FEDERATION FOR AMERICAN IMMIGRATION REFORM

Obama's Immigration Executive Actions: One Year Later

November 20, 2015

Summary

On November 20, 2014, Homeland Security (DHS) Secretary Jeh Johnson, at the direction of President Obama, released ten immigration policy memoranda (the "Johnson Memos") that unilaterally changed U.S. immigration law by executive fiat. Combined, the memos are sweeping in the number of aliens they cover and the relief they provide— spanning from deferral from deportation and work authorization to a pathway to citizenship. They also create special exceptions for certain workers seeking to enter the United States. In July, the Migration Policy Institute (MPI) estimated that the Johnson Memos would grant amnesty with work permits to 5.2 million illegal aliens and would shield another 4.4 million illegal aliens from deportation. (FAIR Legislative Update, July 28, 2015) Combined, this means that approximately 87% of the illegal alien population would be exempt from deportation. (*Id.*)

In response, 26 states—led by Texas—sued the Obama administration to stop implementation of the executive amnesty. Importantly, this case (*Texas v. U.S.*) is limited to only two actions taken by the Obama administration: the expansion of Deferred Action for Childhood Arrivals (DACA) and the creation of Deferred Action for Parents of Americans (DAPA). In February, federal district Judge Andrew Hanen issued an injunction against DAPA and expanded DACA, effectively blocking implementation of these programs until the case's merits are litigated. (FAIR Legislative Update, Feb. 18, 2015) The Fifth Circuit Court of Appeals upheld Judge Hanen's injunction this month. (FAIR Legislative Update, Nov. 17, 2015) However, the remaining memos are not subject to the injunction.

While the administration released all of the Johnson memos at once, it has been implementing the unilateral changes to immigration law incrementally. Indeed, even on the one year anniversary of President Obama's announcement, not all of the policy changes covered in the memos have been released in full detail. Some of the memos are being implemented by policy memo while others through regulations. Below is a summary of the major changes to immigration law laid out in the Johnson Memos, and an update on the progress of the implementation of each of them, one year after the administration published them.

1) Expansion of DACA

The Johnson Memos significantly expand the DACA amnesty program. Currently, the DACA program grants a two-year reprieve from deportation and work authorization to aliens who:

- Were under the age of 31 as of June 15, 2012;
- Came to the U.S. before reaching their 16th birthday;
- Have continuously resided in the U.S. since June 15, 2007;
- Have been physically present in the U.S. on June 15, 2012, and at the time of application;
- Had no lawful status on June 15, 2012;

- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety; and
- Are at least 15 years or old at the time of application.

(*See* FAIR Legislative Update, June 19, 2012; *see also* DACA Guidelines).

Through one of the Johnson Memos, the Obama administration intended to expand DACA to cover an estimated additional 270,000 illegal aliens. This is accomplished mainly by eliminating the age requirement (#1) and changing the date-of-entry requirement from June 15, 2007 to January 1, 2010 (#3). The Johnson Memos also extend the length of deferred action granted from two-year increments to three-year terms, which applies to new applications and renewals submitted November 24th, 2014 or later. And, as with the original DACA program, DHS will grant work authorization to DACA beneficiaries. (*See* FAIR Legislative Update, Nov. 24, 2014)

U.S. Citizenship and Immigration Services (USCIS) originally planned to start accepting applications for expanded DACA on February 18, 2015. However, on February 16, 2015, Judge Hanen temporarily blocked the implementation of expanded DACA . (*See* FAIR Legislative Update, Feb. 18, 2015) The Obama Administration appealed the ruling at the 5th Circuit Court of Appeals, but the 5th Circuit upheld Judge Hanen's ruling on November 9, 2015. (*See* FAIR Legislative Update, Nov. 17, 2015)

Note: the DACA program, as laid out by the Obama administration in June 2012, continues to extend deferred action and work permits to illegal aliens under the original eligibility criteria.

Current Status

The expansion of the DACA program has been blocked by a preliminary injunction, pending completion of a trial on the merits.

