



January 29, 2015

Submitted via: <http://www.regulations.gov>

Ms. Laura Dawkins
Chief, Regulatory Coordination Division
USCIS Office of Policy and Strategy
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

**Re: Notice of Request for Information: Immigration Policy
79 Fed. Reg. 78,458 (December 30, 2014)
Docket ID: USCIS-2014-0014**

Dear Chief Dawkins:

The Alliance of Business Immigration Lawyers (ABIL) is pleased to submit immigration reform proposals in response to the December 30, 2014 Federal Register notice. ABIL is comprised of 20 of the top U.S. business immigration law firms, each led by a prominent member of the U.S. immigration bar. ABIL member firms employ over 250 attorneys (700+ total staff) devoted to business immigration in 25 major U.S. cities, plus 25 international cities.¹

ABIL first proposes several general administrative reforms, including proposals for visa modernization, that would reduce the complexity of the immigration system, promote program integrity and transparency, and stem fraud and abuse. ABIL then addresses questions 1, 2, 3, 4, 5, 6, 8, 10, 12, 15, and 17 of the Federal Register notice.

In addition, ABIL endorses the comments submitted by the American Immigration Lawyers Association to this Federal Register notice and the recommendations of the Administrative Conference of the United States at <http://www.acus.gov/recommendation/immigration-removal-adjudication> that relate to Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS).

General Proposals

Create a Single Administrative Tribunal for All Immigration Appeals. The U.S. immigration system is complex. One factor contributing to that complexity is the number of agencies

¹ More information about ABIL is at www.abil.com.

involved in immigration law and policy. The Obama administration should form an inter-agency working group to develop cross-memoranda of understanding, and ultimately regulations, among the several administrative appellate tribunals and boards identified below that now interpret the Immigration and Nationality Act (INA). Their collective purpose would be to create a single appellate body that would review the decisions of first-line adjudicators in all of the federal departments, agencies, and components that now issue divergent interpretations of immigration laws and regulations. The single administrative tribunal would adopt uniform rules of court and make rulings, whether precedential or non-binding as the case may be, that would create a single, uniform body of immigration “common law.”

This single tribunal would take the place of the following appellate bodies:

- The Executive Office for Immigration Review, whose units include Immigration Judges and the Board of Immigration Appeals (BIA), within the Department of Justice, exercising jurisdiction over the removal of foreign nationals from the United States;
- The Office of the Chief Administrative Hearing Officer, whose administrative law judges, also in the Justice Department, hear appeals relating to immigration-related discrimination, document fraud, Form I-9 paperwork violations, and the knowing employment of unauthorized workers;
- The Administrative Appeals Office—within U.S. Citizenship and Immigration Services, a component of the Department of Homeland Security—which reviews appeals and certifications of decisions by USCIS adjudicators in the field offices and regional service centers;
- The Admissibility Review Office of U.S. Customs and Border Protection (CBP), another DHS component, which reviews decisions made by inspecting officers at ports of entry to determine whether the port officer's determination of inadmissibility was correctly decided and considers requests of foreign nationals for waivers of inadmissibility.
- The Board of Alien Labor Certification Appeals, within the Department of Labor (DOL), which decides appeals denying applications by employers for temporary (H-2) or permanent labor certification;
- The Labor Department's administrative law judges and its Administrative Review Board, which review decisions involving Labor Department rules protecting U.S. workers and foreign employees in various nonimmigrant visa categories, including specialty-occupation employees (under the H-1B, H-1B1 and E-3 visa categories); and
- The Advisory Opinions unit with the State Department's Bureau of Consular Affairs (BCA), which provides unpublished guidance to and overrules consular officers with respect to questions of law arising in refusals of visa applications. (Unlike the current practice, BCA advisory opinions should be published unless the consular officer or the

BCA presents an articulable reason of national security or public safety that warrants a decision by the single immigration administrative tribunal to authorize non-publication.)²

ABIL urges DHS and DOS to work with the Labor Department to harmonize and reconcile the crazy quilt of immigration legal interpretations now spewing forth from these several administrative tribunals. A uniform body of immigration common law would benefit all stakeholders. Federal immigration agencies would benefit because the existing thicket of laws and interpretations that they each administer and enforce would be harmonized and made more comprehensible and manageable. Most importantly, immigration stakeholders would be better able to gain a general familiarity with immigration interpretations and better understand how to attain the immigration benefits they seek.

Expand Access to Legal Counsel. The cause of justice and the rule of law are impaired by artificial restraints now in place on the right to counsel in immigration administrative proceedings. The actions of counsel often spell the difference between the grant or denial of an immigration benefit. As USCIS has acknowledged in Policy Memorandum PM-602-0055, December 21, 2011, attorneys and representatives accredited by the Board of Immigration Appeals³ play a “meaningful role” in maintaining the integrity of the immigration system.

ABIL urges DHS and DOS to replace the antiquated policies and rules (described below) that unnecessarily constrain the access to counsel of citizens, noncitizens and other stakeholders requesting benefits or trying to protect their legal rights in immigration adjudications, programs, proceedings and interactions.

In ABIL’s view, the right to a lawyer in immigration proceedings is a broad right. It extends beyond merely allowing counsel to enter appearances in writing on behalf of clients, submit evidence and make legal arguments. Robust rules for access to counsel should allow the lawyer to be present in-person or by electronic means, such as by telephone or videoconferencing, and make real-time legal arguments orally in every case where a petitioner or applicant seeks to procure a benefit or avoid a penalty under U.S. immigration laws and regulations. The right to counsel should also include the right to be heard, through a lawyer of one’s choosing, whenever a party asserts a distinct and identifiable legal interest. Thus, in immigration proceedings where multiple parties hold a legitimate interest in the outcome, legal standing and the right to be heard by separate counsel of each party’s choice should be expressly granted in all immigration matters

² As outlined later in this comment, DOS and DHS should create a pilot system for the review of decisions by consular officers or by the DHS to refuse all immigrant visas and specified categories of nonimmigrant visas, including E-1, E-2, L-1 (blanket and individual) and O-1 visa applications.

³ ABIL’s comment in this section urges expanded access of immigration stakeholders to attorneys and accredited representatives. However, ABIL believes that in some situations access should be prohibited to avoid harming legitimate stakeholders and facilitating the unauthorized practice of law. For example, USCIS should inform the U.S. Department of Labor (DOL) that after a given date, DOL-approved labor condition applications and labor certifications prepared by “agents” who are not licensed to practice law or are not accredited representatives under auspices of the Board of Immigration Appeals will be rejected and treated as void for purposes of supporting an employment-based I-140 petition. This change would not require an amendment of the DOL regulations at 20 C.F.R. § 656.10(b)(1), which allows agents to submit labor certification applications on behalf of employers. Instead, DOL should notify employers on its website that USCIS will not accept certified labor certification applications prepared by agents, and will return any such applications to the employer directly.

so that the conflicts in interest that are so prevalent in the present immigration system may be avoided and due process made available to all.

ABIL recognizes that in some cases considerations of national security or public safety may justify restricting in-person or electronic access to counsel, e.g., where regional service centers or processing centers, unlike USCIS field offices, do not have safe and secure physical facilities to interview applicants, petitioners, beneficiaries and other stakeholders. Nonetheless, DHS and DOS should adopt the general principle that access to counsel is permitted unless special and clearly articulated circumstances require limits on the right to counsel. In those situations, only the least restrictive restraint on access to counsel should be established.

Allowing lawyers to be present at interviews and examinations will also minimize abuse and promote the integrity of the immigration system because lawyers are adept at identifying and reporting fraud and abuse in immigration programs. Thus, ABIL believes that had counsel been present in embassy or consulate waiting areas adjacent to the counters where visa applicants were interviewed, numerous flagrant instances of, or suspicious circumstances suggesting, visa fraud and acceptance of bribes by consular officers may well have been noted and reported.⁴

ABIL therefore recommends the following changes to departmental and agency practices:

Department of State:

U.S. consular officers should not bar attorneys from representing clients in person or by electronic means during interviews and examinations of visa applicants. Rather, DOS should amend the Department of State Foreign Affairs Manual (FAM) to provide the same access to counsel as is now allowed under the Iraqi and Afghan Special Immigrant Visa programs. See 9 FAM 42.32(D)(11) N12. These FAM provisions prescribing the right to counsel and role of the attorney in consular interviews should be broadened so that they apply to *all* immigrant and nonimmigrant visa applicants and to *all* persons who wish to give up lawful permanent resident status or renounce U.S. citizenship. Once these FAM provisions are published, DOS should propose new regulations providing these same rights to counsel on a more enduring basis.

In addition, new FAM provisions and DOS regulations should mandate that consular officers acknowledge the right to counsel and the standing of other individual and organizational stakeholders requesting the approval of visas, e.g., family-based and employment-based petitioners whose petitions provide statutory eligibility to immigrant and nonimmigrant visa applicants, and agents, associations or universities that have invited foreign nationals to address or entertain them.

