

## Immigration Law After Trump

by Ron Tasoff

Given that nearly 38% of the residents of the San Fernando Valley (and Los Angeles City) were born in a foreign country it is quite likely that many Valley lawyers will be asked question regarding changes in immigration law policy under the new Trump administration. Controlling “illegal immigration” was one of the major campaign promises made by candidate Trump despite data showing that the number of undocumented immigrants has declined since the “great recession” of 2007. Indeed, in the first 7 years of the Obama administration over 2.5 million people were removed (the legal term for “deportation” since 1996) from the United States compared to 2 million by George W. Bush’s administration and is more than the total sum removed by all 19 presidents of the 20<sup>th</sup> century.

Truth is, at the time of publication no one can really say what Mr. Trump will do after inauguration day. He talked tough during the campaign (see “Trump’s 10 Point Plan) but in August Trump told Fox News Host Bill O’Reilly “Lots of people were brought out of the country with the existing laws. Well, I’m gonna do the same thing... Now the existing laws are very strong...” In other interviews he said that his policy would focus on “bad dudes”. Perhaps he was referring to the current DHS Priority Enforcement Program enforcement program in which top priority are aliens convicted of felonies and gang members and 2<sup>nd</sup> priority are those convicted of a “significant misdemeanor” including crimes of domestic violence and driving under the influence. In 2015 91% of removed aliens were convicted of a crime.

Although what initiatives the Trump Administration will employ to counter illegal immigration, including the building of a wall along the Mexican border, are still unfolding, there may also be some significant changes in legal immigration policy as well – or maybe not. Thus, a very basic understanding of the structure of our current immigration law, and what can be changed by Presidential fiat versus Congressional legislation, would be helpful.

### A Short Overview of Immigration Law.

The Immigration and Nationality Act<sup>1</sup> (the “Act”) has four primary goals: family unification, allowing skilled individuals to work in the U.S. while protecting the jobs of American workers, refugee/asylee relief and diversity<sup>2</sup>. With apparent simplicity, it divides all of humanity into U.S. citizens and noncitizens. Under the 14<sup>th</sup> Amendment of the U.S. Constitution “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>3</sup> Congress has additionally provided citizenship for certain children of U.S. citizens born abroad.

The Act then subdivides the class of noncitizens into immigrants and nonimmigrants. Immigrants are people who are allowed to live and work in the United States permanently although there are a myriad of ways to lose that status. Referred to in the Act as lawful permanent residents (LPR's) they receive a noncitizen registration card also known as a "green card"<sup>4</sup>.

### Nonimmigrants

Nonimmigrants are individuals who are allowed to legally enter the United States for a temporary period of time to pursue specific goals or activities. Nonimmigrant categories include visitors for pleasure or business, professional workers, treaty investors, intracompany transferees and crime victims (and family members) who have suffered substantial mental or physical injury who are willing to assist law enforcement (ex.: domestic violence victims). Please refer to the accompanying chart for a list of common visas – including several that allow for employment authorization.

Trump has nominated Senator Sessions to be Attorney General. He has long been a legal immigration restrictionist and there is a possibility that several categories of nonimmigrant working visas will be reduced or eliminated. In particular, the H-1B visa which is utilized by many high tech professionals to work in the U.S.

### Deferred Action and Temporary Protected Status

In the last few years a third category of noncitizens has become prominent: those legally allowed to temporarily stay in the United States for humanitarian reasons. This category includes "temporary protected status" (TPS) and "deferred action for childhood arrivals" (DACA) status. Deferred action status – a form of prosecutorial discretion – has long been part of immigration law and has been used by Presidents from Eisenhower to Obama for various groups of noncitizens. Programs have included people who escaped from Cuba and El Salvadorians and Guatemalans in the U.S. after Hurricane Mitch hit those countries in 1998. However the number of DACA recipients – also known as "dreamers" - is now over 750,000. By definition, these are noncitizens that were brought to the U.S. before they turned 16 years old and have lived here since June 15, 2010 and have no serious criminal record. Recipients are given employment authorization documents and the status can be renewed every 2 years. Since this program was created by an Executive Order from President Obama it can just as easily be canceled by one from President Trump.

### Quantitative and Qualitative Restrictions on Legal Immigration

There are two barriers stopping the masses from legally immigrating to the U.S. First there are quantitative restrictions, quotas, which limit the number of people who can come to the U.S. in any one category of eligibility or from a specific country<sup>5</sup>. Second, there are qualitative restrictions – people that Congress has determined should not be allowed to live here due to a myriad of reasons ranging from criminal convictions and health issues to membership in terrorist organizations<sup>6</sup>. Although there are waivers for

some grounds, most require a showing of extreme hardship to a close U.S. citizen or LPR relative.

