

April 2014

Understanding H.R. 3431: The American Families United Act

Introduction

On October 30, 2013, Representatives Steve Pearce (R-NM) and Beto O'Rourke (D-TX) announced the introduction of H.R. 3431, the American Families United Act (AFUA).¹ Co-sponsors as of January 2014 included Jim Costa (D-CA) and James McGovern (D-MA). This bipartisan immigration bill approaches immigration reform from a unique angle, focusing on amendments to the system that address the separation of immigrants from their U.S. family members. The bill expands the discretionary authority of government officials to waive minor violations of law, but does not create new mechanisms for legalizing undocumented individuals. Thus, in contrast to [S. 744](#), the comprehensive immigration bill passed by the Senate in 2013, the AFUA focuses on a narrower group of individuals who might be eligible for lawful permanent residence under current standards if not for certain legal obstacles.

The bill would permit certain young immigrants who arrived unlawfully as children to qualify for skilled work visas if they meet the usual visa criteria, including possession of a bachelor's degree and a professional job offer. It would expand the waivers of the "3 and 10 year bars,"² and waivers of the bars due to certain misrepresentations and false claims to citizenship. Like S.744, it also would expand the authority of immigration judges and the Department of Homeland Security (DHS) to waive a broad range of minor inadmissibility and deportability³ factors if it is in the public interest or if there is hardship to family members. This authority would not be available to waive felonies, multiple crimes, or threats to national security. The bill also creates a broader definition of "hardship" in cases requiring a waiver in order to account for more individualized circumstances.

Availability of Higher-Skilled Temporary Visas for DREAMers

Section 4(a) of the bill makes higher-skilled non-immigrant H-1B visas available to undocumented immigrants who were brought to the U.S. illegally as children. It does this by waiving the "3 and 10 year bars" found at INA § 212(a)(9)(B), which prevent immigrants from obtaining permanent residence or re-entering the United States if they have previously been unlawfully present in the U.S. for a year or more.² The bars are waived for immigrants who entered the U.S. before the age of 16 and have approved H-1B visa petitions. Like any other applicant for an H-1B visa, the immigrants must have a least a bachelor's degree in a specialty occupation and have a job offer in a professional position to qualify for the visa. The undocumented applicants would normally need to leave the U.S. and re-enter in order to receive the visas. Note that the H-1B visa is only valid for 6 years and does not lead to lawful permanent residence (a "green card") or citizenship.

Limitations on Bars to Legal Status Due to Illegal Presence

Section 4(b) expands the current waiver of the [“3 and 10 year bars”](#) for applicants eligible for immigration benefits. These bars prevent immigrants from obtaining lawful permanent residence or re-entering the U.S. if they have previously been unlawfully present for a year or more. The waiver is currently available if the applicant qualifies for some type of immigrant benefit (e.g., through marriage to a U.S. citizen or lawful permanent resident) and has a U.S. citizen or permanent resident spouse or parent who would experience extreme hardship if the immigrant were removed. The bill expands the availability of the waiver by allowing immigrants to qualify if they are a parent of a citizen or permanent resident who would experience hardship. The standard is reduced from “extreme hardship” to “hardship.”

Section 4(c) of the AFUA would limit the application of the “permanent bar,”⁴ which prevents immigrants from obtaining legal status who have been unlawfully present for a year or more or have been previously ordered removed and have reentered the U.S. unlawfully. The bar would no longer apply to minors, asylees, or battered women and children, and would not apply in certain other situations such as technical status violations.

Limitations on Bars to Legal Status Due to Misrepresentation

Section 4(d) amends current grounds of inadmissibility relating to misrepresentation and false claims of citizenship to reflect certain age and time constraints. This section creates a three-year statute of limitations on inadmissibility based on fraud or misrepresentation tied to the procurement of a visa or other immigration benefit. It creates an exemption for false claims to citizenship made if an applicant was under 18 at the time or otherwise lacked the mental competence to knowingly make such a misrepresentation. These changes would also be applicable to deportation charges based on a false claim to citizenship.

This section would also replace the existing “extreme hardship” standard for obtaining waivers of misrepresentations or false claims to citizenship with a more generous “hardship” standard. Separation from family in itself would qualify as “hardship.” The eligibility for the waiver is expanded to include hardship to the immigrants themselves and the immigrants’ sons and daughters (as well as spouses and parents) who are citizens or residents. In the case of a VAWA self-petitioner,⁵ eligibility is expanded to include hardship to the immigrant or the immigrant’s parent or child who is a citizen, resident, or a “qualified alien” with regard to public benefits under the Personal Responsibility and Work Opportunity Act of 1996 (a resident, asylee, refugee, parolee, beneficiary of withholding, conditional entrant, Cuban or Haitian entrant).

