THE TYRANNY OF PRIORITY DATES

by
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And let it be noted that there is no more delicate matter to take in hand, nor more dangerous to conduct, nor more doubtful in its success, than to set up as a leader in the introduction of changes.[1]

The arc of history is long, but it bends toward justice...[2]

I. INTRODUCTION

The Immigration Act of 1924[3] is rightly condemned for the invidious system of national-origin quotas that discriminated against Jews and Catholics from Southern and Eastern Europe.[4] Likewise the

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[1] NICCOLO MACHIAVELLI, THE PRINCE 21 (Charles W. Eliot ed., N. H. Thomson trans., The Harvard Classics, P. F. Colier & Son 1910) (1532).

[2] Reverend Martin Luther King, Jr., Address to the Southern Christian Leadership Conference, Aug. 16, 1967, http://www-personal.umich.edu/~gmarkus/MLK_WhereDoWeGo.pdf.

[3] 43 Stat. 153 (1924).

[4] *See id*. at § 11 for the numerical limitations of the Act. This section used the American population of 1890 as the basis for visa limitations. This was before the mass migration of Jews and Catholics to the United States. The quota for immigrants entering the country was set at two percent of the total of any given nation's residents in the United States as reported in the 1890 census. After July 1, 1927, the two percent rule gave way to an overall cap of 150,000 immigrants annually and quotas determined by "national origins" as revealed in the 1920 census. According to the SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, Staff Report 161-216 (1981): "[T]he Immigration Act of 1924 clearly represented a rejection of one of [the] longest-lived democratic traditions in the United States, represented by George Washington's view that the United States should ever be "an asylum to the oppressed and the needy of the earth." *See* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP – PROCESS AND POLICY (6th ed. Thomson/West). The Commissioner of Immigration could report, one year after this legislation took effect, that virtually all immigrants now "looked" exactly like Americans. Abraham Lincoln's fear that when the "know-nothings" gained control of American policy they would rewrite the Declaration of Independence seemed to be coming true. Abraham Lincoln's fear is a warning that deserves to be quoted in full:

1965 Immigration Act,[5] which abolished this system, is justly celebrated as a civil rights measure that opened up the United States to global migration for the first time. Recent developments with respect to the priority date system, however, threaten to reverse this progress as a practical matter.

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 United States to such an extent that it is virtually blocked.[6] The categories might just as well not exist for most people. If you are from China or India with an advanced degree, the implosion of the employment-based second preference (EB-2) and third Preference (EB-3) categories[7] does not regulate your coming permanently to the United States; it makes it functionally impossible. While the bonds that unite family members can be expected to survive many years of waiting, and even this is painfully excruciating, how many employers will wait a decade for an engineer or geophysicist? Will the business need still exist by the time the priority date becomes current? Will the business itself? In a labor certification case, what relevancy will a determination of unavailability concerning qualified American workers retain after such a long wait?

> I am not a Know-Nothing. That is certain. How could I be? How can any one who abhors the oppression of [N]egroes, be in favor or degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that '*all men are created equal.*' We now practically read it 'all men are created equal, *except [N]egroes.*' When the Know-Nothings get control, it will read 'all men are created equal, except [N]egroes, and *foreigners, and Catholics.*' When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty -- to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.

ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN: AUGUST 24, 1855 LETTER TO JOSHUA SPEED (Roy Basler ed., Rutgers Univ. Press 1955) (1855) (Emphasis in original). To keep in perspective why quotas matter and what these quotas actually mean, had it not been for the national origin quotas, America may have been able to take in refugees from Nazi Germany rather than allowing them to perish in the Holocaust.

[5] Amendments to the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965). Our immigration laws tell us much about the psyche of the nation itself. The 1952 Act, notable for its many ideological grounds of exclusion, reflected the harsh suspicion and garrison mentality of the Cold War. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952). The 1965 Act, passed the same year as the Voting Rights Act and only one year after the Civil Rights Act of 1964, was the confident expression of a prosperous nation. Now, America does not know what it wants and is caught between the implacable realities of the global marketplace and the primordial urge to resist change by holding on to a domestic world view that is fading fast. The authors pay homage to the late Senator Edward M. Kennedy (D-Mass.) for ushering the 1965 Act that eliminated the racist national origin quotas and changed the face of America. The "Lion of the Senate" remained steadfastly committed to immigration reform and due process until the time of his death on August 25, 2009. As the floor manager for the 1965 Act in the Senate, he played a crucial role in its enactment.

[6] For instance, the U.S. Department of State's Visa Bulletin for April 2010, the latest that was available at the time of writing this article, indicates that the cut-off dates for family-based third preference for Mexico and the Philippines are 10/15/1992 and 3/1/1992 respectively, while the cut-off date for the rest of the world is 5/22/01. *See* U.S. DEP'T OF STATE, 19 VISA BULLETIN IX: APR. 2010, Mar. 09, 2010, http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4747.html.

[7] *See* INA § 203(b)(2) and § 203(b)(3) [8 U.S.C. § 1153(b)(2) and § 1153(b)(3) (2006)]. Charles Oppenheim of the Department of State Visa Office advised AILA in June 2009 that the EB-2 India preference for India, which had already retrogressed to January 1, 2000, would likely become unavailable in August or September 2009. It is a measure of the times that, when the EB-2 for India leapfrogged three years to January 2003 in the August Visa Bulletin, and then to January 8, 2005 in the September Visa Bulletin, such forward movement was greeted with an almost audible sigh of relief, even though the holy grail of a current priority date remained a shimmering mirage. *See* AILA Infonet, *Department of State Advises of Dire State of Affairs on Visa Number Availability for Those Born in India or China!*, Doc. No. 09061032, June 10, 2009, http://www.aila.org/content/default.aspx?docid=29231.

It is a standard of civil rights law that measures not designed to discriminate may still be found violative of the Constitution's guarantee of equal protection if their impact disproportionately disadvantages suspect classes such as race, gender or ethnicity.[8] While we realize that there is no parallel claim that an immigrant might have against such quotas, is this not the same discriminatory system we have now in immigration? Is it not the case that, far from regulating immigration, the all-powerful priority date is, in effect, a national origins quota against China, India, Mexico and the Philippines? Is it not the case that restrictions against the H-1B visa, so heavily used by Chinese and Indian nationals, are politically acceptable in a way that restrictions against the E visa used by more socially accepted groups from "less suspect" countries would not be?[9] Can the system of priority dates therefore not be rightly condemned as an official, though unacknowledged, acceptance by the government of institutionalized racism?[10]

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[8] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[9] The writers can attest to the fact that even though the H-1B quota was not reached for Fiscal Year 2010 until December 21, 2010, the USCIS has been exercising heightened scrutiny on H-1B petitions that have been filed by Information Technology companies which employ Indian nationals. *See* Patrick Thibodeau, *H-1B demand may be retreating as feds increase scrutiny*, ComputerWorld, Jul. 22, 2009, http://www.computerworld.com/s/article/9135779/H_1B_demand_may_be_retreating_as_feds_increase_scrutiny. Indeed, the constant drumbeat of criticism against "Indian job shops" betrays more than a whiff of cultural parochialism that fails to appreciate the very real value that the Indian business model has brought to American businesses that have betrayed no hesitation in taking advantage of it. A memo issued by Donald Neufeld, Associate Director of USCIS, is directed against Information Technology consulting and other staffing firms, pejoratively called "job shops," whose business model relies on H-1B workers being assigned to third party client sites. Donald Neufeld, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements*, Jan. 08, 2010, Memo # USCIS HQ 70/6.2.8, http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf (Neufeld Memo). While the Neufeld Memo insists that the H-1B petitioner be able to demonstrate an employer-employee relationship with the H-1B worker, the criteria that it sets forth to determine such a relationship, give adjudicators broad discretion to deny such H-1B petitions. Indeed, we have also been seeing heightened enforcement actions by Customs and Border Patrol at Newark Liberty Airport since January 2010 resulting in Indian H-1B visa entrants working in the Information Technology consulting industry being subjected to expedited removal orders once it is discovered upon a cursory review that the H-1B worker is working at a client site. For further commentary on the memo and its adverse impact on Indian H-1B workers, *see* Cyrus D. Mehta, *More on H-1B Admissions at Newark Airport: Expedited Removal Should Be Used Wisely*, Feb. 02, 2010, http://cyrusmehta.blogspot.com/2010/02/more-on-h-1b-admissions-at-newark.html. *See also*, Eleanor Pelta, *Why is the H-1B Such a Dirty Word*?, Feb. 01, 2010, AILA Leadership Blog, http://ailaleadership.blogspot.com/2010/02/why-is-h-1b-dirty-word.html; Cyrus D. Mehta, *New USCIS Memo on Employer-Employee Relationship for H-1B Petitions: Is It A Way To Keep Certain Workers Out*?, Jan. 15, 2010, http://cyrusmehta.blogspot.com/2010/01/new-uscis-memo-on-employer-employee.html; and Cyrus D. Mehta, *Halcyon Days In H-1B Processing*, Feb. 26, 2010, http://cyrusmehta.blogspot.com/2010/02/halcyon-days-in-h-1b-visa-processing.html. On March 19, 2010, AILA sent a memo to USCIS Director Alejandro Mayorkas and USCIS Chief Counsel Roxanna Bacon demanding that the Neufeld Memo be withdrawn as it is contrary to the definition of "employment" already incorporated in 8 C.F.R. § 214.2(h)(4)(ii), which incorporates elements other than right to control such as "hire, pay, fire, supervise, or otherwise control the work of such employee." *See* AILA, Memo to USCIS: *Determining Employer-Employee Relationship in Third-party Placement Settings*, posted on Mar. 19, 2010, AILA Infonet Doc. No. 10031931, http://www.aila.org/content/default.aspx?docid=31592, (Available only to subscribers). In addition, AILA's memo highlights the unintended consequences the Neufeld Memo would have on other industries such as health care and projects involving government contracts as well as the hardships that it would cause to those caught in the EB backlogs who have otherwise been able to routinely extend their H-1B status each year but now have to overcome the objections of the Neufeld Memo when they next apply for the H-1B extension. *Id*.

[10] How different is our modern system different from the Chinese Exclusion Act of 1882, 22 Stat. 58 (1882), which provided for the exclusion of persons from China? Is it consistent with a global economy to have a state of affairs where the United States welcomes capital and technology from the rest of the world but not the people from the nations that send them? The structural imbalance flowing from the tyranny of priority dates not only shuts out badly needed infusions of intellectual capital but actually increases the centrifugal pressures on knowledge workers already here, whether on a temporary or

The numerical quotas introduced in 1921 were part of the nativist reaction against immigration following World War I that would culminate in the adoption of infamous national origins quota in 1924. Ending the tyranny of priority dates can be justified as an advance in human freedom just as the abolition of the national origins quota in 1965 was very much part of a whole series of Great Society initiatives on civil rights. It is no coincidence that the Immigration Act of 1965 came the same year as the Voting Rights Act and only one year after the 1964 Civil Rights Act.

Our article will suggest many reasons why the United States has to move away from the tyranny of priority dates, and offer several proposals regarding how this could be done. Immigrants on the path to permanent residence in our imperfect immigration system, notwithstanding their status, ought to be viewed as Americans-in-waiting rather than being dispensed with through removal.[11]

Is There An Alternative Path to Comprehensive Immigration Reform?

Two roads diverged in a wood, and I--
I took the one less traveled by,
And that has made all the difference."[12]

This is why we write. 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 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

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permanent basis, who are already feeling the urge to return home as part of a reverse brain drain that promises to grow in scope and intensity as the perception grows that the "welcome mat" is no longer out in America. *See* Vivek Wadhwa, *Why Skilled Immigrants Are Leaving the US*, BusinessWeek, Mar. 02, 2009, http://www.businessweek.com/technology/content/feb2009/tc20090228_990934.htm. Mr. Wadhwa, who has researched extensively on the positive impact of H-1B workers and immigrants in the American economy, has a number of noteworthy academic publications to his credit and they can be accessed at the Social Science Research Network. SSRN Website, Vivek Wadhwa's profile, http://ssrn.com/author=738704. A recent blog post of Mr. Wadhwa quite vividly depicts the plight of H-1B visa holders who are stuck in an immigration limbo, prevented from starting their own companies and are thus unable to boost the American economy. *See* Vivek Wadhwa, *Free the H-1Bs, Free the Economy*, TechCrunch, Aug. 30, 2009, http://www.techcrunch.com/2009/08/30/free-the-h-1bs-free-the-economy/. Just as the 20th century has been known as the "American Century" largely because it was the time when this country became the dominant world power, so we may come to see the 21st century as the "Asian Century" in recognition of the increased ascendancy of China and India. This does not mean that the United States will exit the international stage, far from it. It does certainly mean that, as with the hostility created between this country and Japan in the 1930's resulting from the Oriental Exclusion Acts, the barely-submerged anti-Asian bias of the priority date system cannot fail to inflame mass opinion and government policy in this increasingly important part of the global economy. Just as past immigration restrictions infuriated the Japanese militarists and provided the emotional impetus for their failed yet disastrous attempts at creating an East Asian Co-Prosperity Sphere, *see* RONALD STEEL, WALTER LIPPMANN AND THE AMERICAN CENTURY 391-92 (Atlantic Monthly Press 1980), current nativist sentiments that dominate attacks on "job shops," H-1Bs and visa retrogression will also intensify the Indian and Chinese desire for commercial and economic dominance in a way that will inevitably inflate their strategic profile.

[11] The authors have been inspired by Hiroshi Motomura's story, which makes an eloquent argument for giving permanent residents the same rights and protections as citizens. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (Oxford Univ. Press 2006). We wish to extend this concept to those on the cusp of permanent residence too. An editorial in the New York Times sums up this premise, "A bedrock premise of smart immigration reform is the sharp distinction it draws between criminal aliens and Americans-in-waiting." Editorial, *Immigrants, Criminalized*, N.Y. TIMES, Nov. 26, 2009, at A38.

[12] ROBERT FROST, MOUNTAIN INTERVAL, THE ROAD NOT TAKEN (Henry Holt & Co. 1920).

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? We believe there is. It is this core conviction that animates what is to follow, an abiding faith in the remedial potential of the Immigration and Nationality Act, even while flawed in its present form, and the agency's historic role in administratively dealing with crisis situations. Walking sightless among miracles, our very preoccupation with root and branch reform, valid though it is, has blinded us to the possibilities that are ready and waiting to be developed if the will and vision to do so exists. The ideas we offer are designed to give form and shape to these possibilities in the hope that they will benefit America and those from other lands who have made our cause and our story their very own.

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 (CIR).[13] Yet, our proposals need not be the only option, and they would play the role of junior partner to CIR. If CIR is enacted, perhaps our proposal might lose relevance, or it may still be relevant under the new law. If CIR does not pass, or until it passes, we hope that our proposals may be given attention as an alternative path to CIR.

The family and employment quotas are woefully inadequate. Permanent migration to the United States is regulated by quotas and categories, which was last set by the Immigration Act of 1990 (IMMACT90).[14] IMMACT90 established a "flexible" worldwide cap on family-based, employment-based, and diversity immigrant visas. After a transition period, since fiscal year 1995 the worldwide limit has been 675,000. Independent restrictions shape the size and scope for each of the major immigrant categories: for family-sponsored visas, 480,000; for employment-based visas, 140,000; and for diversity visas, 55,000.[15] While the parents, spouses and minor children of United States citizens come in quota-free, these "immediate relatives" are subtracted from the overall numbers available for

[13] President Obama stated that he expects Congress to begin working on Immigration reform after finishing Health Care, Financial and Energy reforms. *See* Ginger Thompson & Marc Lacey, *Obama Says Immigration Changes Remain on His Agenda, but for 2010 Enactment*, N.Y. TIMES, Aug. 11, 2009, at A6. Subsequently, Department of Homeland Security Secretary Janet Napolitano stated that the Obama administration would push for immigration reform in 2010, and would argue for a "three-legged stool" that includes tougher enforcement laws against illegal immigrants and employers who hire them and a streamlined system for legal immigration, as well as a "tough and fair pathway to earned legal status." *See* Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009, at A10. On December 14, 2009, Rep. Luis Gutierrez (D-Ill.) fired the first salvo by proposing the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 (CIR ASAP). *See* H.R. 4321, 111th Cong. (2009). However, with the loss of the 60th Democratic seat in the Senate after Scott Brown's (R-Mass.) win, resulting in the stalling of the health care legislation, the prospects for CIR appear to have diminished in 2010. Yet, in the State of the Union Address on January 27, 2010, President Obama signaled his ongoing commitment to immigration reform noting, "we should continue the work of fixing our broken immigration system - to secure our borders, enforce our laws, and ensure that everyone who plays by the rules can contribute to our economy and enrich our nation." *See* American Immigration Council, *President Declares Ongoing Commitment to Immigration Reform*, http://www.americanimmigrationcouncil.org/newsroom/release/president-declares-ongoing-commitment-immigration-reform. Then, as recently as March 04, 2010, President Obama called on Senators Schumer and Graham to come up with a blueprint for immigration reform. *See* Peter Nicholas, *Obama looking to give new life to immigration reform*, L.A. TIMES, Mar. 04, 2010, http://articles.latimes.com/2010/mar/04/nation/la-na-immigration5-2010mar05.

[14] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[15] This is reduced by up to 5,000 based upon the grants of cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, title II; 111 Stat. 2160, 2193-201 (1997); *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997).

family sponsorship. However, there is a floor under family immigration: under no circumstances can the number of numerically restricted family-sponsored visas drop below 226,000. Therefore, if the number of immediate relatives of American citizens exceeds 254,000 (i.e., 480,000 - 226,000), the flexible worldwide ceiling of 675,000 may give way.

In addition to expanding total admissions, IMMACT90 modified the formula to determine per-country immigrants. Previously, the per-country quota was set at 20,000 visas per year. IMMACT90 takes a different approach, mandating that "green cards" for citizens of a single independent foreign state may not exceed seven percent of the total "green cards" available.[16] Once you do the math, the per-country quota rose to 25,620. Big or small, Lichtenstein or China, each country gets the same. This geographically neutral approach dates from the abolition of the infamous national origins quota in 1965. The allocation of immigrant visas is further subdivided into a system of sub-categories, or preferences, determined by a variety of relevant criteria such as education, exceptional ability, managerial status, shortage of United States workers, clergy and religious professionals, investment potential, and levels of skill.[17] On the family side of the ledger, relationships to U.S. citizens and

[16] *See* INA § 202(a)(2) [8 U.S.C. § 1152(a)(2) (2000)].

