FAIR

FEDERATION FOR AMERICAN IMMIGRATION REFORM

Summary of S. 744—The Border Security, Economic Opportunity, and Immigration Modernization Act

Asylum and Refugee Provisions

On April 17, 2013, Senators Chuck Schumer, John McCain, Dick Durbin, Lindsay Graham, Bob Menendez, Marco Rubio, Michael Bennet, and Jeff Flake introduced S.774, entitled the Border Security, Economic Opportunity, and Immigration Modernization Act. If passed, S.744 would grant amnesty to the approximately 12 million illegal aliens currently living in the U.S., create new guest worker programs for agricultural workers and low-skilled workers, and significantly increase legal immigration.

Title III Subtitle D of S. 744 undermines current asylum and refugee law by eliminating preexisting requirements aliens apply for asylum within a certain time frame of entering the U.S., allowing asylum officers to bypass immigration judges before granting asylum to unlawful aliens, and giving broad authority to the Administration to create new categories of refugees and stateless persons to be admitted into the country.

I. Asylum

Time Limits and Efficient Adjudication of Genuine Asylum Claims (p. 566, sect. 3401)

- Amends the sec. 208(a)(2) exceptions for aliens being permitted to apply for asylum:
    - Grants discretionary authority to the Secretary of Homeland Security (along with the Attorney General under current law) to make determinations regarding the "safe third country" exception.
        - Note: the "safe third country" exception provides that an alien cannot apply for asylum if the alien can be removed to another country safely pursuant to a bilateral or multilateral agreement.
    - Eliminates the current "time limit" provision requiring aliens to demonstrate by clear and convincing evidence they filed their asylum application w/in 1-year of arrival to the United States. In doing so, S. 744 eliminates a key safeguard in ensuring against fraudulent applications.
- Undermines the last 2 years of asylum application decisions by creating a process by which an alien can file a motion to reopen an asylum claim within 2 years of enactment, if the alien:
    - Was denied asylum based "solely upon" the failure to meet the 1 year application filing requirement in effect when the application was filed (*as provided under current law and removed by this bill*);

- Was granted withholding of removal pursuant to sec. 241(b)(3) ("restriction on removal to a country where alien's life or freedom would be threatened"), and has not obtained LPR status;
- Is not subject to the "safe third country" exception or a bar to asylum under subsection (b)(2), and should not be denied asylum as a "matter of discretion;" and
- Is physically present in the U.S. when the motion is filed.

- Note: S. 744 does not preclude illegal aliens who have previously filed frivolous asylum claims from applying for amnesty.

Asylum Determination Efficiency (p. 571, sect. 3404)

- Amends current law under INA sec. 235(b)(1)(B)(ii) to weaken the review process for certain inadmissible aliens seeking asylum.
  - Under current law, aliens who are inadmissible under section 212(a)(6)(C)(obtaining a visa through misrepresentation, or falsely claiming citizenship) and 212(a)(7)(lacks proper documentation at time of admission) are eligible for expedited removal. (*See* 8 CFR § 235.3(b)(1)(ii)) However, if such an alien indicates intent to claim asylum; or if he or she possesses a fear of persecution or torture, or fear of returning to his or her home country; then the alien cannot be removed and must be referred to an asylum officer for an interview to determine the validity of the claims. (*See* 8 CFR § 235.3(b)(4)).
  - If during the interview process the asylum officer finds the alien has a credible fear of persecution or torture, the asylum officer will inform the alien and issue a Notice to Appear. The Notice to Appear is to appear in front of an immigration judge for full consideration of the asylum and withholding of removal claim in proceedings under sec. 240(c)(4) of the Immigration and Nationality Act. (*See* 8 CFR § 208.30(f))
  - S. 744 weakens current law by bypassing the requirement that asylum officers issue a Notice to Appear before an immigration judge. Instead, rather than having an immigration judge make the final decision as to whether an alien is subject to removal based on an asylum claim, S. 744 would leave that decision up to the interviewing officer and his supervisor.
  - In addition, S. 744 would allow asylum officers to refer the case to a designee of the Attorney General, for:
    - A de novo asylum determination;
    - Relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, done at New York December 10, 1984; or
    - Protection under sec. 241(b)(3) ("restriction on removal to a country where alien's life or freedom would be threatened").

II. Refugee

Refugee Family Protections (p. 568, sect. 3402)

- A child of an alien who qualifies for admission as a spouse or child under sec. 207(c)(2)(A) or 208(b)(3) "shall be entitled" to the same admission status as such alien if the child:
    - Is accompanying or following to join such alien; and
    - Is otherwise eligible under sec. 207(c)(2)(A) or 208(b)(3).

