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NO-WIN IMMIGRATION POLICY: DENYING H-1B EXTENSIONS TO SKILLED WORKERS FROM INDIA SO THAT THEY SELF-DEPORT

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There are many people born in India, and to a lesser extent China, who have been patiently waiting for over a decade for their green cards. They have complied with all immigration formalities and the only thing holding them back is an available visa. The law allows them to continue working on extended H-1B visas while they wait legally in the United States. President Trump, in the name of protecting US workers, wants to send these skilled workers home to wait for their green cards. This is consistent with the Trump administration's goal to destabilize the immigration system – from the travel ban aimed at Muslims to depriving skilled workers on H-1B visas to remain in their jobs and contribute to the United States.

A McClatchy press report has sent shock waves within the backlogged H-1B community, as well as alarmed employers who sponsor skilled foreign workers for visas and green cards, attorneys and all people concerned about fairness. The report cites credible sources within the Department of Homeland Security who say that they are drafting a proposal to restrict H-1B visa extensions beyond the six-year limitation, which would result in the "self-deportation" of tech workers, thus opening up jobs for Americans in furtherance of President Trump's Buy American Hire American Executive Order. Such a move is completely counter intuitive as these H-1B workers have all been beneficiaries of approved labor certification applications that resulted in unsuccessful attempts at locating qualified US workers to perform these specialized duties.

There are reportedly more than 1 million H-1B visa holders in the country, mainly from India, that have been waiting for green cards for more than a decade. Although the H-1B visa's maximum duration is 6 years, those who are

caught in the green card backlogs can apply for either a 3-year extension or a 1-year extension under the American Competitiveness in the 21st Century Act (AC21).

The DHS is specifically looking to reinterpret Section 104(c) of AC21, which provides for a 3-year extension of H-1B visas beyond the 6-year limitation. In order to be eligible for a 3-year extension under 104(c), the H-1B visa holder must be the beneficiary of an approved employment-based I-140 petition and must also demonstrate eligibility for adjustment of status but for the visa not being available as a result of the per country limitation. Section 104(c), however, states that the beneficiary of an I-140 petition "may apply" and the Attorney General (and by extension the DHS) "may grant" such an H-1B extension.

Since the enactment into law in 2000, prior administrations under Presidents Clinton, Bush and Obama have routinely granted 3-year H-1B extensions under 104(c). Even if the statute indicates that the government "may grant" the extension, such discretion cannot be used to arbitrarily deny H-1B visa extensions and thus eviscerate Congressional intent. The purpose of Section 104(c) was to provide relief to those in H-1B visa status who are caught in the employment-based backlogs as a result of the per-country limitation. India and China are the two countries where the per country limit within the employment-based second and third preferences have been oversubscribed. The extended H-1B visa has provided a lifeline to skilled workers who are otherwise eligible for green cards but for their priority dates not being current.

When a statutory provision bestows discretion through words such as "may grant," such discretion cannot be exercised in an arbitrary and capricious manner. The Supreme Court's opinion in *Judulang v. Holder*, 565 U. S. ____ (2011) has provided parameters under which a government agency may exercise discretion in the immigration context relating to a waiver under Section 212(c). The following interesting discussion is worth noting:

> *This case requires us to decide whether the BIA's policy for applying §212(c) in deportation cases is "arbitrary capricious" under the*
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> *Administrative Procedure Act (APA), 5 U. S. C. §706(2)(A). The scope of our review under this standard is "narrow"; as we have often recognized, "a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile*

> *Ins. Co., 463 U. S. 29, 43 (1983); see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 416 (1971). Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making. When reviewing an agency action, we must assess, among other matters, "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" State Farm, 463 U. S., at 43 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U. S. 281, 285 (1974)). That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons. See FCC v. Fox Television Stations, Inc., 556 U. S. 502, 515 (2009) (noting "the requirement that an agency provide reasoned explanation for its action"). The BIA has flunked that test here. By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.*

. . . .