[17] The Act sets forth five employment-based immigration preferences. They use up the 140,000 visas in the following proportions: EB-1 provides 40,000 numbers for persons of extraordinary ability, outstanding researchers and professors and multinational executives; EB-2 provides 40,000 numbers for persons with advanced degrees or with exceptional ability plus any unused EB-1 numbers; EB-3 provides 40,000 numbers for professionals having baccalaureate degrees, skilled and unskilled workers plus any unused EB-1 and EB-2 numbers; EB-4 provides 10,000 numbers to special immigrants, which includes religious workers; and EB-5 provides 10,000 numbers for investors who create ten jobs and invest up to $1 million (although the amount varies depending on whether it is a rural area or a low or high unemployment area). *See* INA § 203(b) [8 U.S.C § 1153(b) (2006)]. As stated before, because no country may use more than seven percent of the worldwide numbers in any of the above categories, nationals of a particular country are limited to no more than 9,800 EB numbers per year. *See supra* n.17. Therefore, the greater demand for EB visas from countries with large populations like China and India lead to immense backlog for EB applicants from these nations. Immigration attorney Carl Shusterman predicts that it will take over ten years for a person born in India to file an adjustment application in the EB-2 and over twenty years in the EB-3. Carl Shusterman, *EB Immigrants: How long before I get my visa?*, Nov. 25, 2009, http://shusterman.com/cgi/ex-link.pl?shusterman.typepad.com/nation-of-immigrants/2009/11/eb-immigrants-how-long-before-i-get-my-green-card.html; *see also* Carl Shusterman, *Fix Our Broken Legal Immigration System*, Feb. 07, 2010, http://blogs.ilw.com/carlshusterman/2010/02/fix-our-broken-legal-immigration-system.html. According to a press release by former D.H.S. Ombudsman Prakash Khatri, dated February 2, 2010, the situation, based on incomplete statistics released by the USCIS and the State Department, is even direr than it appears and 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*, Press Release, http://www.khatrilaw.us/leadership.html. In a more detailed position paper, *The Employment Based Green Card Process and the Dramatic Negative Impact of Country Based Quotas on persons of Indian and Chinese Origin*, Mr. Khatri offers the following revelation: During the first four months of FY 2010, Service Centers requested 4,200 employment-based immigrant visas but field (district) offices, whose statistics are not reflected in the monthly Visa Bulletin, put in an order for double this amount (8,400)! Aside from the troubling lack of transparency, which makes intelligent advance planning virtually impossible, neither the USCIS nor those affected by what it does are well served by such hidden surprises. *See* Prakash Khatri, *The Employment Based Green Card Process and the Dramatic Negative Impact of Country Based Quotas on persons of Indian and Chinese Origin*, Feb. 2010, http://kpkgs.com/files/The_Employment_Based_Green_Card_Process_and_the_Dramatic_Negative_Impact_of_Country_Based_Quotas_on_persons_of_Indian_Origin_Feb_2010.pdf

For a further explanation of the long waits based on recently released statistics of pending applications issued by the National Visa Center, which does not include pending adjustment of status applications, s*ee* Sherry Neal, *NVC Inventory Report: When It's Not Good To Be #1*, Immigration Daily, http://www.ilw.com/articles/2010,0222-neal.shtm. Finally, for a tongue-in-cheek article on what can actually happen to someone who has waited 40 years for visa availability, *see* Cyrus D. Mehta, *Adjustment of Status Interview After Decades*, Jun. 15, 2009, http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus2009615234712&Month=&From=Menu&Page=1&Year=All.

permanent residents, modified by age and marital status, govern annual quota allocations.[18] Each preference gets a fixed percentage of the overall total for both family-based and employment-based visas as well as spillover of unused visas from other categories. Ours is a supply and demand system so that the time it takes to get a "green card" depends upon your country of birth, not of current citizenship, and your family-based or employment-based category as well as your place in line under such preference. In immigration parlance, this is known as your "priority date." If the demand in a category for any country goes up, and the supply remains static, it will take longer for the priority date to become current, now a condition precedent to even applying for the "green card," much less actually getting one.

We do not object to priority dates. Our argument is with their manifest insufficiency. If Congress had the vision and the will to expand immigrant visa quotas in a humane and realistic manner so that they could satisfy current demand and anticipate future appetite, the need for our modest proposals would melt away. This is apparently unlikely to happen, perhaps even in the context of comprehensive immigration reform. If the disappointments of the years since IMMACT 90 have taught us anything - since the expanded quotas that this legislation created still resulted in backlogs - it is that improvements in the legal immigration system are not necessarily the answer for the problems of the undocumented. Despite IMMACT 90, the Child Status Protection Act[19] and the American Competitiveness in the 21st Century Act (AC 21),[20] gifting us with H and adjustment portability, notwithstanding premium processing and cap exemptions, the undocumented are still with us and their numbers continue to grow, disproving any claim that America's immigration woes have been solved. Small band-aid tinkering in the legal immigration system is not necessarily the answer for the problems of the undocumented. If we have a more rational system for legal immigration, there will be fewer undocumented migrants. By contrast, if the legal means of migration are so miserly that their promise becomes a cruel illusion, then the law itself will no longer retain its relevance. Bringing the undocumented in from the shadows is necessary, but the promotion of broad expansions and improvements in the legal migration system is imperative. We live in an anxious age of political instability and economic insecurity on a global scale; indeed this is a time when the most we can realistically hope for is to preserve past victories and not to win new ones. It is neither disrespect to CIR nor any diminution of our support for it to acknowledge that this is so. We devoutly hope that we are profoundly mistaken; nothing would please us more. Yet, in the absence of the solution we would like to have, a decent respect for our clients and our country compels us to think anew of interim measures knowing that the problems we face demand no less.

That is what this article seeks to propose. There are three simple but highly effective ways to end the tyranny of priority dates. First, since there are too many people and too few visas, allow adjustment of status applicants to be filed though not approved in the absence of an immediately available immigrant visa number. Second, even if adjustment of status applications cannot be filed without an immediately available visa number and a congressional amendment, there is ample room in

[18] The Act sets forth four family-based immigration preferences. The F1 provides 23,400 numbers for unmarried adult sons and daughters of American citizens; the F2 provides 114,200 numbers for spouses and unmarried children or sons and daughters of permanent residents, and a higher percentage are allocated to spouses and minor children (category 2A) over adult unmarried sons and daughters (category 2B); F3 provides 23,400 numbers for unmarried sons and daughters; and F4 provides 65,000 numbers each year for siblings of American citizens. *See* INA § 203(a) [8 U.S.C. § 1153(a) (2006)].

[19] Pub. L. No. 107-208, 116 Stat. 927 (2002).

[20] Pub. L. No. 106-313, 114 Stat. 1251 (2000).

existing law for the Executive to grant parole and employment authorization for people with approved petitions. Third, the problem is not just the number of visas but how we count them. Exempt immediate family members from being counted against the overall quotas and the specter of never-ending backlogs will haunt our slumber no longer. It is no longer necessary, if it ever was, to place all our eggs in one basket. It does not undermine the need for CIR to suggest that there is now enormous remedial potential in the INA ready to be used if the Executive has the vision and the will to act. Starting here, we are ready to begin.

II. FIRST PROPOSAL: FILING OF ADJUSTMENT OF STATUS APPLICATIONS IN THE ABSENCE OF A VISA NUMBER

A. Dinesh Shenoy's Innovative Proposal on Cut-off Dates

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."[21] We know from § 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 § 203. The place in line for a prized "green card" number, also known as the priority date, is established through the filing of an immigrant petition or labor certification.[22] 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 § 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, Mr. Shenoy deserves to be allowed to speak for himself:

> With this revised language, an I-140 [petition] beneficiary would be able to file his or her I-485 [application] once an I-140 [petition] is filed, even if they know it will be many years before their priority date is reached.[23]

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 C.F.R. § 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.[24] If there is retrogression after such visa availability, the age remains frozen. However, if the

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[21] Dinesh Shenoy, *The October 2005 Visa Bulletin Warrants An Amendment to INA 245(a)(3)*, ILW, Sept. 16, 2005, http://www.ilw.com/articles/2005,0916-shenoy.shtm. This article is dedicated to Dinesh Shenoy whose wisdom and insight made it possible.

[22] For a family-based petition, the priority date is established on the date that the I-130 petition is properly filed. 8 C.F.R. § 204.1(c), 22 C.F.R. § 42.53(a), 9 FAM 42.53 n.1. For employment-based petitions, the priority date is established on the date the labor certification is filed, or in cases that do not require the labor certification or where the labor certification needs to be submitted with the petition (such as Schedule A cases), the date the preference petition is filed with the USCIS. 8 C.F.R. § 204.5(d).

[23] *Supra* n. 21.

[24] *Supra* n. 19.

precondition of a current priority date is removed or relaxed, then language will have to be inserted in INA § 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 § 101(b)(1) so that it would then read "an unmarried person under age twenty-one or who had applied for adjustment of status under 8 U.S.C. § 1255 before reaching the age of twenty-one."

B. Expanding on Dinesh Shenoy's Idea

It does not diminish the magnitude of Dinesh Shenoy's conceptual breakthrough to note that it raises but does not resolve several serious questions.[25] First, it is limited to applicants for adjustment of status applicants who enjoy a significant advantage not shared by those applying for immigrant visas at American consulates abroad. However, one wonders whether we can still speak of an even playing field in the aftermath of INA § 204(j) that extends occupational mobility to adjustment applicants in a way not open to equally long-suffering consular cases.[26] 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 United States unless and until an immigrant visa number became immediately available to them? Instead, as will be explained later, to create an equal playing field such beneficiaries of visa petitions based overseas may be able to get paroled into the United States. 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 United States while they wait for their priority dates to become current. Third, because prior approval of the I-140 petition is not required, it assumes that the current practice of concurrent filing of I-140 petitions and I-485 applications will continue, when we know that USCIS wants to end

[25] The authors are reminded of the wisdom of the ancient Chinese philosopher Lao Tzu (604 B.C.E. - 531 B.C.E.) who reminds us that "A journey of a thousand miles begins with a single step." *See* LAO TZU, TAO: THE WAY (Shawn Conners ed., Lionel Giles trans. El Paso Norte Press 2009). Dinesh took that first step and we follow in his path.

[26] The American Competitiveness in the 21st Century Act (AC 21) of 2000 permits a labor certification or an employment-based petition to remain valid when the adjustment of status application has been pending for 180 days or longer even if the non-citizen changes jobs provided it is in the "same or similar occupational classification" as the job described in the labor certification. INA § 204(j) [8 U.S.C. § 1154(j) (2009)]. Also, note that INA § 204(j) portability only benefits applicants while their application is pending and not after permanent residency is granted upon the availability of the priority date. *See* Cyrus D. Mehta, *The Portability Paradox*, Feb. 16, 2009, http://www.cyrsumehta.com/Print_Prev.aspx?SubIdx=ocyrus20092161618.

Why did Congress enact AC 21? Because of lengthy INS adjudications! Is that not, for different reasons, the same situation that we now seek to combat when we contend against the tyranny of priority dates? With AC 21, the INS was simply taking too long. Now, the utter collapse of the priority date system prevents adjudication. While the reasons are different, the ultimate impact on aliens waiting is still the same. In enacting AC 21, Congress took the lead; however, the USCIS also moved forward by interpreting INA § 204(j) broadly to allow "porting" even to self-employment. *See* Michael Aytes, *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000*, Dec. 27, 2005, Memo # USCIS HQPRD 70/6.2.8-P, http://www.uscis.gov/files/pressrelease/AC21Intrm122705.pdf ("Aytes Memo on Portability"). Now, we seek, while waiting for CIR, to provide the intellectual foundation for the Executive to act based on discretionary authority it already enjoys in the INA.

this practice and intends to publish a notice of proposed rulemaking.[27] 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 Department of State has employed a more flexible mechanism to ensure a smooth and regular allocation of immigrant visas known as the "qualifying date."[28] What is that? Simply stated, the Visa Office anticipates what priority dates are likely to come on the stream over the next six to twelve 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 National Visa Center 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 Department of State as being documentarily qualified.[29] That demand can then be compared against the amount of visas that 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.[30] To require a

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[27] This item has been on the USCIS semi-annual Unified Agenda since 2006 in compliance with the Regulatory Flexibility Act, and it remains to be seen whether the abolition of the concurrent filing of I-140 petitions and I-485 applications will ever be proposed or if it will remain on the wish list of some officials within the agency. *See* Department of Homeland Security, *Semiannual Regulatory Agenda – Spring 2008*, May 06, 2008, http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648054de52.

[28] U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL (FAM) 42.55 PROCEDURAL NOTES (PN) 1.1 (Sept. 05, 2008).

[29] For an excellent summary of this process, *see* U.S. DEP'T OF STATE, VISA OFFICE, THE OPERATION OF THE IMMIGRATION NUMERICAL CONTROL SYSTEM, http://www.travel.state.gov/pdf/Immigrant%20Visa%20Control%20System_operation%20of.pdf. Indeed, the next report from the same Department of State source is even more revealing: MONTHLY DETERMINATION OF EMPLOYMENT PREFERENCE CUT OFF DATES confirms the hopeless situation for the EB-2 for China and India and the EB-3 for India. There are 59,500 pending cases in the India EB-3 and an annual per country limit of 2,987. U.S. DEP'T OF STATE, VISA OFFICE, MONTHLY DETERMINATION OF EMPLOYMENT PREFERENCE CUT-OFF DATES, http://www.travel.state.gov/pdf/EmploymentDemandUsedForCutOffDates.pdf. If you do the math, it is consistent with Mr. Khatri's prognosis that the EB-3 for India may take more than 30 years to materialize. Then, when the April 2010 Visa Bulletin was issued, the Department of State took pains to explain common misunderstandings about the priority date system, "Applicants entitled to immigrant status become documentarily qualified at their own initiative and convenience. By no means has every applicant with a priority date earlier than a prevailing cut-off date been processed for final visa action. On the contrary, a significant amount of demand is received each month for applicants who have priority dates that are significantly earlier than the applicable cut-off dates. In addition, fluctuations in demand can cause cut-off date movement to slow, stop, or even retrogress. Retrogression is particularly possible near the end of the fiscal year as visa issuance approaches the annual limitations." U.S. DEP'T OF STATE, 19 VISA BULLETIN IX: APR. 2010, Mar. 9, 2010, http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4747.html.

[30] The authors credit David Isaacson, an associate at Cyrus D. Mehta & Associates, PLLC and resident legal guru, for finding something in the preamble to the regulation regarding concurrent filing of I-140 petition and I-485 application that implies USCIS could allow filing of an I-485 application with respect to an I-140 petition lacking a current priority date, without a change in the law.

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 of today. What worked efficiently before may no longer work efficiently under today's reality. 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 the Department of State and USCIS could post estimated "qualifying dates." But given the long waits, estimated qualifying dates must take into account how long it will take for the quota to become current. The estimates must be announced sooner rather than later and look further ahead. Precisely as it now happens in a consular case, USCIS would then allow 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 final adjudication when the priority date is reached. Only at that point would USCIS formally request an immigrant visa number from the Department of State.[31] Not until then would the adjustment of status be considered for approval. 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 visa availability contained in 8 C.F.R. § 245.1(g)(1) and § 245.2(a)(2).[32]

> Aliens?
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> These amendments will allow the Service to issue Employment Authorization Documentation (EAD) and advance parole authorization (which allows the alien to travel outside of the United States temporarily while his or her Form I-485 is pending with the Service) to certain alien workers within substantially less time that at present. In being able to apply for employment authorization and advance parole, the alien may avoid the adverse consequences of accrual of unlawful presence. *To achieve the desired efficiency improvement in the Service's processing, only aliens who have filed a Form I-140 for which a visa number is immediately available and Form I-485 will qualify for these benefits.* Therefore, as a result of this interim rule, an eligible beneficiary of a form I-140 visa petition for whom a visa is immediately available will no longer need to wait for approval of the underlying Form I-140 before eligible to apply for these benefits.

James Ziglar, *Allowing in Certain Circumstances for the Filing of Form I-140 Visa Petition Concurrently With a Form I-485 Application*, July 05, 2002, Request for Comments # INS No. 2104-00, http://shusterman.com/concurrentimmigrationfilings.html. (Emphasis added).

The statement that visa number availability is only being required in order "[t]o achieve the desired efficiency improvement in the Service's processing" implies that this was a policy decision, made for pragmatic reasons, rather than a dividing line required by law. That is, it implies that if the USCIS had found an alternative approach more efficient, it could just as easily have offered EAD and advance parole to I-140 petition beneficiaries without an immediately available visa number.

Note also that pursuant to *Ruiz-Diaz v. U.S.*, No. C07-1881RSL (W.D. Wash. 2009), which found the concurrent filing regulation, 8 C.F.R. § 245.2(a)(2)(i)(B), *ultra vires* INA § 245 with respect to religious worker I-130 petitions, the USCIS has now allowed religious workers who have filed I-360 petitions to concurrently file I-485 applications. *See* Neufeld, *Implementation of the District Court's Order in Ruiz-Diaz v. U.S., No. C07-1881RSL* (W.D. Wash. June 11, 2009), Memo # HQDOMO AD09-, June 25, 2009, http://www.uscis.gov/files/nativedocuments/Ruis-Diaz_Implementation_25jun09.pdf.

[31] It is interesting to note that the Nebraska Service Center informed AILA on May 7, 2009 that "EB- 485 team is 'Pre-adjudicating' cases to try and have them done 'but for' the priority date being current." AILA InfoNet, Doc. No. 09052132 (posted May 21, 2009) (Available only to subscribers). More recently, Michael Aytes, Acting Deputy Director of USCIS, stated that 180,000 I-485 applications have been pre-adjudicated waiting for visa availability. *See VSC Stakeholder Meeting Questions*, Aug. 20, 2009, AILA InfoNet, Doc. No.09090265 (posted Sep. 2, 2009) (Available only to subscribers).

[32] Our advocacy of informal agency action is well grounded in American history. Over 60 years ago, we read the following: "informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process." *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, Jan. 22,

The only regulation that defines visa availability is 8 C.F.R. § 245(g)(1), which provides:

> 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 [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). 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.[33]

Under 8 C.F.R. § 245.1(g)(1), why must visa availability be based solely on whether one has a priority date on the waiting list which is earlier shown in the Visa Bulletin? Why can "immediately available" not be re-defined based on a qualifying or provisional date? We are all so accustomed to paying obeisance to the holy grail of "priority date" that we understandably overlook the fact that this all-important gatekeeper is nowhere defined. Given the collapse of the priority date system, all of us must get used to thinking of it more as a journey than a concrete point in time. The adjustment application would only be approved when the provisional date becomes current, but the new definition of immediately available visa can encompass a continuum: a provisional date that leads to a final date, which is only when the alien can be granted Legal Permanent Resident status but the provisional date will still allow a filing as both provisional and final dates will fall under the new regulatory definition of immediately available. During this period, the adjustment application is properly filed through the new definition of immediately available through the qualifying or provisional date.[34] The authors

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1941, http://www.law.fsu.edu/library/admin/1941report.html. The Committee chairman, future Secretary of State Dean G. Acheson, testified along these same lines before the Subcommittee of the Senate Committee on the Judiciary: "It would be an impossible problem to tackle if the committee undertook to set up machinery for dealing with all of the informal procedures of all the organizations; it just cannot be done." *Administrative Procedure Act: Hearing on S.674, S.675 and S.918 Before Subcom. of Comm. on the Judiciary*, 77th Cong. 804-06 (1941). Furthermore, the logic of pre-adjudication is particularly compelling in times like these of severe and prolonged visa retrogression so that the case can be prepared for final action and approved as soon as there is a current priority date. Ironically, it is the very absence of an immediately available immigrant visa number that makes pre-adjudication uniquely necessary. *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (upholding building of a highway through a park in Memphis without any formal findings by the Secretary of the Department of Transportation in support of the project, though case remanded for review of administrative record).

