

**NATIONAL FOUNDATION FOR AMERICAN POLICY**  
**NFAP POLICY BRIEF » SEPTEMBER 2014**

**EXECUTIVE ACTION AND LEGAL IMMIGRATION**

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**EXECUTIVE SUMMARY**

If President Obama decides to take executive action on immigration, then he should consider aiding those who have waited to immigrate to America through appropriate legal channels. Changes that only or primarily help those who entered the United States unlawfully could be interpreted as unfair to those who remain in legal immigration backlogs and might leave those who entered unlawfully in a better position than those who applied through a legal immigration category.

This analysis estimates 4 to 6 million unauthorized immigrants could gain deferred action or be granted parole in place to avoid deportation, receive employment authorization and, if they are the parent, spouse or child of a U.S. citizen, over time become eligible for permanent residence (green cards) under measures advocated by the Congressional Hispanic Caucus and being considered by President Obama.

The research also found:

- A reinterpretation of current law that counts only the principal individuals sponsored and not their dependents would significantly shorten wait times for employment-based immigrants, many of whom now wait 6 to 10 years or more for green cards.
- The reinterpretation of the law would not “double” legal immigration. If it had been in effect from FY 2011 to FY 2013 counting only the principal individuals sponsored for employment-based immigration would have increased the overall annual level of legal immigration by approximately 17 percent (by about 170,000 people). Almost 90 percent of those sponsored for employment-based immigration are already in the country, many working in a legal temporary status, and would not represent new entrants to the United States.
- Reinterpreting the statute for family-sponsored immigrants to count only principals and not dependents would reduce the long wait times experienced by many close relatives of U.S. citizens who have been sponsored for legal immigration.
- Estimates indicate counting only the principal individuals sponsored for family-based immigration would have increased the annual level of legal immigration by 14 percent (about 142,000 people) if in effect from FY 2011 to FY 2013.

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- The Obama Administration can improve the labor mobility of those sponsored for employment-based green cards by a variety of means, including issuing an employment authorization document (EAD) and advance parole (for re-entry to the United States) to individuals with an approved I-140 petition for employment-based immigration. The Department of Homeland Security would likely need to alter its regulations to ensure an individual's pending employment-based green card is not jeopardized when changing jobs or positions.
- The Administration can also expand the degrees eligible for international students to receive 29 months of Optional Practical Training to include economics, accounting and other business-related fields. That would help international students unable to obtain an H-1B visa due to the limited supply to remain in the country.
- Other measures that would improve the legal immigration system include loosening the bureaucratic rules for admitting lower-skilled workers on legal H-2A and H-2B visas, improving the guidance for professionals with specialized knowledge on L-1B visas, and making available the unused supply from previous years of H-1B temporary visas and employment-based green cards.

Congress making legislative changes to the legal immigration system is the best way to address problems in the system that include the lack of a visa category for year-round lower-skilled jobs, which contributes to illegal immigration, and the short supply of temporary visas and green cards for highly skilled professionals, which affects competitiveness, growth and innovation. However, administrative measures to attract talented people to the United States represent good reforms whether or not Congress ultimately passes immigration reform legislation.

Many immigration lawyers believe that the executive actions President Obama decides upon are likely to withstand legal scrutiny, including any possible court challenge, and be part of the immigration system for many years. That makes it important that changes to the immigration system include helping those who apply to enter and stay in the United States through legal immigration.

## **BACKGROUND**

President Barack Obama is poised to change U.S. immigration policies in ways that could affect the lives of millions of people. Press reports indicate the Obama Administration may issue orders that would address the fate of unauthorized immigrants living in the United States. Reports indicate it could take the form of expanding the President's June 2012 Deferred Action for Childhood Arrivals (DACA) program to include other unauthorized immigrants. That program protects from deportation, within certain parameters, unauthorized immigrants who came to America as children. It also provides them work authorization. Under DACA, individuals need to renew their status every two years and, as an executive action, as opposed to legislation, it could be overturned by a future administration.

While media speculation on the anticipated executive action has focused on what will happen to unauthorized immigrants, the President could also take action to affect other immigrants, including those here legally or outside the country waiting for family and employment-based immigrant visas. Whether the President undertakes any action to include those who entered and have remained in the country legally is an important question. If not, it could create an unintended dynamic whereby those who entered the country unlawfully might be in a better position than those who entered the country legally and are awaiting permanent residence.