2) Creation of DAPA

Another Johnson Memo created a new deferred action program, similar to DACA, to grant approximately four million illegal aliens reprieves from deportation and work authorization. Known as DAPA, to be eligible, alien applicants must, on the date of the memo:

- Have a son or daughter who is a citizen or green card holder (legal permanent resident);
- Have continuously resided in the U.S. since before January 1, 2010;
- Be physically present in the U.S. and be physically present at the time of the request for deferred action;
- Have no lawful status
- Not be an enforcement priority (as redefined by the Johnson Memos)
- Present no other factors that make the grant of deferred action inappropriate.

Aliens who apply must also submit digital fingerprints and submit to background checks. Like the expanded DACA program, beneficiaries of this program will receive deferred action in three-year increments.

USCIS originally planned to start accepting applications for DAPA on May 20, 2015. (*See* FAIR Legislative Update, Nov. 24, 2014) However, on February 16, 2015, Judge Hanen temporarily blocked the implementation of DAPA . (*See* FAIR Legislative Update, Feb. 18, 2015) The Obama Administration appealed the ruling at the 5th Circuit Court of Appeals, but the 5th Circuit upheld Judge Hanen's ruling on November 9, 2015. (*See* FAIR Legislative Update, Nov. 17, 2015)

Current Status

The DAPA program has been blocked by a preliminary injunction, pending completion of a trial on the merits.

3) Expansion of waiver of 3 and 10 year bars: Permission for Certain Illegal Aliens to Apply for Green Cards in the U.S.

The Johnson Memos also waive the statutorily mandated 3- and 10-Year bars from admission for spouses and children of legal permanent residents (green card holders), and adult children of citizens and legal permanent residents.

Congress added the 3 and 10 year bars to Section 212 of the Immigration and Nationality Act (INA) in 1996 to help deter illegal immigration and marriage fraud. Section 212 provides that an alien who has been in the U.S. unlawfully for 180 days to one year and leaves is inadmissible to the U.S. for three years; aliens unlawfully in the U.S. for a year or more who leave are inadmissible for ten years. (*See* INA § 212(a)(9)(B)(i)) Current law allows USCIS to waive unlawful presence, and thus the 3 and 10-year bars, for spouses or minor children of citizens and LPRs, but the illegal alien must show "extreme hardship" to the citizen or LPR and apply for the waiver outside of the U.S. at a consular office. (INA § 212(a)(9)(B)(v))

In January 2013, DHS by rule created a categorical waiver for spouses, parents, and minor children of U.S. citizens (otherwise known as immediate relatives). This rule permits these immediate relatives to be eligible for provisional waivers of the 3- and 10-year bars and apply for green cards from within the U.S. (*See* USCIS Final Rule, Jan. 3, 2013; *see also* Sec. Napolitano Press Release, Jan. 2, 2013) In January 2014, DHS issued guidance to immigration officers not to deny applications simply because the applicant has a criminal background. (FAIR Legislative Update, Mar. 26, 2014)

The Johnson Memos expand the categorical waiver of the 3- and 10-year bars to other relatives. Specifically, the memo orders USCIS to issue new regulations permitting spouses and minor children of LPRs and adult children of citizens and LPRs to be eligible for waivers and apply for their green cards from within the U.S. The memo also orders USCIS to re-define the term "extreme hardship" (required to receive a waiver) to include family ties to the U.S. and home country, conditions in home country, age of citizen or LPR, length of residence in U.S., health conditions, financial hardships, educational hardships.

DHS published the proposed rule implementing this policy on July 22, 2015. (Federalregister.gov, 80 FR 43338) Comments closed on September 21, 2015, after receiving 641 comments. (Regulations.gov)

Current Status

DHS has published and closed comments on the proposed rule that will implement this memo. In July 2015, the White House estimated that the final regulation would be published in the spring of 2016. (White House Report, July 2015)

4) Establishment of New Enforcement Priorities (Updating Morton Memos)

The Johnson Memos rescind the Morton Memos that initially established the Obama administration's immigration enforcement "priorities" and replace them with new "priorities."

The Morton Memos, issued in 2011, set three priorities for immigration enforcement under the Obama administration:

1) Aliens who pose a threat to national security or public safety—which includes all aliens convicted of crimes, including aggravated felonies (which has its own definition); felonies; and misdemeanors;
2) Recent illegal entrants (defined within prior three years); and
3) Aliens who are fugitives or otherwise obstruct immigration controls.

