



Could Obama Increase Immigration By Not Counting Family Against Visa Caps?

By Jon Feere

Though the Obama administration has released 10 memos outlining the president's plans to shape immigration policy unilaterally, they are limited in detail and leave much of the policy-making to executive branch agencies.¹ As such, much remains unknown about how immigration policy will change under President Obama's watch.

The president's lawless immigration actions consist of two parts: (1) granting work permits, Social Security accounts, travel documents, and protection from deportation to millions of illegal aliens; and (2) manipulating the visa system in order to increase legal immigration. Though much has been written about the amnesty part, this analysis looks at one policy change long sought by advocates of increased immigration that the administration may advance: to stop counting family members of legal immigrants toward annual visa limits.

Under current law, both employment-based immigrants and their dependent family members are counted toward the numerical caps. This is how it has been done since the program started half a century ago. By not counting family members, Obama could more than double immigration in this category. The memos issued by the administration do not specifically call for this change, but because the memos direct USCIS to come up with as-of-yet unreleased plans and guidelines it is possible a change in the way visas are counted is in the works.

Furthermore, one day after the 10 memos were released, President Obama issued his own memo calling for "modernizing and streamlining" the visa system, which some advocates have interpreted as potentially leading to a change in visa counting.² The memo directs agency officials to develop recommendations by March 2015.

Interestingly, this proposed change has been rejected by Congress in the past, most recently in the failed Senate amnesty bill (S.744). This indicates that the authors and supporters of these bills believe that such changes to our immigration system require legislation. Furthermore, the fact that these bills failed to make it out of Congress indicates that the American people do not support such changes to the law.

In fact, polling suggests that increases in legal immigration are very unpopular. According to a recent Gallup poll, only 22 percent of Americans support increasing legal immigration, while 74 percent said it should be either decreased (41 percent) or kept at the present level (33 percent).³

Similarly, a recent Ipsos/Reuters poll found that only 17 percent of Americans want immigration increased and that 83 percent want legal immigration either reduced (45 percent) or kept at the present level (38 percent).⁴

Any lawless effort on the part of the executive branch to make this change would be a rejection of the legislative process laid out in the Constitution, a rejection of the will of a majority of the American people, and a clear political move designed to benefit special interests.

Jon Feere is the Legal Policy Analyst at the Center for Immigration Studies.

Exempting Family Members from Visa Caps

Every year the United States grants permanent residency to over a million people. This group is made up of different types of immigrants, from refugees to family members of U.S. citizens. In accordance with federal law, this number includes approximately 140,000 employment-based permanent immigrant visas (also known as “green cards”) made available to qualified applicants and their spouses and children.⁵ This allotment covers the primary worker and any family members he may bring in, some of whom also work. Just under half of these green cards are held by the primary worker, and a little more than half are held by the family members. Like all green card holders, recipients of these permanent work visas can generally apply for citizenship after five years.

Advocates of increases in immigration seek a complete departure from how this visa system has operated since it was created in the 1965 Immigration and Nationality Act. They argue that the Obama administration should ignore a half-century of precedent and declare that family members brought in by primary visa holders will no longer be counted as part of the 140,000 limit. They propose a separate green card category for the family members. As a whole, their proposal would mean higher levels of annual immigration as more primary workers fill up the 140,000 visas and bring in their families.

Using very rough math and assuming the current annual 140,000 visa holders are half primary workers and half family (70,000 + 70,000), granting all 140,000 visas to primary workers would mean a total of 140,000 additional family members, assuming a similar worker/family ratio. This would mean a jump from 140,000 annual visas to 280,000 annual visas (140,000 + 140,000) — a doubling of permanent legal immigration in this category.

In actuality, the number would be more than double since the percentage of family members obtaining green cards through the program is higher than that of the principals. According to the Department of Homeland Security’s 2013 *Yearbook of Immigration Statistics*, approximately 53 percent of people in this category are spouses and children, while 47 percent are primary workers.

On top of this, the actual number of total green cards given out is already generally much higher since, although the number starts at 140,000, it ends up growing because current law allows unused family-based preference visas in the prior fiscal year to be added. In 2013, for example, the total number of green cards issued in this category was over 161,100.

