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Legal Sidebar

The Obama Administration's 2014 Immigration Initiative: Looking Back at What the Obama Administration Has Done—and Ahead to the Trump Administration

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As President-elect Trump prepares to take office, questions have been raised about what his Administration might mean for the various immigration-related initiatives that the Obama Administration announced on November 20, 2014. While the Obama Administration had taken certain actions regarding immigration at earlier dates, as well as subsequently, November 20, 2014 was the date when President Obama and the heads of several executive branch agencies announced that the Administration would be taking a number of steps to "fix" what the President had repeatedly described as a "broken" immigration system in the absence of congressional action on "comprehensive immigration reform." **Table 1** below lists these initiatives.

The implementation of the best-known of these actions—the Deferred Action for Parents of Americans (DAPA) program and the expansion of the 2012 Deferred Action for Childhood Arrivals (DACA) program—was blocked by the federal courts. However, many, although not all, of the other actions announced on November 20, 2014, have been implemented, as **Table 1** below illustrates. (The Obama Administration also took other actions as to immigration at other dates that are not reflected in **Table 1**. These include the 2012 DACA program, which remains in place.)

It is unclear whether a Trump Administration would seek to reverse any or all the November 20, 2014 actions as to immigration. However, assuming that President Trump wishes to terminate a particular initiative, it would appear that he could direct the appropriate executive branch agency to modify or rescind the directive that forms the basis of the action. The type of action, and the procedures followed prior to its issuance, will generally determine the process and expediency by which it can be revoked. For example, legally binding final agency rules promulgated pursuant to the notice-and-comment procedures of the Administrative Procedure Act generally may be repealed only after compliance with those same notice-and-comment procedures. In addition, if the repeal is challenged, the executive branch agency will be required to provide a "reasoned analysis" that justifies the repeal. In contrast, informal directives from executive branch agencies that were not issued pursuant to notice-and-comment procedures, and which lack the force and effect of law, can be more easily withdrawn. Policy statements, agency letters, and other guidance documents, for example, can generally be revoked immediately and without significant procedural hurdles.

It should be noted, however, that limitations imposed on an executive branch agency either by statute or through judicial decision may constrain an agency's ability to revoke a specified action.

Table 1: Implementation of the November 20, 2014, Actions as to Immigration

Proposed Action	**Current Status**		

	Implementing Regulations	Implementing Policy Guidance	Other
Advance Parole Issuance of written legal guidance by the Department of Homeland Security (DHS) general counsel on the meaning of the decision of the Board of Immigration Appeals in *Matter of Arrabally*, clarifying that when an alien leaves the United States pursuant to a grant of advance parole, that individual does not make a "departure" within the meaning of Section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA). *INA § 212(a)(9)(B)(i) generally bars, for a period of three to ten years, the admission of aliens who depart the United States after having been unlawfully present for more than 180 days. Parole involves an entry into the United States that does not constitute an admission for purpose of the INA, and advance parole involves permission to reenter the United States granted to aliens prior to their departure from the country.*			No further publicly available guidance appears to have been issued to date.
Border Security Establishment of a "Southern Border and Approaches" campaign, involving the commissioning of three joint task forces, incorporating elements of the U.S. Coast Guard (USCG), U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS), and the meeting of specified objectives (e.g., interdicting people and goods attempting to enter illegally between ports of entry).			Task forces reportedly became operational on February 6, 2015.
Citizenship Implementation of specific actions to "[p]romote and [i]ncrease [a]ccess to U.S. [c]itizenship," including allowing the use	Final rule providing for partial waivers of naturalization fees		USCIS began practice of accepting credit card payment for naturalization

of credit cards to pay naturalization fees; commission of a study of the feasibility of granting partial waivers of the naturalization fee for certain impoverished individuals; and expansion of USCIS's citizenship public awareness campaign.	(promulgated Oct. 24, 2016 and effective on Dec. 23, 2016).		fees in September 2015.
Deferred Action for "Unlawfully Present Aliens" Establishment of a program to grant deferred action—one type of relief from removal—and work authorization to aliens who entered or remained in the United States in violation of immigration law and whose children are U.S. citizens or LPRs. Expansion of the 2012 DACA program to cover additional aliens, and the provision of three-year grants of deferred action and work authorization, as opposed to two-year grants.			Implementation enjoined as the result of a legal challenge brought by a number of states.
Employment-Based Immigrant Visa System Implementation of steps to ensure that all employment-based immigrant visas authorized for use by Congress in a particular year are used. Improvements in determining when immigrant visas are available to applicants during the fiscal year, to be reflected in the *Visa Bulletin*.			Report issued in July 2015 set forth specific options for ensuring that all employment-based immigrant visas are used.
Extreme Hardship Development of additional guidance on the meaning of "extreme hardship," a phrase used in several provisions of the INA that gives immigration officials the authority to waive particular grounds of inadmissibility for aliens who demonstrate "extreme hardship" to qualifying relatives, such as specified U.S. citizen or lawful permanent resident (LPR) family members. *Absent a waiver, these grounds of inadmissibility could preclude an alien's admission to the United States in a legal status or keep an alien from being able to adjust to LRP status.*		Policy memorandum (dated Oct. 21, 2016), changes to the USCIS Policy Manual (effective Dec. 5, 2016).	

