

Comprehensive Immigration Reform Is Waiting in the Wings

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Following President Obama's reelection, numerous political pundits have suggested that there are improved prospects for passing comprehensive immigration reform ("CIR") in 2013.¹ Latino and Asian-American voters, observers note, overwhelmingly supported the President in the election, in part because of his past support for CIR and his administration's effort to redress Congress's failure to pass the DREAM Act by establishing the Deferred Action for Childhood Arrivals ("DACA") program.² Evidently the election results, exit polls and the changing composition of the electorate took Republicans by surprise. As a result, some GOP lawmakers now evince a similar dedication to enacting CIR. The pressure for sweeping reform now appears to be considerable on both sides of the aisle.

Despite the political momentum and President Obama's vow to push CIR through Congress in early 2013,³ and even though the need to fix our broken immigration system has never been more pressing, doubts persist over whether federal lawmakers will successfully resolve the highly contentious aspects of any reform package. Unfortunately, by 2014 the millions of foreign nationals residing in the United States without authorization may well, for the most part, still be living here without legal status.

There are several reasons for this glum prediction:

First, if our government's profound inability to agree on a path out of our fiscal crisis is any indication, our elected officials are too polarized to negotiate effectively on controversial issues.

Second, after the perceived failure of the 1986 Immigration Reform and Control Act to curb illegal immigration⁴, neither side is likely to force the issue of broad immigration reform until illegal border crossings significantly decrease. While there may be improvements in border integrity, and centralized efforts to control the flow of illegal immigration are likely to intensify as our

1 See, e.g., Lisa Lambert, "Obama seeks comprehensive immigration reform in early 2013," Reuters (November 14, 2012), accessible at <http://www.reuters.com/article/2012/11/14/usa-obama-immigration-idUSL1E8MEHCB20121114>. (All web links are current as of December 19, 2012.)

2 See Elise Foley, "Latino Voters In Election 2012 Help Sweep Obama To Reelection," The Huffington Post (November 7, 2012), accessible at: http://www.huffingtonpost.com/2012/11/07/latino-voters-election-2012_n_2085922.html.

3 See supra N.1.

4 See, e.g., "A Reagan Legacy: Amnesty For Illegal Immigrants," NPR (July 4, 2010), accessible at <http://www.npr.org/templates/story/story.php?storyId=128303672>.

technology improves, the lack of coordination with our southern neighbors and a deficit of manpower are serious impediments to enforcement.⁵

Third, adding or expanding the range of visa options and expanding or eliminating the annual visa quotas are seen by many knowledgeable observers as essential to address the future flow of immigrants, so that pressures to enter unlawfully do not build up again. But there is no consensus on those measures.

Reasonable Expectations – A Wish List for 2013

Although the chances of CIR passing next year seem slim, there are areas of immigration law where reform is not intrinsically controversial, and where it should be comparatively easy to pass the appropriate legislation or make ameliorative regulatory and procedural modifications.⁶ Out of the list of reforms with a realistic chance in 2013, our top five include the creation of green card avenues for workers in STEM (science, technology, engineering and mathematics) fields, passage of the DREAM Act, authorization of dependent visas for same-sex spouses and partners, improvements to the employment authorization process and a raised ceiling on H-1B and H-2B visa numbers.

I. STEM Visas

Both Republicans and Democrats agree that the business community needs easy and immediate access to the best and brightest talent the world has to offer.⁷ Nevertheless, backlogs are so severe that some individuals with professional job offers may have a wait exceeding twenty years for a green card.⁸ By the time these individuals obtain the right to reside permanently in the United States, they will be closer to the end of their careers than the beginning.

In an attempt to improve the situation, the U.S. House of Representatives recently passed a bill to eliminate the Diversity Visa lottery program and use the immigrant visa numbers from that program to grant annually up to 55,000 green cards to advanced degree holders working in Science, Technology, Engineering and Mathematics (“STEM”) fields.⁹ House of Representatives Judiciary Committee Chairman Lamar Smith explained the purpose of the STEM measure in his introduction: “This bill makes our immigration system smarter by admitting those who have the

5 See Richard M. Stana, “Testimony Before the Committee on Homeland Security and Governmental Affairs, U.S. Senate: DHS Progress and Challenges in Securing the U.S. Southwest and Northern Borders” (March 30, 2011), accessible at <http://www.gao.gov/new.items/d11508t.pdf>.

6 For additional reform proposals, see Angelo Paparelli, “Reforming Immigration ‘with Liberty and Justice for All,’” accessible at <http://blogs.ilw.com/angelopaparelli/2012/11/reforming-immigration-with-liberty-and-justice-for-all.html>.