[33] 8 C.F.R. § 245(g)(1) (2009).

[34] Expanding the definition of visa availability eliminates the need to re-define the meaning of "filed" in INA § 245(a)(3). Broadening the definition of visa availability would indeed allow such a filing under the statutory provision, after which all the usual benefits of adjustment of status would automatically flow, including portability under INA § 204(j) and protecting the age of the child under the CSPA. Notwithstanding it is also worth analyzing the meaning of a filing in the event that our expanded definition of visa availability is rejected, and it is arguable that INA § 245(a)(3), which requires that the alien have an available visa "at the time his application is filed," cannot be read literally to preclude the initial filing of an adjustment application when its conditions are not met, as opposed to merely precluding the approval of such application. Otherwise ordinary concurrent filing even as it exists today would be impermissible, because, as immigration judges periodically point out in the course of denying motions for continuance, someone who does not have an approved visa petition necessarily does not have an available visa number. Like concurrent filing, what we are arguing for is a kind of "pre-filing" that comes with ancillary benefits but is not filing in the strict statutory sense of the word. As David Isaacson has observed, there are other contexts under existing law in which one cannot simply assume that the date of "application" or date of "filing"

propose the following amendments to 8 C.F.R. § 245(g)(1), shown here in italics, that would 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 [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) *("current priority date"). An immigrant visa is also considered available for provisional submission of the application Form I-485 based on a provisional priority date without reference to current priority date. No provisional submission can be undertaken absent prior approval of the visa petition and only if visas in the preference category have not been exhausted in the fiscal year. Final adjudication only occurs when there is a current priority 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.

Once 8 C.F.R. § 245.1(g)(1) is amended to allow adjustment applications to be filed under INA § 245(a)(3), the authors propose similar amendments in the Department of State's Foreign Affairs Manual to even the playing field for beneficiaries of approved I-140 and I-130 petitions who are outside the U.S. so as not to give those here who are eligible for adjustment of status an unfair advantage. Since the visa will not be valid when issued in the absence of a current priority date, it will

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referred to in statute or regulation means the date the application papers are filed in the ordinary sense of the word. Rather, such terms sometimes mean something closer to the date of final adjudication. So in *In re Ortega-Cabrera*, the examination of good moral character for the ten years "immediately preceding the date of the application" under INA § 240A(b)(1)(A) was held to entail examination of good moral character during the ten years immediately preceding the final decision in the case, not the ten years immediately preceding the date the application papers were initially filed as a physical matter. 23 I&N Dec. 793 (BIA 2005). Similarly, in *In re Garcia*, the Board of Immigration Appeals interpreted a regulation allowing special-rule cancellation for an alien who "has been physically present in the United States for a continuous period of [seven] years immediately preceding the date the application was filed," 8 C.F.R. § 1240.66(b)(2), to be satisfied where "the respondent accrued [seven] years of continuous physical presence prior to the issuance of a final administrative decision for purposes of establishing eligibility for relief." 24 I&N Dec. 179, 183 (BIA 2007).

One could thus analogize and alternatively argue that the requirement of INA § 245(a)(3) that the alien have an available visa "at the time his application is filed" actually means that there must be an available visa at the time the application is finally adjudicated. In effect, what we are ultimately saying in both cases is that the official time of "filing" for statutory purposes does not have to correspond to the date when the application papers are physically submitted and ancillary benefits are granted. Although Section 6 of the 1976 Act to Amend the INA, Pub. L. No. 94-571 § 6, 90 Stat. 2703 (1976), substituted the word "filed" for the word "approved" in INA § 245(a)(3), it should not cripple our argument that the statutory moment of "filing" is not necessarily the same thing as the moment the papers are submitted or the moment that ancillary benefits are granted.

Ultimately, however, the authority to grant ancillary benefits is not dependent on how one defines the moment of "filing." As will be addressed further below, neither the power implied in INA § 274A(h)(3)(B) for the Attorney General (and now Department of Homeland Security "D.H.S.") to grant employment authorization, nor the power to parole under INA § 212(d)(5)(A), require that an adjustment application have been filed, pre-filed, or anything else. The decision to grant advance parole to aliens with non-current approved I-130 and I-140 petitions is no more contrary to the statute than the current policy to grant advance parole to aliens with pending adjustment applications because there is no specific reference in the statute to the latter either.

be necessary for USCIS to parole such visa applicants in to the United States. Since parole is not considered a legal admission, they will not be eligible for adjustment of status but will have to depart the United States and use the now-valid visa as a travel document to return when visa availability subsequently presents itself. The authors suggest the insertion of the following sentence, shown here in italics and deletion of an other sentence, in 9 Foreign Affairs Manual (FAM) 42.55 PN 1.1, as follows:

> 9 FAM 42.55 PN1.1 Qualifying Dates
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> "Qualifying dates" are established by the Department to ensure that applicants will not be officially informed of requisite supporting documentation requirements prematurely, i.e., prior to the time that the availability of a visa number within a reasonable period can be foreseen. Therefore, post or National Visa Center (NVC) will not officially and proactively notify applicants of additional processing requirements unless the qualifying date set by the Department (CA/VO/F/I) encompasses the alien's priority date. Otherwise, it is likely that some documents would be out-of date by the time a visa number is available and delay in final action would result. *An immigrant visa is also considered available for provisional submission of the immigrant visa application on Form DS 230 based on a provisional priority date without reference to current priority date. No provisional submission can be undertaken absent prior approval of the visa petition and only if visas in the preference category have not been exhausted in the fiscal year. Issuance of the immigrant visa for the appropriate category only occurs when there is a current priority date.* ~~Nevertheless, should an applicant or agent request information concerning additional processing requirements, this information may be provided at any time with a warning that some documents may expire if obtained too early in the process.~~

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 priority date becomes current. Nothing could be simpler. The reason to seek Congressional modification of INA § 245(a) is not because it is the 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 would be 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, Secretary of D.H.S., is thinking of permitting adjustment of status applications to be filed before the priority date becomes current.[35] Put down your coffee cup for a moment and consider 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 cut-off 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

[35] USCIS Office of the Press Secretary, Press Release: *Secretary Napolitano Issues Immigration and Border Security Action Directive*, ILW.com, Jan. 30, 2009, http://www.ilw.com/immigrationdaily/news/2009,0203-immigration.shtm.

legislative changes (including a possible pre-application filing procedure for adjustment cases) are recommended to facilitate caseload planning and make optimum use of [the United States] Citizenship and Immigration Services' adjudication capacity?"[36] If Secretary Napolitano wanted some precedent to support her curiosity, she need look no further than S. 2611 as passed by the United States Senate in May 2006.[37] As part of this comprehensive immigration reform measure that died in the House of Representatives, the Senate amended INA § 245(a) to allow for foreign-born students who had earned an "advanced degree," though not necessarily from an American 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 petition, though no final approval could issue until an immigrant visa number became available.[38] Interestingly, the Senate did not extend this exception to family-based adjustments nor to immigrant visa applicants outside the United States.[39] More recently, on December 14, 2009, Representative Luis Gutierrez (D-Ill.) introduced the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 (CIR ASAP).[40] Under § 321 of this bill, nonimmigrant skilled workers whose employer has petitioned for an employment-based "green card" on their behalf and their dependents will be permitted to file an application for adjustment of status, regardless of whether a visa is immediately available.[41] An applicant under this section must pay a supplemental $500 fee, to be used by D.H.S. for backlog reduction and clearing security background check delays.[42] The Secretary of D.H.S. shall provide employment and travel authorization in three-year increments while the application is pending.[43] Here too, this ameliorative measure is only applicable to EB applicants and not FB applicants.[44] We propose that if CIR ASAP gains momentum, this provision ought to also extend to FB immigrants.[45]

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 openly by USCIS as the prime rationale for their liberality, STEM students are uniquely important to

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[36] *Id.*

[37] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

[38] *See id.*

[39] *Id.*

[40] H.R. 4321, 111th Cong. (2009).

[41] *Id.* at § 321.

[42] *Id.*

[43] *Id.*

[44] *See id.*

[45] There are other provisions in CIR ASAP that we should mention. Section 301 proposes that the EB quota be increased from 140,000 to 290,000 and unused "green card" numbers roll over from one fiscal year to the next. Unused numbers from 1992 to 2009 will also be recaptured. H.R. 4321, 111th Cong. § 301 (2009). Section 302 makes the spouse and minor children of lawful permanent residents into immediate relatives, and they will no longer be part of the FB second preference. *Id.* at § 302. Section 303 increases country limits from seven percent to ten percent. *Id.* at § 303. Section 320 exempts those who have earned Master's or higher degrees from American schools from the EB quotas, and this is not just restricted to STEM disciplines. *Id.* at § 320.

the United States.[46] If we are willing to treat them differently for Optical Practical Training 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 in time (perhaps two years as with other conditional categories) and in number, say 65,000 to match the pitiable H-1B quota. In the ninety days before the second anniversary of what the authors call the "grey card,"[47] applicants will have to file a petition to lift the condition, thus giving the USCIS a second chance to determine if the "grey card" holder'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 earned in America, something that Mr. Shenoy left out. 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.

The "grey card" would arise after an adjustment application is filed through the establishment of a "provisional priority date." The notion of such a filing, while a radical proposal in immigration law, is commonplace in other administrative contexts. An excellent example of this is the provisional patent application. Since June 8, 1995, the United States Patent and Trademark Office has extended an option to inventors to file a first-time, barebones patent application, the effect of which is to preserve a priority date on a conditional basis so long as it is perfected by a subsequent application within a year.[48] There is no formal patent claim, oath or declaration, or an information disclosure statement. This "provisional patent" promotes administrative efficiency by marking an official United States patent application date for the invention and permits use of the term "patent pending" in connection with its description. The inventor can make a simplified submission with a reduced initial investment and gets twelve months to evaluate the invention's commercial possibilities before jumping in with both feet and incurring the additional expense of a full-blown patent application that is more complex and costly. At the same time, the inventor benefits from the ability to market the invention without worrying that the competition, whether foreign or domestic, might steal it for themselves. The Patent Office can keep their workload under control and focus on the inventions that are ready for final review.[49] The notion of a "provisional priority date," symbolized by the "grey card" can extend the benefits to the USCIS and the alien beneficiary, not to mention the employer who needs their services or the family member who treasures their companionship. The potential for fraud or abuse will be distinctly minimized by the need for an approved petition and an immediately available immigrant visa number as a precondition to permanency.

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 will be able to live as permanent residents in all but name. The authors recognize that this is still not a substitute to the actual "green card," since a loss in job or a plan to change careers would jeopardize one's ability to "port"

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[46] The usual limitation of 12 months of Optional Practical Training does not apply to STEM (science, technology, engineering or mathematics) students who can extend their Optional Practical Training for an additional 17 months if the employer is enrolled in the E-Verify program and agrees to various reporting requirements. 8 C.F.R. § 214.2(f)(10)(ii)(C).

[47] The authors credit Sam Udani for coining this most apt term.

[48] *See* 35 U.S.C § 111(a) and § 111(b) (2009)

[49] *See* United States Patent and Trademark Office, Resources and Guidance, Provisional Application for Patent, http://www.uspto.gov/patents/resources/types/provapp.jsp.

under INA §204(j).[50] 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. There 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 United States.[51] 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. In the same spirit, we propose to allow adjustment of status applications to be filed, though not approved, without immediate availability of an immigrant visa number.[52]

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[50] On the other hand, if one leaves the sponsoring employer shortly after receiving permanent residency, this too could be scrutinized when the individual applies for naturalization. Of course, if the individual who receives permanent residence reports to the employer with good intentions and the employer shortly thereafter terminates the employment, the individual is in a more defensible position. *See, e.g.*, *In re* Cardoso, 13 I&N Dec. 228 (BIA 1969). Therefore, an individual whose job is terminated after receiving permanent residence is not in so vulnerable a position as one who is porting under INA §204(j).

[51] *See* JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION INTO THE UNITED STATES, Chapter 16, (Univ. Mich. Press 1999); *available at* http://www.juliansimon.com/writings/Immigration/CHAP16.txt.

[52] David Isaacson argues that a blunter version of this approach could be pursued unilaterally by the Department of State without the need for regulatory changes, although doing this would have its drawbacks. Readers will remember how, in the July 2007 Visa Bulletin, the Department of State designated all employment-based categories other than "other worker" as "current," rendering visa numbers theoretically available for all priority dates in those categories and thus allowing the filing of adjustment applications by all otherwise adjustment-eligible aliens in those categories who had I-140 petitions filed on their behalf. *See* U.S. DEP'T OF STATE, 107 VISA BULLETIN VIII: JULY 2007, June 12, 2007, http://travel.state.gov/visa/frvi/bulletin/bulletin_3258.html. The Department of State could similarly allow filing of adjustment applications by applicants with priority dates for which no visa number was realistically available, at any time it chose to do so, simply by declaring the relevant categories "current" in the Visa Bulletin as it did for July 2007. The most efficient time to do this would be in September, at the end of each fiscal year, when the measure could also be justified as a way to ensure that any remaining visa numbers for that fiscal year did not go unused. The Visa Bulletin cut-off dates for the rest of the fiscal year could theoretically then proceed normally, with dates for each October following naturally from whatever the dates had been in the August two months before.

This idea would substantially and explosively lengthen the priority date backlog significantly and cause chaos in the application processing much greater than the one in the summer of 2007. This idea is less nuanced as it would be unable to easily focus on particular categories of applicants deemed vital to our national interest. This approach would increase the processing backlog at USCIS to a greater degree than an approach based on a regulatory or statutory change because it would not distinguish between the pending applications that are likely to have a visa number available in the near future from the other applications in the "pre-processing" queue that do not fall under the parameters of our proposal. Also, when presented with this idea, Charles Oppenheim from the Department of State confirmed that given the way that Visa Bulletin cut-off dates are actually calculated, the existence of many additional pending adjustment applications would lead to substantial retrogression of cut-off dates in the non-current Visa Bulletins, because cut-off dates currently depend upon pending adjustment applications and consular-post demand, without regard to approved I-130 and I-140 petitions that have not reached the adjustment or consular-processing stage. *See* Interview of Charles Oppenheim by Gary Endelman, Aug. 25, 2009. (On file with authors). Further, by increasing the number of visa petitions and adjustment applications that are filed, this proposal would make the ultimate waiting time before "green card" issuance even longer. That final drawback, however, is shared at least to some degree by any proposal that allows filing of adjustment applications in the absence of a realistically available visa number: some number of petitioners who would not have otherwise bothered to pursue the I-140/I-485 process in backlogged categories will now decide to do so, resulting in more aliens waiting on line for the limited supply of visa numbers, and even in the family-based categories, some may feel more incentivized to file I-130 petitions on behalf of their qualifying relatives if it allowed them to apply for adjustment of status by September in any given fiscal year, or to apply for parole and employment authorization.

C. Remembering the Children and Backdating Grant of Permanent Residence

We conclude this section of the article with two ancillary ideas to our proposal of being able to file an adjustment of status application before the priority date as defined by the Visa Bulletin. When Congress enacted the Child Status Protection Act, it wanted above all else to soften the harsh blows of long delays by the USCIS in the adjudication of "green card" cases. How? Congress did so by extending this generous benefit to protect vulnerable children who would otherwise be cavalierly abandoned to the tender mercies of an indifferent jurisprudence when their parents immigrated. The Board of Immigration Appeals, in *In re Avila-Perez*, faithfully captured this humane spirit:

> The CSPA was created to remedy the problem of minor children of United States citizens losing their immediate relative status and being demoted to the family first-preference category as a result of the INS's backlog in adjudicating visa petitions and applications for adjustment of status…To prevent these individuals from "aging out" because of INS processing delays, Congress decided that a child's age should be determined by the date his visa petition was filed, not as of the date the INS reviewed his applications, as it would have been under the old law.[53]

There was no way that Congress could have possibly anticipated the implosion of the EB-3 or EB-2 in the China and India categories. Of all the virtues our legislative worthies possessed, the gift of prophecy was not among them. That is why the CSPA formula to freeze the age of a child in preference cases requires visa availability. While the architects of the CSPA strived mightily to promote family unity, the restrictive formula they came up with reflects their wholly understandable failure to account for the possibility of visa retrogression greatly exceeding government processing delays. It is no exaggeration to conclude or contend that this adverse effect on "aging out" children ran directly contrary to what Congress thought it was doing. Given an EB-3 backlog of almost 7-8 years worldwide and over 30 years for India, you would have to start a labor certification now for someone who has a child turning 12 because that child's age will only be frozen when the immigrant visa is available, many years later. For India, even if the labor certification is started around the time of the child's birth, such strategic foresight may not suffice! If you get a quick labor certification followed by prompt USCIS approval of the I-140 petition, the child you think you are helping might not be so lucky down the road. When you have visa retrogression like we have right now, the CSPA formula is useless to protect children no matter how you interpret the CSPA formula. To the EB-3 preference child, especially if the

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On the other hand, the authors proposal of allowing of pre-filing adjustment applications without linking such a filing to a current priority date, and as discussed *infra* in the article, to be able to obtain work authorization and parole even without filing an adjustment application will not immediately generate the explosive backlogs that followed the July 2007 Visa Bulletin; therefore, the authors have decided not to include this interesting idea as a centerpiece of their proposals. Regardless of the drawbacks of such a proposal actually being implemented, the threat of the Department of State accomplishing many of the goals of our proposed reforms through this unilateral instrument serves as a spur to regulatory change by USCIS, or to Congressional action. Just as the July 2007 Visa Bulletin provoked greater EB number usage by USCIS, the threat of future similar Visa Bulletins could provoke a more efficient resolution of the overall priority date problem. The Department of State's ability to unilaterally make progress towards resolving a substantial portion of the problem faced by EB-2 and EB-3 beneficiaries from India or China is particularly appropriate because of the adverse foreign policy effects that the invidious discrimination inherent in our current system may have on our diplomatic relations with those countries.

[53] 24 I&N Dec. 78 at 83-84 (BIA 2007).

parents are born in India, the promise of the CSPA has become a cruel joke.

What to do? This article is based on the belief that, until you get a new law, the best, perhaps the only, thing to do is to take a new look at the law we have. Using our analogy that adjustment of status applications can be provisionally submitted absent a current priority date, we could save the children by redefining the concept of visa availability for the CSPA age formula pursuant to INA § 203(h).[54] Doing so would freeze the child's age despite visa backlogs! While we acknowledge that such an approach is, to say the least, openly unorthodox, we are warmed by the well-settled truth that a generous interpretation of any statute should be adopted where its "remedial purposes are most evident."[55] Moreover, USCIS has, in the past, expanded the meaning of visa availability. During the July 2007 Visa Bulletin period, when the dates for the EB-2 and EB-3 were made current, eligible applicants filed concurrent I-140 petitions and I-485 applications. The I-140 petitions were not approved at the time of visa availability, and after August 17, 2007, there was again retrogression. To the credit of the USCIS, the child's age was still frozen at the time of filing the unadjudicated I-140 petitions and I-485 applications, even if the I-140 petitions were approved after August 17, 2007 and when there was no longer any visa availability. In this case, the government informally expanded the interpretation of visa availability to a point of time when the visa was available by virtue of the July 2007 Visa Bulletin, but the I-140 petition had not been approved even though the "Johnny William memo"[56] insisted that there had to be an approved I-140 petition at the time of visa availability to freeze the age of the child, even if the priority date subsequent to this event regresses.