Enforcement of Federal Labor, Employment, and Immigration Law Establishment of an interagency working group for the "consistent enforcement of federal labor, employment, and immigration laws."			Task force was reportedly established and is working.
H-4 Visa Holders & Work Authorization Finalization of regulations on the granting of work authorization to certain aliens present in the United States on H-4 nonimmigrant visas. *H-4 visas are granted to the spouses and minor children of aliens currently in the United States on H nonimmigrant visas. The rule only applies to spouses of H-1B nonimmigrant visa holders. The INA does not expressly authorize the issuance of work authorization to H-4 visa holders, although it does include language that the Executive has historically relied upon in granting work authorization to aliens not expressly authorized to work by the INA.*	Final rule (promulgated Feb. 25, 2015, and effective May 26, 2015).		
Immigration and Customs Enforcement Officers Realignment of the job series for ICE Enforcement and Removal Operations (ERO) officers, and the provision of premium ability pay coverage for such officers.			DHS has reportedly completed the transition to such a "single career path" for ICE ERO officers.
Immigration Enforcement Policies Rescission of a number of earlier policy memoranda regarding immigration enforcement and detention priorities and establishment of new priorities.		Policy memorandum (effective January 5, 2015).	
Interior Immigration Enforcement			Implementation of PEP

Discontinuance of the Secure Communities Program, which was used for identifying potentially removable aliens within the interior of the United States, replacing it with a new program—the Priority Enforcement Program (PEP)—that, using the new priorities as a guide, would make more limited use of immigration detainers issued to state and local governments in obtaining custody of aliens for purposes of removal. *An immigration detainer is a form by which ICE advises other law enforcement agencies of its interest in individual aliens whom these agencies are detaining. Implementation of PEP did not affect the database interoperability or information transmission components of Secure Communities.*			reportedly began in summer 2015; three new immigration detainer forms were issued in April 2015.
L-1B Visas for Intracompany Transferees Development of guidance on the meaning of "specialized knowledge" for purposes of L-1B visas, which enable U.S. employers to transfer professional employees with specialized knowledge relating to the organization's interests from an affiliated foreign office to a U.S. office.		Policy memorandum (dated Aug. 17, 2015).	
"National Interest" Waivers for Certain Employment-Based Immigrants Expansion of use of the waiver set forth in INA § 203(b) (2) (B) to permit certain aliens with advanced degrees or exceptional ability to seek LPR status without employer sponsorship—something typically required for employment-based immigrants—if their admission is in the "national interest."		Policy memorandum (dated Mar. 9, 2016).	
Optional Practical Training for Foreign Students Promulgation of regulations that expand the degree programs in which foreign students in science, technology, engineering, and manufacturing (STEM) fields are eligible for optional practical	Final rule (promulgated on Mar. 11, 2016, and generally effective May 10, 2016).		

training (OPT) and extend the time period of such OPT. *OPT permits foreign undergraduate or graduate students with F-1 status who have completed or are pursuing their degrees to work in the United States for a period of time on their student visas.*			
Parole in Place for Family Members of Certain Military Personnel Granting parole in place or deferred action to certain unlawfully present spouses, children, and parents of individuals seeking to enlist in the U.S. Armed Forces. (A previous policy memorandum had already made provision for such parole for qualifying family members of active members of the U.S. Armed Forces and certain others with military ties.) *Parole involves an entry into the United States that does not constitute an admission for purpose of the INA, and parole in place involves a grant of parole to aliens already present within the United States.*			No further publicly available guidance appears to have been issued to date.
Parole of Inventors, Researchers, and Start-Up Founders Parole into the United States of certain inventors, researchers, and founders of start-up enterprises. *Parole involves an entry into the United States that does not constitute an admission for purpose of the INA.*	Proposed rule (promulgated Aug. 31, 2016, with comments due no later than October 17, 2016).		
PERM Program Modernization "Modernization" of recruitment and application requirements for the Program Electronic Review Management (PERM) program, whereby the Department of Labor (DOL) certifies that the issuance of an employment-based immigrant visa will	Draft rule reportedly submitted for Office of Management and Budget (OMB) review, but is said to be		

not displace U.S. workers or adversely affect the wages or working conditions of similarly employed U.S. workers, in order to identify methods for aligning domestic worker recruitment requirements with demonstrated occupational shortages and surpluses.	"unlikely" before the end of the Obama Administration.		
Provisional Waivers of the Three- and Ten-Year Bars Permission for spouses and children of LPRs to obtain provisional waivers of the three- and ten-year bars on the admission of aliens who have accrued more than 180 days of unlawful presence in the United States before leaving the country to apply for an immigrant visa to obtain LPR status pursuant to a family-based visa. *Previously only spouses and children of U.S. citizens could obtain such waivers in the United States.*	Final rule (promulgated on July 29, 2016, and effective Aug. 29, 2016).		
"Same or Similar Job" for Purposes of Job Portability Development of additional guidance on what constitutes a "same or similar job" for purposes of INA § 204(j), which would permit workers who have filed for adjustment to LPR status to change jobs without jeopardizing their ability to seek such status, provided that their new jobs are in the same or similar occupational classification as their old jobs.	Final rule addressing this and other issues (promulgated Nov. 18, 2016, and effective Jan. 17, 2017).	Policy memorandum (dated Mar. 18, 2016).	
T and U Visas for Trafficking Victims Announcement that the Wage and Hour Division at DOL would (1) begin certifying applications for T visas and (2) expand its certifications for U visas for victims of human trafficking. *T visas provide legal status to certain victims of severe forms of human trafficking who assist in the investigation*			Practice of granting such certifications reportedly began on April 2, 2015.

or prosecution of trafficking crimes (unless they are under 18 years of age or unable to do so due to the trauma). U visas provide legal status to victims of "qualifying criminal activities" who possess information about that crime and have been, are being, or are likely to be helpful to law enforcement or government officials. Applications for T and U visas must generally be certified by law enforcement or government officials confirming the applicant's assistance.			

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