Much of Obama's Lawless Immigration Scheme Still Unknown

Many more plans, guidelines, and policies not yet issued

By Jon Feere

President Obama's Department of Homeland Security issued 10 memos outlining the administration's planned lawless amnesty, but they are limited in detail and leave much of the policymaking to executive branch agencies.[1] As such, much remains unknown about exactly how this scheme will operate.

For example, in a memo titled "Expansion of the Provisional Waiver Program", the administration has expanded provisional unlawful presence waivers for immediate relatives of U.S. citizens and Lawful Permanent Residents (LPRs) who, under law, are not eligible to adjust status in the United States and must travel abroad to obtain a visa. This is a problem for those who have been in the country illegally for more than 180 days because if they travel home and attempt to come back in, they will discover they are barred from returning for three or 10 years.[2] The purpose of this law is to deter people from living illegally in the United States for long periods of time.

On March 4, 2013, the Obama administration offered a waiver to immigrant visa applicants who are spouses, minor children, or parents of U.S. citizens. But the new memo extends this to "all statutorily eligible classes of relatives for whom an immigrant visa is immediately available." This means the spouses, children, and parents of lawful permanent residents and the adult children of U.S. citizens and LPRs will now have access to these waivers.

As part of this, DHS Secretary Jeh Johnson — who authored the memos — announced that he has directed "USCIS to provide additional guidance on the definition of 'extreme hardship.'" The memo notes that to be eligible for the waiver, aliens much demonstrate that their absence from the United States would cause extreme hardship to a spouse or parent who is a U.S. citizen or LPR.

More notable is the fact that Johnson notes that the statute "does not define the term, and federal courts have not specifically defined it through case law." In other words, the administration is going to come up with as-of-yet unseen guidelines about the definition of "extreme hardship" that Johnson notes "would provide broader use" of the waiver.

Of course, Congress could better define the phrase through legislation. If they do not, they are explicitly allowing the Obama administration to do as it pleases.

Additionally, the memo calls on USCIS to "clarify the factors" that are used by adjudicators to determine the existence of extreme hardship. In the memo, Johnson also "further direct[s] USCIS to consider criteria by which a presumption of extreme hardship may be determined to exist."

The point is, these memos are only the beginning and much more policymaking from the executive branch should be expected. The decisions they make here could affect other areas of immigration enforcement.

Similar directives for more policymaking exist in many of the other memos as well.

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In the memo titled "Secure Communities", the administration has announced that it will discontinue the program that has resulted in the removal of "more than 283,000 convicted criminal aliens", according to the government's own webpage on the program.[3] Though it has been a success and has been expanded to all states and U.S. territories, the memo directs ICE to "put in its place a program" that has yet to be developed. The same memo also directs the Office of Civil Rights and Civil Liberties "to develop and implement a plan to monitor state and local law enforcement" engaged in transferring illegal aliens to ICE. Again, it's unclear how this program will operate and what type of an impact it will have.

In the memo lengthily titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents", the administration expands President Obama's lawless Deferred Action program and attempts to defend his controversial use of prosecutorial discretion. Johnson explains that he "hereby direct[s] USCIS to establish a process, similar to DACA" that would benefit parents of U.S. citizens and lawful permanent residents. Though the memo provides some guidance, it remains unclear how this will operate.

The same memo also directs ICE to "establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action." Since no guidance is given, it remains to be seen how this process would operate.

The memo also notes that immigration officers "will be provided with specific eligibility criteria" for this lawless program. It is unclear when that will be provided.

In the memo titled "Policies Supporting U.S. High-Skilled Businesses and Workers", the administration notes that USCIS "is about to publish the final rule" that extends work authorization for the spouses of H-1B visa holders. Though it was announced in May, it is uncertain how this rule will look in its final form. Additionally, Johnson explains that "USCIS has been working on guidance" to change "various" employment-based visa programs and that he expects them to be published "in a timely manner".

The same memo also directs USCIS "to revise its current regulations" and "consider other regulatory or policy changes" to "correct the problem" of a foreign worker's temporary status expiring. It is unclear how this would operate if Congress allows it to go forward.

