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Immigration

Possibly Leaked Document Arouses Suspicion About Pending Immigrant Work Permit Rule

A document said to have been leaked from U.S. Citizenship and Immigration Services shows a range of options for granting work permits to both documented and undocumented immigrants, raising some eyebrows over the past week.

The June 2015 memorandum was posted Oct. 27 by Immigration Voice, an organization representing high-skilled foreign workers. An apparent follow-up to a ''Regulations Retreat,'' it goes through the pros and cons of various regulatory scenarios in which different groups of immigrants would be granted employment authorization documents (EADs).

The Immigration Reform Law Institute, the legal affiliate of the Federation for American Immigration Reform—which supports lower levels of immigration—said Nov. 2 that the memo is evidence that the administration is looking at options for getting around a February court order.

''It's basically trying to do what's been blocked,'' Ian Smith, an investigative associate with IRLI, told Bloomberg BNA Nov. 3.

The order, issued in February by Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas (*Texas v. United States*, S.D. Tex., No. 1:14-cv-00254, *preliminary injunction issued* 2/16/15) (31 DLR AA-1, 2/17/15), barred the administration from granting EADs—also known as work permits—and deferral from deportation to some 5 million undocumented immigrants under new programs announced as part of President Barack Obama's executive action on immigration (225 DLR AA-1, 11/21/14).

The administration has appealed the injunction against the expanded deferred action for childhood arrivals program and new deferred action for parents of Americans and lawful permanent residents program. Although the U.S. Court of Appeals for the Fifth Circuit heard oral arguments in July (132 DLR A-3, 7/10/15), the court has yet to issue a decision.

Congressman Decries Memo. Reports that the administration could be exploring back-door avenues for skirting the injunction have reached the ears of lawmakers, including former House Judiciary Committee Chairman Lamar Smith (R-Texas).

''This memo shows the great lengths to which [Department of Homeland Security] officials have gone in order to defy a federal judge's orders that halted President Obama's executive actions from last November,'' Smith said in a Nov. 3 statement. ''The American people cannot and will not tolerate this administration ignoring the rule of law. It is the only thing that protects the people and distinguishes our democracy from a dictatorship.''

A USCIS spokesman Nov. 3 declined to comment on the record about the memo, including whether or not it's from the agency.

The memo considers the benefits and drawbacks of providing EADs to four different groups of immigrants:

- individuals who are physically present in the U.S., including those who are lawfully present, those who entered without inspection and/or those who overstayed their visas;

- individuals who are lawfully present in the U.S., including those whose status may have expired but who have filed a timely request for an extension of stay or change of status, parolees and those who either entered the U.S. illegally or who overstayed their visas, yet are allowed to remain in the U.S. and not accrue unlawful presence;

- individuals with lawful temporary immigration status that hasn't expired; and

- individuals with certain temporary visas, which excludes those on H-1B highly skilled guestworker visas or those with an L-1A intracompany transferee visa for executives or managers.

'Would Seem to Cover the Exact Same People.' IRLI's Smith told Bloomberg BNA the first option ''would seem to cover the exact same people that have been blocked'' by Hanen's order. He added that ''it's possible that the second option as well might also cover those people.''

One of the ''pros'' listed under the first option in the memo is that it would cover ''the needs of some of the intended deferred action population.''

In a blog published Nov. 2 on the website of the Hill newspaper, IRLI's Smith said the memo is an indication that the administration, rather than waiting for the courts to resolve the issues in the lawsuit—including the legality of the deferred action programs at issue—is gearing up to roll out a massive EAD campaign that po-

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tentially could cover millions of undocumented immigrants.

Such a move not only would violate the court order, but also the 1986 Immigration Reform and Control Act, which set up the current employment authorization rules.

But Aman Kapoor, co-founder of Immigration Voice, told Bloomberg BNA Nov. 3 that the first option listed in the memo ''is not on the table right now.''

He said the only population group currently under consideration for EADs in the regulations that are in the works is highly skilled immigrants who came to the U.S. legally and who remain in lawful status but are being bogged down by the lengthy green card application process.

Employment-based green cards can take years or even decades to obtain even after an employer's I-140 petition is approved because of annual caps on the visas as well as per-country caps.

In the meantime, Kapoor said, the green card seekers are ''tied to the same employer'' because of the terms of their temporary work visas. According to Kapoor, no matter how good an employer-employee relationship is, ''the unfairness will come into that relationship'' once the employer knows the employee can't leave for another job.

