CRS Reports & Analysis

Legal Sidebar

The Obama Administration's November 20, 2014, Actions as to Immigration: Pending Legal Challenges One Year Later

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On November 20, 2014, the Obama Administration announced that it was taking a number of actions to "fix" what the President has repeatedly described as a "broken" immigration system. These actions addressed various issues, from border security to legal immigration to enforcement priorities and policies, as well as providing certain relief from removal to some of the approximately 11 million aliens who are present in the United States without a legal immigration status.

One year later, many of these actions have been implemented, or are being implemented, without any legal challenge to the Executive's authority to take such actions. However, several legal challenges are currently pending to actions directly or indirectly called for on November 20, 2014. This Sidebar provides a brief overview of the status of these challenges.

Texas v. United States and the Challenge to the Proposed Deferred Action Programs

The best known of the legal challenges to the November 20, 2014, actions is likely *Texas v. United States*, which concerns the permissibility of the Administration's proposal to grant deferred action (one type of relief from removal) to certain aliens who entered or remained in the United States in violation of federal immigration law. Specifically, the Administration proposed expanding its earlier Deferred Action for Childhood Arrivals (DACA) program to encompass aliens who were older or who entered the United States at later dates than the initial DACA beneficiaries, as well as to grant DACA beneficiaries work authorization for three years, instead of two years. It also proposed creating a new deferred action program—widely known as DAPA—for aliens present in the United States without legal status who are the parents of U.S. citizens and lawful permanent residents (LPRs).

As discussed in earlier Sidebar postings, on February 16, 2015, a federal district court enjoined implementation of DAPA and the DACA expansion after finding that Texas and the other plaintiff states were likely to prevail on the merits of their argument that DAPA, in particular, constitutes a substantive rule, but was issued without the notice-and-comment rulemaking generally required for substantive rules under the Administrative Procedure Act (APA). Motions to stay the injunction pending appeal were rejected first by the district court, on April 7, 2015, as noted in this Sidebar; and then by a majority of the U.S. Court of Appeals for the Fifth Circuit on May 26, 2015, as noted in this Sidebar.

Subsequently, on November 9, 2015, the Fifth Circuit upheld the injunction on appeal after finding that DAPA violates the APA substantively, as well as procedurally. In so doing, the Fifth Circuit went beyond the lower court's analysis to find that DAPA is impermissible because it conflicts with certain provisions of the Immigration and Nationality Act (INA) or, alternatively, represents an unreasonable interpretation of the INA, as explained in this Sidebar posting. The federal government reportedly plans to appeal this decision to the Supreme Court.

A separate legal challenge to DAPA and the DACA expansion, *Arpaio v. Obama*, was dismissed by the lower courts because the plaintiff was found to lack standing, as discussed in this Sidebar posting. The plaintiff in this case has

reportedly petitioned the Supreme Court for review.

Mehta v. Department of State and the Challenge to the Revised October 2015 *Visa Bulletin*

Another challenge, *Mehta v. Department of State*, arises from certain changes that the Department of State (DOS) made to the October 2015 *Visa Bulletin*. As discussed in earlier Sidebar postings, DOS rescinded the initial version of the October *Bulletin* and replaced it with a revised version that permits fewer aliens currently present in the United States on nonimmigrant visas to apply for adjustment to LPR status than would have been permitted to do so under the initial version. The initial version of the October *Bulletin*, in particular, could be seen as an outgrowth of President Obama's November 20, 2014, call for the Secretaries of State and Homeland Security to "streamline and improve the legal immigration system," and the plaintiffs in *Mehta* noted this in seeking to require DOS to abide by the initial version.

On October 6, 2015, a federal district court denied a request by the *Mehta* plaintiffs for a temporary restraining order, but the litigation continues.

Save Jobs USA v. U.S. Department of Homeland Security and the Challenge to the Granting of Work Authorization to Certain Aliens with H-4 Nonimmigrant Visas

The third challenge, *Save Jobs USA v. U.S. Department of Homeland Security*, involves Department of Homeland Security (DHS) regulations that provide for work authorization for the spouses of certain aliens currently in the United States on H-1B nonimmigrant visas. The INA does not expressly authorize the issuance of work authorization to these spouses, who are present in the United States pursuant to H-4 visas, although it does include language in INA §274A(h)(3) that the Executive has historically relied upon in granting work authorization to aliens not expressly granted work authorization by the INA.

DHS had proposed extending work authorization to certain H-4 visa holders prior to November 2014. However, the November 20, 2014, actions included a call for these regulations to be finalized, which occurred on February 25, 2015. DHS asserts that the regulations make it more likely that "talented H-1B nonimmigrants" will remain permanently in the United States, rather than returning to their home countries because their spouses cannot work in the United States. The *Save Jobs* plaintiffs, though, argue that the regulations are beyond DHS's authority, and adversely affect U.S. workers.

On May 24, 2015, a federal district court denied the plaintiffs' request for a preliminary injunction. Later, on July 1, 2015, it rejected the government's assertion that the case should be dismissed because the plaintiffs lack standing. Since then, each party has requested summary judgment in its favor.

Washington Alliance of Technology Workers v. U.S. Department of Homeland Security and the Challenge to the Extension of Optional Practical Training for Certain Student Visa Holders

The fourth—and final—challenge, *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, concerns the permissibility of DHS regulations that extend the period that certain student visa holders can work in the United States pursuant to their student visas after graduating from their degree programs. The regulations at issue in this case were promulgated in 2008, and provide for 29 months of work authorization (as opposed to the 12 months previously provided) for F-1 student visa holders who have completed science, technology, engineering, or mathematics (STEM) degrees. However, the November 20, 2014, actions called for further expansion of this so-called optional practical training (OPT) program to encompass additional degree programs, as well as lengthen the period of work authorization, and the outcome of the litigation in *Washington Alliance* could have implications for the permissibility of this further expansion.

As discussed in an earlier Sidebar posting, a federal district court vacated the 2008 regulations on August 12, 2015, after finding that DHS had failed to comply with the requisite notice-and-comment procedures when promulgating them. However, because the court found the substance of the regulations was within DHS's authority, it stayed the vacatur for six months so that DHS could conduct the necessary rulemaking. DHS subsequently issued a notice of proposed rulemaking on October 19, 2015, that both responds to the court's decision and effectuates the November 20, 2014, expansion.

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