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US IMMIGRATION & NATIONALITY LAW

TWO ACES UP PRESIDENT OBAMA'S SLEEVE TO ACHIEVE IMMIGRATION REFORM WITHOUT CONGRESS – NOT COUNTING FAMILY MEMBERS AND PAROLE IN PLACE

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By Gary Endelman and Cyrus D. Mehta

Nothing more poignantly describes the current humanitarian crisis at the Southwest border than a recent New York Times article describing the journey of Alejandro, 8, who came to the United States on his own with only his birth certificate looking for his parents who are somewhere in San Antonio or an aunt in Maryland. The story of an adorable, courageous and resourceful 8 year old braving a dangerous journey in search of his parents will pull at the heartstrings of any parent.

There may be many reasons for this crisis and what may draw unaccompanied young children to the United States, but one reason for this is our broken immigration system. This system does not allow people accessible pathways to come to the United States legally or gain legal status. Even those who are here as permanent residents or naturalized citizens have to wait years before their loved ones can join them due to the backlogs in our family and employment-based immigration preferences. Until recently there was some hope that the House would pass its own version of immigration reform after the Senate passed S. 744 last year. Those hopes have now been dashed.

The impetus to preserve family unity is pervasive and exists across all cultures, and so is the deep love that parents have for their children and that children have for their parents. Many of the children fleeing violence in Central American countries are trying to unite with parents living in the United States. However, the broken immigration system does not allow families to unite

through legal means Instead of beefing up the border with more enforcement; President Obama can bring some balance to the immigration system through bold administrative measures that will promote family unification in a legal and orderly manner. While there are several proposals on the table, one that resonates is to not count derivative family members in the employment and family preferences. 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, resulting in family members waiting endlessly, will quickly become a thing of the past.

Not Counting Family Members

Section 203(d) of the Immigration and Nationality Act (INA) is the provision that deals with family members. Let us examine what section 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 section 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. If Congress allocates a certain number of visas to immigrants with advanced degrees, it makes no sense if half or more are used up by family members.

There is no regulation in 8 Code of Federal Regulations (C.F.R.) instructing what section 203(d) is supposed to be doing. Even the Department of State's regulation at 22 C.F.R. 42.32 only parrots section 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 section 203(d). We acknowledge that section 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.*

If the Executive Branch wanted to reinterpret section 203(d), there is sufficient ambiguity in the provision for it do so without the need for Congress to sanction it. A government agency's interpretation of an ambiguous statute is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—often abbreviated as "*Chevron* deference". When a statute is ambiguous in this way, the Supreme Court has made clear in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), the agency may reconsider its interpretation even after the courts have approved of it. *Brand X* can be used as a force for good. For instance, in *Sciallaba v. Osorio*: Does the Dark Cloud Have A Silver Lining, Cyrus Mehta and David Isaacson propose that notwithstanding the Supreme Court's recent decision concerning section 203(h)(3) of the INA, where the Court agreed with the Board of Immigration Appeal's (BIA) more restrictive interpretation of this Child Status Protection Act provision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA has the power to reverse *Matter of Wang* under *Brand X*. *Matter of Wang* held that not all children who are unable to protect their age under the Child Status Protection Act can claim the earlier priority date under which their parent immigration to the United States.

As the plurality opinion in *Sciallaba v. Osorio* explained in its conclusion:

> This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting §1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board.

Kagan slip op. at 33.

Thus, when a provision is ambiguous such as section 203(d), the government agency may reasonably interpret the provision in a reasonable manner. In our prior article relating to not counting relatives, *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, we discussed that there are admittedly some statutory provisions which might be read as pointing against an interpretation to not count family members. Most notably, it has also been pointed to us that INA section 202(b) permits a spouse or child to "cross charge" to the foreign state of either of the parents or the spouse to avoid family separation, and this may suggest that derivatives must be individually counted for purposes of the per country cap. Still, this too can be interpreted differently under *Chevron*and *Brand X*, namely, that the entire family be counted as single unit to the other spouse or parent's country. Of course, the statutory provision which militates in favor of such an interpretation is most notably the text of INA §203(d) itself. 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!

