CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HELPING THOSE WHO HELP THEMSELVES: HOW USCIS CAN STOP GOING BROKE AND DO THE RIGHT THING

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By Gary Endelman and Cyrus D. Mehta

Dear Mr. Mayorkas:

Please forgive us. It has been far too long since we last wrote to you, http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus20103925436. Times are hard all around. You are bleeding revenue with caseload dropping. Our clients are lost in limbo and there seems to be no exit. Maybe now is the time to try something new.

Ali (let's do away with formality), facts are indeed stubborn things. Here are some of them. As you told the House Judiciary Immigration Subcommittee on March 23, 2010, FY 2009 was not the best of times: "In fiscal year 2009 USCIS experienced a marked decline in revenue. Revenue declined 15 percent- a drop of approximately $345 million- from the estimate in the fiscal year 2007 fee rule and approximately 8 percent (or $164 million) from our estimate just one year ago. We have not seen a material increase in filing volumes for fiscal year 2010. This is clearly unsustainable." USCIS closed FY 2009 with a $164 million shortfall though some posit a $200 million gap. Faced with these numbers, we understand full well why you felt that you had to raise user fees. Ali, this will not work in the long run. Remember what happened with N-400 naturalization applications when USCIS raised the filing fee to $675 in 2007? The number of new cases plunged from 1.4 million to just over 525,000 in a single year. In a painful and protracted recession, people will simply keep their hands in their pockets. Look at the numbers from your own 3rd Quarter FY 2009 report to Congress on October 5, 2009: the drop in applications was not confined to

naturalization but spanned the full spectrum of all main product lines:

- "There has been a significant reduction in year-to-date employment filings."
- "The non-immigrant worker I-129 year-to-date filings are at 67 percent and the immigrant worker I-140 filings are at 35 percent of anticipated annual receipts"
- "Naturalization applications N-400 year-to-date receipts continue to be below forecasted levels at 64 percent of anticipated annual receipts."

Volume is going through the floor. Ali, you said it best yourself in the Oct 2009 report card to Congress: "It would appear the economy is having an effect on immigration."

What to do? If you cannot squeeze more out of existing customers, how about trying to get some new ones? Yes, we know it is an election year and Congress is unlikely to enact Comprehensive Immigration Reform. That does not mean that all is lost. We have a way for USCIS to end its financial woes while still doing the right thing by our clients! Imagine that, making money and doing justice at the same time! The best thing about it Ali is that you do not have to go hat in hand to Congress nor even endure the tender mercies of APA rulemaking. Settle in for what comes next.

Ali, how many I-140s and I-130s have your folks approved since the adjustment of status window closed on August 16, 2007? You probably do not capture these numbers in a discrete fashion but let's agree it is a whole bunch. These are not immigrant petitions tied to any pending adjustment of status cases since the gulag of visa retrogression has put even this faint hope out of reach. So long as you do not challenge the tyranny of priority date, http://scr.bi/i0Lqkz, so long will you be going broke. There is a better way. You too have realized it. While we were composing this letter, we chanced upon a leaked undated USCIS Memo addressed by your colleagues to you entitled Administrative *Alternatives to Comprehensive Immigration Reform* ("*Alternatives to CIR Memo*"), http://s3.documentcloud.org/documents/6800/memo-on-alternatives-to-comprehensive-immigration-reform.pdf, suggesting use of executive discretion to provide remediation to the current inequities. Nothing in the INA would prevent you from allowing provisional submission of an adjustment of status application in the absence of a current priority date following approval of an I-140 or I-130 immigrant petition. USCIS would not approve this provisional submission in the absence of a current priority date but everything else could be done in anticipation of this blessed event. You are already doing much of

this pre-adjudication right now. You do not even have to change any of your regulations. You could do it through the positive exercise of your discretionary authority, precisely as the USCIS did in July 2007 when, without any regulatory change, it threw open all employment categories for one month due to the communication snafu over visa availability with your Foggy Bottom colleagues at the State Department. If, out of an abundance of caution, you want to play by the numbers, we have prepared an appropriate amendment to 8 CFR 245.1(g)(1) for you to consider (new language in **bold** italics):

