

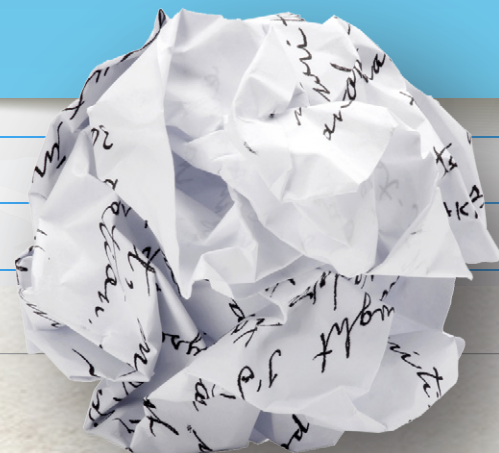
REPORT CARD

HOW PRESIDENT OBAMA CAN IMPROVE IMMIGRATION IN HIS LAST YEAR



FAIL

Humanitarian Protection and Family Detention



INCOMPLETE

The Legal Immigration System

UNSATISFACTORY

Enforcement

GOOD EFFORT

Relief for the Undocumented

With one year left in office, there is much that President Obama can still do to fix America's immigration system.

Sweeping plans he announced one year ago have only been partially implemented, and overall, his record on immigration during seven years in office is mixed. With Congress seemingly unable to pass meaningful reform, the American Immigration Lawyers Association (AILA) urges the president to lead on immigration and ensure lasting change for the nation. AILA recommends actions in four major areas: 1) humanitarian protection and family detention; 2) the legal immigration system; 3) enforcement; and 4) protecting undocumented families and others with strong ties to America.



Humanitarian Protection and Family Detention [FAIL]

When it comes to humanitarian protection, and in particular, the response to the refugee crises in Central America and Syria, the president has failed. When Salvadoran, Guatemalan, and Honduran individuals and families, including young children, arrived at our southern border seeking refuge from the horrific violence plaguing those countries, the president should have protected them. Instead, the Obama Administration treated these refugees as a border threat, detaining thousands and putting them on a fast track for deportation. The administration has bought into the false premise that it cannot protect refugees without compromising the integrity of our border or national security. As a result, it has undermined America's global reputation as a humanitarian leader. With respect to the Syrian refugee situation, the U.S. response has been modest at best, unbecoming of a country that was founded on humanitarian values with the resources to do so much more. Consequently, refugee protection is also the area of greatest opportunity where the president can still take action to save thousands of lives.

- **Start treating Central American families as refugees:** The president should acknowledge that the situation in Central America is a humanitarian crisis and use every tool at his disposal to protect fleeing refugees. The president should end the massive detention of families, and return to the practice of releasing mothers and their children to relatives and other sponsors. Community-based alternatives to detention should be used but only when necessary to ensure appearances in court. To date, the Central American Minor program has not resettled a single child and should be completely overhauled.
- **Protect more Syrian refugees:** The president should increase the fiscal year 2016 refugee resettlement goal to at least 200,000 refugees, of which 100,000 should be Syrian.
- **Improve protections for asylum seekers:** Asylum seekers should be protected from removal as required by law and should never be prosecuted for illegal entry or reentry. DHS should end the unconscionable practice of expedited removal and other fast-track processes against asylum seekers. Parole should be granted as a matter of course to asylum seekers.

The Legal Immigration System [INCOMPLETE]

The president has proposed more changes to improve the legal immigration system than any other. While these plans would greatly benefit American families, businesses, and the U.S. economy, most have not been introduced at all or are just beginning to be rolled out.

The president cannot leave office without fulfilling his pledge to make improvements to the legal employment-based immigration system, including changes to promote research and development and improve opportunities for entrepreneurial business growth. The administration began making such promises in 2011 with the launch of the Entrepreneurs in Residence initiative, a program that was intended to promote startup enterprises and spur job creation. Though it was announced with much fanfare, the initiative has not produced any tangible results.