## **EMPLOYMENT-BASED IMMIGRANTS AND EXECUTIVE ACTION**

There are several actions the Obama Administration could take to help skilled foreign nationals and the companies that employ them. Taking such measures could gain the Administration support in the business community and be seen as aiding not just individuals who entered the country unlawfully. Family-sponsored immigrants waiting legally outside the country could also be helped.

## **NOT COUNTING DEPENDENTS OF EMPLOYMENT-BASED IMMIGRANTS**

When employers sponsor skilled foreign nationals for green cards (permanent residence) both the principal and the dependents (spouses and children) of those sponsored are counted against the 140,000 annual limit. For example of the 143,998 employment-based green cards issued in FY 2012, 65,909 went to principals and 78,089 went to dependents.<sup>1</sup> In other words, not counting dependents in FY 2012 would have allowed approximately an additional 78,000 skilled individuals to receive employment-based green cards.<sup>2</sup> (Note: the 140,000 annual limit for employment-based preferences and how many are recorded against it can fluctuate from year to year based

<sup>1</sup> *2012 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security, 2013

<sup>2</sup> It is difficult to determine exactly how many more individuals would gain permanent residence if dependents were not counted, since, it is a hypothetical exercise and, for example, some of the employment-based preferences go to "Certain Special Immigrants," which include juvenile court dependents.

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on when a case is recorded and whether there were unused family-based preference visas in the prior fiscal year.)

Not counting dependents for employment-based immigrants would likely result in approximately 170,000 more green cards being issued in a fiscal year, based on a calculation of principals and dependents for FY 2011, FY 2012 and FY 2013. This calculation used data from the Department of Homeland Security to determine the number of dependents for each principal in the employment-based category (approximately 1.1 to 1.2 dependents per principal) and used the average of the three years to smooth over anomalies in data from any particular year.

**Table 1**  
**Projected Increase in Legal Immigration of Counting Only Principals for Family and Employment**

<b>CATEGORIES</b>	<b>ANNUAL INCREASE IN LEGAL IMMIGRATION</b>	<b>PERCENTAGE INCREASE IN LEGAL IMMIGRATION</b>	<b>PERCENTAGE ALREADY IN THE U.S.</b>
<b>Employer-Sponsored Preference Categories</b>	170,000	17 percent	87 percent
<b>Family-Sponsored Preference Categories</b>	142,000	14 percent	13 percent

Analysis of data in *FY 2011, FY 2012 and FY 2013 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security. Percentage increase in legal immigration based on 1,028,075, the average level of legal immigration to the United States for FY 2011, FY 2012 and FY 2013. Data on percentage already in the U.S. derived from adjustment of status data for FY 2011, FY 2012 and FY 2013. DHS does not release some data on dependents, which made it necessary to estimate to avoid undercounting.

An increase of 170,000 would represent about a 17 percent increase in overall legal immigration over the approximately 1 million legal immigrants admitted to the United States each year. In this case, it would be largely an accounting measure, since the vast majority of the individuals would already be in the country legally and working on a temporary visa or residing here lawfully with a spouse or parent working here legally. In fact, typically almost 90 percent of employment-based immigrants adjust their status inside the United States.<sup>3</sup> But accelerating when an individual receives lawful permanent residence is extremely important to the individuals and their families, since it provides them with greater mobility in the labor market and within their companies and places them on the path to become U.S. citizens.

<sup>3</sup> *2012 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security, 2013. In FY 2012, approximately 87 percent of employment-based immigrants obtained permanent residence through adjustment of status inside the country.

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It would not be a good reason for the Obama Administration to oppose changing the counting rules on employment-based immigrants because of a fear that it increases legal immigration. The Obama Administration strongly supported S. 744, the Senate-passed immigration and, according to the Congressional Budget Office, S. 744 would “increase the number of employment-based visas from 140,000 in 2013 to about 400,000 in 2023.”<sup>4</sup> That is a larger annual increase in immigration than would result from changing the rules on counting dependents.<sup>5</sup>

Changing the rules on counting for green cards would benefit those who have applied legally and have been waiting for green cards. The National Foundation for American Policy estimates approximately 500,000 people or more are in the employment-based green card backlog. Wait times can be 6 to 10 years or more for skilled immigrants, with the vast majority working in the United States on temporary visas.<sup>6</sup> The reason for these wait times and backlogs are two-fold: 1) The annual limit of 140,000 employment-based green cards is too low relative to the demand and 2) per county limits in the employment-based category causes nationals from countries with larger populations, including India, China and the Philippines, to wait longer than people from other nations.

