

No More Waiting on Legal Immigration

By Angelo A. Paparelli and Ted J. Chiappari

President Barack Obama has professed a new strategy of impatience. With the economy still in malaise, and the unemployment outlook only a tad improved, the White House has begun to implement a reelection gambit entitled, “We Can’t Wait.” The waiting is not for Godot, but rather for a moribund Congress to pass his largely ignored proposal, the American Jobs Act:

“ Without a doubt, the most urgent challenge that we face right now is getting our economy to grow faster and to create more jobs.... we can’t wait for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.” — President Obama, October 24, 2011.¹

In an effort to jumpstart the economy, the approach taps his exclusive authority over federal departments to craft executive orders. Hoping to avoid the fate of Jimmy Carter, a one-term Democrat who also faced malaise, Mr. Obama’s first foray into economy-goosing executive orders has involved housing, education and veterans’ affairs. His more recent jobs-focused directives have begun (albeit too timidly and slowly in the authors’ view) to address administrative reforms to America’s system of legal immigration.

As this article will show, an assertive President Obama, with his eyes transfixed on the reelection prize, can do much more to improve our immigration regulations and agency practices, which the President oversees through the Departments of Homeland Security, State, Justice and Labor. With presidential orders on legal immigration, he can recharge the economy in countless ways while protecting American jobs and creating hundreds of thousands of new ones.

To his credit, President Obama has taken initial positive steps by issuing an executive order designed to promote travel and tourism to the United States, an immediate and tangible boon to the economy likely to spur job creation in sectors ranging from the hospitality industry to the IT sector to health/medicine.² The order tasks the Secretaries of Homeland Security and State, their subordinate agencies, and the Office of Management and Budget, to produce a plan in 60 days, consistent with existing national-security screening protocols, that will achieve several specific objectives, quoted below:

- increase nonimmigrant visa processing capacity in China and Brazil by 40 percent over the coming year;

¹ The quote can be found at the White House web page for the American Jobs Act, accessible here <http://www.whitehouse.gov/economy/jobsact> (all links current as of Feb. 12, 2012).

² See, Jan. 19, 2012 “Executive Order -- Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness,” accessible at: <http://1.usa.gov/yqh8TP>.

- ensure that 80 percent of nonimmigrant visa applicants are interviewed within 3 weeks of receipt of application, recognizing that resource and security considerations and the need to ensure provision of consular services to U.S. citizens may dictate specific exceptions;
- increase efforts to expand the Visa Waiver Program [(VWP)] and travel by nationals of [VWP] participants;³ . . .
- expand reciprocal recognition programs for expedited travel [and clearance through customs and immigration inspections], such as the Global Entry program;⁴ [and]
- . . . identify other appropriate measures that will enhance and expedite travel to and arrival in the United States by foreign nationals, consistent with national security requirements, as well as any potential challenges in achieving the stated goals of this subsection.

This executive order also creates an interdepartmental task force – headed by the Secretaries of the Commerce and Interior Departments – which must produce within 90 days a National Travel and Tourism Strategy. The strategy must include recommendations to (a) achieve the “goal of increasing the United States market share of worldwide travel, including obtaining a greater share of long-haul travel from Brazil, China, and India,” and (b) “identify any barriers to increasing the United States market share of worldwide travel, and any other related areas of concern.” Lastly, the order will require data reporting and more transparency by way of postings on the Commerce Department’s website so that the public and the travel and leisure industries can monitor Executive Branch progress (or its absence) in endeavoring to fulfill the President’s mandate.

While the fruits of the President’s laudable efforts are yet to be enjoyed, his encouragement to foreigners – in essence, that they heed George W. Bush’s post-9/11 suggestion to “go shopping” here – will not likely succeed unless existing immigration, visa and entry barriers are eliminated or reduced. Under current law and regulations, notwithstanding the new executive order, tourists and business visitors still face a host of legal obstacles before they can appear with dollars or plastic in hand at the nearest Bloomingdales or Wal-Mart. These include:

³ Thirty-six countries are eligible VWP participants. The list of countries is available at: http://travel.state.gov/visa/temp/without/without_1990.html#countries. Citizens of these countries may enter without a visa for the purpose of business or tourism on stays of up to 90 days. They are nonetheless required to receive pre-travel clearance through an on-line screening procedure, the Electronic System for Travel Authorization, or ESTA, which is accessible at: <https://esta.cbp.dhs.gov/esta/>.

⁴ The Global Entry Program, maintained by U.S. Customs and Border Protection (CBP), an agency of the U.S. Department of Homeland Security, is described in its website (accessible here: <http://www.globalentry.gov/>) as a CBP “program that allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States.” Although it is designed as a convenience for frequent international travelers, no minimum number of trips per year are required to qualify for the program. The on-line Global Entry Enrollment System is accessible here: <https://goes-app.cbp.dhs.gov/main/goes>.