There is, of course, a second part to the CSPA age formula, namely that the child must have "sought to acquire" the status of a lawful permanent resident within one year of visa availability. Now, as immigration guru Quynh Nguyen[57] so incisively reminds us, "seeking to acquire" is a singularly novel term. The authors do not think it is used anywhere else in the INA. We do not seek to re-write the CSPA age formula; just the opposite. We seek to interpret it in a broadly humane way to achieve what Congress thought it was prescribing, a formula for the protection of children and the advancement of family unit. Our suggestion is advanced in furtherance of this intent by allowing a provisional submission to count as "seeking to acquire." Remember, dear friends, the CSPA language speaks of "seeking to acquire" a "green card" within the one year period after the Visa Bulletin indicates availability. Ms. Nguyen correctly points out that nothing precludes the USCIS from interpreting this to mean that the child could not seek to acquire *before* this one year period commences; she just has to conclude the step of "seeking to acquire" within the one year period after an immigrant visa is available. Our provisional filing approach would still require yet allow the child to "seek to acquire" green card status with final ratification firmly conditioned upon availability of an immigrant visa. This has been done before. That is precisely how the Department of State interpreted "seeking to acquire"

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[54] Under INA § 203(h)(1)(A) & § 203(h)(1)(B), the age of a child is frozen at the point that a visa becomes available, based on the first day of the month of the relevant visa bulletin and the approval of the visa petition, provided the child sought to acquire permanent residency within one year of visa availability. The child can also subtract from his or her age (if over 21 years at the time of visa availability) the time the visa petition of the parent took to get approved from the time of filing. *See* Johnny Williams, Office of Field Operations of Legacy INS, *The Child Status Protection Act*, Memo # 2, Feb. 14, 2003, AILA InfoNet Doc. No. 03031040 ("Johnny Williams Memo").

[55] Sedima v. Imrex Co., 473 U.S. 479, 491 n.10 (1985).

[56] *Supra* n. 54.

[57] Quynh Nguyen is a Houston-based immigration attorney in her own practice with particular emphasis on business immigration issues, and is a frequent speaker and writer at regional and national immigration conferences.

when it allowed the I-824 consular notification form to be used in precisely this same way. As the BIA reminded us in *Avila-Perez*,[58] the precise moment when an adjustment of status is filed should command neither our rapt attention nor unquestioning obedience. It can be filed at any time; since the CSPA neither demands nor instructs the child to "seek to acquire" in any particular way or time, why not allow a provisional *submission to suffice?*

If freezing the age of the child based on a re-interpretation of visa availability is too shocking for the faint of heart, we offer another, perhaps more soothing reason, why our provisional adjustment filing honors the spirit to the CSPA in a way that the traditional understanding of the age formula simply does not. We turn now to the automatic conversion mechanism under INA § 203(h)(3) that allows for seamless transfer of a child to the appropriate preference if that child cannot claim CSPA protection.[59] Allowing the child to provisionally file her adjustment of status with the parent(s) means that the child still remains an adjustment applicant even after "aging out." Then, when the parent gets the "green card," the child shifts over to the Family 2-B category which, *mirable dictu*, might then be current. The parents need not file a new I-130 petition. Since the child's adjustment of status was already filed under the provisional priority date, the "aged out" child will either get the "green card" simultaneously with the parent if F-2B is ready and waiting or, if not, the child can wait it out a bit longer, but still as an adjustment applicant under a provisional date under F-2B. The key is to allow the child to file their adjustment of status with the parents while minors under a provisional date so that, once they become adults, they will continue to be adjustable when they automatically convert to Family 2B after Mom and Dad are done.

Finally, quite apart from our CSPA proposal, once the priority date becomes current and USCIS grants adjustment of status, why not backdate the grant of permanent residence to the point of time when the application was filed under the "provisional priority date?" This would allow people who waited for years for permanent residence to immediately file an application for naturalization.[60] If an EB-3 beneficiary born in India waited over ten years for permanent residence, why should we require him to wait another five years to apply for naturalization? Since citizenship is necessary for voting, and voting is a fundamental right, then backdating "green card" approval enables people from China and India to become citizens and exercise the franchise years earlier than is now the case.[61] On the other

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[58] *Supra* n. 53.

[59] While we acknowledge that the BIA, in *In re Wang*, overturned its more generous interpretation in the unpublished decision of *In re Maria T. Garcia*, *In re Wang* does not faithfully interpret INA § 203(h)(3), which rings loud and clear for the automatic conversion of the child to an appropriate preference category, and provides the government with ample running room to re-interpret the provision consistent with *Garcia*. *See In re* Wang, 25 I&N Dec. 28 (BIA 2009); *In re* Maria T. Garcia, 2006 WL 2183654 (BIA June 16, 2006); *see also*, David A. Isaacson, *BIA Rejects Matter of Maria T. Garcia in Precedent Decision Interpreting the Child Status Protection Act*, June 22, 2009, http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus20096221176.

[60] A permanent resident who is not married to a U.S. citizen has to wait five years before he or she may naturalize. *See* INA §316(a) [8 U.S.C. § 1427(a) (2006)].

[61] This is not as revolutionary as it may seem. Under the INA, a refugee who has adjusted her status receives a priority date of the initial arrival to the United States. *See* INA §209(a)(2) [8 U.S.C 1159(a)(2) (2005)]. Similarly, an asylee who has adjusted her status receives a priority date of one year before the approval of the I-485 application. INA § 209(b)(5) [8 U.S.C. § 1159(b)(5) (2005)]. Of course, benefits guaranteed by statutes, like the ones for refugees and asylees, do not fit into our proposal of agency intervention. On the other hand, Lautenberg parolees are provided a one-year backdate not by statute but by regulation. *See* 8 C.F.R. § 245.7(e). Therefore, the Lautenberg parolee regulation is a better example of how the agency can also backdate a "green card" to someone who has waited over a decade under the EB-3 so that he or she can immediately apply for naturalization.

hand, there might be a statutory roadblock since INA § 245(b) requires the recording of the alien's lawful admission for permanent residence "as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 202 and 203 within the class to which the alien is chargeable for the fiscal year then current."[62] Under INA § 245(b), there are two obstacles. The first is that the recording of the permanent residence must be made "as of the date of the order of the Attorney General." This might be overcome as there is nothing that explicitly prohibits backdating the date of the order. The more burdensome obstacle is that the visa must be allocated from the fiscal year then current. Quynh Nguyen has come up with a brilliant interpretation that may save the day. Her point is that USCIS can backdate the validity of permanent residence status while still honoring the statutory mandate to subtract immigrant visas from the current fiscal year because the I-140 or I-130 petition was already counted at the time of initial submission when the provisional priority date was established. Since it was counted then, it would be double counting to count a second time when the priority date becomes current.

III. SECOND PROPOSAL: DE-LINK THE GRANT OF BENEFITS FROM THE FILING OF AN ADJUSTMENT OF STATUS APPLICATION

A. Grant Of Employment Authorization And Parole Without Congressional Action

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 American immigration policy? The authors do not think so. Amendment of INA § 245 is unlikely because action by Congress, even in the best of times, is neither swift nor easy. We also assume that our expanded regulatory definition of visa availability may be difficult to swallow. When Congress does rouse itself to act, 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? They want what we all want: the ability to work freely in the United States without constant fear, and the ability to take their families on vacations or visit relatives for holidays. Can they only do that as adjustment applicants? Is there another way? The authors think there is. While INA § 245 conditions adjustment of status on having a current priority date and meeting various conditions,[63] there is no 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.[64] Of course, for I-140 petition

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[62] INA § 245(b) [8 U.S.C. § 1255(b) (2009)].

[63] Under the Act, unless the applicant is a Violence Against Women Act (VAWA) petitioner or an immediate relative, any person who accepted unauthorized employment or was in unlawful immigration status is ineligible to adjust her status. *See* INA § 245(c) [8 U.S.C. § 1255(c) (2009)]. Certain non-citizens, on the other hand, who accepted unauthorized employment or failed to maintain status, may still be eligible for adjustment under the limited exceptions. *See* INA § 245(k) and § 245(i) [8 U.S.C. § 1255(k) and § 1255(i) (2009)].

[64] Further, President Obama has recently expressed his willingness to use Executive Orders to bypass the current gridlock in Congress in enacting his economic policy ideas; in the same spirit, we hope that the President would set his sights on immigration consistent with the theme of this article. *See* Peter Baker, *Obama Making Plans to Use Executive Power*, N.Y. TIMES, Feb. 13, 2010, at A13. For another view from a leading commentator on how changes in the immigration system can happen through executive action, *see* Angelo Paparelli, *Immigration Reform with the Stroke of a Pen*, Mar. 06, 2009, http://www.nationofimmigrators.com/?p=228.

beneficiaries, being able to "port" under INA § 204(j) will not be possible without a pending adjustment of status application. Beneficiaries of I-140 petitions would still need to harbor an intention to work for the sponsoring employer even though the EAD would allow them to seek employment in the open market until they filed an adjustment of status application upon the priority date becoming current. But we do not see why the government cannot establish a similar ability to "port," even without an adjustment of status application, after an I-140 petition has been approved for more than 180 days and the priority date has not become current, similar to INA § 204(j) portability.[65] For those who want some comfort in finding a statutory basis, the government could rely on its parole authority under INA § 212(d)(5) to grant such interim benefits either for "urgent humanitarian reasons" or "significant public benefit."[66] There is nothing in 8 C.F.R. § 212.5 that would prohibit D.H.S. from granting parole on the ground that the continued presence of the beneficiaries of I-140 or I-130 petitions provides a significant public benefit. Since such parole is not a legal admission,[67] there is no separation of powers argument since the Executive is not trying to change existing grounds of

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[65] We know that the Department of Labor has always insisted that an approved labor certification is only good for one job in one place, but we find nothing in the INA or in 20 C.F.R. § 656 that corroborates it, and there is nothing in the INA that would prevent the Department of Labor from extending, by regulation, the same occupational mobility that INA § 204(j) provided to adjustment applicants, something most EB-3 holders will not be for 10-15 years or longer. Here is how it would work, the labor certification and the I-140 petition would belong to the beneficiary and not to the employer (1) after a labor certification and I-140 petition have been filed, and (2) 180 days have passed since the I-140 petition was filed (INA § 204(j) standards). The economy would benefit from such circularity since the alien would not have to stay in the same job for the same employer but would be free to develop her talents to the fullest and a qualified U.S. worker could be hired in the vacancy that was created.

Moreover, even though CSPA triggers when there is visa availability, and even though our second proposal de-links the grant of benefits, such as work authorization, from filing an adjustment application when the visa becomes available, the authors again ask for a more faithful interpretation of INA § 203(h)(3) and reversal of *In re Wang*, *supra* n. 59, which results in the automatic conversion of the child into the appropriate preference category when the parents obtain their "green cards." In the meantime, the "aged-out" child still receives work authorization and parole until this "child" can obtain the "green card" under the F-2B preference using the priority date of the parent under the prior EB petition.

[66] INA § 212(d)(5) [8 U.S.C. § 1182(d)(5) (2009)]; *see also* 8 C.F.R. § 212.5, which further spells out the various classes of aliens who can be granted parole. Such parole must be less than 365 days to avoid subtraction of an immigrant visa number. INA § 201(c)(4)(A) [8 U.S.C. § 1151(c)(4)(A) (2009)].

[67] *See, e.g.*, Leng May Ma v. Barber, 357 U.S. 185 (1958). The USCIS recently stated that "Parole is [a] discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be in the United States. By statutory definition, parole is not admission." Scialabba, Neufeld, & Chang, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators*, Mar. 3, 2009, Memo # USCIS HQ 70/21.1 AD07-18, http://www.uscis.gov/files/nativedocuments/section212_a_6_immi_natl_act_illegal_violators.pdf ("212(a)(6) Memo"). The 212(a)(6) Memo also states that a parolee under INA § 212(d)(5)(A) "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Id.*; *Barber*, 357 U.S. 185 (1985). The 212(a)(6) Memo goes on to state, "Parole may be granted for 'urgent humanitarian reasons' (humanitarian parole) or for 'significant public benefit.' Deferred inspection, 8 C.F.R. § 235.2, and advance parole, 8 C.F.R. § 212.5(f), are types of parole, as are individual port of entry paroles and paroles authorized while the person is overseas." *Id*. For an excellent treatment of parole, *see* Chris Gafner and Stephen Yale-Loehr, *Immigration Parole: Recent Developments*, 15 Bender's Immigration Bulletin 191 (2010). While Gafner and Yale-Loehr contend that the 1996 amendments to INA § 212(d)(5)(A) allowed parole "only on a case by case basis for urgent humanitarian reasons or significant public benefit," and thus eliminated the use of parole for mass immigration purposes, the authors forcefully argue that the USCIS still routinely grants advance parole to anyone who applies for adjustment of status, and the 1996 limitations were intended to restrict the use of parole for refugees. Under our proposal, we ask that USCIS grant parole to beneficiaries of approved I-130 and I-140 petitions outside adjustment of status. These individuals, but for the lack of current visa availability, would have been able to apply for adjustment of status and avail of parole or apply for immigrant visas if outside the United States.

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.[68]

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 United States in the employment-based second and third preferences. After all, most have an H-1B and can extend under § 106(a) or § 104(c) of AC 21,[69] but as noted previously, some may still not be able to take advantage of AC 21. Moreover, spouses on H-4 cannot work, and if they cannot file an adjustment application, due to the backlogs in the priority dates, they will not be able to work for several years. The EAD would thus also come as a relief for the H-4 spouse whose career may otherwise be derailed.[70] The EAD in itself for prospective

[68] The authors further credit David Isaacson for pointing out that INA § 274(A)(h)(3) provides that "As used in this section, the term 'unauthorized alien' means with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or *(B) authorized to be so employed by this Act or by the Attorney General.*" (Emphasis added). Under these circumstances, an EAD could be issued to someone who has yet to have an approved I-130 or I-140 petition, and could possibly be granted in deserving situations. One scenario is where a bona fide labor certification, the first necessary step before an I-140 petition is filed under INA § 203(b)(2) and § 203(b)(3), is not yet approved due to Department of Labor processing delays, or has not been on file for 365 days. The foreign national's H-1B six-year time limit is maxing out yet this person is unable to take advantage of an H-1B extension beyond the six years under § 106(a) of AC21. Congress does not necessarily have to amend AC21 to solve this issue because the INA authorizes the Executive to issue an EAD to any person for any purpose under any circumstances and for any validity. INA § 274(A)(h)(3) [8 U.S.C. § 1324 (2005)]. *Sub silentio*, the USCIS has already relied on precisely this authority, perhaps not even realizing it, when it decided to issue a two-year EAD to the eternally waiting adjustment applicants with approved I-140 petitions but without a current priority date. USCIS Office of Communications, *USCIS to Issue Two-Year Employment Authorization Documents (EADs)*, June 12, 2008, http://www.uscis.gov/files/article/2yrEAD_FAQ_061208.pdf. The USCIS acted in response to tidal wave of visa retrogression. This sends an essential message to all with ears to hear it: Regulations do not exist in a vacuum. They are created in response to what the INA says or does not say, what the statute allows or prohibits. There is an inescapable policy dimension to any exercise of federal regulatory authority so the suggestions we advance here are but a new application of doing what already exists.

[69] What about those not on the H-1B? The unavailability of an EAD outside the adjustment of status context forces people into the H-1B category who might not otherwise need or even want to be there. Our proposal would ease the pressure on the H-1B category and, by so doing, serve to diminish opposition to all employment-based immigration.

[70] Many talented H-1B beneficiaries choose not to stay in the United States because their spouses on H-4 visas are unable to work. *See* Matt Richtel, *Tech Recruiting Clashes with Immigration* Rules, N.Y. TIMES, Apr. 12, 2009, at A1, *available at* http://www.nytimes.com/2009/04/12/business/12immig.html. This can be done by regulation. There is no statutory prohibition on this. While L-2 and E-2 spouses were given EAD after Congress enacted INA § 214(c)(2)(E) [8 U.S.C. § 1184(c)(2)(E) (2009)] and § 214(e)(6) [8 U.S.C. § 1184(e)(6) (2009)] respectively, the authors believe that there is no need for Congressional intervention. There is no need for an EAD in fact. We should simply include H-4 spouses as part of 8 C.F.R. § 274a.12(a) so that they can work incident to status. This is one way to ameliorate the extreme hardship suffered by H-4 spouses who must wait for years to apply for legal permanent resident status without being able to work. Again, there is nothing to prevent the Executive from granting work authorization to teenage children on H-4 visa status. This would be a terrific way to help them. Finally, § 106(a) of AC 21 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. AC 21 § 106(a) should 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 her own labor certification. This used to be allowed, but in May 2005, the Associate Director for Operations of the USCIS set forth a memorandum indicating that only dependant H-4 spouses will get the benefit of the extension. *See* William Yates, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000*, May 12, 2005, Memo # USCIS HQPRD 70/6.2.8-P, http://www.mnllp.com/CISac21104ccyatmay05.pdf. Now, both spouses need to have labor certifications filed on their behalf to obtain the benefit of AC 21 § 106(a), which is absurd. The statute itself has more flexibility and speaks of "any application for labor certification …in a case in which certification is 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 wife's labor certification on a derivative basis to file for adjustment of status. This interpretation is very much in the spirit of AC 21, which is to soften the hardship caused by lengthy

employment-based immigrants will not have a portability benefit. The principal foreign national beneficiary will still need to intend to work for the sponsoring employer even if she is using the EAD for open market employment unless a regulation, as suggested above, parallels the ability to "port" under INA § 204(j). 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 H-1B numbers. This will not work for those who are not H-1B material. It will not work for those with essential skills who find themselves in the "other worker" backlog under INA § 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, though the scope and size of such a program might shrink. If anything, allowing non-citizens with approved I-140 or I-130 petitions to receive EAD and Parole will serve to reduce the size of the permanently undocumented in America, many of whom do not leave for fear that they will be unable to return. The Executive would not be granting legal status to the undocumented, for that is what only Congress can do. But, as is done in the context of adjustment of status itself, the Executive certainly can create a period of stay that permits the undocumented to remain here.

B. Legalizing the Undocumented

While those out of status or who entered without inspection should not simply 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.[71] One conceptual difficulty is whether parole can be granted to an individual who is already admitted on a nonimmigrant visa but has overstayed. Since parole is not considered admission, it can be granted more readily to one who entered without inspection. On the other hand, it is possible for the Executive to rescind the grant of admission under INA §212(d)(5), and instead, replace it with the grant parole. As an example, an individual who was admitted in B-2 status and is the beneficiary of an I-130 petition but whose B-2 status has expired can be required to report to D.H.S. who can retroactively rescind the grant of admission in B-2 status and instead be granted parole retroactively.