Expansion of Parole in Place

The very idea of "parole" in section 212(d)(5) of the INA is linked to allowing deserving aliens to come to the United States for "urgent humanitarian reasons or significant public benefit." In most cases, we think this only applies to people who are not yet here. Not so. Digging a bit deeper into the INA, we find in section 235(a)(1) this golden nugget: an applicant for admission is "an alien present in the United states who has not been admitted…" Putting all of this together, there is nothing in law or logic that prevents the full embrace and unfettered application of parole to those already in the United States outside the color of law. The invocation of 'parole in place" is another example of using new interpretive techniques to mine the existing law for greater benefits. It is the antidote to the inability of Congress to enact comprehensive immigration reform. There should be no concern over a possible infringement of separation of powers for the authority of Congress over the legislative process is being fully respected. Part of the responsibility of the President to enforce the laws is to adopt an understanding of them that best promotes what Congress had in mind when it passed the law in the first place. Parole in place does precisely that. This is not amnesty. The requirements for obtaining legal status on a permanent basis apply in full. It is merely an attempt to think of the law we have not purely or primarily as an instrument of enforcement but as a platform for remediation of the human condition. Indeed, is this not how law in the American tradition is meant to function?

The creation of new solutions by federal agencies has become the norm rather

than the exception in our system of governance if for no other reason that the sheer multiplicity of issues, as well as their dense complexity, defies traditional compromise or achievable consensus which are the hallmarks of Congressional deliberation. They require timely and directed executive action as a formula for keeping present problems from getting worse. This is exactly why Congress authorized the Attorney General to grant employment authorization without terms or limitations pursuant to INA 274A (h) (3)(B), a provision that should be linked with the robust exercise of the Executive's parole power. The INA leaves the granting of parole completely up to the discretion of the Attorney General, now shifted to the DHS. It is hard to imagine a more open invitation to Executive rule- making to provide when parole can be extended, as there is absolutely nothing in the INA that would contradict a DHS regulation allowing parole in place. Not only is it appropriate for the DHS to formulate immigration policy on highly minute technical issues of surpassing moment such as parole in place, but the Constitution expects that to happen. Indeed, without this, who would do it? Far from crossing the line and infringing the authority of Congress, what we ask the DHS to do augments Congressional prerogative by providing a practical way for them to function.

In addition to not counting derivatives, the Obama Administration can extend parole in place (PIP) that has been granted to military families to all immediate relatives of US citizens, which would allow them to adjust in the US rather than travel abroad and risk the 3 and 10 year bars of inadmissibility under sections 212(a)(9)(B)(i)(I) and (II) of the INA. Such administrative relief would be far less controversial than granting deferred action since immediate relatives of US citizens are anyway eligible for permanent residence. The only difference is that they could apply for their green cards in the US without needing to travel overseas and apply for waivers of the 3 and 10 year bars.

The concept of PIP can be extended to other categories, such as beneficiaries of preference petitions, which the authors have explained in The Tyranny of Priority Dates. However, they need to have demonstrated lawful status as a condition for being able to adjust status under INA section 245(c)(2) and the current memogranting PIP to military families states that "arole does not erase any periods of unlawful status." There is no reason why this policy cannot be reversed. The grant of PIP, especially to someone who arrived in the past without admission or parole, can retroactively give that person lawful status too, thus rendering him or her eligible to adjust status through the I-130

petition as a preference beneficiary. The only place in INA section 245 where the applicant is required to have maintained lawful nonimmigrant status is under INA section 245(c)(7), which is limited to employment-based immigrants. Family-based immigrants are not so subject. For purposes of section 245(c) of the INA, current regulations already define "lawful immigration status" to include "parole status which has not expired, been revoked, or terminated." 8 C.F.R. section 245.1(d)(v). Indeed, even if one has already been admitted previously in a nonimmigrant visa status and is now out of status, the authors contend that this person should be able to apply for a rescission of that admission and instead be granted retroactive PIP. Thus, beneficiaries of I-130 petitions, if granted retroactive PIP, ought to be able adjust their status in the US.

