.S. worker protections.

L Visas¹⁰²

Current law permits intracompany transferees to enter the United States on a nonimmigrant L visa that is designed for executives, managers, or employees with specialized knowledge of a firm's products. The L visa permits multinational firms to transfer top-level personnel to their locations in the United States for up to seven years.¹⁰³ The INA does not require firms wishing to bring L intracompany transfers into the United States to demonstrate that U.S. workers will not be adversely affected in order to obtain L visas.

The L visa category is considered essential to retaining and expanding international businesses in the United States. Some, however, have raised concerns that intracompany transferees on the L visa may displace U.S. workers who had been employed in those positions for these firms in the United States. Others contend that the L visa has become a substitute for the H-1B visa, noting that L visa employees are often comparable in skills and occupations to H-1B workers yet lack the latter's labor market protections. These concerns have often been raised with certain outsourcing and information technology firms that employ L visa workers as subcontractors within the United States. A related concern is that the unchecked use of L visas will foster the transfer of STEM and other high-skilled professional jobs overseas.¹⁰⁴ After investigating the L visa, the DHS Inspector General offered this assessment: "That so many foreign workers seem to qualify as possessing specialized knowledge appears to have led to the displacement of American workers, and to what is sometimes called the 'body shop' problem."¹⁰⁵

¹⁰¹ To qualify for the 17-month extension, F-1 students must have received STEM degrees included on the STEM Designated Degree Program List, be employed by employers enrolled in E-Verify, and have received an initial grant of post-completion OPT related to such a degree (i.e., already approved for 12 months in OPT). 8 C.F.R. 214.2(f)(10). E-Verify is an electronic employment eligibility verification program that U.S. employers voluntarily use to confirm the new hires' employment authorization through Social Security Administration and, if necessary, DHS databases. CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

¹⁰² This section is adapted from CRS Report R43745, *Temporary Professional, Managerial, and Skilled Foreign Workers: Legislation in the 113th Congress*, by Ruth Ellen Wasem.

¹⁰³ See CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.

¹⁰⁴ For historical background, see archived CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, by Ruth Ellen Wasem.

¹⁰⁵ Office of the Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, U.S. Department of Homeland Security, OIG-06-22, January 2006, p. 9.

In the High-Skilled Memorandum, the DHS Secretary directs USCIS to issue a policy clarifying the meaning of “specialized knowledge” for L visa qualification. Reportedly, the goal of the new policy guidance is to yield more consistent adjudication outcomes.¹⁰⁶

Discussion

The Administration did not provide details about the proposed policy changes related to high-skilled workers, but rather directed agencies to develop policies and regulations in these areas. Until such details are clarified, the potential impact of the changes remains unclear.

Integration and Naturalization

Immigrant Integration

Immigrant integration refers to the process by which immigrants become socially, economically, culturally, and politically integrated into American society.¹⁰⁷ The United States admits for permanent residence, and processes for citizenship, the largest proportion and absolute number of foreign nationals of any other major immigrant-receiving nation. As the foreign-born population in the United States increases—41.3 million persons or 13.1% of the total U.S. population in 2013—federally funded immigrant integration programs take on greater prominence.

Unlike other major immigrant-receiving nations, the United States has no national policy or dedicated executive branch office focused on coordinating immigrant integration efforts across federal agencies.¹⁰⁸ Federal immigrant integration programs take direct and indirect forms. Direct forms include the Department of Education’s English Language Acquisition Grants and Migrant Education Programs, and the DHS Office of Citizenship’s Immigrant Integration and Citizenship Program. Indirect forms are more numerous and often provide assistance to mostly low-income individuals.¹⁰⁹ States and localities also contend with immigrant integration, particularly in new immigrant destination states. Increasing numbers of states and localities grapple with issues of communication and English language learning as well as law enforcement, education, workforce development, adult literacy, and health access, among others.

Immigration advocates contend that the size and growth of the foreign-born population and the need for greater efficiency and integration among federal and state agencies warrants an executive

¹⁰⁶ U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, from Jeh Charles Johnson, Secretary of Homeland Security, *Policies Supporting U.S. High-Skilled Business and Workers*, November 20, 2014, p. 4.