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

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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 § 106(a) is contrary to the intent of Congress. It is not enough to say that the H-1B spouse for whom a labor certification has not been filed can change to non-working H-4 status. Given the backlogs facing India and China, as well as worldwide EB-3, it is simply unrealistic and punitive to deprive highly educated 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.

[71] The following observation by the Board of Immigration Appeals in *In re Garcia-Linares* is worth noting:

> We note initially that there is no provision in the immigration laws that expressly authorizes [*nunc pro tunc*] permission to reapply for admission to cure an alien's failure to obtain such permission prior to reentry after deportation. However, even prior to the enactment of the Immigration and Nationality Act of 1952…there had been an administrative practice of granting relief 'in a few well defined instances.' (citation omitted).

In re Garcia-Linares, 21 I&N Dec. 254 (BIA 1996); *see also In re* Roman, 19 I&N Dec. 855 (BIA 1988).

problem but not the overstay or unlawful presence problem. The three or ten year bar[72] is not triggered by a violation of status resulting from unauthorized employment but by an overstay past the validity of their I-94 forms. For this reason, a retroactive EAD would do nothing to ameliorate the crushing harshness of the three or ten year bar, though it might restore eligibility in some situations to adjust by avoiding the unauthorized employment preclusion of INA § 245(c).[73] What would cure the prior

[72] A noncitizen who is unlawfully present in the United States for more than 180 days or one year can trigger the three year or ten year bar respectively upon departing the United States. INA § 212(a)(9)(B)(i)(I) or § 212(a)(9)(B)(i)(II) [8 U.S.C. § 1182(a)(9)(B)(i)(I) or § 1182(a)(9)(B)(i)(II) (2009)]. As a result of the potential for triggering these bars, many potential immigrants with approved I-130 and I-140 petitions who are unable to adjust status in the United States do not leave the country to process their immigrant visas at a consulate overseas, which has contributed to the huge undocumented immigrant population in the United States.

[73] David Isaacson suggests that the retroactive grant of parole and EAD may render a family-based immigrant, or an employment-based immigrant who entered on a nonimmigrant visa but overstayed (although not one who entered without inspection), eligible to adjust status in the United States, on the theory that the grant of *nunc pro tunc* parole would render the applicant to have maintained lawful status. The only place in INA § 245 where the applicant is required to have maintained lawful nonimmigrant status is under § 245(c)(7), which is limited to employment-based immigrants and not family-based immigrants, and which can be overcome by INA § 245(k)(2) for aliens who are present pursuant to a lawful admission and have not accumulated more than 180 days of unauthorized employment or failure to maintain a lawful status. "For purposes of section 245(c)(2) of the Act," current regulations already define "lawful immigration status" to include "the immigration status of an individual who is . . . [i]n parole status which has not expired, been revoked or terminated." 8 C.F.R. § 245.1(d)(v). A similar interpretation could be applied to INA § 245(k)(2)(A).

Although the interpretation of "lawful status" expressed in 8 C.F.R. § 245.1(d)(v), and proposed here to be extended to INA § 245(k)(2)(A), may be surprising to some given the conventional wisdom that parole is not a status, *see Barber, supra* n. 73, David Isaacson correctly observes that the term "status" is not defined anywhere in the INA, and by ordinary English usage, "parolee status" is a perfectly natural way of describing someone who has been paroled. Parole is a lawful status in the sense that, by virtue of the parole, it is lawful for the parolee to remain in the United States, at least for the authorized period of time. There are other instances in the INA where lawful status for a non-legal permanent resident does not automatically equate with nonimmigrant status: for example, asylum status under INA § 208 and refugee status under INA § 207 are lawful statuses, even though strictly speaking neither an asylee nor a refugee is a type of nonimmigrant according to the INA § 101(a)(15) definition of that term. *See* INA § 208 [8 U.S.C. § 1158 (2009)] and INA §207 [8 U.S.C. §1157 (2009)]. Parole is a status in the sense of being a classification given to aliens so that they can remain here under its prescribed terms and conditions. If "lawful status" and "lawful nonimmigrant status" meant the same thing, then the word "nonimmigrant" in INA § 245(c)(7) would be superfluous: the paragraph would have the same meaning if it just said that employment-based adjustment applicants had to be in "a lawful status" at the time of application for adjustment, rather than "a lawful nonimmigrant status." There is a canon of interpretation instructing us that statutes should be interpreted when possible to avoid rendering words superfluous, which the authors think given the wording of INA § 245(c)(7) supports the view that "lawful status" need not equate to nonimmigrant status. *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) (holding that a statutory interpretation should not render another section of the statute superfluous).

The Executive by regulation (or a court in an appropriate case) could easily declare parole under INA § 212(d)(5) to be a status for INA § 245(k)(2) purposes because it has already declared parole a lawful status for INA § 245(c)(2) purposes under 8 C.F.R. § 245.1(d)(v), asylum a lawful status under INA § 208, and refugee a lawful status under INA § 207. *See* 8 C.F.R. § 245.1(d)(iii)-(iv). In all three cases, Congress has authorized the Executive to allow people into the United States in a capacity that is neither legal permanent residence nor, strictly speaking, nonimmigrant. True, INA § 101(13)(B) does say that parolees are not "admitted," but then again it is not clear that one who enters without inspection and is granted asylum under INA § 208 has ever been "admitted" per the statutory definition of that term, and yet such a person still has a lawful status. If Congress had wanted to import a lawful "admission" into INA § 245(c)(2), Congress would have used that word; they did not. And while the overall title of INA § 245 refers to the adjustment of status of non-immigrants, there is a canon of interpretation that the title of a statutory provision does not dictate over the actual language, and we know from the mention of parole in INA § 245(a) and the exemption for immediate relatives in § 245(c)(2) that at least some aliens who are not non-immigrants can adjust under INA § 245. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004) (holding that the title of statute aids in resolving ambiguities); *but see* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 n.14 (1981) (holding that the title of a statute, while helpful, cannot enlarge or confer powers).

unlawful presence would be a retroactive granting of parole. If you look at the definition of "unlawful presence," you would see that 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."[74] So, if you are present in the United States on parole, you are not accumulating any unlawful presence. You can grant retroactive parole without overriding the will of Congress. There is no separation of powers problem. By its very nature, parole is discretionary and, as such, *nun pro tunc* parole can be issued when there is good cause. A possible regulation may very well deem an approved I-140 or I-130 petition to be good cause.

The Executive's use of parole, *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 comes readily to mind.[75] 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, will need not wait an 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.[76] Like our proposal, Deferred Action is purely discretionary.[77] They are both informal ways to allow continued presence in the United States. The INA never mentions deferred action. Neither does deferred action depends upon regulation. Deferred action

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INA § 245(k) requires the alien to be present pursuant to a lawful admission so employment-based immigrants who entered without inspection would not be able to adjust status even under this aggressive theory. Adjustment of family-based immigrants who entered without inspection, based on *nunc pro tunc* parole and employment authorization, would face the obstacle that under USCIS's current interpretation of INA § 212(a)(6)(A)(i), most such immigrants might be inadmissible as "[a]n alien . . . who arrives in the United States at any time or place other than as designated by the Attorney General." *See* 212(a)(6) Memo at *supra* n. 67. One could resolve that problem, however, either by liberalizing the interpretation of INA § 212(a)(6)(A)(i) or by taking the view that the Attorney General had retroactively authorized the time and place of the aliens' arrival.

[74] INA § 212(a)(9)(B)(ii) [8 U.S.C. § 1182(a)(9)(B)(ii) (2009)].

[75] *See* Refugee Relief Act of 1953, Pub. L. No. 203, 66 Stat. 400 (1953). Only after its hand was forced did Congress comprehensively rewrite the refugee provisions in the Refugee Act of 1980 to provide for a less arbitrary process for refugee admissions. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). Here too, the authors credit the late Senator Kennedy for enacting this landmark legislation as the Chairman of the Senate Judiciary Committee.

[76] Although former § 242.1(a)(22) of the Operations Instructions has been withdrawn, Deferred Action is still available. *See* Doris Meissner, *Exercising Prosecutorial Discretion*, Nov. 17, 2000, Memo # USCIS HQOPP 50/4, http://www.miracoalition.org/uploads/V_/hg/V_hgJbpG0Xs-0mZLNg7CDQ/Prosecutorial-Discretion1.pdf. Moreover, a removal order can be reopened upon the agreement of the respondent and the government, especially when relief such as adjustment of status under INA § 245 becomes available many years later. *See* 8 C.F.R. § 1003.2(c)(3)(iii) and § 1003.23(b)(4)(iv). At present, the government's attorney has unfettered discretion and often resists joining in a motion to reopen. The D.H.S. can institute a standard policy for all government attorneys to follow in the event that the D.H.S. provides benefits to beneficiaries of approved petitions. There is no reason to treat a noncitizen in removal proceedings differently just because she was unlucky to have been apprehended and placed in removal proceedings.

[77] *See In re* Quintero, 18 I&N 348 (BIA 1982) (deferred action is a matter of the District Director's prosecutorial discretion and, therefore, neither the immigration judge nor the Board may grant such status or review a decision of the District Director to deny it).

is not mentioned in Title 8 of the Code of Federal Regulations ("8 C.F.R.") but only in the old, and now inapplicable, Operations Instructions. Both, our proposals and deferred action, are the products of limitations. The exercise of prosecutorial discretion to grant deferred action status is an expression of limited enforcement resources in the administration of the immigration law. Our advocacy of EAD and Parole outside the adjustment context is an expression of limited EB quotas and the impact of visa retrogression. Since both are inherently discretionary, they are not proper subjects for judicial review since, in both cases, there is no law to apply.

Deferred Action has also been applied to battered spouse and children self-petitioners who had approved I-360 petitions under the Violence Against Women Act, so that they could remain in the United States and obtain work authorization.[78] In 2006, Congress, in recognition of this informal practice, codified at INA § 204(a)(1)(k) the grant of employment authorization to VAWA self-petitioners.[79] Deferred Action has also been granted to U visa applicants.[80]

More recently, the Department of Homeland Security provided interim relief to surviving spouses of deceased American citizens and their children who were married for less than two years at the time of the citizen's death. Mr. Neufeld's memo, issued on June 15, 2009,[81] provides extraordinary relief to spouses whose citizen spouses died regardless of whether the I-130 petitions were approved, pending or even not filed. Such beneficiaries may request deferred action and obtain an EAD. Then, on October 28, 2009, Congress amended the statute to allow, *inter alia*, a widow who was married less than two years at the time of the citizen's death to apply for permanent residence.[82] Even more recently, on November 30, 2009, USCIS announced in a press release that certain affected persons in the Commonwealth of the Northern Mariana Islands (CNMI) would be granted parole under INA § 212(d)(5).[83] The Consolidated Natural Resource Act of 2008 (CNRA) extends most provisions of the United States immigration law to the CNMI beginning on November 28, 2009.[84] As of this date, foreign nationals in the CNMI will be considered present in the United States and subject to U.S. law.

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[78] Michael Cronin, *Deferred Action Memo*, Dec. 22, 1998, Memo # INS HQ 204-P*; see also* Michael Cronin, *Deferred Action Determinations For Self-Petitioning Battered Spouses and Children*, Sept. 8, 2000, Memo # INS HQ/AND/70/6.1P.

[79] INA § 204(a)(1)(k) [8 U.S.C. 1154(a)(1)(k) (2009)].

[80] William Yates, *Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceeding*, May 6, 2004, Memo # USCIS HQOPRD 70/6.2b, http://www.nationalimmigrationproject.org/DVPage/U_Visas_in_Proceedings_5.6.04.pdf.

[81] Donald Neufeld, *Guidance Regarding Surviving Spouses of deceased US Citizens and their Children*, July 15, 2009, Memo # USCIS July 15, 2009, http://www.ssad.org/images/Surviving_Spouses_Deferred_Action_Guidance.pdf. The USCIS also states, "Until there is a legislative solution to remedy the situation commonly referred to as the 'widow penalty,' USCIS is providing interim administrative relief in the form of deferred action to surviving spouses whose US citizen spouses died before the second anniversary of their marriage." USCIS Office of Communications, *Q & A: USCIS Provides Interim Deferred Action for Surviving Spouses*, Aug. 31, 2009, Press Release, http://www.ilw.com/immigrationdaily/news/2009,0901-spouse.pdf.

[82] Pub. L. No. 111-83, 123 Stat. 2142 (2009).

[83] *See* USCIS Public Release, *USCIS Will Exercise Parole Authority for Certain Foreign Nationals in the Commonwealth of the Northern Mariana Islands*, Nov. 30, 2009, http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e2969cf715555210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

[84] *See id*.

In order to avoid their removal from the CNMI, the grant of parole will place individual members of CNMI groups in lawful status under the United States immigration law and permit employment authorization. Parole status will also allow for the issuance of advance parole when the individual seeks to depart the CNMI for a foreign destination.

In another display of Executive legerdemain, in March of 2000, Mr. Cronin, in a Memo,[85] allowed nonimmigrants holding H-1B or L status to travel overseas while their adjustment of status applications were pending and be admitted on advance parole and still be able to work as if they were in H-1B or L status without first obtaining an EAD. The following Q&A extract in Mr. Cronin's memo is worth noting:

> **4. If an H-1 or L-1 nonimmigrant has traveled abroad and reentered the United States via advance parole, the alien is accordingly in parole status. How does the interim rule affect that alien's employment authorization?**
>
> A Service memorandum dated August 5, 1997, stated that an 'adjustment applicant's otherwise valid and unexpired nonimmigrant employment authorization…is not terminated by his or her temporary departure from the United States, if prior to such departure the applicant obtained advance parole in accordance with 8 CFR 245.2(a)(4)(ii).' The Service intends to clarify this issue in the final rule. Until then, if the alien's H-1B or L-1 employment authorization would not have expired, had the alien not left and returned under advance parole, the Service will not consider a paroled adjustment applicant's failure to obtain a separate employment authorization document to mean that the paroled adjustment applicant engaged in unauthorized employment by working for the H-1 or L-1 employer between the date of his or her parole and the date to be specified in the final rule.[86]

A close examination of this astonishingly creative policy reveals that the Executive presumably allowed such an individual to continue working without any formal work document. Admitting an H-1B on advance parole (and thus presumably as a parolee rather than as an H-1B nonimmigrant), and allowing her to extend H-1B status subsequently, while permitting this individual to continue working for the employer without an EAD, required creative thinking on the part of the government. These are a few examples of how the Executive has creatively found ameliorative solutions within the four corners of the INA. Our final observation is that, for the past decade, major changes in immigration law have come about not through action by Congress or even formal Administrative Procedure Act rulemaking by either the now defunct INS or the current USCIS. Rather, major changes have come *sua sponte* either through administrative decisions given precedential impact or informal memoranda that are followed by Service Center adjudicators. This shows that it is not necessary for Congress to act in order for the law to change. Consider, for example, that INA § 212(a)(9)(B) only allows unlawful presence to be tolled for 120 days as a result of timely extension while the Pearson Memorandum of March 2000[87]

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[85] Michael Cronin, Office of Programs, *AFM Update; Revision of March 14, 2000 Dual Intent Memo*, Mar. 25, 2000, Memo # INS HQADJ 70/2/8/6, 2.8.12, 10.18, http://www.boulettegolden.com/H_and_L_Travel_and_Advance_Parole.pdf.

[86] *Id*. (Emphasis in original).

[87] Michael Pearson, *Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act*), Mar. 3, 2000, Memo # INS HQADN70/21.1.24-P, http://www.immigrationlinks.com/news/news201.htm.

allowed tolling to last for the entire pendency of such extensions.[88]

The appropriateness of our proposal can be seen with a simple example. Say you have two Chinese or Indian geophysicists both of whom filed NIW I-140 petitions on July 18, 2007.[89] For whatever reason, only the second geophysicist also filed a concurrent adjustment of status. What do they have in common? They have the same priority date. They are both years away from having immediate eligibility of an immigrant visa number. What is the difference? The difference is that only the geophysicist who filed for adjustment is eligible for Parole and/or EAD. Why? Why waste precious resources of different government agencies to keep alive pipeline adjustment cases that will languish for years? What does the foreign national get out of that? EAD and parole, of course. But, if you decouple these benefits from adjustment of status, as we argue, and grant them by virtue of an approved I-140 petition, there would be no need to have a backlog at all. It could be wiped away, eliminated, with more efficient use of government resources without any injury to the foreign national. That is why our ideas make sense! Nothing in the INA compels the EAD and parole to be linked indissolubly to the adjustment of status. That being the case, they can be decoupled by regulation, to eliminate the backlog, and enable the government to focus only on those adjustment cases with current priority dates, while eligible foreign nationals continue to stay here with permission to work and travel. Voila![90]

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[88] *See* Naomi Schorr, *Do Not Make A Fortress Out of the Dictionary: The USCIS Is Not An Outstanding Researcher,* 15 Bender's Immigration Bulletin 79, 88 (2010).

[89] On that day, the Department of State announced that visa numbers under the EB-2 and EB-3, which were backlogged, would be current until August 17, 2007. *See* USCIS Office of Communications, *USCIS Announces Revised Processing Procedures for Adjustment of Status Applications*, Press Release # July 17, 2007, http://www.uscis.gov/files/pressrelease/VisaBulletinUpdate17Jul07.pdf. Prior to that, the Department of State had announced that the EB-2 and EB-3 visa number would be current on July 1; however, on July 2, D.H.S. closed all filings on grounds that there would no longer be any visa availability. Adjustment applicants who were affected by the flip-flop protested in "Gandhi style" by sending flowers to the USCIS Director. *See* Moira Herbst, *The Gandhi Protests*, BusinessWeek, July 13, 2007, http://www.businessweek.com/bwdaily/dnflash/content/jul2007/db20070713_687551.htm. Upon being threatened with a lawsuit from the American Immigration Law Foundation (AILF), D.H.S. reversed itself and again declared the EB-2 and EB-3 current effective from July 17, 2007 to August 17, 2007. *See* American Immigration Law Foundation, *Lawsuit on Visa Bulletin*, Nov. 19, 2008, http://www.ailf.org/lac/lac_lit_visab.shtml. Indeed, this episode demonstrates that there has been a practice of the government accepting and holding I-485 applications even after the numbers have retrogressed. The AILF complaint also refers to an August 30, 1991 cable from the former Immigration and Naturalization Service, IMMACT90 Wire #69, file CO204.8P, which states in relevant part:

> The Department of State (DOS) has advised INS that as of August 2, 1991, all third preference visa numbers for fiscal year 1991 have been allocated. Furthermore, DOS will not be issuing a visa bulletin for the month of September 1991… This creates a problem for field offices which (under [then] 8 C.F.R. 245.(f)(1)) must continue to accept concurrent filings of I-140s and I-485s if the alien's priority date is before the date reflected on the August bulletin. In response to an INS inquiry, DOS has advised that *they could not issue an amended August visa bulletin* reflecting the unavailability of third preference numbers. Accordingly INS *has no alternative but to continue to accept such concurrent filings.*

See generally Copy of Complaint brought by AILF on behalf of unnamed plaintiffs against Department of Homeland Security, July 17, 2007, http://www.ailf.org/lac/chdocs/visab-complaint07.pdf. (Emphasis added).