⁴ See, e.g., *U.S. Official in Guyana Allegedly Traded Visas for Sex, Cash*, United Press International, July 8, 2013, accessible at http://www.upi.com/Top_News/US/2013/07/08/US-official-in-Guyana-allegedly-traded-visas-for-sex-cash/17771373334471/; *Former U.S. Consulate Employees Plead Guilty to Conspiracy to Commit Visa Fraud*, accessible at http://www.justice.gov/archive/opa/pr/2003/March/03_crm_170.htm; *U.S. Consulate Official Pleads Guilty to Receiving More Than \$3 Million in Bribes in Exchange for Visas-Scheme Allegedly Generated More Than \$9 Million in Bribes*, accessible at <http://www.justice.gov/usao/dc/news/2013/nov/13-379.html>; Department of State, Office of Inspector General, *Semiannual Report to the Congress, April 1, 2008 to September 30, 2008*, at 61, accessible at <http://oig.state.gov/system/files/115621.pdf>. (all links accessible as of Jan. 20, 2015).

Department of Homeland Security:

U.S. Customs & Border Protection:

CBP should allow applicants for admission to the United States the right to be represented by an attorney in person, or, if necessary, by electronic means, at all secondary inspection and deferred inspection proceedings (with narrow, articulable exceptions allowed on the ground of national security and public safety). These internal instructions and regulations should also acknowledge that individual and organizational stakeholders who or which may benefit from the grant of admission have the right to counsel and standing to assert their legal interests to the same extent as proposed above for consular officers.

U.S. Citizenship and Immigration Services:

Under current USCIS regulations, many parties with a tangible legal interest in the outcome of an immigration-benefits request have no right to appear in person or through legal counsel before USCIS. As immigration law has evolved, legislation and regulations have increased the actual and potential conflicts of interests. As a result, situations increasingly arise where a variety of individuals and entities have distinct legal interests to protect in an immigration matter. These parties in interest can include, among others:

- Individual beneficiaries of an I-129 or an I-140 petition (who currently cannot get a copy of the petition to show that they were in compliance with the law, to qualify under the 245(i) grandfathering provisions, or to port to an approved employment-based petition);
- Regional Centers in EB-5 immigrant investor petitions, which cannot enter appearances to demonstrate that their investments qualify under the initial EB-5 determination or the removal of conditions phase, even though an RFE might challenge the Regional Center's investment or its job-creation calculation;
- Individual EB-5 investors who do not have access to I-924 and I-924A proceedings involving the particular Regional Center in which each investor has invested;
- Employers that have a clear legal interest in the success of their foreign workers' I-485 adjustment of status cases or the workers' family members' applications for extension or change of status, given that the employer may be injured by loss of the employee's services if the family's member's presence in the United States is treated as unauthorized; and
- The guardian of a child's interest or an estranged spouse in a derivate employment-based immigration matter involving the principal applicant.

USCIS should modify Form G-28 and its regulations to recognize and allow separate legal representation of each of the parties with legitimate legal interests to protect. Failure to do so prevents USCIS from getting all the facts and considering all the legal issues raised in immigration matters. That USCIS's current technology infrastructure may lack the capacity to provide notices, decisions and correspondence to multiple parties in interest and their respective attorneys is no reason to deny due process.

USCIS Should Eliminate the Systemic Penalties and Consequences of Regulations That Chill the Right of Administrative and Judicial Appeal. ABIL maintains that non-frivolous appeals contribute material benefits to our nation’s immigration jurisprudence by helping to develop, clarify and refine the law, particularly when they form the basis for precedent decisions that can be cited by USCIS or immigration stakeholders.

Under current USCIS regulations, however, an individual beneficiary has no right of appeal and no right to remain in the United States or work while a non-frivolous appeal filed by the petitioner awaits adjudication. The visa-voidance and 3/10-year bars under the unlawful presence provisions of the INA penalize legitimate employers and nonimmigrants because they cannot be certain of victory on appeal. Thus, beneficiaries have no choice but to depart, thereby rendering the appeal moot and pointless in most cases. The problem could be resolved by issuing a USCIS regulation that time spent in awaiting the results of administrative and judicial appeals shall be deemed a “period of stay authorized” by USCIS and a category for which employment authorization can be granted.

While USCIS may arguably be concerned that allowing preservation of the status quo by the grant of employment authorization and the tolling of unlawful presence might produce frivolous appeals, new regulations and interim policy guidance should permit non-frivolous appeals while using sanctions to penalize those appeals that lack a good-faith and tenable factual or legal basis, e.g., by reliance on the “falsely-made” document sanctions of INA § 274C(f), involving appeals that have no basis in fact or law.

Adopt an Expansive Definition of Immigration Successorship in Interest. An August 6, 2009 USCIS Headquarters memorandum,⁵ without analysis, eliminated the salutary successorship-in-interest principle for EB1-2 outstanding researchers and EB1-3 multinational managers and executives. It also espouses a restrictive interpretation that would terminate a petition if minor changes occur in job duties or requirements, changes that would have had no materially adverse legal effect on the I-140 petition if the company had not undergone a merger or acquisition. Finally, the memorandum leaves uncertain the extent to which immigration successorship applies to nonimmigrant work-visa categories. USCIS should withdraw that memo and instead should adopt a broad and flexible definition of immigration successorship to allow a wide array of legitimate business combinations and other forms of corporate restructuring to occur without unnecessary and unwise immigration impediments.

In particular, DHS and DOS should adopt a successor in interest principle that would allow uninterrupted employment authorization and the preservation of employment-based immigrant visa and adjustment of status benefits. No longer should immigration successor in interest turn on an assumption of all or some liabilities, whether they be solely immigration-related liabilities or liabilities associated with the occupational classification of the particular beneficiaries affected by the change in corporate circumstances.

⁵ Memorandum from Donald Neufeld, Acting USCIS Associate Director for Domestic Operations, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)*, HQ 70.6.2 (Aug. 6, 2009), accessible at <http://1.usa.gov/1CcLf00>.

Moreover, USCIS should adopt a regulation that if there is a material change in the organizational structure that would affect employment-based visa eligibility, the new employer can submit a single “class-representative” petition⁶ covering all foreign national employees (who would be named in an attachment submitted by the petitioner, much like similarly situated employees are listed in the attachment to amended E-2 visa petition) in the same nonimmigrant visa classification whose job duties have not materially changed.⁷ Hence, an approval of the petition filed on behalf of the class representative’s employment authorization incident to status would stand as an approval of all other similarly situated foreign employees identified on the attachment (which would accompany the USCIS I-797 approval notice for the classification representative).

Create an Agency to Support and Protect the Economic Benefits of Immigration within the Department of Commerce or Another Cabinet Department. Existing Executive Branch departments protect and promote important national interests: foreign policy (State), homeland security (DHS), labor (DOL). No department performs a similar function to promote and defend the economic benefits of immigration as a means of fostering innovation, job creation, and economic prosperity.

“Fortress-America” policies and those that go too far in protecting domestic labor interests without recognizing the job-creating capabilities of employment-based immigration undermine important national interests.

ABIL urges DHS and DOS to develop memoranda of understanding with the Department of Commerce and other appropriate departments to provide for the services of a federal agency to support and protect the economic benefits of immigration. ABIL also proposes that these Departments jointly publish proposed and final rules rendering permanent the advocacy role suggested to benefit employment-based immigration.

In the meantime USCIS should take steps to espouse, protect and defend encroachments on the job-creating power of business-related immigration laws, e.g., by reigning in, reprimanding or terminating the employment of field office and regional service center adjudicators who fail to adhere to regulations, precedent decisions and policy guidance by adopting extra-legal interpretations of law that prejudice the right of business and individual stakeholders in employment-based immigration matters. In particular, the memoranda of understanding to confer on a cabinet-level Department the power to advocate and defend employment-based immigration should include the creation of a user-fee funded⁸ Office of Small Business Immigration

⁶ The class-representative approach is described in Alan Tafapolsky, Angelo A. Paparelli, A. James Vazquez-Azpiri & Susan K. Wehrer, *Thriving on Change: How to Solve Immigration Problems in Merger and Acquisition Deals*, 13th Annual California Chapters Conference Handbook (AILA 2010), and in Angelo A. Paparelli, Alan Tafapolsky, Ted Chiappari, Susan Cohen & Stephen Yale-Loehr, *It Ain't Over Till It's Over: Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes*, 5 Bender’s Immigration Bulletin 849 (Oct. 15, 2000).

⁷ See 8 C.F.R. § 214.2(e)(8)(v) (“In cases involving multiple employees, an alien may request that USCIS determine if a merger or other corporate restructuring requires the filing of separate applications by filing a single Form I-129, with fee, and attaching a list of the related receipt numbers for the employees involved and an explanation of the change or changes.”)

⁸ The funds for this purpose should be drawn from the Immigration Examinations Fee Account, INA § 286(m).

