



A GUIDE TO THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION

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The American Immigration Council's policy mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, the Immigration Council provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. Our reports and materials are widely disseminated and relied upon by press and policymakers. Our staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. We are a non-partisan organization that neither supports nor opposes any political party or candidate for office.

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CONTENTS

1	INTRODUCTION & OVERVIEW OF THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION
2	DEFERRED ACTION PROGRAMS
4	IMMIGRATION BENEFITS AND VISA PROCESSING
7	CITIZENSHIP
7	ENFORCEMENT
10	LEGAL AUTHORITY FOR THESE EXECUTIVE ACTIONS
12	HISTORY AND BACKGROUND
13	CONCLUSION
14	GLOSSARY

INTRODUCTION

On November 20 and 21, 2014, President Obama announced his “immigration accountability executive action,” which includes a series of measures that are first steps towards common-sense reforms to an outdated immigration system. The series of executive actions presented by the administration range from new temporary immigration protections for many unauthorized parents of U.S. citizens and **lawful permanent residents** to highly technical regulatory proposals to fix outdated visa provisions. The series of changes, updates, and temporary measures relies on the expansion of successfully implemented programs, enhanced efforts to coordinate immigration enforcement and benefit policies across agencies, and attempts to use immigration as a tool of economic and social change. At the same time, the policies reflect the limits of executive authority, in many cases offering temporary respites until Congress definitively acts to reform the law. This guide from the American Immigration Council puts the issues in context, explaining what we know about the executive actions thus far, what the President’s legal authority is for these actions, and some of the history and background that preceded the announcement.

OVERVIEW OF THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION

The President announced efforts to retool critical aspects of the immigration system—how we enforce immigration laws, how we process immigration benefits, how we encourage further business innovation, and how we welcome immigrants to this nation. In addition, acknowledging the failure to reach a legislative solution that addresses the fate of unauthorized immigrants who have lived in the country for years, the President authorized the Department of Homeland Security (DHS) to significantly expand its use of deferred action to provide temporary protection from removal for millions of unauthorized immigrants currently in the U.S. This will be accomplished through expansion of the current Deferred Action for Childhood Arrivals (DACA) program, as well as the creation of a new deferred action program, Deferred Action for Parental Accountability (DAPA).

The expanded use of deferred action is coupled with other enforcement measures, including a new, department-wide enforcement priorities memo that provides greater direction to all agencies to focus attention on national security threats, those with criminal convictions, and recent unlawful entrants. DHS is replacing the controversial **Secure Communities** program in favor of a new model of federal/state/local cooperation that focuses on convicted criminals rather than all unauthorized immigrants encountered by local authorities. DHS will further consolidate its approach to border security, developing new task forces to coordinate the numerous federal actors at the southern border.

Inter-agency task forces will be formed to make recommendations to modernize and streamline current visa-processing practices; improve coordination among the Department of Labor, DHS, and other federal agencies; and ensure the protection of immigrant workers’ rights. The President also created a New Americans Task Force, tasking a broad range of federal agencies to develop a national policy on immigrant integration and cooperation with local communities, and has directed U.S. Citizenship and Immigration Services (**USCIS**) to embark on an ambitious effort to encourage **naturalization**.

Numerous other programs will be tweaked or expanded, including programs that protect unauthorized family members of persons who join the military, an expansion of eligibility for in-country processing of waivers of the **three- and 10-year** admission bars, and protections for high-skilled workers transitioning from a temporary to a permanent legal status.

These measures will be implemented in a variety of ways. For instance, the President signed two memoranda launching initiatives around integration and visa reform, but other actions have been announced through memos issued by DHS and other cabinet agencies. Some, such as the new enforcement priority memo or eligibility for deferred action programs, have specific categories and criteria already established. Other memos direct the agencies to explore, consider, draft, recommend, or otherwise issue policies and recommendations that will be developed and implemented over the course of the next two years. In either case, answers to many questions about how programs will be developed or implemented, and the role of stakeholders in shaping them, are still forthcoming.

DEFERRED ACTION PROGRAMS

What is the new DAPA program?

The Deferred Action for Parental Accountability (DAPA) is a **prosecutorial discretion** program administered by **USCIS** that provides temporary relief from deportation (**deferred action**) and work authorization to unauthorized parents of U.S. citizens or **Lawful Permanent Residents** (LPRs). The DAPA program resembles the DACA program in some important respects, but the eligibility criteria are distinct.

The program will be open to individuals who:

- have a U.S. citizen or LPR son or daughter as of November 20, 2014;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on November 20, 2014, and at the time of applying;
- have no lawful immigration status on November 20, 2014;
- are not an enforcement priority, which is defined to include individuals with a wide range of criminal convictions (including certain **misdemeanors**), those suspected of gang involvement and terrorism, recent unlawful entrants, and certain other immigration law violators
- present no other factors that would render a grant of deferred action inappropriate; and
- pass a background check.

DAPA grants will last for three years. The DAPA program should be ready to receive applications within 180 days.

How was DACA expanded?

Deferred Action for Childhood Arrivals (DACA) is a **prosecutorial discretion** program administered by **USCIS** that provides temporary relief from deportation (**deferred action**) and work authorization to certain young people brought to the United States as children—often called “**DREAMers**.” While DACA does not offer a pathway to legalization, it has helped over half a million eligible young adults move into mainstream life, thereby improving their social and economic well-being. On November 20, 2014, the Administration modified the DACA program by eliminating the age ceiling and making individuals who began residing here before January 1, 2010 eligible. Previously, applicants needed to be under the age of 31 on June 15, 2012, and to have resided here continuously since June 15, 2007. Moreover, the Administration announced that DACA grants and accompanying employment authorization will, as of November 24, 2014, last three years instead of two. While **USCIS** will continue to take applications and renewals under current eligibility criteria, those eligible under the new criteria should be able to apply within 90 days of the announcement.

