



# President Obama's Executive Actions on Immigration

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# Introductions

- Who are our panelists?
- Our focus today
- Our scope
- Caveat: evolving issues -- many guidelines are to-be-issued, regulations to-be-published
- Questions at end of webinar



# What are the Executive Actions?

- Three “buckets”



- (1) Deferred Action program for undocumented individuals
- (2) Border security and enforcement changes
- (3) Improvements to the processing of business and family immigration benefits

# Why is President Obama taking this action now?



- Nearly 20 years since last major immigration package
- 12 million living in shadows without status
- Polls support immigration reform
- Congressional inaction in spite of bipartisan efforts, Senate victory in 2012

# What is the legal authority for the President to act?

- Federal immigration statutes and regulations
- Prosecutorial discretion
- Precedents from former Presidents





# How will these changes be implemented?

- A mixed bag: some guidance forthcoming via memos and policy guidelines, some changes will require rule-making
- Rule-making process overview
- Can these actions be reversed or thwarted?
  - (1) Lawsuits
  - (2) De-funding agencies
  - (3) A post Obama administration can “reverse course”

# DACA Expansion and DAPA Program

Defining our terms:

- **DACA = Deferred Action for Childhood Arrivals**
  - Existing DACA program expanded by removing age limit
  - Will cover about 300,000 new DACA beneficiaries
- **DAPA = Deferred Action for Parental Accountability**
  - Undocumented parent of a USC or LPR child born before 11/20/2014 and living in U.S. since 1/1/2010 can obtain three-year work permit
  - Will benefit about 4 million individuals



# More on DACA and DAPA

*“Is it amnesty?”*

No ~ not permanent, confers no legal status, provides no path to citizenship or lawful permanent resident status

- When will it come about?
- Is the individual foreign national at risk in this program?
- Net result: just under five million people coming out of the shadows





# What might DACA and DAPA mean for employers?

- So-called “Honesty Policies” will be tested
- Certain industries may have a blanket “forgiveness” policy: But will this impact the application of the Honesty Policy in other arenas?
- California Labor Code § 1024.6 specifically prohibits an employer from taking adverse action or retaliating against an employee because the employee changed personal information



# The Form I-9: New approaches to a 27-year-old form

- Per DHS guidance on DACA:
  - Employer will need to create new I-9 and attach it to old I-9
- Employer also must run new E-Verify query:
  - But will this flag the issue to ICE?
- Should employers consider a voluntary I-9 audit?
- For unionized employers: Collective bargaining agreement may be problematic in terms of limiting use of a new I-9 and/or E-Verify.

A scan of a Form I-9, Employment Eligibility Confirmation, with a large blue 'Form I-9' watermark overlaid diagonally across the center. The form is a standard government document with various fields for employer and employee information, including name, address, date of birth, and identification details. The watermark is a large, semi-transparent blue text that reads 'Form I-9'.




# The employer's role in this “brave new world” of DACA and DAPA

- Employer community now comfortable with the formulation, “Do you now or in the future need an employer to sponsor you for work authorization”
- Emergence of a large class of workers who do not need sponsorship but whose DACA/DAPA status (and employment authorization) is at risk
- Can an employer refuse to hire DACA or DAPA beneficiaries?
- DACA/DAPA beneficiaries are not a “protected class” for citizenship discrimination purposes
- What about national origin and alienage discrimination?



# Worksite enforcement coordination among various agencies

- Department of Labor to coordinate on worker protections with ICE, Office of Special Counsel for Unfair Immigration-Related Employment Practices, EEOC, and NLRB
  - Faster than rulemaking
  - Only requires Memoranda of Understanding



# What are the potential risks to employers?

- Is there a risk that a worker's unauthorized status could be “imputed” to the employer of a DACA or DAPA individual?
- What steps should employers take to protect themselves?



# Tax and Social Security issues

- Tax Issues will include:
  - Submitting a corrected Form W-2
  - Correcting wage withholding that was credited under the wrong Social Security Number

# Improvements re: common work visas

- Current situation with respect to unjust RFEs, denials of L-1B petitions
  - Clarification, long-awaited guidance for workers with specialized knowledge
  - May reverse trend of denying legitimate filings, providing employers with more predictability
- Expanding work authorization to H-4 spouses:
  - Where H-1B spouse has an approved I-140 immigrant visa petition OR
  - Where H-1B spouse has been granted an H-1B extension beyond 6 years
- Final rule could:
  - Afford work permission to other H-4 spouses or H-4 children
  - Afford work permission to dependents of other work visas such as O-1 or TN





# Foreign inventors, entrepreneurs, and researchers

- USCIS will clarify when foreign inventors, researchers and founders of start-up enterprises qualify for a “National Interest Waiver”
- USCIS will grant parole to 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
  - Otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research



# Improving the Green Card Program



- Form I-485 adjustment of status (“AOS”) basics
- Can’t file until a green card (“GC”) number is available
  - Hard to promote employee into new role
  - Spouse and kids can’t work
  - Employer has to continue to pay for work permit renewals
  - Demoralizing for employee
- Change in regulations required; final rule expected by late 2015
- Would affect about 500,000 people

# Improving the Green Card Program



- Proposal to allow foreign national employees to file the AOS before a green card number is current, so long as visa number is not “unavailable”
- Proposal to interpret *Visa Bulletin* differently to reduce green card quota backlogs, prevent “waste” of GC numbers
- Challenges: could accelerate visa number movement, thereby putting pressure on employers to promote FNs into the GC role and/or pay the GC salary earlier than anticipated
- Benefits of AOS “early filing” to employees:
  - Work and travel documents for family members
  - AC-21 portability enables career mobility

# Improving the Green Card Program



## Clarification of eligibility for AC-21 portability

- “Same or similar occupation” clarity
- Could enhance worker mobility
- Employers could lose the value of sponsorship with earlier employee resignations



# F-1 student work authorization improvements

- ICE and USCIS will develop proposed regs for Notice and Comment, with these potential benefits to STEM students:
  - Extend the 17-month term of STEM Optional Practical Training (“OPT“) work authorization
  - Expand fields of study that will qualify for STEM OPT
  - Allow STEM OPT even if an intervening non-STEM degree is in the picture
  - Grant “dual intent” to F-1 students
- Regs may require stronger “nexus” between OPT employment and university field of study, better safeguards for U.S. workers
- Current *WashTech* lawsuit challenges Federal government OPT program, affords IT workers “standing” to sue



# PERM modernization

- At the 10-year mark: system is dysfunctional, broken, and misaligned with employer real-world recruitment practices
- DOL seeking input from stakeholder community: “modernized recruitment”
- Possibilities for Premium Processing
- Options to cure “non-material errors”



# For more information

## On-Line Resources:

[www.immstar.com](http://www.immstar.com)

[Executive Immigration Action Source Materials](#)

[\(courtesy of the American Immigration Lawyers Association\)](#)

[Worksite Harmony and the President's Executive Actions:](#)

[It's All about Immigration Timing](#)

[\(from www.nationofimmigrators.com, Dec. 3, 2014\)](#)



# Questions?