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US IMMIGRATION & NATIONALITY LAW

THE PATH LESS TAKEN: IS THERE AN ALTERNATIVE TO WAITING FOR COMPREHENSIVE IMMIGRATION REFORM?[Ë]

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By

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"Two roads diverged in a wood, and I-
I took the one less traveled by,
And that has made all the difference."

Robert Frost: The Road Not Taken (1915)

America should not wait for Congress to solve most of its major immigration problems. While we do need new law, what we need even more than that, perhaps far more, is a new vision, a willingness to examine existing law from a novel perspective. Given renewed political will, the Executive can take sweeping action on its own initiative. Action no longer should take a back seat to the endless controversy over comprehensive immigration reform.

Congress is back in session and, like the return of spring, we wait in transfixed anticipation for this year's great debate over comprehensive immigration reform. When the cherry blossoms return to Washington, so does CIR. Both sides are digging in, dusting off old arguments, reviewing past tactics, and vying for the heart, soul and support of the new Administration. It has now become accepted folk wisdom to assume that only Congress can solve our immigration woes and then only through the mechanism of CIR. So deeply is this believed, that is has become an article of faith embraced by friend and foe alike, so secure that it no longer needs explicit expression. The corollary of such a credo is that nothing can be done unless everything is done, that the nation is

powerless to take more limited measures that do not require legislative consensus. That means we can do nothing to bring the undocumented in from the shadows, nothing to alleviate the economic pain caused by the lack of H-1B numbers, nothing to give hope to essential workers, nothing to get around the lifetime exclusion resulting from membership in the Other Worker Gulag, nothing to regulate future migration flows or make sense out of past ones, nothing to unite families now separated by shameful quotas that make a mockery out of our stated national commitment to family values, nothing to stay the sword of the 3/10 year bar- nothing at all about anything we care about. Why? Why are we as a nation impotent, fated to stand silent and mute while all around us the need for action becomes ever more imperative? Because Congress can not act. Because CIR has proved so difficult to achieve. Because no one can agree on what divides us. Is there a better way? We believe there is and we hope that, at the end of our essay, you will share that belief and act upon it so that America's immigration policy will no longer be waiting for Godot, in thrall to an illusion of CIR that may never come and does not have to. Now we can begin.

Dinesh Shenoy had it right when he wrote in 2005 that "cut-off dates are a function of the fact that America does not have unlimited immigration."[1] We know from Section 245(a)(3) of Immigration and Nationality Act (INA) that no one can apply for adjustment of status to lawful permanent resident unless an immigrant visa number is immediately available to them. Similar numerical constraints regulate consular processing as determined by INA Section 203. The place in line for a prized green card number is known in legal parlance as a priority date established through the filing of an immigrant petition or labor certification.[2] As the waiting lines grow ever longer and frustrations rise, the question naturally presents itself: Is there an alternative to priority dates?

It was Dinesh Shenoy's great leap forward to suggest that Congress amend INA Section 245(a)(3) to allow for the submission, though not final approval, of employment-based adjustment of status cases without respect to priority dates. Since insight is original, Dinesh deserves to be allowed to speak for himself: "With this revised language, an I-140 beneficiary would be able to file his or her I-485 once an I-140 is filed, even if they know it will be many years before their priority date is reached." In order for this to happen, of course, USCIS would have to remove the requirement for an immediately available

immigrant visa number from the operative regulations that govern adjustment of status, namely 8 CFR 245.1(g)(1) and 245.2 (a)(2). Other changes would also be necessary. Under the Child Status Protection Act, one needs an approved petition and a visa number to freeze the age of the child. If there is retrogression after such visa availability, the age remains frozen. However, if the precondition of a current priority date is removed or relaxed, then language will have to be inserted in INA Section 203(h)(1)(A) that will freeze the age of the child upon the filing of an I-485 adjustment application even if an immigrant visa number is not available. It will do little good to allow the parent(s) to apply for adjustment of status if their kids age out and have to leave. It would also be prudent to modify the definition of "child" set forth in INA Section 101(b)(1) so that it would then read to mean " an unmarried person under age twenty-one except for one who had applied for adjustment of status under 8 USC 1255."