- the duty to carry the burdens of proof and persuasion, “to the satisfaction of” the interviewing consular officer and border inspector, an intentionally nebulous standard of proof, by showing that the applicant is a *bona fide* temporary visitor for business or pleasure (this means that there indeed is an unrelinquished permanent residence abroad to which he or she will return upon conclusion of the sojourn to America);
- the barrier of “consular nonreviewability” – a doctrine that consular officers may not be overruled by the courts or any executive authority when determining questions of fact, such as, whether the visitor is truly coming temporarily; and
- the presumption of immigrant intent – a haughty legislative inference that all nonimmigrant visa applicants and would-be entrants must overcome a presumption which holds that everyone who lands at our shores wants to stay here forever.

The State Department has the authority to shrink these obstacles by issuing guidance to its consular officers. State and the Homeland Security unit known as U.S. Customs and Border Protection (CBP) could issue instructions, respectively, to consular and border officers to give the benefit of the doubt to applicants for temporary visas and entry to the U.S. who possess a modicum of funds and a residence abroad and to grant (with a generosity of spirit) the immigration benefits these would-be visitors seek.

Another recent “We Can’t Wait” initiative, this one by the Department of Homeland Security (DHS), offers a cornucopia of minor immigration refinements (not yet reduced to actionable forms and procedures) supposedly intended “to attract and retain highly skilled workers.”⁵ In the authors’ view, however, these measures would do little to spark job creation and would help only a small population of employers and foreign citizens. Under the DHS proposal, beneficiaries would include:

- a small coterie of students of science, technology, engineering or math who would receive work permits;
- spouses of foreign students who could now pursue part-time study in fields beyond “vocational or recreational classes;”
- schools and universities that would now be allowed to increase the rolls of their foreign student advisors;
- an undefined cohort of spouses of H-1B (specialty-occupation workers) who would receive employment authorization if the principal H-1B worker had reached an, again undefined, milestone in pursuing permanent residence;

⁵ See, Jan. 31, 2012 DHS Release entitled, “DHS Reforms To Attract And Retain Highly Skilled Immigrants,” accessible at: <http://www.dhs.gov/ynews/fact-sheets/20120131-dhs-retain-highly-skilled-immigrants.shtm>. The “reforms” also include the launch of the first meeting of the USCIS Entrepreneur in Residence (EIR) program, announced Aug., 2011, and at last to be convened in Feb. 2012. For an analysis of the EIR initiative and its challenges, see Angelo A. Paparelli & Ted. J. Chiappari, “Intubation and Incubation: Remedies for an Ailing Immigration Agency,” *New York Law Journal*, Oct. 26, 2011.

- E-3 visa holders from Australia and H-1B1 visa holders from Singapore and Chile who would be allowed to continue working with their current employer for up to 240 days while their petitions for extension of status are pending;
- persons seeking green-card designation as “outstanding professors and researchers” who would be permitted to submit “comparable evidence” beyond the specifically articulated regulatory list.”

If the President truly wants to infuse the economy with vigor and create jobs through administrative immigration reforms, he has many tools at hand. Here are just a few immediate opportunities to fine-tune immigration regulations⁶ that, perhaps counter-intuitively, reward Americans by benefiting law-abiding foreign citizens:

- **Housing and Construction.** Instruct the State Department to issue three-year business visitor visas to foreign citizens who purchase and maintain a home in the U.S. priced at \$500,000 or more. In return for propping up real estate values and creating demand for construction of new or refurbished homes, these visitors would receive a U.S. work permit allowing them to start a business and further spur the economy. Working on a visitor visa is already permitted for some categories of entrants. Nothing prevents the President from expanding the list to include these job creators and to provide in the implementing regulations for periodic review and changes in the number of visas issued or other restrictions if the number of homes purchased adversely affects the housing market or home prices. The National Association of Realtors reports that in the year ending March 2011 foreign buyers accounted for \$82 billion of the \$1.07 trillion in U.S. existing-home sales and that one job is created for every two homes sold.⁷ On that basis, assuming that 200,000 business visitors were granted “home-buyer” visitor visas, an Obama visas-for-homes executive order could create up to 100,000 jobs.⁸

⁶ Additional Executive Branch improvements are discussed in Gary Endelman & Cyrus Mehta, “Why We Can’t Wait: How President Obama Can Erase Immigrant Visa Backlogs with the Stroke of A Pen” (accessible here: <http://www.ilw.com/articles/2012,0201-endelman.shtm>), and Angelo A. Paparelli, “Faint Immigration Praise” (accessible here: <http://www.nationofimmigrants.com/immigration-reform/faint-immigration-praise/>), “Executive Craftsmanship: Job Creation through Existing Immigration Laws” (accessible here: <http://www.nationofimmigrants.com/immigration-reform/executive-craftsmanship-job-creation-through-existing-immigration-laws/>), “The Immigration Appeaser-in-Chief Should Try Some New Ammunition” (accessible here: <http://www.nationofimmigrants.com/immigration-reform/the-immigration-appeaser-in-chief-should-try-some-new-ammunition/>), and “Immigration Reform with the Stroke of a Pen” (accessible here: <http://www.nationofimmigrants.com/general/immigration-reform-with-the-stroke-of-a-pen/>).