> *The BIA may well have legitimate reasons for limiting §212(c)'s scope in deportation cases. But still, it must do so in some rational way. If the BIA proposed to narrow the class of deportable aliens eligible to seek §212(c) relief by flipping a coin—heads an alien may apply for relief, tails he may not—we would reverse the policy in an instant. That is because agency action must be based on non-arbitrary, "'relevant factors,'" State Farm, 463 U. S., at 43 (quoting Bowman Transp., 419 U. S., at 285), which here means that the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system. A method for disfavoring deportable aliens that bears no relation to these matters—that neither focuses on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious. And that is true regardless whether the BIA might have acted to limit the class of deportable aliens eligible for §212(c) relief on other, more rational bases.*

The key in determining whether denying a 3-year H-1B extension is arbitrary is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Is the DHS proposal to restrict 3-year H-1B extensions based on "relevant factors" or is it planning to disfavor a class of noncitizens through the mere flipping of a coin? The DHS's proposal will likely fail under this test as 104(c)'s plain language requires the government to grant the extension so long as the prerequisites have been met. This means that so long as one who is in H-1B status is the beneficiary of an approved I-140, and the priority dates is not yet current, this person should be granted a 3-year extension. Even justifying the "self-deportation" of hundreds of thousands to protect US workers under the BAHA Executive Order is no excuse. BAHA was not around when AC21 was enacted in 2000. If the DHS seems to reinterpret 104(c) in light of BAHA, this decision can be challenged as it is contrary to the plain meaning of 104(c) as well as Congressional intent. The concern under INA § 212(a)(5) that US workers be protected was already met through the labor certification or by seeking an exemption of it through the national interest waiver. The imposition of BAHA should not upend the carefully crafted statutory structure enacted by Congress over the years.

Moreover, a presidential executive order cannot supersede a law previously passed by Congress. A case in point is *Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996) which held that a 1995 executive order of President Clinton violated a provision of the National Labor Relations Act. President Clinton's EO No. 12, 954 declared that federal agencies shall not contract with employers that permanently replace lawfully striking employees. The lower district court held that the president's interpretation of a statute was entitled to deference under *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984). The DC Court of Appeals, however, overruled the district court, without explicitly stating whether the president's interpretation was entitled to *Chevron* deference or not. Based on the holding in *Chamber of Commerce v. Reich*, if H-1B visa extensions are denied under President Trump's interpretation of AC21 provisions pursuant to the BAHA Executive Order, they too ought to be challenged as being violative of the INA and it ought to be further argued that the president's interpretation of a statutory provision, unlike a government agency, is not entitled to *Chevron* deference.

The title to 104(c) "One-Time Protection Under Per Country Ceiling" does not mean that it empowers the Trump administration to restrict its application to a

one-time 3-year extension. The title can clarify an ambiguous statute but shouldn't be used to contradict the text of the statute. In this case, the text of 104(c) clearly states that three year extensions can be granted indefinitely until the "alien's application for adjustment of status has been processed and a decision made thereon." *See* *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 n.14 (1981) (*the title of an Act cannot enlarge or confer powers); INS v. National Center for Immigrants' Rights,* 502 U.S. 183, 189-90 (1991) (the title of a statute or section can aid in resolving an ambiguity in the legislation's text).

The Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers that took effect on January 17, 2017 further restrains the government's ability to restrict H-1B extensions under 104(c). Current 8 CFR § 214.2(h)(13)(iii)(E)(i), which implements 104(c), does not appear to give broad discretion and pertains more to granting discretion with respect to the validity period, as follows:

> *Validity periods. USCIS may grant validity periods for petitions approved under this paragraph in increments of up to 3 years for as long as the alien remains eligible for this exemption.*

This suggests that if the priority date is likely to become current imminently, the USCIS may shorten the time period of the H-1B extension to less than 3 years. The USCIS may also shorten the validity period if it is planning to revoke an approved I-140 petition if it believes it was previously erroneously granted. These sorts of discretion would pass muster and could have been contemplated under 104(c) when Congress said that the DHS "may grant" the extension. On the other hand, a new rule that would wholesale preclude the granting of a 3-year H-1B extension would be a completely erroneous reading of 104(c) and should certainly invite a lawsuit to challenge the Trump administration's capricious interpretation. Even an H-1B worker, rather than an employer, should be able to sue as plaintiff following the Supreme Court's decision in *Lexmark Int'l Inc. v. Static Control Components*, 134 S.Ct. 1377 (2014), which held that a plaintiff has the ability to sue when his or her claim is within the zone of interests a statute or regulation protects. See also *Mantena v. Johnson*, 809 F.3d 721 (2015) and *Kurupati v. USCIS*, 775 F.3d 1255 (2014). The proposal appears to be based on pure xenophobia by the Trump administration to curb legal immigration of legitimate skilled workers from

