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US IMMIGRATION & NATIONALITY LAW

MYTH OR REALITY: IS THE DHS TRULY SERIOUS ABOUT VISA MODERNIZATION FOR THE 21ST CENTURY?

Posted on February 2, 2015 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

We cannot teach people. We can only help them discover it within themselves. Galileo Galilei

On November 21, 2014, as part of President Obama's Executive Actions, the President issued a memorandum to modernize and streamline the U.S. immigrant and nonimmigrant visa systemfor the 21st century. The DHS followed up by publishing a notice in the Federal Register on December 30, 2014 inviting responses to 18 questions relating to visa modernization. We responded in great depth to 2 of the 18 questions as they relate to what we have been advocating for several years to administratively fix the immigration system though big picture and out of the box ideas. Our ideas are also included in the more expansive comments provided by the Alliance of Business Immigration Lawyers, and we salute all of the lawyers who were part of the comment team and who came up with the most innovative suggestions to modernize the visa system. We hope not without reason that this is not an exercise in futility, and that the DHS will seriously consider our ideas and those of our colleagues, including the weighty comments from the American Immigration Lawyers Association and other stakeholders in the immigration advocacy community. There is no escaping the fact that our visa system designed decades ago to accommodate much less sustanined and far lower levels of migration urgently needs to be brought into alignment with 21st century needs and challenges. If Congress is unable or unwilling to reform the system, it is incumbent upon the

Administration to find ways to reinterpret provisions within the existing INA to ensure that we have an immigration system that can help US employers remain globally competitive and that can attract the best talent to our shores. It remains to be seen whether all the wonderful ideas in the Supporting US High Skilled Business and Workers memo will ever see the light of the day. One way for the Administration to demonstrate that it means what it says is to promptly promulgate the rule that would allow H-4 dependent spouses to work. This rule was proposed in May 2014, and it is about time for the rule to be finalized. If the H-4 rule is still pending approval from the powers that be within the governmental bureaucracy, one wonders how much longer would it take for the DHS to lengthen the time period for STEM Optional Practical Training or establish a parole policy to attract entrepreneurs into the US.

At the end of the day, immigration policy is not only, or even primarily, about the immigrants but about how the United States can attract and retain the best and the brightest regardless of nationality who wish to join us in writing the next chapter of our ongoing national story. There are two ways to achieve progress. Congress can change the law, which it persists in refusing to do, or the President can interpret the existing law in new ways, which he has done. Immigration reform should not be viewed as only a Latino issue, it is an American issue. The view that reform is a Latino issue is not surprising due to two reasons. First, most Americans continue to think that immigration benefits the immigrants not themselves. Second, because of that, business immigration is not deemed to have the ethical legitimacy the same way that family migration has. For that to change, for sweeping CIR to become reality, all of us must realize that immigration is not a problem to be controlled but an asset to be maximized.

We reproduce, below, our comment:

January 28, 2015
Attn: Laura Dawkins
Chief of the Regulatory Coordination Division
USCIS Office of Policy and Strategy
20 Massachusetts Avenue NW
Washington, DC 20529-2140

Re: Notice of Request for Information: Immigration Policy
79 Fed. Reg. 78,458 (December 30, 2014)
Docket ID: USCIS-2014-0014

Dear Ms. Dawkins:

Gary Endelman and Cyrus D. Mehta have advocated for administrative fixes to improve the immigration system for several years. In The Tyranny of Priority Datesand Why We Can't Wait: How President Obama Can Erase Immigrant Visa Backlogs with the Stroke of a Pen,we advocated that the President had broad authority under the Immigration and Nationality Act to ameliorate the plight of many who were caught in the crushing immigrant immigrant visa backlogs, along with many widely disseminated blogsthat further fine-tuned and refined the proposals made in our original articles. We are thankful for the opportunity to respond to selected questions in the above referenced Request for Information relating to Visa Modernization which we believe will greatly improve our immigration system. We respond specifically to two of the questions based on arguments we have previously made in our articles and blogs.