Among the more promising reforms is the expansion of the "provisional waiver" process, first begun in 2013, which has already enabled thousands of families to remain together while going through the proper legal channels to obtain their green cards. In the next 12 months, the president must:

- **Fulfill promises to promote research, development, and start-ups** by issuing expansive guidance on the availability of the national interest waiver to benefit the U.S. economy and launching a parole program for inventors, researchers, and start-up founders.
- **Finalize a regulation for the Optional Practical Training program** for science, technology, engineering and mathematics (STEM) fields that maximizes the participation of students and employers.
- **Publish regulations significantly reforming the permanent labor certification program (PERM).**
- **Finalize regulations to expand the provisional waiver program** by allowing people in removal proceedings to apply and ensuring that the legal interpretation for "reason to believe" does not prematurely eliminate anyone. The regulation should also provide an appellate review process.
- **Publish regulations on the extreme hardship standard.** The proposed guidance is a good interim step to helping more individuals apply for green cards. The standard can be improved with a regulation that includes presumptions of hardship.



Enforcement [UNSATISFACTORY]

The president has not made good on his 2014 pledge to ensure immigration enforcement is humane. U.S. Border Patrol still operates with almost no accountability for the excessive use of force, and its practices remain largely shrouded from the public. The president's tenure is also tarnished by mass detentions, now exceeding 400,000 people each year, and fast-track deportations that bypass review by immigration judges – a severe deprivation of due process. These punitive measures are unnecessary and ineffective.

The administration's prosecutorial discretion policies have yielded more fair and just outcomes in some regions where officers are choosing not to pursue enforcement against individuals with strong equities and ties to the U.S. In other jurisdictions, prosecutorial discretion is not being exercised, and it is unclear whether the Department of Homeland Security (DHS) can successfully implement its policies nationwide.

President Obama has presided over a period of unprecedented growth in the deployment of resources dedicated to enforcement, estimated at \$18 billion for 2012. Fencing, personnel, and surveillance on the border is currently at an all-time high, resulting in more people being detained and removed during this administration than in any other. Despite these efforts, the president has endured constant criticism that he is not enforcing the law.

In the past year removal numbers have declined, a phenomenon the administration attributes to the successful implementation of its enforcement priorities. The drop in removal figures, however, is also the result of historic declines in illegal border crossings to the lowest point in more than 40 years. Fewer illegal entrants means fewer removals. Moreover, the number of Mexican border

apprehensions has dropped while the number of arrivals from Central America has risen dramatically due to the violence in Guatemala, Honduras and El Salvador. The processing of asylum claims for Central American refugees takes far more time and resources, thus further reducing total removals. In his last year in office, President Obama should:

- **Reduce immigration detention and ensure that every detained person has a prompt bond hearing before an immigration judge.** In cases where bond or release is not possible, DHS should expand the use of community-based alternatives to detention.
- **Reduce federal prosecutions for illegal entry and reentry** and reserve such prosecutions for individuals who pose a threat to public safety or national security.
- **Ensure everyone in the removal process has legal counsel.** The administration should expand legal assistance programs to those deprived of their liberty and other vulnerable populations, including families and unaccompanied children; expedite the hiring of immigration judges and staff; and request significantly higher appropriations for immigration courts.
- **Strengthen prosecutorial discretion.** DHS should screen recent border crossers and people with minor or old convictions for family ties and length of residence in the U.S. These individuals should not be treated as automatic priorities for removal.
- **Allow detainer requests to be issued to local law enforcement agencies only after DHS demonstrates probable cause that is promptly reviewed by a judge.**

Relief for the Undocumented [GOOD EFFORT]

The failure to lead on immigration reform rests primarily with a divided Congress which has not passed a major bill in more than a decade. Already, House Speaker Paul Ryan has pledged not to address immigration in 2016. In 2012, in the absence of legislative action, the president announced bold reforms within his executive authority, most notably the highly successful Deferred Action for Childhood Arrivals (DACA) which has provided temporary reprieve from deportation for nearly 700,000 people.

Unfortunately, the 2014 Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and the expansion of DACA were halted by a Texas federal court injunction and are still being fought in court. The DACA and DAPA reforms are clearly within the president's constitutional authority. With three out of four Americans in support of legalization, the president should be praised for providing relief for those who would have been eligible for legalization and are still at risk of deportation.

- **Defend the DAPA and expanded DACA programs vigorously in court and ensure they are implemented.** The president should also explore other methods for granting reprieve from deportation for those with strong ties to our country who call America home, and use his executive authority to the maximum extent possible to provide relief for the undocumented.