Advocacy and should enact meaningful protections that take into account the special needs, obstacles and challenges that small businesses face under current immigration law.

Create Explicit Immigration Protections and Benefits for Small Businesses. Small businesses create about 65 percent of all new jobs in America. These are companies formed when an entrepreneur takes a chance on a dream or when a worker decides it's time to become his or her own boss. These are also companies that drive innovation, producing 13 times more patents per employee than large companies. Moreover, a small company that may have started in an entrepreneur's garage may become a big business — and change the world.

Current USCIS practices, interpretations and adjudication trends have imposed unfair burdens and obstacles on small businesses. Working owners who have established corporate entities are denied approval of employment-based petitions by their companies through a piercing-the-corporate-veil contrivance founded on a supposed lack of an employer/employee relationship. I-140 petitioners are subjected to intense scrutiny of their ability to pay the offered wage even if they have been managing to pay it for years or have financial backing from venture capital or parent entities. Employers that hire an H-1B worker are subjected to intense scrutiny concerning the need for the worker, and if successful, may lose the worker when another officer disagrees when an extension is submitted. Employers of functional managers are deprived of their services as L-1s if they perform the function and do not merely oversee others doing it.

In addition, the USCIS VIBE initiative has exacerbated the problem because small businesses and start-ups, even those supported by venture capitalists and ingenious and profitable business plans, will not yet be reflected in Dun and Bradstreet's database.

Thus, USCIS, DOL and DOS should issue policy guidance and regulations under the Administrative Procedure Act that would provide that no petition or application seeking employment-based immigration benefits may be denied solely on the basis that the petitioner or applicant is associated with a small business or that the entity offering employment possesses the characteristics that are typical of today's small businesses.⁹

Establish an IRS-Style "Private-Letter-Ruling" Procedure for Immigration Stakeholders. The Internal Revenue Service has long provided a formal mechanism for individual stakeholders to gain guidance on the agency's views concerning the legal consequences of a particular transaction. A request for a private letter ruling can lead to a published ruling that is binding solely on the party making the request. Because private letter rulings are published, the public can better ascertain the agency's views in comparable situations and then, with advice of counsel, make reasoned determinations of the potential legal consequences of a particular course of conduct or transaction.

This process, if adopted by USCIS and the Advisory Opinions unit of the BCA, would be far superior to the unhelpful and at times poorly considered nonbinding letters issued by legacy INS

⁹ For a description of the characteristics of small businesses, see "Startups 101, the Early Stage Innovation Landscape," USCIS Academy Training Materials (Dec. 3, 2012), accessible at <http://www.nationofimmigrants.com/wp-content/uploads/sites/224/2013/05/Visa-Options-for-Entrepreneurs-USCIS-TRAINING-MA.pdf>.

and USCIS officials over the years at the request of inquiring lawyers. The publication of private letter rulings would also be superior to the ersatz advisory opinion process that exists under the E-2 regulations involving substantive changes, an adjudication that does not result in a formal written decision offering analysis, but merely a less-than-clear I-797 approval notice bereft of analysis and guidance on the interpretation of governing INA provisions or agency regulations.

Develop a Streamlined, Fast track Process for Immigration Guidance. The current process for announcing changes in interpretation and procedure does not provide immigration stakeholders with a meaningful opportunity to comment before changes are finalized.

The issuance of policy memoranda, FAQs, press releases, fact sheets and advisory letters – none of which permit lasting reliance by stakeholders and all of which lack stakeholder vetting in advance – flouts the rule of law and sows confusion about the already opaque immigration laws. The current APA rulemaking process, to be sure, is cumbersome and slow. It is in USCIS’s and the public’s interest that a fast-track process be created, perhaps involving two tiers – one for significant rules (the current APA process) and the other for rules of importance for which interim guidance is urgently needed. This interim guidance should first be published in proposed form and the immigration stakeholder community should be accorded the opportunity to submit comments and review the comments of other submitters. Normal APA rulemaking procedures would then follow.

Defer I-9 and IRCA enforcement. Given that the President’s stated intentions in announcing the Administration’s executive actions were to (a) avoid foreseeable harm to mixed-status families, and (b) allow hard-working undocumented immigrants to “get right with the law” and “come out of the shadows,” DHS should announce a temporary deferral of enforcement against otherwise law-abiding employers of I-9 paperwork and “knowing-unauthorized-employment” violations under INA § 274A to avoid termination of employment if the employer becomes aware that employees intend to file for deferred action for childhood arrivals (DACA) or deferred action for parental accountability (DAPA) benefits.

Without a deferral of enforcement of INA § 274A employers must terminate the employment of individuals whom the employer knows or should know lack employment authorization notwithstanding that the employees intend to submit non-frivolous applications for employment authorization under DACA or DAPA. In the case of DAPA beneficiaries, such terminations of employment would adversely affect U.S. citizen and lawful permanent resident children by depriving the family unit of an income stream before USCIS is prepared to grant employment authorization to their undocumented parents. It is reasonable, moreover, to infer that a similar adverse effect would apply to families with a close relative who intends to apply for employment authorization under the expanded DACA program. In addition, enforcement of INA § 274A against employers with employees who intend to seek employment authorization under DACA or DAPA would be antithetical to the purpose of the President’s executive actions because such employees would still be reluctant to come out of the shadows and get right with the law until their DACA- and DAPA-based employment authorization is in hand.

Accordingly, the Secretary of Department of Homeland Security should announce that ICE will defer enforcement of INA § 274A, will not issue Notices of Intention to Fine (NIFs), and will not

seek to collect fines thereunder with respect to employers whose workers evidence a non-frivolous intention to file for DACA or DAPA benefits. Any such enforcement efforts, including any NIFs issued between November 20, 2014 and the date of the Secretary's announcement, should be rescinded. This deferral of enforcement should continue until USCIS publicly announces that it has concluded its processing of all applications for employment authorization arising under DACA and DAPA. Nothing in the Secretary's announcement, however, should be interpreted to prevent INA § 274A enforcement for reasons of national security, public safety, human trafficking, or flagrant and recurrent violations of the prohibitions against the employment of individuals as to whom the employer possesses actual knowledge that such individuals lack employment authorization.

Comments on Specific Questions

- 1. What are the most important policy and operational changes that would streamline and improve the processing of immigrant visas at U.S. Embassies and Consulates, for both family-sponsored and employment-based immigrant visas?**

Expand the I-601A Provisional Waiver Program. USCIS and DOS should expand the provisional waiver program beyond that proposed in the November 20, 2014 memorandum from DHS Secretary Johnson.

Current regulations allow USCIS to make a provisional decision regarding a waiver of inadmissibility under INA § 212(a)(9)(B)(v) before the waiver applicant leaves the United States to apply for a visa, but only if the waiver applicant is seeking a visa based on an immediate relative petition, is seeking a waiver based on extreme hardship to a qualifying relative who is a U.S. citizen, and does not face certain other bars such as a removal order. The proposal made in Secretary Johnson's November 20, 2014 memorandum to extend this to all visa applicants with an immediately available visa number who are seeking an immigrant visa under INA § 212(a)(9)(B)(v) will streamline and improve the immigrant visa process. However, a further expansion would achieve significantly greater gains.

First, the provisional waiver process need not be limited to applicants for a waiver under INA § 212(a)(9)(B)(v). Many deserving immigrant visa applicants with qualifying U.S. citizen or LPR relatives have in their past an isolated incident of fraud or willful misrepresentation, rendering them inadmissible under INA § 212(a)(9)(C)(6)(i), for which they seek a waiver of inadmissibility under INA § 212(i). Just as gains in efficiency, and reduction of extreme hardship to qualifying relatives, are achieved by allowing a provisional application for a § 212(a)(9)(B)(v) waiver before the applicant departs the United States to apply for a visa, similar gains would be achieved by allowing a provisional application for a § 212(i) waiver. The same is true of a waiver for an applicant who may have assisted a close family member with an unlawful entry into the United States, leading to inadmissibility under § 212(a)(6)(E) that can be waived under INA § 212(d)(11), or an applicant who may have a criminal conviction leading to inadmissibility under INA § 212(a)(2) that can be waived under INA § 212(h). These other statutorily authorized waivers should also be amenable to a provisional waiver process. This would reduce the workload at consulates otherwise forced to process waiver-related cases in multiple steps, while also reducing the hardship to U.S. citizen and LPR qualifying relatives during adjudication. The

efficiency gains from allowing this would be significant, since each waiver processed in advance by DHS is one less waiver application that the consulate would need to be involved in.

The provisional waiver process should also be expanded by allowing concurrent filing of an advance Form I-212 application for permission to reapply for admission following execution of a removal order under INA § 212(a)(9)(A)(iii), in conjunction with any provisional waiver application. 8 C.F.R. § 212.2(j) allows an application for advance permission to reapply, but only allows an application for provisional waiver by one who does not have an outstanding removal order. 8 C.F.R. § 212.7(e)(4)(vi). The two advance waivers, although separately available, cannot be combined by an applicant who has an outstanding final order of removal, but would otherwise be eligible for a provisional waiver of inadmissibility. Particularly now that it has been clarified that only those with final orders of removal issued in 2014 or later are enforcement priorities, there is no reason to forbid such combining of an advance I-212 application with an I-601A, at least not by those whose removal orders date before 2014.