The Johnson Memos set new priorities for immigration enforcement that lower the priority for aliens convicted of misdemeanors and aliens who illegally entered the U.S. before January 1, 2014. Under the Johnson Memos, the administration's enforcement priorities are as follows:

1) Aliens who pose a threat to national security, border security, or public safety
   - Includes aliens apprehended at the border.
   - Includes aliens convicted of a felony (except an immigration-related felony) and aliens convicted of aggravated felonies.

2) Misdemeanants and new immigration violators
   - Three or more misdemeanors, except traffic offenses;
   - Aliens convicted of a "significant" misdemeanor;
   - Aliens who have not been continuously present in the U.S. since January 1, 2014;
   - Aliens who have "significantly abused" the visa or visa waiver program; or
   - Aliens who have been issued a final order of removal after January 1, 2014.

Importantly, the Johnson Memos require ICE agents to get the approval of their ICE Field Office Director to approve the removal of any illegal alien not in these three categories.

Current Status:

After a short period of training for Border Patrol agents, the new priorities became effective on January 5, 2015. (*See* Breitbart.com, Jan. 11, 2015)

5) Termination of Secure Communities; New Restrictions on Detainers

The Johnson Memos terminate the Secure Communities Program, a program that was responsible for identifying tens of thousands of criminal aliens for removal. Secure Communities was created in 2008, when Congress directed the Executive Branch to develop a program to identify and remove criminal aliens in custody at the state and local level. Secure Communities worked by comparing fingerprints of all individuals booked into state and local jails to Homeland Security databases and flagging those individuals who are deportable aliens.

The Johnson Memos replace Secure Communities with a program called the "Priority Enforcement Program" (PEP) designed to deport convicted criminals by using fingerprints and working with the Justice Department to remove illegal aliens in federal prisons. However, the Johnson Memos suggest ICE should continue use digital fingerprints to identify and remove criminal aliens in the custody of state and local jails.

The Johnson Memos also direct ICE to stop issuing detainers in most instances. A detainer is a request made by immigration agents to state and local jails to hold a criminal alien for 48 hours at the time of release in order to allow federal agents to assume physical custody of the alien. Pursuant to the Johnson Memos, however, federal agents seeking to deport a criminal alien in state or local custody will merely ask the local agency to notify them of the alien's pending release.

Moreover, the memo instructs ICE to only seek the transfer of custody of criminal aliens released by state and local jails if the aliens that fall into the following categories:

- Aliens suspected of terrorism;
- Gang-related convictions;
- Aliens convicted of felonies (non-immigration related);
- Aliens convicted of aggravated felonies;
- Aliens convicted of three or more misdemeanors; or
- Aliens convicted of a "significant misdemeanor."

Current Status
DHS implemented the PEP, which replaced Secure Communities, in July 2015. (*See* DHS.gov, July 30, 2015)

6) Call for a New "Strategy" on Southern Border

The Johnson Memos created three Joint Task Forces: Joint Task Force East, for the southern maritime border; Joint Task Force West, for the southern land border and west coast; and Joint Task Force Investigations, which conducts investigations for the others.

- The Johnson memos direct the task forces to "incorporate elements" of the Coast Guard, CBP, ICE, and USCIS in order to achieve border security goals.

Current Status
As of September 2015, DHS had appointed commanders for each of the three task forces, as well as a DHS Coordinator to oversee the task force implementation. (DHS.gov) The commanders have not yet made the specific strategies they plan to implement publically available.

7) Expansion of Parole as Route to Amnesty

The Johnson Memos also expand on a concept called "parole in place" to create another program that grants legal residence for certain categories of aliens. DHS has created amnesty programs with "parole in place" before, but the Johnson memos expand this use.