The various categories of noncitizens that Congress has given a path to LPR status can be basically broken down into five groups: family based immigration, employment based immigration, refugees/asylees, investors and successful applicants to a “diversity” lottery selection process. See the accompanying Chart for more details regarding the family and employment based categories.

There is a multitude of ways that a noncitizen, including a LPR, can become subject to removal or barred from reentering the U.S. after a trip abroad. The most common reason is a criminal conviction. However, some of the grounds of removal found in section 237 of the Act apply to activities that are not so serious, especially for crimes involving controlled substances (including marijuana), firearms and domestic violence. For instance, the violation of a civil protective order is considered a removable offense. Even the act of remaining abroad for over one year continuously may result in “abandonment” of LPR status and confiscation of a noncitizen’s green card.

For LPR’s, the discovery of a removable offense might occur when the person is arrested and booked for any offense and a fingerprint check reveals a criminal record. Others, after traveling abroad without incident for many years, find out upon being routinely inspected at an airport that CBP official have access to new data bases. And others are caught upon applying for naturalization or renewal of their green cards which like passports expire every 10 years.

### The 3 and 10 Year Bars

In addition to the quantitative and qualitative limitations stated in the Act, regulatory policy and procedures can also create obstacles in the path of legalization. A classic example is the dilemma discovered by undocumented immigrants who marry U.S. citizens. Many of these individuals came to the U.S. as children. Not allowed to adjust their status in the U.S. because of their illegal entry, they must apply abroad at an American Consulate for an immigrant visa<sup>7</sup>. However, upon their departure they immediately become subject to the 3 or 10 year bar of section 212(a)(9)(B) of the Act<sup>8</sup>. Although eligible for a waiver, prior to the Obama administration’s policy to allow applicants to receive their waivers before they attend their interviews abroad, many applicants had to spend weeks to months waiting for their waivers to be processed while living abroad. Under Trump this burdensome procedure may be reinstated.

### Naturalization

Thus, being a lawful permanent resident is not all that permanent. Only one thing can halt the possibility of the loss of legal immigration status: naturalization. Once a person has held LPR status for 5 years, 3 if married to U.S. citizen, he or she is eligible to apply. The applicant must also show that during that period he or she has been a person of “good moral character”, and has spent at least half the period physically in the U.S. The

applicant must also pass citizenship and American history test and be able to speak and read basic English although exceptions exist for the physical and mentally disabled and long term LPR's who reach a certain age.

Finally, on an optimistic note, now that both houses of Congress and the President are controlled by the Republicans it is possible that true comprehensive immigration reform legislation could be passed. Ronald Reagan signed the "amnesty" of 1986, George W. Bush supported comprehensive reform until 9/11 hijacked the momentum and more recently Senators McCain and Rubio were also on board. Perhaps a President Trump, who has said that some "terrific people" are living in the U.S. illegally, may have a change of heart and support comprehensive immigration reform. Let's not forget that his mother and two of his wives were noncitizens.

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**Selected Nonimmigrant Visas**  
**\* Designates Employment Authorized**

- B-1 Temporary visitor for Business
- B-2 Temporary visitor for Pleasure (Tourist Visa)
- E-1 Treaty Trader, spouse and children\*
- E-2 Treaty Investor, spouse and children\*
- F-1 Student Visa (\* possible)
- H-1B Work Visa for Specialty Occupations (professions), however subject to a quota that allows less than half of qualified applicants to be granted status\*
- J-1 Visas for exchange visitors\*
- K-1 Fiancée and Fiancé Immigration Visa\*
- O-1 Extraordinary ability in Sciences, Arts, Education, Business, or Athletics\*
- P-1 Individual or team athletes or entertainment groups\*
- R-1 Religious workers\*
- U Victims of specified crimes who assist law enforcement.
- T Victims of human trafficking.
- TN Trade NAFTA visas for citizens of Canada and Mexico in enumerated professions.\*

Note: Citizens of certain countries do not need visas to come to the U.S. for business or pleasure. The Visa Waiver Program enables foreign nationals from most developed countries to visit the United States for up to 90-day visa-free.

## **Immigrant Visas Categories** **aka Lawful Permanent Resident (“Green Card”) Status**

### **Family Based**

Immediate Relative (no quota restrictions)

- Spouse, Child (unmarried and under 21) of US Citizen (USC) or Parent of adult (over 21) USC son/daughter.

Preference System (subject to quota limit of 226,000)

- Unmarried Adult Son or Daughter of USC;
- Spouse or Child (under 21) of LPR;
- Unmarried Adult Son or Daughter of LPR;
- Married Son or Daughter of USC;
- Brother or Sister of Adult USC.

