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FEWER PEOPLE TO GET DEPORTED UNDER NEW POLICY: HAS THE ADMINISTRATION FINALLY COME TO ITS SENSES?

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By Cyrus Mehta

The Department of Homeland Security in a letter addressed to Senator Durbin and 21 other senators announced on August 18, 2011 a new policy that would identify low priority removal cases for the exercise of prosecutorial discretion. According to a New York Times story, the beneficiaries of such discretion would also be able to obtain work permits.

This is a refreshingly positive development, and shows that the Obama administration may have hopefully finally come to its senses. At a time when Congress is in a stalemate, and it has been acknowledged that 12+ million people cannot be deported, the administration has used its executive power to tap into the resources, energies and dreams of people who can ultimately benefit the United States. In providing some legal basis for them to remain in the US, they are more likely to add to tax revenues, spur consumer confidence, buy homes and ultimately build businesses that may result in jobs for Americans. On first impression, the new policy appears to be a mere promotion of the Morton Memo of June 17, 2011 on prosecutorial discretion. It does not grant relief on a broad scale, and it appears, if put into effect as promised, that it will probably only assist people on a case by case basis who are already in removal proceedings or will be placed in such proceedings. According to Senator Durbin's website, this is how the new process will work:

Under the new process, a Department of Homeland Security (DHS) and Department of Justice (DOJ) working group will develop specific criteria to identify low-priority removal cases that should be considered for prosecutorial discretion. These criteria

will be based on "positive factors" from the Morton Memo, which include individuals present in the U.S. since childhood (like DREAM Act students), minors, the elderly, pregnant and nursing women, victims of serious crimes, veterans and members of the armed services, and individuals with serious disabilities or health problems. The working group will develop a process for reviewing cases pending before immigration and federal courts that meet these specific criteria.

On a regular basis, ICE attorneys will individually review every case scheduled for a hearing within the next 1-2 months to identify those cases that meet these specific criteria. These cases will be closed except in extraordinary circumstances, in which case the reviewing attorney must receive the approval of a supervisor to move forward. DHS will also begin reviewing all 300,000 pending cases to identify those that meet these specific criteria. These cases will be closed except in extraordinary circumstances, in which case the reviewing attorney must receive the approval of a supervisor to move forward. Individuals whose cases are closed will be able to apply for certain immigration benefits, including work authorization. All applications for benefits will be reviewed on a case-by-case basis.

On the other hand, the new policy involves an inter-agency effort to identify the low priority cases. Under the Morton Memo, only ICE was charged with the responsibility of exercising prosecutorial discretion, and it seemed unlikely that all ICE officials in the field would follow the new mandate. Indeed, there was already a rebellion within the rank and file of ICE against the Morton Memo. The latest inter-agency initiative refreshingly also involves Immigration Judges at the Executive Office for Immigration Review, who could probably coax the ICE prosecuting attorney to terminate a deserving low priority case and take it off their tremendously clogged court calendar. The new initiative ought to also deeply involve the USCIS. Although the USCIS's mandate is to grant immigration benefits rather than enforce the law, the USCIS is also authorized to issue Notice to Appears upon a denial of a benefits application. If the USCIS applies discretion earlier on, fewer low priority individuals will be placed in removal proceedings in the first place.

Most problematic at this stage with the new policy, as noted by DREAM activist and law student Prerna Lal, who is herself in deportation is that it may not assist those who are in a legal limbo. These are undocumented individuals who have not yet come on the radar of DHS to even be considered being placed in removal proceedings. We surely do not want to encourage the perverse effect of such people coming forward and attempting to be placed in removal

proceedings (by say filing a frivolous asylum application) solely to be considered for prosecutorial discretion. This would also defeat the purpose of the new policy as it will create more work than necessary to process people for removal and then consider them under the new policy for prosecutorial discretion. Indeed, the next logical step for the Obama administration and DHS is to affirmatively grant deferred action, parole and work permits to people in legal limbo who can come forward if they meet the same low priority criteria as those who are in removal proceedings or about to be put into these proceedings. The government does have the power to exercise such discretion under the existing provisions of the Immigration and Nationality Act. Gary Endelman and Cyrus Mehta in a prior blog have outlined a blueprint for undocumented individuals to be affirmatively granted administrative relief, *See Keeping Hope Alive, President Obama Can Use His Executive Power Until Congress Passes The Dream Act*, http://cyrusmehta.blogspot.com/2010/12/keeping-hope-alive-president-obama-can.html.

Critics of the use of prosecutorial discretion such as House Judiciary Chairman Lamar Smith will argue that the President is not faithfully implementing the law. This would be a valid position if our immigration laws were rational and not broken. The reason why we have such a huge undocumented population is because our outdated laws are broken, and have not been able to provide sufficient pathways for people who need to unite with family members in the US . The existing legal framework also deprives employers from being able to effectively sponsor them for work permits or green cards. Moreover, the President is not bypassing Congress by creating a new class of permanent residence. In exercising prosecutorial discretion, the President is merely refraining from deporting low priority individuals, and using his power within the INA to grant administrative relief such as a work permits, parole or deferred action. If Mr. Smith were to have his way through the passage of the HALT Act, which would remove all discretion from the administration, our immigration law would be even more broken, and the undocumented population would continue to build without being able to benefit the US.