5. What are the most important policy and operational changes that would streamline and improve the process of applying for adjustment of status to that of a lawful permanent resident while in the United States?

We propose that aliens caught in the employment-based (EB) or family-based (FB) backlogs could file an adjustment of status application, Form I-485, based on a broader definition of visa availability. It would promote efficiency, maximize transparency and enhance fundamental fairness by allowing someone to file an I-485 application sooner than many years later if all the conditions towards the green card have been fulfilled, such as labor certification and approval of the Form I-140, Form I-130 or Form I-526. The EB-5 for China has reached the cap, and there will be retrogression in the EB-5 in the same way that there has been retrogression in the EB-2 and EB-3 for India. Systemic visa retrogress retards economic growth, prevents family unity and frustrates individual ambition all for no obvious national purpose. The current priority date system has become a de facto national origin quota perpetrating a continuing injustice against China and India. Rather than regulating immigration, it now serves to prevent it, making the opportunity to migrate permanently to the United States a cruel joke and frustrating the objective of geographic neutrality that we all thought had been achieved by enactment of the Immigration Act of 1965.

Upon filing of an I-485 application, one can enjoy the benefits of "portability" under INA § 204(j) in some of the EB preferences, and children who are turning

21 can gain the protection of the Child Status Protection Act if their age is frozen below 21. Moreover, the applicant, including derivative family members, can also obtain employment authorization. We acknowledge that INA §245(a)(3) only allows the filing of an I-485 application when the visa is "immediately available" to the applicant, and this would need a Congressional fix. What may be less well known, though no less important, is the fact that the INA itself offers no clue as to what "visa availability" means. While it has always been linked to the monthly State Department Visa Bulletin, this is not the only definition that can be employed nor is there any indication that Congress preferred or mandated this intepretation. Therefore, we propose a way for USCIS to allow for an I-485 filing before the priority date becomes current, and still be faithful to §245(a)(3).

The only regulation that defines visa availability is 8 C.F.R. §245.1(g)(1), which provides:

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). 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.

Under 8 C.F.R. §245.1(g)(1), why must visa availability be based solely on whether one has a priority date on the waiting list which is earlier shown in the Visa Bulletin? Why can't "immediately available" be re-defined based on a qualifying or provisional date? We are all so accustomed to paying obeisance to the holy grail of "priority date" that we understandably overlook the fact that this all-important gatekeeper is nowhere defined. Given the collapse of the priority date system, an organizing principle that was never designed to accommodate the level of demand that we have now and will likely continue to experience, all of us must get used to thinking of it more as a journey than a concrete point in time. The adjustment application would only be approved

when the provisional date becomes current, but the new definition of immediately available visa can encompass a continuum: a provisional date that leads to a final date, which is only when the foreign national can be granted lawful permanent resident status but the provisional date will still allow a filing as both provisional and final dates will fall under the new regulatory definition of immediately available. During this period, the I-485 application is properly filed under INA §245(a)(3) through the new definition of immediately available through the qualifying or provisional date.

We acknowledge that certain categories like the India EB-3 may have no visa availability whatsoever. Still, the State Department can reserve one visa in the India EB-3 like the proverbial Thanksgiving turkey. Just like one turkey every Thanksgiving is pardoned by the President and not consumed, similarly one visa can also be left intact rather than consumed by the alien beneficiary. So long as there is one visa kept available, our proposal to allow for an I-485 filing through a provisional filing date would be consistent with INA §245(a)(3).
We propose the following amendments to 8 C.F.R. §245.1(g)(1), shown here in bold, that would expand the definition of visa availability:
*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.*