India and China who have been waiting for years in the green card backlogs. It does not protect American workers as the labor market has already been tested. Trump's animus towards immigrants can also be cited in a future court challenge, as was successfully done in court challenges against the travel ban where Trump's utterances and tweets against Muslims were invoked. Trump's animus was further evident in a recent *New York Times* article that described President Trump angrily disparaging *bona fide* Haitian visitors by assuming they all had AIDS and Nigerian visitors who would "never go back to their huts." President Trump's sentiments reflect the true underpinnings behind his administration's new immigration policy – white nationalism, which can be used to show bad faith if the USCIS starts denying 3-year H-1B extensions.

The Trump administration will have less scope to play mischief with the ability to seek a 1-year H-1B extension under Section 106(a) and (b) of AC21. Section 106(b) states that the Attorney General "shall" extend H-1B status in increments of 1 year provided a labor certification or I-140 was filed one year prior to the final year in H-1B status, and until the labor certification, I-140 or adjustment of status is denied. It is not the case that 104(c) is surplusage, as contended by an activist organization that supports backlogged H-1B visa holders, and so one who qualifies under 104(c) will also be eligible for the grant of a 1-year extension under section 106. 104(c) allows for longer extensions and removes the need to file for extensions every year, and so it is clearly providing an additional benefit. 8 CFR §§ 214.2(h)(13)(iii)(D)(2) and (10), the rules that implement 106(a) and (b), give further support to this position as they both contemplate an approved I-140 petition while an H-1B beneficiary seeks a 1-year extension beyond the sixth year. The widely held view is that either section can be applicable when its own conditions are met. There are some cases where only 104(c) is available (where the labor certification was filed in the sixth year or final year of H-1B status and the I-140 is approved in that year), some cases where only 106(a)-(b) is available (where the labor cert or I-140 filed one year before the 6th year is still pending or where the priority date is current), and some cases where both are available but 104(c) gives greater benefits. Even when both are available, at times, for strategic reasons, one may wish to still seek an H-1B extension for 1 year under 106(b) if the priority date will become current at the time of adjudication of the extension request. Nothing in the text or logic of the statute indicates that 106(a)-(b) ceases to become available, when it otherwise would be, simply because 104(c)

is also available.

While the need of the hour is to oppose any arbitrary changes in interpreting 104(c), the ultimate goal is to reduce the green card backlogs. AC21 is a mere band-aid that provides relief to H-1B workers in a hopelessly broken immigration system that keeps them from getting green cards for years on end. HR 392 is one vehicle through which the backlogs can get reduced through elimination of per country limits. Still, HR 392 is not the magical elixir as backlogs will likely remain, but they will be far less. In fact, all will likely face a few years of backlogs if the per country limits are eliminated. If we can also hope for the unitary counting of derivatives in addition to HR 392, that will completely drain the employment-based system of backlogs. While all this is wishful thinking under a Trump administration, it never hurts to strive for a sensible winning immigration reform for the good of the country. Until backlogs are completely eliminated, the ability of skilled workers to remain in the US and extend H-1B status should never be taken away through policies inspired by white nationalism and xenophobia under the Trump administration. This can be the only explanation for attacking immigration in a full employment economy and BAHA is only thinly veiled nativism. In conclusion, just because a statute says “may” does not mean that the Trump administration can capriciously defeat the will of Congress by denying H-1B extensions to hundreds of thousands of Indians so that they may self-deport – an action that is a no-win for the United States or the foreign national skilled worker. Fortunately, there is enough protection in the AC21 law that will make it very hard for the Trump administration to see the light of the day with such a loser immigration policy.