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Humanitarian Protection and Family Detention

Central American refugee crisis

A dark blemish on this president’s record is his treatment of thousands of Central American refugees, including unaccompanied children and families. There is now overwhelming evidence that the vast majority of the Central American families who arrive at our borders are refugees. In October, *The Guardian* reported on more than 80 confirmed cases, since January 2014, in which Central Americans deported from the U.S. had been killed upon return to their home country.

The administration has shamefully justified massive detention and rapid deportations as necessary to fortify America’s borders against what has proven to be a non-existent threat. Two federal district courts have now ruled against the administration’s family detention practices. Three out of four Democrats in Congress have called upon the president to end family detention. The tide is turning against this abhorrent practice, and the administration has the opportunity to uphold America’s commitment to protect refugees.

Recommendation: The president should end family detention and release mothers and their children to family and other sponsors. Community-based alternatives to detention should be used but only when necessary to ensure appearances in court. DHS should ensure due process and provide legal counsel to mothers and their children. All asylum seekers should have the opportunity to appear before an immigration judge rather than be subject to expedited removal and fast-track removal processes. The Central American Minor program should be overhauled.

Syrian refugee crisis

No less important is the protection of refugees fleeing civil war in Syria and other violent conflicts abroad. The U.S. has pledged to resettle 10,000 Syrian refugees in the current fiscal year, an embarrassingly inconsequential increase. Our nation has always been a beacon of hope for those fleeing persecution and oppression, and we should accept far more than the 85,000 total refugees planned for the next year.

Recommendation: In the current fiscal year, the administration should resettle at least 200,000 refugees, of which 100,000 should be Syrian.

Operation Streamline and the prosecution of asylum seekers

For years, Operation Streamline has been the subject of controversy for fast-tracking federal criminal prosecutions against those who commit immigration status offenses and depriving individuals of due process. Operation Streamline, unwisely shifts law enforcement resources away from the prosecution of more serious crimes such as weapons and narcotics smuggling and human trafficking. In 2015, the DHS Inspector General concluded that Customs and Border Protection (CBP) uses the program to refer asylum seekers for prosecution, a practice which violates U.S. and international law.

Recommendation: DHS should halt Operation Streamline which subjects thousands of asylum seekers to rapid, mass removal hearings that deprive them of a fair day in court and the opportunity to seek protection in the U.S.



Legal Immigration

Entrepreneurs, inventors, and researchers

The administration has long pledged to improve policies benefiting entrepreneurs, researchers, and inventors. DHS should act immediately to implement the reforms announced in November 2014:

Recommendation — National Interest Waivers: With an eye toward promoting research and development in the United States, in November 2014 DHS announced plans to issue guidance or regulations to clarify the standard by which a national interest waiver can be granted to benefit

the U.S. economy. To date, nothing has been published.

Recommendation — Parole for Entrepreneurs, Inventors, Researchers: In November 2014, DHS proposed a program that would permit parole status for inventors, researchers, and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research. To date, no proposed rule has been published.

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STEM/Optional Practical Training (OPT)

In November 2014, DHS announced plans to evaluate, strengthen, and improve the OPT program for foreign students and graduates with degrees in science, technology, engineering, and mathematics to further enhance American innovation and competitiveness. In October 2015, DHS published a proposed rule with a final rule expected by early 2016.

Recommendation: DHS should improve the proposed rule by ensuring that requirements pertaining to mentoring and training, evaluations, and attestations are not so burdensome as to drive employers and individuals away from the program. To encourage entrepreneurship and job creation, DHS should also permit self-employment and non-salary compensation while in STEM OPT status.

PERM modernization

In November 2014, the Department of Labor announced that, in conjunction with the 10-year anniversary of the PERM (permanent labor certification) program, it would embark upon a review of the PERM regulations with the goal of modernizing the program and making it more responsive to changes in the national workforce. DOL has stated that a notice of proposed rulemaking should come in early 2016.

Recommendation: The DOL final rule should make significant changes to the PERM program to permit correction of “harmless errors;” reduce backlogs; incorporate real-world, modern recruitment practices; recognize teleworking and flexible work arrangements; reform the prevailing wage process; and expand the list of shortage occupations, among other things.

