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US IMMIGRATION & NATIONALITY LAW

AN IMMIGRATION ATTORNEY'S RESPONSE TO STATEMENT OF USCIS UNION PRESIDENT OPPOSING SENATE IMMIGRATION BILL, S. 744

Posted on May 24, 2013 by Cyrus Mehta

Kenneth Palinkas, President of the National Citizenship and Immigration Services Council, the union representing 12,000 United States Citizenship and Immigration Services (USCIS) adjudications officers and staff, issued a statement joining a vocal minority of other government union bosses, most notably Chris Crane of the ICE employee union, opposing the Senate immigration bill, S. 744.

Mr. Palinkas' statementfunnily reminds me of a Request for Evidence (RFE) that the USCIS routinely issues after it receives an application for an immigration benefit. An RFE typically lists the many real and phantom concerns that the USCIS may have about an application, which this statement does too. I will attempt to respond to Mr. Palinkas' statement like one would respond to an RFE, first repeating the concerns of the USCIS in bold followed by my response:

USCIS adjudications officers are pressured to rubber stamp applications instead of conducting diligent case review and investigation. The culture at USCIS encourages all applications to be approved, discouraging proper investigation into red flags and discouraging the denial of applications. USCIS has been turned into an "approval machine."

Really! We attorneys always thought that there was a "Culture of No" at the USCIS. I scratch my eyes with disbelief when you say that USCIS has been turned into an "approval machine." How I wish there was some resemblance to what you say and what we actually experience in our day to day practice.

But seriously, what about all the H-1B and L-1 petitions that are filed, which receive an RFE of several pages, asking for the kitchen sink, even when the

occupation is readily a specialty occupation or the position is managerial? Even after we respond with triple or quadruple the number of pages contained in the RFE (and much longer than the instant response), your officers often deny the petition with a cursory denial. What "approval machine," Mr. Palinkas, are you talking about?

Actually, whether you like it or not, Congress did indeed make USICS an "approval machine." Your mandate is to grant the benefit whenever the eligibility requirements are met through a preponderance of the evidence standard. Congress created certain visas and green card categories because it believed that they would benefit the country. So a culturally unique folk singer should be granted the P-3 visa if she qualifies for it and the manager of a new startup office could also be granted the L-1A visa. Please do not have any qualms in approving an application if it is deserved under the law, without factoring your own biases in the decision process such as the sluggishness in the economy or the national origin of the beneficiary. That is not your job. In fact, USCIS examiners should look to approving applications after carefully examining the evidence within the legal framework, which many of them do. It is they who are doing a good job!

USCIS has created an almost insurmountable bureaucracy which often prevents USCIS adjudications officers from contacting and coordinating with ICE agents and officers in cases that should have their involvement. USICS officers are pressured to approve visa applications for many individuals ICE agents have determined should be placed into deportation proceedings.

Mr. Palinkas, you may not be aware of this interesting paradox in our nation's immigration laws. One may still be authorized to remain in the United States even though technically deportable.

ICE would probably determine that just about every beneficiary of a visa petition, such as an H-1B petition, who has applied timely for an extension, is deportable during the pendency of the extension request. Still, under 8 CFR 274a.12(b)(2), such a person is authorized to continue working for the same employer for up to 240 days. Also, a spouse who has applied for adjustment of status based on a marriage petition filed by her US citizen spouse, according to ICE, is technically deportable while the adjustment of status application is

pending. This person too is allowed to remain and work in the US while waiting for the green card during the pendency of the adjustment of status application even though the underlying visa has expired.

Does this mean that you would request ICE to start deportation proceedings whenever you are asked to adjudicate a visa extension request and not do your job? Your job, again, as mandated by Congress, is to approve these applications if they qualify under law. In the event that ICE places such hapless aliens in removal proceedings, an Immigration Judge will most likely terminate or administratively close such proceedings, and you will have to continue to adjudicate such cases. Indeed, this will waste more tax dollars than what you complain of below regarding fee waivers.

USCIS officers who identify illegal aliens that, in accordance with law should be placed into immigration proceedings before a federal judge, are prevented from exercising their authority and responsibility to issue Notices To appear (NTAs). In the rare case that an officer attempts to issue an NTA, it must first be approved by a secretive panel created under DHS Secretary Janet Napolitano, which often denies the officer's request. Illegal aliens are then permitted to remain in the United States as USCIS officers are not able to take action or contact ICE agents for assistance.

Please carefully review the USCIS NTA Policy Memo dated November 7, 2011, which still gives you considerable authority to issue NTAs, such as when you deny a Form I-751 application to remove the conditions on residence or when you do not approve an asylum case and have to refer it to an Immigration Judge. Consistent with the policy on prosecutorial discretion, which promotes the sound use of limited resources, you are still required to issue NTAs when you see a fraud case, or cases involving non-citizens with criminal convictions or where there is a national security concern. So what's all the fuss about? You still have plenty to do if you want to put non-citizens in removal proceedings even if your mandate by Congress is to grant benefit applications. I suggest you stay focused and adjudicate applications, and let others worry about putting folks in removal proceedings.

The attitude of USCIS management is not that the Agency serves the American public or the laws of the United States, or public safety and national security, but instead the agency serves illegal aliens and the attorneys which represent them. While we believe in treating all people

with respect, we are concerned that this agency tasked with such a vital security mission is too greatly influenced by special interest groups – to the point that it no longer properly performs its mission.

