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US IMMIGRATION & NATIONALITY LAW

THE ONLY TRUE TEST OF LEADERSHIP: PRESIDENTIAL INITIATIVE AND IMMIGRATION REFORM

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Facing the setting sun out beyond the vast confines of the Los Angeles coliseum, John Kennedy accepted the Democratic nomination for President in 1960 by proclaiming that "the only valid test of leadership is the ability to lead and lead vigorously." Doubtless thinking how to respond to the challenges of his own time, President Kennedy has unwittingly showed the way to meaningful immigration reform for our era. While we fondly hope and fervently pray that the Congress will enact comprehensive immigration reform, we must not stand silent while waiting for Godot. There is enormous remedial potential in the current corpus of immigration law that can be realized through the dedicated application of executive initiative if the vision and will to do exists. It was for this purpose and with this intent that we wrote at length in *The Tyranny of Priority Dates* in BIB Daily, http://scr.bi/i0Lqkz. While our ideas there were audaciously incremental, we did not cite to past examples of innovative executive leadership that expressed profound policy changes through regulatory revision. It is our great good fortune to remedy this troubling omission with a large helping hand from Solicitor General Elena Kagan recently nominated by President Obama to replace retiring Justice John Paul Stevens on the United States Supreme Court. What a relief!

In 2001, then Harvard Law School Dean Kagan wrote her most widely cited foray into legal scholarship *Presidential Administration* in 114 Harvard Law Review 2245, http://www.harvardlawreview.org/issues/114/june01/Article_7038.php We freely admit that Dean Kagan does not mention immigration even once in over a hundred pages. Most of the article analyzes the influence wielded by various Presidents over the federal regulatory process, presenting at length legal

arguments for and against such a sweeping exercise of authority. However, deep within the bowels of this robust exegesis, one finds a golden nugget that we hope to polish for our own very different purposes. On pages 2281-2282, we take a deep breath and read the following:

President Clinton treated the sphere of regulation as his own and in doing so made it his own, in a way no other modern President had done. Clinton came to view administration as perhaps the single most critical-in part because the single most available- vehicle to achieve his domestic policy goals (emphasis added).

Dean Kagan offers several examples: a rule to curb underage smoking by restricting the marketing and advertising of tobacco products to children; a rule that allowed the states to offer paid family leave to new parents through the mechanism of unemployment insurance and regular issuance of executive memoranda that directed agency heads to take specified actions within the scope of those powers previously delegated to them by the Congress; making public lands off limits from private development as national monuments; prohibition of discrimination on the basis of sexual orientation; barring federal contracts with companies that used strikebreakers or child labor; mandating a minimum level of employment by federal agencies of welfare recipients and those with physical disabilities; compelling the adoption of workplace rules on expanded religious expression and making sure that regulatory agencies honored strict environmental codes. Doubtless, there are many others. *See Presidential Administration* at 2292. As it turns out, Dean Kagan reminds us that other Presidents had also changed the nation through the stroke of a pen:

Presidents, of course, discovered long ago that they could use executive orders and similar vehicles(for example, proclamations) to take various unilateral actions, sometimes of considerable importance. Consider, by no means as typical examples but as historical highlights., Thomas Jefferson's Louisiana Purchase, Theodore Roosevelt's reservation of public lands for a system of national parks, Harry Truman's desegregation of the armed forces, Lyndon Johnson's requirement that federal contractors adopt affirmative action policies, and… initiation of OMB regulatory review. See Presidential Administration at 2291.

There is no reason why Presidents cannot make immigration policy in precisely the same way. Doing so would be yet another reminder that the most long-

lasting impact of Immigration Reform and Control Act of 1986 was to bring the whole issue of immigration out of the shadows and into the mainstream of national political conversation and public debate. Immigration as an issue has grown up; what Presidents have done in so many other aspects of governance can now be tried within the confines of the Immigration and Nationality Act. So, for example, until Congress acts to overthrow the tyranny of priority dates and reverse the implosion of the green card category system by revising INA § 245(a)(3) and removing the arbitrary and capricious burden of a current priority date as a condition precedent to application for adjustment of status, the President can give hope to untold thousands, especially from India and China, but also those with no graduate degree, through the simple stroke of a pen. How? By taking a new long look at what "immediate availability" of an immigrant visa number can or should mean, which is one of the central ideas in *The Tyranny of Priority Dates*.

Would it not be advantageous if those caught in the crushing EB-2 or EB-3 backlogs could file an adjustment of status application, Form I-485, based on a broader definition of visa availability? It would only be more fair to allow someone to file an I-485 application sooner than many years later if all the conditions towards the green card have been fulfilled, such as labor certification and approval of the Form I-140 immigrant visa petition. Upon filing of an I-485 application, one can enjoy the benefits of occupational mobility or "portability" under INA § 204(j) and children who are turning 21 can gain the protection of the Child Status Protection Act if their age is frozen below 21. Moreover, the applicant, including derivative family members, can also obtain employment authorization, which they otherwise would not be able to get on an H-4 dependent visa.

Unfortunately, INA § 245(a)(3) only allows the filing of an I-485 application when the visa is immediately available to the applicant, and this would need a Congressional fix. We know that Congress either NEVER makes any sensible fix or takes a very long time to do so. So, why not find a way for the immigration agency, USCIS, to allow for an I-485 filing before the priority date becomes current, and still be faithful to § 245(a)(3)?