Once 8 C.F.R. §245.1(g)(1) is amended to allow adjustment applications to be

filed under INA § 245(a)(3), we propose similar amendments in the Department of State's Foreign Affairs Manual to even the playing field for beneficiaries of approved I-140 and I-130 petitions who are outside the U.S. so as not to give those here who are eligible for adjustment of status an unfair advantage. Since the visa will not be valid when issued in the absence of a current priority date, it will be necessary for USCIS to parole such visa applicants in to the United States. The authors suggest the insertion of the following sentence, shown here in bold and deletion of another sentence, in 9 Foreign Affairs Manual (FAM) 42.55 PN 1.1, as follows:

9 FAM 42.55 PN1.1 Qualifying Dates

"Qualifying dates" are established by the Department to ensure that applicants will not be officially informed of requisite supporting documentation requirements prematurely, i.e., prior to the time that the availability of a visa number within a reasonable period can be foreseen. Therefore, post or National Visa Center (NVC) will not officially and proactively notify applicants of additional processing requirements unless the qualifying date set by the Department (CA/VO/F/I) encompasses the alien's priority date. Otherwise, it is likely that some documents would be out-of date by the time a visa number is available and delay in final action would result. An immigrant visa is also considered available for provisional submission of the immigrant visa application on Form DS 230 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. Issuance of the immigrant visa for the appropriate category only occurs when there is a current priority date.

We believe our proposal would not be creating new visa categories, but simply allowing those who are already on the pathway to permanent residence, but hindered by the crushing priority date backlogs, to apply for adjustment of status or be paroled into the U.S. It would be within the discretion of the USCIS to allow such submissions on a provisional basis in the absence of a current priority date under the current traditional definition of visa availability so that, in a strictly technical sense, actual "filing" and final approval would be deferred until the actual availability of an immigrant visa number did present itself. Allowing time for the perfection of such a provisional submission is based upon well-established patent law procedure which allows for a 12 month period

following initial filing to finalize the skeletal patent application. Another proposal that has been suggested is to allow the beneficiary of an approved I-140 to remain in the United States, and grant him or her an employment authorization document (EAD) if working in the same or similar occupation. While such a proposal allows one to avoid redefining visa availability in order to file an I-485 application, as we have suggested, we do not believe that a stand-alone I-140 petition can allow for portability under INA §204(j) or protection under the CSPA. Portability can only be exercised if there is an accompanying I-485 application. Still, at the same time, the government has authority to grant open market EADs to any category of aliens pursuant to INA §274A(h)(3). Under the broad authority that the government has to issue EADs pursuant to §274A(h)(3), the validity of the underlying labor certification would no longer be relevant.

Allowing early adjustment of status with companion work authorization, travel permission, and AC 21-like adjustment portability will make possible the green card on a provisional basis in all but name. However, this is not all. The most important benefit may be the freezing of children's ages under the formula created by the Child Status Protection Act (CSPA). If the White House will only grant EAD and Parole to I-140 beneficiaries, but stop short of allowing adjustment, then, on a massive scale, their children will turn 21, thereby aging out, long before the magic time for I-485 submission ever arrives. This is because Section 3 of the CSPA only speaks of freezing the child's age when the petition has been approved and the visa number has become available. Also, the child must seek to acquire lawful permanent resident status within one year following petition approval and visa availability. Since *Matter of O.Vazquez,* 25 I&N Dec. 817 (BIA 2012) absent extraordinary circumstances, only the filing of the I-485 can do that. Under the current definition of visa availability, joined at the hip to the Visa Bulletin, they have no hope. Only through a modified definition coupled with the notion of provisional adjustment can they retain the CSPA age. This is why invocation of early adjustments themselves, not merely EAD and Parole, to beneficiaries of I-140 petitions is so manifestly necessary. However, precisely as in the INA, the CSPA contains no definition of visa availability. A change in the applicable regulatory meaning along the lines we suggest will apply to CSPA and prevent the children of I-140 beneficiaries from aging out. Granting the EAD and advance parole will sadly have no such effect. Only early adjustment can do that. This is especially relevant now since the Supreme Court in *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191, 573 US __, 189

