Seeing Green In US Immigration Policy

by Cyrus D. Mehta

The latest economic meltdown, resulting in the government's $700 billion plus financial bailout, makes us all despondent about this country's economic future. Couple this with the latest jobless report where 159,000 jobs were lost in September as compared to 73,000 in August and gas prices at over $4 per gallon. Amidst all this bad news, sensible immigration reform in Congress, even for legal immigrants, continues to flounder. The prospects of the passage of a bi-partisan bill, H.R. 5882, to capture unused employment-based immigrant visas from previous years so as to alleviate the horrendous backlogs in the green card quotas for those who have been sponsored by US employers remain extremely slim.

Yet, it is time now to recognize that one of the ways for the U.S. to breakout from this economic meltdown is to be the world's greatest innovator in green technology. Imagine replacing the current automobile, still reliant on the 19th century internal combustion engine, with cars that run solely on electricity generated by fuel cells. Or developing these fuel cells that convert natural gas, or for that matter sugar, into diesel or jet fuel. America must quickly gear its immigration policy to attract the best and the brightest to its shores to partake in the development of this technology, similar to how internet and web technologies developed in the 1990s, which also resulted in the creation of whole new industries and millions of jobs. The commercialization of pioneering green technologies will create millions upon millions of new jobs for Americans.

It is imperative that we have an immigration policy that recognizes this potential, and thus ensures that the pioneering green technologies are created in the US rather than in other countries. The U.S. cannot afford to lose out in this race by not being able to attract the people around the world who are desirous of developing these technologies. If given an opportunity, they may rather do so in the US given easy accessibility to venture capital, research at universities, innovative marketing and the potential to raise further funds through the capital markets. But Congress is always slow to act, given that every sensible immigration measure is vociferously opposed by rabid anti-immigration groups. Although these groups profess to only be opposed to illegal immigration, their opposition to bills such as H.R. 5882, a measure to ameliorate the endless waits that potential immigrants have to suffer, amply demonstrate their xenophobic tendencies that reflexively oppose any positive immigration measure, be it for legal or undocumented immigrants. Congress has also yet to act on the shortage of H-1B visas each year, when the annual cap dropped down to 65,000 in 2003, which has forced employers to scramble on April 1 every year to file petitions so as to ensure getting selected under what has come to be known as the H-1B Visa Lottery.

Even if the H-1B visa is not readily available, there are other provisions in the Immigration and Nationality Act that can still facilitate America's competitiveness in pioneering technologies. A glorious chapter in positive immigration reform was the enactment of the Immigration Act of 1990 (IMMACT90), which not only expanded employment-based immigrant visas but also created new opportunities for talented immigrants to seek permanent residence without a job offer, such as the Person of Extraordinary Ability category and the National Interest Waiver. Since 1990, we have seen no further reform in business or employment-based immigration except for the American Competitiveness in the 21st Century Act of 2000 (AC21), which introduced the concept of job flexibility or portability. In other words, a green card applicant whose adjustment of status application is pending for more than 180 days to "port" to a same or similar job and still continue with the green card process even though the original sponsoring employer is no longer in the picture. . Until Congress acts again, which may be a pipe dream, it is at least hoped that the United States Immigration and Citizenship Services (USCIS), the agency

within Department of Homeland Security, that grants immigration benefits, interprets the provisions introduced by IMMACT90 and AC21 generously and broadly to ensure that foreign nationals who wish to come to the US are not dissuaded and go elsewhere or remain in their home countries. There are already provisions in the existing law that can facilitate America's continuing competitiveness in innovative and pioneering technologies.

Take for example the National Interest Waiver, which permits a waiver of the job offer and labor certification requirement, if the applicant can demonstrate that it is in the national interest. An applicant applying for the National Interest Waiver, at present, has a very difficult burden to overcome. Under the criteria set forth in *Matter of New York State Dept. of Transportation* (NYSDOT*)*, 22 I&N Dec. 215 (Assoc. Comm'r 1998), the applicant must satisfy a three-prong test. With respect to the first two, the applicant must show that he or she will be employed "in an area of substantial intrinsic merit" and that the "proposed benefit will be national in scope." It is the third that is extremely opaque and difficult to overcome. The petitioner must demonstrate that "the national interest would be adversely affected if a labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien." The AAO went on to further illuminate this criterion as follows: "Stated another way, the petitioner, whether the U.S. employer or the alien, must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications."

Overcoming the third criteria is difficult, and allows the USCIS to shoot down the best of arguments made by a national interest waiver claimant. Indeed, the USCIS can always resort to this subjective criterion to thwart even the most meritorious of claims, which is that the claimant does not overcome the inherent interest of the government in making the job available to US workers. On the other hand, the USCIS must recognize that green technologies are brand new technologies, and requiring a foreign national to have an employer test the US market through a labor certification application will be inherently futile and a waste of resources, which will only benefit a bloated foreign labor certification bureaucracy within the Department of Labor (DOL). A foreign national whose "green" idea has attracted the attention of a venture capitalist in the US and who has a cogent plan to develop the product should be granted the National Interest Waiver without the need to go through a labor certification.