Clarification on Designation of Certain Refugees (p. 569, sect. 3403)

- Grants President ability to expand scope of refugee status.
    - Adds new sec. 207(c)(1)(B), which **grants the President the discretionary authority to create new categories of refugees** using recommendations from the Secretaries of State and Homeland Security.
    - Factors for the President to consider in determining new categories of refugees:
        - Resettlement of the aliens in the U.S. is "justified" by humanitarian concerns or is otherwise in the "national interest;" and
        - The aliens:
            - Share "common characteristics" that identify them as targets of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion; or
            - Having been identified as targets for the reasons stated above, the aliens share a "common need" for resettlement due to a "specific vulnerability."
    - Exception: refugee status will not be granted if the Secretary of DHS determines an alien ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, nationality, membership in a particular social group, or political opinion.
- Designation under this section may be revoked by the President at any time after notice to Congress.
- Designation under this section "shall not influence" decisions to grant aliens:
    - Asylum,
    - Protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, done at New York December 10, 1984; or
    - Protection under sec. 241(b)(3) ("restriction on removal to a country where alien's life or freedom would be threatened").
- Categories of aliens established under section 599D of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990:
    - Shall be designated under factors to consider until the end of the first FY commencing after the date of the enactment of S. 744; and
    - Shall be eligible for designation thereafter at the discretion of the President, considering, among other factors, whether a country under consideration has

been designated by the Secretary of State as a 'country of particular concern' for engaging in or tolerating systematic, ongoing, and egregious violations of religious freedom.

- Decisions to deny admission as a refugee to an alien who "establishes to the satisfaction" of the Secretary of DHS that the alien is a member of a "specially defined group of aliens" shall:
    - Be in writing; and
    - State the reason for denial to the "maximum extent feasible"
- Refugees admitted pursuant to designation under this section "shall be subject to the number of admissions under this section"

Representation at Overseas Refugee Interviews (p. 580, sect. 3407)

- Adds additional provisions to sec. 207(c):
    - The adjudicator of a refugee application shall consider all "relevant evidence" and maintain a record of the evidence considered.
    - A refugee applicant may be represented (including at a refugee interview) by attorney or "accredited representative" at no expense to the Government who:
        - Was chosen by the applicant; and
        - Is authorized by the Secretary of DHS to be recognized as the applicant's representative.
    - A decision to deny an application for refugee status:
        - Shall be in writing; and
        - Shall provide information on the reason for denial to the "maximum extent feasible," including:
            - The underlying facts; and
            - Whether there is a waiver of inadmissibility available to the applicant.
        - The basis of any negative credibility finding shall be part of the written decision.
    - An applicant denied refugee status may file an appeal within 120 days to the Secretary of DHS for a review of the denial.
        - The review shall be adjudicated by refugee officers who have received training on considering requests for review of denied refugee applications
        - The Secretary of DHS shall publish the standard applied to a request for review
        - A request for review may result in the decision being:
            - Granted;
            - Denied; or
            - Reopened for a further interview.

        - A decision on a request for review shall:
            - Be in writing; and
            - Provide information on the reason for the denial to the "maximum extent feasible".

III. Stateless Persons in the U.S.

- Creates a new section under the INA, "Sec. 210A. Protection of Certain Stateless Persons in the United States," to significantly increase the number of "stateless persons" admitted to the U.S. (p. 572, sect. 3405)
    - **Expands the definition of "stateless person" by granting the Secretary of DHS discretion, in "consultation with the Secretary of State," the ability to designate specific groups of individuals stateless.**
        - Note:
            - Under current law, a person not considered a national under the operation of laws of any country is considered to be "stateless."
            - According to the United Nations, there are 12 million stateless individuals in the world.

- **Once deemed a "stateless person," the Secretary of DHS or Attorney General, in his or her discretion, may confer upon such alien "conditional lawful status" notwithstanding any grounds for inadmissibility or deportability**, if the alien:
    - Is a stateless person present in the U.S.;
    - Applies for such relief;
    - Has not lost his or her nationality as a result of "voluntary action or knowing inaction" after arrival in the U.S.;
    - Is not inadmissible under sec. 212(a) for grounds other than:
        - Public charge (sec. 212(a)(4));
        - Alien workers without labor certification (sec. 212(a)(5));
        - Aliens who do not possess proper documents (sec. 212(a)(7)); and
        - The 3 and 10 year bars for unlawful presence (sec. 212(a)(9)(B)); and
    - Is not an alien found to have ordered, incited, assisted, or otherwise participated in the persecution of an individual as described in sec. 241(b)(3)(i).
    - *However, in addition to the mandatory waiver of sections (4), (5), (7), and (9)(B) under 212(a), the Secretary of DHS or the Attorney General can also waive other grounds of inadmissibility for "humanitarian purposes, to assure family unity, or if it is otherwise in the public interest"* except for the following sec. 212(a) grounds:
        - Subparagraphs (B), (C), (D)(ii), (E), (G), (H), or (I) of paragraph 2 (criminal and related grounds);
        - Paragraph (3) (security and related grounds);
        - Paragraph (6)(C)(i) (misrepresentations relating to visa application); or
        - Subparagraphs (A), (C), (D), or (E) of paragraph (10).