L. Ed. 2d 98 substantially narrowed the utility of priority date retention. The redefinition of visa availability that we propose not only provides the legal underpinning for early adjustment of status but also allows the children of I-140 petition beneficiaries to derive a priceless immigration benefit through this family relationship that would otherwise be lost. Given the importance of preserving the age of a child under the CSPA, why only restrict early I-485 filings to beneficiaries of I-140 petitions? Our proposed redefinition of visa availability ought to also apply uniformly to beneficiaries of family based I-130 petitions too. Not only can children who age out not benefit from the CSPA, how many parents will want to remain in the United States if their children cannot?

15. What are the most important policy and operational changes, if any, available within the existing statutory framework to ensure that administrative policies, practices, and systems fully and fairly allocate all of the immigrant visa numbers that Congress provides for an intends to be issued each year going forward?

Unitary Counting of Derivatives

There is nothing in the Immigration and Nationality Act that requires each derivative family member to be counted on an individual basis against the worldwide and country caps. That being so, President Obama tomorrow can issue an executive action providing that this long-established practice be stopped. That single stroke of the pen would revolutionize United States immigration policy and, at long last, restore balance and fairness to a dysfunctional immigration system badly in need of both. If all members of a family are counted together as one unit, rather than as separate and distinct individuals, systemic visa retrogression will quickly become a thing of the past. The issue is not whether family members should be exempt but rather how they should be counted.

We proposed this idea in *The Tyranny of Priority Dates, supra*, and *How President Obama Can Erase Immigrant Visa Backlogs with the Stroke of a Pen, supra,* long before it achieved the intellectual acceptance in many quarters that it now enjoys.We are pleased to now find that President Obama is considering this proposal as part of the package of administrative reform measures he announced on November 20, 2014. That this is so suggests the broad possibilities for change when the vigorous and disciplined exercise of executive initiative allows genuine progress to overcome the paralysis of political stalemate.

We know of no explicit authorization for derivative family members to be counted under either the Employment Based or Family Based preference in the Immigration and Nationality Act. The treatment of family members is covered by an explicit section of the Immigration and Nationality Act (INA), Section 203(d). Let us examine what INA §203(d) says:

> *A spouse of child defined in subparagraphs (A), (B), (C), (D), or (E) of section 1101(b) 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.*

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. Should only the principal become a permanent resident while everyone else waits till next year? What if visa retrogression sets in and the family has to wait, maybe for years? This does not make sense. Is there not sufficient ambiguity in INA §203(d) to argue that family members should not be counted against the cap? We do not contend that they should be completely exempted from being counted. As stated in INA §203(d), family members should be given the “same status and the same order of consideration” as the principal. Hence, if there is no visa number for the principal, the rest of the family does not get in. If, on the other hand, there is a single remaining visa number for the principal, the family members, however many there are, ought to be “entitled to the same status, and the same order of consideration as the principal.” Viewed in this way, INA §203(d) operates in harmony with all other limits on permanent migration found in INA both on an overall and a per country basis. There is no regulation in 8 Code of Federal Regulation (CFR) that truly interprets INA §203(d). Even the Department of State’s regulation at 22 CFR §42.32 fails to illuminate the scope or purpose of INA §203(d). It does nothing more than parrot INA § 203(d). The authors recall the Supreme Court’s decision in *Gonzales*

v Oregon, 546 US 243, 257 (2006) reminding us that a parroting regulation does not deserve deference:

> *Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.*

It is certainly true that family members are not exempted from being counted under INA § 201(b) as are immediate relatives of US citizens, special immigrants, or those fortunate enough to merit cancellation of their removal. Yet, we note that the title in INA §201(b) refers to "Aliens Not Subject to Direct Numerical Limitations." What does this curious phrase mean? Each of the listed exemptions in INA §201(b) are outside the normal preference categories. T*hat is why they are not subject to direct counting*. By contrast, the INA § 203(d) derivatives are wholly within the preference system, bound fast by its stubborn limitations. They are not independent of all numerical constraints, only from direct ones. It is the principal alien through whom they derive their claim who is and has been counted. When viewed from this perspective, there is nothing inconsistent between saying in INA §203(d) that derivatives should not be independently assessed against the EB or FB cap despite their omission from INA §201(b) that lists only non-preference category exemptions.
We do not claim that derivative beneficiaries are exempt from numerical limits. As noted above, they are indeed subject in the sense that the principal alien is subject by virtue of being subsumed within the numerical limit that applies to this principal alien. 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, then, a profound difference between not being counted at all, for which we do not contend, and being counted as an integral family unit rather than as individuals. For this reason, INA §201(b) simply does not apply. *We seek through the simple mechanism of an Executive Order not an exemption from numerical limits but a different way of counting them.*

We are properly reminded that INA §§201(a)(1) and 201(a)(2) mandate that

"family sponsored" and "employment based immigrants" are subject to worldwide limits. Does this not cover spouses and children? True enough but all is not lost. While the term "immigrant" under INA §101(a)(15) includes spouse and children, they were included because, in concert with their principal alien family member, they intended to stay permanently in this their adopted home. No one ever contended they were or are non-immigrants. However, this does not mean that such family derivatives are either "employment based" or "family sponsored" immigrants. No petitioner has filed either an I-140 or I-130 on their behalf. Their claim to immigrant status is wholly a creature of statute, deriving entirely from INA §203(d) which does not make them independently subject to any quota.

INA §203(d) must be understood to operate in harmony with other provisions of the INA. *Surely, if Congress had meant to deduct derivative beneficiaries, it would have plainly said so somewhere in the INA.* The Immigration Act of 1990 when modifying INA §§201(a)(1) and 201(a)(2) specifically only referred to family sponsored and employment-based immigrants in §203(a) and §203(b) respectively in the worldwide cap. This was a marked change from prior law when all immigrants save for immediate relatives and special immigrants, but including derivative family members, had been counted. In this sense, the interpretation of INA §203(d) for which we contend should be informed by the same broad, remedial spirit that characterizes IMMACT 90's basic approach to numerical limitation of immigration to the United States As already noted, these immigrants ought to only be the principal beneficiaries of I-130 and I-140 petitions. Derivative family, of course, are not the beneficiaries of such sponsorship. At no point did Congress do so. Under the theory of *expressio unius est exclusio alterius*, it is entirely reasonable to conclude that Congress had not authorized such deduction.Surely, if this was not the case, Congress would have made its intent part of the INA. If the Executive Branch wanted to reinterpret §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. Thus, when a provision is ambiguous such as INA §203(d),

the government agencies charged with its enforcement may reasonably interpret it in the manner that we suggest.

Skeptics who contend that the INA as written mandates individual counting of all family members point to two provisions of the INA, §§202(a)(2) and 202(b). Neither is the problem that supporters of the status quo imagine. Let's consider §202(a)(2) first. In relevant part, it teaches that not more than 7% of the total number of family and employment-based immigrant visas arising under INA §203(b) may be allocated to the natives of any single foreign state. Eagle eyed readers will readily notice that this does not apply to derivative family members whose entitlement comes from INA §203(d) with no mention of §203(b). Also, but no less importantly, INA §202(a)(2) is concerned solely with overall per country limits. There is no reason why the number of immigrant visas cannot stay within the 7% cap while all members of a family are counted as one unit. There is no reason why monitoring of the per country family or employment cap should require individual counting of family members. The per country cap is, by its own terms, limited to the named beneficiaries of I-130 and I-140 petitions and there is no express or implied authority for any executive interpretation that imposes a restriction that Congress has not seen fit to impose.

