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US IMMIGRATION & NATIONALITY LAW

PROPOSALS FOR SHATTERING BARRIERS AND OBSTACLES TO LEGAL IMMIGRATION WITHOUT WAITING FOR CONGRESS TO ACT

Posted on May 19, 2021 by Cyrus Mehta

In response to the Biden administration's invitation to comment, I submitted several proposals to reform the immigration system through executive actions so that many can be quickly helped without waiting for Congress to act. You too can submit a proposal by May 19, 2021 at https://www.regulations.gov/document/USCIS-2021-0004-0001

May 19, 2021

Samantha Deshommes
Regulatory Coordination Division Chief
Office of Policy and Strategy
U.S. Citizenship and Immigration Services, DHS
5900 Capital Gateway Drive
Camp Springs, MD 2074

Re: USCIS-2021-0004

Identifffying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

Dear Ms. Deshommes**:**

I would like to propose ideas that would provide relief to beneficiaries of immigrant visa petitions caught in the backlogs. While I understand that

President Biden has proposed the US Citizenship Act of 2021, my proposals do not need legislative action and can bring about far reaching reform and restore balance to the immigration system whether Congress acts or does not act.

I submit the following ideas for consideration under the following headings: 1. Using the Dual Date Visa Bulletin to Allow the Maximum Number of Adjustment Filings; 2. Parole of Beneficiaries of Approved I-130 and I-140 Petitions; 3. Protecting the Age of the Child Under the Filing Date, and 4. Counting the Family Together So That They May Stay Together.

1. Using the Dual Date Visa Bulletin to Allow the Maximum Number of Adjustment Filings

As a result of the existence of the per country limits, those born in India and China have been drastically affected by backlogs in the employment-based green card categories. Each country is only entitled to 7 percent of the total allocation of visas under each preference. Thus, a country like Iceland with only about 330,000 people has the same allocation as India or China with populations of more than a billion people. For instance, in the employment-based second preference (EB-2), those born in India have to wait for decades, and one study estimates the wait time to be 150 years!

It would be ideal for Congress to eliminate the per country limits and even add more visas to each preference category. Until Congress is able to act, it would be easy for the Biden administration to provide even greater relief through executive action. One easy fix is to advance the dates in the State Department's Visa Bulletin so that many more backlogged beneficiaries of approved petitions can apply for adjustment of status and get ameliorative relief. Other fixes could include allowing beneficiaries of petitions overseas to enter the US on parole, and protecting more derivative children from aging out under the Child Status Protection Act.

The State Department's October 2020 Visa Bulletin was thus refreshing. It advanced the Dates for Filing (DFF) for the India employment-based third preference (EB-3) from February 1, 2010 to January 1, 2015. This rapid movement allowed tens of thousands of beneficiaries of I-140 petitions who were languishing in the backlogs and born in India to file I-485 adjustment of status applications. Although an I-485 application filed pursuant to a current DFF does not confer permanent residence, only the Final Action Dates (FAD)

can, the DFF provides a number of significant benefits, such as allowing the applicant to "port" to a different job or employer in the same or similar occupational classification after 180 days pursuant to INA 204(j), obtain an Employment Authorization Document (EAD) that enables them to work in the United States, and request advance parole or travel permission. Even derivative family members can also get EADs and travel permission upon filing an I-485 application.

The DFF in the November 2020 Visa Bulletin continued to remain at January 1, 2015 for the India EB-3, thus enabling many more in the backlogs to file I-485 applications and take advantage of job portability. In the December 2020 Visa Bulletin the DFF for the India EB-3 was pulled back to January 1, 2014. From January 1, 2021 onwards, the USCIS closed I-485 filings under the DFF for EB cases. While the advance to January 1, 2015 in October and November 2020 was a positive development, there is a legal basis to advance the DFF even further, perhaps to as close as current, without regard to whether the FAD will move to the DFF within a year or not. The Biden administration should seriously consider this proposal.