[90] The authors credit immigration expert Quynh Nguyen for this insight. As Ms. Nguyen has taught us, not only those hoping for immigrant visa numbers but also those tasked with the responsibility for their dispensation benefit from a rational system where law and logic join in a common purpose.

C. Our Proposal Does Not Violate the Separation Of Powers Doctrine[91]

There are those who argue that only Congress can make immigration policy in this fundamental way; this reservation is both serious and worthy of deep respect.[92] The authors are also not oblivious to the dangers that can ensue when Congress is unable to check the powers of the Executive. President Nixon's infamous remark, "When the President does it that means that it's not illegal"[93] serves as a useful reminder about the potential abuse of power if the Executive remains unchecked by Congress and the Judiciary. However, to allow the Executive to grant parole and EAD outside the adjustment context by virtue of positive regulation is not to displace Congress as the primary architect of federal immigration policy; rather, it is to aid the legislative body and, as such, it is in harmony with constitutional injunction to diversify authority.

Unlike *Youngstown Sheet and Tube Co. v. Sawyer*,[94] where the Supreme Court held that the President could not seize a steel mill to resolve a labor dispute without Congressional authorization, the Executive under our proposal is well acting within Congressional authorization. In his famous concurring opinion, Justice Jackson reminded us that, however meritorious, separation of powers itself was not without limit: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[95] Although President Truman did not have authorization to seize the mill to prosecute the Korean War, Justice Jackson laid a three-pronged test to determine whether the President violated the Separation of Powers clause. First, where the President has express or implied authorization by Congress, his authority would be at its maximum. Second, where the President acts in the absence of congressional authority or a denial of authority, the President may still act constitutionally within a "twilight zone" in which he may have concurrent authority with Congress, or in which its distribution is uncertain. Under the second prong, Congressional inertia may enable, if not invite, measures of independent presidential authority. Finally, under the third prong, where the President acts in a way that is incompatible with an express or implied will of Congress, the President's power is at its lowest and is vulnerable to being unconstitutional.[96]

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[91] While this section and the next, *Agency Discretion under Chevron and Brand X*, fall under our second proposal, they also apply equally to our first proposal with respect to filing an adjustment application based on an expanded definition of visa availability, although our first proposal attempts to be more consistent with the statutory framework under INA § 245(a).

[92] The United States Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

[93] *See generally* Author's name unavailable, *Third Nixon/Frost Interview*, N.Y. TIMES, May 27, 1977, at A16.

[94] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[95] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[96] *See id*. Despite the statement in Article I of the Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States," it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers. As Justice White explained in his dissent in *INS v. Chadha*, 462 U.S. 919, 947 (1983) (White, J., dissenting) after reviewing prior cases upholding broad delegations of legislative power:

> [These] cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law -- the substantive rules that regulate private conduct and direct the operation of government -- made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U.S.C. § 551(4), provides that a 'rule' is an agency statement 'designed to

Under our proposal, the President is likely acting under either prong one or two of Justice Jackson's tripartite test.[97] We have shown that INA § 212(d)(5), which Congress enacted, authorizes the Executive to grant interim benefits for "urgent humanitarian reasons" or "significant public benefits." Moreover, INA § 274A(h)(3)(B) provides authority to the Executive to grant employment authorization. Even if such authority is implied and not express, Congress has not overtly prohibited its exertion but displayed a passive acquiescence that reinforces its constitutional legitimacy.[98] Operating

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> implement, interpret, or prescribe law or policy.' When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect.' These regulations bind courts and officers of the Federal Government, may preempt state law and grant rights to and impose obligations on the public. In sum, they have the force of law.

Chadha, 462 U.S. 919, 985-986 (internal citations and footnote omitted). This is perhaps the most telling rejoinder to those who attack our proposals as radical theories without balance or precedent. Truth be told, as Justice White aptly observed, the creation of law by federal agencies has become the norm rather than the exception in our system of governance, if for no other reason that the sheer multiplicity of issues, as well as their dense complexity, defy traditional compromise or consensus which are the hallmarks of Congressional deliberation. They require timely and directed executive action that builds upon a well settled legislative foundation not merely, or even primarily, as a means of solution but also, indeed primarily, as a formula for keeping present problems from growing far worse.

[97] *Supra* n. 95. In *Medellin v. Texas*, although the Supreme Court held that the President's conduct of foreign policy did not extend to his ability to direct Texas to comply with the consular notification requirement under the Vienna Convention, this decision still provided interesting commentary on the power of the President to conduct foreign policy. *Medellin*, 552 U.S. 491 (2008). For example, the Court mentioned that the President has "the lead role… in foreign policy. *Id*., *cf.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (Article II of the Constitution places with the President the "vast share of responsibility for the conduct of our foreign relations) (sub-internal citations omitted).

The following passage from *Garamendi* is also worth noting:

> While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act. [*See*], *e.g.*, [Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.], 333 U.S. 103 (1948) (The President…possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs') (parallel citations, internal citations, and internal references omitted); [*Youngstown*], 343 U.S. 579, 635-636. n. 2, (1952) (Jackson, J., concurring) (the President can 'act in external affairs without congressional authority') (parallel citations, internal citations, and internal references omitted); [First Nat'l City Bank v. Banco Nacional de Cuba], 406 U.S. 759,767 (1972) (the President has 'the lead role…in foreign policy') (parallel citations and internal citations omitted); [Sale v. Haitian Ctrs. Council, Inc.], 509 U.S. 155, 188 (1993) (the President has 'unique responsibility: for the conduct of foreign and military affair') (parallel citations omitted).

Garamendi, 539 U.S. 396, 414-15 (2003). Since immigration has historically been linked to foreign policy, and indeed this is the core reason for the plenary federal power over immigration since it implicates foreign policy concerns, this is another reason why the Executive enjoys wide, though not unchecked, discretion to effect changes in immigration procedure through *sua sponte* regulations. For the classic exposition of immigration as a core component of foreign relations, consider this:

> The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

Chy Lung v. Freeman, 92 U.S. 275, 280 (1876).

[98] Candor, however, compels the admission that Justice Black, writing for the majority in *Youngstown*, was more cautious than Justice Jackson in his concurrence: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking

in Justice Jackson's "twilight zone," such constructive ambiguity creates the opportunity for reform through Executive initiative. From this, we must conclude that, had Congress not enacted INA § 212(d)(5), the President could not act by fiat to broaden or diversify its application beyond the adjustment context. In terms of EAD issuance, Congress has rarely spoken on this except via INA § 274A(h)(3)(B), so that most instances of EAD issuance are purely an act of executive discretion justified by that one statutory provision.[99] Furthermore, INA § 103(3) confers powers on the Secretary of Homeland Security to "establish such regulations, prescribe such forms or bonds, reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."[100]

The President is not divorced from lawmaking; that is the very reason why the Framers provided an executive veto power. If the President was totally divorced from the making of laws, why give such a weapon to limit congressional prerogative? Once we accept the fact that the Executive is a junior partner in lawmaking, then the use of executive initiative to promulgate implementing and interpretative regulations, as we propose be done in the grant of parole and EAD benefits, becomes a valid extension of this well settled constitutional precept.

To suggest that the President is powerless to act simply because only Congress can change the INA is to isolate one co-equal branch of our national government from another beyond what the Constitution suggests or requires.

Consider what the Supreme Court taught us in *Buckley v. Valeo*:[101]

> Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of

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process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S. 579, 588 (1952).

[99] Some exceptions are the rules regarding employment authorization of asylees and asylum applicants contained in INA § 208(c)(1)(B) and § 208(d)(2), the employment authorization for spouses of L-1 and E non-immigrants added to INA § 214(c)(2) and § 214(e) in 2002, the employment authorization for beneficiaries of approved VAWA self-petitions that was added to INA § 204(a)(1) by the Violence Against Women Act of 2005, and the employment authorization for abused spouses of certain non-immigrants provided at INA § 106 by that same act. Notably, however, some of the most common categories of employment authorization, such as that for aliens with pending applications for adjustment of status, have no specific statutory authorization.

[100] It is hard to imagine a more all-encompassing grant of authority in INA § 103(a)(3), especially one sweeping enough for our proposals. Should there be any doubt on this, we need only look to the ringing words of Chief Justice Marshall that come down to us with undiminished relevance: "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. 316, 321 (1819).

[101] 424 U.S. 1 (1976).

governing itself effectively.[102]

The doctrine of separation of powers is not a maxim that can "divide the branches into watertight compartments," nor "establish and divide fields of black and white."[103] Major interpretations by the Supreme Court on the meaning of this doctrine emphasize the primacy, if not the inevitability, of subtle distinctions rather than bright line absolutes.[104] More on the same theme can be found in *Loving v. United States*.[105] After acknowledging that only Congress can pass new laws, the Court went on to offer a common sense qualification:

> This principle does not mean, however, that only Congress can make a rule of prospective force. To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government. Thomas Jefferson observed: 'Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution.'[106]

James Madison in The Federalist No. 47 reminds us that the "high priest" of separation of powers, Montesquieu, always took a ruthlessly pragmatic view of the subject. To Montesquieu, Madison aptly explains, this doctrine "did not mean that these departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words import… can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted."[107]

Similarly, Justice Story wrote:

> [W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.[108]

The boundaries between each branch must be adjusted "according to common sense and the inherent necessities of the governmental coordination."[109] There are only two ways for a breach to

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[102] *Id*. at 121.

[103] Springer v. Phil. Islands 277 U.S. 189 (1928) (Holmes, J., dissenting); *see also* Mistretta v. U.S., 488 U.S. 361 (1989) (the doctrine does not create a "hermetic division among the Branches" but "a carefully crafted system of checked and balanced power within each Branch").

[104] *See, e. g.*, Crowell v. Benson, 285 U.S. 22 (1932); A. L. A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935) (Cardozo, J., concurring).

[105] 517 U.S. 748, 758 (1996).

[106] *Id*., *cf.* 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed. 1904) (Letter to E. Carrington, Aug. 4, 1787).

[107] THE FEDERALIST NO. 47, at 325-26 (James Madison) (J. Cooke ed., 1961).

[108] 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow, 5th ed. 1905).

[109] J.W. Hampton & Co. v. U.S., 276 U.S.. 394, 406 (1928).

occur. One branch may interfere impermissibly with the other's proper discharge of its constitutionally delegated responsibility.[110] Alternatively, violation exists when one branch brazenly appropriates a function that is constitutionally entrusted to the other.[111]

Our proposals do nothing to inhibit or prevent Congress from enacting amendments to the INA. We neither argue nor suggest that the President should supplant Congress when it comes to the exercise of a function over which it alone enjoys plenary power. We seek only that the President act in aid of what Congress has done to make immigration policy more effective and more adaptable to the exigencies of the moment so that both the nation and the immigrants can benefit in equal and balanced measure.[112]

In perhaps the most famous judicial exposition of the need for pragmatism between the President and Congress, we turn to the still cogent observations of Chief Justice Marshall in our early national period:

> To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.[113]

The job of the Congress is to articulate long-range policy while that of the Executive is to make short-term tactical adjustments.[114] They are complementary in purpose but fundamentally different in method and technique. To suggest that the President can broaden the scope of Parole and EAD through regulation is neither radical nor remarkable but, rather, a sober recognition of the delicate but finely tuned balance that makes each co-equal Branch a necessary partner to the other in the discharge of its constitutionally delegated functions.

D. Agency Discretion Under *Chevron* and *Brand X*

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[110] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 433 (1977); U.S. v. Nixon, 418 U.S. 683 (1974).

[111] *See* Youngstown, 343 U.S.579, 587 (1952); Phil. Islands, 277 U.S. 189, 203 (1928).

[112] "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). This dovetails with our separation of powers argument. Not only is it okay for the USCIS to formulate immigration policy on highly minute technical issues of surpassing and sustaining importance, but the Constitution expects that to happen; indeed, without this, who would do it? Far from crossing the line and infringing upon the authority of the Congress, what we ask the USCIS to do augments Congressional prerogatives by providing a practical way for them to function.

[113] *McCulloch*, 17 U.S. 316 (1819).

[114] Moreover, Congress acts of necessity through broad-brush strokes while the Executive creates additional policy through administrative rulemaking that fills in the details. RLC Indus Co. v. Comm'r, 58 F.3d 413, 413-417 (9th Cir. 1995) ("Rulemaking, the quasi-legislative power, is intended to add substance to the Acts of Congress, to complete absent but necessary details… Adjudication, the quasi-judicial power, is intended to provide for the enforcement of agency… regulations on a case-by-case basis." *Citing from* 3 JACOB STEIN ET AL., ADMINISTRATIVE LAW § 14.01 at 14-2 (1994)).

We proffer other legal theories to support our proposal. When the Service extended Occupational Practical Training from twelve months to twenty-nine months for STEM students,[115] the Programmers Guild sued D.H.S. in *Programmers Guild v. Chertoff*[116] challenging the regulation, and initially seeking an injunction, on the ground that D.H.S. had invented its own guest worker program without Congressional authorization. The court dismissed the suit for injunction on the ground that D.H.S. was entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[117] Simply stated, under the oft quoted *Chevron* doctrine, courts will pay deference to the regulatory interpretation of the agency charged with executing the laws of the United States when there is ambiguity in the statute.[118] The courts will step in only when the agency's interpretation is irrational or in error. The *Chevron* doctrine has two parts: Step 1 requires an examination of whether Congress has directly spoken to the precise question at issue. If Congress had clearly spoken, then that is the end of the matter and the agency and the court must give effect to the unambiguous intent of the statute. Step 2 applies when Congress has not clearly spoken, then the agency's interpretation is given deference if it is based on a permissible construction of the statute, and the court will defer to this interpretation even if it does not agree with it.[119] Similarly, the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*,[120] while affirming *Chevron,* held that if there is an ambiguous statute requiring agency deference under *Chevron* Step 2, the agency's interpretation will also trump a judicial decision interpreting the same statute.[121] *Brand X* involved a judicial review of an FCC ruling exempting broadband Internet carrier from mandatory regulation under a statute. The Supreme Court observed that the Commission's interpretation involved a "subject matter that is technical, complex, and dynamic;"[122] therefore, the Court concluded that the Commission is in a far better position to address these questions than the Court because nothing in the Communications Act or the Administrative Procedure Act, according to the Court, made unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.[123]

The District Court in dismissing the *Programmers Guild* lawsuit discussed the rulings in *Chevron* and *Brand X* to uphold the D.H.S.'s ability to extend the student F-1 OPT regulation.[124]

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[115] *See* 8 C.F.R. § 214.2(f)(10)(ii)(c).

[116] Programmers Guild v. Chertoff, 08-cv-2666 (D.N.J. 2008), *available at* http://www.aila.org/content/default.aspx?docid=26215. (Available only to subscribers).

[117] 467 U.S. 837 (1984).

[118] *See id*.

[119] *Id*. In *United States v. Mead Corp.*, the Supreme Court developed a Step 0 analysis. 533 U.S. 218, 226-27 (2001). Under Step 0, agency interpretations will not receive *Chevron* deference unless the agency has been delegated the appropriate authority to make rules and puts forth such rules with the requisite degree of formality. *Id*. The same rules of deference apply to an agency's own interpretation of its ambiguous regulation. Auer v. Robbins, 519 U.S. 452 (1997). There is no question that the Secretary of D.H.S. has the delegated authority to make rules under INA § 103(a)(3).

[120] 545 U.S. 967 (2005).

[121] *Id*.

[122] *Id*. at 1002-03.

[123] *Id*.

[124] Programmers Guild v. Chertoff, 08-cv-2666 (D.N.J. 2008), *available at* http://www.aila.org/content/default.aspx?docid=26215. (Available only to subscribers).

Programmers Guild appealed and the Third Circuit also dismissed the lawsuit based on the fact that the Plaintiffs did not have standing.[125] While the Third Circuit did not address *Chevron* or *Brand X* – there was no need to – it interestingly cited *Lorillard v. Pons,*[126] which held that Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it reenacts its statutes without change. Here, the F-1 practical training regulation was devoid of any reference to the displacement of domestic labor, and Congress chose not to enact any such reference, which is why the Programmers Guild lacked standing.[127]

Brand X tells us that federal agencies and Congress have a commingled role to play in making new law: "*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps."[128] Is there a more effective constitutional answer to the charge that our argument violates separation of powers? If the FCC can use its policy expertise to exempt broadband Internet carriers from mandatory regulation under the Communications Act, why can USCIS not use its policy expertise to extend Parole and broaden EAD issuance, especially since the latter is entirely a creature of regulation? The raison d'être for the *Chevron* defense that federal agencies are owed deference when they seek to execute the law through regulatory interpretation suggests, if not compels, the conclusion that, while only Congress can enact laws, the executive agencies charged with their enforcement can say what these laws mean, this in turn, determines how they are applied or enforced. Those who argue that we seek to violate the separation of powers doctrine take an artificially cramped view of what lawmaking involves and ignore the fact that, like the idea of judicial review itself, no law can live apart from interpretation that, by its very nature, inevitably changes the law itself.[129]

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[125] Programmers Guild, Inc. v. Chertoff, 338 Fed. Appx. 239 (3rd Cir. 2009), *petition for cert. filed*, (U.S. Nov. 13, 2009) (No. 09-590).

[126] 434 U.S. 575, 580 (1878).

[127] *But see* Int'l Union of Bricklayers v. Meese, 616 F.Supp. 1387 (N.D. Cal. 1985), which declared former Operations Instructions § 214.2 (b)(5), allowing construction workers to enter on B-1 visas, invalid as being in contravention of the congressional purpose of the B-1 visa under INA § 101(a)(15)(B), which prohibits skilled or unskilled worker, and the H-2B visa under INA § 101(a)(H)(ii), which requires a labor certification for such labor. *Meese* may be distinguished from the *Programmers Guild* case and the proposals that the authors advocate since it dealt with the government's interpretation of a specific statute, INA § 101(a)(15)(B), which made reference to skilled or unskilled labor. In *Programmers Guild,* neither the statute nor the regulations pertinent to F visa students made any specific reference to the displacement of labor in the United States. Moreover, our proposals do not advocate a broadening of any nonimmigrant visa categories that have been specifically addressed by Congress, but rely on the broad authority of the government to grant parole under INA § 212(d)(5) or EAD under INA § 274A(h)(3) to aliens who have already met the requirements of sponsorship, including the labor certification requirement, under the immigrant visa categories pursuant to INA § 203(a) or § 203(b).

[128] *Brand X*, 545 U.S. 967, 982 (2005).

[129] The authors seek what Chief Justice Marshall sought in McCulloch when he described the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch*, 17 U.S. 316 (1819).