Finally, in those instances where an immediate relative of a U.S. citizen obtains a provisional waiver of inadmissibility, but who is ineligible for adjustment of status under INA § 245(a) because of not having been admitted or paroled into the United States, USCIS should exercise parole-in-place authority under INA § 212(d)(5). This would enable adjustment of status and render unnecessary consular processing of an immigrant visa. The combination of avoiding extreme hardship to the qualifying relative on whose behalf the provisional waiver was approved, along with reduction of consular workload, will often qualify as “urgent humanitarian reasons or significant public benefit” to justify such parole-in-place.

Allow Consular Reviewability. DOS claims that the judicial branch lacks jurisdiction to review visa refusals by consular officers. This proposition will be tested in a case now before the Supreme Court, *Kerry v. Din*, No. 13-1402. As an exhaustive historical analysis in an *amici curiae* brief in *Din* (accessible here: <http://bit.ly/1D6XQR1>), submitted by 73 immigration law professors and academics demonstrates, however, no such principle exists in U.S. jurisprudence.

The doctrine of absolute consular non-reviewability has never had any basis in case law. To the contrary, the Supreme Court’s case law allows for meaningful judicial review of consular decisions. Such review – including at least review to ensure that the consular officer follows the governing statutes and regulations, that there is some factual basis for findings made by the consular office, and that fundamentally fair procedures are used – is essential to ensure that the laws passed by Congress are followed.

The Obama administration need not wait for the Supreme Court’s decision in *Din* to modernize the visa system, promote systemic integrity and the rule of law, and minimize instances of visa abuse. However the Court may rule, DHS and DOS should act on the historic opportunity occasioned by the President’s executive order.

DHS and DOS should adopt internal policies--by amending the Memorandum of Understanding between the Secretaries of State and Homeland Security concerning implementation of § 428 of

the Homeland Security Act of 2002 (§ 428)¹⁰--and jointly promulgating proposed regulations to provide for meaningful, albeit limited, review of consular visa refusals.

DHS and DOS should create a pilot program for administrative and judicial review of all family-based and employment-based immigrant visa refusals as well as nonimmigrant refusals under the E-1 (treaty trader), E-2 (treaty investor), E-3 (Australian specialty occupation worker), H-1B (specialty occupation), L-1 (intracompany transferee) and O-1 (extraordinary ability) visa categories.¹¹

The policies and regulations so promulgated should expressly grant legal standing to parties who experience injury in fact as a result of a visa refusal, including immigrant and nonimmigrant visa petitioners, visa applicants and other “aggrieved parties,” including individual and organizational stakeholders alleging injury in fact as a result of a visa refusal.¹²

The pilot program should also enable data collection to provide sufficient information on trends by consular posts, by statutory grounds of visa refusals, by speed of final administrative review, etc., so that the two Departments, Congress and the U.S. public can assess results and evaluate whether the pilot program should be expanded and made permanent.

2. What are the most important policy and operational changes that would streamline and improve the processing of nonimmigrant visas at U.S. Embassies and Consulates, including visitor, student, temporary worker and other nonimmigrant visas?

Expand the Nonimmigrant Visa Reissuance Program. The visa reissuance program permits visa reissuance of biometric nonimmigrant visas without the personal appearance of the visa applicant in certain circumstances. 9 FAM 41.102. DOS should allow visa applicants to apply for reissuance by mail from anywhere in the world, including the United States. DOS should also resume visa revalidation at the Department of State in Washington, D.C. Both policies were prior practice by the State Department.

¹⁰ The Memorandum of Understanding is accessible at <http://www.gpo.gov/fdsys/pkg/CDOC-108hdoc131/html/CDOC-108hdoc131.htm>.

¹¹ Serious proposals for the creation of a process to review consular visa refusals have been made but have been largely ignored by DOS. *See, e.g.*, Administrative Conference of the United States, Recommendation number: 89-9, *Processing and Review of Visa Denials* (Dec. 15, 1989), accessible at <http://www.acus.gov/recommendation/processing-and-review-visa-denials>; American Bar Association, *Consular Visa Adjudication and Review* 56 (Feb. 1990, accessible at <http://bit.ly/1Jlth6s>); Angelo Paparelli & Mitchell Tilner, *A Proposal for Legislation Establishing a System of Review of Visa Refusals in Selected Cases*, Interpreter Releases (Oct. 7, 1988).

¹² Although section 428 states that the DHS Secretary does not have the authority “to alter or reverse the decision of a consular officer to refuse a visa to an alien,” nothing in this section precludes the creation of a system for review of consular visa refusals. If the reviewing authority concludes that a visa refusal was based on an error of law or fact, there is no need to reverse or alter the decision of the consular officer who refused the visa initially. DOS has long recognized that visa adjudications are based on a particular consular officer’s assessment at a particular point in time, and that applicants are not precluded from submitting another application. Thus, the reviewing panel would merely issue an order remanding the matter to a different consular officer to issue the visa based on a subsequent application presenting the same or similar facts or otherwise act in accordance the panel’s written instructions.

Visas by mail will not compromise any national security interest, as revalidations are now done in most countries through an outside contractor to receive applications for revalidation and to return passports with visas without compromising security interests. Since the visa applicant generally does not appear at a consular post, and revalidation adjudications are often done remotely, where the applicant is located at the moment of issuance is not generally known. Nor does it have a bearing on the process. In this fashion, for example, a baseball player in the middle of training or the baseball season could remain in lawful status in the United States while the nonimmigrant visa, generally a P visa, is revalidated in the home country. Visas are now being issued “by mail” through third party contractors in most countries. Permitting applicants to apply for reissuance while in the United States or elsewhere could save scarce government resources.

Visa reissuances for qualified applicants issued at the Visa Office in Washington, D.C. could result in great savings of consular resources without compromising the integrity of adjudications or national security. It costs about \$400,000 a year to support a foreign service officer abroad. If the Visa Office contracted with a third party to screen applicants for eligibility, receive passports and documents for delivery to the Visa Office, and return passports to applicants, there would be an enormous cost saving. A consular officer at the Visa Office, using the same data as adjudications for applications for visa reissuance at a consular post abroad, would make adjudications. This practice is currently in effect for diplomatic visas. The practice of accepting reissuance applications for E, H, L, O and P visas should be reinstated and F and J visas should be accepted for reissuance. The benefits to DOS and to U.S. employers are enormous, with no countervailing negative impact to any governmental interest. Indeed, if an applicant in the United States who is applying for reissuance at the Visa Office is deemed a security threat, the likelihood of detection and apprehension is greatly increased as the applicant can be investigated, interrogated and, if appropriate, apprehended in the United States.

3. What are the most important policy and operational changes that would streamline and improve U.S. Citizenship and Immigration Services (USCIS) processing of immigrant and nonimmigrant visa petitions?

Clarify L-1B Adjudications. The L-1B nonimmigrant visa classification is available to those who have been employed abroad for at least one continuous year in an executive, managerial, or specialized knowledge capacity with an employer which has a qualifying corporate relationship with the U.S. petitioner and where the U.S. petitioner is offering the individual a position that requires the employment of specialized knowledge from abroad. 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as that “special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.” This definition has generated much discussion, including a series of memoranda from senior level INS and USCIS officials. See, e.g., Memorandum from James A. Puleo, Acting INS Exec. Assoc. Comm., “Interpretation of Special Knowledge” (March 9, 1994); Memorandum from Fujie Ohata, Assoc. Comm., INS, “Interpretation of Specialized Knowledge” (Dec. 20, 2002); Memorandum from Fujie Ohata, Director, USCIS Service Center Operations, “Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status” (Sept. 9, 2004). Despite the volume of discussion,

little predictability exists as to how officers determine whether a set of facts presented by a petitioner meets the definition of “specialized knowledge.”

In response to a Freedom of Information Act, USCIS released L-1B petition data for FY2012 and FY2013. In FY2012, a total of 18,740 petitions were filed. Of these, 8,688 (46%) received Requests for Evidence (RFE) and 6,068 (32%) were denied. In FY2013, the numbers were worse. 17,723 petitions were filed, 8,363 (47%) received RFEs, and 6,242 (35%) were denied. What this means is that any time a U.S. petitioner files a petition, it is likely to receive a RFE. RFEs require additional work and effort that slows down business operations and eventually the economy. More clear guidance and consistent adjudications can avoid this.

Such high rates of RFEs and denials discourage employers from establishing or expanding businesses in the United States. Clear guidance and consistent adjudications will help encourage more U.S. petitioners to establish businesses in the United States, to transfer key specialized knowledge personnel to the United States to train others, and to contribute to our growing economy.