How many people are affected?

The White House estimated that almost 5 million unauthorized immigrants could be directly affected by the DACA and DAPA programs. A recent analysis from the Migration Policy Institute estimates that as many as 3.7 million unauthorized immigrants could be eligible for the DAPA program, while another 300,000 people could qualify for DACA under the expanded guidelines. Based on previous estimates that 1.2 million people were eligible for the original DACA program, this expansion brings the total of potential DACA-eligible individuals to 1.5 million people. Taken together, the MPI figures suggest that 5.2 million unauthorized immigrants could qualify for protection from removal under the two programs. However, past experience suggests that the actual number who apply for the program may ultimately be much smaller, depending on outreach, access, cost, and numerous other factors

How will the government ensure that people eligible for DAPA are not deported before the new program is in place?

DHS has instructed officials in both Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to identify expanded **DACA** and **DAPA**-eligible individuals who are already in their **custody**, in removal proceedings, scheduled for deportation, or whom they newly encounter, and to exercise discretion favorably for those individuals. For eligible individuals in immigration court or before the **Board of Immigration Appeals**, ICE lawyers are instructed to close or terminate their cases and refer those individuals to **USCIS** for case-by-case determinations.

How will the deferred action programs be financed?

The deferred action programs will be financed by a user fee of \$465 per application. This is similar to the **DACA** program that President Obama announced in 2012. DHS has stated that “there will be no fee waivers and, like **DACA**, very limited fee exemptions.”

Why can't the President just grant a permanent legal status and be done with this?

The new DAPA program, like the DACA program, is a temporary measure, designed to eliminate the fear of removal while the country comes to a resolution about permanent legal status for the unauthorized. The executive branch can defer action, effectively declining to remove an individual, but only Congress can determine who is eligible for permanent legal status and citizenship.

Why isn't DAPA an amnesty?

The DAPA and DACA programs are temporary measures that do not meet either the technical or the political definitions of amnesty in use today. Technically, an “amnesty” is a governmental pardon, often issued to individuals or groups convicted of crimes, and it represents a form of forgiveness in which the offending party is admitted back into the fold. The 1986 legalization program was often referred to by its supporters as an amnesty—under that program, people who were in the country unlawfully could come forward, prove that they met certain criteria, pay fees, and obtain a **green card**. Over the years, the term amnesty has been appropriated by immigration critics and restrictionists to imply a “something for nothing” deal, in which legalization is viewed as a reward for entering the country unlawfully. For many immigration critics, anything short of deportation is an “amnesty,” irrespective

of the stringent criteria put in place to ensure that unauthorized immigrants pay penalties and fulfill numerous other requirements to obtain a legal status. In the case of DACA and DAPA, these programs offer some unauthorized immigrants a temporary reprieve, but offer neither permanent legal status nor a chance at citizenship. That power remains in the hands of Congress.

Will DAPA recipients be eligible for public benefits?

DAPA recipients will not be eligible for federal public benefits, including federal financial aid, food stamps, and housing subsidies. *The New York Times* has [reported](#) that the Obama Administration will promulgate regulations to exclude DAPA recipients from any benefits under the Affordable Care Act, much as it did in the aftermath of the DACA announcement.

Whether DAPA recipients will be eligible for state benefits and opportunities like driver's licenses, in-state tuition, and professional licenses will turn on the law of the state. As of the publication of this guide, deferred action recipients are eligible for driver's licenses in the overwhelming majority of states.

IMMIGRATION BENEFITS AND VISA PROCESSING

What is the Presidential Memorandum on visa modernization?

On November 21, 2014, the President issued the **Presidential Memorandum** on "[Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century](#)." In this memo, the President called on immigration agencies to develop recommendations to improve the current visa system, while at the same time reinforcing that legislative reforms were needed to bring the U.S. immigration system in line with current economic and national security needs. He has directed the Secretaries of the Departments of Homeland Security and State, working in consultation with the White House, the Attorney General, the Secretaries of Agriculture, Commerce, Labor, and Education, and non-governmental stakeholders to submit recommendation to him by March 20, 2015.

The recommendations shall be designed to ensure (1) that the processing of all immigrant (permanent) and non-immigrant (temporary) visas is done efficiently, with an emphasis on reducing costs, waste, and fraud while improving services; (2) that all available immigrant visa numbers are used consistent with demand; and (3) that a stronger technology infrastructure exists to improve the applicant's experience, enable better oversight, and eliminate duplicative systems. The recommendations must include metrics for measuring progress in implementation and in achieving service improvements, while still protecting U.S. border integrity and economic opportunities for U.S. and foreign workers.

What changes are proposed for employment-based visas?

DHS Secretary Jeh Johnson issued a [memorandum](#) outlining new policies that support U.S. high-skilled businesses and workers by better enabling U.S. employers to hire and retain foreign workers. First, the Secretary directed **USCIS** to take steps to reduce wait times for employment-based immigrant visas and improve visa processing. Far too often, visas have gone unused due to processing issues. **USCIS** will work with the Department of State (DOS) to ensure that all visas authorized by Congress are issued to eligible individuals when there is sufficient demand. **USCIS** also will work with DOS to improve the process for determining when immigrant visas are available to applicants during the **fiscal year**. In addition, the Secretary directed **USCIS** to consider regulatory or policy changes that ensure

that individuals with pending immigrant visa petitions will not lose their place in line if they change jobs.