There is a larger point when we speak of the relationship between our advocacy of "audacious incrementalism" and CIR. It is more than junior vs. general partners. In the American political tradition, reform movements have more commonly been characterized by an 18th century belief in prudence as an operating principle rather than a 19th century romantic belief in absolute solutions. Prudence was not a derogatory term for the Enlightenment Era; rather, it was a term of approval indicating a sound belief in incremental progress and an approach that set a problem on the road to solution in the belief and expectation that future progress would follow in a way that would minimize disruption and maximize acceptance. This intellectual strain infused the American Revolutionary. That is an apt characterization of what we are trying to do when compared to CIR. Yes, CIR would solve a wider array of problems in a more fundamental way but it is also true that

Chevron and *Brand X* are more than just constitutional justifications of agency action but an invitation to action where the Congress has stayed its hand. Until now, *Brand X* has been feared by the immigration bar and immigration advocates for its negative potential as a legitimization of government repression. Yet, it has a positive potential by enabling the Executive to expand individual rights and grant benefits *sua sponte*. We do not need to live in fear of *Brand X*. We can make it our own.[130]

If Congress wants to repeal what the Executive has done, it can do so. If it fails to do so, this very lack of action suggests legislative acquiescence, if not agreement. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when its reenacts a statute without change."[131] In *United States v. Rutherford*, the Supreme Court held, "Once an agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."[132] The Framers developed the separation of powers doctrine to defend against tyranny and not to prevent the extension of benefits. Theirs was a negative concern to guard against arbitrary action not a positive one to prevent new initiatives.

Finally, the following extract from the Supreme Court's decision in *United States v. Mead Corp*. is worth noting:

> When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered.[133]

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attempting to get it and implement it after passage would involve significant social and economic dislocation. These are not arguments against CIR but only an attempt to place it in a true and honest perspective. We seek less dramatic and less immediate gains because they are the ones that can be achieved sooner and with greater predictability. Once the principle we advocate is established, there can be little doubt that the scope of its future operation will grow to bring other and potentially more significant gains. Our justifiable zeal for CIR must not blind us to the benefit of more moderate proposals; let us abide by Voltaire's famous caution and not let "The perfect [be] the enemy of the good." *See* VOLTAIRE, LA BÉGUEULE, 1 CONTES 2, (Oxford Dictionary of Quotations, Elizabeth Knowles ed, 5th ed 1999) (1772). Let us hold fast to the distinction between prudence and absolutism, between 18th Century incremental reform and 19th century upheaval. In the long run, the American experience has been characterized more by the former than the latter and it has led to a stability that remains the envy of the world.

[130] One good example of the BIA taking a more forgiving line than the courts is *In re F-P-R-*, 24 I&N Dec. 681 (BIA 2008), which largely rejected the Second Circuit's decision in *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006). The Second Circuit in *Joaquin-Porras* had held that a brief exit and re-entry pursuant to advance parole did not restart the one year "clock" for a timely asylum application; the BIA interpreted 8 C.F.R. § 1208.4(a)(2)(ii) to provide one year from any entry, except perhaps where the exit and reentry had been for the sole purpose of enabling an asylum application. *Id*.

[131] Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[132] 442 U.S. 544, 554 (1979).

[133] 533 U.S. 218 (2001) (internal citations omitted).

Like *Chevron* and *Brand X*, the authors also rely on *Mead* as a force for good for the following reasons:

Is there a gap for the USCIS to fill when it comes to granting of parole? Clearly, since the INA leaves the granting of parole completely up to the discretion of the Attorney General. It is hard to imagine a more open invitation to Executive rulemaking to provide when parole can be extended, as there is absolutely nothing in the INA that would contradict a USCIS regulation allowing parole and/or EAD outside the adjustment context or that would provide that the beneficiary of an approved I-140 or I-130 petition should be allowed to stay without accumulating unlawful presence.[134]

Is there a reason to have such regulations? Definitely. If they are clear, specific, and well reasoned, they have significant potential to influence the courts if and when judicial challenges to such executive initiative present themselves, as they doubtless will. The more detailed the regulations are, the better.[135] The absence of deference increases the insecurity of any rights extended thus making it less likely that they will be completely or properly exercised. We do not seek to promote deference as a limit on the exercise of judicial authority, but to provide a stable legal framework within which our proposals can function.

Moreover, it can be argued that the Attorney General, now the Secretary of D.H.S., certainly has been delegated power by Congress to administer and enforce the INA under which all of the issues for which we contend arise.[136] In our view, the USCIS regulations can be most correctly understood as

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[134] Nothing prohibits federal agencies from moving in an incremental manner. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002 (2005). In *Brand X*, the Supreme Court noted that the FCC did not attempt to apply its new policies to all types of information service providers. *Id*. That was left for possible future action. So, we may say in the immigration context, that the ability of the Executive to grant parole and EAD outside the adjustment context does not necessarily mean that it can do other things absent statutory authorization or consent. That too can be left for another day. The concept of audacious incrementalism not only is historically well positioned as a supplement to, not a substitute for, CIR but it is also logically closely aligned to the spirit and scope of the *Brand X* decision itself.

[135] Agency interpretations advanced in "opinion letters" do not justify *Chevron* style deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000) (contrasting interpretations in opinion letters with those "arrived at after… a formal adjudication or notice-and-comment rulemaking"). Instead, "interpretations contained in less reliable formats such as opinion letters are 'entitled to respect' under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), but only if they have the 'power to persuade.'" Christensen, 529 U.S. at 587; *see also* Catskill Devel. LLC v. Park Place Enter. Corp., 547 F.3d 115, 127 (2d Cir. 2008) (under *Skidmore*, agency viewpoint articulated in an opinion letter was "entitled to deference only to the extent that it ha[d] the power to persuade" the court).

One is reminded, for example, that all of the AC 21 interpretations upon which lawyers and aliens routinely rely are not the product of APA rulemaking but of agency memoranda or opinion letters. To the extent that these memoranda or opinion may benefit us, we should keep in mind that they do not receive *Chevron* style deference and can be ignored or overturned by subsequent court rulings without concern for *Brand X*. For instance, in a recent decision from the Ninth Circuit, *Herrera v. USCIS*, No. 08-55493, 2009 U.S. App. LEXIS 14592 (2009), the Court held that the revocation of an I-140 petition under INA § 205 trumped an alien's ability to port under INA § 204(j). Unfortunately, the Ninth Circuit failed to acknowledge or distinguish its facts from the "Aytes Memo on portability", *supra* n. 27, which states that a withdrawal of an I-140 petition, after 180 days, resulting in revocation, does not affect portability. *See* Cyrus D. Mehta, *Ninth Circuit In Herrera v. USCIS Rules That Revocation of I-140 Petition Trumps Portability*, July 09, 2009, http://www.cyrusmehta.com/Print_Prev.aspx?SubIdx=ocyrus200979113434. This suggests that our advocacy needs to be enshrined in notice and comment rulemaking that complies with APA procedures if it is to provide sufficient reliability for future strategy.

[136] *See* INA § 103(a)(3) [8 U.S.C. § 1103(a)(3) (2008)].

being legislative in nature, but they can legitimately be characterized as interpretative as well. We follow the logic articulated by Professor K. Davis as the test for categorizing a rule as legislative or interpretive:

> Rules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no granted power to make law through rules, the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power. The statutory grant of power may be specific and clear, or it may be broad, general, vague, and uncertain.[137]

Moreover, *Production Tool Corporation* has held that an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion.[138] Even if the rules on EAD and Parole are considered "interpretative" rather than "legislative" the Secretary of D.H.S. has inherent authority within the due and proper exercise of the agency's discretion to issue them.[139]

We do not augment agency deference beyond the just limits of law or logic by arguing that it can be a force for good. We all know it can also be a force for ill. It is like fire. The answer is not to forswear it and curse the darkness. Rather, the answer is to use it to bring light into the world and

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[137] *See* Production Tool Corporation v. ETA, 688 F.2d 1161 (7th Cir. 1982) (*citing from* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:10 at 54 (2d ed. 1979)). More recently, in *Durable Mfg. v. U.S. Dep't of Labor,* 578 F.3d 497 (7th Cir. 2009), the Seventh Circuit upheld the ability of the Department of Labor to amend 20 C.F.R. § 656.30(b), which created a 180 day validity period for a labor certification, based on the authority it has under INA § 212(a)(5). Plaintiffs unsuccessfully challenged the Department of Labor's authority to curtail the validity of the labor certification under this statute. The court's reasoning is worth noting here:

> The Supreme Court instructs that "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" [Adams Fruit Co., Inc. v. Barrett], 494 U.S. 638, 650 (1990) (*quoting* [Fed. Mar. Comm'n v.Seatrain Lines, Inc.], 411 U.S. 726, 745 (1973)). Accordingly, this Circuit reviews de novo an agency's determination of the scope of its own jurisdiction. [N. Illinois Steel Supply Co. v. Sec'y of Labor], 294 F.3d 844, 847 (7th Cir. 2002). We examine the text and purpose of a statute to determine whether a regulation falls within the scope of the authority the statute delegates. *See* [Am. Hosp. Ass'n v. Schweiker], 721 F.2d 170, 176-78 (7th Cir. 1983).

Durable Mfg., 578 F.3d 497 (7th Cir. 2009). In *Durable Mfg.*, the Court reasoned that the Department of Labor had statutory authority to restrict the validity period to 180 days under INA § 212(a)(5)'s overarching objective of protecting the domestic workforce from foreign competition, and to ensure that labor certifications are not stale appraisals of the labor market when the I-140 petition is filed. While the authors may not agree with the outcome of this case, *Durable Mfg.* demonstrates that the Executive can have power to further a statutory objective even though it is not spelt out in the statute. Interestingly, as noted in footnote #6 of *Durable Mfg.*, the appellants did not contend that the entire corpus of labor certification regulations set forth in 20 C.F.R. § 656 was *ultra vires* and in contravention of what Congress intended when it changed the labor certification system in 1965. *See Durable Mfg.*, 578 F.3d 497, 501, n. 6 (7th Cir. 2009). Consequently, the Court did not feel obliged to determine whether these rules were legislative or interpretative. That being the case, the extent, if any, of a *Chevron* style deference due and owing to these rules remained undecided. For a historical analysis of the way in which litigants might launch such a direct assault, *see* Gary Endelman, *The Lawyer's Guide to 212(a)(5)(A): Labor Certification From 1952 To PERM*, Nov. 02, 2004, http://www.ilw.com/articles/2004,1102-endelman.shtm.

[138] *Production Tool Corporation,* 688 F.2d 1161 (7th Cir. 1982).

[139] *See* General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

spread the warmth of a new and welcoming truth.[140]

IV. THIRD PROPOSAL: A NEW WAY TO COUNT - MORE IMMIGRATION WITHOUT MORE VISAS!

In addition to the other areas of potential executive action that we have proposed, there is a way to create more visas, many more in fact. How? By not counting derivative family members against the quotas. This single step, without more, would revolutionize United States immigration policy by making all EB and FB categories current and, at long last, restoring equilibrium to our immigration system.

The authors have failed to find any explicit authorization for derivative family members to be counted under either the FB or EB quotas in the INA. Even INA § 203(d) does not explicitly provide such authority. Let us examine what INA § 203(d) says:

> **d) Treatment of Family members**
>
> A spouse or child defined in subparagraphs (A), (B), (C), (D), or (E) of section 1101 (b)(1) of

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[140] There is doubtlessly concern that our argument, by strengthening the ability of the Executive to act independently of the Congress, may ultimately lead to repressive action that violates established rights. Is there a check on this potential? Can we, in other words, argue for our case without creating unanticipated horrors in the future? We think such a check exists in the concept of constitutional avoidance. As the Tenth Circuit explained in *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1243 (10th Cir 2008):

> It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due. In *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), the Supreme Court applied the canon of constitutional avoidance to reject the National Labor Relations Board's interpretation of an ambiguous statute that it was empowered to administer. [*DeBartolo Corp.*] at 574-77. Although the Court recognized that the NLRB's interpretation "would normally be entitled to deference" under *Chevron*, it found that "the Board's construction of the statute, as applied in [*DeBartolo Corp.*], pose[d] serious questions of the validity of [the statute] under the First Amendment." Id. at 575. As a result, the Court concluded that "[e]ven if [the NLRB's] construction of the Act were thought to be a permissible one" under *Chevron*, id. at 577, the Court was required to inquire as to whether there existed another permissible interpretation that did not raise substantial constitutional doubts. *See* id. at 575-77. The doctrine of constitutional avoidance serves as a constitutionally imposed moderating force to restrain potential executive action and channel it within acceptable boundaries.

The Tenth Circuit Court of Appeals, in *Hernandez-Carrera*, went on to observe that "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Hernandez-Carrera*, 547 F.3d at1243, *quoting* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). Further, "like *Chevron*, the canon of constitutional avoidance is 'a means of giving effect to congressional intent, not of subverting it.'" *Hernandez-Carrera* at 1243, *quoting* Clark v. Martinez, 543 U.S. 371 (2005). The canon follows not only from courts' prudential desire not to decide constitutional issues unnecessarily, but from the assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. *Hernandez-Carrera* at 1243, *quoting* Solid Waste at 172-73. Just as *Chevron* reflects a judgment that Congress generally intends to empower an agency to resolve certain statutory ambiguities, the avoidance canon reflects a judgment that Congress does not typically intend to authorize agencies to fill in statutory gaps in a manner raising substantial constitutional doubts.

Putting all this together, if a future Executive attempted to subvert established liberties and arbitrarily withdraw previously granted benefits extended under a well settled interpretation or practice by relying upon *Chevron* or *Brand X* deference, the authors find ample reason to believe that a skeptical judiciary could and would invoke the doctrine of constitutional avoidance to invalidate it as beyond the limits of agency authority.

> 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.[141]

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 "entitled to the same status, and the same order of consideration" as the principal, nothing requires that family members also be given numbers.

Let us posit a situation where the family member is "entitled to the same status, and the same order of consideration" as the principal. Suppose there is only one visa number left in Fiscal Year 2009 in the EB-2 category, and the last principal beneficiary, who is entitled to this remaining visa, has seven derivative family members. What happens to his seven family members? Ought they not be accorded "the same status and the same order of consideration?" Or should only the principal be awarded the remaining visa for Fiscal Year 2009, and his seven family members be left out until they become eligible for visa numbers in the new fiscal year? What if there is a great demand for EB-2 visas and the Department of State moves the cut-off dates back? The seven family members will have to keep on waiting as a result of becoming victims to arbitrary priority date retrogression. 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 quotas? We are not arguing that they should be completely exempted from being counted against the quotas, but, as stated in INA § 203(d), the family members should be given the "same status, and the same order of consideration" as the principal.[142] Hence, if there is no visa number for the principal, the family members cannot get in. If, on the other hand, there is a single remaining visa number for the principal, the family members, even if there are seven of them, ought to be "entitled to the same status, and the same order of consideration as the principal."

There is no regulation in 8 C.F.R. instructing what INA § 203(d) is supposed to be doing. Even the Department of State's regulation at 22 C.F.R. § 42.32 only parrots INA § 203(d) and states that children and spouses are "entitled to the derivative status corresponding to the classification and priority date of the principal." 22 C.F.R. § 42.32 does not provide further amplification on the scope and purpose of INA § 203(d). In the event that there is ever litigation on whether derivative family members ought to be counted, the plaintiffs may rely on the Supreme Court decision in *Gonzales v. Oregon,*[143] which held that a parroting regulation is not deserving of any deference.[144] As the majority in *Gonzales v. Oregon* stated:

> 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

[141] INA § 203 [8 U.S.C. § 1153 (2008)].

[142] *Id*.

[143] Gonzales v. Oregon, 546 U.S. 243 (2006).

[144] Otherwise, an administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. *See* Auer v. Robbins, 519 U.S. 452 (1997).

language.[145]

The authors acknowledge that there are weaknesses to this argument. We wish they were not there but unfortunately they are. Each of these weaknesses will be addressed.[146] The main weakness to the argument of exempting family members is INA § 201(b), which carves out aliens who are not subject to the numerical limitation. They include, among others, special immigrants, those who will adjust under INA § 245(A) and § 210 and those whose removal has been cancelled under INA § 240(A)(a). Of course, INA § 201(b) also provides a specific carve out for "immediate relatives" who are also exempt from the numerical limits. But then, the title in INA §201(b) refers to "Aliens Not Subject to Direct Numerical Limitations." What does "Direct Numerical Limitations 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 and bound by its limitations. They are not independent of numerical limits, only from *direct* limitations. It is the principal alien through whom they derive their claim who is counted and who has been counted. There is nothing inconsistent between saying in INA § 203(d) that derivatives should not be independently counted against the EB or FB cap and that their omission from INA § 201(b), which lists only non-preference category exemptions.

Furthermore, we do not claim that derivative beneficiaries are exempt from numerical limits. They are subject to numerical limitations 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 a difference between not being counted at all, which we do not argue, and being counted as an integral family unit as opposed to individuals, which we do assert. Therefore, INA § 201(b) does not apply to our argument. *We seek not an exemption from numerical limits but a different way of counting such limits.*

Another weakness in our argument is that when Congress wished to carve out family members from a quota, it knew how to do so. Take a look at how family members of special immigrant Iraqi translators have been treated.[147] In § 1244(c) of the Defense Authorization Act of 2008, Congress specifically stated that principal aliens are counted in the 5,000 visas allocated to Iraqi translators, which means that derivatives are not.[148] Our argument would have surely been helped if INA § 203(d) explicitly exempted spouses and children as did § 1244(c) the Defense Authorization Act of 2008. But it does not count them out or count them in. There is only silence.

Here is our rebuttal. We contend that § 1244 of the Defense Authorization Act is not a guide here. Why? It was emergency legislation designed to extract Iraqi translators from a dangerous

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[145] *Supra* n. 143 at 257.

[146] The authors credit Theodore Ruthizer and Richard Steel for the "tough love" they showed us by taking the time to point out the weaknesses in our argument, yet still encouraging us to explore it further. They are the very definition of collegiality. The authors also thank our teacher Quynh Nguyen for coming to our rescue (we hope!) with insightful counter arguments to each of the weaknesses we identified.

[147] Defense Authorization Act of 2008, Pub. L. No. 110-181, § 1244(c), 122 Stat. 3 (2008).

[148] This is further confirmed in a Department of State Fact Sheet on Iraqi translators. *See* U.S. DEP'T OF STATE, FREQUENTLY ASKED QUESTIONS FOR IRAQI SPECIAL IMMIGRANT VISA APPLICANTS, Feb. 18, 2010, http://travel.state.gov/visa/immigrants/info/info_4172.html.

situation. The United States felt a moral obligation to extract these people who had worked with us and could not allow inadequate visa allotments to separate families and defeat the very purpose of the law itself. So, § 1244 of the Defense Authorization Act is clearly *sui generis*. The INA is not an emergency legislation.[149]

Yet another argument that can be made in opposition to our proposal is that INA § 201(a)(1) and § 201(a)(2) indicate that "family-sponsored immigrants" and "employment-based immigrants" are subject to the worldwide limits. Is it not clear that "family sponsored immigrants" and "employment-based immigrants" include spouses and children? Look to the definition of "immigrant" in INA § 101(a)(15), which defines the term "immigrant" as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." Then the rest of the section goes on to define the various nonimmigrant visa classifications from A to V.

All is not lost! We can address this weakness too. While the term "immigrant" under INA § 101(a)(15) includes spouses and children, they were included because they too as immigrants planned to stay permanently. No one ever contended they are nonimmigrants. We, on the other hand, argue that derivative beneficiaries are neither "family-sponsored" nor "employment-based" immigrants. No one has filed either an I-130 or I-140 petition on their behalf. Their claim to immigrant status is a creature of statute, deriving entirely from INA § 203(d), which does not make them independently subject to any quota. We have to interpret INA § 203(d) in concert 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. Or in the 1952 Act, the 1924 Act, or the Immigration Act of 1990. At no point did it do so.

