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US IMMIGRATION & NATIONALITY LAW

PROPOSALS FOR AGENCY ACTION TO AMELIORATE THE PRIORITY DATES CRISIS

Posted on March 9, 2010 by Cyrus Mehta

We reproduce, below, a summary of an article, ***Tyranny of Priority Dates****, by Gary Endelman and Cyrus D. Mehta, forthcoming in BenderXs Immigration Bulletin, which was sent to USCIS Director Mayorkas. Mr. Mayorkas expressed interest in the ideas contained in* ***Tyranny of Priority Dates*** *at a stakeholderXs meeting between him and some of the members of the Alliance of Business Immigration Lawyers (ABIL), which included Cyrus D. Mehta, on March 3, 2010, in Washington, D.C.*

March 8, 2010

To: USCIS Director Mayorkas

From: Gary Endelman and Cyrus D. Mehta

Re: Proposals for Agency Action to Ameliorate the Priority Dates Crisis

The whole idea of priority dates is not to prevent immigration but to regulate it. That is not what is happening today. If you are from Mexico or the Philippines, the family-based quotas delay permanent migration to the U.S. to such an extent that it is virtually blocked. If you are from China or India, the implosion of the employment-based second preference (EB-2) and third preference (EB-3) categories do not regulate your coming permanently to the U.S.; it makes it functionally impossible. According to a press release by former DHS Ombudsman Prakash Khatri, the situation, based on incomplete statistics released by the USCIS and the State Department is even more dire than it appears, and is discriminatory too as the wait for persons born in India may be 35 years. *See* Prakash Khatri, *National-Origin Quotas Unfairly Penalizing Visa Applicants from Most Populous Nations Harming U.S. Economy*, Feb. 2, 2010, http://www.khatrilaw.us/leadership.html.

Gary Endelman and Cyrus D. Mehta, in their forthcoming article in BenderXs Immigration Bulletin, entitled *The Tyranny of Priority Dates*, propose three ways to end the tyranny of priority dates without the need for Congressional intervention. Immigration is a big problem and, like most big problems, the American people rightly expect Congress to solve it. This is as it should be. A national issue requires a uniform approach, something only a new law can provide. Yet, precisely because the dilemma is so complex, because immigration has become inextricably intertwined with virtually all aspects of the American experience any attempt to come to terms with it requires contemplation and compromise. These take time. While waiting for a comprehensive reform strategy to take shape, the question naturally arises: Is there anything we can do now? The authors believe there is.

First, even if INA ¤ 245(a)(3) states that an adjustment of status application can only be filed if a visa number is immediately available, the USCIS has the flexibility to interpret this provision broadly since Congress did not define when a case is Tfiled,У leaving it to the informed exercise of agency discretion. The term TimmediatelyavailableУ need not be limited by a current priority date according to the visa bulletin. Instead, just like the State Department for the past 25 years has started processing an application for an immigrant visa prior to the priority date becoming current, the USCIS too could create a Tprovisional filing dateУ many years in advance of the priority date becoming current that would allow the adjustment application to be submitted but not approved. This would result in the applicant obtaining all of the benefits of such a filing, such as interim work and travel benefits along with the ability to exercise occupational mobility under INA
¤ 204(j).

Second, there is nothing that would bar the USCIS from allowing the beneficiary of an approved I-140 or I-130 petition, and derivative family members, to obtain an employment authorization document (EAD) and parole. The Executive, under INA ¤ 212(d)(5), has the authority to grant parole for urgent humanitarian reasons or significant public benefits. The crisis in the priority dates where beneficiaries of petitions may need to wait for green cards in excess of 30 years may qualify for invoking ¤ 212(d)(5) under Turgent humanitarian reasons or significant public benefits.У Similarly, the Executive has the authority to grant EAD under INA ¤274A(h)(3), which defines the term TunauthorizedalienУ as one who is not T(A) an alien lawfully admitted for