¹⁰⁷ The term immigrant is synonymous with lawful permanent resident (LPR), a person who has been legally admitted to the United States to reside permanently.

¹⁰⁸ Jeb Bush, Thomas F. McLarty III, and Edward Alden, *U.S. Immigration Policy*, Council on Foreign Relations, Independent Task Force Report No. 63, Washington, DC, 2009, p. 80 (hereafter *U.S. Immigration Policy*, 2009.)

¹⁰⁹ Examples include the Department of Education’s Upward Bound Program, which facilitates college enrollment through academic preparation for first-generation college students from low-income families, and the Department of Labor Employment and Training Administration’s National Farmworker Jobs Program, which helps seasonal farmworkers and their families attain greater economic stability.

branch office for immigrant integration.¹¹⁰ A number of task forces have been convened to address this issue.¹¹¹ Immigration advocates contend, however, that such proposals must go farther by establishing a federal office to coordinate and facilitate immigrant integration nationally in a more comprehensive manner.¹¹² The Senate's comprehensive immigration reform bill, S. 744, included such broader provisions.¹¹³

The President's executive action establishes an interagency "White House Task Force on New Americans" with two primary objectives: (1) identify, promote, and expand immigrant integration best practices within states and localities; and (2) help determine steps that federal agencies can take to improve their own immigrant integration efforts.¹¹⁴ Other functions outlined within the action include: providing technical assistance and training; collecting and disseminating related data and information; soliciting recommendations from nonprofit organizations, government officials and other stakeholders; and monitoring equitable access to integration programs. The task force is expected to provide the President with recommendations to further the civic, economic, and linguistic integration of new Americans within four months and an implementation status report within a year.

Encouraging Naturalization

Naturalization, the process that grants U.S. citizenship to LPRs, is often viewed as a milestone for immigrants and a measure of their socioeconomic integration and assimilation to the United States. Practically, naturalized immigrants gain important benefits, including the right to vote, security from deportation in most cases, access to certain public-sector jobs, and the ability to

¹¹⁰ Attempts to create an office can be seen in H.R. 1617 introduced during the 112th Congress which sought to both rename USCIS's Office of Citizenship the Office of Citizenship and Immigrant Integration and to expand its mission accordingly.

¹¹¹ In 2006, President George W. Bush initiated the Task Force on New Americans as an inter-agency effort to help immigrants "learn English, embrace the common core of American civic culture, and fully become American." The Task Force worked to develop more cooperative federal approach to assimilation and included representatives from 20 federal agencies. See <http://www.uscis.gov/archive/archive-news/fact-sheet-task-force-new-americans>. In June 2010 the White House Domestic Policy Council formed the Interagency Working Group on the Federal Role of Immigrant Integration to assess the roles and equities of the federal government in promoting immigrant integration and to better coordinate integration efforts across agencies. President Barack Obama's proposed 2010 budget included a \$10 million allocation for a new Immigrant Integration Program in USCIS' Office of Citizenship that would have established a program devoted exclusively to helping legal immigrants transition into their new communities. See U.S. Government Accountability Office, *Immigrant Integration: U.S. Citizenship and Immigration Services Could Better Assess Its Grant Program*, GAO-12-274, Washington, DC, December 2011.

¹¹² The White House, Presidential Memorandum, *Creating Welcoming Communities and Fully Integrating Immigrants and Refugees*, November 21, 2014.

¹¹³ S. 744 would have renamed USCIS's Office of Citizenship as the Office of Citizenship and New Americans (OCNA). OCNA's functions would have included promoting institutions and providing training and educational materials on aliens' citizenship responsibilities and providing general leadership, consultation, and coordination of such activities across federal agencies and with state and local entities. In coordination with the Task Force on New Americans (TFNA) established in 2006, OCNA would have: advised USCIS, DHS, and the Domestic Policy Council on challenges related to immigrant integration; established national integration goals; evaluated federal immigrant integration efforts; and identified and assessed integration implications of new and proposed immigration policies. In addition, OCNA would have coordinated with state and local governments on integration issues; coordinated with other federal agencies to do the same regarding education and English programs; assisted states with new immigrant integration grant programs; and required a report to Congress every two years. S. 744 §§2511, 2521-2524.