⁷ See, “Profile of International Home Buying Activity 2011,” National Association of Realtors, May, 2011, accessible here: <http://bit.ly/kXGchK>.

⁸ The authors’ estimate is conservative given that millions of visitors enter the U.S. annually on visas or under the VWP. According to the State Department, in fiscal year 2010 consular officers issued over 3.5 million visas for business visitors or tourists. See Department of State Chart, “NIV [Nonimmigrant Visa] Workload by Category,” accessible here: <http://www.travel.state.gov/pdf/FY2010NIVWorkloadbyVisaCategory.pdf>. In FY 2005, 15.8 million visitors entered the United States under the VWP. See, Alison Siskin, “Visa Waiver Program,” Congressional Research Service, Jan. 24, 2007, accessible here: <http://www.ilw.com/immigrationdaily/news/2007,0314-crs1.pdf>

- **Manufacturing, Services and Technology.** Order State and Homeland Security to allow foreign employees of U.S. companies who need a visa renewal to obtain it from within the country rather than interrupt work, fly abroad for a consular appointment and perhaps be stranded for months by State Department red tape. This method worked for decades without a hitch; it should be reinstated. It would probably save tax dollars too, as more State Department staff responsible for visa issuance could be redeployed in the United States rather than stationed abroad. Another executive order should instruct USCIS to let foreign workers whose skills are in short supply, as certified by the Labor Department, to apply immediately for green cards through the adjustment of status process. This would not speed the grant of permanent residence but would allow foreign workers greater job portability and the freedom to start new businesses, making them more likely to stay here and create American jobs than leave and compete with us from abroad.
- **All Industries.** Order Attorney General Holder and Secretaries Napolitano (Homeland Security), Clinton (State) and Solis (Labor) to present a 90-day “legal-immigration administrative reform” plan to the newly installed Secretary of Commerce, John Bryson. Commerce is well suited to lead the charge since it already directs other Obama initiatives (Startup America, SelectUSA and the Jobs Council). Under the plan, the cabinet members would require their subordinate agencies to suspend or withdraw outdated employment-based immigration rules and issue new regulations or policy interpretations within a three-month accelerated timetable. Each agency would be compelled to achieve the unfulfilled mandate of the Immigration Act of 1990 (known as IMMACT) – a law signed by the first President Bush with the stated purpose of “dramatically increas[ing] the number of immigrants who may be admitted to the United States because of the skills they have and the needs of our economy.”⁹ At a minimum, the State Department and DHS plan would put an immediate end to unapproved practices that have resulted in extraordinary rates of burdensome requests for evidence and refusals of employment-based immigration benefits¹⁰ and to measures that disproportionately reward career officers if they point out suspected fraud, national security threats or legal ineligibility.¹¹ Ninety

⁹ See Pres. George H. W. Bush, “Statement on Signing the Immigration Act of 1990,” November 29, 1990, accessible here: <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1mY3X6J4v>. The economic arguments in favor of legal immigration, particularly employment-based and entrepreneurial immigration of foreign citizens on temporary or permanent visas remain as compelling in 2012 as in 1990. See, “Is Immigration Good for America?,” a compendium of 13 articles by 16 scholars who answer the question in the affirmative, *The Cato Journal*, Vol. 32, No. 1, Winter 2012.

¹⁰ See Policy Briefs of the National Foundation for American Policy, “Analysis: Data Reveal High Denial Rates For L-1 and H-1B Petitions,” Feb., 2012, and “L-1 Visa Approvals Decline Significantly at U.S. Posts in India,” Nov., 2011 (accessible at: www.nfap.com).

¹¹ According to a recent DHS Office of Inspector General Report, “The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers” (Jan., 2012, OIG 12-24, p. 11, accessible here: http://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan11.pdf), beginning with the 2011 fiscal year, 50% of the performance rating (and presumably the compensation and promotion prospects) of immigration adjudicators has been “based on fraud detection and national security identification.”

days may be a short time to transform legal immigration, but as the President has said, “We Can’t Wait.”

None of these executive orders would reduce existing safeguards that require in-depth screening of foreign citizens on national-security grounds and for prior criminal history. None of these directives requires a single vote or committee hearing in Congress. If the President truly means what he says (if “an increasingly dysfunctional Congress . . . won’t act, I will.”), the time is now for the White House to introduce economy-stimulating legal immigration changes.

*Angelo A. Paparelli is a partner in Seyfarth Shaw in New York and Los Angeles. Ted J. Chiappari is a partner at Satterlee Stephens Burke & Burke in New York City.

Reprinted with permission from the February 22, 2012 edition of the New York Law Journal. © 2010 ALM Properties Inc. All rights reserved. Further duplication without permission is prohibited. The authors thank the Journal for permission to reprint this article.