It does not diminish the magnitude of Dinesh Shenoy's conceptual breakthrough to note that it raises several serious questions. First, it is limited to applicants for adjustment of status applicants who enjoy a signal advantage not shared by those applying for immigrant visas at American consulates abroad. However, one wonders if we can still speak of an even playing field in the aftermath of INA Section 204(j) that extends occupational mobility to adjustment applicants in a way not open to equally long-suffering consular cases.[3] To the extent that one wants everyone to play by the same rules, why not allow immigrant visa applicants to apply for immigrant visas, but not be able to use them to gain entry into the USA unless and until an immigrant visa number became immediately available to them? Such a restriction could, in fact, be annotated on the face of the machine-readable immigrant visa itself to prevent any attempt at premature exercise. Second, as originally expressed, it would only apply to employment cases rather than those based on family ties. Our proposal would extend this innovation to reward the beneficiaries of approved family-based I-130 petitions. This is the answer to the wholly inadequate Family 2B category that divides families in defiance of compassion and logic. Now they can stay in the USA while they wait for their priority date to become current. Third, because prior approval of the I-140 is not required, it assumes that the current practice of concurrent filing of I-140 petitions and I-485 adjustments will continue when we know that USCIS wants to end this practice and intends to publish a notice of proposed rulemaking.[4] Finally, it is highly instructive to ask whether there is a new and better way to define what

"immediately available" means in the context of visa allocation. Is a current priority date the only way?

For the past twenty-five years, the Visa Office in the State Department has employed a more flexible mechanism to ensure a smooth and regular allocation of immigrant visas known as the "qualifying date". What is that? Simply stated, the VO anticipates what priority dates are likely to come on stream over the next 6 to 12 months, though this is subject to variance, and it then allows the National Visa Center to kick off the consular processing for these cases by sending out the Choice of Agent form. Once this response is received, the NVC lets folks know what further documentation is required and, as soon as all necessary paperwork has been provided, the case can be reported to the Visa Control branch of the Visa Office in the State Department as being documentarily qualified. That demand can then be compared against the amount of visas which are available for use in a particular month during the determination of the monthly cut-off dates. Those cut-off dates ultimately allow a case to be scheduled for a consular interview and hopefully receive their prized immigrant visas just as soon as the Visa Bulletin says they have an eligible priority date.

Now, this has worked pretty well in the consular context to smooth out the flow of immigrant visas so one wonders if the results would be no less stellar as a way to define immediate availability in the adjustment context. Even under the traditional priority date scheme, there is nothing in the INA that compels a particular definition or understanding of what "immediate availability" means. To require a current priority date as the only acceptable interpretation is to continue a practice that began before migration flows to this country reached the massive levels we have today. What worked before may no longer be adapted to current needs or contemporary realities. If we are to preserve the utility of priority dates as a control on permanent immigration, we have to understand and use them in a fundamentally new and different way.

USCIS does not have to define "immediate availability" strictly on the cut-off dates listed in the Visa Bulletin. Rather, both State and CIS could post estimated "qualifying dates" on their websites so that, precisely as now happens in a consular case, USCIS would now allow pre-filing of adjustment applications so that applicants could begin to assemble the necessary documentation and send in their I-485 packages so that USCIS could conduct necessary checks and get the case ready for formal submission when the priority date is reached.

Only at that point would CIS formally request an immigrant visa number from the State Department. Not until then would the adjustment of status be considered "filed". The beauty of this is that Congress need not lift a finger; all that need be done is for USCIS to modify the definition of filing contained in 8 CFR Sections 103.2 (a)(7) and 245.2(a)(2). If Congress wanted to ratify what the USCIS had done, it could certainly do so after the fact. Everything that we now consider to be the adjustment of status process could take place before the I-485 is "filed". Nothing could be simpler. The reason to seek Congressional modification of INA 245(a) is not because it is only way forward but because, by enshrining such a procedural benefit in the INA itself, it will be a much more secure right, one not subject to administrative whim or unilateral repeal. This process would not only afford the Visa Office a more accurate picture of adjustment demand but it holds out the potential of drastically slashing processing times. Far from granting adjustment applicants any special or unfair advantage, the use of qualifying dates as a way to define immediate visa availability would serve to harmonize the green card process in and out of the United States. Clearly, close and constant coordination between the Visa Office and USCIS would be required and integration of this procedural innovation with the Child Status Protection Act is transparently necessary. Given the obvious and not insignificant benefits, any transitional angst is surely worth the effort.