¹¹⁴ The White House, Presidential Memorandum, *Creating Welcoming Communities and Fully Integrating Immigrants and Refugees*, November 21, 2014.

travel with a U.S. passport.¹¹⁵ U.S. citizens are also advantaged over LPRs for sponsoring relatives to immigrate to the United States.

Despite the clear benefits of U.S. citizenship status over LPR status, millions of LPRs who are eligible to naturalize do not do so. Part of the reason for this may stem from INA requirements for naturalization that include five years of continuous residence in the United States, possession of “good moral character” and English language competency, and the passing of a U.S. government and history examination as part of a naturalization interview.¹¹⁶

Naturalization applicants must also pay a fee, which some observers argue hinders LPRs from acquiring citizenship.¹¹⁷ USCIS currently charges \$680 to process naturalization petitions. The fee amount raises several issues for Congress, including whether it is sufficiently onerous that it discourages naturalization, and whether it accurately reflects USCIS’s cost to process naturalization applications. Empirical studies suggest that the volume of naturalization petitions filed may be inversely related to the naturalization fee amount,¹¹⁸ although other factors also explain application volume increases apart from fee increases.¹¹⁹ Immigration advocates have proposed providing more payment options for naturalization fees and making information about fee waivers more widely known.¹²⁰

The President’s executive action directs USCIS to accept credit cards as a payment option for the naturalization fee, in addition to money orders or checks (which are currently the only payment options).¹²¹ The action also directs USCIS to consider the feasibility of a partial fee waiver to the naturalization fee. While USCIS offers waivers for some of its immigration services fees, waivers for the \$680 naturalization fee are currently available only to those whose income is less than or equal to 150% of the federal poverty level. Those with incomes above this level do not qualify for any waiver and must pay the full \$680 fee.

¹¹⁵ See CRS Report R43366, *U.S. Naturalization Policy*, by William A. Kandel.

¹¹⁶ The INA waives some of these requirements for applicants over age 50 with 20 years of U.S. residency, those with mental or physical disabilities, and those who have served in the U.S. military.

¹¹⁷ See National Immigration Forum, *Making the Naturalization Process Less Daunting by Reforming the USCIS Fee Structure*, Washington, DC, 2011; commentary by the United States Conference of Catholic Bishops, Hebrew Immigrant Aid society, and Immigration Policy Center in National Foundation for American Policy, *Reforming the Naturalization Process*, NFAP Policy Brief, August 2011; and Joyce Baldwin, *Helping Immigrants Become U.S. Citizens*, Carnegie Corporation of New York, *The New Americans Campaign*, vol. 7, no. 2, Summer 2013 (hereafter “*Helping Immigrants*, 2013”).

¹¹⁸ Manuel Pastor, Jared Sanchez, and Rhonda Ortiz, et al., *Nurturing Naturalization: Could Lowering the Fee Help?*, Center for the Study of Immigrant Integration, University of Southern California, February 2013.

¹¹⁹ See CRS Report R43366, *U.S. Naturalization Policy*, by William A. Kandel, pp. 15-18.

¹²⁰ See *Helping Immigrants* 2013 and commentary of the Catholic Conference of Bishops etc. NFAP Policy Brief 2011. Many also characterize the naturalization application forms and instructions as excessively complex and unclear, with potential legal consequences for incorrect responses. They contend that prospective naturalization petitioners may be deterred from applying, and that simplifying the language in the N-400 application and instructions would make the naturalization process more accessible. See commentary of Mary Giovagnoli, Immigration Policy Center, in National Foundation for American Policy, *Reforming the Naturalization Process*, NFAP Policy Brief, August 2011. Others raise concerns over the naturalization residency requirements which disadvantages LPRs based overseas for employment. Such individuals must wait until they physically reside in the United States to fulfill the naturalization requirements, prolonging their time required to naturalize. See commentary of Cyrus D. Mehta and Gary Endelman in National Foundation for American Policy, *Reforming the Naturalization Process*, NFAP Policy Brief, August 2011.