The concept of "parole in place" is a politically-motivated distortion of the "humanitarian parole" (*See* FAIR Legislative Update, Nov. 20, 2013) However, unlike humanitarian parole, **there is no statutory or regulatory authority for parole in place**. The concept was predicated on yet another memorandum, this time by the former General Counsel of the Immigration and Naturalization Service under the Clinton Administration. (Read the 1998 memo here)

While U.S. immigration law gives the Executive Branch discretion to grant aliens "humanitarian parole" under INA § 212(d)(5), this is only to allow aliens *outside* of the country into the U.S. on a temporary and case-by-case basis under certain circumstances. Specifically, the provision of the INA governing parole provides:

The Attorney General may...in his discretion parole *into* the United States *temporarily* under such conditions as he may prescribe *only on a case-by-case* basis for urgent humanitarian reasons or significant public benefit.... (INA Section 212(d)(5)(A))(emphasis added))

Accordingly, the plain language of the statute requires not only that the alien being paroled be outside of the U.S., but that such aliens be considered for such temporary relief on an individual basis. This is further borne out by the regulations issued to implement the statute on humanitarian parole, which reference only "arriving aliens." **Nowhere does U.S. law grant the Executive Branch authority to grant parole for a broad class of illegal aliens already *inside* of the U.S. so they circumvent current law to obtain a green card.** Nevertheless, DHS is now directing its agencies to do exactly that.

Granting parole is significant, because it allows aliens to circumvent provisions in the law that would normally bar their admission and puts immediate relatives of U.S. citizens on a path to citizenship. In general, aliens who have neither been admitted or paroled into the U.S. are inadmissible to the U.S. pursuant to INA Section 212(a)(6)(A). When an alien receives parole, however, this bar to inadmissibility no longer applies. Furthermore, unlike aliens who have been deported or voluntarily left, an illegal alien who has not departed the United States is not subject to the 3- and 10-year bars to admission for having been illegally present in the country. (*See* INA § 212(a)(9)(B)) With these two bars to admission inapplicable, a paroled (illegal) alien who is present in the United States will generally become admissible (unless other bars to admission apply, such as convictions for felonies, for example). Aliens who are now admissible and are also immediate relatives of U.S. citizens are then eligible to obtain a green card and citizenship. (*See* INA § 245(a),(c)(2))

- The Administration started granting "parole in place" to illegal aliens who are immediate relatives of active and veteran U.S. military members in 2013

There are **three** Johnson Memos that deal with parole. One creates a DHS standard that an illegal alien who leaves the country with "advance parole" has not "departed" under the INA. (*See* below, part

(a) for analysis) The other two create new amnesty/visa programs for classes of aliens that have no basis for creation in statute. One is an amnesty for military families and the other is a visa program for "entrepreneurs." (*See* below, part (b) for analysis of the new military amnesty; and *see* below in Section # 10: Expansion of the "High Skilled" Work Visa Programs, part (e) for an analysis of the parole program for entrepreneurs)

a) Advance Parole classified as not "departure"
   - One memo orders that all agencies within DHS, including CBP, must follow the precedent set by a 2012 Justice Department Executive Office Review (EOIR), Board of Immigration Appeals case, *Matter of Arrabally*. In *Arrabally*, the Obama Justice Department ordered that immigration judges must hold that aliens who leave the country with "advance parole" have not "departed" the country under INA Section 212(a)(9)(B)(i). What that means is that the 3- and 10-year bars on admission will not apply to illegal aliens who leave with permission in the form of "advance parole" from USCIS.
   - The memo that covers this issue is meant to give "greater assurance" to illegal aliens who travel in and out of the country with the permission of USCIS that CBP will allow them back into the U.S.

Current Status
While DHS already considers aliens leaving the country with "advance parole" as not having "departed" the country under the INA, the Johnson Memos direct the DHS General Counsel to issue written legal guidance specifically clarifying that as policy. However, as of yet, the DHS General Counsel has not actually issued this written guidance, and DHS has yet not publically provided a date when it can be expected to do so.

b) New Amnesty Program for Military Families
   - The Obama administration created a special parole program via policy memorandum in November 2013 for illegal aliens who are immediate relatives of active and veteran U.S. military members. (*See* FAIR Legislative Update, Nov. 20, 2013)
   - The Johnson Memos expand this to the family members of citizens and permanent residents who merely seek to enlist in the military. This would presumably mean that every citizen or permanent resident with an illegal alien family member who simply tries to enlist would be eligible to be on a path to citizenship, even if that citizen never serves at all.
   - The Johnson Memos themselves reveal little about how the process will actually work, and who exactly is eligible, only saying that USCIS will "work with" the Department of Defense.
   - The memos also instruct USCIS to grant deferred action to those family members of military service members and veterans if they cannot be eligible for parole-in-place but are still illegally present—presumably those who overstayed their visas.

