

Immigration Law and Policy After the Election: Six Key Points¹

The 2016 election is consequential and has instilled great concern and fear among immigrant communities. Importantly, the current framework for immigration law has not changed and will remain intact until January 20, 2017. The content of future immigration proposals is uncertain, but there is a good reason to believe that immigrants will be the target of greater enforcement and scrutiny. Below are six points to educate the community about immigration law and policy after the election.

POINT ONE: The main statutory framework for immigration law remains the same today. Congress passed the [Immigration and Nationality Act \(The Act\)](#) in 1952 and this remains the framework for immigration law. The Act includes temporary (i.e., students, visitors) and permanent (i.e., family, employment) categories through which people may be admitted and specific grounds for removing (deporting) a person. The Act also describes various procedures for how a person is removed. Finally, the Act contains several forms of relief and protection for qualifying individuals, such as for those who fear persecution in their home country, who are victims of crime or who have lived in the United States for a long period of time with family ties. Inherent and contained in the Act is the Department of Homeland Security's (DHS) authority to exercise prosecutorial discretion (i.e., decision to refrain from bringing immigration charges).

POINT TWO: Even if Congress has the authority to change the statute or fund certain enforcement actions (i.e., deportation, border wall), implementation may take years. To change or repeal a section of the Act would require an act of Congress. Employees of DHS and Department of Justice will continue to process and adjudicate applications and are required to follow these laws unless and until Congress passes new laws. If these laws are not followed, violations may be the subject of litigation in the courts.

POINT THREE: All current regulations for immigration remain the same today. A change or repeal to regulations published during President Obama's Administration may require new regulations and a time period with written notice and comment from the public. This will take time. If a regulatory change does not require "notice and comment" the timeline could be quicker.

POINT FOUR: A new Administration has the authority to "revoke" or change immigration policies that were originally crafted by the Executive Branch without legislation or a regulation. These can happen more quickly than a change to the statute or regulation and include may include DACA 2012 (and related work authorization) and the Johnson Priorities Memo (see Point Five).

Point FIVE: Though policy documents by a new Administration can be "revoked" the current Administration's policies are still in effect and may be used by noncitizens until and unless a new President has modified or repealed these memos. Some important policies appear below (and are hyperlinked at each title).

[Prosecutorial Discretion Memo by DHS Secretary Jeh Johnson](#): This memo identifies factors that DHS employees should consider when making prosecutorial discretion decisions, including but not limited to: length of time in the U.S.; military service; family or community ties in the U.S.; status as a victim, witness or plaintiff in civil or criminal proceedings; and humanitarian reasons like poor health, age, pregnancy, a young child, or a seriously ill relative.

¹This is a living document and does not constitute legal advice. Specific questions should be directed to a qualified immigration attorney or representative. Descriptions about stated proposals by President-Elect Donald Trump are beyond the scope of this document. For a good summary, see: <http://www.maggio-kattar.com/blog/president-trump-what-it-may-mean-us-immigration>

Deferred Action for Childhood Arrivals (DACA): Deferred Action for Childhood Arrivals is a program implemented in 2012 that allows qualifying individuals who entered the United States before the age of 16 to apply for a form of prosecutorial discretion called “deferred action” and on this basis apply for employment authorization. More than 700,000 people have received DACA. Whether or not a person should now apply for DACA 2012 initially or seek a renewal of such status has varying levels of risk. See following explanation from ILRC (Immigrant Legal Resource Center) about these risks:

“Initial DACA applications. For those who have not yet applied for DACA, the processing of those applications is taking long enough now that they would likely not be adjudicated until after January 2017, and it is possible the DACA program will not exist by then. Therefore, at this point potential applicants’ efforts to assemble an initial DACA application and pay the filing fees (which go up in December 2016) may result in no benefit and expose them to DHS.

DACA renewals. It is unknown whether the next Administration will terminate existing DACA grants or instead not allow DACA recipients to renew. Those who have already received DACA are known by the government. Therefore, renewing DACA does not carry a new risk. In fact, renewing DACA may mean a DACA recipient can have a work permit until it expires one to two years into the next Administration. One risk, however, is again that the renewal might not be adjudicated before Trump becomes President, and the effort and money to renew will be for nothing. People who file to renew soon may be successful, as DACA renewals are currently being processed in 8 weeks with USCIS’ upgraded system. The cost may be offset by loans and other funding available through Mission Asset Fund, the Mexican Consulate, some DACA collaboratives and/or other programs.”

Sensitive Locations Memo: This memo instructs immigration and border agents to avoid undertaking enforcement actions at sensitive locations, which include:

- Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop;
- Medical treatment and health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities;
- Places of worship, such as churches, synagogues, mosques, and temples;
- Religious or civil ceremonies or observances, such as funerals and weddings; and
- During public demonstration, such as a march, rally, or parade.

Prosecutorial Discretion for Victims, Witnesses and Crimes: This memo pertains to victims, witnesses, and plaintiffs. The Victims Memo contains language about the policy of ICE which states in part: “Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.” The memo asks that particular attention should be paid to:

- victims of domestic violence, human trafficking, or other serious crimes;
- witnesses involved in pending criminal investigations or prosecutions;
- plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and
- individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.”

Prosecutorial Discretion Memo by Doris Meissner:

The Meissner Memo includes a thoughtful primer on the principles of prosecutorial discretion in immigration law and the duties of agency employees to exercise this discretion at every stage of the case. The Meissner Memo is still viable and among other things, lists certain triggers that may be identified early in the enforcement process by officers: “Lawful permanent residents; Aliens with a serious health condition; Juveniles; Elderly aliens; Adopted children of U.S. citizens; U.S. military veterans; Aliens with lengthy presence in United States (i.e., 10 years or more); or Aliens present in the United States since childhood.”

POINT SIX: Every noncitizen has rights and responsibilities. For more information, see:

<http://www.immdefense.org/ice-home-and-community-arrests/>