

FREQUENTLY ASKED QUESTIONS

Administrative Immigration Relief 2014–15

IMMIGRATION ENFORCEMENT

NOVEMBER 21, 2014

On November 20, 2014, President Barack Obama announced his ten-point plan to change immigration policy. This FAQ describes the changes that will be made to the Department of Homeland Security’s (DHS’s) border, detention, and deportation policies. The National Immigration Law Center’s FAQ “[The Obama Administration’s Deferred Action for Parental Accountability and Expanded Deferred Action for Childhood Arrivals Program](#)” describes the administration’s plan to allow certain undocumented Americans to come forward and apply for work authorization and protection from deportation.¹

Secure Communities

■ Is it true that the Secure Communities Program (S-Comm) is being terminated?

Yes. S-Comm, which is a Department of Homeland Security program that began in 2008, will be terminated. Through S-Comm, the fingerprints of people arrested by state or local law enforcement agencies are shared with DHS for checks against the person’s immigration history.

Although marketed as a program that would allow U.S. Immigration and Customs Enforcement (ICE) to focus immigration enforcement resources on people who pose a threat to public safety, S-Comm has been the subject of widespread public criticism and outrage for its indiscriminate targeting of people in state or local law enforcement custody. DHS has announced that a new federal enforcement program will replace S-Comm: the Priority Enforcement Program (PEP).

■ What is the difference between S-Comm and the new Priority Enforcement Program (PEP)?

Under S-Comm, if a person’s fingerprints sent by the state or local law enforcement agency matched an immigration record, ICE issued an immigration detainer for the person, also known as an “ICE hold.” The detainer requested the local law enforcement agency to hold the person for an additional 48 hours after he or she would otherwise be released. The detainer was issued preconviction, which means before a person’s arresting charges were resolved.

¹ www.nilc.org/dapa&daca.html.

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According to the DHS announcement, PEP will continue to use fingerprint information obtained by state and local law enforcement agencies at the time of booking, but any immigration enforcement action will be taken only after the person is convicted of a crime. In addition, the person must be convicted of one of a list of prioritized offenses (see the section below titled “Prosecutorial Discretion”).²

However, there will be two notable exceptions to this policy. In the first, ICE may pursue deportation against people who pose a “demonstrable risk to national security,” regardless of whether they have been convicted of any crime. And under the second exception, ICE may pursue enforcement against people who fit within any of the November 20, 2014, prioritization categories (which includes all other immigration violations not included in the first two priority levels) if the state or locality agrees to cooperate with the transfer.

■ Will ICE still issue immigration detainers?

For the most part, no. ICE will no longer use detainers to request the extended detention of people in state or local custody. Instead, ICE will request that the state or local law enforcement agency notify ICE regarding the person’s impending release.

However, the memo does leave open the possibility that in “special circumstances” ICE could continue to use immigration detainers to request detention if the person is subject to a final order of removal or if there is other sufficient evidence to give ICE probable cause to believe that the person is removable.

■ What do the enforcement reforms mean for states and localities that passed TRUST policies, limiting the state or local agencies’ role in immigration enforcement?

The enforcement reforms do not change or undo any of the state or local policies aimed at limiting state or local law enforcement’s role in immigration enforcement (often called TRUST policies because their goal is to foster increased trust between immigrant communities and local police).

In practice, because under PEP ICE will no longer request detention (except in certain circumstances as discussed earlier), TRUST policies that are limited to prohibiting the detention of people on immigration detainers will have less practical impact. However many of the TRUST policies have additional provisions, including those that prohibit sharing information regarding the incarceration status and release dates of people in the agency’s custody with ICE. Nothing in the Nov. 20 announcements changes those policies.

² Convictions permitting immigration enforcement action under PEP include: terrorism; espionage; convictions posing a danger to national security; gang-related offenses; all felonies, except those in which an essential element was the noncitizen’s immigration status; “aggravated felonies” as defined by section 101(a)(43) of the Immigration and Nationality Act; 3 or more misdemeanors arising out of 3 separate incidents, except minor traffic offenses or offenses in which an essential element was the noncitizen’s immigration status; and “significant misdemeanors,” defined as domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, or any offense for which the person was sentenced to 90 days or more time in custody (not to include a suspended sentence).

■ What did *not* change about federal immigration enforcement?

The announced changes relate only to the federal Secure Communities Program. Other programs, such as the 287(g) program and the Criminal Alien Program will continue to operate in jails and prisons across the country. While the new prioritization memo aims to narrow DHS's priorities for immigration enforcement, DHS retains its enormous budget (ICE alone has a budget of over \$5 billion) and its deportation quota, so it is unlikely that these enforcement reforms will result in an actual decrease in the number of deportations.

