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Because You're Mine, I Walk the Line: The Trials and Tribulations of the Family Visa Program

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BECAUSE YOU'RE MINE, I WALK THE LINE*: THE TRIALS AND TRIBULATIONS OF THE FAMILY VISA PROGRAM

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ABSTRACT

The current backlog of over 3.5 million immigration visas places strains on mixed immigration status families and exacerbates the undocumented population problem. Families who choose to wait for a visa to become available before reunifying may strain the family unit. Those who reunify in the United States without first obtaining legal status face deportation and inadmissibility because of their unlawful residence in the United States.

Congress has made some attempts to alleviate these strains. Unfortunately, the broad intent of these statutory changes has run up against narrow administrative interpretation. Nonetheless, in the present political climate, administrative solutions that seek to solve inadequacies in the current system are more politically expedient than installing a completely new family visa program. Therefore, immigration reform efforts must focus on expansive statutory interpretation of these and other existing statutes.

In this essay I outline the social costs of an inadequate family visa program and offer some suggestions for administrative improvements to the program that do not necessitate legislative action. However, the inadequacies of the current family petition system must eventually be addressed through a congressional overhaul of the process. Therefore, I visit the history of narrow administrative interpretation of immigration legislative action to highlight how important agency interpretation is in the drafting of immigration legislation. I conclude the essay by discussing the elements I believe should be included in family visa petition reform.

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* JOHNNY CASH, *I Walk the Line*, *on* WITH HIS HOT AND BLUE GUITAR (Sun Records 1957).

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INTRODUCTION

The Immigration and Nationality Act (INA) permits American citizens to immigrate a spouse, parent, or child (unmarried and under twenty-one years old) to the United States.[1] These family members, commonly known as immediate relatives, are not subject to the congressional annual limits on immigrant visas.[2] Approximately 536,000 immediate relatives of American citizens immigrated to the United States last year.[3] The spouses and unmarried children of Lawful Permanent Residents, as well as the siblings and adult or married children of U.S. citizens, can also immigrate, but they must wait for an available immigrant visa.[4] The United States issues 376,000 immigrant visas each year, of which 226,000 are allocated for non-exempt family immigration.[5] Unfortunately, the allocated visas are insufficient. As a result, there are approximately 3.5 million pending family visa applications.[6] Moreover, because no more than 26,260 visas can be granted to a country per year, there is a huge backlog for Mexico and the

1. 8 U.S.C §§ 1153(a), 1154(a)(1)(A)(i) (2006).

2. 8 U.S.C § 1151(b)(2)(A)(i) (2006).

3. RANDALL MONGER, U.S. LEGAL PERMANENT RESIDENTS: 2009, U.S. DEP'T OF HOMELAND SECURITY ANNUAL FLOW REPORT 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2009.pdf.

4. 8 U.S.C. § 1153(a).

5. 8 U.S.C. § 1151(b); MONGER, *supra* note 3, at 2.

6. *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences*, NAT'L VISA CTR., 2 (Nov. 1, 2009), http://www.immigration.com/sites/default/files/annual_report_Immvisa_applicants.pdf.

Philippines.[7] There are 1.5 million visa applications pending for nationals from these two countries, translating into decades-long waits for visa approvals.[8]

Much can happen while individuals wait for visa approvals. The desire to see loved ones can lead to individuals entering or remaining illegally in the United States. The petitioning relative can die, a marriage can be terminated, or a derivative child[9] can get married and be rendered ineligible for a visa. United States immigration laws account poorly for these externalities.

This essay catalogs the process and bottlenecks faced by families attempting to navigate the immigration process and examines some of the proposed changes. The essay suggests that, in the present political climate, solutions are more politically expedient if they seek to solve inadequacies in the current system. Eventually, the inadequacies of the family petition system must be addressed through an overhaul of the process. This essay also offers some suggestions toward this end, discussing elements that should be included in a family visa petition reform.

I. THE LINE: THE VISA PETITION PROGRAM BASICS

Keep a close watch on this heart of mine
I keep my eyes wide open all the time.
I keep the ends out for the tie that binds
Because you're mine, I walk the line.[10]

The family visa petition process has three steps. The first step is for the petitioner, a U.S. citizen or Lawful Permanent Resident, to submit a visa application.[11] The petitioner must include proof of his immigration status.[12] He also must prove that the intending immigrant, known as the beneficiary, is in fact related to the petitioner.[13] If the beneficiary is an immediate relative of a U.S. citizen, he can move to the next step in the

7. *Id.* at 3.