7 See “Transcript And Audio: Second Presidential Debate,” NPR (October 16, 2012), accessible at <http://www.npr.org/2012/10/16/163050988/transcript-obama-romney-2nd-presidential-debate>.

8 See http://www.travel.state.gov/visa/visa_1750.html for information about visa priority dates and statistics.

9 STEM Jobs Act (H.R. 6429), accessible at http://judiciary.house.gov/issues/issues_STEM%20Jobs%20Act.html.

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education and skills America needs. STEM visas are substituted for diversity visas, which invite fraud and pose a security risk.”¹⁰

Because of the trade-off of STEM for Diversity Visas, which encourage inclusiveness in the population of new immigrants, this bill fell flat in the Democrat-controlled Senate on December 5, 2012. The Obama Administration also opposed its passage.¹¹ After voicing his objection to the STEM Jobs Act proposed in the Senate by Senator John Cornyn (R-TX), Senator Chuck Schumer (D-NY) proposed consideration of the BRAINS Act, the Democrats’ version of the bill, which only would have created new visas. Senator Cornyn objected to consideration of this bill,¹² and we were left with nothing.

Looking forward, since Republicans and Democrats fundamentally agree that STEM visas would benefit the economy, this could easily be a stand-alone bill that flies through or the first step toward compromise that forms the basis for a more ambitious bill. Leveraging STEM visas – or any area of consensus – in the fight over immigration reform is a zero-sum game.

II. The DREAM Act

The Development, Relief, and Education for Alien Minors Act or “DREAM” Act, was first proposed in 2001 by a bipartisan coalition in order to grant lawful immigration status to innocent minors who are in the United States without authorization through no fault of their own.¹³ Since then, multiple bills have been considered by the Senate and the House of Representatives, but each has failed.

Congress’s failure compelled the Obama Administration to implement a stop-gap measure this year – the DACA program. Similarly to the DREAM Act, DACA provides work authorization and a two-year deferral of immigration prosecution for certain qualifying childhood arrivals to the United States. President Obama has repeatedly confirmed that DACA is a temporary program meant to be replaced by Congressional action on CIR or the DREAM Act. Given that the benefits of DACA are temporary, and the program has been compromised in states like Arizona, which refuses to provide DACA beneficiaries with driver licenses,¹⁴ it is essential that Congress act to improve the situation of this group right away. Consensus in the post-election environment should be a possibility since there is enough support for the fundamental point of the DREAM Act on both sides of the aisle.

¹⁰ “Statement of Judiciary Committee Chairman Lamar Smith Floor Consideration of H.R. 6429, the ‘STEM Jobs Act of 2012,’” (September 20, 2012), accessible at <http://judiciary.house.gov/news/Floor%20Statement%20HR%206429.html>

¹¹ See “Statement of Administration Policy: H.R. 6429 – STEM Jobs Act of 2012,” accessible at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr6429r_20121128.pdf.

¹² See <http://democrats.senate.gov/2012/12/05/objections-to-stem-jobs-act-and-brains-act/>.

¹³ See <http://dreamact.info/>.

¹⁴ See Roque Planas, “Lawsuit Challenges Arizona Driver’s License Ban For DACA Immigrants,” The Huffington Post (November 29, 2012), accessible at http://www.huffingtonpost.com/2012/11/29/arizona-immigrants-drivers-license_n_2212261.html.

III. Availability of Dependent Visas and Green Cards for Same-Sex Partners

Regardless of how the Supreme Court rules in the two pending cases about the Defense of Marriage Act and Proposition 8 in California,¹⁵ the State Department already has introduced work-arounds (albeit insufficient ones) to recognize same-sex partners as dependents for nonimmigrant visa purposes (essentially allowing them in as tourists), and a more flexible option for some same-sex partners of diplomatic visa holders.¹⁶ In addition, the State Department has established a J-1 visa that is available to same-sex partners of U.S. citizen Foreign Service Officers returning to a post in the United States.¹⁷ If the State Department has the authority to make such adaptations, then surely such license could extend to other nonimmigrant categories.

In addition, the Uniting American Families Act introduced in 2011 by Representative Jerrold Nadler (D-NY) would amend the Immigration and Nationality Act to include same-sex “permanent partners” in the list of familial relationships allowing for green card sponsorship.¹⁸ On December 14, 2012, two Republican members of the House of Representatives signed onto the bill, which may be a positive sign that pressure for a change in our deplorable exclusionary system is building in Congress.¹⁹

IV. Employment Authorization

The USCIS prohibits the filing of an application to renew an employment authorization document (“EAD”) more than 120 days before its expiration date. Despite a regulatory mandate to adjudicate these applications within 90 days of receipt,²⁰ the USCIS has been unable to meet this deadline in many cases. If an applicant has not received a new EAD by the expiration date of her prior document, the pending application provides her no basis for continuing to work. An easy solution to this would be to provide an automatic extension of work authorization based on a timely-filed renewal.²¹ To further simplify the process, the USCIS should eliminate EADs for nonimmigrants altogether, and incorporate automatic work authorization into the provisions for appropriate visa categories, such as for L-2 dependents of intracompany transferees.