Why do you focus so much on "illegal aliens?" I thought the USCIS is required to adjudicate applications so that people may come to the US legally. If you do your job properly, there will be more people in legal status in the US. Nowadays, when you carelessly deny an H-1B extension request that you granted many times before, you place this individual and her family in jeopardy. All of the petitions that you receive from employers for H-1B visa, L visas or O visas, just to name a few, are for folks who will enter the US legally and who will also clearly benefit our country.

Moreover, an alien has a right to be represented by an attorney when filing an application for a visa benefit, and so I would suggest that you refrain from calling us "special interest groups." We as attorneys under ABA Model Rule 3.3 and 4.1 are required to file truthful applications on behalf of our clients, along with many other DHS rules at 8 CFR 1003.102 that can sanction improper attorney conduct. Attorneys are required to ethically represent clients, who are applicants applying for immigration benefits, that you must serve efficiently under your Congressional mandate. Indeed, most of the times, attorneys representing applicants and the USCIS can be on the same side, developing interpretations of the law that would be consistent with Congressional intent and facilitate consistent adjudications. It is a win-win situation for everyone, including the American public, if we can work cooperatively with you!

Currently, USCIS reports a 99.5% approval rate for all illegal alien applications for legal status filed under the Obama Administration's new deferred action for childhood arrivals (DACA) policies. DHS and USCIS leadership has intentionally established an application process for DACA applicants that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers. These practices were put in place to stop proper screening and enforcement, and guarantee that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk.

DACA is the model of an efficiently run USCIS program that is worthy of emulation and replication. There are many USCIS applications procedures that bypass the traditional interview process. Also, if there is an issue, there is

nothing to stop the USCIS from inviting the applicant for an interview. You also have your FDNS folks do as much snooping around to their hearts content without regard to counsel being present Moreover, most DACA applicants can establish their presence in the US through school records and other concrete proof, such as bank statements and even through their Facebook profiles, which could facilitate swift approval.

While illegal aliens applying for legal status under DACA policies are required to pay fees, DHS and USCIS are now exercising their discretion to waive those fees. Undoubtedly these practices will be replicated for millions of illegal aliens if S. 744 becomes law.

I thought there is a regulation at 8 CFR 103.7(c), which allows the DHS to waive fees if an applicant can demonstrate an inability to pay based on stringent criteria. There's also statutory authority at INA 286(m). As the head of a union, you are probably going beyond the scope of your position to challenge a regulation that was properly promulgated under the Administrative Procedures Act and the INA. How does a rule legitimately allowing fee waivers for a narrow class of individuals affect the working conditions of your employees in the union? Let's move on to the next concern in the RFE!

US taxpayers are currently tasked with absorbing the cost of over $200 million worth of fee waivers bestowed on applicants for naturalization during the fiscal year. This is in addition to the strain put on our Social Security system that has been depleted by an onslaught of refugees receiving SSI benefits as soon as their feet touch US soil.

There you go again about fee waivers legitimately applied for under 8 CFR 103.7(c). You gripe about $200 million, but you forget about the immense contributions made by immigrants by way of taxes, purchasing power as consumers, and as entrepreneurs through job creating businesses. By the way, one of the founders of Google, Sergey Brin, came to the US with his parents at the age of six because they faced anti-Semitism in their native Russia. Yet, you deride refugees who have escaped persecution and legitimately come to the US pursuant to the Refugee Act of 1980 based on the U.N. Convention Relating to the Status of Refugees. I wonder whether you speak on behalf to the many dedicated USCIS officers who painstakingly determine whether an applicant qualifies for asylum or as a refugee under our obligations under the UN Convention. Do you also forget that America was built since its very inception

and made great by people who escaped persecution from other countries? Have you lost sight of our most cherished and enduring symbol that gave hope to millions when they landed on our shore – the Statue of Liberty?

According to a Kauffman Foundation study, the Startup Visa in S. 744, the bill which you oppose, could conservatively lead to the creation of between 500,000 and 1.6 million jobs, which in turn could give a boost to the US economy of between $70 billion and $224 billion a year. According to another report sponsored by Cato Institute – The Economic Benefits Of Comprehensive Immigration Reform by Raul Hinjosa-Ojeda, the legalization of 11 million immigrants would be equivalent to more than $1.5 trillion added to GDP over 10 years. Yet you gripe about $200 million.

Large swaths of the Immigration and Nationality Act (INA) are not effectively enforced for legal immigrants and visa holders, including laws regarding public charges as well as many other provisions, as USCIS lacks resources to adequately screen and scrutinize legal immigrants and non-immigrants seeming status adjustment. There is also insufficient screening and monitoring of student visas.

There are thousands of dedicated USCIS examiners who carry out their duties diligently and thoroughly when adjudicating adjustment of status applications. If there is a properly executed Affidavit of Support pursuant to INA 213A, the examiner need not go further under the law. Congress has allowed agencies to sue the sponsor who has executed such an affidavit in the event that the alien seeks welfare benefits. Your allegation that students are not sufficiently monitored is shorn of any basis. What about STEM students whom we want to remain here and who can contribute to US competitiveness and innovation?

A new USCIS computer system to screen applications known as "Transformation" has proven to be a disaster as the agency has spent upwards of $2 billion for a system that would eventually allow an alien – now referred to as a "customer" under current USCIS policy – to upload their own information visa the internet for adjudication purposes. To date, only one form can be accepted into the program that has been in the making for close to 10 years.

If the USCIS were to hire some crackerjack H-1B computer programmers, those same people whose applications you like denying, I think there will be "transformation" in less than 10 months! Finally, and in closing, would you not

agree that “customer” is a more dignified term than “alien”?