On November 21, 2014, President Obama made an announcement regarding several areas of the U.S. immigration policy, most significant of which addresses approximately 4.4 million undocumented aliens living in the U.S. without documentation. While these changes obviously affect many, they also reflect limits to the President’s executive authority as they offer only temporary reprieve until Congress enacts changes to current law. This article addresses changes in immigration policy, some of the related considerations of which employers should be aware, and how these changes can impact their businesses.

DEFERRED ACTION FOR PARENTS OF U.S. CITIZENS AND LAWFUL PERMANENT RESIDENTS

Based upon the current Deferred Action for Childhood Arrivals (DACA) program, the President authorized creation of a new deferred action program, Deferred Action for Parental Accountability or DAPA, also called Deferred Action for Parents of Americans, to be operational within 180 days.

An alien living in the U.S. without documentation can apply to be eligible for “deferred action” which will allow him or her to remain in the U.S. for three years. Based thereon, the U.S. Department of Homeland Security (DHS) will defer for three years a deportable individual from being removed from the U.S. if he or she:

1. Has a child who is a U.S. citizen or lawful permanent resident, known as holding a green card as of November 20, 2014;
2. Is not an “enforcement priority” under DHS policy, meaning a criminal, suspected terrorist, gang member or felon (but this does include certain misdemeanors);
3. Has continuously resided in the U.S. since before January 1, 2010;
4. Is physically present in the U.S. when DHS initiates this program and at the time of applying;
5. Presents no other factors, at the discretion of DHS, making a granting of deferred action inappropriate; and
6. Passes a background check.

Like DACA, the DHS decision to allow a parent to remain will be made on a case-by-case basis – approval may be revoked and approval will not automatically put someone en route to permanent U.S. residence or citizenship. Further, an individual eligible for this relief can get a Social Security number and will receive employment authorization if economic need can be demonstrated, but will not be eligible for government benefits under the Affordable Care Act or other government subsidy programs. Eligibility for state benefits such as driver’s licenses, in-state tuition and professional licenses will be left to the discretion of each state.

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

This executive action will not legalize the status of the parents of “Dreamers” (young people who received temporary status under DACA). However, the DACA program has been expanded. Currently, the only eligible DACA recipients are those who were born before June 15, 1981, arrived in the U.S. prior to January 1, 2007, and were under the age of 31 as of June 15, 2012. The cut-off age of 31 will be eliminated and the cut-off date for arrival in the U.S. will be extended to January 1, 2010. DACA recipients will receive three years’ relief instead of two, reflecting the same policy for eligible parents under DAPA.

IMPLEMENTATION OF DAPA AND DACA

The expansion of both deferred action programs comes with additional enforcement activities. A memo to all agencies will provide directions to focus on national security threats, illegal entrants with criminal convictions and recent unlawful entrants. By the same token, DHS has instructed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to apply these new directives to DACA and DAPA eligible individuals already in custody, removal or those scheduled for deportation. Financing for both DAPA and DACA will come from a filing fee of $465 per application.
SECURE COMMUNITIES PROGRAM TO CHANGE

Obama’s executive action authorizes the replacement of the controversial Secure Communities program to a Priority Enforcement Program. Secure Communities uses a federal information-sharing database between ICE and the Federal Bureau of Investigations. Under the Secure Communities program, when an individual was arrested by local law enforcement for a criminal violation of local, state or federal law, the arresting officer would automatically notify ICE. At that time of notification, ICE made a decision whether immigration enforcement was warranted. The process will change under the President’s executive action so that, instead of local law enforcement automatically notifying ICE of an arrest, ICE will request local law enforcement to notify it of an arrested individual’s pending release. Also, the DHS has designated the Office of Civil Rights and Civil Liberties to monitor state and local law enforcement to ensure there is no biased policing.