Effort to Restrict Breadth of Regulation. Rather than granting EADs to broad groups of immigrants, undocumented or otherwise, Kapoor told Bloomberg BNA that there is a ''systematic effort going on behind the scenes,'' spurred by big business, to actually severely restrict the types of immigrants who would be eligible for the documents.

Granting EADs to the beneficiaries of I-140 petitions would allow them job mobility while they are awaiting their green cards. Additional flexibility in being able to change jobs during this time was part of President Barack Obama's executive action on immigration, announced nearly a year ago .

But Kapoor said although it wasn't originally part of the plan, there is now a push for EADs to be offered only to those who can demonstrate that ''extraordinary circumstances'' such as economic hardship or exploitation by the employer require that the document be issued.

Immigration Voice in an Oct. 27 post said this limitation would mean no more than 600 people a year would be eligible for EADs.

IRLI's Smith maintained Nov. 3 that only the third and fourth options in the memo seem to pertain to foreign workers with approved I-140s, whereas the first two options explore granting EADs to ''everyone under the sun.''

''And we've seen that already,'' he told Bloomberg BNA. Smith pointed to one of the administration's chief arguments in the lawsuit over the deferred action programs—that a 1981 regulation allows the grant of EADs to recipients of deferred action at the discretion of the Homeland Security Department.

Even without deferred action, an EAD ''kind of anchors you a little bit more closely to the country'' and therefore serves as a type of ''quasi-amnesty,'' Smith told Bloomberg BNA.

Do Employers Petition for Undocumented Workers? Although the reasons an employer would have to file an I-140 on behalf of an undocumented immigrant ''are varied,'' Smith said the petition doesn't require that the employer prove that the worker is in lawful immigration status.

But Greg Siskind, an attorney with Siskind Susser in Memphis, Tenn., said in a Nov. 4 e-mail to Bloomberg BNA that it would be highly unlikely for an employer to petition for a green card for an undocumented immigrant, including one who would be covered by DAPA if it had gone into effect.

Because of increasing pressure to use the E-Verify electronic employment eligibility system—including mandates in 22 states—as well as increased enforcement by Immigration and Customs Enforcement, employers ''are going to be a lot more concerned about being prosecuted under IRCA if they file an application for an unauthorized worker,'' Siskind said.

He added that undocumented workers themselves are reluctant to come forward to start the green card application process out of fear of exposing themselves to deportation.

''If this is the means to skirt the injunction, it's not likely to be the most effective way,'' Siskind said. Considering the time it takes to file and get a permanent labor certification application approved, combined with the time it takes to file and get an I-140 petition approved—plus a likely built-in waiting time of 180 days—''you're probably looking at about two years before these folks got an EAD card,'' he said.

''That takes you in to the next presidency and who knows what will happen,'' Siskind said.

IRLI's Smith said the memo references approved I-140s, but it isn't clear that the USCIS would indeed make that a requirement for the EADs to be issued.

Skilled Workers, 'Quasi-Legal Status.' Siskind, like Kapoor of Immigration Voice, said he believes the regulations likely will be ''conservative'' and cover skilled foreign workers and those with lawful status or ''quasi-legal status'' such as temporary protected status or DACA protection under the original, 2012 program, which wasn't affected by the injunction.

Immigrants with TPS and DACA already are working legally in the U.S., removing the enforcement risks for both them and their employers, he explained. ''This might make it easier for some of them to eventually transition to permanent residency,'' Siskind said.

Kapoor told Bloomberg BNA that he expects a proposed rule to be released around the middle of November, in time for the one-year anniversary of the president's announcement of the executive action. At the same time, he said there is no reason the regulations should have taken so long to be issued when immi-

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grants who are seeking green cards have been waiting so long for relief.

Kapoor said employers typically wait until the fifth year of an H-1B worker's six-year term to start the labor certification portion of the green card application process. PERM approval takes about a year to a year and a half, and then the I-140 petition approval process takes another six to eight months, he said.

That means foreign workers have been with the same employer for around seven and a half years by the time the I-140 is approved, he said. Adding another waiting period after an I-140 is approved before receiving an EAD means the worker is tied to the same employer for at least eight years before being able to switch jobs, Kapoor said.

''How many years do they want somebody to work for the same employer?'' he asked.

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