While not counting dependents toward the employment-based limits would be a change in policy, immigration attorney Greg Siskind has studied the law and says the executive branch would be within bounds to interpret the statute to count only the principals sponsored for immigration.<sup>7</sup> Moreover, a group of leading immigration attorneys provided the Administration with a legal analysis that supports the President’s authority to make this change in policy. The group includes a leading author in immigration law, former counsels for USCIS and the INS and two individuals involved in the drafting of the relevant language in the 1990 Immigration Act.<sup>8</sup> The spouses and children of H-1B visas are not counted against the annual limit on H-1B visas but are counted against the employment-based green card quotas, which is one reason for the large backlogs that have developed for green cards.

Immigration attorneys Gary Endelman and Cyrus D. Mehta also make a legal argument for not counting dependents. “While there are several proposals on the table, one that resonates is to not count derivative family

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<sup>4</sup> Congressional Budget Office Cost Estimate of S. 744, Congressional Budget Office, June 18, 2013.

<sup>5</sup> S. 744 would have not counted dependents of employment-based immigrants toward the annual limit, and expanded employment-based green cards through a variety of means. A bill that passed the House Judiciary Committee would have increased the number of employment-based green cards issued in a year by approximately 90,000, but would have continued counting dependents towards the annual limit.

<sup>6</sup> *House and Senate Legislation on High Skill Immigration*, NFAP Policy Brief, National Foundation for American Policy, June 2014; Stuart Anderson, *Waiting and More Waiting: America’s Family and Employment-Based Immigration System*, NFAP Policy Brief, National Foundation for American Policy, October 2011.

<sup>7</sup> Interview with Greg Siskind.

<sup>8</sup> The authors of the analysis have asked not to have their names cited.

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members in the employment and family preferences,” they write. “The solution is simple but elegant: Count all members of a family together as one unit rather than as separate and distinct individuals.”<sup>9</sup>

Endelman and Mehta explain: “There is nothing in section 203(d) that explicitly provides authority for family members to be counted under the preference quotas. While a derivative is ‘entitled to the same status, and the same order of consideration’ as the principal, nothing requires that family members also be given numbers. If Congress allocates a certain number of visas to immigrants with advanced degrees, it makes no sense if half or more are used up by family members.”<sup>10</sup>

Anticipating objections, the attorneys note, “There is a difference between not being counted at all, which we do not argue, and being counted as an integral family unit as opposed to individuals, which we do assert. *We seek not an exemption from numerical limits but a different way of counting such limits.* If the Executive Branch wanted to reinterpret section 203(d), there is sufficient ambiguity in the provision for it do so without the need for Congress to sanction it. A government agency’s interpretation of an ambiguous statute is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) – often abbreviated as ‘*Chevron* deference.’”<sup>11</sup>

Within two to three years, not counting dependents would likely reduce the overall backlog in half and make the employment-based second preference (EB-2) current. The EB-2 category is not current for individuals from India and China and the wait time in that category has ranged from 5 to 10 years for nationals of those countries.

Executive action is unlikely to eliminate the per country limit on employment-based immigrants. The practical impact of the per country limit, as noted, is that wait times for countries like India and China (and more recently the Philippines) are much longer than for other employment-based immigrants. Because of the per country limit, not counting dependents toward the annual limit would likely help nationals of India and China less than other countries in the employment-based third preference (EB-3) category. However, eventually the additional numbers could decrease the wait times for skilled immigrants from India, who currently can wait a decade or potentially longer in the EB-3 category.

Operationally, to stay within per country limits that would remain in the law alongside a new interpretation that no longer counts dependents, it might be necessary to assess the overall count of employment-based green cards after the 3<sup>rd</sup> quarter of a fiscal year before issuing such green cards at the end of a fiscal year.

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<sup>9</sup> Gary Endelman and Cyrus Mehta, “Two Aces up President Obama’s Sleeve to Achieve Immigration Reform Without Congress – Not Counting Family Members and Parole in Place,” *The Insightful Immigration Blog*, June 29, 2014.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* Emphasis in original.