What about cross-chargeability under INA §202(b)? Even if §202(b) has language regarding preventing the separation of the family, it does not mean that the derivatives have to be counted separately. If an Indian-born beneficiary of an EB-2 I-140 is married to a Canadian born spouse, the Indian born beneficiary can cross charge to the EB-2 worldwide rather than EB-2 India. When the Indian cross charges, the entire family is counted as one unit under the EB-2 worldwide by virtue of being cross charged to Canada. Such an interpretation can be supported under *Chevron and Brand X*, especially the gloss given to Chevron by the Supreme Court in the recent Supreme Court decision in *Scialabba v. de Osorio, supra,* involving an interpretation of the provision of the Child Status Protection Act. Justice Kagan's plurality opinion, though seeking to clarify the Child Status Protection Act, applies with no less force to our subject: "This is the kind of case that Chevron was built for. Whatever Congress might have meant… it failed to speak clearly." *Kagan slip op.* at 33. Once again, as with the per country EB cap, the concept of cross-chargeability is a remedial mechanism that seeks to promote and preserve family unity, precisely the same policy goal for which we contend.

Expansion of Parole in Place

The very idea of "parole" in §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 §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 expansion of parole in place would reduce the burden on American consular posts abroad so that their limited resources could be more properly deployed within more narrowly targered objcctives that would thus expedite visa issuance and promote national security by allowing more in-depth examination of visa applicants. 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 §§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 §245(c)(2) and the current USCIS memo granting 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 §245 where the applicant is required to have maintained lawful nonimmigrant status is under INA §245(c)(7), which is limited to employment-based immigrants. Family-based immigrants are not so subject. For purposes of §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. §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 §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 §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 §101(a)(13)(B). So, while retroactive PIP would help satisfy the 180 day requirement imposed by INA §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 §245(k) benefits and, having failed to continuously maintain valid nonimmigrant status, would remain unable to adjust due to the preclusive effect of §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 §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 Under the INA

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. These proposals too 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.
Yours truly,

Gary Endelman

Cyrus D. Mehta

See 15 Bender's Immigration Bulletin 469, April 1, 2010. Another version of The Tyranny of Priority Dates article is available online at https://www.scribd.com/doc/45650253/The-Tyranny-of-Priority-Dates-by-Gary-Endelman-and-Cyrus-D-Mehta-3-25-10
See 17 Bender's Immigration Bulletin 3, January 1, 2012.
See e.g, Two Aces Up President Obama's Sleeve To Achieve Immigration Reform Without Congress – Not Counting Family Members And Parole In Place, http://blog.cyrusmehta.com/2014/06/two-aces-up-president-obamas-sleeve-to_29.html; The Family That Is Counter Together Stays Together: How To Eliminate Immigrant Visa Backlogs, http://blog.cyrusmehta.com/2014/09/the-family-that-is-counted-together.html; Do We Really Have To Wait For Godot?: A Legal Basis For Early Filing Of An Adjustment Of An Adjustment of Status Application, http://blog.cyrusmehta.com/2014/08/do-we-really-have-to-wait-for-godot.html

See e.g. Stuart Anderson, *Executive Action and Legal Immigration*, National Foundation for American Policy, September 2014, available at http://nfap.com/wp-content/uploads/2014/09/NFAP-Policy-Brief.Executive-Action.Sept-2014.pdf
In §1244(c) of the Defense Authorization Act of 2008, Pub. L. No. 110-181, Congress explicitly stated that only principal aliens would be charged against the 5,000 visas allocated to Iraqi translators. Even if Congress imposed a numerical limit on principal applicants and exempted derivative applicants in special emergency legislation, this provision does not dictate how derivative beneficiaries who are subject to the general family or employment-based caps should be counted under §203(d).
See Mehta, Isaacson and Endelman, *Scialabba v. de Osorio: Does the Dark Cloud Have a Silver Lining*? 19 Bender's Immigration Bulletin 1021, September 15,

2014.

Policy Memorandum, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i),* **PM-602-0091, November 15, 2013.**