The memo also directs ICE and USCIS to "develop regulations" to "expand the degree programs eligible for OPT [optional practical training] and extend the time period and use of OPT for foreign STEM students and graduates." It remains unclear how these regulations will look.

The memo also seeks to expand the "national interest waiver", which Johnson describes as allowing "certain non-citizens with advanced degrees or exceptional ability to seek green cards without employer sponsorship if their admission is in the national interest." In the memo, Johnson describes this waiver as "underutilized" and with "limited guidance with respect to its invocation". As such, Johnson directs USCIS "to issue guidance or regulations to clarify the standard by which a national interest waiver can be granted, with the aim of promoting its greater use for the benefit of the U.S. economy." Until these regulations are issued (or unless Congress steps in with its own clarifications), it will remain unknown how much more expansive the use of these visas will become.

The memo also directs USCIS "to issue a policy memorandum that provides clear, consolidated guidance on the meaning of 'specialized knowledge'" in order to "enhance companies' confidence" in the L-1B visa program, which allows for intercompany transferees, meaning from a job site overseas to a job site in the United States. The Center for Immigration Studies has found that the L-1 program "is full of loopholes, and is used routinely to cut wages of workers and deny jobs to qualified U.S. residents".[4] Depending on how this guidance operates, it is possible that the administration's memos will expand these problems, a goal of many high-immigration advocates in the White House.[5] Again, Congress could, if it wanted to, provide its own definition of "specialized knowledge" instead of leaving it to the Obama administration.

The memo also directs USCIS to issue a policy memorandum that will clarify the definition of "same or similar" in the context of a law that allows employment-based visa holders to change jobs to one that is the same or similar to the one they obtained as part of their original entry into the United States. The goal is to provide the immigrant workers "more flexibility"

as they seek to prolong their stay in the United States and adjust to a different immigration status. Since the memorandum is forthcoming, it remains unclear whether the phrase "same or similar" will have much meaning after the White House gets done interpreting it. Congress could better clarify the phrase on its own, of course.

In the memo titled "Families of U.S. Armed Forces Members and Enlistees", Johnson directs USCIS to "issue new policies on the use of parole-in-place deferred action for certain spouses, children, and parents of individuals seeking to enlist in the U.S. Armed Forces." It is unclear what type of policies USCIS will come up with and two things immediately come to mind. First, what does "seeking to enlist" actually mean? Would beneficiaries of the parole-in-place designation actually have to have filled out enlistment forms? How far along in the process would they have to be? What if they don't make it through the enlistment process; does their parole-in-place status get rescinded? Second, Johnson's use of the phrase "Armed Forces" may very easily be changed to "uniformed services" as it was in some versions of the DREAM Act so that employment at the National Oceanic and Atmospheric Administration or the Public Health Service would qualify an alien for amnesty.[6]

In the memo, Johnson directs USCIS and DHS to work together to "address the availability of parole-in-place and deferred action for the spouse, parent, and child of a U.S. citizen or lawful permanent resident who seeks to enlist in the U.S. Armed Forces." Further, Johnson is "also directing USCIS to consider the availability of deferred action" to "now undocumented" family members of U.S. military service members and veterans who had previously entered legally. It is unclear what USCIS and DHS will find, but it appears this would benefit visa overstayers and people who lost their legal status for any number of reasons. It should also be noted that the veterans element may allow illegal aliens to benefit even if the person who served has since passed away, served for a very short period of time, and/or was kicked out of the military. This was what USCIS suggested may be the case in the context of the military-related amnesty announced by the White House last year.[7]

Other memos include additional yet-to-be determined elements. The memo titled "Southern Border and Approaches Campaign" directs the creation of three joint task forces. It is unknown who will make up these task forces and to what extent those involved will be committed to actual enforcement of our borders.

In the memo titled "Directive to Provide Consistency Regarding Advance Parole", Johnson directed the DHS General Counsel to "issue written legal guidance on the meaning of the *Arrabally* decision", which is a holding from the Board of Immigration Appeals (BIA) that decided that illegal aliens with pending applications for adjustment of status can travel abroad and not effect a "departure" that would trigger the 3/10 year bar of inadmissibility. Still, it's unclear exactly how DHS will interpret the decision.