Establish More Predictability in E-2 Adjudications. An E-2 visa is available where an individual “has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living.” 8 C.F.R. § 214.2(e)(2)(i). U.S. consular posts differ in what constitutes a substantial amount of capital. Investors are therefore subject to the proclivities of each consulate and also subject to much unpredictability. What makes it worse is that to qualify for the E-2, investors must already have put their resources at risk or be in the process of doing so. While business always carries a certain level of uncertainty, there is no reason why the immigration process should contribute to this and create hurdles for investors to start businesses, which eventually lead to jobs for U.S. workers. While setting forth a fixed amount may be inconsistent with the spirit of the regulations, guidance such as a percentage of investment could facilitate more predictability for investors.

Grant Work Authorization to More Nonimmigrant Spouses. USCIS should grant employment authorization to spouses of nonimmigrants who have employment authorization, e.g., H-1B, O-1, P-1, R-1, and TN. Already, employment authorization exists for the spouses of certain nonimmigrants: E-1, E-2, L-1, and J-1. By extending employment authorization to more spouses, the United States can attract more professionals who often are married to professionals who desire to continue their careers in this country. Immigration practitioners have reported that it is common for professionals to turn down opportunities to come to the United States when the spouse learns that he or she will not be able to work in the United States as well. Countries such as Canada are already extending this spousal benefit. To increase our global competitiveness, the United States should do the same.

Extend the H-1B Cap Gap Fix to J-1 Exchange Visitors. USCIS already allows certain F-1 students who have an approved H-1B petition to remain in the United States after their OPT ends until they can start working in H-1B status. 8 C.F.R. § 214.2(f)(5)(vi). A similar regulation exists for J-1 exchange visitors. 8 C.F.R. § 214.2(j)(1)(vi). However, as far as we are aware, USCIS has invoked the J-1 regulation only once, in 2005. USCIS should apply this regulation every year.

Allocate NIW Green Cards to Qualifying Regions to Stimulate the Economy. USCIS should redefine the definition of a national interest waiver (NIW) in the EB-2 immigrant visa category to better suite state and local governments and community requirements. State and local governments know better than the federal government what companies and populations need and what to take into consideration concerning job creation, tax growth, and financial renaissance.

Communities experience numerous benefits when immigrant workers inhabit cities and regions. For example, immigrant workers spend their wages in U.S. businesses, which results in more jobs for more U.S. workers. Immigrants with advanced degrees and immigrants of any skill level who come to the United States on temporary visas create jobs for U.S. workers. Specifically, immigrants working in STEM fields with advanced degrees from U.S. universities create approximately an additional 262 jobs for U.S. workers. Finally, immigrants are more likely than U.S. workers to start their own businesses and help fuel technological and scientific innovation.¹³

USCIS should redefine the NIW program to include regional areas by allowing state and local governments to work as interested government agencies (IGAs). As an IGA, the state or local government agency would determine whether it is in the public interest that the foreign national qualify for an NIW and live in that particular region. Qualified areas could be determined by a specific formula, taking into account the city's population size, violent crime rate, poverty rate, and illiteracy rate. These criteria would demonstrate that the regional area requires immigrants to invigorate the economy and thus is the national interest.

4. What are the most important policy and operational changes that would streamline and improve the process of changing from one nonimmigrant status to another nonimmigrant status?

Extend a Grace Period for Extension or Change of Status. When an individual extends her nonimmigrant status or changes from one nonimmigrant classification to another, she must be in a valid nonimmigrant status. However, an individual can fail to maintain nonimmigrant status through no fault of her own. For example, an individual may be laid off and told to leave her job the same day. This may terminate the individual's nonimmigrant status on the very same day without prior notice to the individual. USCIS should extend a grace period of 30 or 60 days for an individual to find a new employer to sponsor her or to file an application to change nonimmigrant status. This would be consistent with grace periods currently offered to those in F-1 and J-1 status. Offering a grace period is also consistent with 8 C.F.R. § 214.1(c)(4).

Allow Change of Status Applications Even if the Applicant Temporarily Leaves the United States. USCIS should halt its practice of declaring an application for change of status to be abandoned if the applicant leaves the United States while such an application is pending. An application for change of status should be permitted to survive departure from the United States, just as an application for extension of stay survives departure from the United States under current USCIS practice.

¹³ <http://www.immigrationpolicy.org/just-facts/value-added-immigrants-create-jobs-and-businesses-boost-wages-native-born-workers>.

For example, consider a person who is maintaining valid L-1 status with a petitioning employer but who wishes to change status to H-1B with a different employer. If such an applicant leaves the United States briefly while the change of status application is pending, she should be allowed to resume the application for change of status upon her return. So long as the applicant has a valid visa for the category under which she is seeking to be admitted at the time, the applicant's future desire to change to another status is beside the point. This would remove the necessity for duplicative filings and allow for more legitimate business travel during the pendency of a change of employers that involves a change in status.

5. What are the most important policy and operational changes that would streamline and improve the process of applying for adjustment of status to that of a lawful permanent resident while in the United States?

Allow Immigrant Visa Applicants to File Adjustment Applications Earlier. USCIS should allow aliens caught in employment-based or family-based immigrant visa backlogs to file an I-485 adjustment of status application, based on a broader definition of visa availability than it currently recognizes.¹⁴ Doing so would promote efficiency, maximize transparency, and enhance fundamental fairness by allowing someone to file an I-485 application sooner rather than many years later if all the conditions towards the green card have been fulfilled, such as labor certification and approval of the Form I-140, Form I-130, or Form I-526.

Upon filing of an I-485 application, one can enjoy the benefits of “portability” under INA § 204(j) in some of the EB preferences, and children who are turning 21 can gain the protection of the Child Status Protection Act if their age is frozen below 21. Moreover, the applicant, including derivative family members, can also obtain employment authorization.

INA § 245(a)(3) only allows the filing of an I-485 application when the visa is “immediately available” to the applicant. But the INA does not define “visa availability.” While it has always been linked to the monthly State Department Visa Bulletin, this is not the only definition that can be employed. Nor is there any indication that Congress preferred or mandated this interpretation. USCIS should expand the concept of “immediate availability” in 8 C.F.R. § 245.1(g)(1) to allow submission of Form I-485 based on a provisional priority date without reference to a current priority date. No provisional submission would 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. As long as there is even one unused visa in the preference category, there can be a deeming of “immediate availability” under the proposed new definition. Final adjudication would only occur when there is a current priority date.

DOS should similarly amend the FAM for beneficiaries of approved I-526, I-140 and I-130 petitions who are outside the United States so as not to give those here who are eligible for adjustment of status an unfair advantage. Since an immigrant visa will not be valid when issued in the absence of a current priority date, USCIS will need to parole such visa applicants into the United States. DOS should amend 9 FAM 42.55 to allow provisional submission of an

¹⁴ For a more detailed analysis of this argument, see Gary Endelman & Cyrus Mehta, *Do We Really Have to Wait for Godot? A Legal Basis for Early Filing of an Adjustment of Status Application* (Aug. 29, 2014), <http://blog.cyrusmehta.com/2014/08/do-we-really-have-to-wait-for-godot.html>.

immigrant visa application based on a provisional priority date without reference to the current priority date. No provisional submission would 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 would only occur when there is a current priority date.

Allowing early adjustment of status with companion work authorization, travel permission, and AC 21-like adjustment portability will make possible a green card on a provisional basis in all but name. However, this is not all. The most important benefit may be the freezing of children's ages under the formula created by the Child Status Protection Act (CSPA). If USCIS were to only grant EAD and parole to I-140 beneficiaries, but stop short of allowing adjustment, then their children would turn 21, thereby aging out, long before the magic time for I-485 submission arrives. This is because section 3 of the CSPA only speaks of freezing the child's age when the petition has been approved and the visa number has become available. Also, the child must seek to acquire lawful permanent resident status within one year following petition approval and visa availability. Since *Matter of Vazquez*, 25 I. & N. Dec. 817 (BIA 2012), absent extraordinary circumstances, only the filing of the I-485 can do that. Under the current definition of visa availability, joined at the hip to the Visa Bulletin, they have no hope. Only through a modified definition coupled with the notion of provisional adjustment could they retain the CSPA age. This is why invocation of early adjustments themselves, not merely EAD and parole, to beneficiaries of immigrant visa petitions is so manifestly necessary. However, precisely as in the INA, the CSPA does not define visa availability. A change in the applicable regulatory meaning along the lines suggested above should also apply to CSPA and prevent the children of I-140 beneficiaries from aging out. This is especially relevant now since *Scialabba v. Cuellar De Osorio*, 573 U.S. ___, 189 L. Ed. 2d 98 (2014), substantially narrowed the utility of priority date retention.

The redefinition of visa availability proposed here not only provides the legal underpinning for early adjustment of status but also allows the children of I-140 petition beneficiaries to derive a priceless immigration benefit through this family relationship that would otherwise be lost. Moreover, the proposed redefinition of visa availability ought to also apply uniformly to beneficiaries of I-526 petitions and family-based I-130 petitions.