Previous to IMMACT 90, family members were counted against the cap, but there was no explicit provision as in current INA § 203(d) granting them the same visa and "green card" status as the principal alien family member. INA § 203(d) took effect under IMMACT 90.[150] What was the purpose of inserting INA § 203(d)? Section 101(b)(3) of the House version of the bill amended INA § 201(b) to provide that an alien "who is provided immigrant status under INA § 203(d) as the spouse or child of an immigrant under INA § 203(b)" would be among the other classes not subject to numerical limitation.[151]

Then take a look at the Conference Report which accompanied S. 358, IMMACT 90. In the Joint Explanatory Statement of the Committee of Conference at page 121 under the title Employment-Based Immigration, it reads: "The House amendment allocated 65,000 employment-based visas during the Fiscal Years 1992-96 and 75,000 thereafter *not including numerically exempt derivative spouses and children…*"[152] There is no explicit discussion of what became of INA § 203(d) in the Conference Report.

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[149] The authors also concede that INA § 214(g)(2) carved out dependent H-4 applicants from the annual H-1B cap of 65,000 and the Master's cap of 20,000. Here too, we argue, and thank Ms. Nguyen for aiding us, that H-4 derivatives cannot work. There is therefore no point in counting them against the H status, which is for employment. Congress did not want any H numbers wasted on beneficiaries who could not use the H anyway, so they made the exemption explicit. This is not the case in the EB or FB permanent immigration context where being a Legal Permanent Resident does convey employment authorization. Hence the same logical imperative to make the exemption explicit is absent.

[150] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[151] H.R.4300, 101st Cong. (1990); *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR04300:.

[152] H.R. Rep. No. 101-955, pt. 2, § 121 (1990) (Emphasis added).

We next look at House Report No. 101-723 (1990) that accompanied the House passage of H.R. 4300 on October 3, 1990. S. 358 passed in lieu of H.R. 4300 after its language was amended to contain much of the text of the House bill. Under the proposed H.R. 4300, the 54,000 visas that were then allocated under the employment-based preference would have been capped at 75,000 principals. *Those family members accompanying or following to join are not included in this cap.*[153] The effect of this change would be to increase the proportion of employment based immigration within our total immigration system.

Alas, while it was clearly the House's intent to exclude family members, we cannot say that not counting derivatives represents the legislative intent behind IMMACT 90. It seems now that this was the other way since the House exemption for derivatives was removed in conference.[154] Ultimately, Congress enacted INA § 201(d), which set a numerical limit of 140,000 for EB immigrants, and it appears that the intent of Congress in IMMACT 90 was to count family members under the EB quotas in the final legislation. If the House had its way, the law would have had a lower numerical limit of 75,000 EB numbers, but since family members were not counted, the numerical limit would have been higher than 140,000.[155] Also, the House's intent to exclude family members only applied to the EB

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[153] H.R. Rep. No. 101-723(I), Title I, Subtitle A (1990) (Emphasis added).

[154] Since INA § 203(d) is ambiguous, legislative history becomes even more relevant in unraveling its mystery. The Supreme Court stated in *Caminetti v. United States*, 242 U.S. 470, 490 (1917): "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation…But…when words are free from doubt, they must be taken as the final expression of the legislative intent…in other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Caminetti* at 490. (Internal citations omitted). Many decades later Chief Justice Rehnquist remarked that "we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," *Garcia v. United States*, 469 U.S. 70, 76 (1984), which the Supreme Court has relied on as the "considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168,186 (1969).

At the same time, we have to be mindful of the dicta in *Exxon Mobil Corp., v. Allapattah Servs. Inc.*, where we read that:

> The authoritative statement is the statutory text, not the legislative history or any other extrinsic material…First, legislative history is itself often murky, ambiguous and contradictory…Second, judicial reliance on legislative materials like committee reports…may give unrepresentative committee members - or worse yet, unelected staffers and lobbyists - both the power and the incentive to attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text.

Allapattah Servs. Inc., 545 U.S. 546, 568 (2005). That said, the authors believe in the usefulness of legislative history for the same reasons that Chief Justice Marshall did:

> As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "where the mind labours to discover the mind of the legislature, it seizes every thing from which aid can be derived." [United States v. Fisher], 6 U.S. 358 (1805*).* Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past…We suspect that the practice will likewise reach well into the future.

Wisc. Public Intervenor et.al. v. Mortier, 501 U.S. 5*97*, 610-11 (1991).

[155] Former Congressman Bruce Morrison (D-N.Y.) on August 31, 2009, one of the architects of IMMACT90, told the authors that there is no basis in IMMACT90 for arguing that dependents should be exempt. He does say that the House bill H.R. 4300 would have exempted dependents but the EB level in the House bill would be much lower – 75,000 principal multiplied by 1.5 to give EB total of 187,000; however, his proposal was rejected in Conference. The goal in Conference

quota and not to the FB quota.

Despite the legislative history cutting against us, it still remains a mystery as to why INA § 203(d) was enacted. There was no need to do so since family members were counted in the pre-IMMACT90 quotas. Was INA § 203(d) introduced to ensure that family members would be counted especially after the House sought to exempt them? Or was it the converse? Could INA § 203(d) have been a vestige of the House's intent that was never taken out - to make sure that, even though these derivatives would not be counted against enlarged EB cap, they would not be left out in the cold but still get the same "green card" benefits as the principal?

If the Executive wanted to reinterpret INA § 203(d), there is sufficient "constructive ambiguity" here too for it do so without the need for Congress to sanction it. This, our final proposal, is consistent with the broad theme of our thesis that there is enough flexibility in the INA for de-linking family members from the worldwide and per country limits. If this happened, the EB and FB preferences could instantly become "current." The backlogs would disappear. The USCIS might even have to build a new Service Center!

But we do not want to end on such optimism and throw all caution to the winds. The legislative intent is contrary to our proposal. Thus, we propose a simple technical fix in Congress, which is to exclude family members from the FB and EB quotas. We do not see why this cannot be accomplished as there is already a pedigree for such a legislative fix. Not only did Congress try to remove family members in IMMACT90, but also attempted to do so in S. 2611, which was passed by the Senate in 2006. Section 501(b) of S. 2611 would have modified INA § 201(d)(2)(A) to exempt family from being counted in EB cases.[156] If Congress considers this technical fix, it will be politically palatable, the authors believe, even during these hard economic times. We acknowledge that restrictionists might well regard such a change as substantive rather than technical; the NumbersUSA[157] crowd would be all over this! Congress while not directly expanding numbers is doing so indirectly by not counting family members. Indeed, Congress contemplated categories directed toward the principal beneficiary of an FB or EB petition. A labor certification would be filed, requiring the employer to test the United States labor market, on behalf of the principal and not the family members. The EB and FB numbers ought not to be held hostage to the number of family members each principal beneficiary brings with him or her. Nor should family members be held hostage to the quotas. One principal beneficiary may have no family members while another, as we saw in our earlier hypothetical, may have seven. Of course, if Congress passes CIR, our proposal may not so relevant as Congress may boost total numbers to more realistic levels that reflect the reality of immigration in the 21st century. But in the event that Congress cannot politically increase numbers so expansively, a small technical fix, which already has some history, will make it possible to reinterpret INA § 203(d) in the way we have proposed. This will also go a long way in restoring balance and fairness to our immigration system. CIR ASAP also incorporates our idea of excluding derivative family members, although this exclusion of family

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was to set a total number. The House conferees wanted more, but former Senator Alan Simpson (R-Wyo.) wanted less and did not like exemptions. Ultimately, the EB number was set at 140,000. *See* Informal Interview of Congressman Bruce Morrison by Gary Endelman, Aug. 31, 2009. (on file with authors).

[156] Comprehensive Immigration Reform Act of 2006, 106th Cong. § 501(b) (2006). This was really a free vote since the Senate knew that Mr. Sensenbrenner, then House Judiciary Committee Chair, would not go to conference on this bill and they did not.

[157] NumbersUSA is an organization that advocates lower immigration levels. *See* NumbersUSA Website, Feb. 18, 2010, http://www.numbersusa.com/content/.

members is actually more restrictive than what we support. It would not include family members under the EB3 section, for example, nor would it include the family members of multinational managers. It would not include family members of EB2 beneficiaries based on a labor certification grant. It would not include family members of FB3 beneficiaries.

While CIR ASAP is a step in the right direction, we advocate excluding all derivative immigrants from the quotas, which will go a long way in restoring balance and fairness to our immigration system.

V. CONCLUSION

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 seventeen months of employment authorization was a regulatory response to an inadequate H-1B quota. When it limited the validity of a labor certification to 180 days, the U.S. Department of Labor did so on its own without the fig leaf of legislative authorization.[158] Remember when the Administrative Appeals Office handed down the decision in *In re N.Y. Dep't of Transp.*,[159] thus effectively repealing the national interest waiver statute for several years until the relaxation came?[160] 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 INA § 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 him or her eligible for adjustment of status under the CAA.[161] Did Congress tell the agency that it could do that? All of these

[158] 20 C.F.R. § 656.30(b)(1). This limitation was upheld in *Durable Mfg. Co.*, which stated that the Department of Labor had inherent authority to promulgate regulations under INA § 212(a)(5). *See Durable Mfg. Co.*, 578 F.3d 497 (7th Cir. 2009).

[159] 22 I&N Dec. 215 (BIA 1998).

[160] The national interest waiver, pursuant to INA § 203(b)(2)(B)(i), permits a waiver of the job offer and labor certification requirement, if the applicant can demonstrate that it is in the national interest. An applicant applying for the National Interest Waiver, at present, has a very difficult burden to overcome. Under the criteria set forth in *In re N.Y. Dep't of Transp., id.*, the applicant must satisfy a three-prong test. With respect to the first two, the applicant must show that he or she will be employed "in an area of substantial intrinsic merit" and that the "proposed benefit will be national in scope." It is the third that is extremely opaque and difficult to overcome. The petitioner must demonstrate that "the national interest would be adversely affected if a labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien." The Administrative Appeals Office went on to further illuminate this criterion as follows: "Stated another way, the petitioner, whether the [United States] employer or the alien, must establish that the alien will serve the national interest to a substantially greater degree than would an available [United States] worker having the same minimum qualifications." *Id*. Overcoming the third criterion is difficult, and allows the USCIS to shoot down the best of arguments made by a national interest waiver claimant. Indeed, the USCIS can always resort to this subjective criterion to thwart even the most meritorious of claims, which is that the claimant does not overcome the inherent interest of the government in making the job available to United States workers.

[161] *See* Pub. L. No. 89-732, 80 Stat. 1161 (1996). *See also* Doris Meissner, *Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other than a Designated Port of Entry,* April 19, 1999, Memo # USCIS HQCOU 120/17-P, http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=b97d8b1a12b3aec464971c659ad3f28. However, the recently issued 212(a)(6) Memo, *supra* n. 67, appears to have narrowed the fictional parole for a Cuban in

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 too does our proposal.

The USCIS' website has a chart on national trends for processing of I-485 applications.[162] The numbers have been declining as the chart shows but they are nowhere near to completing adjudication of all of these cases. Even with this new pre-adjudication procedure that was implemented, it is less than one-fourth of the cases received since 2008. Even if CIR passes, this long grey line of cases ripe for decision would not disappear. Congressional action might help alleviate the quota but not government backlog; if Congress increased the quota, there would probably be even more government backlog. Increasing the quota is not the silver bullet; as IMMACT 90, which vastly expanded quotas taught us, the "push" factors in those countries that send the most immigrants will intensify to create the waiting periods similar or greater to those that now suffocate the system. The day after CIR, the backlog will be with us still. While CIR will provide a more rational future, only the adoption of our proposals can begin to correct the past. Indeed, the USCIS has already recognized the value of pre-adjudication and the number of cases that have been completed in all but name waiting only for that golden priority date far exceeds the number of completed cases in recent years as the USCIS chart makes abundantly clear. The USCIS has embraced pre-adjudication for the same reason that they should adopt our proposals: only through the sustained pursuit of such proactive steps can the backlog be controlled and, hopefully, reduced. There is no law that allows them to pre-adjudicate I-485 applications but they do it because they have the administrative power to process these cases in the most effective manner in furtherance of the law.

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 employment visa law but the Executive can issue an EAD. 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 inaction are authentic manifestations of congressional intent. 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 three or ten year bar; how to reduce the size of the undocumented population who may already working here and contributing to the economy and how to satisfy the hungry manpower needs of employers once the dark cloud of recession lifts without creating a single new immigrant visa.

Our proposals can be encapsulated, here, in our conclusion, as food for thought. Bon Appétit!:

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order to render him or her eligible for adjustment under the Cuban Adjustment Act. The Cuban national must have been actually been paroled after surrendering himself or herself. An imaginary release will not count as parole under the new guidance, such as one who voluntarily comes to the CBP, ICE or USCIS and asks about his or her case, and then leaves freely without being given any evidence of parole such as an I-94 form.

[162] USCIS, NATIONAL VOLUMES AND TRENDS, http://dashboard.uscis.gov/index.cfm?formtype=9&office=5&charttype=1.

1. A “provisional” filing date based on an expanded definition of visa availability would allow the “green card” application to get rolling, along with making applicants eligible for interim work and travel benefits so that lives are not held hostage to the tyranny of priority dates; perfection of this provisional submission would still require immediate availability of an immigrant visa number.

2. When you combine being able to file for adjustment of status without a current priority date with adjustment of status portability, not to mention eligibility for spousal employment through an EAD, you have the “green card” in all but name, so long as care is taken to prevent children from “aging out.”

3. If EAD and parole were divorced from the adjustment of status, then there would be no need for other nonimmigrant visa categories to shift over to the H-1B category merely to remain in the United States since AC 21 extensions would then be irrelevant. They would already enjoy permission to work and travel regardless of whether they remained in nonimmigrant visa status. This takes away major pressure for ever-larger H quotas and, as a result, there will be less opposition to other EB reforms that are hurt by the antagonism to the H quota enlargements. Even though they could not adjust if not in lawful nonimmigrant visa status and never actually admitted due to INA § 245(c)(7) and § 245(k)(1), nothing would prevent beneficiaries of I-140 approved petitions who had parole and EAD from consular processing when their priority dates finally became current.

4. The need for a guest worker program would continue only for those who were not the beneficiaries of approved I-140 or I-130 petitions. This would make CIR smaller, more manageable and more politically palatable. It would actually increase the chances for passage of CIR. Those fortunate enough to have an approved petition would now have a choice, something that should be preserved so that the tyranny of priority dates is not replaced by the tender mercies of employer sponsorship.

5. This would cut down on the size of the undocumented population now trapped here for fear of leaving. If they had parole and EAD, they could come and go as they wanted to. No longer would those in the shadows have to remain hidden from view, cut off from family and friends and all that makes life worthwhile.

6. There would be no three or ten year bar since, as we noted earlier, INA §212(a)(9)(B)(ii) defines “unlawful presence” as someone who is here “without being admitted or paroled.” Parole eliminates accrual of unlawful presence.

7. Not only principal aliens but also their spouses would have work authorization with or without an EAD.

8. There would be need for any “green card” backlogs. Since the ability to work and travel can now be exercised outside the adjustment of status context, USCIS and the Department of State can now focus on those cases that have made it to the head of the line. They can devote precious resources to deciding cases, not keeping them on life support through heroic measures.

9. No longer subtract family members from EB or FB quotas. Count only the principal beneficiaries of I-140 or I-130 petitions. Amend INA § 203(d) to restore the exemption that the House of Representatives approved in 1990.

10. Adopt the suggestion of former USCIS Ombudsman Prakash Khatri for a one-time recapture of 219,000 unused immigrant visas gathering dust from INS/USCIS inaction during the 1994-2006 period.[163]

11. Allow extension of H-1B status for both spouses beyond the six-year limit when either spouse is the beneficiary of an immigrant petition or labor certification.

12. Allow alien beneficiary to exercise ownership over labor certification and move to a same or similar job with current or third party employer without a current priority date 180 days after the filing of an approved immigrant visa petition.

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 petition. 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."[164] We must not wait for Congress to act. However important CIR remains, it is not the only way. Even if we get CIR, our ideas retain their relevance. Let us not forget that, in the long run, CIR will result in more, not less, pressure on family-based immigrant quotas, unless Congress relaxes current limits. Indeed, this is precisely what happened with IRCA.[165] So long as the needs of the larger economy exceed the capacity of the quotas to respond, a way must be found to bridge the gap. Future administrations will still need the flexibility we seek to give them, either to facilitate the acceptance of adjustment applications or to extend parole and EAD to persons who may be left out under a future priority date system. CIR is a short-term fix for an immediate problem; our ideas provide the mechanism for a more fundamental realignment. This cannot happen without what F. Scott Fitzgerald rightly called "a willingness of the heart."[166] To make possible this good work, those who administer the system and those who use it must come to see our national immigration framework in an altogether new and different way, not as a problem to be controlled but as an asset to be developed, a potential to be realized, a promise that is ours to keep. This is a challenge not just for Congress but for all of us. Many times, both today and in the not too distant past, change has come not through a modification of the INA but as a result of agency regulation, adjudication and interpretation. In this time, at this place, the ability and willingness of relevant federal agencies to shape the immigration law in accord with the challenges of today and tomorrow is a necessary and proper manifestation of our societal complexity. Such initiative should not be undertaken nor understood as a replacement for legislative action but, rather, as a tactical blueprint to outline policies and procedures that can elicit judicial deference and allow for subsequent congressional ratification. As one people, one nation, we must embrace a sustained commitment designed to honor our historic ideals and maximize our competitiveness in the global marketplace. For those who think

[163] *See supra* n. 17.

[164] FRANKLIN ROOSEVELT, 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN ROOSEVELT: ADDRESS AT OGLETHORPE UNIVERSITY 639 (Random House 1938).

[165] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[166] F. SCOTT FITZGERALD, THE CRACK-UP (Edmund Wilson ed., New Directions 2009) (1945).

that the time for true reform has come and gone, we offer the hope of which Alfred, Lord Tennyson wrote in *Ulysses*: "Come my friends, 'tis not too late to seek a newer world."[167]

March 2010[168]

[167] ALFRED, LORD TENNYSON, POETICAL WORKS: TENNYSON: ULYSSES lines 56-57 (Wordsworth 1998) (1842).

[168] The authors wish to extend special thanks to Charles Oppenheim, Chief, Immigrant Control and Reporting Division, Visa Services Office, United States Department of State for patiently answering questions regarding the operation of the numerical control process, to David Isaacson for showing how much flexibility there is within the existing INA and always being willing to be around to bounce off ideas at any time of the day or night, and to Quynh Nguyen for her refreshingly original insights that teach us how to plan for the future. Along with Ted Ruthizer and Richard Steel, these are the real experts; the mistakes are ours. Finally, we offer our heartfelt thanks to Marcello Martinez Zambonino, a law student at New York Law School and extern at Cyrus D. Mehta & Associates, PLLC during Spring 2010 (as well as a Blue Book wizard!), for his tireless efforts in editing this article.