Second, the agencies have announced a series of policy changes intended to prevent ambitious and creative people, many of whom received their higher education in the United States, from continuing to leave the country and work abroad—a trend that has created great uncertainty and frustration for employers. The proposed changes will include:

- Reforms to the **Optional Practical Training** (OPT) program, which authorizes foreign students before and after graduation from U.S. schools to gain experience through work in their fields. The changes would expand the degree programs eligible for OPT. In addition, they would allow foreign students with degrees in designated science, technology, engineering, and mathematics (**STEM**) fields who are already eligible for OPT to work for a longer period in the United States.
- Expanded opportunities for foreign inventors, researchers, and founders of start-up enterprises to conduct research and development and create jobs in the United States.
- Consolidated guidance to ensure greater consistency in the adjudication of **L-1B** visas for “intracompany transferees.” These visas allow multinational companies to transfer certain managers, executives, or persons with specialized knowledge in their fields to the United States for a temporary period.
- Increased flexibility in the rules permitting applicants for employment-based permanent resident status to change jobs (called “porting”), if their applications are stalled due to processing delays.
- Review of the Department of Labor’s certification process for foreign labor, known as the **PERM** process. The certification process is an initial step in obtaining employment-based permanent resident status and requires DOL to determine that there are not sufficient U.S. workers for the position and that employment of the foreign worker will not adversely affect U.S. workers.
- Completing work on current initiatives such as providing employment authorization to certain spouses of foreign workers with H-1B visas (i.e., high-skilled, temporary workers) who have been approved to receive permanent resident status based on employer sponsorship.

What is a provisional waiver and how does it help family members of U.S. citizens and lawful permanent residents who might be eligible for permanent status?

Many unauthorized family members of U.S. citizens and LPRs could become permanent residents themselves if they left the United States, requested and obtained a waiver of **inadmissibility** for their unlawful presence in the United States (**three- and 10-year bars** problem), and then applied for an immigrant visa through a U.S. consulate abroad. This process is uncertain and can take years, during which time the individual is separated from his or her family in the United States.

In 2013, **USCIS** adopted regulations allowing spouses, minor children, and parents of U.S. citizens to apply for the **inadmissibility** waiver from within the United States and then travel abroad for consular processing *after* **USCIS** provisionally granted the waiver. These changes significantly reduced the time that family members had to remain outside the country and provided more confidence that they would be able to return. Under new DHS guidance, **USCIS** is directed to adopt a new regulation expanding the family members eligible for the “**provisional waiver**” process (also known as “stateside

processing”) to include adult children of U.S. citizens and LPRs and spouses and minor children of LPRs. There is no deadline for the adoption of these new regulations.

The Secretary of Homeland Security also directed **USCIS** to provide additional guidance regarding the standards for obtaining a **provisional waiver**. In order to obtain a waiver, a person must demonstrate that his or her absence from the United States would cause “extreme hardship” to a spouse or parent who is a U.S. citizen or LPR. Neither the statute nor the courts have specifically defined what constitutes hardship. The Secretary of Homeland Security stated that “additional guidance about the meaning of the phrase ‘extreme hardship’ would provide broader use of this legally permitted waiver program.”

What are the distinctions between parole, advance parole, and parole in place?

At least three separate DHS memos address various aspects of “parole.” In the immigration context, parole refers to allowing an individual to temporarily enter the United States for purposes of significant public benefit or for humanitarian reasons without technically admitting the person into the country. Although parole is issued on a case-by-case basis, there is a long history of designated categories of individuals who may qualify for parole.

“**Advance parole**” and “**parole-in-place**” are forms of parole. **Advance parole** refers to giving an individual currently residing in the United States in a temporary status permission to travel abroad for a short period and return to the United States without jeopardizing the existing status. **Parole-in-place** is parole in which an individual who is already in the United States, but who is here without permission, is nonetheless granted parole without having to leave the country. Individuals granted parole—including **advance parole** and **parole-in-place**—may ultimately be able to gain lawful permanent status without leaving the United States, if they are otherwise eligible.

What changes are being made to parole policies?

Parole in place to protect military families

Secretary Johnson announced [new policies](#) to protect unauthorized families of the U.S. military and of those seeking to enlist. In November 2013, DHS issued [guidance](#) permitting **parole-in-place** for unauthorized family members of military personnel and veterans. The new guidance will expand the availability of **parole-in-place**, as well as deferred action, to family members of U.S. citizens and **lawful permanent residents** who seek to enlist in the U.S. Armed Forces. The Secretary also asked **USCIS** to consider granting deferred action to family members of current military personnel and veterans who have overstayed their visas.

Department-wide advance parole policy

Under [direction](#) from the Secretary of Homeland Security, DHS officials will be instructed to follow a [2012 immigration decision](#) (*Matter of Arrabally*), finding that a lawfully present individual who travels abroad after a grant of **advance parole** does not trigger the **three- or 10-year bars** that ordinarily apply when a person departs the United States after residing here unlawfully for more than six months. Under this decision, individuals who would be eligible for LPR status but for the fact that their last entry into the United States was unlawful may be able to apply for permanent resident status upon their parole back into the United States. The new DHS instruction will ensure consistent application across the department.

Parole for investors, researchers, and founders of start-up enterprises

USCIS has been directed to draft regulations for a new category of parole to enable certain inventors, researchers, and founders of start-up businesses to enter the United States before they become eligible for a visa. Parole would allow these individuals to temporarily pursue research and development of promising ideas and businesses in the United States, rather than abroad.

CITIZENSHIP

How will executive action affect integration and naturalization?

On November 21, 2014, the President issued a **Presidential Memorandum**, “Creating Welcoming Communities and Fully Integrating Immigrants and Refugees,” establishing a White House Task Force on New Americans. Within 120 days, the task force, made up of officials from across the executive branch, is expected to present recommendations that will allow the federal government to shape a national integration strategy. The memorandum places a heavy emphasis on working with state and local groups who have been championing immigrant integration, with the goal of leveraging federal, state, and local resources to improve efforts to assist and welcome immigrants, as well as the communities that receive them.