Current Status
In April 2015, the administration said that the "guidance" that would implement this memo was "undergoing internal vetting" at USCIS. (USCIS.gov) More information is not yet publically available.

8) Personnel Reform for ICE Officers

The Johnson Memos announce the intention of the Obama administration to raise the pay of ICE's enforcement and removal officers to be at the same level as officers in other law enforcement agencies.

Current Status
The administration included a request for the specified pay reforms in its FY2016 Budget Request in February 2015. (FY 2016 Congressional Budget Justification, *see e.g*. p. 3) Congress has not yet passed a full year appropriations bill for FY 2016.

9) Naturalization Fees by Credit Card

The Johnson Memos state that the administration wants to maximize the number of permanent residents eligible for naturalization to do so. To accomplish this goal, the memo makes it easier for a green card holder to pay the fees for naturalization.

- The memo directs USCIS to begin taking credit cards for these fees.
- As the administration is funding DACA and DAPA through USCIS fees, this would presumably also given the administration more money for start-up costs of the amnesty, if the courts eventually allow the amnesty programs to proceed.

Current Status
USCIS began taking credit cards in September 2015. (USCIS.gov)

10) Expansion of the "High Skilled" Work Visa Programs.

The Johnson Memos do not merely grant amnesty with these various distortions of the INA, they also rewrite the INA to create new visa categories to give businesses access to a larger pool of cheap foreign labor despite Congress's refusal to pass legislation increasing guest worker caps. In some cases the administration does this by distorting existing visa categories, in other cases through a use of parole that is similar to parole-in-place. These new programs have only been gradually coming into place as the months pass.

The Johnson Memos also expand numbers of work based visas issued with six changes.

a) Spouses of H-1B holders receive work permits

The Johnson Memos announced that one of the expansions of "high skilled" visa programs was that the proposed rule granting work authorization to certain dependent spouses of H-1B nonimmigrant visa holders issued in May 2014 would become final. (*See* FAIR Legislative Update, May 14, 2014) The proposed rule became final on February 24, 2015, and went into effect on May 26, 2015. (*See* USCIS Press Release, Feb. 24, 2015)

The H-1B program itself was created by Congress in 1990 to allow U.S. employers to hire foreign workers for "specialty occupations" and is most commonly associated with "high-skilled" jobs in the science, technology, engineering, and mathematics (STEM) fields. (Immigration and Nationality Act (INA), § 101(a)(15)(H)) H-1B visa holders may bring dependent spouses and children with them, but they were not statutorily allowed to work in the U.S. while they are here. (*See* 8 CFR 214.2(h)(9)(iv) and

274a.12(c)) The visa these dependent spouses hold are known as H-4 dependent visas, and they are valid only as long as the visa held by the H-1B principal. (*Id*.)

The new rule amended current regulations to allow H-4 visa holders to work while their H-1B principal spouses are in the process of seeking lawful permanent residence status through their employment. (Federal Register, Vol. 79, No. 91, May 12, 2014) Although H-1B visas are supposed to be "nonimmigrant" visas meant to alleviate temporary labor shortages rather than another permanent immigration category, DHS proposed the rule change explicitly to encourage H-1B visa holders to seek permanent residence. (*See Id*. at p. 26886)

Current Status
The change allowing the spouses of H-1B visa holders to work was fully implemented on May 26, 2015.

b) Loosening Rules for L-1B visas

The Johnson Memos also promised to provide "consistency" to the L-1B visa program, one of several corporate visas used by companies to employ guest workers. By consistency, the administration meant watering down the requirements of the program so that more aliens could qualify. USCIS implemented these changes by policy memo, announced on March 24, 2015 and made effective on August 31, 2015. (USCIS Policy Memo PM 602-0111; *see* FAIR Legislative Update, Mar. 31, 2015)