## **NOT COUNTING THE DEPENDENTS OF FAMILY-SPONSORED IMMIGRANTS**

The wait time for the relatives of U.S. citizens who applied for legal immigration through a family preference category, such as an unmarried son or daughter, is typically 3 to 10 years or more, depending on the country of origin. The vast majority of those sponsored in family categories, about 87 percent, are outside the United States waiting to immigrate, which means accelerating when they receive green cards is very important to them and their U.S. citizen or lawful permanent resident sponsor.<sup>12</sup>

If dependents are not counted for employment-based immigration, then it may be logical also to not count them for the family-based preference categories. Interestingly, because there are not as many dependents within the family preference categories as employment-based categories not counting dependents in the family preference would not increase legal immigration by as much as in employment. For example, two of the family preference categories are the married and unmarried sons and daughters of U.S. citizens, which means the sons and daughters (21 or older) are the principals.

In FY 2013, of the 210,303 immigrants in the family-based preference categories, approximately 81,600 were dependents and 128,600 were principals, about .63 dependents per principal in that year.<sup>13</sup> Based on the average level of the family-based preferences in FY 2011, FY 2012 and FY 2013, approximately an additional 142,000 immigrants would receive green cards if dependents were not counted against the quota in the family-based preference categories. That would represent about a 14 percent increase in the annual level of legal immigration.<sup>14</sup>

## **INCREASED LABOR MOBILITY FOR SKILLED FOREIGN NATIONALS**

The best solution for skilled foreign nationals waiting in immigration backlogs would be for Congress to increase the employment-based green card quotas sufficiently to eliminate backlogs and enable skilled foreign nationals to gain permanent residence in a timely fashion. But if Congress is not going to change the law anytime soon and if the Obama Administration plans to grant work authorization to many people currently in unauthorized status, then it makes sense to include in any executive action a way to increase labor mobility for skilled foreign nationals.

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<sup>12</sup> The second preference category is for the spouses, children and unmarried sons and daughters of lawful permanent residents.

<sup>13</sup> *2013 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security, 2014. Calculations performed based on counts of dependents and principals. DHS does not release some data on dependents, which made it necessary to estimate to avoid undercounting.

<sup>14</sup> Analysis of data in *FY 2011, FY 2012 and FY 2013 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security.

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One approach would be to allow anyone with an approved I-140 petition (for employment-based immigration) to be issued an employment authorization document (EAD) and advance parole (to travel outside the country and re-enter the United States). If necessary to address possible objections, one could require individuals to continue working with their original sponsor for a period of time after the approval.

The goal would be to increase labor mobility but to do so without jeopardizing an individual's pending employment-based green card. Attorneys note it would likely be necessary for the Department of Homeland Security to alter its regulations to ensure that an immigrant petition continues to be valid even if the foreign national changes jobs or moves to a new employer. There is also a role for the Department of Labor to ensure the underlying labor certification and I-140 petition remain valid even if a foreign national moves to a different geographic location.

Issuing an employment authorization document and advance parole would allow employment-based immigrants to change positions within their companies, to move to another employer, or even to start a business. It could also enable them to travel freely and for their spouse to obtain work authorization. As noted earlier, an estimated 500,000 skilled foreign nationals and/or their relatives are waiting for employment-based green cards. Those waiting in backlogs are at a disadvantage compared to many other people in the country. Because of the long waits many are reluctant to change jobs or be promoted if it would mean needing to re-start the employment-based immigration process and begin a new wait time.

No one would receive an employment-based green card more quickly but it would give such individuals greater mobility and a higher quality of life while waiting. It would at least put such individuals on par with those who entered the country unlawfully and were granted work authorization.<sup>15</sup> Employment-based immigrants would have needed to gain approval from the U.S. Department of Labor (for labor certification) and U.S. Citizenship and Immigration Services for the I-140 petition.

Other approaches, if less straightforward could accomplish something similar. Allowing pre-registration or concurrent filing of an adjustment application with the approval of an I-140 petition would also allow employment-based immigrants to obtain work authorization. Another suggestion is that once (or more) a year the State Department could make the Visa Bulletin "current" for employment-based immigrants. This happened in 2007. The result was that all employment-based immigrants in the backlog could file for their green card regardless of their priority date, which is usually tied to the date a labor certification application was filed. People did not receive green cards earlier, but it did allow them to apply and receive employment authorization documents and to travel easier outside the country.

