



MAKING COMPREHENSIVE IMMIGRATION REFORM POSSIBLE

Posted on May 3, 2010 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

In shock at the overtly racist profiling now sanctioned by the State of Arizona, <http://blog.cyrusmehta.com/news.aspx?Subldx=ocyrus201042724527>, the Democratic Party has turned to comprehensive immigration reform to pay off its political debt to the vast and growing body of Hispanic voters whose allegiance may determine our national electoral map for decades to come. That is why Senators Reid, Durbin, Schumer, Leahy, Feinstein & Menendez this week introduced the aptly named REPAIR proposal otherwise known more completely as the Real Enforcement with Practical Answers for Immigration Reform Act, <http://tiny.cc/gnm21>. While the prospects for ultimate enactment remain highly uncertain, the commitment by the Democratic Party to moving on CIR is an event of singular importance and one that deserves serious consideration.

This proposal might also be called the "Indian and Chinese PhD Relief Act" because relief for these folks is precisely what it would provide. The per country cap would be lifted for those foreign-born scholars who earned advanced degrees from US universities in science, technology, engineering and mathematics, the now sacrosanct STEM cordon sanitaire. There is the slight matter of having a job offer from a US employer in a related field but that is mere detail. We do not know if these lucky few would be able to apply directly for adjustment of status to lawful permanent resident given the immediate availability of a green card number or whether they would still have to qualify under one of the existing employment categories such as national interest waiver, outstanding researcher, extraordinary ability or on the basis of labor certification. What is clear, however, and perhaps most importantly, is that the

tyranny of priority dates under which the prospect of gaining green card status had become a cruel dream has now been overthrown. No longer does the priority date regime have legal relevance. Praise the Lord!

REPAIR also ends the unconscionable injustice of separating lawful permanent residents from their families for years on end by treating such dependents as immediate relatives free of quota restrictions which is precisely what they should and now will be. Bravo Congress! Before we get too excited, we would do well to remember that significant new burdens would cripple the H-1B and L-1 categories. L-1B specialized knowledge workers are limited to one year, though the statute is silent on the possibility of extensions. Numerical caps will be placed on both H and L sponsorship for large employers and all H employers must face both more investigations and more restrictive wage methodology so Wage Levels I and II are likely no longer to be available. The prospect of further government intrusion in the form of more and more frequent H and L investigations also clouds the happy horizon. It is ironic that Congress would select the REPAIR bill as the vehicle to deliver such punishment at the same time as they are making the H1B less relevant. Indeed, if STEM Master's and PhD graduates from our top schools can apply right away for the green card, and since STEM F-1 visas will now enjoy dual intent, why would anyone in his or her right mind seek H-1B sponsorship at all? Most ominous is the Orwellian sounding "Commission on Employment-Based Immigration" which is invested with the awesome power to declare an immigration emergency and issue Olympian edicts to which a hapless Congress must say "yea" or "neigh". A concept born in the brain of the AFL-CIO and former Carter Secretary of Labor Ray Marshall, this Commission places all of employment-based immigration on the chopping block, even the priority date relief noted above.

What of those who live in the shadows? For them, REPAIR offers "Lawful Prospective Immigrant" (LPI) status in two phases. First comes the right to live, work and travel for eight years. Then, once all current green card visa backlogs have been cleared out, one can apply for adjustment of status after learning English, mastering civics, paying back taxes with penalties, registering for Selective Service and passing security checks. Glad the rest of us don't have to do all that! . How will the magic of backlog elimination weave its spell? Well, a massive infusion of new numbers on the family side of the ledger should help some. What about employment-based waiting lines? Ah, here, REPAIR is

strangely silent. What are we to assume from this? Will LPI adjustments take precedence over EB-3 cases where the employer has demonstrated the absence of qualified, willing and available US workers? Will they come ahead of EB-2 applicants from China or India whose work has been found to be in the national interest? Congress should step up to the plate and provide the same green card relief on the employment side of the ledger. The fact that REPAIR does not do that once again illustrates the pervasive yet unspoken belief that family migration is worthy of our compassionate concern while employment migration has no claim on our conscience or our sense of national priorities.

If Congress does not do the right thing, what then? That is where executive fiat can help make CIR possible in two key ways. First, as we have discussed at length previously (Tyranny of Priority Dates, <http://scr.bi/i0Lqkz>) the USCIS can largely eliminate EB backlogs by eliminating family members from the cap, an approach that can be supported by textual reinterpretation and legislative history. Second, the very notion of visa availability can be redefined to allow for provisional submissions that can be advanced in the absence of current priority dates following I-140 approval. If we allow those who have been here without color of law to apply for green cards as lawful prospective immigrants, which we strongly support, there is no reason in law or logic to prevent those who are in legal status from also prospectively seeking to get LPR status. Allowing adjustment of status applications for EB beneficiaries after I 140 approval but conditioning final approval of same upon a current priority date is the perfect book-end to the LPI program, . It is something that can be done entirely through Executive Fiat and the effect of which would be to wipe away the EB backlog which very presence could indefinitely delay the implementation of the LPI initiative. What's not to like? Now that Congress has taken the first tentative steps on the road to real immigration reform, why not use all the weapons at our disposal to make it happen?