In the memo titled "Policies to Promote and Increase Access to U.S. Citizenship", Johnson notes that he has previously asked USCIS to consider a fee waiver for some immigrants applying for naturalization, but that USCIS was against the idea, citing uncertain financial risk that it would cause the partially fee-dependent agency. In the memo Johnson directs USCIS to include the feasibility of his fee waiver proposal as part of the next "biennial fee study" and states that "we will reconsider" a partial fee waiver after that study.

In the memo titled "Personnel Reform for Immigration and Customs Enforcement Officers", the administration has announced "an expeditious review" of work performed by Enforcement and Removal Operations officers that will "identify gaps in current job series to support a classification that accurately reflects" the officers' "realigned mission". The memo anticipates "changes in job classification structure" as a result of the review. The memo also calls for a review of "premium pay coverage" and calls for "regulations and legislation necessary" to affect these changes. While this is probably interesting only to people employed in these positions, it nevertheless is another example of how the effect of these memos remains largely unknown despite the administration's efforts to sell them as good ideas grounded in rational policymaking.

Notice and Comment?

Some defenders of the president's actions have claimed that all of the policy changes and rulemaking efforts will go through the notice and comment process required under federal law by the Administrative Procedures Act. Generally, a proposed rule will appear in the *Federal Register* and remain open to comments from the American public for a period of time before the final version of the rule is published. As a Center for Immigration Studies blog post noted, "Although on the surface, the

purpose of the statute is to prevent agencies from unilaterally, and outside the public eye, engaging in rule-making or regulatory over-reach, looking deeper one understands that its fundamental protection is to curb abuse of executive power and the growth of despotism in government."[8]

As explained by the Center for Effective Government, there can be exemptions from notice-and-comment procedures such as rules of "agency organization, procedure, or practice", "interpretive rules" that add little substantive interpretation of the law, and "general statements of policy".[9]

It remains unknown whether the Obama administration will attempt to use these exemptions for its forthcoming guidelines and rules, but the Center for Effective Government notes that if "the proposed action has a major impact on the public, however, agencies may run into difficulties in the courts trying to invoke these exemptions."

Interestingly, we may already have an idea of how the Obama administration will handle this. On August 15, 2012, the administration started taking applications for its Deferred Action program, but it was not until a day later, August 16, that a *Federal Register* notice appeared soliciting public comments.[10] The notice did not offer any detailed rules that were being applied, but instead sought feedback about the form DHS had come up with for vetting applicants. As one expert asked: "[H]ow serious can an agency be in posting anything for review and comment when it has already begun taking applications?"[11]

It is very possible that Americans will not know how Obama's new immigration scheme will operate until it is already up and running.

End Notes

[1] "Fixing Our Broken Immigration System Through Executive Action - Key Facts", Department of Homeland Security website, accessed December 9, 2014.

[2] Jessica Vaughan, "Bar None: An Evaluation of the 3/10-Year Bar", Center for Immigration Studies *Backgrounder*, July 2003.

[3] "Secure Communities", Department of Homeland Security website, accessed December 9, 2014.

[4] David North, "L-1 Nonimmigrant Worker Program Gets Some Well Deserved Attention", Center for Immigration Studies blog, September 4, 2013.

[5] David North, "The Hairsplitters Are at It Again, This Time with L-1B Alien Workers", Center for Immigration Studies blog, March 13, 2012.

[6] Hans von Spakovsky, "DREAMing of Amnesty", The Daily Signal, December 7, 2010.

[7] Jon Feere, "Obama's New Military-Related Amnesty Raises Questions", Center for Immigration Studies blog, December 9, 2013.

[8] W.D. Reasoner, "DHS Belatedly Launches Mandatory Public Comment Period on DACA Process", Center for Immigration Studies blog, August 17, 2012.

[9] "Notice-and-Comment Rulemaking", Center for Effective Government website, accessed December 9, 2014.

[10] "Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D, New Information Collection; Emergency Submission to the Office of Management and Budget; Comment Request", U.S. Citizenship and Immigration Services notice, *Federal Register*, August 16, 2012.

[11] W.D. Reasoner, "DHS Belatedly Launches Mandatory Public Comment Period on DACA Process", Center for Immigration Studies blog, August 17, 2012.