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<sup>15</sup> Deferred Action for Childhood Arrivals (DACA) program.



## **EXPANDING OPTIONAL PRACTICAL TRAINING (OPT)**

An international student can receive Optional Practical Training (OPT) with an employer for 12 months under current rules, but that can be extended to 29 months if the student's most recent degree was in a STEM (science, technology, engineering, and math) field. Due to the annual supply of H-1B petitions being exhausted, the extended period of OPT has become important to allowing highly educated individuals to gain an opportunity to work legally in the United States. If an H-1B filing is unsuccessful because the H-1B limit has been reached it is possible the student-worker can remain in OPT status until the next filing period.

Expanding Optional Practical Training would permit more international students than those with degrees strictly defined as STEM to be eligible for 29 months of OPT. Those additional fields would include economics, accounting, management analysis and other business-related degrees.

It may also be possible to extend Optional Practical Training in a way to allow international students to transition to employment-based green cards without first obtaining H-1B status. Unless some other fixes are made that address the long waits for employment-based immigrants, such as by not counting dependents toward the annual limit, it is unclear how one would draft an extension of Optional Practical Training as a bridge to an employment-based green card. An individual remaining in Optional Practical Training for 6 years or more, rather than in H-1B status for that period of time, would likely not represent a significant difference for employers and skilled foreign nationals.

## **OTHER POTENTIAL ACTIONS ON EMPLOYMENT-BASED IMMIGRATION**

The President could take other actions to make it easier for employers to hire skilled foreign nationals or other workers. For example, those who could not obtain H-1B petitions due to the H-1B cap could be paroled into the country. That could allow them to work for any employer in America, which would achieve the goal of some critics who argue skilled foreign nationals should have complete labor mobility, rather than having to wait for a second employer to petition for them, as is now the case. If the President paroles into the country previously deported relatives of U.S. citizens, as advocated by the Hispanic Congressional Caucus (see next section), it might be difficult to argue that those never in unlawful status who applied legally to enter should not be eligible for parole as well and granted employment authorization.

For lower-skilled workers the President could streamline the highly bureaucratic structure of the H-2A visa category for agricultural workers and the H-2B visa category for seasonal nonagricultural workers. The double "temporary" requirement for H-2B that prevents, for example, the hiring of a nanny through an H-2B visa because

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the job must be “temporary” could be interpreted less restrictively by regulation, as well as, potentially, the way petitions are counted. Given how the Department of Labor has not been friendly toward either the H-2A or H-2B category it would take significant White House leadership to change current interpretations. There is always a risk that any executive action could add new restrictive measures to either high skill or low skill temporary visa categories.

The Obama Administration could also issue guidance on transferring into the United States employees with “specialized knowledge” on L-1B visas. Any clear direction from the Administration that results in consistent and reasonable adjudications would be welcomed by the business community, although it would solve a problem largely caused by the Administration. The denial rates for L-1B petitions have increased significantly since 2009, rising to over 33 percent in FY 2013.<sup>16</sup> A main problem seems to be the adjudicators and the oversight of those adjudicators. The guidance on L-1B petitions has been promised by the Administration since 2012.

Recovery of H-1B petitions or employment-based green cards not issued in previous fiscal years would be of significant help to employers and skilled foreign nationals waiting in backlogs due to low quotas. It would likely make available an additional 300,000 H-1B visas (unused below H-1B cap since FY 1992) and 200,000 to 250,000 employment-based green cards.<sup>17</sup>

## **EXPANDING DACA AND OTHER OPTIONS**

On April 3, 2014, the Congressional Hispanic Caucus (CHC) sent a memorandum to Department of Homeland Security Secretary Jeh Johnson recommending administrative relief for unauthorized immigrants.<sup>18</sup> The memorandum establishes the potential parameters of executive action by the Obama Administration. Even though it is unclear if President Obama would implement all of the recommendations it is useful to make estimates and analyze measures advocated in the CHC memorandum, since that will give a picture of the potential impact of the executive action.

The Congressional Hispanic Caucus recommended the Obama Administration utilize the legal framework established under President Obama’s Deferred Action for Childhood Arrivals (DACA) and expand the class of individuals eligible for DACA to other people the caucus also considers to be a “low priority” for detention and

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<sup>16</sup> *L-1 Denial Rates For High Skill Foreign Nationals Continue to Increase*, NFAP Policy Brief, National Foundation for American Policy, March 2014.