The L-1B visa was originally created to enable multinational corporations to temporarily transfer their top-level employees with "specialized knowledge" of the corporation to assist its affiliates in the United States. (INA § 101(a)(15)(L))

Through the USCIS memo, the administration broadened the definition of "specialized knowledge" to such a degree that nearly any foreign employee could qualify for an L-1B visa. Now, an L-1B applicant needs "special knowledge," which is knowledge of the petitioning employer's product, service, research, equipment, techniques, management, or other interests and its applications in international markets that is demonstrably distinct or uncommon in comparison to that generally found in the particular industry or within the petitioning employer. (USCIS Policy Memo PM-602-0111, Mar. 24, 2015 at 7)

The USCIS memo provided a non-exhaustive list of factors USCIS may consider when evaluating an applicant for the "special knowledge," yet provided no guidance on how USCIS should weigh these factors. (*Id*. at 8) If USCIS determines L-1B applicants lack "special knowledge" they can still grant the aliens an L-1B visa if they possess "advanced knowledge, which is knowledge or expertise in the organization's specific processes and procedures that is not commonly found in the relevant industry and is greatly developed or further along in process, complexity and understanding than that generally found within the petitioning employer." (*Id*. at 7) The memo emphasized that an applicant can meet the "advanced knowledge" standard even if the knowledge is not proprietary or even narrowly held within the organization. (*Id*. at 7, 9)

Additionally, the memo took several other steps to loosen the L-1B requirements. First, the memo provided that USCIS adjudicators cannot consider the availability of American workers for the position when evaluating an L-1B application. "A petitioner is not required to demonstrate the lack of readily available workers to perform the relevant duties in the United States." (*Id*. at 9) Since the L-1 visa does not have a minimum wage requirement, employers will be legally able to discriminate against American workers in favor of cheaper foreign labor. Second, the memo reduced the burden on L-1B applicants as they no longer have to demonstrate that there is a legitimate need for the L-1B worker. According to the

memo, "[e]ven if an officer has some doubt about a claim, the petitioner will have satisfied the standard of proof if it submits relevant, probative, and credible evidence… that leads to the conclusion that the claim is 'more likely than not' or 'probably' true." (*Id*. at 5-6)

There is no annual cap for the number of L-1B visas admitted into the country. By lowering the standard to qualify for an L-1B visa, the administration is encouraging corporations to sponsor a wave of L-1B foreign workers who will flood the U.S. labor market.

Current Status
The change loosening the standards of the L-1B visa program was fully implemented and in effect since August 31, 2015.

c) Expansion of the already unlawful Optional Practical Training (OPT) program to allow foreign nationals here on student visas to stay in the United States a year longer for "training," even though they are no longer students

The OPT program is a creation of the executive branch that basically created an entire new category of workers via regulations. In 1974, the Immigration and Naturalization Service on its own initiative began to allow aliens to work on student visas through regulation, though such work was limited to that required or recommended by the school. (*See*, John Miano Testimony before Senate Judiciary Committee, Mar. 17, 2015) However, as time went on, the regulations became more and more expansive, allowing graduates to remain in the U.S. for expanded periods of time without being tied to a school at all, in a specific workaround of H-1B statutory limits. As of 2013, there were over 120,000 OPT guest workers in the U.S. Not only are there a tremendous number of OPT workers, but there are *no* labor protections, either for Americans or the guest workers themselves, as there often are for statutorily established guest worker programs.

Until 2008, DHS allowed foreign student graduates on F-1 visas to work in the country for a year after graduation. The Bush administration expanded that time through regulation in 2008 to 29 months. (*See* 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) The Washington Alliance of Technology Workers (WashTech), represented by the Immigration Reform Law Institute (IRLI), challenged the 2008 expansion in federal court last fall, alleging that the regulations promulgated since 2008 were unlawful. In August 2015, the court invalidated the rule, holding that the Executive Branch violated the Administrative Procedures Act (APA) in not providing notice and comment. However, it upheld the substance of the rule, finding that "student" was an ambiguous term under the law, that could possibly mean a foreign graduate no longer affiliated with a school at all. (*See* Opinion) WashTech is appealing this part of the ruling. The court also stayed its ruling until February 12, 2016, so that DHS could implement a new rule with notice and comment. (*See* Irli.org)