On a related note, there are few dependent visa categories that allow for employment authorization eligibility. Currently, the Obama Administration is considering a proposal by the Department of Homeland Security to amend its regulations to “extend ... the availability of employment authorization to H-4 dependent spouses of principal H-1B nonimmigrants who have

15 See “Supreme Court On Gay Marriage: Prop 8, DOMA To Receive Hearings,” The Huffington Post (December 7, 2012), accessible at http://www.huffingtonpost.com/2012/12/07/supreme-court-gay-marriage_n_2218441.html.

16 See “Visas for Diplomats and Foreign Government Officials,” available at http://travel.state.gov/visa/temp/types/types_2637.html#immediate.

17 See Erica Pearson, “Immigration benefits arrive for same-sex couples ... but only if you’re a diplomat,” New York Daily News (February 23, 2011), accessible at <http://www.nydailynews.com/news/national/immigration-benefits-arrive-same-sex-couples-diplomat-article-1.138696>.

18 The text of H.R. 1537 is available at <http://www.thomas.gov/cgi-bin/bdquery/z?d112:H.R.1537>.

19 See Elise Foley, “Uniting American Families Act Wins Support From Two Republicans,” The Huffington Post (December 18, 2012), accessible at http://www.huffingtonpost.com/2012/12/18/uniting-american-families-act-republicans_n_2322779.html.

20 8 C.F.R. § Sec. 274a.13.

21 Provisions already exist for automatic extensions of employment authorization documents for some foreign nationals in F-1 optional practical training (see 8 C.F.R. §214.2(f)(5)(vi), 8 CFR 214.2(f)(11)(i)(C) and 8 CFR 274a.12(b)(6)(iv)) and Temporary Protected Status (see, e.g., 77 F.R. 1710).

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begun the process of seeking lawful permanent resident status through employment and have extended their authorized period of admission or ‘stay’ in the U.S.”²² The proposal states that “Allowing the eligible class of H-4 dependent spouses to work encourages professionals with high demand skills to remain in the country and help spur the innovation and growth of U.S. companies.”²³ We propose that the same logic applies to spouses of other work-authorized visa holders, and that this amendment be extended to cover dependent spouses of other work-authorized foreign nationals, regardless of whether they have begun the process of applying for permanent residence.

V. Our Quota System and the H-1B and H-2B Visas

The United States limits the number of visas allocated annually for most immigrant visa categories and some nonimmigrant ones.²⁴ In many categories, the quotas do not pose a hardship since the cap is rarely reached. However, the caps for H-1B visas (workers in a specialty occupation) and H-2B visas (skilled and unskilled workers in non-agricultural jobs) – now, respectively, at 65,000 and 66,000 per year – pose an extreme hardship on U.S. employers as the limited quota numbers and the short window of time to petition²⁵ do not correspond with business hiring practices and needs, and there is rarely a suitable alternative visa category. The business community has complained for years about this limitation, which prevents employers from hiring the most qualified professionals on a rolling basis.²⁶ We suggest that the cap should be eliminated or at least raised significantly to meet the legitimate demands of U.S. employers.

Beyond 2013

In addition to the very necessary reforms that President Obama has mentioned will be part of his CIR package,²⁷ which include a legalization program for the undocumented, there will be no meaningful reforms of our dysfunctional immigration laws without the following measures.

I. Due Process Reforms

Despite the common understanding that “The due process and equal protection clauses embodied in our Constitution and Bill of Rights apply to every ‘person’, and are not limited to U.S. citizens,”²⁸ the rights of foreign nationals to fight an unjust outcome in the immigration process are severely restricted.²⁹ For example, the longstanding doctrine of consular nonreviewability

²² Proposed rule, “Allowing Certain H-4 Dependent Spouses to Apply for Employment Authorization,” accessible at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=1615-AB92>.

²³ Id.

²⁴ INA § 201, 8 U.S.C. § 1151.

²⁵ For H-1B employment in FY2013, the window was open for less than three months.

²⁶ See, e.g., Emily Parkhurst, “Seattle Tech Community Calls for Reform of H-1B Visa Program,” Puget Sound Business Journal (September 7, 2012), accessible at <http://www.bizjournals.com/seattle/blog/techflash/2012/09/tech-community-calls-for-reform-of.html?page=all>.