Provisional unlawful presence waivers

In March 2013, DHS announced a new system to accept applications for provisional unlawful presence waivers for immigrant visa applicants who are the spouses, children, and parents of U.S. citizens. The process allows qualified individuals to apply for a waiver while in the United States, thus shortening the time families are separated while they go through the process of becoming U.S. lawful permanent residents. The provisional waiver program has alleviated unnecessary familial hardship for thousands of people. Moreover, it has facilitated legal immigration by encouraging more individuals to apply for green cards. In 2015, DHS published a proposed rule to expand the provisional waiver program to include all individuals who are statutorily eligible for an unlawful presence waiver and to expand the list of those who can be considered a “qualifying relative” for purposes of the “extreme hardship” determination.

Recommendation: To allow more people to benefit from the program, DHS should establish an interpretation of “reason to believe” to ensure individuals are not unnecessarily and prematurely eliminated from the program. DHS should also allow individuals who are in removal proceedings to apply for provisional waivers, and establish a mechanism for appeal or reconsideration of waiver denials.

Extreme hardship guidance

In November 2014, DHS announced plans to clarify the definition of “extreme hardship,” the standard that applicants must demonstrate to qualify for many different types of

waivers of inadmissibility, including provisional unlawful presence waivers.

Recommendation: As DHS revises the draft memorandum issued in October 2015, it should reconsider establishing criteria for which a presumption of hardship may be deemed to exist. Moreover, while the policy guidance is a good interim step to help more individuals and families apply for lawful permanent resident status, ultimately, DHS should memorialize a generous and humanitarian extreme hardship standard that fosters family unity by publishing a regulation.

Visa bulletin changes/Determining when an immigrant visa is “available”

In September 2015, DHS and the Department of State (DOS) announced improvements to the system for determining when an immigrant visa is “available,” thus allowing applicants to submit an application for permanent residence. Unfortunately, on September 25, just five days before the filing window was to open, DOS and DHS rolled back previously announced filing dates. The sudden change significantly reduced the number of applicants who could file for adjustment of status, hurting many applicants who relied upon the earlier announcement.

Recommendation: DHS and DOS should provide the public with greater transparency into calculating and determining demand and availability for visas under the new process and take steps to advance the filing dates to allow as many people to benefit from early filing as possible.



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Providing stability to employment-based immigrants

In November 2014, DHS announced plans to provide better stability to the beneficiaries of approved employment-based immigrant visa petitions who are unable to move forward with an application for permanent residence due to the long visa backlogs.

Recommendation: DHS should move quickly and issue a proposed rule to ensure that approved, long-standing visa petitions remain valid in certain cases where the beneficiary seeks to change jobs or employers, and to provide other relief to workers facing lengthy green card delays.

Portability for employment-based immigrants

In November 2014, DHS announced plans to clarify the types of job changes that constitute a “same or similar” job, thus allowing such workers to change jobs without jeopardizing their ability to apply for green cards.

Recommendation: DHS should issue guidance or regulations on portability that provides increased flexibility and stability to foreign workers while ensuring a more level playing field for U.S. workers. Such guidance or regulations should not include unnecessarily burdensome procedures or a lengthy application form, and under no circumstances should DHS seek to impose a fee on individuals or employers in making a “same or similar” determination.

The L-1B visa program

According to a March 2015 report by the National Foundation for American Policy (NFAP), the “denial rate for L-1B petitions increased to a historic high of 35 percent in FY2014.” In August 2015, DHS published new policy guidance on the meaning of “specialized knowledge” with the intention of bringing “greater coherence and integrity to the L-1B program, improve consistency in adjudications, and enhance companies’ confidence in the program.” It is too soon to determine whether employers will see greater predictability and a discernable shift in U.S. Citizenship and Immigration Services (USCIS) adjudications under this new policy. The new 23-page policy may create more confusion in an already complicated area of law.

Recommendation: To improve transparency and to allow the public to determine whether adjudicators are properly implementing the new guidance, USCIS should issue statistics on adjudications not only for FY2015, but importantly, for the first quarter of FY2016- the first full quarter for which the new policy memorandum will have been in effect.

Work authorization for H-4 spouses

In May 2015, USCIS began implementing a new regulation extending work authorization to H-4 spouses of H-1B workers who are well into the process of getting a green card.

Recommendation: This regulation should be expanded to include all H-4 spouses.