Dinesh Shenoy is not alone. It appears that Janet Napolitano, formerly Governor of Arizona but now the newly-minted Secretary of the Department of Homeland Security, is thinking of permitting adjustment of status applications to be filed before the priority date becomes current. Take a look at her January 30, 2009 Action Directive on immigration and border security. In pertinent part, Secretary Napolitano spoke of "information sharing with the Department of State's Bureau of Consular Affairs on projected adjustment caseloads to be used by that Bureau in setting each month's cutoff dates on waiting lists for immigration categories that are limited by a yearly quota" and went on to pose this very intriguing question: "What regulatory or legislative changes (including a possible pre-application filing procedure for adjustment cases) are recommended to facilitate caseload planning and make optimum use of US Citizenship and Immigration Services' adjudication capacity?"[5] If Secretary Napolitano wanted some precedent to support her curiosity, she need look no further than S. 2611 actually passed by the US Senate in May 2006. As part of this comprehensive immigration reform measure that died in the House of

Representatives, the Senate amended INA Section 245(a) to allow for foreign-born students who had earned an "advanced degree", though not necessarily from a US university, in sciences, technology, engineering or mathematics (the famous STEM gang!) to file for adjustment of status irrespective of priority date currency on the basis of an I-140, though no final approval could issue until an immigrant visa number became available. Interestingly, the Senate did not extend this exception to family-based adjustments nor to immigrant visa applicants outside the United States.

If this made sense in 2006, why not now? After all, as the USCIS has already recognized in the Optional Practical Training context by allowing a 17 month renewal as an antidote to the manifestly inadequate H-1B quota, announced quote openly by CIS as the prime rationale for their liberality, STEM students are uniquely important to the USA.[6] If we are willing to treat them differently for OPT purposes, why not do so for far more weighty adjustment of status purposes? If we are concerned over potential abuse, launch it as a pilot project that is limited by time (perhaps two years as with other conditional categories) and number, say 65,000 to match the pitiable H-1B quota. In the 90 days before the second anniversary of what the authors call the "grey card"[7] will have to file a petition to lift the condition, thus giving the USCIS a second chance to determine if the grey card's continued presence in the United States was in the national interest. That ought to show good faith! Throw in the requirement for the advanced degree to be made in America, something that Dinesh Shenoy left out, as noted above. At the same time, to allow for future expansion, add a provision authorizing USCIS in its discretion to extend this same remedial practice to other professions or disciplines, perhaps those best suited to health care or growing a green economy. Without Congress authorizing a single new immigrant visa, this one procedure will revolutionize employment-based migration. When combined with adjustment of status portability under INA 204 (j), this quasi-permanent category of green card applicants card will be able to live as permanent residents in all but name. In effect, a new era of vastly increased legal immigration would result from a return to system preceding the 1920's national origins quota system. By increasing the opportunity for legal immigration without the need for congressional action, such an approach combines simplicity with maximum opportunity. This is ample precedent for doing this beyond the Senate enactment of S. 2611. In 1997 the noted immigration scholar Julian Simon wrote a book in which, among other things,

he argued that special preference for permanent residence should be given to foreign students who came to study in the USA.[8] Simply stated, retain the general notion of a current priority date but waive it for select reasons of higher national interest. The logic of doing this is not terribly dissimilar from the concept of the EB-2 national interest waiver where the national interest of reserving jobs from Americans rightly gives way in carefully chosen instances to the retention of foreign nationals whose recognized contributions justify such exception. Do the same thing for the same reasons to allow adjustment of status applications to be filed, though not approved, without immediate availability of an immigrant visa number.