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.*

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. Nothing could be simpler. Ali, you have it within your power to end all of the USCIS' financial woes. You will create an entire new class of customers by the tens, if not hundreds, of thousands and you can charge as much as your want for their provisional adjustments- the sky is the limit for the price of hope is never too high. Until now, Ali, you have listened to your policy gurus who have told you the USCIS is trapped in a zero sum game with no alternative but to make those already inside the tent pay more. We offer a better way. Sure, there will be

expenses to service the tsunami of customers but, as with legalization and 245(i), the sheer volume of cases will overwhelm the added costs, particularly when economies of scale and attendant efficiencies are factored in to the equation.

There are other innovative ideas, though not as audacious as our first idea, you can think of too, Ali. The *Alternatives to CIR Memo* indicates that you have thought of granting EADs to spouses after the H-1B spouse has maximized the six years. How about granting the EAD earlier on, at the very outset, like L-2 or E spouses? These spouses of H-1Bs who also had careers in their home countries need not sit at home twiddling their thumbs while patiently waiting for the day they can file an adjustment application or obtain work authorization. Not only will they rev up our economy, but the filing of tens of thousands of EAD applications will be another source of fees for the USCIS. Can you also think of the revenues you would generate if you allowed for the pre-adjudication of waivers of the 3 and 10 year bars to re-entry prior to departure? This too has been thought through in the *Alternatives to CIR Memo*, and we applaud your people for doing so and for even considering a lower hardship standard. Most folks with approved I-130 or I-140 petitions who have accrued unlawful presence in excess of 180 days do not want to take the chance of leaving the US unless they know that they can obtain the waiver. Not only will this generate fees, but it will also reduce the undocumented population if people are assured of coming back with green cards after they trigger the 3 or 10 year bars upon departure.

In case you still consider our revenue generating schemes too outlandish, how about some plain vanilla ideas, already proposed in the *Alternatives to CIR Memo* such as subjecting more applications to premium processing? The EAD presently takes 90 days to renew. Many people forget to file applications in advance of 90 days, and then have to stop working if USCIS does not renew before the expiration of the EAD. Could you consider premium processing of EADs for the thousands of desperate people who want their work permits renewed before the expiration date so that their employment is not disrupted? You could also consider the simultaneous premium processing of advance parole permits? Here are other variations on a premium processing theme: Allow premium processing for stand alone I-539 applications for extension or change of status; premium processing for biometrics for those who wish to leave the US soon after filing the I-131 for a Re-entry permit; charge more for

multi-year EADs and parole, and add a further premium for a combined multi-year EAD/Parole. Finally, increase the premium for a 7 day turn around as opposed to a 15 day turnaround. This would also make USICS more efficient. In the 2007 USCIS report to Congress, your agency explained that premium processing involved fewer employees, less repeat steps and less delay.

Take note, Ali, that premium processing will never eliminate the backlog. Those who can pay will pay the higher premium fees. Those who cannot but still need the work permission will pay and wait as the line grows ever longer. No matter how high the fees go, the line remains. Since fees came into existence as the principal USCIS funding mechanism in 1988, the fees and the backlog have both increased. The only way to get rid of the backlog is to change the rules of the game, to expand the universe of clients rather than getting more out of the current universe. That is what provisional submission of adjustments would do. Like 245(i), it creates an entirely new revenue stream that provides the funding for a project dedicated to backlog elimination, not just reduction. In the end, this will save taxpayer money and achieve USCIS efficiencies in a way that higher fees will not make possible. Our proposal also goes hand in hand with the expansion of use of Parole In Place, that has been suggested in the *Alternatives To CIR Memo*.

Be strong and of good courage Ali. The *Alternatives to CIR Memo* is a great first step, and we will stand by you despite the fact that critics will think you are bypassing the will of Congress. We have cogently argued in *Tyranny of Priority Dates* and companion blog pieces that this is not the case as Congress has already given you authority in the existing INA to use executive discretion to ameliorate the hardships of applicants, http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus20105711018. You are a student of history. Remember what Lincoln said to Congress on the occasion of his second annual message dated December 1, 1862: “The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise -- with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country” Worth a try right?