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US IMMIGRATION & NATIONALITY LAW

THE WAY WE COUNT

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"Perfect numbers like perfect men are very rare." Rene Descartes

Now is the time to change the way America counts green card numbers. Congress is presently debating comprehensive immigration reform and grand events are likely to reshape the legal landscape. Yet, at such a seminal moment we ought not lose sight of the value of technical modifications that can have enormous consequences. Most Americans, including virtually all policy makers, would be surprised to learn that the majority of green cards awarded each fiscal year go not to the principal aliens themselves but to dependent family members, thus reducing even further permanent migration to the United States. In fact, as the waiting lines over the past decade have grown ever longer, this pattern has become more pronounced. A quick overview of green card distribution during the first decade of the 21st century quickly makes this evident. Let us take employment based migration in the employment-based first preference (EB-1) category as our data sample. In 2000, there were 5,631 new arrivals under the EB-1, 2,241 went to the principal vs. 3,390 to family members. This means that family members accounted for 58.67% of EB-1. In 2012, there were 1,517 new arrivals under the EB-1. 516 went to the principal & 1001 to family members. This means that family members accounted for 65.98% under the EB-1. Things are getting worse.

It need not be that way. Neither the law nor logic commend or require such a result. Without creating a single new immigrant visa, Congress can eliminate quota backlogs and restore relevance to a green card system that is sorely in need of such restoration. The solution is simple but elegant: Count all members of a family together as one unit rather than as separate and distinct individuals. Do that and systemic visa retrogression will quickly become a thing of the past.

Nor is this merely something for idle academic debate. Rather, it is essential if the path to legal resident status for the undocumented is ever to mean anything. Under any conceivable iteration of CIR, even if there is an expansion of immigrant visa numbers in the preference categories, the undocumented will be relegated to the back of the green card line behind those patiently waiting under the legal system. Unless a solution is found to remediate the tyranny of priority dates, the undocumented like the ancient Israelites who left Egypt, will never enter the promised land.

Section 203(d) of the INA is the provision that deals with family members. Let us examine what INA § 203(d) says: A spouse or child defined in subparagraphs (A), (B), (C), (D), or (E) of section 1101 (b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent. There is nothing in INA § 203(d) that explicitly provides authority for family members to be counted under the preference quotas. While a derivative is "entitled to the same status, and the same order of consideration" as the principal, nothing requires that family members also be given numbers. Is there not sufficient ambiguity in INA § 203(d) to argue even under current law that family members should not be counted against the quotas?

There is no regulation in 8 C.F.R. instructing what INA § 203(d) is supposed to be doing. Even the Department of State's regulation at 22 C.F.R. § 42.32 only parrots INA § 203(d) and states that children and spouses are "entitled to the derivative status corresponding to the classification and priority date of the principal." 22 C.F.R. § 42.32 does not provide further amplification on the scope and purpose of INA § 203(d). We acknowledge that INA 203(d) derivatives are wholly within the preference system and bound by its limitations.. They are not independent of numerical limits, only from direct limitations. It is the principal alien through whom they derive their claim who is counted and who has been counted. Hence, if no EB or FB numbers were available to the principal alien, the derivatives would not be able to immigrate either. If they were exempt altogether, this would not matter. There is a difference between not being counted at all, which we do not argue, and being counted as an integral family unit as opposed to individuals, which we do assert. *We seek not an exemption from numerical limits but a different way of counting such limits.*

INA § 203(d) took effect under IMMACT 90. It still remains a mystery as to why INA § 203(d) was enacted. There was no need to do so since family members were counted in the pre-IMMACT90 quotas. No clear answer can be gleaned from the legislative history of IMMACT 90. Though family members were explicitly exempted from being counted in the House bill, such exemption was removed in conference with the Senate. Ultimately, Congress enacted INA § 201(d), which set a numerical limit of 140,000 for EB immigrants, and it appears that the intent of Congress in IMMACT 90 was to count family members in the final legislation. Was INA § 203(d) introduced to ensure that family members would be counted especially after the House sought to exempt them? Or was it the converse? Could INA § 203(d) have been a vestige of the House's intent that was never taken out – to make sure that, even though these derivatives would be counted against enlarged EB cap, they would not be left out in the cold but still get the same "green card" benefits as the principal?

If the Executive wanted to reinterpret INA § 203(d), there is sufficient "constructive ambiguity" here too for it do so without the need for Congress to sanction it. We have explained this in our prior article, Why We Can't Wait: How President Obama Can Erase Immigrant Visa Backlogs With A Stroke Of A Pen, http://www.ilw.com/articles/2012,0201-endelman.shtm. If this happened, the EB and FB preferences could instantly become "current." The backlogs would disappear. The USCIS might even have to build a new Service Center! But we do not want to end on such optimism and throw all caution to the winds.. Thus, we propose a simple technical fix in Congress, which is to exclude family members from the FB and EB quotas. We do not see why this cannot be accomplished as there is already a pedigree for such a legislative fix. The proposed wording to INA 203(d) would be a simple add on to the current text, such as: "All family members, including the principal alien applicant, shall be counted as one unit for purposes of INA 201(c) and 201(d) limitations. They shall not be counted on an individual basis." Not only did Congress try to remove family members in IMMACT90, but also attempted to do so in S. 2611, which was passed by the Senate in 2006. Section 501(b) of S. 2611 would have modified INA § 201(d)(2)(A) to exempt family from being counted in EB cases. The EB and FB numbers ought not to be held hostage to the number of family members each principal beneficiary brings with him or her. Nor should family members be held hostage to the quotas. We have often seen the principal beneficiary being granted permanent residency, but the derivative family

members being left out, when there were not sufficient visa numbers under the preference category during that given year. If all family members are counted as one unit, such needless separation of family members will never happen again.

Even an increase in the visa numbers in a reform proposal, which might seem adequate today, will again result in backlogs shortly based on the uncertainties with economic booms and busts as well as the varying size of families. An immigration system that does not count derivatives separately will have more of a chance to remain viable before Congress is again required to expand visa categories a few decades later. This will also go a long way in restoring balance and fairness to our immigration system. Sometimes even small things can cast a giant shadow.