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TRUMP CAN PROVIDE A POTENTIAL PATH TO CITIZENSHIP FOR H-1B VISA HOLDERS

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On Friday, January 11, 2019, many were intrigued by President Trump's tweet assuring H-1B visas that they should expect a potential path to citizenship. This is what he tweeted:

> "H1-B holders in the United States can rest assured that changes are soon coming which will bring both simplicity and certainty to your stay, including a potential path to citizenship. We want to encourage talented and highly skilled people to pursue career options in the U.S."

There is no direct path to citizenship for H-1B visa holders. They first have to obtain permanent residence, and must then wait for at least 5 years, in most cases, before they become eligible for naturalization.

Trump's appointee, USCIS Director Cissna, has made life extremely difficult for H-1B visa holders, and thus this tweet was seen like rubbing salt on an open wound. In recent times, even routine requests for extensions of H-1B status for occupations, which should have traditionally been recognized for H-1B classification, have been denied. These arbitrary denials by no means bring simplicity and certainty in the life of an H-1B visa holder, leave alone providing a path to citizenship. To add further insult to injury, the Trump administration is proposing a rule that would rescind the grant of work authorization to H-4 spouses.

Indeed, the goal of the Trump administration, inspired by restrictionists like Steve Miller, is to restrict legal immigration to the United States. This is to appeal to Trump's base that feel threatened by immigrants of all stripes, whether they are legal, undocumented or refugee.

Some thought that Trump was referring to a proposed rule that would allow

employers to preregister for the H-1B lottery, and would be skewed in favor of those with advanced degrees, but this rule too does nothing for existing H-1B visa holders and also does nothing to put them on the path to citizenship.

But if Trump really wants, he can make his tweet become reality without the need to even go through Congress. It has become de riguer for presidential administrations to bring about seismic policy shifts in immigration through executive actions such as President Obama's DACA or Trump's travel ban. Even if frowned upon, bypassing Congress to provide benefits to foreign nationals like Obama did is far more preferable than Trump's travel ban that potentially prevents mothers from banned countries to see their dying child in the United States.

Trump could immediately order Director Cissna to adjudicate H-1B visas in the way that Congress intended, with the goal of approving rather than denying the visa, bringing about much needed simplicity and certainty to both employers and H-1B visa holders. This used to be the case, where the supporting letter for an H-1B petition seldom exceeded a page or two. Presently, employers must brief an H-1B visa petition as if they are filing a brief in federal court. This is quite unnecessary for a routine work visa application.

If H-1B processing resumes in a fair and rational manner, most nationals not born in India and China should be able to obtain permanent residency relatively quickly upon being sponsored by their employers through the labor certification process. Unfortunately, the situation is different for people born in India and China. Due to the per country limits in the employment preferences, they have to wait for several decades even after the employer's labor certification has been approved. One study predicts that the wait time could be 151 years for Indian born beneficiaries in the employment based second preference.

The outrageous waiting times are due to the excess demand and limited supply of visas, further compounded by the per country cap, set by Congress each year. On first brush, only Congress can change this and not Trump. As Congress is divided, such changes for H-1B visa holders are unlikely for now. There have been proposals in Congress to eliminate the per country caps, which have yet to pass. However, if he wanted to and had the guts, Trump could change the way we count dependents that would dramatically decrease, and ultimately eliminate the backlogs, thus providing a pathway for citizenship to H-1B visa

holders.

Ever since I co-wrote The Tyranny of Priority Dates in 2010, followed by How President Obama Can Erase Immigrant Visa Backlogs With A Stroke Of A Pen in 2012, I have steadfastly maintained that the current Trump and the prior administrations of Obama, Bush, Clinton and Bush (Senior), have got it wrong when counting visa numbers under the family and employment preferences.

There is no explicit authorization for derivative family members to be counted separately under either the employment-based or family based preference visas in the Immigration and Nationality Act. The treatment of family members is covered by INA 203(d), enacted in 1990, which states:

> "A spouse or 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."

Nothing in INA 203(d) 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 allocated visa numbers. If Congress allocates a certain number of visas to immigrants with advanced degrees or to investors, it makes no sense if half or more are used up by family members. I have also written blogs over the years, here, here and here, to further advance this argument.

If Trump wanted to give meaning to his tweet so as to truly assure H-1B visa holders, even if he may not have known what he was saying, he does have room under INA 203(d) to order the State Department and USCIS to count both the principal beneficiary and the family members as one. This will greatly reduce the backlogs and put H-1B visa holders, born in India and China, on a path to permanent residency and citizenship.

In Wang v. Pompeo a group of EB-5 investor arguments made the same argument that the State Department was counting visa numbers incorrectly. Their request for preliminary injunction was recently denied, although the case has to yet be decided on the merits. Still, this is a setback as the judge did not accept the plaintiff's argument that the administration was counting visas

incorrectly under INA 203(d). Even if plaintiffs were denied the preliminary injunction, the Trump administration could cease opposing the plaintiffs in this litigation and start counting the principal and derivative beneficiaries as one unit. There is sufficient ambiguity in INA 203(d) for the administration to count in this new way, and 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".

Admittedly, hoping that Trump would put H-1B visa holders on a pathway to citizenship is really a pipe dream. So long as restricitonists like Stephen Miller continue to make the United States hostile to immigrants, there is no chance that Trump's tweet would ever become reality. If he really wanted to carry out his proposal, it might anger his base. He may have to also fire Miller. But if Trump ever wants to follow through on his tweet, this blog shows him a way to do so.