<sup>17</sup> *House and Senate Legislation on High Skill Immigration*, NFAP Policy Brief.

<sup>18</sup> Memorandum from Congressional Hispanic Caucus to Secretary Jeh Johnson, Re: Administrative relief and more humane enforcement practices, April 3, 2014. Hereafter referred to as Congressional Hispanic Caucus memorandum.

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deportation.<sup>19</sup> Here is how U.S. Citizenship and Immigration Services describes DACA: “On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.”<sup>20</sup>

**Table 2**  
**Unauthorized Immigrants Who Could Gain Deferred Action Under Executive Action**

<b>IMMIGRATION CATEGORY</b>	<b>ESTIMATED RANGE OF ELIGIBLE UNAUTHORIZED IMMIGRANTS WHO COULD GAIN DEFERRED ACTION</b>
<b>Parents of DACA Recipients</b>	648,766 to 1.3 million
<b>Siblings of DACA Recipients</b>	200,000 or more
<b>Parents of U.S.-Born Children</b>	4.4 million or more
<b>Spouses of U.S. Citizen or Lawful Permanent Resident Spouses</b>	1 million to 1.7 million
<b>TOTAL</b>	<b>4 to 6 million*</b>

Source: National Foundation for American Policy analysis of data from the Pew Research Center, U.S. Department of Homeland Security, Congressional Hispanic Caucus and Congressional Budget Office. \*There is likely overlap among the categories, since an individual could be a parent of both a DACA recipient and a U.S.-born child. Some may be granted another form of relief or be ineligible for relief.

On the next page are estimates of the number of people who would gain protection from deportation if the Obama Administration followed the recommendations of the Congressional Hispanic Caucus and expanded DACA to other individuals in the country without legal status. Some additional estimates are included based on their similarities to the Congressional Hispanic Caucus proposal. There are likely overlaps in some categories, since someone could be a parent of a U.S.-born child and a DACA recipient.

“Parents and siblings of DACA recipients and parents of USC or LPR children should be protected from deportation under the DACA model,” advocated the Congressional Hispanic Caucus.

<sup>19</sup> Memorandum from Congressional Hispanic Caucus to Secretary Jeh Johnson, Re: Administrative relief and more humane enforcement practices, April 3, 2014. Hereafter referred to as Congressional Hispanic Caucus memorandum.

<sup>20</sup> “Consideration of Deferred Action for Childhood Arrivals (DACA),” U.S. Citizenship and Immigration Services. Updated on website August 15, 2014.

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**Parents of DACA Recipients:** 648,766 to 1.3 million. This estimate is based on 580,859 DACA initial cases (not renewals) approved through the 3<sup>rd</sup> quarter of FY 2014.<sup>21</sup> An additional 70,736 initial cases are pending. Based on the 96 percent approval rate for DACA applications, this would bring the number of individuals who have received DACA to approximately 648,766 by the end of the fiscal year. There is not good information on the number of parents of DACA recipients currently in the United States but assuming either one or two parents in the United States per DACA recipient would give a range of 648,766 to 1.3 million.

**Siblings of DACA Recipients:** 200,000 or less. It seems likely that most siblings of DACA recipients were either born in the United States (and therefore are U.S. citizens) or are close enough in age and circumstances to also be eligible for DACA. Approximately 400,000 unauthorized immigrant children have U.S.-born siblings, according to the Pew Research Center.<sup>22</sup> Perhaps half that many or less have received DACA and also have siblings who are unauthorized and not eligible for DACA.

**Parents with U.S. Citizen or Lawful Permanent Resident Children:** 4.4 million or more. An estimated 4.4 million unauthorized adult immigrants had U.S.-born children (under 18) in March 2011, according to the Pew Research Center.<sup>23</sup> Good estimates are not available on the number of unauthorized immigrants with U.S.-born children over age 18 as of March 2011. Nor are good estimates available on the number of unauthorized immigrant parents with lawful permanent resident children. It is unlikely many unauthorized immigrant parents have children who are green card holders (and not U.S. citizens), since while a child born in the United States is a citizen at birth it would not be easy for a child brought here out of status to become a lawful permanent resident.