Ultimately, immigrant integration is also connected to assisting with the transition from LPR status to citizenship. On November 20, 2014, DHS Secretary Johnson issued a memorandum memo directing **USCIS** to explore options to expand access to **naturalization** and to consider innovative ways to address barriers that may impede access, including for those who lack resources to pay application fees. Among other items, **USCIS** will implement credit card processing for fee payments, determine whether it could expand its use of fee waivers, and conduct a major marketing campaign encouraging **naturalization**.

ENFORCEMENT

How will immigration enforcement change?

At the start of the Obama Administration, DHS sought to shift its priorities toward what it termed “smart, effective enforcement.” To this end, the agency replaced the worksite raids of the past with a new worksite enforcement strategy prioritizing investigation and prosecution of “egregious” employers who drive the demand for unauthorized immigration. Outside the worksite enforcement context, DHS committed to focusing on the apprehension of noncitizens convicted of serious crimes or who posed security risks.

However, the agency’s stated priorities were not always followed in practice. Agents on the ground continued to arrest large numbers of people with strong family and community ties in the United States and no criminal histories. Meanwhile, DHS continued to expand its use of programs like **Secure Communities**, which involved state and local law-enforcement agencies in immigration enforcement activities with minimal oversight by the federal government.

Between 2010 and 2011, then-ICE Director John Morton issued various memoranda encouraging the expanded exercise of **prosecutorial discretion** in all phases of civil immigration enforcement. Two months later, DHS announced the establishment of a joint DHS-Department of Justice (DOJ) working group charged with reviewing all cases pending before the immigration courts to identify those appropriate for administrative closure. In June 2012, DHS announced that certain individuals who came to the United States as children would be eligible for a form of **prosecutorial discretion** known as Deferred Action for Childhood Arrivals (DACA).

The new measures announced on November 20, 2014, represent an attempt to further refine DHS policy and procedures for prioritizing removals, reducing the likelihood that unauthorized immigrants who have resided in the United States for many years and have committed no crimes will be targeted for removal. The release of a single enforcement priorities memo binding on *all* DHS agencies, the restructuring of those priorities, and the replacement of the **Secure Communities** program represent a more streamlined and consistent enforcement scheme. In addition, the potential inclusion of nearly 5 million people in deferred action programs will allow enforcement resources to be better targeted towards individuals who pose a real risk to public safety, as well as cross-border criminal enterprises and other high-priority objectives.

What is the purpose of the new priorities memo?

DHS Secretary Jeh Johnson issued a new memorandum entitled “Policies for Apprehension, Detention and Removal of Undocumented Immigrants” on November 20, 2014, setting forth department-wide policies for prioritizing the removal of unauthorized immigrants. For the first time, all DHS agencies will operate under a shared set of enforcement priorities that are focused on the removal of individuals who pose threats to “national security, public safety, and border security.” These topline priorities include persons engaged in or suspected of terrorism or espionage, persons convicted of felonies, persons convicted of offenses defined as **aggravated felonies** by the immigration law, gang related convictions or intentional participation in gang activities, and recent border crossers. The memo identifies secondary priorities, including convictions for significant or multiple **misdemeanors** (excluding traffic violations) and recent border crossers (those who entered after January 1, 2014). Lowest priority is accorded to other individuals ordered removed after January 1, 2014. Irrespective of these priorities, persons eligible for asylum or other relief should not be targeted. However, the memo also indicates that anyone can be a target for removal if an ICE Field Office Director determines that removal would serve an important federal interest. The memo supersedes many previous policies, including ICE-specific memos issued by former ICE Director Morton, excluding a memo designed to protect victims of crimes and other vulnerable groups. Following a period of training, the memo will become effective on January 5, 2015.

What does it mean that the President is ending Secure Communities?

The **Secure Communities** program has been plagued with problems since its inception. Critics of the program have denounced its adverse impact on community policing, asserting that it encourages racial profiling, and highlighting the mounting evidence that many individuals encountered and subsequently removed through the program did not actually represent a threat to security or public safety. As DHS noted, “Governors, mayors and state and local law enforcement officials around the country have increasingly refused to cooperate with the program.” Moreover, “detainers,” the lynchpin of **Secure Communities** and other ICE enforcement programs, have been found unconstitutional in numerous

courts across the country. A detainer is a request from ICE that a state or local jail hold an individual beyond the point when the person would otherwise be released so that ICE can take the person into immigration **custody**.

The **Secure Communities** [memo](#) issued November 20, 2014, by Secretary Johnson acknowledges many of the program's shortcomings, and recognizes that the program could not continue in its prior form. By launching the **Priority Enforcement Program** (PEP), a new program that focuses efforts on apprehending individuals actually *convicted* of specified crimes, the agency should minimize its use of detainers. And by monitoring implementation to uncover any biased policing, the agency is attempting to address many of the problems that plagued **Secure Communities**.

DHS will retain its ability to gather fingerprint-based biometric data obtained by state and local law enforcement during bookings and submitted to the FBI. However, it will substantially alter what it does with this data. First, under PEP (unlike **Secure Communities**), DHS typically will seek **custody** only of a person who has been *convicted* of certain offenses referenced in its enforcement priorities memo or who otherwise poses a risk to national security. The types of convictions that will trigger DHS action include national security-related crimes, gang activity, felonies and **aggravated felonies**, three or more **misdemeanors**, and "**significant misdemeanors**" (such as domestic violence, burglary, firearms offenses, drug trafficking, and DUI).

