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

ISSUES RIPE FOR RULEMAKING: SOME MODEST PROPOSALS

Posted on November 5, 2012 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

Immigration lawyers are used to interpreting complex immigration statutes in the absence of regulations. Indeed, there has evolved a "common law" within immigration practice based on governmental guidance memos and even letters written by government officials in response to an attorney's query. Immigration lawyers often refer to a letter of Efren Hernandez or Jacqueline Bednarz from more than a decade ago as if they have the halo of an authoritative and binding decision. The problem is that unless the government actually promulgates a regulation under the Administrative Procedure Act, such memos and letters are hardly binding. Still, stakeholders, including the government agencies, have conveniently created an illusion that they are binding, and readily cite to them, even when they are not. From an immigration attorney's point of view, the stakes are too high for challenging their authority. It is strategically prudent to demonstrate how their client qualifies under such informal agency guidance, and seek a quick approval, rather than challenge their validity in long drawn litigation.

Agency interpretations advanced in "opinion letters" neither justify nor enjoy *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (contrasting interpretations in opinion letters with those "arrived at after…a formal adjudication or notice-and-comment rulemaking."). Instead, "interpretations contained in less reliable formats such as opinion letter are 'entitled to respect' under *Skidmore v. Swift*., 323 U.S. 134, 140 (1944), but only if they have the 'power to persuade.'" *Christensen*, 529 US at 587; *see also Catskill Devel, LLC. V. Park Place Enter. Corp.*, 547 F.3d 115, 127 (2d Cir. 2008) (under Skidmore, agency viewpoint articulated in an opinion letter was "entitled to

deference only to the extent that it ha(d) the power to persuade" the court).

Much of our legal reasoning rests upon a very uncertain foundation. One is reminded, for example, that all of the American Competitiveness in the 21st Century Act (AC 21) interpretations upon which we routinely rely are not the product of APA rulemaking but of agency memoranda or opinion letters. To the extent that these may benefit us or our clients, let us remember that they are not endowed with *Chevron*-style deference and can be ignored or overturned by subsequent court rulings. We have seen this in the context of AC 21 adjustment of status portability. In a 2009 decision styled*Herrera vv USCIS, No. 08-55493,* 2009 U.S.App. LEXISs 14592 (2009), the Ninth Circuit held that the revocation of an I-140 petition under INA 204(j) without bothering to acknowledge or distinguish the facts of the case sub judice from the 2005 Aytes Memo on AC 21, which states that a withdrawal of an I-140 petition after 180 days did not undermine portability.*See* Cyrus D. Mehta, *Ninth Circuit In Herrera v. USCIS Rules that Revocation of I-140 Petition Trumps Portability,* http://blog.cyrusmehta.com/Print_Prev.aspx?Subldx=ocrus200979113434.

Several years ago, stunned lawyers learned to their utter dismay that even opinions of the legacy INS General Counsel could not be counted on. *Matter of Izumi, A 76 426 873* (decided by Associate Commissioner, Examinations, July 13, 1998). The absence of guidance is the lawyer's worst nightmare. Without knowing how the game is played, the lawyer does not know when to advance or when to retreat. He or she is prone to putting in too much or not enough, placing undue emphasis on what is secondary and glossing over that which is truly essential. Some cases take an excessive amount of time to prepare while others are filed prematurely. Law becomes a high stakes poker game, justice by ambush. The USCIS adjudicator also is at sea. Uncertain what standards to employ, frustrated by a nagging suspicion that overly clever attempts by an unscrupulous bar will win benefits for clients who do not deserve them, the line analyst looks in vain for guidance that does not come. The process becomes complex, complicated and expensive. Conflict replaces cooperation leading to litigation and micromanagement. There seems no exit. When nothing is sure, almost anything can happen. In the absence of borders, can order survive?