INA 245(a)(3) allows for the filing of an adjustment of status application when the visa is "immediately available" to the applicant. 8 CFR 245.1(g)(1) links visa availability to the State Department's monthly Visa Bulletin. Pursuant to this regulation, an I-485 application can only be submitted "if 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)." The term "immediately available" in INA 245(a)(3) has never been defined, except as in 8 CFR 245.1(g)(1) by "a priority date on the waiting list which is earlier than the date shown in Bulletin" or if the date in the Bulletin is current for that category.

The State Department has historically never advanced priority dates based on certitude that a visa would actually become available. There have been many instances when applicants have filed an I-485 application in a particular month, only to later find that the dates have retrogressed. A good example is the April 2012 Visa Bulletin, when the EB-2 cut-off dates for India and China were May 1, 2010. In the very next May 2012 Visa Bulletin a month later, the EB-2 cut-off dates for India and China retrogressed to August 15, 2007. If the State Department was absolutely certain that applicants born in India and China who filed in April 2012 would receive their green cards, it would not have needed to

retrogress dates back to August 15, 2007. Indeed, those EB-2 applicants who filed their I-485 applications in April 2012 are still waiting and have yet to receive their green cards even as of today! Fortunately, under the advances in the October 2020 Visa Bulletin and a bit beyond, the beneficiary of an I-140 petition under EB-2 was able to "downgrade" by filing an I-140 under EB-3 and a concurrent I-485 application. Another example is when the State Department announced that the July 2007 Visa Bulletin for EB-2 and EB-3 would become current. Hundreds of thousands filed during that period (which actually was the extended period from July 17, 2007 to August 17, 2007). It was obvious that these applicants would not receive their green cards during that time frame. The State Department then retrogressed the EB dates substantially the following month, and those who filed under the India EB-3 in July-August 2007 waited for over a decade before they became eligible for green cards.

These two examples, among many, go to show that "immediately available" in INA 245(a)(3), according to the State Department, have never meant that visas were actually available to be issued to applicants as soon as they filed. Rather, it has always been based on a notion of visa availability at some point of time in the future.

Under the dual filing dates system first introduced by the State Department in October 2015, USCIS acknowledges that availability of visas is based on an estimate of available visas for the fiscal year rather than immediate availability:

> *When we determine there are more immigrant visas available for the fiscal year than there are known applicants, you may use the Dates for Filing Applications chart to determine when to file an adjustment of status application with USCIS. Otherwise, you must use the Application Final Action Dates chart to determine when to file an adjustment of status application with USCIS.*

See https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates.

Taking this to its logical extreme, visa availability for establishing the DFF may be based on just one visa being saved in the backlogged preference category in the year, such as the India EB-3, like the proverbial Thanksgiving turkey. Just like one turkey every Thanksgiving Day is pardoned by the President and not consumed, similarly one visa can also be left intact rather than used by the

foreign national beneficiary. So long as there is one visa kept available, it would provide the legal basis for an I-485 filing under a DFF, and this would be consistent with INA 245(a)(3) as well as 8 CFR 245.1(g)(1). DFF could potentially advance and become current, thus allowing hundreds of thousands of beneficiaries of I-140 petitions to file I-485 applications.

This same logic can be extended to beneficiaries of family-based I-130 petitions.

8 CFR 245.1(g)(1) could be amended (shown in bold) to 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)* ***("Final Action Date"). An immigrant visa is also considered available for submission of the I-485 application based on a provisional priority date ("'Dates for Filing") without reference to the Final Action Date. No provisional submission can be undertaken absent prior approval of the visa petition and only if all visas in the preference category have not been exhausted in the fiscal year. Final adjudication only occurs when there is a current Final Action 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.*

2. Parole of Beneficiaries of Approved I-130 and I-140 petitions

With respect to beneficiaries of approved I-130 and I-140 petitions who are outside the US, they too can be paroled into the US upon their DFF becoming

current. This would provide fairness to beneficiaries of approved petitions who are within or outside the US.