Another category of IMMACT90 that requires no job offer or labor certification is the Persons of Extraordinary Ability category. But this requires the applicant to demonstrate that he or she has risen to the very top of the field of endeavor. One can be talented and on the cusp of pioneering a new technology, but may not as yet be able to demonstrate being (at least not as yet) at the very top of the field. A recent New York Times article describes an innovator who developed a prototype of a fuel cell in his garage, which could convert natural gas into electricity, through chemical reaction rather than combustion. (See Jon Gertner, *Capitalism to the Rescue*, The New York Times Magazine, October 5, 2008). A foreign national like this innovator may not be able to qualify under the Extraordinary Ability category, as the technology has not yet been proven and he or she may not be considered a leader in the field, but might be able to under the National Interest Waiver. The quick grant of the National Interest Waiver should ideally also rapidly lead to the green card so that this individual can have the flexibility to grow a business unencumbered to visa restrictions and create tens of thousands of job opportunities.

Yet, the National Interest Waiver category may not readily apply to all people. Foreign nationals may be employed as engineers for solar electric systems or wind turbines or for monitoring photovoltaic modules in established alternative energy companies (see www.greenjobs.com). The employer, under the current system, will have to file a labor certification first before applying for a green card. The Labor

Department does not consider any engineering job to require more than a bachelor's degree and two years experience, according to its job database on www.onetonline.org. If an employer legitimately requires a Master's degree, or for that matter a PhD, and a few years of experience, the DOL will automatically consider it as a restrictive requirement and require the employer to justify this alleged restrictive requirement through business necessity. Such a labor certification is likely to be scrutinized and audited, resulting in unnecessary delays. The DOL, like the USCIS, also ought to recognize the importance of green jobs, and give more leeway to an employer to freely determine the legitimate minimum educational and experience requirements. Also, the DOL may consider waiving the testing of the US labor market for foreign nationals in green jobs like it has been doing for nurses and physical therapists.

It should be noted that the National Interest Waiver or labor certification, even if successfully granted, will be ineffective if the foreign national cannot obtain permanent residency right away but has to wait for years in the Employment-based Second Preference (EB-2) until the priority date becomes current. While the EB-2 is current for foreign nationals born in just about every country of the world, it is backlogged for those born in India and China. It is for this reason that a bill like H.R. 5882 is so important for legal immigrants from China and India. This bill should not be controversial whatsoever, even if allegedly opposed by groups claiming that it will take away U.S. jobs, as it does not create any new category or add to existing numbers. All that it does is to recapture lost numbers of prior years, which will go a long way in benefiting a potential green card applicant from India or China who wishes to pioneer a green technology in the US.

It is thus essential that the USCIS liberalize its interpretation of the National Interest Waiver and other categories to facilitate foreign talent in the US, who in turn can innovate and create millions of new jobs. The DOL must also do the same with regards to labor certification filed on behalf of foreign nationals who are being sponsored for green jobs. It is also important that Congress permits foreign nationals to quickly obtain green cards once their initial petitions are approved by the USCIS, or if that is not politically feasible for Congress at the present time, are at least able to simultaneously file adjustment of status applications with the immigrant visa petition even if the date is not current. Even if they do not get their green cards quickly, at least the filing of an adjustment application will allow them to exercise job flexibility under AC21 while they wait some years to obtain the green card. And if Congress is unable to also take this baby step in the right direction, the beneficiary of an approved immigrant visa petition should be allowed to visit the US on the B-1 business visa (as well as liberalize the B-1 in lieu of the H-1B doctrine) or the L-1 intra-company transferee visa, assuming that the applicant is employed overseas and wishes to transfer to a branch, affiliate or subsidiary in the US, while waiting endlessly for the green card. A foreign national who qualifies for an L-1 visa may also independently qualify for a green card as a multinational executive or manager, and here too the USCIS has been extremely tough on small businesses that petition for their multinational managers. The USCIS must realize that it is these businesses, even though small, are at the forefront of innovation and thus become less stringent in determining whether an individual can qualify as a top manager in a small business.

Finally, the USCIS needs to relax a bit and not reflexively spit out long Requests for Evidence (RFEs) on almost every petition that is filed. Applying for an immigration benefit, even the National Interest Waiver, should not be rocket science. It is preferable that "rocket science" skills be utilized in pioneering new technologies in the US rather than obtaining immigration benefits. The struggle that a foreign national undergoes in obtaining the National Interest Waiver or other immigration benefit also compels the applicant and his or her lawyer to respond to the USCIS with mountains of paper, which is counterintuitive in an age of increased environmental consciousness.

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