At the recently concluded CIS Second Annual Conference in Washington DC on October 18, 2012, Cyrus D. Mehta addressed key issues ripe for rulemaking involving unlawful presence, American Competitiveness in the 21st Century Act

(known as "AC 21"), EB-5, Child Status Protection Act and more. A power point presentation, which is part of the conference record, lays out some areas that are in need of rule making as well as some areas that do not need new rulemaking. Of course, this presentation does not claim to cover every issue, but selects a narrow slice of issues, which can greatly benefit from rulemaking. The need for rulemaking, in the opinion of the authors, can be broken into several components, as follows:

First, some areas are ripe for rulemaking especially when the law has been interpreted in a consistent and reasonable manner over several years through policy guidance memos. Although there may be no compelling need for a rule, a rule affirming a guidance memo would create consistency and would guide all the agencies administering immigration law. One area that would benefit from such rulemaking is unlawful presence that triggers inadmissibility under INA 212(a)(9)(b)(B). There already exists a weighty USCIS May 6, 2009 Interoffice Memo providing guidance on unlawful presence, which has generally been accepted by the government and stake holders. Still, a rule on unlawful presence affirming this memo would bind CBP, where some offices have taken inconsistent position on Canadian overstays not being treated as if they are in duration of status (like students in D/S) and thus not accruing unlawful presence and triggering the 3 or 10 year bars. Such a rule could also potentially help to clarify the conundrum between maintenance of status and period of stay authorized by the attorney general (POSABAG)., as discussed in this previous blog, Cyrus D. Mehta, *Victory in El Badrawi: Narrowing The Disconnect Between Status and Work Authorization,* http://blog.cyrusmehta.com/2011/04/victory-in-el-badrawi-v-usa-narrowing.html. It is incongruous to allow ICE to attempt to remove one from the US while that person has filed a timely application with USCIS to extend nonimmigrant status or is in the process of adjusting status to permanent residence. The promulgation of a rule may also avoid differences in interpretations by US consulates, such as minors accruing unlawful presence for purposes of INA 212(a)(9)(C) bar when minors do not accrue unlawful presence for purposes of the 3 and 10 year years under 212(a)(9)(B)(iii)(I). Finally, such a rule should affirm informal USCIS Chief Counsel Divine letter, July 14, 2006, holding that time spent for purposes of 3 or 10 year bars can be spent in the US, and not necessarily outside the US, *See* Cyrus D. Mehta, *Can One Spend The 3-And 10-Year Bars In The US?*

http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus2008982149&Month=&From=Menu&Page=30&Year=All.

Second, some areas simply cry out for a rule because the absence of which renders the statute inoperable. A regulation long overdue will assist a group of EB-5 investor applicants who have filed removal of their conditional resident applications more than a decade earlier. The 21st Century Department of Justice Appropriations Authorization Act, H.R. 2215; PL 107-273 – which affect investors who filed I-526 applications between January 1, 1995 and August 31, 1999 and I-829 applications before November 2,2002 – can only take effect upon the promulgation of a regulation. Their I-829 applications still remain pending in 2012 due tot the absence of a regulation. Even in the absence of such a long overdue regulation, EB-5s should at least be found eligible for naturalization as they have been conditional residents for over a decade.

Third, we can and should advocate for new or modified regulations, where there has been harshness and the impact to those seeking immigration benefits that may not necessarily reflect the plain meaning of the statute. Such regulations may also be in the spirit of the Obama administration's policies concerning prosecutorial discretion. We make a few selected proposals that can greatly improve both efficiency and fairness:

- Foreign equivalent degree determinations have caused hardship to employment-based beneficiaries of I-140 petitions, especially as they are inconsistent with the way H-1B foreign equivalent degrees are determined, and after the DOL has approved labor certification based on the employer's good faith recruitment. The USCIS insists on a single source 4 year degree under an I-140 petition, and if the EB beneficiary has a degree based on a three year foreign degree and post graduate diploma, it will not accept that as the equivalent of a US 4 year bachelor's degree even if it was determined to be so for the H-1B visa. *See*Cyrus D. Mehta, *EDGE Says Indian 2-Year Master's Degree Following A 4-Year Bachelor's Is Not Equivalent To A US Master's Degree*, http://blog.cyrusmehta.com/2012/01/edge-says-indian-4-year-bachelors.html. Many EB beneficiaries who would otherwise be able to qualify under the EB-2 have to qualify under the EB-3. If the equivalency is not properly defined on the PERM labor certification, the I-140 gets denied. We recommend that the current definition of "foreign equivalent degree"

under 8 CFR 204.5(k)(2) and 204.5(l)(2) be modified to parallel the H-1B definition of equivalent degree under 8 CFR 214.2(h)(4)(iii)(D).

