



Senate “Gang of 8” Immigration Bill Needs More Work to Ensure Fundamental Fairness for All Immigrants

Statement and Recommendations:

We must ensure that all aspiring citizens have a fair shot at the pathway to citizenship. The promise of immigration reform requires that that we restore due process and discretion, including waivers that will allow individuals to present their case to gain or keep lawful status before an immigration judge. The current discriminatory and punitive immigration laws and policies must be changed to ensure that the fundamental American values of fairness and equal protection under the law are upheld.

The Senate bill includes some restoration of due process and judicial discretion, but more work is needed to avoid repeating the policy and political mistakes that have led to record number deportations, including the expulsion of many long time lawful permanent residents.

I. Legalization

S. 744 runs the risk of blocking many people from legalizing even though it provides some important criminal exemptions and waivers for those seeking a path to citizenship.

Description of Disqualification Bars for Legalization: S. 744 puts forth a complicated, long, and overlapping list of crime-related obstacles for legalization. Disqualification bars will apply at all stages of the multi-year legalization process. Specifically, the bill disqualifies persons with:

- Any state or federal felony conviction, except certain status-based offenses;
- An “aggravated felony” conviction (which includes hundreds of offenses that are neither aggravated nor felonies);
- Three or more misdemeanor convictions occurring on different dates, except minor traffic offenses and certain status-based crimes;
- Certain foreign convictions;
- Gang related conduct or convictions; and
- Anyone falling within current immigration criminal law bars (called grounds of inadmissibility), which include expansive categories of crimes labeled as crimes of moral turpitude (includes theft, fraud, assault, sex, and some driving related offenses) and any drug related offense. S. 744 expands this last category to now include, in certain circumstances, a third DUI conviction and domestic violence related offenses.

Summary Analysis

A person applying for legalization will face disqualification bars for one misdemeanor crime that is classified as an aggravated felony. For example, a person in Arizona who sells a small quantity of marijuana may never be able to legalize.

Exceptions to disqualification bars: Minor traffic offenses are not included, but it is not clear what they are. Narrow exceptions do not apply to federal immigration convictions for illegal entry (one of the most common federally prosecuted), illegal reentry, and many state offenses that are prosecuted relating to immigration status, such as showing a false ID.

Changes to the definition of conviction: Expunged (or erased), “set aside or equivalent” convictions will not disqualify someone. This new definition only applies to legalization applications.

Legalization waiver is tough: As a rule, waivers (a pardon of conduct) are not automatic and not granted easily. It is not clear whether the waiver can be used after initial Registered Provisional Status (RPI) is granted. This would be



needed if someone commits a violation of the ineligibility bars of any kind after a grant of RPI status. This waives three misdemeanor bar, some grounds of “inadmissibility,” and some of the new grounds of inadmissibility. It does not waive nearly all aggravated felonies, two convictions (where sentence is > 5 years) of any kind, and foreign convictions. It does not waive conduct that is believed to be “drug trafficking,” security/terrorist grounds, or unlawful voting. Legalization applicants, however, are allowed to use other waivers under both existing under current immigration law and those proposed by S. 744.

USCIS has discretion to grant the legalization waiver. Under S. 744 the immigration court cannot review or grant a legalization waiver. If it is denied, the individual can appeal to the federal District Court in the area in which he/she resides. If the person is placed into deportation proceedings, he/she can apply for other waivers under law (including waiver described in next section) and possibly move to reopen his/her legalization application.

The criminal disqualification bars are applied at many points of the years-long path from legalization to citizenship. The ever-expanding list of criminal bars risk funneling people into deportation, instead of a path to citizenship. The pathway to citizenship must instead be fair and inclusive. Limiting disqualification categories and ensuring meaningful waivers are essential to a balanced and robust legalization program.

II. Waivers

The Sec. 2313 conditional waiver in S.744 must be expanded to help applicants at risk of being disqualified from the legalization program and to correct overly harsh immigration laws that hurt people lawfully here. Without discretion, many old and proposed new grounds of deportation cannot be waived, leading to mandatory deportation.

