



Lessons learned from the Immigration Reform and Control Act of 1986: A look at the “Border Security, Economic Opportunity and Immigration Modernization Act of 2013”

For over three decades, the Immigrant Legal Resource Center (ILRC) has been at the forefront of promoting and defending immigrants’ rights. In the 1980s, we were actively involved in the national policy debate that led to the enactment of the Immigration Reform and Control Act (IRCA) of 1986, the last major overhaul of our immigration system. The ILRC published the only comprehensive practitioner guide, developed a group processing workshop model for legalization cases, and provided trainings and technical assistance to practitioners and immigrants across the country.

Drawing from our experiences during and after IRCA, we offer a brief analysis of some of the legalization aspects of the recently introduced Senate Bill—the “Border Security, Economic Opportunity and Immigration Modernization Act of 2013.”¹ We divide our discussion broadly into the positive and negative features of provisions in Senate Bill 744 (S.744) that relate to the length of the path to citizenship, eligibility requirements, and confidentiality provisions, and compare these to the provisions that existed under IRCA.

Positive Aspects of the Legalization Provisions in S. 744:

Roadmap to Citizenship. Among the most positive features of the Senate Bill is that it provides a roadmap to citizenship for certain undocumented immigrants. The path to citizenship for those living in the United States without lawful status will consist of four steps: (1) Adjustment to “Registered Provisional Immigrant” (RPI) Status; (2) Extension/Renewal of RPI status (3) Adjustment of Status to Lawful Permanent Resident (LPR); and (4) Naturalization. Just like under IRCA, legalization under S.744 is an integral part of bringing undocumented immigrants out of the shadows and into the fold of American society.²

Benefits of RPI Status. Similarly to IRCA, the Senate Bill will allow those approved for RPI status to receive employment authorization and be able to work for any employer, and travel outside of the United States for limited periods of time. Notably, those in RPI status may apply for their spouse and child as derivatives, so long as the child or spouse lives in the United States.

¹ On April 17, 2013, a bipartisan group of Senators, known as the “Gang of Eight” introduced S.744, the “Border Security, Economic Opportunity and Immigration Modernization Act of 2013.”

² See Bill Ong Hing, *The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon*, 6 GEO. IMMIGR. L.J. 413, 485-86 (1992) [hereinafter Hing, *Lessons for the Self- Help*].

The DREAM Act. The Senate Bill also recognizes the unique circumstances and equities of those who entered the United States as children (“DREAMers”). It allows those who meet the DREAM Act provisions to adjust to Lawful Permanent Resident Status after five years in RPI status and to naturalize immediately thereafter. DREAMers are also exempt from having to pay the \$2,000 penalty fee required of others applying for RPI status.

Ineligibility for RPI Status and Inadmissibility. The Bill makes some efforts to address certain grounds that have prevented many immigrants from adjusting to lawful permanent residence under existing law. Specifically, the Senate Bill provides that the three and ten year bars and the so-called “permanent” bar for those with a history of unlawful presence in the U.S. shall not apply to applicants for determining eligibility for RPI status (unless based on unlawful entry after enactment of S.744). Also, those who have made a false claim to U.S. citizenship or other immigration misrepresentations³ will not be barred from RPI eligibility, unless based on unlawful entry after enactment of S.744. Furthermore, under IRCA minor offenses could be expunged and therefore not disqualify an applicant for legalization. S.744 includes a provision that serves a similar purpose. Specifically, S.744 redefines the term “conviction” for criminal related offenses that would make someone ineligible for RPI status. The definition of conviction for RPI applications, excludes judgments that have been expunged, set aside, or the equivalent.

Finally, one of the most significant aspects of the Senate Bill provides a waiver that allows those who have been previously deported, for non-criminal grounds, to apply for RPI status, if they are the spouse, parent, or child of a U.S. citizen or lawful permanent resident. DREAM Act eligible individuals may also apply for this waiver without a qualifying relative, if they meet certain requirements.⁴

Moreover, grounds of inadmissibility that are waived for RPI applicants will count as having been waived when adjusting to lawful permanent residence. Together, these provisions will work to increase the number of applicants.

For those who apply for permanent residence not through the legalization provisions of the Bill but through regular adjustment of status, the Senate Bill provides for a waiver of the 3-year and 10-year bars for parents of U.S. citizens and Lawful Permanent Residents, for whom this waiver is not currently available. It also provides a waiver for those who have made a false claim to U.S. citizenship or other immigration misrepresentations.