- With respect to the Child Status Protection Act (CSPA), we propose the issuance of a regulation overruling *Matter of Wang*, 25 I&N Dec.28 (BIA 2009), now that two circuit courts, *Khalid v.Holder*, 655 F.3d 363 (5th Cir. 2011) and *De Osorio v.Mayorkas*, __ F.3d __(9th Cir. 2012) have rejected it. Aged out children who cannot get CSPA protection should have the former priority date convert to a new F2B petition filed by the LPR parent under INA 203(h)(3). Such a policy is consistent with prosecutorial discretionary polices of Obama administration, including deferred action for childhood arrivals. See Cyrus D. Mehta, *Reinterpreting The Automatic Conversion Provision Of The CSPA To Help DREAM Kids*, http://blog.cyrusmehta.com/2011/09/reinterpreting-automatic-conversion.html.
- Given that the endless waits in the China and India EB-2 India, and that the EB-3 wait is long as 60 years, we propose an amendment to 8 C.F.R. § 245(g)(1), See Gary Endelman and Cyrus D. Mehta, *Re-Defining "Immediately Available" To Allow Early Filing Of An Adjustment Of Status Application*, http://blog.cyrusmehta.com/2010_03_01_archive.html, shown here in bold italics, that would expand the definition of visa availability and allow an I-485 application to be filed prior to the priority date becoming current under the Visa bulletin:
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.*

- *While INA 245 conditions adjustment of status on having a current priority date and meeting various conditions, there is no prohibition anywhere that would bar USCIS from allowing the beneficiary of an approved I-140 or I-130 petition to apply for an employment authorization document (EAD) and advance parole. No action by Congress would be required. This could be done purely by act of regulation. For those who want a statutory basis, the USCIS can rely on its parole authority under INA 212(d)(5) to grant such interim benefits for "urgent humanitarian reasons" or "significant public benefit." See Gary Endelman and Cyrus D. Mehta, Comprehensive Immigration Reform Through Executive Fiat, http://blog.cyrusmehta.com/2010/04/comprehensive-immigration-reform.html.*
- *Section 106(a) of AC 21 allows an H-1B visa holder on whose behalf a labor certification has been filed 365 days prior to the maximum time limit to obtain an H-1B extension beyond the six years. AC 21 Section 106(a) ought to also allow the spouse of an H-1B who is also in H-1B status to be able to go beyond the six year maximum without having his or her own labor certification. This used to be allowed but the Aytes Memo on AC 21 seems to suggest that only dependent H-4 spouses would get tthe benefit of such an extension. Now, both spouses need to have labor certifications filed on their behalf to obtain the benefit of AC 21 Section 106(a). The statue itself has more flexibility and speaks of "**any application for labor certification**...in a case in which the certification is required or used by the alien to obtain status under section 203(b) of such Act." (emphasis added). Under this interpretation, the H-1B husband who does not have his own labor certification can still use his H-1B wife's labor certification on a derivative basis to file for adjustment of status. This interpretation can be implemented by the USCIS through a regulation and such remediation would be faithful to the generous spirit of AC 21. It would help to soften the hardship caused by chronic visa backlogs with respect to China and India as well as worldwide EB-3. The current interpretation placed upon AC 21 Section 106(a) is contrary to the intent of Congress. It is not enough to say that the H-1B spouse for whom a labor certification has not been filed can change to non-working H-4 status. Given the backlogs facing*

India and China, not to mention worldwide EB-3, it is simply realistic and punitive to deprive degreed professionals of the ability to work for years at a time but force them to remain to preserve their eligibility for adjustment of status. All this can be done with the stroke of a pen. See Gary Endelman and Cyrus D. Mehta: Two H-1B Spouses And One Labor Certification: Both Spouses Should Be Able To Seek 7th Year H-1B Extensions Under AC 21, http://blog.cyrusmehta.com/2010/03/two-h-1b-spouses-and-one-labor.html. Of course, the issue of the spouse of an H-1B being limited for 6 years, who is also in H-1B status, can be obviated if USCIS goes ahead with its proposed regulation to allow H-4 spouses to work, but it has been allowed to languish and USCIS seems content to allow it to die. This proposed regulation also appears to limit the group of H-4 spouses who can potentially work, and we refer readers to our blog that advocates that H-4 spouses and children be granted employment authorization in the same way as L-2 or E spouses from the very moment an H-1B is admitted into the US. See Gary Endelman and Cyrus D. Mehta: Working: H-4 Spouses Get To Take A Leap Forward, But Is It A Giant One, http://blog.cyrusmehta.com/2012/02/working-h-4-spouses-get-to-take-step.html.