### **Employment Based**

(subject to quota limit of 150,000)

EB1      1st Preference-

- Noncitizen of Extraordinary Ability;
- Outstanding Professor/Researcher;
- International Executive or Manager.

EB2      2nd Preference

- Advanced Degree or Exceptional Ability Workers.

EB3      3rd Preference

- Baccalaureates/Skilled Workers and Unskilled Worker (such as housekeepers).

EB4      4th Preference

- Special Immigrants (religious workers, abandoned children, etc.)

EB5      5th Preference

- Immigrant Investor (\$1 million or \$500 k in redevelopment zone + creation of 10 new jobs).

### **Refugees and Asylees**

(subject to quota set each year by President appx 80,000)

### **Diversity Visa Program (“Green Card” Lottery)**

(subject to quota limit of 55,000)

### **Five Facts About Illegal Immigration In The U.S. (Pew Research Center Estimates)**

1. There were 11.1 million unauthorized immigrants in the U.S. in 2014, a total unchanged from 2009 and accounting for 3.5% of the nation's population. The number of unauthorized immigrants peaked in 2007 at 12.2 million.
2. Since 2009 the U.S. civilian workforce included 8 million unauthorized immigrants in 2014, accounting for 5% of those who were working/looking for work.
3. The 5.8 million Mexican unauthorized immigrants living in the U.S. Mexicans made up 52% of all unauthorized immigrants in 2014, down from 6.4 million in 2009.
4. Six states accounted for 59% of unauthorized immigrants in 2014: California, Texas, Florida, New York, New Jersey and Illinois.
5. A rising share of unauthorized immigrants have lived in the U.S. for at least a decade. About two-thirds (66%) of adults in 2014 had been in the U.S. at least that long (median time 13.6 years).

## **Donald J. Trump's 10 Point Immigration Plan to Put America First**

(From [www.donaldtrump.com/policies/immigration](http://www.donaldtrump.com/policies/immigration))

1. Begin working on an impenetrable physical wall on the southern border. [Mexico will pay for the wall.](#)
2. End catch-and-release. Under a Trump administration, anyone who illegally crosses the border will be detained until they are removed out of our country.
3. Move criminal aliens out day one, in joint operations with local, state, and federal law enforcement.
4. End sanctuary cities.
5. Immediately terminate President Obama's two illegal executive amnesties. All immigration laws will be enforced - we will triple the number of ICE agents. Anyone who enters the U.S. illegally is subject to deportation.
6. Suspend the issuance of visas to any place where adequate screening cannot occur, until proven and effective vetting mechanisms can be put into place.
7. Ensure that other countries take their people back when we order them deported.
8. Ensure that a biometric entry-exit visa tracking system is fully implemented at all land, air, and sea ports.
9. Turn off the jobs and benefits magnet. Many immigrants come to the U.S. illegally in search of jobs, even though federal law prohibits the employment of illegal immigrants.
10. Reform legal immigration to serve the best interests of America and its workers, keeping immigration levels within historic norms.

## **Know Your Rights for Noncitizens**

Talk to an immigration lawyer about your immigration options.

- Find out if you qualify for a work permit, green card or citizenship • If you have a criminal conviction find out how it might affect your case and what you can do about it.

Make a child care and family preparedness plan.

- Create a sheet of emergency numbers and contact information and a file of important documents • Complete a caregiver's for your children temporarily (available in California).

Figure out which documents you should and should not carry with you.

- Have a telephone number of an immigration lawyer, your valid work permit or green card. If you do not have one carry a state ID or driver's license that does not state your immigration status or your country of birth. • Do not carry any documentation about your country of birth or any false identity documents or false immigration documents.

You have the right to remain silent.

- You can refuse to speak to an ICE agent. Do not answer any questions, especially about your birth place, immigration status or how you entered the United States

You have the right to demand a warrant before letting anyone into your home.

You have the right to speak to a lawyer and the right to make a phone call.

You have the right to refuse to sign anything or show any documents before you talk to a lawyer.

Remain calm and do not try to run away. If you do, ICE or the police may use that against you.

**Test (correct answer follows)**

1. Some of the goals of the Immigration and Nationality Act are to reunite families and protect American workers.

True.

2. A child born abroad with at least one U.S. citizen parent may be able to claim U.S. citizen.

True.

3. Noncitizens who enter on B-1 Business visas are allowed to work in the U.S.

False. They are only allowed to perform business activities like meeting with clients, taking orders, going to conferences, etc.

4. There is no quota for parents of U.S. citizens who are over 21 years old.

True. They qualify as ‘immediate relatives’ and there is no numerical limitation as to how many can come in any year.