The 2313 conditional waiver has two parts: (1) It allows an immigration judge to terminate proceedings or waive a particular ground of removal and (2) allows a DHS agent to waive a ground of removal. DHS or an immigration judge can weigh the individual circumstances of people’s cases when they are applying for status or when the government is trying to take away their lawful status, such as a Green card, asylum, or TPS. People must show that their deportation is against the public interest or would result in hardship to their U.S. citizen or lawful permanent resident parent, spouse or child. They could also show they are eligible to naturalize.

Description of Disqualification Bars for Legalization: The waiver does not cover anyone who has:

- Convictions of 2 or more “crimes involving moral turpitude” (includes misdemeanors and violations, including most theft and fraud offenses);
- A felony conviction described in the “aggravated felony” definition of the immigration law that would have been classified as an aggravated felony at the time of conviction;
- Convictions of 2 or more offenses for which the aggregate sentences to confinement were 5 years or more;
- “Reason to believe” known or suspected drug trafficker;
- Procures, attempts to procure, or receives proceeds of prostitution;
- Other bars include security/terrorism grounds, human trafficking, failure to register as a sex offender, unlawful voting, and money laundering; and
- May include proposed new grounds of deportation.

Summary Analysis: The waiver in S.744 is confusing, will be tough to get, and runs the risk of excluding many legalization applicants and DREAMers and deporting lawful permanent residents, asylees, and Temporary Protected Status (TPS) holders.

Positive changes: Includes more generous standard than most current waivers. Covers misdemeanor “aggravated felony” convictions, such as misdemeanor drug offenses; offenses not considered “aggravated felonies” at time of



conviction; and some new grounds of deportation. Allows immigration judge to determine that someone is eligible to naturalize.

Conditional waiver is tough: Waiver has so many exclusions that many people will likely not qualify. For example, it still does not apply to most aggravated felonies, such as someone who got in a bar fight or has a shoplifting offense in certain states. It also does not apply to people who have two “crimes involving moral turpitude,” such as someone who has twice jumped a turnstyle on the subway, shoplifted, or wrote a bad check. This means people will never have a fair day in court before facing mandatory deportation and separation from their families. In these cases, an immigration judge or official will never have a chance to look at any of the positive factors in someone’s life, such as length of residence in the U.S., family ties, creation of jobs for U.S. citizens, or even U.S. military service.

Waiver for people already deported is limited: The bill also allows certain people (spouse, child, or parent of a US Citizen or LPR, or certain Dreamers) who have already been deported, received voluntary departure, or who illegally reentered after 12/31/11, to apply for legalization if they are otherwise eligible. However, people will be subject to the multiple criminal bars applicable to those seeking RPI status. In addition, the government may argue that such persons remain subject to the time bars on returning to the US after a prior removal under current law. These time bars, which are rarely waived, range from 5 or 10 or 20 years all the way to permanent bars for someone convicted of an aggravated felony.

Most waivers are tough: As a rule, waivers are not automatic and not granted easily. Our current immigration laws contain a handful of waivers that apply in very limited cases. For example, Immigration Courts handled nearly 400,000 cases in 2012, but less than 8,000 people were granted the most common pardon from deportation called cancellation of removal. This means that immigrants who have been accused or convicted of a crime, including people who have been granted asylum, TPS, or a Green card, as well as undocumented immigrants, have little chance to stay in the country with their families. This new waiver will help expand the very limited discretion we have now.

Immigrants should not be treated only as the sum of their mistakes in a nation that values second chances. Immigration judges must be given back the power to grant a second chance and cancel someone’s deportation after looking at other aspects of a person’s life. Real reform requires a broad waiver to restore judicial discretion for those seeking to keep or gain lawful status.

III. New Deportation Grounds and New Crimes

S. 744 adds several grounds of deportation that threaten a straightforward path to citizenship and expands deportation for lawful permanent residents and individuals applying for a green card.

