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DHS Plan to Review Immigration Cases May Cause Boost in Work Authorizations

By Amber McKinney

The Department of Homeland Security's plan to review current immigration cases to ensure that enforcement resources are focused on deporting criminal aliens rather than low-priority immigrants may open the door to more immigrants applying for employment authorization documents, speakers said during an Aug. 22 teleconference organized by the Immigration Policy Center.

In a letter to Senate Majority Leader Harry Reid, DHS Secretary Janet Napolitano Aug. 18 said the Homeland Security and Justice departments have initiated an interagency working group to "execute a case-by-case review of all individuals currently in removal proceedings to ensure they constitute our highest priorities."

The review will consider cases that are at various stages of enforcement proceedings, including charging, hearing, and after a final order of removal.

Melissa Crow, director of the American Immigration Council's Legal Action Center, said it is unclear how this policy will play out in practice, but once a case is administratively closed by DHS an immigrant then would be able to apply for an employment authorization document (EAD).

Currently, DHS has the authority to grant an EAD to an immigrant who obtains deferred action, and similar authority could be used for those low-priority immigrants the agency decides not to pursue through the exercise of prosecutorial discretion, Crow said.

Granting an EAD is a discretionary determination, so there is no guarantee an immigrant would be granted a work permit, she added.

About 300,000 Cases to Be Reviewed

Mary Giovagnoli, director of the Immigration Policy Center, said during the Aug. 22 teleconference that about 300,000 immigration cases are set to be reviewed under the new prosecutorial discretion policy. In addition, DHS plans to issue guidance to U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection about the proper use of discretion in the immigration context, she said.

Crow said these steps have the "potential to fulfill DHS's stated purpose of smart, focused enforcement." The Aug. 18 announcement follows the June 17 issuance of memoranda by ICE Director John Morton about the exercise of prosecutorial discretion. In the Aug. 18 letter, Napolitano said the process for implementing the June 17 memoranda "will focus the administration's immigration enforcement efforts on high priority cases," but "will not provide categorical relief for any group."

During an Aug. 23 teleconference sponsored by the National Immigration Forum, Utah Attorney General Mark Shurtleff (R) applauded the decision to review current immigration cases.

"The concept of prosecutorial discretion is nothing new," Shurtleff said. "Law enforcement agents exercise it daily as they determine where to focus their valuable and limited resources."

"I am dismayed at members of the Republican party that oppose this new decision," he added, because it "embodies the core Republican principle of upholding the role of government to best protect the public."

AILA Issues Consumer Advisory

Although it may be possible to obtain an EAD as a result of the new policy, the American Immigration Lawyers Association Aug. 20 issued a consumer advisory to warn immigrants against scams claiming to guarantee work authorization documents.

"Do not believe anyone who tells you they can sign you up for a work permit," or employment authorization document, AILA warns. "There is no 'safe' way to turn yourself in to immigration and there is no guarantee that your case will be considered 'low priority.' "

"Any person who comes into contact with immigration authorities may be arrested, detained or even removed," the group said.

AILA stressed that the policy change announced Aug. 18 is "not an amnesty," and there is no direct way to apply for an EAD under the new prosecutorial discretion policy.

The DHS announcement did say that if a case is administratively closed the individual can apply for an EAD, but "there are no details, guidelines or instructions on how to apply for an EAD or who will be eligible for an EAD," AILA said.

AILA also pointed out that administrative closure of an immigration case is only a "temporary suspension of an immigration court case," and EADs are "temporary permission to work." Neither action grants any legal status to an immigrant, the group said.

Crow agreed with the warning to immigrants thinking about proactively engaging with immigration officials. "Since there are no guarantees that an individual removal case will be administratively closed, anyone who seeks to be placed in removal proceedings could end up being deported," she said.

Smith Says American Workers May Be Hurt

Meanwhile, House Judiciary Committee Chairman Lamar Smith (R-Texas), who recently introduced the proposed Hinder the Administration's Legalization Temptation (HALT) Act (H.R. 2497, S. 1380)-a bill that would prevent the Obama administration from granting parole, deferred action, or work authorizations to illegal immigrants except in very limited circumstances (142 DLR B-1, 7/25/11 <http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=22607380&fname=aoc8p3k4f1&vname=dlrnotallissues>)-said the new policy could hurt unemployed and underemployed Americans.

"The President's decision could mean jobs-but not for unemployed Americans," Smith said in an Aug. 20 statement. "This potential massive back door amnesty to illegal immigrants could instead allow illegal immigrants to receive work authorization and could put more Americans on the unemployment rolls."

He added, "The Obama administration is putting the interests of illegal immigrants ahead of American workers."

SEIU, NIF Say Overhaul Still Needed

Javier Morillo-Alicea, president of Local 26 of the Service Employees International Union, Aug. 22 said the new policy is "an important move on the part of the Obama administration," but it does not eliminate

the need for a comprehensive immigration overhaul.

The new prosecutorial discretion policy does not impact I-9 audits, Morillo-Alicea said. Those audits have resulted in a large number of illegal immigrants being fired and forced to work in the underground economy, he said. The expansion of prosecutorial discretion is "important progress" but "there is still a lot of work ahead," Morillo-Alicea said. After the administration reviews 300,000 immigration cases "we hope some broader policy will come out of that" about not deporting undocumented workers who have otherwise committed no crimes, he said.

"While we welcome this bold step towards bringing sanity to our deportation system, ultimately the responsibility of fundamentally fixing our immigration laws rests on Congress," said Ali Noorani, executive director of the National Immigration Forum. "We call on both Republicans and Democrats to come together and work on sensible immigration solutions."