²⁷ See <http://www.whitehouse.gov/issues/fixing-immigration-system-america-s-21st-century-economy>, for details about President Obama’s plan.

²⁸ <http://www.aclu.org/immigrants-rights/due-process>.

²⁹ See Angelo Paparelli, Ted Chiappari and Olivia Sanson, “Foreigners on U.S. Soil: To Know Your Rights Is to Know Very Little,” New York Law Journal (June 27, 2012).

preempts nearly all administrative and judicial review of visa denials at consular posts.³⁰ In the Second Circuit Court of Appeals, only a violation of the First Amendment of the United States Constitution has been deemed a sufficient basis for review of a decision at a consular post.³¹ This doctrine is almost absolute in its prohibition on judicial or administrative review.

With respect to domestic decisions, under the REAL ID Act of 2005, habeas corpus review of final removal orders was eliminated along with the courts' jurisdiction to review the Department of Homeland Security's discretionary decisions.³² Additionally, in the visa petitioning process the beneficiary has no standing to fight the determination of the adjudicator, even if that decision is prejudicial to the beneficiary's interests.³³

The inability of our administrative and judicial bodies to review decisions that are abuses of discretion, capricious, or against the law or weight of the evidence places an already vulnerable population in an unconscionable position. Perhaps it is time for us to take a hard look at these structural inequities, and decide whether the ends – saving resources and ensuring prompt deportations – actually justify the means.

On a related note, in the United Kingdom there is a tribunal dedicated to adjudicating appeals of decisions made by the U.S. Department of Homeland Security's counterpart - the UK Border Agency - or by consular posts abroad who issue visas.³⁴ The UK tribunal offers a streamlined process that is funded by appeal fees.³⁵ The United States should review this system and create a similar appeal body.

II. Short-Term Visas for Performing Artists

There is no visa category to allow an up-and-coming band from Munich to showcase at SXSW in Austin, Texas. There is no visa category that would allow a locally celebrated Scottish bagpiper to perform for free at a ticketed charity event in New York City. The only way a musician can perform in the United States is if he is a member of an internationally recognized group, possesses extraordinary ability characterized by national or international renown, or meets certain limited criteria involving an exchange program or foreign government sponsorship.³⁶ Moreover, the process of obtaining a visa for the small number of eligible artists is burdensome and expensive.

According to the President's Commission on the Arts and the Humanities, "The creative economy drives tourism and commerce, and supports thousands of American workers – from graphic and

³⁰ INA § 104(a), 8 U.S.C. § 1104(a).

³¹ *American Academy of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009).

³² An analysis of the immigration-related provisions of the REAL ID Act is available at <http://www.aifl.org/lac/pa/realid6705.pdf>.

³³ *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985).

³⁴ See <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccesfulapplications/appeals/system/>.

³⁵ See <http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/online-fees-guidance.pdf>.

³⁶ 9 FAM 41.31 N11.3; 9 FAM 41.31 N11.7.

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software designers to scholars, architects, artists, performers and curators.”³⁷ In consideration of the value added by cultivating international talent and ensuring the flexibility of the arts community, the government should consider developing an additional visa category to accommodate limited admissions for less prominent performing artists with demonstrated professional credentials.

Conclusion

In May 2009, President Obama gave a speech on national security.³⁸ Not once in that speech did he mention immigration reform as a national security issue. In the October 22, 2012 debate between President Obama and Mitt Romney on national security, both candidates expressed a dedication to focusing on nation-building at home before looking abroad.³⁹ Both listed the domestic areas affecting our national security – education, the economy, our military – but neither candidate mentioned that we have over eleven million people living in the United States off the grid or how porous our borders remain. How can we be a secure nation without properly incorporating these individuals into our society, harmonizing the standing of all U.S. inhabitants before the law and securing our borders?

Our government has an obligation to see that the rule of law is upheld and to ensure our national security. And that means reform and effective enforcement of immigration laws, but as long as the extreme partisanship manifested in the fiscal-cliff debate continues, we can expect to see only modest gains this year in rights, remedies and reforms for foreign nationals in our immigration system. Our lawmakers must put aside strident partisanship and compromise on a CIR package that benefits our economy and our society, and keeps us safe.

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³⁷ <http://www.pcah.gov/creative-economy>.

³⁸ See “Text: Obama’s Speech on National Security,” New York Times (May 21, 2009), accessible at <http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html?pagewanted=all>.

³⁹ See “Transcript And Audio: Third Presidential Debate,” NPR (October 22, 2012), accessible at <http://www.npr.org/2012/10/22/163436694/transcript-3rd-obama-romney-presidential-debate>.