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Figuring out what immigration policy shift actually means

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On June 15, 2012, the Department of Homeland Security dramatically shifted policy when Secretary Janet Napolitano issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." Viewed as a major policy breakthrough by some, and election year pandering by others, this massive initiative has the public and affected individuals wanting to know just what the new policy means to them. Meanwhile, immigration lawyers are preparing to counsel clients who may be affected by this latest imprint on the already complex body of immigration and nationality law.

What is it, what it isn't

In broad terms, the move is a form of prosecutorial discretion by the executive branch that temporarily suspends the possibility of deportation for youths who would have qualified for relief under the proposed DREAM Act. The memorandum states that to qualify, the individual must have: (1) come to the United States under the age of 16; (2) resided in the United States continuously for at least five years preceding the June 15 memorandum and have been present in the United States on the date of the memorandum's issuance; (3) currently be in school, graduated from high school or obtained a GED certificate, or be an honorably discharged veteran of the Coast Guard or armed forces of the United States; (4) not convicted of a felony, serious misdemeanor, multiple misdemeanors, or pose a threat to national security or public safety; and (5) not be above the age of 30. Applicants will have to produce "verifiable documentation" of meeting the five criteria and undergo a background check.

Deferred action is an exercise of prosecutorial discretion by which the executive refrains from placing eligible individuals into removal (formerly called deportation) proceedings. It neither confers lawful status to the recipient nor does it confer permanent resident status or citizenship. Legislation would have to be enacted to confer those benefits.

Also, it does not shield the recipient from future prosecution by immigration enforcement authorities. What deferred action does do is take away the threat of immediate removal from the U.S. and it provides an opportunity to apply for a work permit. Each applicant will be subject to a full interagency background check, and if granted, both benefits will be issued in increments of two years subject to renewal.

How it will work

The Department of Homeland Security is facing a daunting procedural task. Within 60 days (by Aug. 14, 2012), Homeland Security agencies must devise a workable plan to adjudicate applications by a projected 1.4 million applicants by creating a workflow, training adjudicators and being physically equipped to take in the sheer volume of incoming applications in order to be in compliance with the secretary's directive. Moreover, Homeland Security has to take steps to overcome applicants' inherent fear of receiving a benefit that entails tipping off enforcement authorities to the location of their unlawfully present family members.

In any case, potentially eligible individuals who meet the five criteria will fall into one of three distinct categories: (1) those who have never been apprehended or placed into removal proceedings; (2) those who are subject to a final order of removal (i.e. removal proceedings against that person have been concluded in immigration court and that person is presently removable); and (3) those who have a case pending before the Executive Office for Immigration Review (immigration court).

Right now, there is no process in place for the first category of individuals. This means that individuals not currently facing immigration charges may not yet make application for deferred action benefits. If the USCIS — the agency responsible for taking in and adjudicating these applications — is able to create an internal procedure by deadline, it will probably open a special post office box and begin accepting applications by mail.

The same is likely to be true of individuals in category two: those subject to a final order of removal. Whether Homeland Security will simply conduct paper adjudications or require in-person interviews remains to be seen. Presumably, face-to-face interviews will be required only in questionable cases, such as an individual with a minor misdemeanor conviction, or in cases where the required documentation is lacking or otherwise suspicious.

The third category of individuals, those with pending immigration court cases, will be handled by ICE — the investigatory and enforcement arm of DHS — who has already begun conducting case-by-case review of these

active cases to determine whether they should be deferred. In addition, ICE too is developing its process by which qualified individuals may seek review of their pending removal case for the deferred action.

Any time a benefit, such as the one here, is announced, the risk of scams and other unlawful schemes devised by unscrupulous lawyers and unlicensed consultants — often identifying themselves as "notarios" — skyrockets. Thus, individuals who believe they are or may be eligible should be sure to contact an experienced immigration lawyer for advice and application preparation, and take extreme care to avoid being victimized by those looking to make a greedy dollar.

Also, attempting to apply prior to any formal procedure announcement from Homeland Security will cause the premature application to be rejected, and improper applications can forever destroy eligibility for relief under this discretionary policy and the Immigration and Naturalization Act alike.

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