There is also no reason why PIP cannot extend to beneficiaries of employment I-140 petitions. If this is done, would such persons be able to adjust status to lawful permanent resident without leaving the USA? In order to do that, they not only need to demonstrate lawful status, but also to have maintained continuous lawful nonimmigrant status under INA section 245(c)(7), as noted above. Is there a way around this problem? At first glance, we consider the possibility of using the exception under INA section 245(k) which allows for those who have not continuously maintained lawful nonimmigrant status to still take advantage of section 245 adjustment if they can demonstrate that they have been in unlawful status for not more than 180 days since their last admission. We would do well to remember, however, that 245(k) only works if the alien is "present in the United States pursuant to a lawful admission." Is parole an admission? Not according to INA section 101(a)(13)(B). So, while retroactive PIP would help satisfy the 180 day requirement imposed by INA section 245(k)(2), it cannot substitute for the lawful admission demanded by section 245(k)(1). Even if an out of status or unlawfully present I-140 beneficiary who had previously been admitted now received *nunc pro tunc* parole, the parole would replace the prior lawful admission. Such a person would still not be eligible for INA section 245(k) benefits and, having failed to continuously maintain valid nonimmigrant status, would remain unable to adjust due to the preclusive effect of section 245(c)(7). Similarly, an I-140 beneficiary who had entered EWI and subsequently received retroactive parole would likewise not be able to utilize 245(k) for precisely the same reason, the lack of a lawful admission. Still, the grant of retroactive PIP should wipe out unlawful presence

and the 3 and 10 year bars enabling this I-140 beneficiary to still receive an immigrant visa at an overseas consular post without triggering the bars upon departure from the US. Thus, while the beneficiary of an employment-based petition may not be able to apply for adjustment of status, retroactive PIP would nevertheless be hugely beneficial because, assuming PIP is considered a lawful status, it will wipe out unlawful presence and will thus no longer trigger the bars upon the alien's departure from the US.

Our proposal to grant PIP retroactively so that it erases unlawful presence can also assist people who face the permanent bar under section 212(a)(9)(C) of the INA. If PIP can retroactively erase unlawful presence, then those who entered the country without inspection after accruing unlawful presence of more than 1 year will not trigger the bar under this provision if the unlawful presence has been erased.

One of the biggest contributors to the buildup of the undocumented population in the US has been the 3 year, 10 year and permanent bars. Even though people are beneficiaries of immigrant visa petitions, they do not wish to risk travelling abroad and facing the bars. Extending PIP to people who are in any event in the pipeline for a green card would allow them adjust status in the US or process immigrant visas at consular posts, and become lawful permanent residents. These people are already eligible for permanent residence through approved I-130 and I-140 petitions, and PIP would only facilitate their ability to apply for permanent residence in the US, or in the case of I-140 beneficiaries by travelling overseas for consular processing without incurring the 3 and 10 year bars. PIP would thus reduce the undocumented population in the US without creating new categories of relief, which Congress can and should do through reform immigration legislation.

Achieving Something Close to Comprehensive Immigration Reform Without Congress

Not counting family members and expanding parole in place can be a potent combination for nearing comprehensive immigration reform administratively in the face of Congressional inaction. The waits in the EB and FB preferences will disappear, and family members waiting abroad can unite with their loved ones more quickly and need not be forced to take the perilous path across the Southwest border in desperation. The expansion of PIP to beneficiaries of approved I-130 and I-140 petitions would allow them to obtain lawful

permanent residence, rather than being stuck in permanent limbo due to the 3 and 10 year bars. After removing the obstacle of the bars, the grant of lawful permanent residence would be more rapid as there would be no backlogs in the FB and EB preferences, and loved ones from abroad can unite with newly minted immigrants in the United States through an orderly and legal process.

Our proposals fall squarely within the mainstream of the American political tradition, animated by the spirit of audacious incrementalism that has consistently characterized successful reform initiatives. We acknowledge that immigration reform passed by Congress would solve more problems in a fundamental way. We seek less dramatic but no less meaningful advances through the disciplined invocation of executive initiative only because these are the ones that can be achieved sooner and with greater predictability. Our justifiable zeal for immigration reform must not blind us to the benefit of more moderate proposals. We are confident that future progress will follow in a way that minimizes disruption and maximizes acceptance. We hold fast to the distinction between prudence and absolutism, between incremental reform and revolutionary upheaval. In the long run, the American experience has been characterized more by the former than the latter and it has led to a fruitful stability that has been the envy of the world.

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