Parole for the families of Filipino veterans

The White House report, “Modernizing and Streamlining Our Legal Immigration System for the 21st Century,” proposed creating a program to allow certain family members of Filipino World War II veterans to seek parole, similar to the Cuban Family Reunification Parole Program and the Haitian Family Reunification Parole Program. For these Filipino veterans who fought side-by-side with U.S. forces during WWII, such a program would finally allow them to reunite with close family members. Filipino veterans are aging and many need support and care from their family.

Recommendation: DHS should immediately move forward to establish a parole program for Filipino veterans.



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Detention

Despite national progress on prison and sentencing reform, immigration detention continues to be a growth industry that costs taxpayers \$2 billion each year and results in the detention of more than 34,000 people per day. Individuals who pose no threat to public safety, including asylum seekers and families, are frequently held for long periods without the opportunity to seek release on bond or other alternatives to detention. President Obama has not implemented any notable reforms to address over-incarceration in the immigration context.

Recommendation: DHS should affirm the well-established principle that detention for civil immigration purposes must only be used as a last resort after an individualized assessment determines there

are no other alternatives. DHS should pilot a community-based ATD program that is not operated by the private prison industry. Alternatives to detention should also be authorized for individuals subject to mandatory custody requirements by statute. DHS and the Department of Justice (DOJ) should provide prompt bond hearings to all detained noncitizens. Finally, the current process for inspecting detention facilities is defunct and requires immediate overhaul.

Prosecutions for illegal entry and reentry

Under President Obama, there has been a dramatic increase in federal prosecutions for illegal entry or reentry. Between 1992 and 2014, convictions for all immigration-related

crimes (the vast majority of which are for illegal entry/reentry) rose from just 5 percent to 30 percent of all federal criminal convictions. Immigration offenses in the first seven years of Obama’s presidency totaled 555,974 convictions, compared to 251,952 during all eight years of the Bush Administration. Expending resources to prosecute non-dangerous individuals for illegal entry and reentry is a waste of limited federal prosecutorial and judicial resources.

Recommendation: DOJ should reduce prosecutions for illegal entry and reentry and prioritize their use for individuals who pose threats to public safety or national security. DHS should halt Operation Streamline.

Prosecutorial discretion

In November 2014, DHS issued new enforcement priorities targeting individuals with criminal convictions, those who pose threats to national security or public safety, and recent illegal entrants. The administration deserves credit for increasing enforcement against individuals with criminal convictions and improving the exercise of prosecutorial discretion in some parts of the country.

Recommendation: The president must ensure the 2014 enforcement priorities are implemented nationwide, and that all enforcement personnel within Immigration and Customs Enforcement (ICE) and CBP are properly trained to apply the policies. Recent border crossers should not be an automatic priority for removal and should be screened for prosecutorial discretion with particular

attention given to family ties and length of residence in the U.S. Individuals with minor convictions or old convictions for which they have been rehabilitated also deserve careful screening for prosecutorial discretion.

Reduce the immigration court backlog

Over the past decade, Congress has dramatically increased funding for ICE and CBP, yet it has not provided the immigration courts with commensurate funding to handle the hundreds of thousands of new removal cases received each year. In November 2015, more than 456,000 cases were on the court docket and the average case had been pending for 643 days. One year ago, the administration announced plans to reform the courts but has yet to explain how it will implement these changes.

Recommendation: To improve the efficiency and fairness of court adjudications, the president should expedite the hiring of judges and court personnel. He should request additional appropriations from Congress for the immigration court system to provide significantly more judge teams than the 55 requested in his 2016 budget.

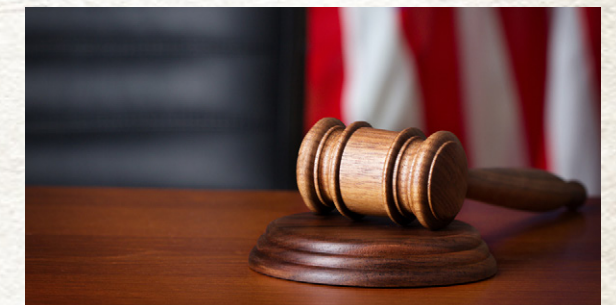


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Access to legal counsel

Studies show that represented individuals are far more likely to appear for immigration court proceedings. In the past few years, DOJ, Corporation for National and Community Service, and the Department of Health and Human Services launched promising pilot programs to provide counsel for unaccompanied children.