PEP also will employ new detainer policies. In general, ICE will no longer issue detainers. Instead, ICE will request that the state and local authority *notify* ICE of a person's pending release. ICE will continue to issue detainers (i.e., request detention) "in special circumstances"—namely, where the person has a final order of removal, or there is sufficient probable cause that the person is removable.

Finally, DHS will implement monitoring procedures to determine if "biased policing" is occurring under the PEP program. DHS designated the Office of Civil Rights and Civil Liberties to monitor state and local law-enforcement agencies participating in transfers of high-priority individuals to ICE.

What is the Southern Border and Approaches Campaign Plan?

In his address to the nation on November 20, 2014, President Obama emphasized that his administration would continue efforts to secure the southern border. In fact, DHS already had begun to implement a new, coordinated, southern border strategy earlier in April 2014. Then, in May, the Secretary announced the **Southern Border and Approaches Campaign Plan**, which he described in testimony before the House Judiciary committee as a program that:

"will be guided by specific outcomes and quantifiable targets for border security, approved by me, and will address improved information sharing, continued enhancement and integration of sensors, and unified command and control structures as appropriate. The overall planning effort will also include a subset of campaign plans focused on addressing challenges within specific geographic areas."

Will the new executive actions address any labor protection issues?

The Department of Labor (DOL) announced an Interagency Working Group designed to ensure the consistent enforcement of federal labor, employment, and immigration laws with an emphasis

on improving and coordinating the protection of workers who find themselves at the intersection of immigration and labor protection laws. The taskforce will work to promote consistent policies that encourage immigrant workers to cooperate with labor enforcement officials without fear of retaliation and to ensure that unscrupulous employers do not attempt to undermine worker protection laws by enmeshing immigration officials in labor disputes. These efforts will include strengthening tools to prevent immigrant workers from being removed during a labor dispute.

In addition, DOL's Wage and Hour Division (WHD) will expand its role in certifying that individuals have been the victims human trafficking or certain other crimes so as to assist those individuals in establishing eligibility for U or T visas. **U visas** provide legal status to victims of an enumerated list of "qualifying criminal activities" who have suffered substantial physical or mental abuse, who possess information concerning that crime, and who have been or are likely to be helpful to law enforcement or government officials. T visas provide legal status to certain victims of human trafficking who assist law-enforcement authorities in the investigation or prosecution of trafficking crimes.

In 2011, WHD began completing **U visa** certifications for victims of crimes detected during its workplace investigations, including trafficking, involuntary servitude, peonage, obstruction of justice, and witness tampering. Beginning in 2015, WHD also will complete certification in appropriate cases of extortion, forced labor, and fraud in foreign labor contracting for **U visa** applicants, and it will complete **T visa** certifications for individuals it determines to be victims of human trafficking.

LEGAL AUTHORITY FOR THESE EXECUTIVE ACTIONS

How is immigration authority divided between the President and Congress?

Congress makes U.S. immigration laws—for example, the laws that govern how noncitizens may become **lawful permanent residents** (**green card** holders) or U.S. citizens. However, the President, as head of the federal executive branch, is ultimately in charge of enforcing U.S. immigration laws. In turn, he must make discretionary decisions, through his agencies, about whether and when to grant benefits or pursue enforcement actions.

What is prosecutorial discretion?

Prosecutorial discretion is the power of the executive to determine when to enforce the law. It is "one of the most well-established traditions in American law," and is common and "long-accepted... in practically every law enforcement context." In the criminal context, law enforcement officials make decisions about whether and when to file or drop charges, how to approach plea bargaining, and when and how to bring cases to trial.

In the immigration context, **prosecutorial discretion** refers to the Department of Homeland Security's authority to decide whether—and to what degree—to enforce the law in a particular case. **Prosecutorial discretion** may take multiple forms. It covers DHS decisions to refrain from pursuing enforcement, like cancelling or not serving or filing a charging document (known as a **Notice to Appear**) with the immigration court, as well as decisions to provide a discretionary remedy, like granting a stay of removal, parole, or deferred action. A favorable grant of **prosecutorial discretion** does not provide formal legal status or independent means to obtain permanent residency. It does, however, provide a temporary reprieve from deportation.

Does the President have the legal authority to authorize deferred action for 5 million people?

Yes. The obligation of the executive branch to enforce the law also carries with it the discretion to determine when, how, and against whom the law will be enforced. As DOJ's Office of Legal Counsel has [noted](#), the practice of granting deferred action has been acknowledged by both Congress and the Supreme Court. Moreover, the actual process remains individualized, resembles the kinds of deferred action programs that Congress has previously approved, and is consistent with longstanding principles of **prosecutorial discretion**. In addition, more than 100 [law professors](#) from around the nation have also affirmed that both the DACA and DAPA programs are well within the President's authority.

Have other presidents made use of deferred action or other executive branch action to address immigration issues?

There is ample historical precedent for executive branch action on immigration matters. Since 1956, every U.S. president since Eisenhower has taken executive action to grant temporary immigration relief to those in need of assistance. In at least [39 instances](#), presidents have acted to protect families from separation, in response to foreign policy crises, or in recognition of pending legislation.

Perhaps the most striking historical parallel to DACA and DAPA are the [“Family Fairness”](#) deferred actions implemented by Presidents Ronald Reagan and George Bush, Sr. The 1986 Immigration Reform and Control Act (IRCA) gave up to 3 million unauthorized immigrants a path to legalization if they had been “continuously” present in the United States since January 1, 1982. But the new law created “split-eligibility” families, like today's **mixed-status families**, by excluding spouses and children who didn't qualify. The law's legislative history explicitly provided that these family members would have to “wait in line.”