However, due to a quirk in the law, beneficiaries of I-130 petitions should be able to file I-485 applications upon being paroled into the US since parole is considered a lawful status for purpose of filing an I-485 application. See 8 CFR 245.1(d)(1)(v). On the other hand, beneficiaries of I-140 petitions will not be eligible to file an I-485 application, even if paroled, since INA 245(c)(7) requires one who is adjusting based on an employment-based petition to be in a lawful nonimmigrant status. Parole, unfortunately, is not considered a nonimmigrant status. Such employment-based beneficiaries may still be able to depart the US for consular processing of their immigrant visa once their FAD become current.

This proposal can be modelled on the Haitian Family Reunification Parole Program that allows certain beneficiaries of I-130 petitions from Haiti to be paroled into the US pursuant to INA 212(d)(5).
See https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program. (The Filipino World War II Veterans Program also has a liberal parole policy for direct and derivative beneficiaries of I-130
petitions, https://www.uscis.gov/humanitarian/humanitarian-parole/filipino-world-war-ii-veterans-parole-program). Once the beneficiaries of I-130 petitions are paroled into the US, they can also apply for an EAD, and adjust status once their priority date becomes current. The HFRPP concept can be extended to beneficiaries of all I-130 and I-140 petitions, and parole eligibility can trigger when the filing date is current for each petition. Beneficiaries of I-130 petitions may file adjustment of status applications, as under the HFRPP, once they are paroled into the US. On the other hand, Beneficiaries of I-140 petitions, due to the limitation in INA 245(c)(7) would have to proceed overseas for consular processing once the FAD become current.

3. Protecting the Age of Child Under the Filing Date

The USCIS Policy
Manual, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7, states that only the FAD protects the age of the child under the Child Status Protection Act (CSPA). Using the DFF to protect the age of the child who is

nearing the age of 21 is clearly more advantageous – the date becomes available sooner than the FAD. Thus, if an I-485 application is filed pursuant to a DFF and the child ages out before the final date becomes available, the child will no longer be protected despite being permitted to file an I-485 application. The I-485 application will get denied, and if the child no longer has an underlying nonimmigrant status, the child can be put in great jeopardy through the commencement of removal proceedings, and even if removal proceedings are not commenced, can start accruing unlawful presence, which can trigger the 3 and 10 year bars to reentry. If the child filed the I-485 as a derivative with the parent, the parent can get approved for permanent residence when the final date becomes available while the child's application gets denied.

There is a clear legal basis to use the filing date to protect the age of a child under the CSPA:

INA 245(a)(3) only allows for the filing of an I-485 adjustment of status application when "an immigrant visa is immediately available." Yet, I-485 applications can be filed under the DFF rather than the FAD. As explained, the term "immigrant visa is immediately available" has been interpreted more broadly to encompass dates ahead of when a green card becomes available. Under INA 203(h)(1)(A), which codified Section 3 of the CSPA, the age of the child under 21 is locked on the "date on which an immigrant visa number becomes available…but only if the has sought to acquire the status of an alien lawfully admitted for permanent residency within one year of such availability." If the child's age is over 21 years, it can be subtracted by the amount of time the applicable petition was pending. See INA 203(h)(1)(B).

Under INA 245(a)(3), an I-485 application can only be filed when an "immigrant visa is immediately available."

Therefore, there is no meaningful difference in the verbiage relating to visa availability – "immigrant visa becomes available" and "immigrant visa is immediately available" under INA 203(h)(1)(A) and INA 245(a)(3) respectively. If an adjustment application can be filed based on a Filing Date pursuant to 245(a)(3), then the interpretation regarding visa availability under 203(h)(1)(A) should be consistent, and so the Filing Date ought to freeze the age of the child, and the child may seek to acquire permanent residency within 1 year of visa availability, which can be either the Filing Date or the Final Action Date.

Unfortunately, USCIS disagrees. It justifies its position through the following

convoluted explanation that makes no sense: "If an applicant files based on the filing date chart prior to the date of visa availability according to the final date chart, USCIS considers the applicant to have met the sought to acquire requirement. However, the applicant's CSPA age calculation is dependent on visa availability according to the final date chart. Applicants who file based on the filing date chart may not ultimately be eligible for CSPA if their calculated CSPA age based on the final dates chart is 21 or older." The USCIS recognizes that the sought to acquire requirement is met when an I-485 is filed under the DFF, but only the FAD can freeze the age! This reasoning is inconsistent. If an applicant is allowed to meet the sought to acquire requirement from the DFF, the age should also similarly freeze on the DFF and not the FAD. Based on USCIS's inconsistent logic, the I-485s of many children will get denied if they aged out before the FAD becomes available.