PROSECUTION AND DEPORTATIONS OF THREE GROUPS

Four groups that will continue to face prosecution and removal are as follows.
1. Suspected terrorists, felons, gang members and those who entered the U.S. illegally after January 1, 2014;
2. Those that pose a risk to national security;
3. Those with convictions of felonies, aggravated felonies, significant misdemeanors (domestic violence, burglary, firearm offenses, DUI and drug trafficking) and three or more misdemeanors (excluding traffic violations);

OTHER IMMIGRATION REFORM

Some of the more salient points of Obama’s executive action touching other areas of immigration law include:
- Re-registration will be available to allow people who are legally in the U.S. and awaiting green cards to adjust their status to that of lawful permanent residents when such status has been approved (but there have been no green cards available due to those individuals’ countries of nationality being over-subscribed). This policy alone is estimated to benefit 400,000 individuals.
- Travelling outside the U.S. while a lawful permanent resident petition is pending will not result in the traveler being inadmissible when attempting to re-enter the U.S.
- There will be a clarification of the standard of extreme hardship for waivers of unlawful presence in the U.S. for some relatives of U.S. citizens and lawful permanent residents.
- Clarification will also be provided for the standard by which a national interest waiver entitling individuals to remain in the U.S. can be granted to foreign inventors, researchers and founders of start-ups that benefit the U.S.
- Authorization to remain in the U.S. will be granted for eligible inventors, researchers and founders of start-ups who do not qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or those that promise innovation and job creation through development of new technologies or cutting edge research.
- Spouses of H-1B visa holders may work if they are on the path to permanent U.S. residence.
- Greater clarity will be provided to interpret the “specialized knowledge” requirement for L-1B nonimmigrant visa status, a visa for transferees from a foreign parent or affiliate.
- The use of the Optional Practical Training Period, an authorized period of work authorization for foreign graduates from U.S. universities and colleges, currently at 29 months for STEM graduates and 12 months for all others, will be expanded and extended.
- The required labor certification by the U.S. Department of Labor, a precursor to applying for lawful permanent residence will be modified to move more smoothly.
- As of 2013, family members of U.S. citizens who are eligible for a waiver of inadmissibility for the three or 10 year bar if they left the U.S could travel abroad to be processed for permanent residence once the waiver was granted. The USCIS has been directed to expand the family members eligible for this stateside processing to include adult children of U.S. citizens and permanent residents as well as the spouses and minor children of permanent residents.
- The new White House Task Force on New Americans will present recommendations to improve integration of immigrants in the U.S. and assist the communities that receive them.

WHY NOT MORE?

Many ask why the President did not just grant permanent residence to DACA- and DAPA-eligible individuals. This area was carefully researched by the White House and Department of Justice legal staff who determined that while the executive branch can defer action, it cannot grant status such as permanent legal residency and U.S. citizenship, actions only possible through Congress.

Notably missing is any action for temporary agricultural workers who do not qualify for some type of relief through their U.S. or permanent resident children. As a result, the White House has asked the Secretaries of DHS, Agriculture, Commerce, Labor and Education, the U.S. State Department, working in consultation with the White House, Attorney General and non-governmental constituencies to submit recommendations for additional action to him by March 20, 2015.

DHS Secretary Jeh Johnson also issued a memorandum to support U.S. employers seeking to hire and retain highly skilled foreign workers. This includes faster processing for employment-based permanent residence, removing any penalty for changing jobs while awaiting permanent residence visa status, and preventing recipients of U.S. higher education from leaving the U.S. for easier immigration policies elsewhere.

CONCLUSION

The President’s immigration reform is a step towards a more inclusive and better coordinated immigration system. Precedents for executive action relating to immigration include every U.S. President since 1956, most notably the executive action known as “Family Fairness” which resulted in the 1986 Immigration Reform and Control Act under President Reagan, giving three million undocumented aliens a path to legalization. Actual conferring of permanent residence and U.S. citizenship remained then and continues to lie within the purview of Congress.