ABIL Offers 12 Business Immigration Recommendations for the Incoming Biden Administration

The Alliance of Business Immigration Lawyers, Inc. (ABIL)[1] has drafted the following 12 recommendations to reform business immigration in the early days of the Biden-Harris administration. This list is not exhaustive. Rather, it focuses on actions that the new administration can take administratively to benefit the largest number of individuals, families and businesses, while spurring domestic job growth and economic prosperity. These recommendations align with the consensus recognition by the incoming administration and the Joint Economic Committee of Congress regarding the economic value that immigrants and immigration bring to the United States.[2]

1. Restore the customer-service ethos and recognition of our heritage as a nation of immigrants in the USCIS mission statement. The mission statement of U.S. Citizenship and Immigration Services (USCIS) should reflect our nation's heritage and values. It should also inspire USCIS employees to recognize and foster the benefits of legal immigration in their work (family unity, refugee and labor protection, and promotion of economic prosperity). By changing the mission statement, the agency would send a message of inspiration to its personnel, immigration stakeholders, the nation and the world. In tandem, the new administration should instruct USCIS to: (A) restore its former deference policy on affirming previously approved grants of immigration benefits when extensions of status involve no material change in the facts; (B) stop rejecting properly filed forms that fail to put "not applicable" or "none" where such notations are unnecessary (e.g., requiring the "current location" of "deceased relatives"); (C) stop using instructions on immigration forms – which have the force and effect of a regulation under 8 C.F.R. § 103(a)(1) – as an end run around formal notice-and-comment rulemaking under the Administrative Procedure Act (APA); and (D) cease issuing boilerplate, kitchen-sink requests for evidence or notices of intent to deny or revoke immigration benefits unless the request or notice expressly articulates an examination of the relevant evidence presented, cites relevant legal authority (no more making stuff up), limits the "ask" to unresolved issues, acknowledges eligibility criteria that have been satisfactorily established, and offers a clear explanation for the agency's action, including a rational connection between the facts found and the agency choice made. Moreover, USCIS adjudicators, just like immigration judges and members of the Board of Immigration Appeals, must be required to sign their name to their decisions (or a pen name, if necessary for security purposes). This way adjudicators who do not comply with these new requirements could be provided additional training.

[1] ABIL is an invitation-only strategic alliance of over 40 prominent law firms in the United States and abroad. ABIL is comprised of more than 420 experienced immigration attorneys and law professors, including several past presidents of the American Immigration Lawyers Association, who have joined forces in advancing best practices in the provision of legal services and positive outcomes for their immigration clients. ABIL advocates publicly for procedural due process, adherence to the rule of law, and enlightened reform of U.S. and foreign immigration laws through comments to proposed agency regulations, continuing legal education, and support for publication of immigration-related educational materials and books. ABIL's U.S. members include Fausta Albi, Dagmar Butte, Philip Curtis, Laura Danielson, Rami Fakhoury, Bryan Funai, Vic Goel, Kehrela Hodkinson, Mark Ivener, Kirby Joseph, Charles Kuck, Vincent Lau, Marketa Lindt, Hannah Little, Robert Loughran, Cyrus Mehta, John Nahajzer, Kristal Ozmun, Angelo Paparelli, Julie Pearl, John Pratt, William Stock, Lynn Susser, Bernard Wolfsdorf, and Stephen Yale-Loehr.

[2] "Immigrants, the Economy and the COVID-19 Outbreak," U.S. Congress Joint Economic Committee (June 30, 2020), accessible at https://www.jec.senate.gov/public/index.cfm/democrats/2020/6/chc-jec-release-report-on-immigrants-the-economy-and-the-coronavirus-crisis.

2. Eliminate racial and national-origin profiling in immigration cases by issuing a Presidential proclamation or executive order that, unless otherwise mandated by law, the federal immigration agencies shall:

- Judge people seeking immigration benefits or relief from removal as individuals, based on their factual and legal circumstances;
- Refrain from discriminating against or profiling people by color or national origin; and
- Apply neutrally phrased legislation even-handedly, without regard to any personal agenda of the adjudicator to serve as an unappointed line of defense against an influx of applicants from a particular country or with a certain complexion.

The President's order should require the Secretaries of State, Labor, Justice, and Homeland Security to produce a formal plan within 90 days to investigate and eliminate racial and national-origin discrimination or profiling, discipline or dismiss any immigration officials who are found to have engaged in prohibited profiling, and publish periodic progress reports. Under the order, claims of racial or national-origin discrimination or profiling should be jointly investigated and violations enforced by the DHS Office of Civil Rights and Civil Liberties and the Justice Department's Civil Rights Division.

