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IS THE USCIS IMPROVING OR UNDERMINING THE IMMIGRATION SYSTEM THROUGH ITS TOP TEN WAYS?

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USCIS posted TOP TEN WAYS USCIS is improving the Integrity of the Immigration System. Really? Is USCIS improving the integrity of the system or undermining it? The USCIS has been mandated by Congress to grant benefits. Instead, it has usurped the role of ICE to become an enforcement agency. USCIS's policies under President Trump and its Director, Francis Cissna, have been mean spirited and cruel, designed to hurt individuals who are trying to come to or remain in the US legally. Their objective is to restrict immigration, and bring it to a grinding halt via the backdoor, something that the Trump administration has not been able to achieve as yet through Congress.

My responses to each Top Ten Way shows that USCIS is actually undermining the immigration system rather than improving it. To those who are dismayed at the sudden turn the USCIS has taken, including many employees of the USCIS who believe in America's noble mission of welcoming immigrants, my advice is to ensure that the USCIS applies the Immigration and Nationality Act as intended by Congress rather than follow the current leadership's meaningless Top Ten slogans! There is a general rule of statutory interpretation that when the legislature enacts an ameliorative law designed to forestall harsh results, the law should be interpreted in an ameliorative fashion, and any ambiguities especially in the immigration context, should be resolved in favor of the non-citizen. See e.g. *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003). As the USCIS is mandated by Congress to implement the provisions of the INA that grant benefits and ameliorative relief, those provisions ought to be interpreted by the official in favor of the applicant seeking the benefit. Unfortunately, this is not the guiding mission of the USCIS through its Top Ten Ways.

1. FAITHFULLY EXECUTING THE LAW THROUGH UPDATED "NOTICE-TO-APPEAR (NTA) GUIDANCE

placing individuals in removal proceedings who have applied for an immigration benefit, are denied, and do not have any lawful status to remain in the United States. Previously, most such persons were not issued NTA.

My Response: It is a waste of resources to place every individual whose application for an immigration benefit is denied, often arbitrarily, in removal proceedings. Many would prefer to leave the United States than stay in the US in an unauthorized manner. Moreover, placing everyone in removal proceedings will overburden the immigration courts even more, resulting in further backlogs and delays. It would force individuals to appear for hearings when they would have otherwise left the country, or at least stayed up to the point they could appeal and reverse the denial. As David Isaacson has aptly stated: "Subjecting well-meaning temporary workers, students, tourists and other nonimmigrants to immigration court proceedings, and even potential detention, just because USCIS disagrees with the merits of their application for extension of stay or change or adjustment of status, is indicative of a malicious attitude towards noncitizens.

2. CLARIFYING "UNLAWFUL PRESENCE"

holding foreign students accountable by counting as unlawful presence all of the time they remain in the United States after violating the terms of their student admission. Previously, students could violate their student status and potentially remain and work illegally in the United States for years and not accrue a single day of unlawful presence.

My Response: There are many ways in which a student may technically violate status without even knowing it. Students are even found to be in violation of status when the school has authorized more than 12 months of Curricular Practical Training under the regulation. A student would only come to know of the violation after departing the country, and being barred for 10 years from reentering the country. This clarification of unlawful presence upends over 20 years of the way "unlawful presence" has been interpreted, potentially in violation of the Administrative Procedures Act, and places students in even greater jeopardy than other nonimmigrants who may have been found to have violated status during their period of authorized stay.

3. ENHANCING SCREENING AND VETTING

strengthening procedures, such as biometric (eg fingerprint) collection and in-person interviews, to ensure that those seeking immigration benefits are eligible and do not pose a risk to national security, and to strengthen identity management and deter fraud.

My Response: The new biometric procedure for nonimmigrant dependents applying for extension of status along with the principal is mean spirited. It is designed to cause further delay of the processing of their applications, and there is no need to subject dependent infants to biometrics. How do they pose a risk to national security? The in-person interview of all applicants is also unnecessary in straight forward cases, and this new imposition is slowing down the granting of immigration benefits that deprive people of their ability to work and travel while their applications remain pending for longer than usual periods of time.

4. MORE EFFICIENT ASYLUM PROCESSING

increasing resources dedicated to processing asylum cases and reinstituting "last in, first out" (LIFO) processing of asylum cases to help recent asylum seekers and address new operational realities at the Southern border.

My Response: This policy delays those who filed asylum cases less recently. The asylum system only becomes efficient when all cases are processed quickly rather than the last cases. The goal of LIFO is not designed to "help" recent asylum seekers, rather it is to apply the new restrictive social group interpretations to those fleeing gang violence or domestic abuse from Northern Triangle countries, thus assuring the denial of their asylum applications and their swift deportation from the US

5. ENSURING PETITIONERS MEET THE BURDEN OF PROOF

rescinding guidance that requires USCIS officers to give deference to the findings of a previously approved petition by the same employer. Every petition for an immigration benefit should stand or fail on its own merit and USCIS officers should not have their hands tied in assessing whether a petition meets legal requirements.