In 1987, Reagan's Immigration and Naturalization Service (INS) commissioner announced a blanket deferral of deportation (logistically similar to today's DACA program) for children under 18 who were living in a two-parent household with both parents legalizing, or with a single parent who was legalizing. Then, in July 1989, the Senate passed legislation to protect a larger group—prohibiting deportation of all spouses and children of those who were legalizing under IRCA. But the legislation stalled in the House.

In 1990, President Bush Sr. administratively implemented the Senate bill's provisions. The House then passed legislation, and President Bush signed it later that year.

HISTORY AND BACKGROUND

What is the history of immigration reform during the Obama administration?

President Obama has long promised that he would work to improve the nation's immigration system. In May 2008, while campaigning, then-Sen. Obama told Univision news anchor, Jorge Ramos, that he wanted Congress to introduce a comprehensive immigration reform bill in his first year as president and that "I want to move that forward as quickly as possible." But as the congressional immigration debate stalled, the Obama Administration took steps to clarify immigration policy.

On June 17, 2011, then-ICE Director Morton issued two significant memoranda on the use of prosecutorial discretion in immigration matters. **Prosecutorial discretion** refers to the agency's authority to decide whether—and to what degree—to enforce the law in a particular case. The primary memo (the Morton Memo on Prosecutorial Discretion) calls on ICE attorneys and officers to refrain from pursuing noncitizens with close family, educational, military, or other ties to the United States and instead spend the agency's limited resources on persons who pose a serious threat to public safety or national security. Morton's second memo focuses on exercising discretion in cases involving crime victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits.

And in June 2012, President Obama announced the Deferred Action for Childhood Arrivals (DACA) program, which offers reprieves from deportation for young immigrants who were brought to the country as minors and meet other specific requirements. President Obama said the policy was "the right thing to do," calling **DREAMers** "Americans in their hearts, in their minds, in every single way but one: on paper." Through the 2014 **fiscal year**, more than half a million young immigrants have received temporary legal status through DACA.

In 2014, after the failure of the House of Representatives to move any comprehensive immigration legislation, the President vowed to take action on his own. In his announcement of the actions he said:

"When I took office, I committed to fixing this broken immigration system... I worked with Congress on a comprehensive fix, and last year, 68 Democrats, Republicans, and independents came together to pass a bipartisan bill in the Senate... Had the House of Representatives allowed that kind of bill a simple yes-or-no vote, it would have passed with support from both parties, and today it would be the law. But for a year and a half now, Republican leaders in the House have refused to allow that simple vote... Now, I continue to believe that the best way to solve this problem is by working together to pass that kind of common sense law. But until that happens, there are actions I have the legal authority to take as President—the same kinds of actions taken by Democratic and Republican presidents before me—that will help make our immigration system more fair and more just."

What happened in the 113th Congress?

There was a renewed push for comprehensive immigration reform following the 2012 election. "I think a comprehensive approach is long overdue, and I'm confident that the president, myself, others, can find the common ground to take care of this issue once and for all," said House Speaker John Boehner in a post-election press conference. In January 2013, eight Senators—Democrats Chuck Schumer

(NY), Dick Durbin (IL), Bob Menendez (NJ), and Michael Bennet (CO); and Republicans John McCain (AZ), Marco Rubio (FL), Lindsey Graham (SC), and Jeff Flake (AZ)—released their framework for comprehensive immigration reform. Most notably, the proposal would give unauthorized immigrants already in the country a chance to earn U.S. citizenship. The four “legislative pillars” this framework outlined became the basis for S. 744, the bipartisan immigration bill that the Senate passed 68-32 in June 2013.

Just before the Senate approved S. 744, Boehner said the House would not take up S. 744 but would focus on its own immigration bill instead. More than half a dozen immigration bills were introduced in the House of Representatives, but no major immigration-related legislation had made it to the House floor by the end of 2013. House Republicans focused on a piecemeal approach, while House Democrats rallied behind H.R. 15, a comprehensive immigration bill similar to S. 744.

In January 2014, Boehner released the House Republicans’ principles of immigration reform, but those guidelines did not lead to a renewed push for reform. House Democrats attempted to force Boehner to call a vote on H.R. 15 when they filed a discharge petition in March, but it did not receive enough votes. Instead of offering a legislative solution to the broken immigration system, before the August recess House Republicans approved two bills that allocated only a fraction of the funds needed to address the humanitarian situation surrounding unaccompanied children and that would have ended the DACA program, stripping deportation relief for more than half a million young immigrants.

CONCLUSION

Taken as a whole, the package of executive actions announced on November 20 and 21 are a first step toward a broader conversation on immigration policy. In the first days after these announcements, it is the expansion of DACA and creation of DAPA that received the most attention, but supporters and critics alike are carefully reviewing all the programs to determine what they mean for the country. As is so often the case, the critical question is whether good ideas and policies issued from Washington will translate into real progress on the ground. There are many hopeful signs that these programs can have a lasting and positive impact on our immigration policies, but thoughtful implementation and engaging with stakeholders who care very deeply about these issues—from enforcement concerns, to the border, to business to labor rights—will be critical to ensuring that the promise of change is realized. And even if all of the programs are implemented in the best and fairest manner possible, it will still not be enough without legislative reform of the system.

