

Implementing Immigration Reform Without Congress

By Kirk A. Carter, Esq.

America's Immigration System has been broken for quite some time now. Employment verification rules put in place in 1986 have been a colossal failure, the ranks of the undocumented have swelled, and the lines for those seeking to enter the country legally have grown exponentially. Repeated attempts by both Democratic and Republican administrations have failed to gain the Congressional support needed to effect major reform. Against this backdrop the Obama Administration has chosen to act without Congress.

Last year a working group within the U.S. Citizenship & Immigration Services ("USCIS") explored a variety of administrative alternatives to comprehensive immigration reform and came up with a list of recommendations. Their memo outlines a series of steps that the administration can take to promote family unity, foster economic growth, achieve significant process improvements, and reduce the threat of removal for certain individuals present in the U.S. without authorization. These recommendations do not change existing law, but instead take a creative look at existing forms of relief (such as parole-in-place, deferred action and the discretion to not put someone in removal proceedings) and apply them to various perceived problems.

One of those problems is the clogging of the immigration court system with non-priority removal cases. Over the past several years the Obama Administration has significantly increased the apprehension and removal of undocumented immigrants. Foreign nationals have historically been placed in removal proceedings if they were apprehended, denied a benefit, or arrested even for a minor traffic offense. As a consequence the immigration courts have become clogged with immigrants the government is seeking to remove, causing processing and detention times to be drawn out, draining valuable government resources. Last summer the Obama Administration announced that it would no longer place every undocumented alien in removal proceedings and instead would focus on the speedy removal of the most dangerous offenders, and past immigration violators. This process known as "prosecutorial discretion" has been addressed in previous issues of our newsletter and an update on its implementation is also included elsewhere in this newsletter.

Another perceived problem is the plight of thousands of undocumented immigrants who are married to US Citizens or who have citizen children who are stuck in limbo. Also addressed in our last issue, many of these immigrants are eligible to receive

green cards through their spouses or children. However, they remain in limbo because the law requires them to leave the US and triggers either a three or a ten year bar on their re-entry. While a waiver is available based on "extreme and unusual hardship" to qualifying family members, few, if any risk the trip home because there is no guarantee that the waiver will be granted. To address this problem the Obama administration has agreed to modify the rules to permit their waivers to be processed here in the US prior to their departure, thereby significantly reducing the risk that they will be stuck in their home country while their spouse and children await their return. This waiver process is addressed in more detail elsewhere in this newsletter. While the working group suggested that USCIS could loosen up its "extreme hardship" standard, which is very difficult to meet for this and other waivers, no announcement has been made on this front yet.

Other reforms that have been implemented as a result of this memo are improvements in the EB-5 job creation visa program, to reduce significant delays in visa processing. Deferred action is also being taken in some instances on the removal of same sex spouses in proceedings pending a determination by the Supreme Court as to the Constitutionality of DOMA (the Defense of Marriage Act). Deferred Action and Parole-in-Place has also been extended to certain individuals brought to the US as minors, who would otherwise benefit from passage of the Dream Act, which Congress has failed to pass. While USCIS is still considering other suggestions contained in this memo, such as the granting of employment authorization to those in deferred status, or to spouses of certain legal non-immigrants, it remains to be seen just how far the Obama Administration is willing to go to affect Immigration Reform. It is also unclear how much of this Congress will tolerate as the President's critics proclaim these actions a "back door amnesty." Should there be a change in administrations in 2013, it is quite possible that these changes will be reversed.

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