

WORKING DRAFT MEMORANDUM
TO SECRETARY JOHNSON

To: Secretary Jeh Johnson
From: Congressional Hispanic Caucus
RE: Administrative relief and more humane enforcement practices

We write to recommend administrative actions that DHS should take to end the needless separation of American families caused by the deportation of immigrants with strong family ties and deep roots in the United States. The Administration should use all legal means available including deferred action (like the Deferred Action for Childhood Arrivals "DACA" program) and parole to suspend, delay or dispense with the deportations of immigrants who would qualify for legal status and protection under S.744, "The Border Security, Economic Opportunity and Immigration Modernization Act," that passed the Senate on a bipartisan basis in June 2013.

The President shared with us in a recent meeting that he has asked you to do an inventory of the Department's current practices to see how it can conduct enforcement more humanely within the confines of the law. Below are several policy options that offer affirmative administrative relief within the purview of the law with the goal of family unity. In addition, we have also included recommendations on enforcement reforms that DHS can implement to better focus its resources on targeting those who pose a serious threat to our communities and reflect a more humane approach to immigration enforcement.

1) DACA should be expanded to undocumented immigrants who are low-priority American workers and families who benefitted from the Senate's immigration reform bill (S. 744).

- On June 15, 2014, DACA was announced and has benefitted thousands of "low priority" individuals who came to the U.S. as children.
- The DACA memo states that the executive branch has the power to set policy for determining when an exercise of discretion is appropriate within the framework of the law.¹
- Parents and siblings of DACA recipients and parents of USC or LPR children should be protected from deportation under the DACA model.
- As of November 2011, 5,100 children are in foster care because their parents have been detained or deported.
- Between July 2010 and September 2012, nearly 205,000 parents of U.S. born children were deported from the U.S.²
- Expansion of DACA to "low priority" individuals will keep families together and prevent children from ending up in foster care.

2) Extend Parole in Place (PIP) to other undocumented immigrants.

¹ <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

² Colorlines, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, Dec. 2012, available at: http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.

- The expansion of parole in place as a form of administrative relief could potentially benefit large groups of individuals in different ways.
- It could function as a stop-gap measure to temporarily protect people against removal and grant them a work permit, even if they can't apply for a green card.
- It can also provide those with a legal path to a green card to be able to pursue a green card in the United States. For example, a DACA recipient who is married to a USC and is granted parole in place would not have to leave the country to apply for a green card. He or she could pursue a green card in the United States. This would also be the case for other immediate relatives of U.S. citizens like spouses, children and parents who are granted parole in place.
- Parole in place would allow immediate relatives of USCs who entered without inspection and are subject to the 3 -or 10-year bar, to apply for a green card.
- Without parole in place, in order to obtain permanent residence, the person would have to depart the U.S. and apply for an immigrant visa at a U.S. Consulate abroad.
- However, for many of these individuals, the act of departure will trigger a 3-or 10- year bar.
- USCIS may parole an applicant for admission into the U.S. on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit."³ We argue that family unity is a "significant public benefit".
- In the November 15, 2013 U.S. Citizenship and Immigration Services (USCIS) memorandum authorizing PIP for certain military family members has been used as a mechanism to assist military family members who are without lawful immigration status.⁴ This memo sets the legal framework to expand upon who else should receive PIP.

3) Permit Adjustment of Status for DACA and TPS recipients granted advance parole.

- Many individuals who have been granted DACA or Temporary Protected Status (TPS) originally entered the U.S. without inspection and they are currently considered ineligible for permanent residence.
- Even though they have TPS or DACA, these same individuals have often acquired significant periods of unlawful presence in the U.S. and would be subject to the 3 -or 10- year bars to admission if they were to depart the U.S. to obtain lawful permanent residence at a U.S. Consulate.
- However, a person who has been granted DACA or TPS is eligible to travel outside the United States and return as a DACA or TPS beneficiary if they are granted "advance parole" prior to their departure.
- USCIS has long taken the position that a departure on advance parole is sufficient to trigger the 3-or 10- year bars.
- However, in a key case called *Matter of Arrabally and Yerrabally* it was decided that a departure on advance parole for purposes of returning to the U.S. to pursue a pending

³ INA section 212(d)(5).

⁴http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/20131115_Parole_in_Place_Memo_.pdf.

application for adjustment of status is not a "departure" and will not trigger the 3-or 10-year bar.⁵

- This case could be interpreted by DHS to permit DACA and TPS beneficiaries, as well as those who might receive certain other forms of relief, who depart and re-enter the U.S. on advance parole and who later become eligible for permanent residence, to adjust status as "parolees" without triggering the 3- or 10-year bars.

4) Expand Humanitarian Parole to parents and siblings of DACA recipients and immediate relatives of USCs or LPRs outside of the United States.

- This would allow family members outside of the US, most of whom have been removed, a way to reunite with their families in the United States.
- The administration can grant "humanitarian parole" on a case by case basis based on "urgent humanitarian reasons or significant public benefit". Again "significant public benefit" could be interpreted by the Administration to include keeping a nuclear family together.⁶
- Additionally, immediate relatives of USCs who are granted humanitarian parole would be able to pursue a green card once granted parole.
- Humanitarian parole is an appropriate tool to advance family unity and heal families who have been separated by deportations.

5) Allow DACA recipients, TPS, Asylees, and Refugees to enlist in the military.