Although it remains unclear whether President Obama will make this change, if one were to use 2013’s numbers and principal/family ratio it could mean over 161,100 principals and 181,766 family members for a total of more than 342,766 immigrants in this category.⁶

Such a change would more than double permanent immigration in this category.

Put simply, advocates of increased immigration want the annual 140,000 limit raised to a much higher number — perhaps over 342,766 a year — but are unable to persuade the American people and their representatives to increase permanent immigration levels. Instead, they have come up with this new counting scheme that they hope will allow them to go around Congress.

Already Rejected by Congress

The proposal to not count family members against the visa caps has already been rejected by the American people through their elected representatives at least twice, once back in 1990, and more recently when the Senate’s Gang of Eight amnesty bill (S.744) failed. If President Obama were to move forward with such a plan unilaterally, it would be a rejection of representative democracy and the constitutional order.

Though consecutive administrations have always interpreted the employment visa law as requiring both the principal worker and their dependents to be counted against the cap, it was not until the Immigration Act of 1990 that Congress attempted to make it clear that this is how it should operate.⁷ As is often the case with legislation, the Senate and the House had two different versions of the bill and the differences had to be ironed out during a conference committee.

As explained in a conference committee report, after the two versions were combined the House version of the bill “allocated 65,000 employment-based visas during FY 1992–96 and 75,000 thereafter (not including numerically exempt derivative spouses and children).”⁸ The Senate version did not attempt to exempt spouses and children and instead allocated 150,000 employment-based visas annually.

Ultimately, the conference committee rejected the House plan to exempt family members and decided on a limit of 140,000 employment-based visas per year.

Two immigration attorneys who have studied this difference have summed it up, writing: “If the House had its way, [the Immigration Act of 1990] would have had a lower numerical limit of 75,000 [employment-based visas], but since family members were not counted, the actual number of [employment-based] immigrants would have been higher than 140,000.”⁹

As part of their research, these same attorneys interviewed former Rep. Bruce Morrison (D-Conn.) who chaired the House immigration subcommittee when this law was being drafted. He explained that there is no basis in the 1990 Immigration Act to argue that dependents should be exempt and that the proposal to do so was, in fact, rejected during the conference committee. He explained that the goal of the conference committee was to set a total number. He also explained that the House conferees wanted more immigration, but former Sen. Alan Simpson (R-Wyo.) wanted less and did not like exemptions.¹⁰

The numbers alone seem to bear out Congress’s ultimate intent that family members not be exempted. If the House’s 75,000 principals were to bring in their families, assuming the current near 50-50 principal/family ratio, the total number entering would be around 150,000 people — which matches up perfectly with the Senate version of the bill of 150,000 total immigrants. It is unclear why the conference committee lowered this to 140,000, but the number is close enough that it remains logical that Congress was well aware that this number included both principals and their families.

There is no evidence that the Senate wanted 150,000 principals or that the conference committee intended all 140,000 immigrants in the final version of the bill to be principals. Such an interpretation from the Obama administration would not be grounded in fact.

The effort to expand employment visas appeared again in 2013 in the Senate amnesty bill S.744, which was ultimately rejected by the American people through their representatives.

In its analysis of the bill, the Congressional Budget Office explained that “under current law” the 140,000 visas are available to “eligible foreign-born workers and their dependents” but that if S.744 were to become law, the dependents (and other types of workers) would not be counted against the cap.¹¹

The proposal to not count family members against the cap was also proposed in the I-Squared Act of 2013 (S.169), but the bill failed to make it out of committee. The senators who authored the bill proposed adding the following language to an exemption section of the INA: “Aliens who are the spouse or a child of an alien admitted as an employment-based immigrant.”¹² Senators from both major parties clearly understand that current law does count family members against the caps. The bill was re-introduced to the new Congress in January 2015 (S.153).

Again, the fact that proposals to exempt family from employment visa caps failed to make it out of Congress indicates that the American people do not support such changes. It is also revealing that the authors and supporters of these changes have always felt that such changes to our immigration system require legislation. By going around Congress, President Obama would be openly choosing to ignore the democratic system because it has not produced the results he and his favored special interests are seeking.

For half a century, every administration and Congress has understood that family members are counted in the caps.