Confidentiality Protections. Similar to IRCA, S.744 protects employment records or other evidence of employment provided by an employer in support of an application for RPI status. Specifically, S.744 provides that employment information may not be used in a civil or criminal prosecution or investigation of the employer for the prior unlawful employment, regardless of the adjudication of such application or reconsideration.⁵ This provision is particularly important because documenting eligibility for immigration benefits has been a major hurdle for those living in undocumented status. Employers will be more willing to provide employment records, if they know they will not be prosecuted for unlawfully employing unauthorized workers.

Problems with Legalization Under S.744:

³ S.744 Sec. 2101, p. 65

⁴ S.744, Sec. 245B(c)(6), p. 73.

⁵ S.722 Sec. 2104.

A close look at IRCA and the Senate Bill reveals that both pieces of legislation represent a struggle between the perceived lack of control over our immigration system and the belief that something has to be done about the large number of undocumented immigrants living in the United States. Unfortunately, the Senate Bill includes numerous roadblocks and restrictions that will prevent many from accessing the path to legalization.

Path to Citizenship. Significantly, S.744 requires a dramatically long path to citizenship. It requires a minimum 10-year wait for lawful permanent resident status, and an additional three years to apply for citizenship (except for “DREAMers” and agricultural workers). This is a sharp contrast to IRCA. Under IRCA, applicants could become permanent residents within a short period of time and then citizens five years later.⁶ This process allowed for increased integration and participation in American society and culture. A thirteen year path to citizenship will delay full integration into American society, and, given the additional roadblocks to citizenship and numerous grounds under which individuals can lose their status, will likely result in legalizing far fewer than the 11 million undocumented immigrants estimated to live in the United States.

Early Cut-Off Date. Similarly to IRCA, which required more than five years of residence for those who wished to apply under the pre-1982 program, the Senate Bill sets a relatively early cutoff date. Those who arrived to the United States during the last two years (after December 31, 2011) will not be able to apply for legalization under the Senate’s program. This restrictive cutoff date represents the tension between advocates who would like as many of the undocumented population to have an opportunity to legalize and those who would like to limit the number of immigrants eligible for legalization. Unfortunately, as was true under IRCA, an earlier cutoff date will exclude many from the legalization program. Thus, possibly hundreds of thousands of individuals who have already made ties to their communities and contributed to this country will be foreclosed from legalization.

Avenues to Citizenship. A substantial departure both from IRCA and existing law is that the Senate Bill limits the avenues to citizenship for those in RPI status to one path. The Bill indicates that those who apply for, and receive RPI status (except for DREAMers and agricultural workers), may *only* adjust to lawful permanent resident status under the 10+ year path provided in the Bill.⁷ This is an unprecedented change in how our immigration system works. It precludes the possibility of a shorter path for those who could benefit from the regular provisions of adjustment of status such as through a close family member who is a U.S. citizen

One-Year Application Window. Complicating the legalization process is the one year application window for those who wish to apply for RPI status. Although the bill allows for an eighteen month extension, the application period is far too narrow and risks excluding many from the process. After IRCA, we learned that many potential applicants did not apply for legalization due to lack of information, insufficient outreach, lack of funds, and confusion about the requirements.⁸ For example, at the outset,

⁶ Under IRCA, eighteen months after obtaining temporary status, every pre-1982 applicant had to submit a second application for permanent resident status and be prepared to show proficiency in English and knowledge of U.S. history and government or enrollment in an approved course. Most agricultural program applicants automatically became lawful permanent residents on December 1, 1990. *See Hing, Lessons for the Self-Help*, p. 423.

⁷ Senate Bill 744. Sec. 2102, page 111.

⁸ The number of potentially eligible applicants under IRCA is still unknown. The Congressional Budget Office (CBO) derived a figure of 1.4 million for the number of likely applicants. The Carnegie Endowment for

some believed they were ineligible and never learned that certain interpretations were later liberally construed. The number of undocumented immigrants living in the United States today is much greater than during the 1980s. Outreach and capacity to educate, screen, and file applications for an estimated 11 million within one year will be a monumental task. The short window of time contemplated under S.744 will make it extremely challenging for advocates and the Department of Homeland Security to work through issues of misinformation, confusion, and eligibility, which will result in many immigrants being left out of legalization.

Confidentiality. Under IRCA, we also learned that the promise of confidentiality was essential to attracting many legalization applicants. This was particularly important to eligible immigrants with ineligible family members who might face deportation. IRCA specified that information in a legalization application could not be used for any purpose other than to make a determination on the application or for penalizing false statements in the application. IRCA further specified that anyone who used, published, or permitted information in the application to be examined in violation of the confidentiality provisions would be fined and/or imprisoned for up to five years.

