

## Let's Get Past The Rhetoric Around Immigration Reform

*Law360, New York (April 28, 2015, 11:36 AM ET) --*

On Nov. 20, 2014, President Obama reacted to the recent landslide Republican victory in the congressional elections by spitting square into the face of the GOP and the Tea Party, announcing his intention to address the problem of illegal immigration by executive action. That announcement has spawned a great deal of discussion, consternation and even some litigation. Much has been stated about the president's authority, or lack thereof, to use his executive powers to address illegal immigration. Even in a country where a large percentage of the population cannot name the vice president, almost everyone seems aware of the president's proclaimed intentions. Very few Americans, however, actually understand the specifics of what the president has proposed or how it would be accomplished. So, let's get past the rhetoric and get down to the nitty-gritty.



John D. Smart

The president's proposal is not, contrary to popular belief, an amnesty plan. At various times in our country's history, Congress has granted what amounted to amnesty to specified persons living illegally in the U.S. The beneficiaries of these acts of congressional largesse were given a "path to citizenship" and immunity from legal consequences for having come to the U.S. illegally (or having come to the U.S. legally, but then remaining beyond the authorized period of stay). For example, in 1986, Congress passed the Immigration Reform Act of 1986 (a/k/a the Simpson-Mazzoli Act), which was then signed into law by President Reagan. The Simpson-Mazzoli Act granted legal status (amnesty) to illegal immigrants who had entered the United States before Jan. 1, 1982, and resided here continuously until the effective date of the act. The recipients of this offer were required to pay a fine, pay any back taxes due, and admit to being guilty of illegal status. Those seeking to obtain legal status were also required to prove that they were not guilty of any major crimes and that they possessed at least a minimal knowledge about U.S. history, government and the English language.

In contrast, President Obama's program is one of "deferred action." The action that is being deferred is deportation or, in current parlance, "removal." While amnesty is a permanent remedy — the beneficiary gets to legally remain in the U.S. indefinitely — deferred action is temporary. Under the president's proposal, an illegal alien that meets certain criteria can apply for deferred action which, if granted, will be for a period of three years, albeit with the potential for renewal (assuming the entire executive action hasn't been scrapped by a succeeding executive). Presumably, successful applicants will also be able to obtain work authorization by applying for employment authorization documents or "EADs."

These successful applicants will neither receive “green cards” nor become citizens with voting rights.

What are the conditions that render one eligible for deferred action under the president’s proposal? There are several key prerequisites. First, one must be the parent of a U.S. citizen or lawful permanent resident. This eligibility criterion is not insignificant. Undoubtedly, there are many illegal aliens who have not produced offspring after entering the U.S. In effect, only illegals who are parents of the infamous “anchor” babies (babies born in the U.S. to illegal parents) will be eligible for deferred action under President Obama’s executive action.

Second, an applicant for deferred action must have lived continuously in the U.S. since Jan. 1, 2010. Any illegal who arrived in the U.S. during the past five plus years after the referenced date may not be eligible for deferred action. That would include the many thousands of illegals who streamed over the border into Texas from Central America in 2014.

Third, the applicant for deferred action cannot have a lawful immigration status on Nov. 20, 2014. This means that the applicant must have come to the U.S. without any papers, or if the applicant entered legally, his or her lawful immigration status must have expired. This criterion is really more expansive than restrictive, as virtually every illegal would be in one of these two categories.

Finally, the applicant must not have been convicted of a felony or “significant” misdemeanor offense (or a series of less significant misdemeanors). Felonies are crimes that carry the potential for a year or more of incarceration. Significant misdemeanors include domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, as well as any other offense that resulted in a sentence of more than 90 days in custody.

So, what have we learned about Obama’s proposal for immigration reform? The three key takeaways here are: (1) it’s not an amnesty; it’s a way for parents of Dream Act beneficiaries and anchor babies who have been in the U.S. for the past five years to avoid deportation and obtain work authorization for a three-year period; (2) it doesn’t create any new citizens or voters; and (3) it excludes those with any serious criminal history from participation in the program. Perhaps an awareness of these three facts could lead to a reduction in the rhetoric and hyperbole that accompanies virtually every discussion of immigration reform. But I doubt it.

—By John D. Smart, Winstead PC

*John Smart is a shareholder in Winstead's Dallas office and former special assistant U.S. Attorney for the Western District of Texas.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*