

Spotlight On Obama's Policy For Undocumented Youth

Law360, New York (July 11, 2012, 2:16 PM ET) -- On June 15, 2012, U.S. Secretary of Homeland Security Janet Napolitano and President Barack Obama announced that, effective immediately, certain undocumented youth who were brought to the United States as young children, who do not present a risk to national security or public safety, and meet several key criteria will be considered for relief from removal from the country or from entering into removal proceedings.

Under the administration plan, certain unauthorized immigrants, who are Development, Relief and Education for Alien Minors (DREAM) Act-eligible, will be able to avoid deportation and obtain work authorization if they can satisfy specific key criteria:

1. Came to the United States before they turned 16;
2. Have continuously resided in the United States for a least five years preceding the date of the memorandum (June 15, 2012) and are present in the United States on the date of this memorandum (June 15, 2012);
3. Are currently in school, have graduated from high school, have obtained a general education development certificate or are honorably discharged veterans of the U.S. Coast Guard or Armed Forces of the United States;
4. Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses or otherwise pose a threat to national security or public safety;
5. Are not above the age of 30.

Only those individuals who can prove through verifiable documentation that they meet these criteria will be eligible for deferred action and work authorization. Individuals will not be eligible if they are not currently in the United States and cannot prove that they have been physically present in the United States for a period of not less than five years immediately before June 15, 2012. Types of evidence include but are not limited to school records, medical records, high school diploma or GED certificate.

Those who demonstrate that they meet the criteria will be eligible to receive deferred action for a period of two years, subject to renewal, and will be eligible to apply for work authorization. This policy will not lead toward citizenship but will remove the threat of deportation and grant the ability to work legally, leaving eligible immigrants able to remain in the United States for an extended period.

Illegal immigrant children won't be eligible to apply for this benefit of deferred action and work authorization until they turn 16, but these younger children will not be deported.

For individuals who are in removal proceedings and have already been identified as meeting the eligibility criteria and have been offered an exercise of discretion as part of U.S. Immigration and Customs Enforcement (ICE) Immigration and Custom Removal ongoing case-by-case review, ICE will immediately begin to offer them deferred action for a period of two years, subject to renewal.

If this has not occurred and you have clients that satisfy the above criteria, you may call the ICE 24-hour hotline at 855-448-6903. If your clients are subject to a final order of removal are eligible for the above relief, you may call 800-375-5283.

Some argue that enlistment in the military is not currently a viable option for persons affected by the above announcement, as Napolitano cannot authorize anyone to enlist in the U.S. Armed Forces — except perhaps the Coast Guard — and did not do so on June 15, 2012.

Generally, unauthorized immigrants are not currently allowed to enlist in the U.S. Armed Forces voluntarily. People with work permits or "deferred action" are likewise ineligible for voluntary enlistment. The announcement does not change the military enlistment law found at 10 USC 504. No service secretary has to date authorized the enlistment of DREAMers, or of people who have been granted "deferred action."

This announcement does not expand the categories of noncitizens who are eligible to enlist in the U.S. Armed Forces (Army, Navy, Marines, Air Force and Coast Guard, including their reserve components and the National Guard).

The U.S. Department of Homeland Security announcement did state that "honorably discharged veterans" age 30 or younger are eligible for deferred action under the terms of the memorandum signed by Napolitano. Given that most honorably discharged veterans under 31 who meet the memorandum's requirements are eligible for naturalization under Immigration and Nationality Act 329, very few will need the relief afforded by the announcement.

While this guidance takes effect immediately, to date, U.S. Citizenship and Immigration Services (USCIS) has not announced the procedure or cost to apply for deferred action and/or work authorization. On July 6, 2012, USCIS issued the following announcement on its website at www.uscis.gov :

"U.S. Citizenship and Immigration Services (USCIS) alerts eligible individuals NOT to submit a deferred action request under the Deferred Action Process for Young People memorandum issued by Secretary Napolitano on June 15. If you submit now, your application will be rejected."

Because USCIS has not as yet announced a procedure to apply for relief, we cannot be sure that the process will be simple or effective. Already, some Republican senators have written letters to Obama in strong terms against his announcement, and more ominously, Lamar Smith, R-Texas, chairman of the House Judiciary Committee — the committee with direct jurisdiction over DHS/USCIS's finances in these matters — has written to the director of ICE raising objection after objection designed to ensure that very few, if any, DREAMers actually get an employment authorization document.

And that brings us back to the issue of time. It is entirely believable that DHS/USCIS will soon advertise themselves as under fire from Smith and his fellow conspirators in Congress and will push back the announced 60-day timetable to later, perhaps September or October.

Some argue that it is to Obama's political advantage to dangle a promise before these undocumented youth, and do nothing to actually deliver employment authorization cards — all the while blaming Republicans such as Smith for the inaction — since this will arguably give the immigrant community a reason to vote for him in November.

While the president deserves to be applauded for his June 15, 2012, announcement, critics have reason to remain skeptical. After all, the Obama administration has deported more immigrants than any other administration in the history of the United States.

As the famous saying goes “the devil is in the details.” We have no choice but to adopt a wait-and-see approach while remaining cautiously optimistic that the procedure to apply for deferred action will be simple, practical and, most of all, announced soon.

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