6. What are the most important policy and operational changes that would streamline and improve the inspection of arriving immigrants and nonimmigrants at U.S. ports of entry?

Grant a Right to Counsel at CBP Ports of Entry During Secondary and Deferred Inspection. INA § 292 guarantees all noncitizens the right to counsel (although at no expense to the government) in any removal proceeding before an immigration judge and in any appeal proceeding before the BIA. 5 U.S.C. § 555(b) also guarantees a right to counsel to any individual who is "a participant in a matter" before a federal agency. After an attorney has entered an appearance, federal agencies must serve counsel with all correspondence, notices, and other communications. Additionally, any person compelled to appear in person before a federal agency is entitled to be accompanied, represented, and advised by counsel.

However, 8 C.F.R. § 292.5 has limited these rights as they apply to individuals applying for admission to the United States. Applicants for admission in both primary and secondary inspection are denied the right to counsel unless they have become the focus of a criminal investigation and have been taken into custody. Even individuals who are subject to expedited removal proceedings under INA § 235(b)(1) have no right to counsel, despite the fact that those proceedings carry penalties substantially similar to those conducted pursuant to INA § 240 (e.g., removal under either provision carries with it a period of inadmissibility unless a waiver is obtained).

CBP officers sometimes use this regulatory lack of a right to counsel during inspection as an excuse to avoid communications with attorneys and to avoid providing a legal explanation for a decision in a particular case. CBP ports of entry, including preflight inspection sites, and deferred inspection sites have routinely implemented differing policies when allowing individuals access to counsel during secondary inspection, including the adjudication of an application for a benefit, as well as during deferred inspection. Some CBP ports of entry are flexible and are willing to engage with counsel, while others refuse to recognize counsel.

CBP should adopt a uniform policy to allow applicants the right to counsel during the inspection and adjudication process. This would be in line with the statutory criteria and allow for the expeditious handling of CBP's adjudication function by allowing counsel to address any apparent deficiencies, advocate for their client, and provide for a smoother adjudication process.

8. What are the most important policy and operational changes that would attract the world's most talented entrepreneurs who want to start and grow their business?

DHS should partner with states that wish to attract talented entrepreneurs from overseas.¹⁵ For example, Massachusetts has launched a [Global Entrepreneur in Residence](#) (GEIR) program. The GEIR facilitates partnerships with institutions of higher education to provide part-time work opportunities to foreign graduates who are entrepreneurs and want to grow their companies but who cannot remain in the United States due to the H-1B visa cap. The university, as a cap-exempt employer under INA § 214(g)(5)(A), can sponsor a foreign national who will not be counted towards the numerical limitations in INA § 214(g)(1). Non-profit affiliates to institutions of higher education can also qualify as cap-exempt employers.

INA § 214(g)(6) allows a person who has been sponsored by a cap-exempt university employer to accept concurrent employment with an employer who is subject to the H-1B numerical limitation. As long as the foreign national has not ceased to be employed with an H-1B cap-exempt employer, he or she can be approved for an H-1B visa through a cap-subject employer without regard to the H-1B annual numerical limitation.

[Vivek Gupta](#) is one such recipient of the GEIR program. The University of Massachusetts, according to a CNN news story, sponsored him in the university's Venture Development Center as an "entrepreneur in residence," where he will advise other founders of startup companies.¹⁶

¹⁵ For further details, see Gary Endelman & Cyrus Mehta, *The Laboratories of Democracy: State Initiative And Promotion of Immigration Reform*, <http://blog.cyrusmehta.com/2015/01/the-laboratories-of-democracy-state.html>.

¹⁶ The CNN report is available at <http://money.cnn.com/2014/09/29/smallbusiness/massachusetts-immigration/>.

This would allow Gupta's own startup WealthVine, a cap-subject employer, to sponsor him. While we do not know whether USCIS approved Mr. Gupta's H-1B visa petition through his company, the GEIR would allow entrepreneurs like Gupta to work for their companies in H-1B visa status, which otherwise may not have been available to them due to the annual H-1B limitation. The [USCIS Entrepreneurs Pathways portal](http://www.uscis.gov/eir), <http://www.uscis.gov/eir>, provides a guide to how founders can use their startups to apply for H-1B visas.

USCIS should make the H-1B visa process easier for entrepreneurs who have founded their own startups.¹⁷ Although 8 C.F.R. § 214.2(h)(4)(ii) requires the existence of an employer-employee relationship, which includes the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of such employee," it should not be a barrier for an entrepreneur to sponsor himself or herself. While the guidance provided in the USCIS Entrepreneurs Pathway portal, <http://www.uscis.gov/eir>, is useful, the information relating to using the H-1B visa by entrepreneurs is still limited by the rigid methodology and narrow assumptions of the Neufeld Memo¹⁸ that elevates the right of control over all the other factors set forth in the regulation, such as the right to hire, pay, fire or supervise the employee. Still, the USCIS suggests that a startup may be able to demonstrate this if the ownership and control of the company are different. This can be shown through a "board of directors, preferred shareholders, investors, or other factors that the organization has the right to control the terms and conditions of the beneficiary's employment (such as the right to hire, fire, pay, supervise or otherwise control the terms and conditions of employment)." However, this is unrealistic in the case of an entrepreneur who has given sweat and tears in organizing a startup only to cede all control in exchange for the H-1B visa.

USCIS should instead follow decisions that recognize the separate existence of the corporate entity. A corporation is a separate and distinct legal entity from its owners and stockholders.¹⁹ As such, a corporation, even if it is owned and operated by a single person, may hire that person, and the parties will be in an employer-employee relationship. USCIS should recognize this concept when an H-1B visa is filed on behalf of an entrepreneur. The DHS should be even more receptive when there is another investor or shareholder, and the beneficiary is not the sole owner of the entity. That person may be able to exercise control over the H-1B beneficiary, even if he or she has a minority interest. It may not be necessary to show that the other individual or entity has the power to discipline the beneficiary, but only that this person can exercise negative control over the beneficiary's decisions.

Other difficulties for an H-1B entrepreneur may require coordination with DOL. Every H-1B petition must be accompanied by a DOL-certified labor condition application (LCA). Under an LCA, the employer attests that it must pay the beneficiary the higher of the prevailing or actual wage, and must also do so on a regular prorated basis. In a startup, there may be no revenue stream to pay the entrepreneur initially. Thus, unless the startup is sufficiently capitalized

¹⁷ For further details, see Gary Endelman & Cyrus Mehta, *The Sweet Smell Of Success: H-1B Visas For Entrepreneurs*, <http://blog.cyrusmehta.com/2012/12/the-sweet-smell-of-success-h-1b-visas.html>.

¹⁸ Available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

¹⁹ *Matter of Tessel*, 17 I. & N. Dec. 631 (Acting INS Assoc. Comm'r 1980); *Matter of Aphrodite Investments Limited*, 17 I. & N. Dec. 530 (INS Comm'r 1980); *Matter of M*, 8 I. & N. Dec. 24, 50 (BIA 1958, Att'y Gen. 1958).

through venture capital or other forms of financing that can ensure a steady stream of income to the H-1B beneficiary at the required wage, the petitioning entity may be in violation of the DOL rules if it cannot guarantee a regular prevailing wage. There ought to be more flexibility with respect to how the wage is paid to a startup's founder, at least in the incipient stages.

Also, 20 C.F.R. § 655.731(c)(9)(iii)(C) states that any attorney fees paid by the H-1B beneficiary will be viewed as lowering the required wage that the employer must pay the beneficiary. DOL rules also bar an employer from paying the training fee of \$750 or \$1,500. In the case of a startup, where the H-1B beneficiary has invested his or her own money into the enterprise, the fact that the petitioning entity makes these payments ought not to be viewed as a violation of the DOL rules regarding impermissible payments. Since it is the entity that is making these payments, which is considered separate from the beneficiary, and which also controls the beneficiary, it should not be viewed as impermissible.

10. Focusing on the EB-5 immigrant investor visa, what policy or operational changes would (a) reduce existing burdens and uncertainties on the part of petitioners, Regional Centers, and other participants in the program; (b) ensure that this program is achieving the greatest impact in terms of U.S. job creation, economic growth, and investment in national priority projects that the capital markets would not otherwise competitively finance; and (c) enhance protections against fraud, abuse, and criminal misuse of the program by petitioners or Regional Centers?

Reduce Processing Times for EB-5 Project Applications. This is critical for the success of the program. There is no question that it is to everyone's benefit – USCIS, project developers, investors – to have USCIS adjudicate an approved project before investors invest and file I-526 petitions. However, this goal will never be achieved if project developers have to wait 8 months or longer for project approvals before investors can invest and file. If project developers are not assured of a consistent 4-month processing time, USCIS will continue to double its workload by forcing project developers to proceed to market the project, resulting in investors filings I-526 petitions while at the same time filing I-924s with exemplar petitions. USCIS then must adjudicate the exemplar projects on I-924s, adjudicate the same projects on I-526s, issue RFEs on I-924s and issue perhaps hundreds of the same or inconsistent RFEs on the project on I-526s. This is the present system in which no one wins and everyone loses. Eliminating these multiple filings and multiple RFEs would realize a significant saving in manpower and resources, which could enable USCIS to meet the 4-month processing goal without having to add additional staffing.