Statute Not Ambiguous

The first section of the Immigration Act of 1990 breaks down the world-wide level of immigration into three categories: family-sponsored immigrants, employment-based immigrants, and diversity immigrants.¹³ There are numerical limits to each of these categories. But the subsection that immediately follows is titled “Aliens not subject to direct numerical limitations” and it includes a number of types of aliens who are exempt from the limits (e.g. children overseas whose parents are U.S. citizens). This exception to the rule does not apply to dependents of family-sponsored immigrants, employment-based immigrants, or diversity immigrants.

As one expert who studies this issue closely has explained: “Because such dependents do not fit any of the exceptions, the plain language of this section unambiguously states that some quota applies to dependent immigrants entering under the three major categories.”¹⁴ If Congress wanted to exempt family members of employment-based immigrants, it could have easily done so in this section. Congress did not.

The statute that supporters for a lawless change to visa counting are looking at is titled “Treatment of Family Members” (8 U.S.C. § 1153) and it explains that a dependent is “entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.” The statute unambiguously states that dependents — spouses and children — have the same status as the principal applicant. It is difficult to see why visas granted to dependents that create the same status would not be counted as part of the employment visa quota.

And it is not as if Congress did not know how to exempt family members from caps. In a different section of the 1990 act specifically about certain temporary workers and trainees, Congress wrote that the “numerical limitations [for this category] ... shall only apply to principal aliens and not to the spouses or children of such aliens.”¹⁵ Congress did not include such language under the employment-based visa section.

Congress Expands Cap, Not the President

A main goal of the Obama administration is to increase legal immigration. Congress has increased the number of employment visas issued and lawmakers could do so again if they wanted. The employment visa’s history over the past half-century clearly illustrates that such changes come from Congress, however, rather than from executive decrees.

When Congress authored the 1965 immigration act, it established a visa preference system that specified some visas for employment-based immigration. By 1970, about 34,000 immigrants entered under occupational preferences for workers, their spouses, and children.¹⁶ This congressional authority over the appropriate number of employment visas continued in the years that followed.

In 1976, Congress amended the INA to increase the total number of annual visas allocated specifically to employment-based immigrants and their family members from 34,000 to 58,000.¹⁷

In the 1990 Immigration Act, Congress raised the annual number of employment-based visas from 58,000 to 140,000.¹⁸

Never once did a president assume that he had the power to raise these visa caps unilaterally. Certainly, presidents played a role in encouraging Congress to raise the caps, and President Obama could do the same if he prefers to increase the number of immigrants entering the United States on employment-based visas. Of course, President Obama likely concludes that it would be difficult to persuade Congress to do such a thing amid the high unemployment the United States is currently experiencing.

Nevertheless, it is well established that increasing the number of people admitted to the United States under an employment visa requires an act of Congress.

Just the Beginning?

If Congress allows the Obama administration to unilaterally change how employment visas are counted, then it may give the president the green light to change the counting of visas in other categories and expand total immigration in a more radical way.

For example, President Obama might feel inclined to not count dependents in the family-based immigration category or the diversity visa category; there is no logical reason to exempt employment-category dependents from the numerical caps, but not the family-category dependents. Such changes could dramatically increase legal immigration in ways the Congress never intended.

As the left-leaning Vox media website noted: “If [the Obama administration] changes the counting method for both work and family-based green cards, it could increase legal immigration by millions.”¹⁹

Similarly, the pro-amnesty organization National Foundation for American Policy (NFAP) recently wrote: “If dependents are not counted for employment-based immigration, then it may be logical also to not count them for the family-based preference categories.”²⁰

NFAP calculates that in FY 2013, there were “about .63 dependents per principal in that year” and that “approximately an additional 142,000 immigrants would receive green cards if dependents were not counted against the quota in the family-based preference categories.”²¹

Finally, under the Diversity Visa lottery program, a total of 55,000 visas are issued to people around the world at random. The ratio of principals to dependents is near 50-50, meaning that only counting the principal applicants against the cap would approximately double this visa category as well. There is no evidence that Congress ever intended such a result.

Conclusion

President Obama’s plan to give work permits to millions of illegal aliens by way of executive decree comes at a time when tens of millions of Americans of all educational levels are out of work. Government data show that there are currently 25.3 million native-born Americans with no more than a high school education not working, 17 million Americans with some college not working, and 8.7 million Americans with a college degree not working.²² It is difficult for anyone to argue that the United States needs more foreign labor.