3. Rescind the three H-1B regulations (DOL wages,[3] specialty occupation,[4] and lottery registration selection[5]) published this fall to allow time for the administration and Congress to develop holistic reforms of the specialty occupation visa category that balance labor protections and business needs.

4. Direct USCIS and the State Department to reinstate and exercise freely their respective authority to waive the requirement that employment-based applicants for adjustment of status or nonimmigrant visa reissuance be interviewed before these benefits can be granted, i.e., allow adjustment of status to be approved for employment-based applicants without interview, and restore State's prior visa-by-mail reissuance process within the United States.

5. Rescind recently revised policies on the use of discretion in adjudications because the policies (A) were adopted without sufficient public notice and opportunity for comment, (B) do not give adequate guidance to adjudicators on how and when to exercise discretion, (C) involve adjudicative decisions shielded from judicial review, and (D) suggest – if not outright mandate – applying discretion to matters, factors or eligibility criteria that are not legally subject to agency discretion.

6. Return to the prior 90-day adjudicatory timeframe and automatic 180-day extensions for all timely filed work authorization applications.

7. Stop counting derivatives separately under the family and employment-based immigrant visas preferences. INA § 203(d) supports the unitary counting of derivatives. The administration's new interpretation will likely be found to be reasonable under *Chevron* deference and *Brand X*. For more details, see *Proposal for the Biden Administration to Reduce Backlog: Count the Family Together So That They May Stay Together.*

8. Take USCIS out of investigations and limit its role to adjudicating requests for immigration benefits. The Homeland Security Act of 2002 (HSA) states that USCIS should engage in only limited activities. As a recent amicus brief filed by ABIL explained, the HSA allows USCIS to decide requests for immigration benefits (e.g., asylum, visa petitions, work permits, permanent residency and

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[3] Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 Fed. Reg. 63,872 (Oct. 8, 2020).
[4] Strengthening the H-1B Nonimmigrant Visa Classification Pro-gram, 85 Fed. Reg. 63,918 (Oct. 8, 2020).
[5] Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions, 85 FR 69,236 (Nov. 2, 2020).

naturalization), but not to conduct investigations and intelligence-gathering activities. USCIS should therefore be ordered to shutter its Fraud Detection and National Security (FDNS) directorate, or limit that unit's role to data collection and analysis. To the degree that immigration officials suspect crimes or fraud, Immigration and Customs Enforcement should conduct any investigation that may be warranted, as the HSA provides – subject to the new Administration's enforcement priorities and under even-handed procedural due process protections, such as issuing advance notice of inspection in writing (except where imminent harm or solid evidence of crimes require dispensing with prior notice). USCIS should end unannounced FDNS site visits.

9. Promote entrepreneurial immigration. This should be done by amending Schedule A labor certification, formally recognizing that owners of start-up or existing legal entities can "self-sponsor" as petitioners for employment-based nonimmigrant and immigrant visa benefits, and allowing adjustment of status portability where an adjustment applicant pursues self-employment in the same or similar occupational classification as stated in the approved labor certification. In addition, devolve to states and municipal governments an annual number (per state and per capita) of EB-2 national-interest waiver petition approvals for petitions on behalf of beneficiaries whom the local or state government authorities believe will promote direct or indirect job creation and economic development. Finally, reactivate the entrepreneurial parole regulation and revive the guidance on how entrepreneurs can use nonimmigrant visa categories to obtain status through their startups.

10. Rapidly advance "Dates for Filing" (DFF) cutoffs in the Visa Bulletin to maximize the number of I-485 adjustment applications based on the Executive Branch's historically elastic view of immediate visa availability under INA § 245(a)(3). This can be made possible so long as one visa is kept in each visa preference category each year.

11. Use the DFF to freeze the age of children under the Child Status Protection Act rather than the Final Action Dates (FAD) in the Visa Bulletin. Doing so will protect many more children from aging out and allow them to obtain permanent residency with the parent. If an I-485 can be filed under the DFF based on visa availability under INA § 245(a)(3), there is legal justification for the age of the child to be protected under the DFF based on similar language relating to the visa being available pursuant to INA § 203(h)(1)(A).

12. Parole into the United States beneficiaries of approved I-130 and I-140 petitions who are waiting overseas. This can be modeled on the Haitian Family Reunification Parole Program. Family-based beneficiaries will be able to file adjustment applications based on a current DFF. Although employment-based beneficiaries will not be able to file adjustment of status applications due to INA § 245(a)(7) requiring the beneficiary to be in a nonimmigrant status (which parole is not), the beneficiaries can be made to leave the United States and process for their immigrant visas at a U.S. consulate when the Final Action Date is current and return as lawful permanent residents. For more details, see *Proposal for the Biden Administration: Using the Dual Date Visa Bulletin to Allow the Maximum Number of Adjustment of Status Filings.*