permanent residence, or (B) **authorized to be so employed by this Act or by the Attorney GeneralУ** (emphasis added). Under sub paragraph (B), the USCIS may grant an EAD to people who are adversely impacted by the tyranny of priority dates. Likewise, the beneficiary of an I-130 or I-140 petition who is outside the U.S. can also be paroled into the U.S. before the priority date becomes current. The principal and the applicable derivatives would enjoy permission to work and travel regardless of whether they remained in nonimmigrant visa status. Even those who are undocumented or out of status, but are beneficiaries of approved I-130 and I-140 petitions, can be granted employment authorization and parole. The retroactive grant of parole may also alleviate those who are subject to the three or ten year bars since INA ¤ 212(a)(9)(B)(ii) defines Tunlawful presenceУ as someone who is here Twithout being admitted or paroled.У Parole, therefore, eliminates the accrual of unlawful presence.

Third, the authors propose that we should count only the principal beneficiaries of I-140 or I-130 petitions and not family members under the employment or family-based quotas. There is nothing in INA ¤ 203(d) that explicitly provides authority for family members to be counted under the preference quotas. While a derivative is Tentitled to the same status, and the same order of considerationУ as the principal, nothing requires that family members also be given numbers. This ambiguity in INA ¤ 203(d) provides the Executive with an opportunity to exclude family members against the employment or family quotas, which could potentially resolve the priority date crisis significantly.

Finally, Endelman and Mehta also propose that existing ameliorative provisions that Congress has specifically passed to relieve the hardships caused by crushing quota backlogs be interpreted in a way that reflects the intention behind the law. For example, ¤ 106(a) of the American Competitiveness in the 21st Century Act allows an H-1B visa holder on whose behalf a labor certification has been filed 365 days prior to the maximum time limit to obtain an H-1B visa extension beyond the six years. ¤106(a) ought to also allow the spouse of an H-1B who is also in H-1B status to be able to obtain extensions beyond the six years without having his own labor certification. This used to be allowed, but, since a restrictive interpretation of the USCIS in 2005 that only allowed dependent H-4 spouses to get the benefit of the extension, is no longertolerated for spouses who have their own H-1B status and the USCIS has retracted.Now,both spouses need to have labor certifications filed on their

behalf to obtain the benefit of 106(a), which is not necessary and absurd.The statute itself has more flexibility and speaks of Tany application for labor certification Йin a case in which certificationis required or used by the alien to obtain status under section 203(b) of such Act." Under this interpretation, the H-1B husband who does not have his own labor certification can still use his H-1B wifeXs labor certification on a derivative basis to file for adjustment of status.This interpretation is very much in keeping with spirit of AC 21 which is to soften the hardship caused by lengthy adjudications and we certainly have that now with respect to China and India, as well as worldwide EB-3.The current interpretation placed upon AC 21 Section 106(a) is contrary to the intent of Congress. It is not enough to say that the H1B spouse for whom a labor certification has not been filed can change to non-working H4 status. Given the backlogs facing India and China in the EB-2, as well as worldwide EB- 3, it is simply unrealistic and punitive to deprive degreed professionals of the ability to work for years at a time but force them to remain here to preserve their eligibility for adjustment of status.

In conclusion, these proposals are consistent with the immigration agencyXs historic ability to ameliorate the situation of foreign nationals in crisis situations. For instance, the agency has used its parole power to bring in refugees into the U.S. when there have been conflicts or natural disasters. The USCIS also has the power to grant Deferred Action, which it has done for battered immigrants, victims of crimes or widows of US citizens, until Congress then passed similar measures, and for those who have demonstrated compelling humanitarian or sympathetic circumstances. While some may argue that there is no express Congressional authorization for the Executive to enact such measures, the President may act within a Ttwilight zoneУ in which he may have concurrent authority with Congress. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring). We welcome President ObamaXs commitment to comprehensive immigration reform. Yet, even should this happen, the backlogs will not go away. The need for decisive administrative initiative to ameliorate the hardship caused by the tyranny of priority dates will continue.