¹²¹ U.S. Department of Homeland Security, Memorandum to Leon Rodriquez, Director, U.S. Citizenship and Immigration Services, from Jeh Charles Johnson, Secretary of Homeland Security, “*Policies to Promote and Increase Access to U.S. Citizenship*,” November 20, 2014.

Discussion

How the President's creation of the White House Task force on New Americans marks a significant departure from previous federal efforts that explicitly focused on immigrant integration is unclear. Because it originates from an executive action, it lacks funding from Congress. While some advances may result from greater federal coordination, the actual integration of immigrants into American society—economically, politically, socially, and culturally—involves considerable time and effort across many policy areas. Some immigration observers, citing experiences of earlier generations of immigrants, argue that taxpayers should not be funding government initiatives to foster integration. Others view some integration programs, such as English language instruction, as valuable investments that yield positive long-term returns.

Promoting naturalization generally has wide support, and expanding payment options for the naturalization fee may provide greater convenience for potential naturalization petitioners. Empirical evidence also suggests that the propensity to naturalize is price sensitive, suggesting that naturalization fee waiver options may boost naturalization rates among those who otherwise would not apply. Any such waiver options, however, will require USCIS to make up the corresponding shortfall in fee revenue through other means, including, possibly, reducing services, increasing processing times, and increasing other processing fees.

Other Executive Action Initiatives

Modernizing the U.S. Immigrant Visa System

Many agree that the U.S. immigration system contains dysfunctions for those who petition for immigration services and benefits: it is complicated to understand, redundant, time-consuming, and costly and burdensome to applicants and businesses. Some argue that the system, which requires technological infrastructure beyond what its fee structure can support,¹²² has reached a level that thwarts effective administration.¹²³

Bureaucratic and legal complexity can be expected of an administrative, technical, and legal system that handles the range of immigrant circumstances found in the United States, as well as the corresponding range of goals and objectives of agencies charged with implementing and enforcing U.S. immigration law. Yet, unlike regularly proposed and attempted overhauls of the similarly complex tax system, no major attempts have been made to overhaul the U.S. immigration system to allow it to work more efficiently and expediently.¹²⁴

¹²² U.S. Citizenship and Immigration Services is almost entirely funded through processing fees, a budgeting approach that contains inherent limitations on how much revenue can be raised to support USCIS operations. See CRS Report RL34040, *U.S. Citizenship and Immigration Services' Immigration Fees and Adjudication Costs: Proposed Adjustments and Historical Context*, by William A. Kandel.

¹²³ See for example *U.S. Immigration Policy*, 2009, pp. 90-95.

¹²⁴ Most recently, for example, S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act passed by the Senate in 2013, did not include explicit provisions to modernize the administrative functioning and infrastructure of USCIS.

USCIS, the DHS agency responsible for processing and adjudicating immigration petitions, has for several years undertaken a “modernization” program intended to convert itself from an entirely paper-based agency to a mostly digital platform. A recent review by DHS’s Office of the Inspector General suggested that the program’s goals have not yet been met.¹²⁵

On November 21, the White House, as part of the President’s executive action, directed the Secretaries of State and Homeland Security in consultation with other federal agencies and stakeholders to recommend ways to (1) improve and streamline the legal immigration system, emphasizing reforms that reduce government costs, improve services for applicants, reduce employer burdens, and reduce waste and fraud; (2) ensure that all the visa numbers are used; and (3) modernize the visa processing technology to reduce redundancy, improve applicants’ experiences and increase public oversight. The secretaries are also to establish metrics that can quantify improvement in these three areas.¹²⁶

Such reforms, long desired, will become more critical for USCIS as it implements the President’s executive action. Soliciting recommendations for improving the functioning of the immigration system may help alleviate some challenges faced by end users. As with other components of the President’s initiative, it remains to be seen how much can be accomplished through administrative refinements and the deployment of existing resources without the benefit of additional funding.