GLOSSARY

Three- and 10-year bars	Foreign nationals who have been unlawfully present for more than 180 days and leave the U.S. are inadmissible and barred from reentering and from obtaining lawful status for three years. Foreign nationals who have been unlawfully present for more than a year and leave the U.S. are inadmissible and barred from reentering and from obtaining lawful status for 10 years. See <i>also</i> inadmissible/inadmissibility .
advance parole	Refers to the act of giving an individual currently residing in the United States under some form of temporary status permission to travel abroad temporarily and return to the United States without jeopardizing the existing status.
aggravated felony	This is a term of art that describes offenses that are most severely punished under immigration law and that render an immigrant automatically deportable with no possibility of waiver or future readmission to the U.S. It includes murder, rape, sexual abuse of a minor, drug trafficking, and crimes of violence or theft that are punishable by a term of imprisonment of at least one year, among other offenses. Note that misdemeanors under state law and convictions for which less than a year in prison is served may be aggravated felonies. See <i>also</i> felony .
Board of Immigration Appeals	The highest administrative appellate body for interpreting and applying immigration laws (within the Department of Justice).
custody determinations	When foreign nationals are arrested, Immigration and Customs Enforcement (ICE) must make determinations as to whether they will be put into immigrant detention based on their criminal histories and whether they are a threat to their community or national security.

DACA (Deferred Action for Childhood Arrivals)

The Deferred Action for Childhood Arrivals (DACA) program was first announced on June 15, 2012. The program is **deferred action** from immigration enforcement for eligible individuals who:

- came to the United States before their 16th birthday;
- were under age 31 and had no valid immigration status on June 15, 2012;
- have continuously resided in the United States between June 15, 2007 up to the present;
- are currently in school, graduated from high school, obtained a GED, or were honorably discharged from the Armed Forces;
- have not been convicted of a felony, a “significant misdemeanor,” or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

On November 20, 2014, the Administration made three major modifications to the DACA program:

- The new policy eliminates the requirement that an individual be under the age of 31 on June 15, 2012.
- The start date for the continuous residence period is advanced from June 15, 2007 to January 1, 2010.
- Effective November 24, 2014, all first-time DACA approvals as well as all DACA renewals shall be effective for three years instead of two.

See also **deferred action, Dreamers**.

DAPA (Deferred Action for Parental Accountability)

USCIS will establish a program, similar to **DACA**, under which the undocumented parents of U.S. citizens and Lawful Permanent Residents, who meet certain stringent criteria, will be able to request three years of deferred action and work authorization upon completion of a background check and the approval of a USCIS adjudicator.

The program will be open to individuals who:

- have a U.S. citizen or LPR son or daughter as of November 20, 2014;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on November 20, 2014 and at the time of applying;
- have no lawful immigration status on November 20, 2014;
- are not an enforcement priority; and
- are not otherwise undeserving of a favorable exercise of discretion.

deferred action	When an immigrant is granted “deferred action,” it means the Department of Homeland Security (DHS) has deemed the individual a low priority for immigration enforcement and has chosen to exercise its discretion and not deport the individual. Deferred action provides temporary relief from enforcement but may be revoked at any time. Deferred action is not amnesty or immunity. It does not provide lawful immigration status or a path to a green card or citizenship. It does not extend to any family members of the person granted deferred action.
detainers	An immigration detainer is a tool used by ICE and other Department of Homeland Security (DHS) officials to identify potentially deportable individuals who are housed in jails or prisons nationwide. An immigration detainer is an official request from Immigration and Customs Enforcement (ICE) to another law enforcement agency (LEA)—such as a state or local jail—that the LEA notify ICE prior to releasing an individual from local custody so that ICE can arrange to take over custody. See also ICE and the American Immigration Council’s “Immigration Detainers: A Comprehensive Look.”
DREAMers	Unauthorized immigrants who qualify for DACA are commonly referred to as “DREAMers” because they comprise most (though not all) of the individuals who meet the general requirements of the Development, Relief, and Education for Alien Minors (DREAM) act. See DACA and the American Immigration Council’s “Who and Where are the DREAMers: Revised Estimates.”
Employment Authorization Document (EAD)	Commonly known as a “work permit,” an employment authorization document (EAD) is a document issued by USCIS that provides its holder with the legal right to work in the United States. Deferred action recipients who demonstrate an economic necessity for work authorization may receive an EAD under federal regulations. 8 CFR § 274a.12(c)(14).
executive action	An action taken by the executive branch of the federal government. Immigration legal scholars have noted that the president has broad executive authority to shape the enforcement and implementation of immigration laws, including exercising prosecutorial discretion to defer deportations and streamline certain adjudications. See also prosecutorial discretion and the American Immigration Council’s “Executive Grants of Temporary Immigration Relief, 1956-Present.”
executive order	An executive order is a directive by the President of the United States that has the power of a federal law (Answers.USA.gov). See also presidential memorandum .

felony	The federal criminal classification scheme defines a “felony” as an offense punishable by a potential sentence of more than one year. See also aggravated felony .
fiscal year	“The fiscal year is the accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends.” (United States Senate)
green card	A green-card holder is someone who has been granted authorization to live and work in the United States on a permanent basis. As proof of that status, a person is granted a permanent resident card, commonly called a “green card.”(USCIS) See also lawful permanent resident .
ICE (Immigration and Customs Enforcement).	U.S. Immigration and Customs Enforcement (ICE) is a part of the Department of Homeland Security (DHS) that enforces federal laws governing border control, customs, trade and immigration (ICE).
inadmissible / inadmissibility	Foreign nationals who are not allowed to enter the United States or obtain Lawful Permanent Residence in the United States because they have a disease of public health significance, have committed certain crimes, are threats to national security, may become a public charge, or due to other factors, pursuant to INA § 212(a) .
L-1B visa	The L-1B visa category was established so a multinational company that met certain requirements could transfer temporarily to the United States workers with “specialized knowledge” of the company’s products or processes.
lawful permanent resident	“Any person not a citizen of the United States who is residing in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant.” (USCIS). See also green card .
misdemeanor	The federal criminal classification scheme governs whether an offense is considered a felony or misdemeanor. A misdemeanor is an offense punishable by imprisonment of more than five days but not more than a year. The label a state attaches to a particular offense is not relevant. Thus, some offenses that a state labels as a misdemeanor, but which include a potential sentence of more than one year, are felonies for purposes of DACA. A violation which carries a sentence of five days or less, such as a municipal violation, may not be counted as a misdemeanor. See also significant misdemeanor .
mixed-status families	A household with individuals with different citizenship or immigration statuses (e.g., an undocumented parent and a U.S. citizenship child).

