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US IMMIGRATION & NATIONALITY LAW

FROM BAD TO WORSE: WHY WE SHOULD NOT LET THE TRUMP ADMINISTRATION'S OUTRAGEOUS IMMIGRATION DEMANDS MAKE THE SUCCEED ACT SEEM LIKE A REASONABLE ALTERNATIVE

Posted on October 10, 2017 by David Isaacson

Following the Trump Administration's decision in September to end the Deferred Action for Childhood Arrivals (DACA) program, President Trump suggested in a Tweet that Congress should "legalize DACA" within the next six months. There have been a number of proposals for how to address the status of the "Dreamers" who would otherwise be left by the termination of DACA without protection from removal, or work authorization, despite having lived in the United States since their childhood.

The Democratic Party's leadership in Congress, including Senate Minority Leader Chuck Schumer and House Minority Leader Nancy Pelosi, has supported passage of the bipartisan Dream Act of 2017, S.1615/H.R. 3440. The Senate version of the Dream Act is co-sponsored not only by leading Senate Democrats such as Minority Leader Schumer and Dick Durbin (D-IL), but also by several Republican Senators including Lindsey Graham (R-SC), Jeff Flake (R-AZ), and Cory Gardner (R-CO). The House version is co-sponsored by nearly all House Democrats as well as several Republicans: Ileana Ros-Lehtinen (R-FL-27), Mike Coffman (R-CO-6), Jeff Denham (R-CA-10), David Valadao (R-CA-21) and Joe Barton (R-TX-6).

The Dream Act of 2017 would allow conditional permanent residence for those who have been in the United States since before age 18, have been continuously present here for at least 4 years before the law is passed, lack any significant criminal record, and meet an educational criterion: applicants for conditional residence would need to be admitted to an institution of higher

education, have obtained a high school diploma or GED, or be enrolled in an educational program leading to the attainment of such a diploma or GED. The conditions on permanent residence could then be removed following the attainment of a degree from an institution of higher education, at least two years of progress towards a bachelor's degree, 2 years of honorable service in the U.S. Armed Forces, or at least 3 years of employment that comprised at least 75% of the time the applicant had a valid employment authorization, along with passage of the same civics and English tests required under section 312 of the INA for naturalization.

The Dream Act of 2017 is currently the subject of a discharge petition which could force a vote on it in the House of Representatives, if the signatures of a majority of the members of the House can be obtained. (The discharge petition technically applies to a rule that would allow the discharge of another bill from committee and its amendment with the text of the Dream Act of 2017, because of procedural issues relating to the required waiting period before a discharge petition can be filed.) Currently, 218 signatures would be needed to comprise a majority of the usually 435-member House because there is only one vacancy, although after the impending resignation of Representative Tim Murphy (R-PA) takes effect on October 21, there will be two vacancies, and 217 signatures will suffice for a majority until at least one of the vacancies is filled by a special election. So far, the discharge petition has 195 signatures. Of those, 194 signatures are from Democrats, and only one is from a Republican, Rep. Mike Coffman (R-CO). Even the other four House Republican co-sponsors of the Dream Act have been thus far unwilling to buck their leadership and sign the discharge petition.

As the American Immigration Council has explained, various members of Congress have introduced variations on the Dream Act, some more restrictive and at least one more generous. Recently, the "SUCCEED Act", S. 1852, sponsored by James Lankford (R-OK), Thom Tillis (R-NC), and Orrin Hatch (R-UT) attracted significant media attention. The SUCCEED Act was then overshadowed by the Trump Administration's release Sunday night of a long list of extreme demands regarding other aspects of immigration law that the Administration wishes to see radically changed in conjunction with any resolution of the status of DACA recipients.

The Administration's demands, which would do immense damage to the U.S. immigration system in a variety of ways, have already been condemned by,

among others, immigrants' rights groups and the Democratic leadership in the House and Senate. Minority Leaders Schumer and Pelosi were quoted by the New York Times as observing that "The administration can't be serious about compromise or helping the Dreamers if they begin with a list that is anathema to the Dreamers, to the immigrant community and to the vast majority of Americans." Former AILA President David Leopold aptly described the Administration's demands as "read like a white supremacist wish list," including as it does a crackdown on refugee children; gutting other aspects of asylum law; removing due process to allow people to be deported more quickly and detained indefinitely if their countries will not take them back; building Trump's infamous border wall; penalizing local governments who decline to detain people at DHS's request without probable cause; deporting purported "gang members" that US authorities have already shown a tendency to believe include anyone with a tattoo; and replacing the family-based immigration system with a purportedly "merit-based" one, among many other things. There is a danger that compared to this list, virtually anything else might come to seem like a reasonable compromise position.