More Consistent Enforcement of Federal Labor, Employment, and Immigration Laws

In 2012, an estimated 8.1 million unauthorized aliens, representing just over 5% of the U.S. workforce, were working or looking for work in the United States.¹²⁷ Lacking proper work authorization, they are vulnerable to exploitation in a variety of ways and less likely to have sufficient resources to enforce their rights effectively.¹²⁸

Three sources of labor protections exist for foreign workers in the United States: (1) conditions imposed on employers hiring foreign workers through the labor certification-attestation portion of the petition to admit foreign workers; (2) federal labor laws regarding employer adherence to requirements for wages and working conditions; and (3) private causes of action that foreign workers may have under state and local laws.¹²⁹ DOL, which is responsible for enforcing minimum wage, overtime pay, and related requirements, focuses a significant percentage of its enforcement resources on low-wage industries that employ large numbers of immigrant—and

¹²⁵ U.S. Department of Homeland Security, Office of Inspector General, *Major Management and Performance Challenges Facing the Department of Homeland Security*, OIG-15-09, November 14, 2014.

¹²⁶ The White House, Presidential Memorandum, “Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century,” November 21, 2014.

¹²⁷ Jeffrey S. Passel and D’Vera Cohn, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14; Decline in Those From Mexico Fuels Most State Decreases*, Pew Research Center, Washington, DC, November 18, 2014, p. 8. In 2012, the size of the civilian labor force was estimated at 157.7 million according to data from the 2012 American Community Survey. See “Factfinder” at Census.gov.

¹²⁸ For example, see Southern Policy Law Center, “Immigrant Justice,” <http://www.splcenter.org/what-we-do/immigrant-justice>.

¹²⁹ Ibid.

presumably large numbers of unauthorized—workers.¹³⁰ Among other tasks, ICE is responsible for investigating immigration law violations related to knowingly hiring unauthorized aliens.¹³¹

In April 2009, DHS issued new guidance on immigration-related worksite enforcement that “reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country’s laws and knowingly hiring illegal workers.”¹³² In December 2011, DHS and DOL signed a revised memorandum of understanding to coordinate worksite enforcement actions and make them consistent with each agency’s mission.¹³³ Questions have arisen as to how rigorous and effective DHS’s worksite enforcement efforts are and have been in past years.¹³⁴

On November 21, 2014, as part of the President’s executive action, DOL announced the creation of an inter-agency working group to “promote effective and consistent enforcement of federal labor, employment, and immigration laws, with the goal of protecting all workers regardless of legal status.”¹³⁵ The working group will include representatives from federal agencies responsible for immigration enforcement and worker protections, including the Departments of Labor, Homeland Security, and Justice, and the Equal Employment Opportunity Commission and National Labor Relations Board.

The working group is broadly tasked with ensuring that (1) current immigration and employment policies do not dissuade workers from cooperating with law enforcement authorities in cases of employment violations; (2) federal enforcement authorities are not used by those who wish to undermine worker protections by enmeshing immigration authorities in labor disputes; and (3) federal labor, employment, and immigration laws are consistently applied.

As with most of the other elements of the President’s executive action, this initiative is being implemented without a congressional appropriation or stated source of funding. Hence, it remains to be seen the extent to which the creation of an inter-agency task force and greater coordination and planning among and within agencies can improve wages and worksite conditions for workers vulnerable to exploitation because of their immigration status (or lack thereof).

Expanding Support for Crime Victims

U nonimmigrant status is reserved for victims of certain statutorily specified crimes that occurred within the United States.¹³⁶ To qualify for U status, a foreign national must receive certification

¹³⁰ Unauthorized workers represents relatively large proportions of the workforce in particular industries, such as agriculture, construction, food handling, and low-skilled services. Jeffrey S Passel and D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Research Center, Washington, DC, April 14, 2009.

¹³¹ INA §274A. These cases also may involve additional violations, such as alien smuggling, document fraud, and worker exploitation. See. CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno.