This new rule that DHS is now in the process of implementing is the OPT expansion contemplated by the Johnson Memos. DHS published its Notice of Proposed Rulemaking on Oct. 19, 2015, inviting comment on the proposed rule until November 18, 2015. The proposed rule received 49,783 comments, many from foreign workers. (*See* here for FAIR's comment on the proposed rule, and here for IRLI's comment on the proposed rule) The proposed rule would expand OPT to 36 months after graduation for foreign workers with STEM degrees and would require employers to implement formal mentoring and training programs for its STEM OPT workers.

Current Status
The comment period for this proposed rule closed on November 18, 2015. DHS is likely to publish and make effective the final rule implementing the expansion before February 12, 2016, the date the district court stayed its ruling invalidating the previous rule. WashTech's case that this expansion of the OPT

program is unlawful, even if DHS follows the proper notice and comment procedures, is on appeal to the DC Circuit. Unless WashTech wins its appeal, however, the expansion of STEM OPT is on track to being implemented by February 2016.

d) Green cards applications for non-citizens with advanced degrees

The Johnson Memos explain that the administration will use the "national interest waiver" of INA Section 203(b)(2)(B) to allow guest workers with "advanced degrees" or "exceptional ability" to apply for a green card without their employers' permission.

Current Status
The administration has not yet released details about how or when this part of the Johnson Memos will be implemented.

e) Using "parole," another visa program to be created for "entrepreneurs."

The Johnson Memos explain that the administration will again use "parole" to create a program that allows DHS to grant parole status to "inventors, researchers, and founders of start-up enterprises." The administration claims that it has authority to grant parole under Section 212(d)(5) in these circumstances as a "significant public benefit."

If it were true that the administration had authority to create such a program, it would make the work visa categories established by Congress entirely pointless.

Current Status
USCIS held a "listening session" on June 25, 2015, to ask for feedback on how to craft its "parole" program for entrepreneurs. (USCIS.gov) After this "listening session," USCIS asked for more feedback from "industry experts" and "stakeholders" (that is, tech industry lobbyists for more visas) until July 10, 2015. (*See*, USCIS email sent to "stakeholders") No further information has been made publically available about when the Administration will implement the program or who it will unilaterally decide will be eligible.

f) Increased "Portability" for Workers

The Johnson Memos direct USCIS to publish a memo that will make it easier for guest workers to change jobs without affecting their application for a green card. USCIS just published a "Draft Policy Memorandum" providing this "additional guidance" on the first anniversary of the Johnson Memos. (USCIS.gov, Nov. 20, 2015) Once this memo is finalized, it will update chapters 20.2 and 22.2 of the USCIS employees' Adjudicator's Field Manual.

Section 204(j) of the INA allows aliens who are in the US on an employment visa application and have had an application to adjust their status to permanent resident pending for more than 180 days to move jobs without having to file a new petition to adjust status if their new job is the "same or similar" to their previous one. (*See* USCIS.gov) The determination of whether the job is "the same or similar" is based on the Department of Labor's occupational classification system. (*Id*.)

According to USCIS' new Draft Policy Memorandum, "stakeholders" have complained that this job portability provision is "underutilized" because there is too much uncertainty about when USCIS will

determine that two jobs are in "the same or similar" occupational classification. (USCIS.gov, Nov. 20, 2015) The memo therefore lays out a number of details about how USCIS makes such determinations, including how it views raises and promotions. (*Id*.) The intention of the memo is to prevent foreign workers from being deterred from "changing employers, seeking new job opportunities, or even accepting promotions" out of fear that doing so would invalidate their currently approved immigrant visa petitions. (*Id*.)

Current Status
The administration just released a Draft Policy Memorandum explaining how this change will be implemented. (*Id*.) USCIS intends to make the memo effective on March 21, 2016. (*Id*.)