Workers' Rights

■ Do the administrative reforms announced by the president include any changes to the U-visa process?

Yes. Under the new reforms, the U.S. Department of Labor (DOL) will now be authorized to provide certification for three additional qualifying crimes if they arise in the workplace and are related to a violation of a law that the DOL enforces: extortion, forced labor, and fraud in foreign labor contracting. These crimes are in addition to the qualifying crimes for which the DOL was already providing certification, including involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering.

To obtain certification for any of these crimes, you should submit a request for certification, including Form I-918B and a detailed description of the facts and relevant statutes or case law, to one of the five DOL Regional U-Visa Coordinators. For more information about the DOL certification process, see www.dol.gov/whd/FieldBulletins/fab2011_1.htm.

■ Do the administrative reforms announced by the president include any changes to the T-visa process?

Yes. Under the new reforms, DOL will now issue T-visa certifications for survivors of trafficking if human trafficking activity is detected in the course of DOL's workplace investigations.

■ Does the president's announcement include any other reforms that pertain specifically to worksite immigration enforcement?

The president announced the creation of a new interagency taskforce that will focus specifically on worksite enforcement issues. The taskforce will be comprised of several governmental agencies, including the Department of Homeland Security, the U.S. Department of Justice, the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board.

The purpose of the taskforce will be to promote workers' cooperation with labor and employment law enforcement agencies without fear of retaliation and to ensure that worker protections are not undermined or violated through the use of immigration authorities in labor disputes. The task force will also strengthen the processes for staying the removal of undocumented workers engaged in workplace disputes and for providing them temporary work authorization during an investigation or proceeding.

- Is the John Morton memo *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), which protects victims, witnesses, and plaintiffs involved in labor-related violations, still valid after the president’s announcement?

Yes, this Morton memo is still in effect. It provides ICE personnel with guidance about when to exercise *prosecutorial discretion* (see below for a definition) and includes criteria that specifically take into account immigrant workers, both victims of workplace abuse and those attempting to enforce their labor rights.

Prosecutorial Discretion

- What is prosecutorial discretion?

ICE has the power to choose whether to proceed with deportation cases. This power is called “prosecutorial discretion.” This gives ICE flexibility to decide which cases to pursue for deportation and the power to stop the deportation process. Although ICE officials have used this power for many years, in June 2011 ICE issued a memo announcing a change in the way it would use this power. ICE said it would exercise prosecutorial discretion in deportation cases that it considers “low priority.”

- Have the prosecutorial discretion priorities changed?

DHS issued a memo on Nov. 20, 2014, that will take the place of the June 2011 memo. The Nov. 20 memo creates new “priority” levels.

Priority level 1 includes people apprehended at the border while attempting to unlawfully enter the U.S., people who have felony convictions, and people who “pose a danger to national security.”

Priority level 2 includes people convicted of a “significant misdemeanor”³ and people convicted of 3 or more misdemeanors.

Finally, priority level 3 includes people with deportation or removal orders issued on or after January 1, 2014.

- What does it mean to be in the priority level 1 category?

DHS will prioritize the detention and deportation of level 1 people by focusing its resources on deporting them. Priority 2 is the second highest priority for deportation, while priority 3 is the lowest priority.

People in all three categories will be prioritized for deportation unless they qualify for a way to remain in the U.S. legally or can show that they are not a threat to public safety or national security.

³ Domestic violence, sexual abuse or exploitation, burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence. For an offense not listed above, one for which the person was sentenced to custody for 90 days or longer (this does not include a suspended sentence).

Detention

■ **Were changes made to detention policies?**

Unless a person is required to be detained under immigration laws (mandatory detention) or the person's case has extraordinary circumstances, ICE will not detain people who are suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.

Border

■ **Were changes made to border enforcement?**

DHS will commission three joint task forces that will be responsible for the southern border and west coast. The task forces will consist of officials from the U.S. Coast Guard, ICE, and U.S. Citizenship and Immigration Services (USCIS) and will further the goals of a Southern Border and Approaches Campaign, which include stopping people attempting to enter unlawfully between ports of entry and decreasing terrorist threats.

This document is a work in progress and will be updated as DHS releases more details about the deferred action process. Check www.nilc.org/relief.html for updates.

NOTE: This FAQ contains general information and **is not legal advice**. Every case is different.

Do NOT take advice from a notary public or an immigration consultant. **Contact ONLY** a qualified immigration lawyer or an accredited representative for legal advice on your case.

For more information, contact

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