5. There is no quota for spouses of LPR’s.

False. The Family Based 2A Preference is for spouses of Lawful Permanent Residents.

6. A “green card” is not green.

True. Though a very long time ago it was.

7. A LPR can be removed for violation of a civil protective order.

True.

8. A LPR could lose his or her green card if they remain abroad for over 12 months.

True.

9. Naturalized U.S. citizens can be removed from the U.S. if they commit aggravated felonies.

False. U.S. citizens, whether naturalized or not, cannot be removed from the United States. Under very limited circumstances a naturalized citizen

can be denaturalized if they made a material misrepresentation on their naturalization application and thereafter they can be removed.

10. ICE officers are in charge of protecting America's borders from noncitizens attempting to enter the U.S. without inspection.

False. Customs and Border Patrol officers protect the border, ICE officers enforce immigration laws in the interior of the country.

11. A spouse of a U.S. citizen who entered without inspection and lives in the U.S. for over one year cannot return to the U.S. for 3 years even if they qualify for an immigrant visa unless they are granted a waiver.

False. They can't return for 10 years.

12. A lawyer in a criminal matter should always know his client's immigration status because a plea to a lesser offense that might be beneficial to a U.S. citizen could result in removal if the person is a noncitizen, unless the client is a permanent resident of the U.S.

False. Even if they are a LPR certain pleas could result in them being removed.

13. A noncitizen here illegally can never become a naturalized U.S. citizen.

False. There are many ways that undocumented immigrants can legalize their status and thereafter apply for naturalization when eligible.

14. LPR's married to U.S. citizens can naturalize 2 years before those who are not married to U.S. citizens.

True. To be eligible for naturalization a person must be a LPR for 5 years however if they are married to a USC it is only 3 years.

15. Both U.S. Citizenship and Immigration Services (USCIS) and the Immigration Courts are parts of the DHS.

False. USCIS is part of DHS and the Immigration Courts are under the Department of Justice.

16. If an undocumented noncitizen is married to a U.S. citizen they can apply for their green card in the U.S. if a penalty fee of \$2,000 is paid.

False. Normally they would have to apply for an immigrant visa abroad although there are several important exceptions.

17. According to the Immigration and Naturalization Act all people are either U.S. citizens or noncitizens.

True.

18. A noncitizen can get a green card if they win a lottery.

True.

19. Mr. Trump thinks that some noncitizens in the United States illegally are “terrific people”.

True.

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20. Approximately 1 out of 3 people in the San Fernando Valley were born in a foreign country.

True

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<sup>1</sup> Title 8 of the U.S. Code (8 USC), sets out the statutory scheme for regulating immigration in the U.S.

<sup>2</sup> The Citizenship and Immigration Services (CIS) administers the benefits side – the adjudication of petitions and applications for various immigration classifications and the naturalization process. Customs and Border Patrol (CBP) enforces the law along the land borders and ports of entry, and Immigration and Customs Enforcement (ICE) is responsible for enforcement in the interior of the country including investigations, arrests and detention and prosecution of removal cases.

<sup>3</sup> Lately, anti-immigrant groups have advocated repealing this provision by a Constitutional amendment. However, the original purpose of the citizenship clause – to prevent the creation a politically disenfranchised underclass of former slaves – is still relevant. Several countries in Asia and the Middle East already have a permanent underclass of people born to foreign workers on their soil who for various reasons cannot be deported – exploited and with little hope of legitimizing their status they are easily recruited by criminal and radical elements.

<sup>4</sup> The current version of the card, USCIS Form I-551, is a high security document white and bluish green in color, that is machine readable and contains the alien's photograph, fingerprints, and signature as well as optical patterns to frustrate counterfeiting.

Before 1976 the card was green. The current version of the card looks like this:



<sup>5</sup> The quota for total Family Based immigration is set at 226,000 not including “immediate relatives” of U.S. citizens for which there is no numerical limitation. Employment Based is set at 150,000. These visa numbers are allocated in unequal proportions set by law to the various subcategories (see chart). No single country can be issue more than 26,366 7% of total) which has resulted in large backlogs for Mexico, Philippines, India and China.

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<sup>6</sup> See section 212 of the Act for the grounds of inadmissibility – the rules that prevent noncitizens from receiving visas and/or entering the U.S. Similar but different in significant ways, is Section 237 of the Act, the grounds of removal, which allow DHS to remove people who are already in the U.S.

<sup>7</sup> There is an important exception for noncitizens who are beneficiaries of an immigrant relative petition or labor certification application filed before April 30, 2001 and certain noncitizens related to such individuals, see section 245(i) of the Act.