My Response: It defies common sense to not give deference to a previously approved petition by the same employer when the facts and circumstances remain unchanged. For those who are caught in the never ending green card

backlogs, their life has become ever more uncertain when they now apply for routine extension of their H-1B status and face the peril of a denial. Moreover, the preponderance of evidence standard is applicable when applying for an immigration benefit. This standard, requiring that there is more than a 50% chance that the claim is true, is being disregarded and petitioners must meet a standard that is higher than even the "beyond a reasonable doubt" standard that is required for proving guilt against a defendant in a criminal trial.

6. COMBATTING H-1B ABUSE AT THIRD-PARTY WORKSITES

ensuring that those who employ foreign workers that they seek to assign to client worksites establish eligibility for h-1B petition approval and comply with the terms of the petition approval; violation of the rules regarding placement of H-1B workers at client worksites and related abuse of those foreign workers can also result in injury to US workers

My Response: Corporate America relies on H-1B workers to keep it efficient and the economy humming. The USCIS has made it impossible for petitioners to place H-1B workers at client sites without onerous and unnecessary documentation in order to establish a nexus between the petitioner and the client. The need to submit detailed statements from the end-client company regarding the specialized duties that the H-1B beneficiary will perform, as well as the qualifications that are required to perform those duties, would be extremely onerous. Since the end-client is not the ultimate employer of the beneficiary, most clients would be reluctant to provide such letters. Indeed, providing such letters would be tantamount to acknowledging an employment relationship with the beneficiary, which the end client has avoided by arranging to contract with the petitioner or intervening vendors for a project or to fill positions. As a result of a client's unwillingness to provide the unreasonable documentation being required by the USCIS, petitioners are unable to successfully assign H-1B workers to clients' project that critically need the H-1B worker's skills. This draconian policy relating to placement at their party sites of H-1B workers is designed not to combat legitimate abuse, but to kill a successful business model that has benefitted the American economy.

7. EXPANDING SITE VISITS

increasing site visits in employment-based visa programs to ensure employers of foreign workers are doing what they represented to the USICS.

My Response: Under the site visit policy, USCIS officials in Fraud Detection and National Security come unannounced often catching unsuspecting employers and foreign workers off guard without the benefit of legal representation. If the foreign worker is legitimately not available during this surprise visit, due to sickness or vacation, fraud is needlessly suspected. These officials are not so well trained in understanding the nuances of different nonimmigrant visas (such as an L-1A functional manager from an L-1A people manager) that has already been granted and adjudicated after a review of the evidence. The site visit official asks for evidence that may have no bearing to establish eligibility under the specific visa category. As a result of misinterpretation of the law and the facts, many approved visa petitions get needlessly revoked causing great hardship to both the employer and the foreign worker.

8. PROTECTING U.S. WORKERS FROM DISCRIMINATION AND COMBATTING FRAUD

USCIS entered into a partnership with the Department of Justice to help deter, detect, and investigate discrimination against U.S. workers

My Response: No one can object to the need of protecting U.S. workers from legitimate discrimination. However, in a market-based economy, employers should also be free to hire the best workers most suited to their needs and the most qualified. Just because an employer hires qualified foreign workers, it should not axiomatically lead to an assumption that the employer is discriminating against US workers. .If the employer can hire the best workers without fear of discrimination, these workers make the business more profitable, which in turn results in more jobs for American workers.

9. STRENGTHENING INFORMATION SHARING

streamlining information sharing with other agencies to administer and enforce the immigration laws and ensure adherence to the President's enforcement priorities

My Response: One can understand the need to share information between government agencies in the interests of national security in specific cases, but unnecessary sharing of information results in delays in the adjudication of an immigration benefit. It is also inappropriate for USCIS to share information to "ensure adherence to the President's enforcement priorities." USCIS should be in the business of granting benefits and leave enforcement priorities to ICE.

10. IMPROVING POLICIES AND REGULATIONS

proposing and implementing policies that better comport with the intent of the laws Congress has passed, including updating the EB-5 immigrant investor program, defining what it means to be a "public charge," and eliminating work authorization for categories of foreign nationals that Congress did not intend to allow to work in the United States.

My Response: While the EB-5 immigrant investor program needs reform, simply raising the investment amounts without expanding visa numbers will kill the program. Foreign investors will no longer be drawn to the US to invest money in projects that create jobs for American workers. Also, proposing a regulation to rescind work authorization for H-4 spouses, most of whom are women and waiting for years in the green card backlogs, is downright cruel. It is also false to claim that Congress did not intend to allow work authorization for certain categories of foreign nationals. INA 274A(h)(3) gives the Attorney General, and now the Secretary of Homeland Security, broad flexibility to authorize an alien to be employed, thus rendering the alien not an "unauthorized alien" under the INA. Finally, redefining the definition of "public charge" is essentially a subterfuge to find ways to deny immigration benefits to a broad swath of people.

I rest my case, and leave it to readers to decide whether USCIS is improving or undermining the immigration system through its TOP TEN WAYS! I would recommend to Mr. Cissna that he spend his time and energy in finding ways to ensure that the INA works for individuals who wish to come to the US through legal means. There are many flaws in the nation's immigration system that restrict pathways to legal status, and the INA clearly needs an urgent update, but USCIS's current anti-immigration bias makes a bad situation even worse. The USCIS has the power to make America a welcoming nation for immigrants. Reverting to its former mission, rather than dabbling in President Trump's enforcement priorities, when there is no basis in the INA for USCIS to do so, would also keep its employees happier as well as being in the nation's interest.