**Spouses of U.S. Citizens or Lawful Permanent Residents:** 1 million to 1.7 million. Immigration attorneys estimate 10 percent of their adult unauthorized immigrant clients have lawfully present spouses who could sponsor them for immigration if not for bars to sponsoring individuals in unlawful status.<sup>24</sup> According to the Department of Homeland Security, today approximately 10 million unauthorized immigrants are 18 years or older. If 10 percent have lawfully present spouses, then that would give an estimated figure of 1 million. Extrapolating from the answers given in a Latino Decisions/NALEO/America's Voice Education Fund survey of Latino

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<sup>21</sup> U.S. Citizenship and Immigration Services.

<sup>22</sup> Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, Pew Research Center, December 1, 2011. See also Stuart Anderson, *A Path to an Agreement?: Analyzing House and Senate Plans for Legalizing the Unauthorized Immigrant Population*, NFAP Policy Brief, National Foundation for American Policy, January 2014.

<sup>23</sup> Unpublished estimates obtained from Jeffrey S. Passel as part of the the Pew Research Center's Hispanic Trends Project. Based on estimates published in December 2012 in Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, Pew Research Center, Hispanic Trends Project, December 6, 2012.

<sup>24</sup> Single people without children may not be as likely to seek legal advice about immigration, which means it is possible estimates from attorneys may overstate how many people within the unauthorized immigrant population could be sponsored through the legal immigration system.

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unauthorized immigrants conducted in March 2013 would result in an estimate as high as 1.7 million unauthorized immigrants with a U.S. citizen or lawful permanent resident spouse.<sup>25</sup>

**Unauthorized Immigrants in the United States 10 Years or More:** Approximately 10 million of the 11.4 million people in the country without legal status have been in the United States 10 years or more, according to the Department of Homeland Security Office of Immigration Statistics.<sup>26</sup> While the Congressional Hispanic Caucus memo did not mention providing DACA to individuals based on their length of time in the United States, providing relief based on the number of years in the country has been a feature of bills in Congress.

## POTENTIAL PATHS TO GREEN CARDS FOR UNAUTHORIZED IMMIGRANTS

The Congressional Hispanic Caucus also proposes a number of measures that would make it possible for individuals in the country without legal status to obtain permanent residence (a green card). One mechanism to do so would be to expand “parole in place,” which would help those inside the country avoid grounds that would, in practice, render them ineligible for permanent residence. Those grounds include the “3 and 10 year bars” for those in the country out of legal status more than 180 or 365 days.

In November 2013, U.S. Citizenship and Immigration Services issued a policy memorandum on using parole in place to help the spouses, children and parents of members of the U.S. Armed Forces.<sup>27</sup> The Congressional Hispanic Caucus argues the November 2013 policy memorandum set the framework for expanding parole in place to other people. “Parole in place would allow immediate relatives of U.S. citizens who entered without inspection and are subject to the 3- or 10-year bar to apply for a green card.”<sup>28</sup>

Potentially as many as 4 to 6 million people, over a period of years, could gain permanent residence if the Obama Administration accepted the Congressional Hispanic Caucus recommendation on “parole in place” and related measures that could result in permanent residence for many individuals in the country unlawfully and currently ineligible for a green card.

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<sup>25</sup> Latino Decisions/NALEO/America’s Voice Education Fund survey of Latino Unauthorized Immigrants, March 2013. 400 person national telephone poll of Latino undocumented immigration, with a margin of error +/- 4.9.

<sup>26</sup> Bryan Baker and Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, Office of Immigration Statistics, Department of Homeland Security, March 2013. According to the report, 9.9 million of the 11.4 million unauthorized immigrants residing in the United States entered the country in 2004 or earlier.

<sup>27</sup> Policy Memorandum, “Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i),” U.S. Citizenship and Immigration Services, November 15, 2013 PM-602-0091.

<sup>28</sup> Congressional Hispanic Caucus memorandum.