It is important, however, not to be lured by the aggressive atrociousness of the Administration's recent wish list into mistaking the SUCCEED Act for a reasonable compromise. As the Center for American Progress and National Immigration Law Center have already observed, the SUCCEED Act, as well, contains deeply troubling features.

The most obvious problems with the SUCCEED Act relate to its treatment of the Dreamers themselves. Applicants would need to spend 10 years in conditional permanent resident status, and then another 5 as lawful permanent residents, before naturalizing—even if they qualified for what would otherwise be an exemption from the normal wait time before naturalization, such as that given to those in active military service during a time of hostilities under INA §329. Even upon becoming lawful permanent residents, they would be unable to sponsor family members. And as conditional permanent residents, they would have to waive all rights to seek "any form of relief or immigration benefit under this Act or other immigration laws other than withholding of removal under section 241(b)(3), or relief from removal based on a claim under the Convention Against Torture" if they were found to have "violate a term for conditional permanent resident status".

The SUCCEED Act does not stop, however, at imposing onerous conditions on

the Dreamers who are its ostensible subjects. It also provides that all future applicants for nonimmigrant visas (other than certain diplomatic visas and other very limited exceptions) will be required to waive all rights to contest removal, and all rights to seek common forms of immigration relief including adjustment of status, if the visa-holder "(1) violates a term or condition of his or her nonimmigrant status; or "(2) fails to depart the United States at the end of the alien's authorized period of stay." That is, anyone who is thought to have exceeded the parameters of their work authorization, or overstayed their admission by a single day, could be removed without a hearing before a neutral adjudicator and without the right to apply for most forms of immigration relief.

Defenders of the SUCCEED Act might point out that similar restrictions, although not quite as onerous in regard to relief from removal, already apply to those admitted under the Visa Waiver Program. Visa Waiver admissions under INA §217, however, are only for visitors from certain qualifying countries who will be admitted to the United States for 90 days. Nonimmigrants admitted on visas, on the other hand, can legitimately stay in the United States for a much longer time, becoming integrated into American society in ways that it would be highly inappropriate to disrupt without even a hearing or the opportunity to apply for relief.

An H-1B nonimmigrant temporary worker can be authorized to remain in the United States for six years, and for substantially more time, pursuant to the American Competitiveness in the 21st Century Act ("AC21") if an application for labor certification was filed more than one year before the expiration of H-1B status or an I-140 petition has been approved but adjustment of status is not yet possible. Given current immigrant visa number backlogs, many H-1B visa-holders, particularly those born in India or China, can remain in H-1B status for well over ten years pursuant to AC21. O-1 aliens of extraordinary ability in the sciences or arts, E-1 treaty traders, or E-2 treaty investors are not subjected to any strict time limit, and can renew their nonimmigrant status for decades on end if they continue to qualify for it.

Such H-1B, O-1, E-1 or E-2 nonimmigrants may have lawfully resided in the United States for a decade or more, and perhaps had children here who are U.S. citizens. Under current immigration law, if there is an allegation that they have violated their status in some way, and the government seeks to remove them from the United States as a result, they can resist the charge before an

Immigration Judge (unless they are stopped at an airport and subjected to expedited removal proceedings, although in the event this occurs after a brief trip abroad, federal court review may be available as I have previously discussed). In the event of minor, short-term overstays and status violations, such nonimmigrants may still be able to adjust their status under INA §245(k), which provides limited forgiveness for up to 180 days of unauthorized employment or status violation in the context of employment-based adjustment, or if they acquire an immediate relative who is a U.S. citizen. The SUCCEED Act would take away these options for future nonimmigrants, subjecting such long-term nonimmigrant residents to summary removal without eligibility for adjustment of status. By prohibiting such nonimmigrants from "contesting removal", it could also prevent them from seeking cancellation of removal for nonpermanent residents under INA §240A(b) even if they have been in the United States for more than 10 straight years and have U.S. citizen children who would suffer exceptional and extremely unusual hardship if their parents were removed. (Although §240A(b) is not specifically listed among the forms of relief for which nonimmigrants would be ineligible, it would be impossible to seek it as a practical matter if one was removed without full removal proceedings pursuant to a forced waiver of the right to contest removal.)

It is one thing to say that a tourist or business visitor who comes to the United States for 90 days without a visa can be subjected to summary removal upon overstay or violation of that brief visit status. It is quite another thing to subject long-term legal residents to such treatment, and make them agree to it before they are permitted to come to the United States as a nonimmigrant worker or in some other long-term nonimmigrant status. This lesser-known feature of the SUCCEED Act is another reason why it should not be enacted.

There is a saying that one should not let the best be the enemy of the good. Equally, though, one should not let the worst be the facilitator of the merely bad. The SUCCEED Act may not be as horrible as the wish list recently published by the Trump Administration, but it is nonetheless bad enough that it should not be accepted as a supposed compromise.