The only regulation that defines visa availability is 8 C.F.R. § 245(g)(1), which provides:

An alien is ineligible for the benefits of section 245 of the Act unless an immigrant

visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and processing the application Form I-485 the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current). An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service office.

Under 8 C.F.R. § 245.1(g)(1), why must visa availability be based solely on whether one has a priority date on the waiting list which is earlier shown in the Visa Bulletin? Why can't "immediately available" be re-defined based on a qualifying or provisional date? We are all so accustomed to paying obeisance to the holy grail of "priority date" that we understandably overlook the fact that this all-important gatekeeper is nowhere defined. Given the collapse of the priority date system, all of us must get used to thinking of it more as a journey than a concrete point in time. The adjustment application would only be approved when the provisional date becomes current, but the new definition of immediately available visa can encompass a continuum: a provisional date that leads to a final date, which is only when the foreign national can be granted Legal Permanent Resident status but the provisional date will still allow a filing as both provisional and final dates will fall under the new regulatory definition of immediately available. During this period, the I-485 application is properly filed under INA 245(a)(3) through the new definition of immediately available through the qualifying or provisional date.

In *The Tyranny of Priority Dates* we propose the following amendments to 8 C.F.R. § 245(g)(1), shown here in italics, that would expand the definition of visa availability:

An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and

processing the application Form I-485 the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current) ***("current priority date"). An immigrant visa is also considered available for provisional submission of the application Form I-485 based on a provisional priority date without reference to current priority date. No provisional submission can be undertaken absent prior approval of the visa petition and only if visas in the preference category have not been exhausted in the fiscal year. Final adjudication only occurs when there is a current priority date.*** *An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service office.*

Once 8 C.F.R. § 245.1(g)(1) is amended to allow adjustment applications to be filed under INA § 245(a)(3), the authors propose similar amendments in the Department of State's Foreign Affairs Manual to even the playing field for beneficiaries of approved I-140 and I-130 petitions who are outside the U.S. so as not to give those here who are eligible for adjustment of status an unfair advantage. Since the visa will not be valid when issued in the absence of a current priority date, it will be necessary for USCIS to parole such visa applicants in to the United States. Since parole is not considered a legal admission, they will not be eligible for adjustment of status but will have to depart the United States and use the now-valid visa as a travel document to return when visa availability subsequently presents itself. The authors suggest the insertion of the following sentence, shown here in bold italics and deletion of an other sentence, in 9 Foreign Affairs Manual (FAM) 42.55 PN 1.1, as follows:

9 FAM 42.55 PN1.1 Qualifying Dates

"Qualifying dates" are established by the Department to ensure that applicants will not be officially informed of requisite supporting documentation requirements prematurely, i.e., prior to the time that the availability of a visa number within a reasonable period can be foreseen. Therefore, post or National Visa Center (NVC) will not officially and proactively notify applicants of additional processing requirements unless the qualifying date set by the Department (CA/VO/F/I) encompasses the alien's priority date. Otherwise, it is likely that some documents would be out-of date by the time a visa number is available and delay in final action would result. **An immigrant visa is also**

considered available for provisional submission of the immigrant visa application on Form DS 230 based on a provisional priority date without reference to current priority date. No provisional submission can be undertaken absent prior approval of the visa petition and only if visas in the preference category have not been exhausted in the fiscal year. Issuance of the immigrant visa for the appropriate category only occurs when there is a current priority date. **Delete this sentence:**

If Congress wanted to ratify what the USCIS had done, it could certainly do so after the fact. Everything that we now consider to be the adjustment of status process could take place before the priority date becomes current. Similarly, those overseas, can also be paroled into the United States prior to a current priority date. Nothing could be simpler. The reason to seek Congressional modification of INA § 245(a) is not because it is the only way forward but because, by enshrining such a procedural benefit in the INA itself, it will be a much more secure right, one not subject to administrative whim or unilateral repeal. What we propose is not out of the ordinary and without precedent. For instance, the USCIS informally allows spouses of military personnel who would otherwise be unable to adjust under INA § 245(a) if they were neither "inspected and admitted or paroled" to apply for "parole in place." This administrative solution, where a non-citizen is fictitiously paroled, and thus rendered eligible for adjustment as an immediate relative of a US citizen under § 245, allows our troops to concentrate in the battlefield without being distracted about whether their spouses can or cannot remain in the US. Moreover, as suggested in *The Tyranny of Priority Dates*, there is nothing to prevent the administration from granting similar parole benefits to undocumented non-citizens in the United States, along with employment authorization, who are waiting for their priority dates to become current or who meet certain sympathetic criteria such as DREAM children. The President can achieve something close to Comprehensive Immigration Reform without going through Congress and without violating the Separation of Powers doctrine, http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus20105711018&Month=&From=Menu&Page=2&Year=All.

Given the obvious and not insignificant benefits of broad administrative solutions proposed in *The Tyranny of Priority Dates*, any transitional angst is

surely worth the effort. If, as Antonio reminds Sebastian in Act II of Shakespeare's The Tempest, "what's past is prologue," the rich history of executive initiative as a mechanism to achieve meaningful change that Solicitor General Kagan has so eloquently brought to our attention can serve as milestones along the march to comprehensive immigration reform so that, when Congress does decide to follow, they will know where to go and how to get there.