Supporters of expanding immigration argue that the legislative rejection of changing how visas are counted does not preclude President Obama from going it alone on the matter. One wonders why these supporters did not attempt to have the executive branch unilaterally overwrite immigration law before instead of spending their resources on getting a legislative change through Congress. Likely, these supporters know that their position is legally, constitutionally, and morally questionable and have demanded Obama act unilaterally out of desperation.

High-immigration advocates argue that the statutes governing visa issuance are vague enough that Obama would be justified in interpreting them in a manner inconsistent with decades of precedent. Though the statutes at issue are quite clear, perhaps Congress could do a better job clarifying the intent of the law at issue. This could be achieved easily through a “sense of Congress” resolution that requires only a simple majority vote and does not require the signature of the president. Though such resolutions are not law, a resolution clarifying that family members are counted against employment visas could provide Obama some direction and give the courts something to consider should Obama’s actions result in a lawsuit.

If President Obama and other supporters of increased immigration want these changes to be made, they should use the legislative process and draft legislation. It may be, however, that they have concluded that such proposals are unpopular and will not garner the support of the American people and their representatives, making lawless, unilateral action by the executive branch the only way to achieve their political goals.

End Notes

¹ Jon Feere, [“Much of Obama’s Lawless Immigration Scheme Still Unknown: Many more plans, guidelines, and policies not yet issued”](#), Center for Immigration Studies *Background*, December 2014.

² [“Presidential Memorandum — Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century”](#), White House Office of the Press Secretary, November 21, 2014.

³ Alistair Bell, [“Americans worry that illegal migrants threaten way of life, economy”](#), Reuters, August 7, 2014.

⁴ Anna Palmer and Carrie Budoff Brown, [“Exclusive: White House meets with big biz on immigration”](#), *Politico*, August 18, 2014.

⁵ [“Permanent Workers”](#), U.S. Citizenship and Immigration Services. See also, [“Employment-Based Immigrant Visa”](#), U.S. Department of State. See also, 8 U.S.C. § 1153, “Allocation of immigrant visas” (specifically, subsection (d)).

⁶ Where there are 161,100 equaling 47 percent of the total and 181,766 family members equaling 53 percent of the total, for a grand total of 342,766. Since the percentages fluctuate from year to year, these numbers would likely change.

⁷ Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990).

⁸ See, “Employment-Based Immigrants” section in H.R. CONF. REP. 101-955 (October 26, 1990).

⁹ Gary Endelman and Cyrus Mehta, [“Why We Can’t Wait: How President Obama Can Erase Immigrant Visa Backlogs with the Stroke of A Pen”](#), *Immigration Daily*, 2012.

¹⁰ *Ibid.*

¹¹ Congressional Budget Office Cost Estimate, “S.744: Border Security, Economic Opportunity, and Immigration Modernization Act”, June 18, 2013. The changes would be even more expansive as the bill would have exempted a number of different types of workers from the caps as noted on p. 17 of the report.

¹² I-Squared Act of 2013, S.169, 113th Cong. § 303 (2013).

¹³ 8 U.S.C. § 1151(a).

¹⁴ John Miano, [“Former Congressman Misrepresents His Own Statute on Immigration Quotas”](#), Center for Immigration Studies blog, October 23, 2014.

¹⁵ 8 U.S.C. 1184(g).

¹⁶ Margaret L. Usdansky and Thomas J. Espenshade, “The H-1B Visas Debate in Historical Perspective: The Evolution of U.S. Policy Toward Foreign-Born Workers,” Center for Comparative Immigration Studies, May 2000.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Dara Lind, [“What could the Obama administration do to expand legal immigration?”](#), Vox, November 13, 2014.

²⁰ Stuart Anderson, [“Executive Action and Legal Immigration”](#), National Foundation for American Policy, September 2014.

²¹ *Ibid.*

²² See Steven A. Camarota and Karen Zeigler, [“All Employment Growth Since 2000 Went to Immigrants: Number of U.S.-born not working grew by 17 million”](#), Center for Immigration Studies *Backgrounders*, June 2014.