Additional Executive Overreach This Year Beyond the Johnson Memos

While the Johnson Memos themselves included the ten programs described above, the Obama administration also created two other major programs, announced around the same time. Both of these programs also transform the immigration system by executive fiat: (1) Central American (CAM) Refugee program and (2) a program that expanded the use of U and T (crime victim) visas to cover workplace violations.

Crime Victim Visas Expansion

Current law allows victims of serious crimes in the United States to become lawful residents in certain cases through the U and T visa categories. The U visa is for those who have suffered "substantial mental or physical abuse" and the T Visa is for victims of human trafficking. (USCIS.gov) To obtain U and T visas, a law enforcement agency certifies that an alien is a crime victim and has been cooperating with a law enforcement agency to detect, investigate, and prosecute the crime. (USCIS.gov) The U and T visa categories were first created by the Victims of Trafficking and Violence Protection Act of 2000. (PL-106-386) The law was originally intended to protect victims, particularly women, of severe forms of trafficking. (DOL.gov)

Last spring, the administration unilaterally expanded the definition of U and T visas, to include illegal aliens who were victims of workplace violations. Tom Perez, the Secretary of Labor, announced that the Department of Labor (DOL) would start certifying victims for U and T visas for extortion, forced labor, and fraud in labor contracting. (DOL Press Release, Apr. 2, 2015; DOL.gov) (For more information, *see* FAIR Legislative Update, Apr. 7, 2015)

The Central American Refugee/Parole (CAM) Program:

In February 2015, the administration's unilateral Refugee/Parole program for Central Americans (CAM) was fully implemented. (USCIS.gov) The administration first announced such a program would be in the works in July 2014, in response to the unaccompanied alien minor (UAC) crisis, and officially revealed the program in November 2014. (*See* FAIR Legislative Update, July 29, 2014; FAIR Legislative Update, Nov. 18, 2014; FAIR Legislative Update, Feb. 18, 2015)

Under the CAM program, the federal government has offered to grant either refugee or parole status to children and adults from Guatemala, Honduras, or El Salvador when a "qualifying parent" who is "lawfully present" in the U.S. files an application for refugee status on behalf of their child currently

living in one of those countries. (USCIS.gov) The guidelines announced last February provide that a "qualifying parent" may be an alien with 1) permanent resident status; 2) temporary protected status; 3) parole (after one year); 4) deferred action (after one year); 5) deferred enforced departure; or 6) withholding of removal. (*Id*.) These categories cover illegal aliens granted amnesty through DACA and DAPA, as well as the President's other backdoor amnesty policies. This means that the Obama administration is unilaterally creating a program to allow illegal aliens to use the laws of the United States governing refugees and parole, to bring in their relatives living outside the U.S.

If an alien is a "qualifying parent," he or she may petition the U.S. government to admit a "qualifying child" to the United States. The "qualifying child" must be: 1) the biological, step, or legally adopted child of the parent in the U.S.; 2) unmarried; 3) under the age of 21; 4) a national of El Salvador, Guatemala, or Honduras; and 5) residing in his or her country of nationality. (*Id*.)

However, "qualifying parents" will not only be able to sponsor their children, but other relatives living in Central America (*Id*.) For example, if the qualifying child has unmarried children of his or her own, they may be brought in as "derivative" relatives. (*Id*.) In addition, the other parent of a qualifying child may also come to the U.S., if that parent lives or is "part of the same economic unit" as the child and is legally married to the parent living in the U.S. (*Id*.)

Importantly, if aliens are ineligible to qualify as a refugee, the program allows the same aliens to apply for parole in order to enter the U.S. (*See* FAIR Legislative Update, Nov. 18, 2014)

Granting refugee or parole status to Central Americans through this program contradicts federal law. (*Id*.) Section 101 of the Immigration and Nationality Act (INA) defines a refugee as a person "who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Moreover, legal opinions make it clear that poverty and crime are not sufficient grounds for granting refugee status. Similarly, granting parole *en masse* to relatives of illegal aliens in the U.S. stretches "humanitarian parole" far beyond its statutory definition in INA Section 212 as allowing the entry of an alien on a temporary, case-by-case basis, and "for urgent humanitarian reasons or significant public benefit." (INA § 212(d)(5)(A))