Dinesh Shenoy made a huge first step but it was only a first step. Is action by Congress the only, or even the best, way to break the priority date stranglehold on US immigration policy? The authors do not think so. Amendment of INA Section 245 is unlikely since action by Congress, even in the best of times, takes time. When Congress finds such time, legalization and other priority items (like recapture of unused visas) will absorb it. Beyond this, is it necessary to relax the rules on adjustment of status? What do potential immigrants really want for themselves and their spouses? The ability to work in the United States on a long-term basis and travel back home for vacation and/or family emergency. Can they only do that as adjustment applicants? Is there another way? The authors think there is. While INA Section 245 conditions adjustment of status on having a current priority date and meeting various conditions,[9] there would be prohibition anywhere that would bar USCIS from allowing the beneficiary of an approved I-140 or I-130 petition to apply for an employment authorization document (EAD) and advance parole. No action by Congress would be required; executive fiat suffices. For those who want some comfort in finding a statutory basis, the government could rely on its parole authority under INA Section 212(d)(5) to grant such interim benefits either for "urgent humanitarian reasons" or "significant public benefit." [10] There is nothing in 8 CFR Section 212.5 that would prohibit the DHS from granting parole for this reason on the grounds that the continued presence of I-140 or I-130 beneficiaries provide a significant public benefit. Since such parole is not a legal admission,[11] there is no separation of powers argument since the Executive is not trying to change existing grounds of admission or create any new ones. Moreover, Congress appears to have provided the government with broad authority to provide work

authorization to just about any non-citizen.[12]

It is undeniably true that more EAD and Parole benefits will be of limited value to retrogressed non-citizens from India and China who are already in the US in the employment-based second and third preferences. After all, most have an H-1B and can extend under Section 106(a) or Section 104(c) of AC 21, but as noted previously, some may still not be able to take advantage of AC 21. The EAD in itself will not have a portability benefit. The foreign national will still need to intend to work for the sponsoring employer even if he/she is using the EAD for open market employment. This reservation, valid as it undoubtedly is, focuses only on those already here. It speaks solely to past migration flows not to future ones. For future flows, this will supplement the H-1B by giving employers of foreign nationals another option. No longer will the constant controversy over the H-1B quota discredit all employment-based immigration in the eyes of its critics and, most importantly, in the court of public opinion. No longer will this one dispute suck all the oxygen out of our national immigration debate. Beyond that, it is manifestly not true to argue that all of our immigration needs can be solved with more H1B numbers. This will not work for those who are not H1B material. It will not work for those with essential skills but find themselves in the "Other Worker" backlog under INA Section 203(b)(3)(iii) with no hope of getting the green card any time soon. It will not eliminate the need for a massive guest worker program to legalize the undocumented. If anything, allowing non-citizens with approved I-140/ I-130 petitions to receive EADs and Parole will serve to reduce the size of the permanently undocumented in America many of whom do not leave for fear they will be unable to return. The Executive would not be granting the undocumented legal status for that is what only Congress can do. But, like adjustment of status itself, the Executive certainly can create a period of stay that permits the undocumented to remain here.

While those out of status or who entered without inspection should not receive employment authorization on a retroactive basis, there is no reason in law or logic why the Executive cannot grant parole on a nunc pro tunc basis.[13] Leaving aside the troubling question of whether such a policy change would not reward conduct that violates the law, the retroactive EAD would only cure the unauthorized employment problem but not the overstay or unlawful presence problem. The 3/10 year bar[14] is not triggered by aviolation of status resulting

from unauthorized employment but an overstay past the I-94 validity. For this reason, a retroactive EAD would do nothing to ameliorate the crushing harshness of the 3/10 year bar, though it might restore eligibility in some situations to adjust by avoiding the unauthorized employment preclusion of INA 245(c).[15] What would cure the prior unlawful presence would be a retroactive granting of parole. Look at the definition of "unlawful presence" in INA 212 (a)(9)(B)(ii). It speaks of being "present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." So, if you are present in the USA on parole, you are not accumulating any unlawful presence. You can grant retroactive parolewithout overriding the will ofCongress. There is no separation of powersproblem. By its very nature, parole is discretionary and, as such, can be issued nunc pro tuncfor good cause shown. Being the Beneficiary of an approved I- 140 or I- 130 could be deemed by regulation to constitute such good cause.