Terms of Conditional Lawful Status (CLS)

- An alien seeking relief under this section shall submit to the Secretary of DHS or the Attorney General:
    - Any available passport or travel document issued to the alien (whether or not the passport or document has expired or been cancelled, rescinded, or revoked); or
    - An affidavit, sworn under penalty of perjury:
        - Stating that the alien has never been issued a passport or travel document; or
        - Identifying "with particularity" any passport or travel document and explaining why the alien cannot submit it
    - Note: This provision is inherently contradictory due to the fact that countries typically do not grant passports to non-nationals.
- **Those who merely appear "on their face" as eligible for conditional lawful status will receive work authorization. Under S. 744, the Secretary of DHS may grant work authorization to an alien**:
    - Who has applied for and is simply found "prima facie eligible" for "conditional lawful status;" OR
    - Who has actually been granted "conditional lawful status".
- The Secretary can issue travel documents to aliens granted CLS allowing them to travel to and from the U.S.
- The spouse or child of an alien granted CLS shall, if not otherwise eligible for admission under this section, be granted CLS if accompanying, or following to join, such alien if:
    - The spouse or child is admissible (except as provided in waiver of inadmissibility provisions above, and is not described in sec. 241(b)(3)(B)(i)); and
    - The qualifying relationship to the principal beneficiary existed on the date that alien was granted conditional lawful status.

Adjustment of Status from "Conditional Lawful Status" (CLS) to a Legal Permanent Resident (p. 575)

- An alien granted "conditional lawful status" is eligible to apply for a green card after only 1 year if:
    - The alien has been physically present in the U.S. for at least 1 year;
    - The alien's CLS has not been terminated by the Secretary of DHS or the Attorney General pursuant to any relevant regulations issued; and
    - The alien has not otherwise acquired LPR status.
- The Secretary of DHS or Attorney General may adjust the status from CLS to that of a legal permanent resident under any relevant regulations if the alien:
    - Is a stateless person;
    - Properly applies for adjustment of status;
    - Has been physically present in the U.S. for at least 1 year after being granted CLS;

    - Is not "firmly resettled" in any foreign country; and
    - Is admissible (except as provided in waiver of inadmissibility provisions above) as an immigrant under this chapter at the time of examination for adjustment.
- Upon approval of adjustment of status, the Secretary of DHS or Attorney General shall establish a record of the alien's admission for LPR as of the date that is 1 year before the date of approval.
- **The number of aliens who may adjust to LPR under this section for a FY is subject to the numerical limitation of "certain special immigrants." (sec. 203(b)(4)).**
    - **Note: sec. 2307 amends the EB-4 ceiling from 7.1% of worldwide level to 10% of the worldwide level plus any unused EB-3 visas (p. 326 of S. 744).**
- The Secretary of DHS or Attorney General shall consider "any credible evidence" relevant to the application in determining eligibility for CLS or adjustment to LPR.
    - Note: the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Secretary of DHS or Attorney General—extremely broad.
- An alien cannot appeal the denial of an application by the Secretary (drafting error? *should include* Attorney General?) but the denial is "without prejudice" to the alien's right to renew the application under removal proceedings (sec. 240)
- *Notwithstanding any limitation imposed by law on motions to reopen removal, deportation, or exclusion proceeds, any individual "eligible" for relief under this section has 2 years to file a motion to reopen proceedings in order to apply to adjust status under this section*.
- This section only applies to aliens present in the United States. Nothing in this section may be construed to authorize or require:
    - The admission of any alien to the U.S.;
    - The parole of any alien into the U.S.; or
    - The grant of any motion to reopen or reconsider filed by an alien after departure or removal from the U.S.
- Amends sec. 242(a)(2)(B)(ii) to include sec. 210(A), prohibiting any judicial review of a decision to grant an alien "conditional lawful status" by the Secretary of DHS or Attorney General (p. 579)
    - Note: maintains current prohibition of judicial review for asylum cases under INA § 208(a).

IV. U Visa Program (pg 579)

- Nearly doubles the number of annual visas under the U nonimmigrant visa program by increasing the annual cap from 10,000 to 18,000.
- Limits the number of visas issued due to "covered crimes" under the U visa program to 3,000 annually.
    - Note: S. 744 broadens the scope of the U visa program to include visas for those who claim workplace abuse and whistleblower retaliation (sect. 3201, p. 536)