- Under current law only U.S. citizens, green card holders, and persons "vital to the national interest" can enlist in the military.⁷
- Many DACA recipients want the opportunity to serve in the military but cannot serve because the DOD policy does not consider them "vital to the national interest".
- There is a current program called MAVNI (Military Accessions Vital to the National Interest) which allows people to enlist if they hold certain visas. But those who are in this program must speak certain specialized languages or be a health care professional to qualify.
- It is "vital to the national interest" that these highly qualified, U.S. educated young people be allowed to serve our country.
- The Administration could issue a memo creating a new MAVNI II program that allows DACA recipients and other legal status holders like TPS, Refugees, and Asylees to enlist without requiring them to speak any strategic language or be a licensed health care professional.
- These individuals have already been vetted by DHS and have been granted a work permit. Having these individuals in the military would enhance the military's regional and cultural expertise and pool of applicants for recruitment across the board.
- If allowed to enlist these individuals would obtain conditional citizenship and must serve 5 years.

Recommendations on Enforcement Reforms

⁵ In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

⁶ INA section 212(d)(5).

⁷ 10 USC 504(b)(2).

In addition to the above recommendations on affirmative administrative relief, we have also included ways in which DHS can adjust its current policies and practices to reflect a more humane approach to immigration enforcement.

1) Clarify extreme hardship waiver and expand provisional waiver process.

- “Extreme hardship” is statutorily not defined and applied in a strict and an ill-defined manner.
- The Administration should provide guidance in clarifying the “extreme hardship requirements” to include family ties to the U.S. and the country of removal, conditions in the country of removal, the age of the U.S. citizen or LPR spouse or parent, relevant medical and mental health conditions, and financial and educational hardships.
- Specifically, particular consideration should be given to a potential beneficiary who is the primary caretaker of a minor USC or LPR child.
- USCIS should also consider factors that would create a presumption that extreme hardship is established when the potential beneficiary and his or her family would be required to travel to a dangerous location for visa processing.
- USCIS should allow “preference relatives” (e.g. unmarried adult children of USCs and spouses and children of LPRs) to apply for the provisional waiver in addition to “immediate relatives.” This extension would be consistent with the stated intent of the law under which the waiver process was created.⁸
- USCIS should consider “extreme hardship” to LPR spouses and children in adjudicating waivers (current practice only considers extreme hardship to USC “qualifying relatives”) to be consistent with the congressional intent of the statute that created the waiver process.

2) Review Civil Enforcement Priorities and Refining Prosecutorial Discretion.

- The 2011 Morton Memo on Prosecutorial Discretion was an improvement to DHS enforcement priorities, but still falls short as evidence continues to show that individuals who are not priorities or a threat to national security or public safety continue to be removed.⁹
- The most effective way to make improvements in this area would be to refine the Priority Levels which DHS currently uses to justify removal (Levels 1-3).
- The priorities are currently overbroad, and should be refined to reflect that:
 - Level 1 - Individuals whose only blemish is based on “status” or has an underlying “status violation” that led to a criminal conviction (e.g. illegal entry or re-entry) should not be prioritized, especially when they have strong familial ties to the U.S. and are not a threat to national security or public safety.

⁸ INA 212(a)(9)(B)(v).

⁹ <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

- Level 2 - "Recent illegal entrants" should not include persons who have been in the U.S. for more than 6 months (current guidelines consider "recent" to be 3 years) and have significant ties to the U.S.¹⁰
 - Level 3 – So called "fugitives" should be revised so that it does not include persons with final orders of removal, especially if those orders are decades old, and where the removal order was not based on an underlying criminal conviction (exempting status-related violations). In addition, the individual's significant U.S. ties should be considered.
- DHS should also refine its guidance to provide expanded case-by-case use of deferred action and give more weight to positive and/or mitigating factors, (especially a familial relationship to a U.S. Citizen or LPR or owning a business) and less weight to negative factors (especially those that do not involve serious criminal activity or egregious immigration violations).

3) Limit deportations without hearings.

- Reevaluate removal procedures, such as expedited removal, where an individual is deported by ICE and CBP without a hearing in front of an immigration judge.
- Implement a screening protocol that would require border regions to evaluate every case for compliance with enforcement priorities and consider each case for prosecutorial discretion.
- This would ensure that every case that is prima facie eligible for relief from removal or prosecutorial discretion receives a fair chance to apply for appropriate immigration relief.

4) Restrict detainers to highest priority cases.

- DHS currently detains and initiates removal proceedings for tens of thousands of individuals who are not, even under current standards, priorities for removal.
- DHS should amend its detainer and Notices to Appear (NTAs) policies to be consistent with its immigration enforcement priorities.
- DHS should at a minimum limit issuance of detainers to only those individuals who have been convicted of certain offenses, as opposed to merely charged with a crime.

5) End 287(g) and Secure Communities.

- When immigrants fear the police they suffer in silence and communities are less safe.
- Immigration law must be enforced by federal officials and not by local law enforcement.
- States and localities should not be required to participate in immigration enforcement programs.

¹⁰ <http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf>.

- Both programs have encouraged racial profiling and damaged trust between the immigrant community and the local police.
- Additionally, DHS should release the statistical analysis of the Secure Communities program conducted by DHS Civil Rights and Civil Liberties.

6) Improve short term custody.

- Independent investigations have documented substandard conditions in CBP facilities and the mistreatment of immigrants. This includes verbal and physical abuse, denial of medical care, inadequate food and water, due process violations, exposure to extreme temperatures, overcrowding, and the permanent confiscating of personal items.
- CBP should implement enforceable standards to govern conditions within short-term custody facilities. CBP should also take steps to improve oversight of these facilities and enhance its complaint process.

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