The use of parole by the Executive acting sua sponte in such an expansive and aggressive fashion is hardly unique in post-World War II American history. The rescue of Hungarian refugees after the abortive 1956 uprising or the Vietnamese refugees at various points of that conflict come readily to mind. While these were dramatic examples of international crises, the immigration situation in America today, though more mundane, is no less of a humanitarian emergency with human costs that are every bit as high and damage to the national interest no less long lasting. Even those who are in removal proceedings or have already been ordered removed, and are beneficiaries of approved petitions, also need not wait until eternity for Congress to come to the rescue. The government has always had the ability to institute Deferred Action, which is a discretionary act not to prosecute or to deport a particular alien.[16] This safety valve will fix our broken system of future flows by allowing those who could not qualify for any other visa option to have new hope and unimagined choices.

There are those who argue that only Congress can make immigration policy in this fundamental way and this reservation is both serious and worthy of deep respect. Yet, we have a dysfunctional Congress that is or appears to be incapable or unwilling to reach consensus on immigration. Do we as a society simply throw up our hands and do nothing, allowing a bad situation to become

worse or do we use this challenge as an opportunity to create something better through temporary and targeted executive action that Congress can either overturn or accept at a later date? There are several examples of administrative action to create new immigration policy in the face of Congressional inaction in recent years. In the STEM OPT regulation, the USCIS openly admitted that granting an additional 17 months of employment authorization was a regulatory response to an inadequate H1B quota. When they limited the validity of a labor certification of 180 days, the US Department of Labor did so on their own without the fig leaf of legislative authorization.[17] Remember when the AAO handed down the decision in *New York State Department of Transportation*,[18] thus effectively repealing the national interest waiver statute for several years until the relaxation came?[19] Finally, under the Cuban Adjustment Act of 1996, even if the Cuban national entered without inspection, the former INS Commissioner Doris Meissner clarified that the Service could use its authority under the humanitarian and significant public benefit criteria in Section 212(d)(5) to parole Cubans who had entered without inspection under the fiction that the individual would surrender to the government, which in turn would release or parole him or her, and thus render them eligible for adjustment of status under the CAA.[20] Did Congress tell them they could do that? All of these actions, and many others not singled out, had profound effect but depended solely upon the imaginative exercise of executive authority yet consonant with a proper respect for separation of powers. So we can do so here.

Those who do not think so ignore at their own peril and ours the fundamental distinction between making policy, which only Congress can do, and implementing tactical adjustments, which the Executive is uniquely suited to do. This is why only Congress can create a legal status while the Attorney General can authorize a period of stay. This is why only Congress can enlarge the EB quota but the Executive can allow adjustment applications without a quota expansion so long as final approval is not forthcoming. This is why only Congress sets visa limits while the Executive can grant parole. This is why only Congress sets work visa law but the Executive can issue EADs. To suggest that Congress must act in both a long and short term context is to ignore the historic and legitimate differences between the two branches of government. If Congress wants to overturn such executive action, it can do so. Likewise, if it

supports the President, it can stay its hand. Either way, Congress is expressing its will, whether through positive action in the form of legislation or negative action in the form of silent acquiescence. Both action and its absence are authentic manifestations of congressional intent. In reality, we all know that there are 40 votes in the Senate to uphold such regulatory initiative. Congress will be more than content to allow the President to take the lead and solve what it has manifestly been powerless to solve- how to regulate both past and future migration flows; how to solve the growing unskilled worker backlog; how to ameliorate the gratuitous cruelty of the 3/10 year bars; how to reduce the size of the undocumented population who may already working here and contributing to the exchequer and how to satisfy the hungry manpower needs of employers once the dark cloud of recession lifts without creating a single new immigrant visa.

When has so much come from so little? We do not say that CIR can be cast aside for there are many people who will never be the beneficiary of an I-140 or I-130. Ours is a far more modest proposal. We seek only to broaden the debate and widen the national conversation. Now is the time for what Franklin Roosevelt rightly called "persistent, bold experimentation." We must not wait for Congress to act. However important CIR remains, it is not the only way.

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[1] Dinesh Shenoy, *The October 2005 Visa Bulletin Warrants An Amendment to INA 245(a)(3)*, http://www.ilw.com/articles/2005,0916-shenoy.shtm. *This article is dedicated t*