naturalization	“Naturalization is the manner in which a person not born in the United States voluntarily becomes a U.S. citizen.” (USCIS)
Notice To Appear (NTA)	<p>The Notice to Appear (“NTA”) is the charging document issued by an authorized agent of the United States Department of Homeland Security (“DHS”) to persons who will face removal in adversarial proceedings. Once an NTA is filed with the Executive Office for Immigration Review, jurisdiction vests with the immigration court and noncitizens enter into proceedings that will determine whether they may be removed from the United States.</p> <p>See also USCIS Notice To Appear Guidance.</p>
Optional Practical Training	Students who graduate with degrees in certain designated STEM fields are currently eligible for a 17-month extension of the 12 months ordinarily available to gain experience through work in their fields.
parole-in-place	Refers to a variant of parole in which an individual who is already in the United States, but is here without permission, is nonetheless granted parole without having to leave the country.
PERM	PERM (Program Electronic Review Management) is the permanent residence certification process for foreign labor.
presidential memorandum	A written instrument through which the president directs and governs actions of the government. It is different from executive order in that an executive order must be published in the Federal Registrar (Congressional Research Service).
Priority Enforcement Program (PEP)	PEP replaces Secure Communities , and will continue to rely on fingerprint data taken during booking and then submitted by state and local law enforcement agencies to the FBI for criminal background checks.

prosecutorial discretion

“Prosecutorial discretion” is the authority of an agency or officer to decide what charges to bring and how to pursue each case. A law-enforcement officer who declines to pursue a case against a person has favorably exercised prosecutorial discretion. The authority to exercise discretion in deciding when to prosecute and when not to prosecute based on a priority system has long been recognized as a critical part of U.S. law. The concept of prosecutorial discretion applies in civil, administrative, and criminal contexts.

The Supreme Court has made it clear that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney* 470 U.S. 821, 831 (1985). Prosecutorial discretion may be exercised at any stage of an immigration case. Specifically, prosecutorial discretion may be exercised when deciding whether to: issue a detainer; initiate removal proceedings; focus enforcement resources on particular violations or conduct; stop, question, or arrest a particular person; detain or release someone on bond, supervision, or personal recognizance; settle or dismiss a removal case; stay a final order of removal; pursue an appeal; and/or execute a removal order. See the American Immigration Council’s [“Understanding Prosecutorial Discretion in Immigration Law.”](#)

provisional waiver

USCIS regulations allow spouses and minor children of U.S. citizens to apply for a waiver of the **three- and 10-year bars** from within the United States and then travel abroad for consular processing after USCIS provisionally grants the waiver.

Secure Communities

Secure Communities is a Department of Homeland Security (DHS) program designed to identify immigrants in U.S. jails who are deportable under immigration law. Under Secure Communities, participating jails submit arrestees’ fingerprints not only to criminal databases, but to immigration databases as well, allowing Immigration and Customs Enforcement (**ICE**) access to information on individuals held in jails. On November 20, 2014, DHS Secretary Jeh Johnson formally discontinued the program. See also the American Immigration Council’s [“Secure Communities: A Fact Sheet.”](#)

Southern Border and Approaches Campaign

A campaign initially announced on May 8, 2014 by Jeh Johnson and expanded on November 20, 2014. “The overarching goals of the Southern Border and Approaches Campaign are to enforce... immigration laws and interdict individuals seeking to illegally cross our land, sea, and air borders; degrade transnational criminal organizations; and decrease the terrorism threat to the Nation, all without impeding the flow of lawful trade, travel, and commerce.” ([DHS](#))

significant misdemeanor	A “significant misdemeanor” as defined in the priorities memo for purposes of the DACA process includes a misdemeanor as defined by federal law that, regardless of the sentence imposed, involves burglary, domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, driving under the influence, and drug distribution or trafficking. A “significant misdemeanor” may also include any other misdemeanor for which the individual was sentenced to more than 90 days’ imprisonment, not including suspended sentences, pretrial detention or time held pursuant to an immigration detainer. See <i>also</i> misdemeanor .
STEM	Occupations in the fields of science, technology, engineering, and mathematics.
T visa	A nonimmigrant status created with the Victims of Trafficking and Violence Protection Act in 2000. Individuals may be eligible for a T visa if they are or were a victim of trafficking; are in the United States or port of entry due to trafficking; comply with any reasonable request from a law enforcement agency for assistance in a human trafficking investigation or prosecution; demonstrate that the individual would suffer extreme hardship if they were removed from the United States; and are admissible to the United States (USCIS).
USCIS (U.S. Citizenship and Immigration Services)	USCIS is a part of the Department of Homeland Security that oversees lawful immigration. USCIS provides citizenship services, manages the process that allows for the immigration of family members, manages the process that allows immigrants to work in the United States, and manages the E-Verify system, among other programs.
U visa	A nonimmigrant visa for victims of certain crimes who are currently assisting or have previously assisted law enforcement in the investigation or prosecution of a crime, or who are likely to be helpful in the investigation or prosecution of criminal activity. The U visa provides temporary status within the United States and, if certain conditions are met, can lead to permanent residence. Examples of qualifying crimes include domestic violence, sexual assault or exploitation, trafficking, torture, witness tampering, and murder (DHS).
work permit	See Employment Authorization Document .