Senate Bill 744 also includes confidentiality provisions, but these provisions have little teeth. Like IRCA, the Senate Bill allows information to be used against the applicant in cases of fraud. However, it also requires disclosure to law enforcement agencies in connection with a criminal investigation, the prosecution of any felony not related to the applicant's immigration status, or a national security investigation. It further provides that the Secretary may use any evidence detected by means of audits and evaluation for purposes of investigating, prosecuting, referring for prosecution or denying or terminating immigration benefits.⁹ All of these exceptions will help contribute to a climate of mistrust by some potential legalization applicants, thus causing fewer to apply than those who would be eligible.

Complex Path to Legalization. Perhaps the most important lesson learned from our experience under IRCA is that a complex path to legalization will have the unfortunate consequence of leaving many immigrants in undocumented status. The Senate Bill includes many requirements that immigrants must comply with throughout the legalization process, and could prevent some in RPI status from remaining on the path. For example under the Senate's Bill, initial RPI status is valid for six years, and may be extended if the RPI applicant demonstrates that s/he was regularly employed through the RPI period (allowing for gaps of not more than sixty days) and is not likely to become a public charge, or demonstrates an average income or resources not less than 100 percent of the poverty level through the RPI period. This public charge or poverty level requirement is particularly concerning because, although immigrants have a high workforce participation rate, they represent 21 percent of all low-wage workers. Therefore, for some meeting these requirements throughout the six year period may pose a significant challenge.

Crime-Related Obstacles. Additionally, the Senate Bill puts forth a complicated, long, and overlapping list of crime-related obstacles for legalization. Some of these are similar to those under IRCA, including a felony¹⁰ conviction, 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, certain status-based crimes, and certain foreign convictions.

International Peace predicted between 1.8 and 2.6 million eligible applicants. The INS predicted between 2 and 3.9 million eligible applicants. Ultimately, 1.7 million applicants filed under the pre-1982 program, and 1.2 million applied as Special Agricultural Workers (SAW). *See* Hing, *Lessons for the Self-Help*, pp. 418 and 468-69.

⁹ *Id.*

¹⁰ S.744 exempts certain status based state or local felony convictions.

However, S.744 also includes new offenses that were not bars to eligibility under IRCA and will have a significant impact. For example, under S.744 two DUI convictions plus one conviction after the date of enactment disqualifies legalization applicants. Green card holders can be deported for three DUI convictions, even if these were committed years ago and the conduct did not trigger deportation at the time it was committed. The Senate bill also adds a new social security fraud crime¹¹ and expands passport fraud offenses to include criminal penalties for any person who is involved in passport fraud. The ever-expanding list of criminal bars risks funneling people into deportation, instead of a path to citizenship, and will lead to the forced separation of families. Limiting disqualification categories and ensuring meaningful waivers are essential to a balanced and robust legalization program.

Family-Based Immigration. The Senate Bill also eliminates important provisions that will have a profound impact on families. Currently, there are four preference categories based on family relationships and 480,000 visas are allocated to family relationships. The Senate Bill eliminates the current 3rd preference category for married sons and daughters of U.S. citizens, for beneficiaries who are 31 or older. It also eliminates the current 4th preference category for siblings of U.S. citizens. The elimination of these categories redefines the concept of families under our immigration laws and will prevent many individuals from reuniting with family members who fall outside of the remaining categories.

While the legislative process is just beginning, and there is no certainty that S.744 will become law, it is essential that members of Congress articulate how the Bill, particularly the legalization provisions, should be interpreted. During IRCA, the question of how the INS was to administer the program was addressed independently by many members of Congress. Lawmakers described the implementation goal of legalization as “generous” and “flexible.”¹² The House Judiciary Committee specifically stated that the intent of the Committee was for the legalization program to be “implemented in a liberal and generous fashion.”¹³ These statements indicated to adjudicators that they should err on the side of the applicant when reviewing cases. If Congress truly wants maximum participation by eligible applicants, it is essential that members of the Senate Judiciary Committee make clear that they expect the Department of Homeland Security to incorporate flexibility into the implementation of the legalization provisions, taking into consideration the special circumstances of applicants. This is especially true given the length and complexity of the path to citizenship.

¹¹ Section 3102, punishes for a maximum of 5 years individuals who engage in, among other things, social security fraud and selling social security information. p. 523.

¹² Hing, Lesson for the Self-Help, p.486

¹³ Id.