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The estimate comes from examining the number of unauthorized immigrants who are the parents of U.S. citizens (4.4 million), the spouses of U.S. citizens or lawful permanent residents (1 million to 1.7 million), and potentially spouses, parents or minor children who have already been deported and permitted to re-enter the country and gain permanent residence (200,000 or more). “Between July 2010 and September 2012, nearly 205,000 parents of U.S. born children were deported from the U.S.,” according to the Congressional Hispanic Caucus.<sup>29</sup>

To reach the 4 million to 6 million estimate of individuals who could gain lawful permanent residence as a result of the executive action it could take many years, possibly decades. For example, a U.S. citizen child would need to be 21 years old before being able to sponsor a parent. Moreover, experience indicates the longer the timeframe the greater the likelihood a portion of those eligible for an immigration benefit do not attain it. Other factors could drive the numbers lower. Individuals could be denied adjustment of status if they violated other laws that bar adjustment, such as the law barring people from obtaining green cards if they have made a false claim to U.S. citizenship, notes Margaret Stock, counsel to the firm, Cascadia Cross-Border Law.<sup>30</sup>

## **CONCLUSION**

Legislation is needed to solve many of the key problems in the U.S. immigration system, including the lack of a legal visa category for most lower-skilled jobs, insufficient visas for high skilled foreign national, inadequate employment-based green card quotas and the per country limits on such quotas. However, it appears President Obama has made the political decision and policy choice to make at least some changes to the immigration system through administrative means.

Some have argued executive action along the lines proposed by the Congressional Hispanic Caucus would be beyond the President’s authority and would follow a pattern of usurping the prerogatives of Congress. *New York Times* columnist Ross Douthat wrote of the contemplated executive action: “It would be lawless, reckless, a leap into the antidemocratic dark.”<sup>31</sup>

Given that Deferred Action for Childhood Arrivals has been in effect for two years without any prospect a court will order the program stopped we cannot assume that the actions discussed in this analysis would be undone by court action. “As long as the administrative decision to defer the removal of a group of undocumented immigrants is legitimately aimed at more efficient use of law enforcement resources, it arguably falls well within the president’s discretion,” according to David Leopold, an immigration attorney in Ohio and a past president of the American Immigration Lawyers Association. “This includes the discretion to defer the deportation of

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<sup>29</sup> Ibid. Only the spouses of U.S. citizens would qualify as immediate relatives.

<sup>30</sup> Interview with Margaret Stock.

<sup>31</sup> Ross Douthat, “Obama’s Impeachment Game, *New York Times*, August 3, 2014.

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undocumented immigrants – individually or as a group – if doing so allows the administration to focus resources on keeping the country safe.”<sup>32</sup>

If a court does not overturn the executive action, then would Congress? In July 2014, the House of Representatives passed legislation that aimed at preventing the DACA program from continuing and stopping expansion to other groups. It appears unlikely such a measure would pass the Senate or be signed by the President.

A number of prominent Republicans hoped to get the immigration issue off the table and focus on attracting Latino voters on issues like jobs, taxes and education. The lack of immigration reform legislation in Congress and expected opposition by Republicans to President Obama’s executive order is likely to keep the issue alive through 2016. If the winning Republican presidential candidate pledges during the Republican primary to undo President Obama’s actions, then that would likely make it more difficult for that candidate to appeal to Latino voters in the general election.

The reality of human nature is once a benefit is granted the prospect of taking it away engenders hostility. That may figure into political calculations on this issue. It also may mean that whatever action President Obama takes it could change immigration policy for a long time. That is even more reason why if the President does issue an executive action on immigration, then he should use it to improve, within the law, the lives of those who have waited legally to immigrate to the United States.

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<sup>32</sup> David Leopold, “Obama Well Within His Authority on Deportations,” *The Hill*, August 12, 2014.

## ABOUT THE AUTHOR

Stuart Anderson is Executive Director of the National Foundation for American Policy, a non-profit, non-partisan public policy research organization in Arlington, Va. Stuart served as Executive Associate Commissioner for Policy and Planning and Counselor to the Commissioner at the Immigration and Naturalization Service from August 2001 to January 2003. He spent four and a half years on Capitol Hill on the Senate Immigration Subcommittee, first for Senator Spencer Abraham and then as Staff Director of the subcommittee for Senator Sam Brownback. Prior to that, Stuart was Director of Trade and Immigration Studies at the Cato Institute in Washington, D.C., where he produced reports on the military contributions of immigrants and the role of immigrants in high technology. He has an M.A. from Georgetown University and a B.A. in Political Science from Drew University. Stuart has published articles in the *Wall Street Journal*, *New York Times*, *Los Angeles Times*, and other publications. He is the author of the book *Immigration* (Greenwood, 2010).

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