- *There is nothing in the INA, which suggests that derivative family members be counted in addition to the principal applicant under the employment-based and family-based preference. This has been carefully outlined in our article, Gary Endelman and Cyrus D. Mehta, Why We Can't Wait: How President Obama Can Erase Immigration Backlogs With A Stroke Of A Pen, http://www.ilw.com/articles/2012,0201-endelman.shtm. INA 203(d) only states that " spouse or child....be entitled to the same status and the same order of consideration ...if accompanying or following to join, the spouse or parent." Hence, there is ambiguity in the plain language of INA 203(d) to allow a rule that will not count all family members in addition to the principal applicant. Thus, a principal applicant with four derivative family members (spouse + 3 children) should only take one visa number and not 4 visa numbers from the preference categories. This will greatly assist in reducing the endless backlogs in the FB and EB preferences, which were not intended by Congress when it last increased visa numbers through IMMACT90. There is no regulation in 8 CFR instructing what INA 203(d) is supposed to be doing. We do not claim that derivative beneficiaries are exempt from numerical limits. They are subject to*

> *numerical limitations in the sense that the principal alien is subject by virtue of being subsumed within the numerical limits that applies to this principal aline. There is a difference between not being counted at all, for which we do not contend, and being counted as an integral family unit as opposed to individuals. We seek not an exemption from numerical limits but rather a different way of counting such limits.*

Finally, there are legal issues, where regulations have already been promulgated, that do not require modification through a new rule just because of a new sentiment. For example, since the economic downturn, there has been a tendency on the part of immigration officials to become self appointed guardians of our economy, and with misguided zeal, they endeavor to protect jobs of American workers by reinterpreting the law. The definition of the employer-employee relationship for H-1B purposes is quite clear under 8 CFR 214.2(h)(4)(ii), and attempts to modify it through the Neufeld Memo are simply not necessary, *See* Cyrus D. Mehta, *Halcyon Days In H-1B Visa Processing*, http://blog.cyrusmehta.com/2010/02/halcyon-days-in-h-1b-visa-processing.html. The Neufeld Memo too has been treated as interpretive guidance and not binding in *Broadgate v. USCIS*, http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2010cv00941/142518/15. We propose that the Neufeld Memo be withdrawn. Similarly, the L-1B specialized knowledge definition under 8 CFR 214.2(l)(1)(ii)(D) reflects the intent of the Immigration Act of 1990 (IMMACT90), and there is no need to muddy the waters by restricting the definition by resurrecting administrative decisions prior to IMMACT90 when the specialized knowledge definition was more restrictive, and included proprietary knowledge, which was eliminated after 1990.

What is blindingly transparent is that what we have now simply has broken down. Years pass after Congress enacts major immigration legislation and, time after time, implementing regulations are nowhere to be found. Is there anyone who knows anything about immigration practice who would not acknowledge a real and present need for rules that are clear, specific and accurate? While the broad outlines of immigration policy are set by Congress what this policy means each day in real life is most often a matter of what the implementing regulations say. The job of Congress is to articulate a long- range vision while that of the Executive is to make short-term, tactical adjustments.
How the agency puts the law into practice often has more to do with its

ultimate impact, of lack of one, than the black letter law itself. The gap between what Congress intended and what the regulation mandates can often be the distance between rhetoric and reality. The proposals we advance reflect our core belief that the American economy would benefit from a more cooperative relationship between regulators and those they regulate. We urge that traditional notice and comment rulemaking be informed by a creative exchange about possible solutions to ultimate problems. Our hope is that the rulemaking process itself facilitates mutual education on the proposed rule's practical effect so that honest strategies can emerge capable of resolving fundamental differences.

Those who believe as we do that immigration is good for America have their principles right. Our challenge as a nation is to translate these principles into practice. This is why we write. We do not expect that this will be easy but we ask our readers who shrink from the task to remember the story of the rebellious prince who ran away from the palace of his father the King. "Come back" said the King through his most trusted messenger, only to be told "I cannot." Back came the royal reply: "Go as far as you can, and I will come to you the rest of the way."
8