Increased Discretionary Authority Regarding Removal and Inadmissibility

Section 5 of the AFUA authorizes expanded case-by-case authority to waive many grounds of inadmissibility and deportability if authorities determine that it is in the public interest or in the interest of family unity. This could allow some immigrants to remain lawfully in the United States whose immigration violations are found to be outweighed by issues of public interest or family concerns.

Pursuant to section 5(a) of the act, immigration judges would be allowed to exercise discretion in declining to order an immigrant removed, deported, or declared inadmissible, and could terminate court proceedings or grant permission to reapply for relief if the immigrant is eligible for naturalization or if deportation is against the public interest or would result in hardship to the immigrant's U.S. citizen or permanent resident parent, spouse, or child.

Under Section 5(b), immigration officials in DHS who review applications for immigration benefits would have similar authority to waive minor infractions or to grant permission to reapply if denial of the application would be against the public interest or would result in hardship. Separation from family itself would be considered both against the public interest and "hardship" for the purposes of exercising this discretion.

This discretionary authority of immigration judges and DHS would not apply if the immigrant is deportable or inadmissible due to serious violations. These would include multiple convictions, drug trafficking, procuring prostitutes, assertion of immunity for crimes, human trafficking, money laundering, national security-related issues, polygamy, international child abduction, unlawful voting, or an aggravated felony.

Limitations on the Definition of Conviction and Reinstatement of Removal

Section 4(e) amends the definition of "conviction" to bring the meaning of that term for immigration purposes more in line with the common understanding of the word. A conviction for immigration purposes would be limited to final convictions, and would not include orders of probation without judgment, or convictions that have been withheld, deferred, expunged, annulled, invalidated, vacated, or similarly modified. For immigration purposes, a pardon would render the conviction void and only the term of imprisonment actually imposed will be considered; suspended sentences would no longer be included. These changes would be retroactive.

Section 5(c) of the bill limits the use of reinstatement of removal in cases involving children or hardship to family members. Reinstatement of removal is the automatic deportation of an immigrant who has reentered illegally after removal.⁶ Reinstatement after unlawful reentry would not apply if the immigrant reentered before the age of 18 or if reinstatement is not in the public interest or would result in hardship to the immigrant's U.S. citizen or resident parent, spouse, or child. Hardship is defined to include the hardship caused by family separation.

Conclusion

The American Families United Act attacks the problem of undocumented immigration by focusing on systemic fixes that open up the possibility of legal status for relatives of U.S. citizens and permanent residents. In that sense, it excises from the law some of the most egregious changes made to the INA by the 1996 immigration amendments. While this could be a critical advance for individual immigrants, it may not address the underlying need for a more global solution created by decades of backlogs and lack of sufficient visas to meet the demand of both employment and family based applicants.⁷ The AFUA provides a useful example of a targeted,

alternative approach to the difficult problem of the undocumented population in our country, but does not address the root causes of illegal immigration and our broken legal immigration system.

Endnotes

¹ H.R. 3431, [The American Families United Act](#), Library of Congress, 2013.

² INA § 212(a)(9)(B). The “3 and 10 year bars” ban foreign nationals from re-entering the U.S. for 3 years if they had been unlawfully present in the U.S. for 180 days but less than a year, and bars them for 10 years if they were unlawfully present for a year or more. The bar also makes them inadmissible for purposes of becoming lawful permanent residents.

³ “Inadmissibility” is an immigration term of art that applies to applicants for admission to the United States. A foreign national who is inadmissible cannot enter the U.S. or change immigration status to legal permanent resident within the U.S. “Deportability” applies to foreign nationals who are present in the U.S. and subject to removal.

⁴ INA § 212(a)(9)(C)(i). The “permanent bar” makes foreign nationals permanently inadmissible if they reenter unlawfully after having been removed or after having been unlawfully present in the U.S. for a year or more.

⁵ Violence Against Women Act of 1994 (VAWA). Immigrants who are battered or subject to extreme cruelty by the family member sponsoring their immigration petition can self-petition independently of their abuser.

⁶ INA § 241(a)(5). Reinstatement of removal applies when a foreign national reenters illegally after being ordered removed. It prevents the immigrant from reopening the removal order, seeking review of the removal order, or otherwise defending himself or herself from removal.

⁷ American Immigration Council, [Why Don't They Just Get In Line?](#), March 2013.