The Legal Orientation Program (LOP) run by the immigration court system has demonstrated remarkable success in improving the efficiency of adjudications and ensuring detained noncitizens appearing before the court understand their legal rights and duties. On average, program participants move through immigration court about 13 days faster than non-participants and there-

fore spend less time in detention. LOP saves both judicial resources and detention costs. The LOP program has grown considerably in recent years but still is not offered to everyone in detention.

Recommendation: Everyone in the removal process should be guaranteed counsel, paid for by the government when necessary. The president should expand upon existing pilot programs to provide legal counsel for those who are detained and for vulnerable populations, including children, families, and the mentally incompetent. LOP should be expanded to ensure everyone in detention, including Border Patrol custody, receives a presentation outlining the individuals' rights and obligations.



Accountability in Customs and Border Protection

Lack of accountability continues to be a serious problem at CBP, which has not responded adequately to the use of excessive and lethal force by field personnel. CBP has dragged its feet in implementing body-worn cameras.

Recommendation: Greater transparency and release of data on the use of force is needed from CBP to demonstrate that real steps are being taken to stop abusive practices and that its officers are accountable. CBP should immediately implement a plan to require all field officers to wear body-worn cameras which are being instituted in law enforcement agencies nationwide as an effective tool for preventing misconduct.

Federal collaboration with local law enforcement

In November 2014, in response to criticism from hundreds of local law enforcement

agencies as well as victim and community organizations, DHS terminated the highly controversial Secure Communities program. Secure Communities and other federal and local collaborations on immigration enforcement have instilled fear in immigrant communities and discouraged victims and witnesses of crimes from coming forward to report crimes. According to DHS, the new Priority Enforcement Program (PEP) will use detainers in more limited circumstances and treat them as requests to local law enforcement agencies to detain individuals. DHS has given no indication that PEP detainers will be accompanied by judicially determined probable cause, and as a result, local authorities may still be liable for unconstitutional detention practices.

Recommendation: DHS should establish a policy allowing detainer requests only in cases where DHS demonstrates probable cause that is promptly reviewed by a judge.

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Relief for the Undocumented



Deferred Action for Childhood Arrivals (DACA)

In August 2012, USCIS began accepting applications for deferred action and employment authorization for certain undocumented individuals who came to the United States as children and meet other eligibility criteria. As of June 30, 2015, USCIS approved a total of **681,345 initial DACA applications, and 377,767 renewal applications.** Though not permanent, the DACA initiative gives new hope for many immigrants who have for many years lived in fear of deportation.

Recommendation: The administration should ensure that renewal DACA applications are adjudicated in a timely manner to prevent applicants from having a lapse in their work authorization. Interim work authorization should be provided for those applications that are not adjudicated before the prior work authorization lapses.

Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)/Expanded DACA

The signature reforms DHS announced on November 20, 2014, are new policies on the use of deferred action to protect the undocumented population from enforcement. The DACA expansion would eliminate the age cap and provide for a more expansive eligibility cutoff date. The new DAPA program would establish a new deferred action process for certain parents of U.S. citizens or permanent residents. Though the initiatives could benefit approximately 4.4 million individuals, a federal court has enjoined their implementation as a result of litigation filed by Texas and 25 other states.

Recommendation: The president should defend the programs vigorously in court and seek certiorari before the Supreme Court on an expedited basis. The administration should explore alternative ways,

including deferred action and parole in place, to grant reprieve from deportation for families and other individuals with strong ties to the country.

Relief for military personnel

On November 15, 2013, USCIS issued a memo encouraging the use of parole in place for certain military family members. These policies helped ease the stress and anxiety on military personnel caused by the lack of immigration status of close family members. On November 20, 2014, Secretary Jeh Johnson issued a memo directing USCIS to issue additional policies to encourage the use of parole in place and deferred action for individuals seeking to enlist in the U.S. Armed Forces.

Recommendation: DHS should issue the announced policy providing protection for individuals seeking to enlist.



AMERICAN IMMIGRATION LAWYERS ASSOCIATION

For more information about these and other immigration issues, please see our website at www.aila.org