USCIS must reverse this policy by allowing CSPA protection based on the DFF.

4. Count the Family Together So That They May Stay Together

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 and prior administrations have got it wrong when counting visa numbers under the family and employment preferences. I do hope that the Biden administration will seriously consider this proposal, which I reiterate below.

There is no explicit authorization for derivative family members to be counted separately under either the employment-based (EB) or family based (FB) preference visas in the Immigration and Nationality Act. While they must still be counted, they should be counted as "one" with the principal family member. Each family unit takes up one visa rather than separate visas. The treatment of family members is covered by INA 203(d), enacted by the Immigration Act of 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.

The EB and FB numbers ought not to be held hostage to the number of family members each principal beneficiary brings with them. 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 even longer, 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? It is not contended 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 Regulations (CFR) that truly interprets INA § 203(d). Even the State Department'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). In *Gonzales v Oregon*, 546 US 243, 257 (2006) the Supreme Court held 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, it is noted 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. *That 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, who is and has been counted, through whom they derive their claim \.. 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.

It is reiterated that derivative beneficiaries are not 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 and being counted as an integral family unit rather than as individuals. For this reason, INA §201(b) simply does not apply. The Biden administration through the simple mechanism of an Executive Order can direct a different way of counting derivatives.

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 under President Biden 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 Supreme Court decision in *Scialabba v. de Osorio* 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.

In a recent not so positive development, a federal district court in Wang v. Pompeo turned down a claim from EB-5 investors that derivatives should not be counted under the employment-based fifth preference (EB-5). Even though

the claim focused on the EB-5 preference, it can be applied to all preference categories. Although plaintiffs argued that the annual limits do not apply to derivatives pursuant to INA §203(d) as enacted by the Immigration Act of 1990, Judge Tanya Chutkan disagreed on the ground that §203(d) is identical to the prior §203(a)(9) as it existed after the 1965 Act. If derivatives were counted under 203(a)(9), under the doctrine in *Lorillard v. Pons*, 434 US 575, 580 (1978), "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that same interpretation when it re-enacts the statute without change." Moreover, in footnote 1 in *Wang v. Pompeo,* the court agreed with the government that "Congress spoke unambiguously spoke to the question at issue" and so the court need not address whether the government was entitled to *Chevron* deference.

Since this is a district court decision, the Biden administration can disregard *Wang v. Pompeo* and still choose to interpret §203(d) to allow for the unitary counting of principal and derivatives. Plaintiffs have appealed this decision to the DC Circuit Court of Appeals. If the DC Court of Appeals affirms Judge Chutkan's decision, especially footnote 1, which indicates that INA 203(d) is unambiguous, it would be impossible for the Biden administration to change the interpretation of §203(d) under *Chevron* and *Brand X* within the jurisdiction of the DC Circuit Court of Appeals. This in turn will result in an untenable situation where those within the jurisdiction of the DC Court of Appeals would not be able to derive the beneficial impact of a reinterpretation of §203(d). It would thus be prudent for plaintiffs to delay taking up the appeal until the Biden administration decides whether they will change the interpretation under §203(d) or not. On the other hand, one would not complain if the DC Court of Appeals rules in plaintiff's favor and overrules the district court decision.

Obviously, if Congress can affirmatively modify §203(d) to explicitly state that derivates will not be counted, that would be the best outcome. However, if Congress remains divided and there is no legislative fix forthcoming, and unless we are willing to watch the slow and tortured death of the priority date system in silence, President Biden must act on his own. Doing so will double or triple the number of available green cards without the creation of a single new visa. The waiting lines will vanish or be drastically reduced.

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If you have further questions or need further input, please do not hesitate to contact me.

Sincerely,

Cyrus D. Mehta