¹³² U.S. Department of Homeland Security, USCIS fact sheet, *Worksite Enforcement Overview*, April 30, 2009.

¹³³ U.S. Department of Labor, *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, December 11, 2011.

¹³⁴ See for instance, National Immigration Law Center, “DHS Issues “New” Worksite Enforcement Guidelines That Are Simply More of the Same,” press release, April 30, 2009.

¹³⁵ Thomas E. Perez, Secretary, U.S. Department of Labor, “Fact Sheet: Establishment of Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws,” November 21, 2014.

¹³⁶ For more on U and T statuses, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for* (continued...)

from a law enforcement agency that he or she is being or is likely to be helpful in the investigation and prosecution of the criminal activity.

T nonimmigrant status is reserved for foreign nationals in the United States who are victims of severe forms of trafficking. To receive it, foreign nationals, with some exceptions, must comply with reasonable requests for assistance from law enforcement. Law enforcement certification is optional for T status, unlike for U status, but it serves as important evidence for applicants.¹³⁷

As part of the President's executive actions, the Department of Labor (DOL) has announced that in early 2015 it will begin exercising its authority to provide law enforcement certification to trafficking victims applying for T status.¹³⁸ In addition, DOL will simultaneously expand the types of crimes for which it certifies to include victims of extortion, forced labor, and foreign labor contracting fraud.¹³⁹

The DOL Wage and Hour Division enforces federal labor laws, including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Workers Protection Act, and assists with human trafficking investigations involving violations of these laws. As a result, DOL may encounter trafficking victims. Some advocates note that DOL's enforcement of wage and hour laws could help reveal trafficking and crime victims, as those who engage in labor trafficking or other criminal activity in the workplace are also likely to violate wage and hour laws.¹⁴⁰

Conclusion

The President's Immigration Accountability Executive Action announced on November 20, 2014, includes provisions meant to alleviate uncertainty for potentially millions of unauthorized aliens through deferred action and the use of provisional waivers and parole. It is also intended to revise enforcement priorities and improve and coordinate strategic initiatives across a range of immigration policy areas, including border security, high skilled immigration, and naturalization. Whether this executive action can accomplish these objectives and prompt Congress to pass more permanent legislative solutions is unclear.

(...continued)

Congress, by Alison Siskin and Liana Rosen.

¹³⁷ Department of Homeland Security U.S. Citizenship and Immigration Services, Information for Law Enforcement Officials, *Immigration Relief for Victims of Human Trafficking and Other Crimes*, http://www.uscis.gov/sites/default/files/USCIS/Resources/Humanitarian%20Based%20Benefits%20and%20Resources/TU_QAforLawEnforcement.pdf.

¹³⁸ Current policy allows DOL's Wage and Hour Division to certify trafficking victims for U status. While trafficking victims may be eligible for U status, only victims of severe forms of trafficking may qualify for T status. Department of Labor, *The Department of Labor's Wage and Hour Division Will Expand Its Support Of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS*, Fact Sheet, Washington, DC, November 20, 2014 ; and Department of Labor, "Secretary's Order 01-2014," vol. 79, no. 247 *Federal Register* 30224, December 24, 2014.

¹³⁹ Since 2011, DOL has provided law enforcement certification for U visa applications for the following crimes: trafficking, involuntary servitude, peonage, obstruction of justice, and witness tampering.

¹⁴⁰ For example, see Alliance to End Slavery and Trafficking, *DOL/Department of Wage and Hour, The Need for Funding and Report Language: \$5,000,000 for services for victims of trafficking to implement Section 107(b) of the TVPA and report language*, <http://endslaveryandtrafficking.org/fy2014/Department-of-Labor-Department-of-Wage-and-Hour.php>.

Accomplishing such goals in the face of a potentially resistant Congress may prove challenging. USCIS, the agency tasked with carrying out sizable portions of the executive action, will be relying upon an indeterminate amount of additional fee revenue from deferred action petitions to implement some of these objectives, while other agencies, lacking congressional appropriations, will be attempting to implement changes to current policies and procedures mostly through increased coordination and more innovative marshaling of existing resources.

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