Expedite I-526 Processing for Investors in an Approved Project. To encourage project developers to use the I-924 process to obtain project approval, there should be some benefit to the project and its investors. A logical benefit would be to have investors in such projects receive I-526 adjudications far more promptly than investors in other projects. This would motivate developers to obtain project pre-approval. It also recognizes that the adjudication process for such investors is far more streamlined and straightforward. The most time consuming aspect of the I-526 processing is the adjudication of the qualification of the project. Once this is completed, a separate dedicated staff of adjudicators whose only role is to adjudicate source and path of funds should be able to complete the adjudication in 3 to 4 months. It only makes sense

that these petitions should have a prompt processing time than petitions that require full project adjudication. In fact, if the only issue is source and path of funds, USCIS should offer premium processing for such petitions. Premium processing, in turn, would increase fee revenue, which could produce funds for more adjudicators.

Process All I-526s in the Same Project Together. USCIS has been inconsistent in its application of two different concepts. On the one hand, USCIS at various times has stated that it will process all project I-526s together as a matter of processing efficiency. In fact, there were many examples where later investors in a project were processed far more quickly than earlier investors because all project issues were resolved. However, it appears that this laudable objective has fallen by the wayside recently in favor of a strict FIFO processing objective. This has resulted in processing inefficiencies whereby adjudicators are looking at investors in a project over a period of many months or sometimes even more than a year. This is also detrimental to projects that require approval of a certain number of investors before any money can be released to the project. The result is that projects may be held in abeyance until it becomes clear that a minimum number of investors have been approved and their funds released from escrow.

Implement a Separate Processing Queue for Investors Who are Subject to Quota Retrogression. This is another change that would have all winners and no losers. Investors subject to quota retrogression gain no benefit upon the approval of the I-526 petition. Many suffer a detriment because longer processing times could enable their children to immigrate with them under the provisions of the Child Status Protection Act. Investors not subject to quota retrogression would also win because their petitions could be adjudicated far more expeditiously, and they can actually benefit from the adjudications of the petitions by being able to immigrate to the United States sooner. USCIS would benefit by devoting its resources in a manner that maximizes benefits to its stakeholders without any need to expand its resources. Such a procedure would not be novel since USCIS has long delayed processing of family-based I-130 petitions in categories with long quota backlogs simply as a matter of allocation of resources.

Have a Separate Processing Line for Direct EB-5 Investors. Up until last year, when USCIS implemented a straight I-526 FIFO processing scheme, direct EB-5 petitions were adjudicated more promptly than I-562 petitions filed through regional centers. This made sense for some of the same reasons mentioned above with respect to I-526 petitions for investors in approved projects. Why should a direct EB-5 investor have to wait in line behind hundreds of investors in projects that require complex adjudication? By contrast, most direct EB-5 projects involve fewer issues for the adjudicator to deal with.

There is another reason why direct EB-5 investors should be in a separate and shorter queue. Unlike regional center investors, whose presence in the United States is not necessary for the development of the investment project, often the direct EB-5 investor is the hands-on manager of the investment project. As such, his or her presence in the United States is critical on a far more expeditious basis.

Allow G-28s for the Attorney for the EB-5 Project or Regional Center. There are two parties to an I-526 petition: the project developer and the investor. In many cases, the attorney for the

project developer is different than the attorney for the investors. USCIS' present modus operandi, which recognizes only the investor's attorney on an I-526 petition, creates various anomalous results. The attorney for the investor has to file a petition consisting mostly of information about a project for which the investor's attorney is not responsible and often has no knowledge of its veracity. If USCIS has questions about the project, it issues an RFE to the investor, who does not know the answer. The project developer must hope that the investor or the investor's attorney sends the information to the project developer. The project developer relies on the investor's attorney to submit its response, unaltered, even though the attorney does not represent the project developer. The present procedure invites different responses from different attorneys to the same RFE about the same project.

This result would be obviated if USCIS adopts the earlier suggestion that would result in project issues being dealt with at the I-924 stage – a petition for which the developer's attorney has filed a G-28. However, until that happens, USCIS should act consistently with other employment-based petitions. In all of the employment-based petitions, USCIS recognizes that the employer may have different counsel than the employee. The I-526 petition is the only example in which USCIS forces two independent parties to have the same attorney, to the detriment of everyone.

If USCIS recognizes the project developer as a separate party in the I-526 process, it would only be required to issue one RFE for the project instead of, for example, one hundred RFEs for one hundred investors in the project.

Improve ELIS. ELIS is an example of a laudable goal with a seriously flawed implementation. ELIS should be implemented in such a manner that there is one set of project documents available to investors and their attorneys online. USCIS should work together with stakeholders to develop a system that meets the needs of USCIS and stakeholders. USCIS should continue to prioritize improvements to ELIS, while looking to expand ELIS to include I-924 exemplar filings and allow RFE replies to be uploaded into the Regional Center's Document Library as they relate to project eligibility. USCIS should also offer faster processing to projects that use ELIS.

Create an I-829 Exemplar Process. Less attention has been paid to the I-829 process, largely because only a small percentage of investors have reached the point of I-829 filing. As more and more such applications are filed, the same kinds of processing inefficiencies that exist in the I-526 process are manifesting themselves in the I-829 process.

Take a project with 100 investors. 100 different petitions with possibly 100 different attorneys are filed containing documentation of which the investors and their attorneys know very little and cannot certify the veracity. Virtually 100% of the I-829 petition involves documentation that is only available to the regional center and the project developer. Hopefully – but not definitely – all 100 I-829 petitions will contain the same information about the project and its job creation. If USCIS has questions about the job creation or the issue of whether the investors have sustained their investments, USCIS currently must issue 100 RFEs. This doesn't make sense.

USCIS should create an I-829 exemplar process whereby USCIS can adjudicate all issues relating to the project. The project and its attorney would file this. The investor's attorney could file any issues specific to the investor on the I-829 when his or her filing window is reached. Any

issues relating to the project should be adjudicated before most investors file their I-829 petitions.

Of course, there may be some instances in which there are enough jobs for the early investors at the time they file their I-829 petitions and then more jobs are created by the time later investors file their I-829 petitions. This can be dealt with through a procedure to update or supplement the I-829 exemplar petition.

Establish a Procedure for an I-829 Exemplar Petition to be Filed for Projects with Material Changes. When a material change occurs in a project after the approval of conditional residence, the investor has to wait 21 to 24 months to learn whether the changed project will be sufficient for condition removal. A more efficient system for all concerned would be to have a procedure whereby USCIS could adjudicate the new materially changed project for EB-5 compliance. If necessary, this would give the investor the opportunity to make a different investment or effectuate whatever changes would be necessary to enable him to remove conditions.

12. How should relevant occupational categories, descriptors, and/or data, such as the Department of Labor's O*NET system ([http:// www.onetonline.org](http://www.onetonline.org)) be refined and updated to better align the prevailing wage determination process for visas with the evolving job market?

Work to Expand and Improve O*NET. The government should work diligently to expand the list of occupations in the O*NET. O*NET is supposed to be the definitive source for occupation information in the United States. It replaced the Dictionary of Occupational Titles (DOT). When the O*NET replaced the DOT, it eliminated more than 75% of the occupational codes to align the occupational codes with the codes in the Standard Occupational Classification (SOC) system. To conform to the SOC, the DOL's Bureau of Labor Statistics combined occupations with different DOT codes, specific vocational preparation (SVP) levels, skill levels, job duties, responsibilities, educational levels, etc. This resulted in the O*NET being extremely incomplete. It is also not updated fast enough to account for new positions created as a result of emerging technologies. In addition, it is not complete enough to account for existing occupations. The DOT was much more complete and comprehensive. The elimination of the DOT as an SVP source and the unrealistic compression of over 12,000 occupations into approximately 1,000 occupations have resulted in occupations being artificially joined and realistic minimum education and experience requirements rejected as exceeding the SVP. Often, the job zones assigned to O*NET occupations conflict with some of the DOL's own publications, including the Occupational Handbook, and are in sharp contrast to the SVP's in the DOT.

15. What are the most important policy and operational changes, if any, available within the existing statutory framework to ensure that administrative policies, practices, and systems fully and fairly allocate all of the immigrant visa numbers that Congress provides for and intends to be issued each year going forward?

