



Immigration Policy Update

August 27, 2016

The political debate on immigration this week was dominated by questions of whether Donald Trump is changing his position on immigration or simply softening his rhetoric. Thus far, Trump has not offered anything that approaches a clear plan but he has hinted at the idea of shifting his positions away from previous calls for mass deportation toward some kind of a legalization plan by saying that deporting whole families would be “tough” and expressing an interest in allowing “the good ones” to come back legally. At the same time, he has continued to repeat that he will “follow the law” and that there would be “no path to legalization unless they leave the country and come back.”

To understand whether Trump is serious about creating a legalization program, it is essential to understand certain facts and realities about immigration law and policy.

Real Reform Requires Legislation There can be no lasting reform to address the status of the undocumented without legislative reform. Trump’s suggestions that we “follow the law” and that the undocumented be required to leave the country first before qualifying for legalization may sound straightforward, but it fails to take into account the structure of current law which specifies exactly who is eligible for, and how many people can receive, green cards. Those rules have not been updated since 1990, despite seismic shifts in American society and the economy. As is, the current system keeps close family members, businesses, and workers waiting years and even decades for the chance to enter legally. Without legislation, sweeping proclamations that we can simply follow the law or that the undocumented should leave the United States and wait for a non-existent visa reflect a fundamental misunderstanding of the current law.

Current Law Keeps the Undocumented Undocumented Not only are there not enough channels to enter the country legally, but current laws include harsh punishment for being in the US without status by imposing “unlawful presence” bars. Under those bars, anyone who has lived for more than six months in the United States without legal authorization and who then leaves the United States—including for the purpose of applying for a visa at a consulate—is barred from seeking legal entry for a period of either three or ten years, or permanently.ⁱ Nearly every unauthorized adult would be banned for at least a decade since that bar applies to people with just over 1 year of unlawful presence. Until Congress removes those bars, individuals and families who have been living for years without legal status will be unwilling to take the risk of leaving. Even undocumented people who qualify for a family-based visa are unable to complete the legal immigration process because they are afraid to leave the country to apply at the consulate in their home country.

Scale and Scope Will Make or Break a Legalization Program The purpose of a legalization program is to hit the “reset” button and to provide legal status for an undocumented population that exists largely because our laws did not provide any way for them to come. To achieve that goal, any program must be structured to ensure the greatest participation of the estimated 11 million undocumented living in the country. Any workable program must have clear and consistent qualifying criteria. Vague assertions that the “good ones” will be able to return to the United States offer none of the clarity needed to succeed.

Legalization should provide an opportunity for the undocumented to apply for legal status, and the option of later applying for citizenship. More than 60% of the undocumented population has lived in the U.S. for more than 10 years.ⁱⁱ About half live in families with children, most of which include spouses and children who are citizens or legal residents.ⁱⁱⁱ Cries to “send them home” miss the reality that they **are** home. They have jobs, their kids go to school, they own cars, they own homes, and all live full lives in the country they call home. “Report to deport” programs or “touchback” provisions that require these longtime residents to take a chance on a process where the outcomes are vague and uncertain will fail. For many families, leaving the country and waiting to legalize would impose insurmountable costs that further undermine such a proposal.

Background on “Touchback” proposals Trump’s statements suggest he is reviving the concept of a touchback requirement as a condition for legalization. Not since 2007 has there been serious consideration that legalization should require unauthorized people to leave the country first before being able to apply for legal status. The so-called “touchback” provision was proposed in the 2007 comprehensive immigration reform bill.^{iv} It would have given undocumented immigrants the opportunity to apply for, and get approved for, provisional legal status in the United States. Under the 2007 proposal, people who wanted to apply for a green card however, would have to go to a consulate outside the United States to apply. The problem with the touchback requirement is that it entailed taking an unacceptable risk of leaving the country without guarantees of readmission. A touchback requirement was not included in the Senate-passed 2013 immigration bill or bills proposed in the House.

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ⁱ See Immigration and Nationality Act Sections 212(a)(9)(B)(i)(I); 212(a)(9)(B)(i)(II); and 212(a)(9)(C)(i)(I).

ⁱⁱ Pew Research Center estimates that, in 2012, 62% of unauthorized adults had lived in the U.S. for a decade or more. Jeffrey S. Passel, D’Vera Cohn, Jens Manuel Krogstad, and Ana Gonzalez-Barrera, Pew Research Center, “As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled,” September 2, 2014, <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/>

ⁱⁱⁱ Jeffrey S. Passel and D’Vera Cohn, Pew Research Center, “A Portrait of Unauthorized Immigrants in the United States, April 14, 2009, <http://www.pewhispanic.org/2009/04/14/iii-demographic-and-family-characteristics/>

^{iv} The Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (S. 1639). A summary of the legalization provisions is available here: <http://aila.org/infonet/summary-of-key-legalization-provisions-in-s-1639>.