Description and Summary Analysis

Our current immigration laws already contain at least 52 separate grounds of deportation, most of which are triggered by criminal conduct and convictions. The current grounds already cover most of the new deportation grounds proposed in the bill.

Unnecessarily expands the domestic violence grounds of deportation: Restricts individuals from applying for green card if convicted of offenses - including misdemeanors - related to partner violence, child abuse or child abandonment, or violation of a restraining order. There is an exception for victims who can prove they are not the perpetrators. It is not clear what waivers will apply. The domestic violence community has always opposed these kinds of additions because it hurts survivors; a survivor is the best person situated to make informed decisions about safety in his/her abusive relationship, not an immigration agent.

Creates new deportation grounds for suspected gang members: Disqualification from legalization or a green card is tied to gang conduct (limited to people 18 years +) or a gang-related conviction. Limited waivers are tough to get



and require the applicant to produce evidence they were never involved in illegal activity connected to the gang or have renounced the gang. These laws are retroactive. Because challenging such a classification is so difficult, these legislative proposals will exacerbate existing problems of misidentification, increase profiling, and target children and youth, many of whom are the victims of crime and human trafficking.

Creates harsh new deportation ground for DUIs: Two DUI convictions plus one conviction after the date of enactment disqualifies green card holders or people who are in status. Legalization applicants can be deported for three DUI convictions, even if they were committed years ago and the conduct did not trigger deportation at the time it was committed. This bill employs a “one-size-fits-all” approach, treating all drunk driving violations the same even if there is no damage to persons or property. In some states a person can be convicted of DUI if the vehicle is not being driven, as when someone passes out in a parked car. Retroactive laws upset settled expectations and undermine faith in our legal system.

Expands the aggravated felony ground relating to sexual abuse of a minor: Allows DHS to use evidence that is not in the conviction of record and that is not proven in court. This undermines fairness and efficiency and will result in individuals being re-tried in immigration courts (often without lawyers) after they have already been through the criminal justice process. This provision will also alter longstanding rules for how crimes are analyzed under immigration law and make it easier for DHS to deport someone.

Converts several existing federal criminal document fraud offenses into a ground of deportability and inadmissibility and heightens penalties for some document fraud crimes: Specifically, makes passport, visa, social security fraud offenses grounds of deportability and inadmissibility.

Adds more federal crimes related to avoiding border controls: Creates three new border control crimes that punish people for avoiding border patrol and circumventing equipment. These crimes carry stiff sentences that could be aggravated felonies.

Expanding deportation grounds is unnecessary and undermines the goal of restoring balance to an extremely harsh immigration system. These new deportation grounds underscore the need for a meaningful waiver.

IV. OTHER ENFORCEMENT

Border policing is heavily funded without effective accountability mechanisms: S. 744 continues to fund and expand border militarization policies that devastate border communities and violate human rights. Operation Streamline, a discredited policy that requires the federal prosecution of undocumented migrants, is fully funded, despite many complaints. Billions of dollars will go into the border fence. Accountability and oversight mechanisms, like the Border Oversight Task Force, have limited powers to correct these abuses. Lastly, making the legalization program contingent upon the completion of border enforcement goals is unfair and arbitrary.

The racial profiling protection proposals are weak: S. 744 fails to include a strong provision to track racial profiling and continues to exclude people suspected of being a security threat, without an opportunity for the person to present evidence to the contrary. Despite the huge numbers of complaints brought against immigration enforcement programs, NSEERS, and others, the Senate bill does not contain a strong racial profiling provision that is consistent with due process rights.

The Immigrant Justice Network (IJN) is comprised of Immigrant Defense Project (IDP), the Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild (NIP/NLG). As specialists in the complex area of immigration consequences of criminal convictions, our organizations have worked for decades to provide legal, technical, communications and messaging support to immigrant communities, legal practitioners, and advocates seeking to advance the rights of all immigrants. Though collaborating for years, we officially joined forces as the Immigrant Justice Network (IJN) in 2006 to overhaul federal immigration law and national, state and local policies that deny immigrants due process and other constitutional rights.