Count Principal and Derivative Beneficiaries Together. USCIS and DOS should count family members together with principal applicants for purposes of INA § 203(d). The Immigration Act of 1990, when modifying INA §§ 201(a)(1) and 201(a)(2), only referred to family sponsored and

employment-based immigrants in INA §§ 203(a) and 203(b) respectively in the worldwide cap. This was a marked change from prior law, when all immigrants except for immediate relatives and special immigrants, but including derivative family members, had been counted. Congress did not intend in a case of limited visa availability to count only the principal and exclude the derivatives. In § 1244(c) of the Defense Authorization Act of 2008, Pub. L. No. 110-181, Congress explicitly stated that only principal aliens would be charged against the 5,000 visas allocated to Iraqi translators. Even if Congress imposed a numerical limit on principal applicants and exempted derivative applicants in special emergency legislation, this provision does not dictate how derivative beneficiaries who are subject to the general family or employment-based caps should be counted under INA § 203(d). If the Administration wanted to reinterpret § 203(d), there is sufficient ambiguity in the provision for it to do so without the need for Congress to sanction it. A government agency's interpretation of an ambiguous statute is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). When a statute is ambiguous in this way, the Supreme Court made clear in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), that the agency may reconsider its interpretation even after the courts have approved of it. *Brand X* can be used as a force for good. Thus, when a provision is ambiguous such as INA § 203(d), the government may reasonably interpret it in the manner suggested above.

Moreover, the cross-chargeability provision under INA § 202(b) should not be an obstacle. Even if § 202(b) has language regarding preventing the separation of the family, it does not mean that the derivatives have to be counted separately. If an Indian-born beneficiary of an EB-2 I-140 is married to a Canadian-born spouse, the Indian-born beneficiary can cross charge to the EB-2 worldwide rather than EB-2 India. When the Indian cross charges, the entire family is counted as one unit under the EB-2 worldwide by virtue of being cross-charged to Canada. Such an interpretation can be supported under *Chevron* and *Brand X*, especially the gloss given to *Chevron* by the Supreme Court in *Scialabba v. de Osorio* involving an interpretation of the provision of the Child Status Protection Act.²⁰ Once again, as with the per country EB cap, the concept of cross-chargeability is a remedial mechanism that seeks to promote and preserve family unity, precisely the same policy goal for which ABIL contends.

Expand Parole in Place. USCIS currently grants parole in place (PIP) for certain members of military families. USCIS should extend PIP to all immediate relatives of U.S. citizens. This would allow them to adjust in the United States rather than travel abroad and risk the 3- and 10-year bars of inadmissibility under INA § 212(a)(9)(B)(i). The concept of PIP could also be extended to other categories, such as beneficiaries of I-130 immigrant visa petitions. However, such individuals must demonstrate lawful status as a condition for being able to adjust status under INA § 245(c)(2), and the current USCIS memo granting PIP to military families states that “[p]arole does not erase any periods of unlawful status.”²¹ There is no reason why this policy cannot be reversed. The grant of PIP, especially to someone who arrived in the past without

²⁰ See Cyrus Mehta, David Isaacson & Gary Endelman, *Scialabba v. de Osorio: Does the Dark Cloud Have a Silver Lining?*, 19 *Bender's Immigration Bulletin* 1021 (Sept. 15, 2014).

²¹ USCIS, Policy Memorandum PM-602-0091, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)* (Nov. 15, 2013), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

admission or parole, can retroactively give that person lawful status too, thus rendering him or her eligible to adjust status through the I-130 petition. The only place in INA § 245 where the applicant must have maintained lawful nonimmigrant status is INA § 245(c)(7), which is limited to employment-based immigrants. Family-based immigrants are not so subject. For purposes of INA § 245(c), current regulations already define “lawful immigration status” to include “parole status which has not expired, been revoked, or terminated.” 8 C.F.R. § 245.1(d)(v). Indeed, even if a person has already been admitted previously in a nonimmigrant visa status and is now out of status, he or she should be able to apply for a rescission of that admission and instead be granted retroactive PIP. Thus, beneficiaries of I-130 petitions, if granted retroactive PIP, ought to be able to adjust their status in the United States.

USCIS should also extend PIP to beneficiaries of employment-based I-140 immigrant visa petitions. While employment-based adjustment applicants need to also maintain nonimmigrant status under INA § 245(c)(7), which will not be achieved through PIP, its retroactive grant could still erase the prior unlawful presence, enabling an I-140 beneficiary to receive an immigrant visa at an overseas consular post without triggering the 3- and 10-year bars upon departure from the United States. Thus, while the beneficiary of an employment-based petition may not be able to apply for adjustment of status, retroactive PIP would nevertheless be hugely beneficial because, assuming PIP is considered a lawful status, it will wipe out unlawful presence and will thus no longer trigger the bars upon the alien’s departure from the United States.²²

Allocate More Visa Numbers Earlier in the Fiscal Year. DOS should designate all immigrant visa categories with remaining numbers as Current during some month sufficiently far in advance of the end of each fiscal year to allow for complete number usage, as well as during the last month of the fiscal year (i.e., September). While DOS has made its best efforts in past years to set cutoff dates that will spur sufficient demand for visa numbers so that none will go unused at the end of a fiscal year, there are frequently such unused numbers left over.

As is known from the experience of DOS and USCIS in July of 2007, when the cutoff dates for nearly all employment-based preferences became Current, setting the cutoff dates in this way has the potential to spur very substantial demand for visa numbers. This procedure could be generalized to apply to family-based preferences as well, to the extent that they had visa numbers remaining in a particular fiscal year.

If such an “all-Current” Visa Bulletin were routinely issued far enough in advance of the end of the fiscal year that USCIS would have the opportunity to “pre-adjudicate” a substantial number of applications for adjustment of status filed as a result of such a Visa Bulletin, the resulting demand would ensure that when the end of the fiscal year came in September, there would be a sufficient number of pre-adjudicated cases to absorb any remaining leftover visa numbers. No numbers would ever go unused, because all USCIS and DOS would need to do, on the last business day before the end of the fiscal year, would be to approve and assign visa numbers to a sufficient number of the pre-adjudicated adjustment applications. It would be, at that point, a simple clerical action.

²² For further details, see Gary Endelman & Cyrus Mehta, *Two Aces Up President Obama’s Sleeve To Achieve Immigration Reform Without Congress – Not Counting Family Members And Parole In Place*, http://blog.cyrusmehta.com/2014/06/two-aces-up-president-obamas-sleeve-to_29.html.

17. From the perspective of petitioners and applicants, which elements of the current legal immigration system (both immigrant and nonimmigrant systems) are most in need of modernized information technology (IT) solutions, and what changes would result in the most significant improvements to the user experience?

The IT infrastructure used for immigration benefits needs substantial revamping as suggested below:

- A. The proliferation of separate online databases for form completion and submission, currently maintained by disparate federal immigration agencies, involves needless duplication of effort in data entry and data correction. DHS (USCIS and CBP) DOL (the Office of Foreign Labor Certification (OFLC)) and DOS (BCA) should work to achieve interoperability for users so that employers, petitioners and applicants for immigration benefits, lawyers, law firms and organizational stakeholders such as universities need not be forced to re-enter the same data into disparate, siloed systems.
- B. All possible questions in online forms that function as a database, such as the BCA's DS-160, where distinct questions appear as determined based on earlier answers to prior questions, should be published and available in full with a cross-referencing of questions and answers by visa category so that the public, as contemplated by the Paperwork Reduction Act, can know in advance what information to assemble.
- C. The USCIS transformation program and its ELIS application, and the BCA's online forms (DS-160 and DS-230) and automated system used for the generation and issuance of visas, should be made available for pre-release testing by outside IT experts such as the major providers of electronic immigration case management and forms generation systems, and major companies with extensive IT capabilities serving as employment-based nonimmigrant visa petitioners. Pre-release testing would include tests for security, reliability, ease of use and overall functionality.
- D. All electronic forms should provide the opportunity to expand on or clarify an answer to any question on the form in data fields permitting unlimited entry of text, since many questions cannot be answered truthfully and fully with, for example, a simple "yes" or "no" reply. Many such questions require the application of fact to law and thus require an answer that is consistent with applicable law. As currently configured, these forms invite a later accusation by federal immigration authorities of, *inter alia*, a willful, material misrepresentation under INA § 212(a)(6)(C), a falsely made document under INA § 274C(f), or a false statement under 18 U.S.C. § 1001.
- E. The attorney for an employer (with authorization of the subject individual employee or family member) should be allowed to access and download the electronic I-94. As the CBP e-I-94 system now is configured, only the applicant for admission who is ultimately admitted, or his or her attorney, can access the database and retrieve the I-94. Many large corporations centralize the management of their foreign employee's maintenance of immigration status through counsel. Without access to the e-I-94 system by corporate

counsel, this process is severely impeded and the prospect of an inadvertent violation of the unlawful-presence 3- and 10-year bars could occur.

- F. Online visa application and immigration forms should allow the user to move from one screen to the next without completion of all relevant data requested in the screen. Often, some but not all information is not presently available. The online systems should also allow saving, downloading, and emailing partially completed forms so that information already provided need not be required to be re-entered again.