8. *Id.*

9. U.S. Dep't of State, *Nonimmigrant (V) Visa for Spouse and Children of a Lawful Permanent Resident (LPR)*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/immigrants/types/types_1493.html (follow "Derivative Status for Children" hyperlink) (last visited Oct. 21, 2010) (establishing that children get derivative status from their parent's I-130 immigrant visa petition).

10. JOHNNY CASH, *I Walk the Line*, *on* WITH HIS HOT AND BLUE GUITAR (Sun Records 1957).

11. 8 C.F.R. § 204.1(a)(1) (2010).

12. *Id.* § 204.1(f), (g).

13. *Id.* § 204.1(f).

process,[14] otherwise he is placed on the visa family preference waiting list ("priority list").[15] How quickly a preference category relative is able to take the next step depends on a number of factors. These include the visa category, the country of citizenship of the beneficiary, and the number of individuals with earlier priorities who immigrate.

It is difficult to predict with any certainty how long it will take for a spouse to be eligible to immigrate.[16] Currently, the Mexican spouse of a Lawful Permanent Resident must wait two and a half years before being allowed to immigrate to the United States.[17] Just a year ago, the waiting period for Mexican spouses of Lawful Permanent Residents had reached seven years.[18]

Once the beneficiary reaches the top of the priority list, the second step in the process is to determine where the person can apply for the immigrant visa. There are two jurisdictional options: (1) the U.S. Citizenship and Immigration Services (USCIS) offices in the United States;[19] or (2) the

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14. *Id.* § 204.1.

15. U.S. DEP'T OF STATE, *Visa Bulletin for August 2010* [hereinafter *Visa Bulletin for August 2010*], *available at* http://www.travel.state.gov/visa/bulletin/bulletin_5092.html (last visited Oct. 27, 2010). Spouses and unmarried sons or daughters under twenty-one years of age are classified as immediate relatives and can immigrate without delay once their applications are processed. All other family-based visa petitions are placed into a "preference category" depending on the relationship the intending immigrant has with the petitioner. The left side of the visa bulletin indicates the preference category, and the top of the bulletin indicates the country in which the intending immigrant lives. Only five individual countries are listed. If the intending immigrant is not from one of those five countries, he falls under the first section listed as "all chargeability areas except those listed." The preference categories are broken down as follows: (1) unmarried sons and daughters, over twenty-one, of a U.S. citizen, (2A) spouses and unmarried children, under twenty-one, of a Lawful Permanent Resident, (2B) unmarried sons and daughters, over twenty-one, of a Lawful Permanent Resident, (3) married sons and daughters of a U.S. citizen, and (4) brothers and sisters of an adult U.S. citizen. Based on these descriptions, the intending immigrant's preference category is determined. The date that corresponds with that preference category and country is the date that he is currently eligible to immigrate to the United States. Those dates indicate when an application was filed on behalf of the intending immigrant. This means that unmarried sons and daughters, over twenty-one, of a U.S. citizen may have to wait five to fifteen years or more from the date the application was originally filed on their behalf, depending on their country of origin. *Id.*

16. Every month the State Department publishes a chart summarizing the visa filing dates that are currently being processed for each family category. *See* U.S. Dep't of State, *Visa Bulletin*, TRAVEL.STATE.GOV, www.travel.state.gov/visa/bulletin/bulletin_1360.html (last visited Oct. 21, 2010).

17. *Visa Bulletin for August 2010*, *supra* note 15.

18. U.S. DEP'T OF STATE, *Visa Bulletin for August 2009* [hereinafter *Visa Bulletin for August 2009*], *available at* http://www.travel.state.gov/visa/bulletin/bulletin_4539.html (last visited Oct. 27, 2010).

19. 8 C.F.R. § 204.1(e).

U.S. consulate in the beneficiary's country of origin.[20] An applicant can submit a petition at the local immigration office under two circumstances: (1) he is physically in the United States pursuant to a lawful admission and is the immediate relative of a U.S. citizen;[21] or (2) he is the beneficiary of a family petition filed before January 14, 1998 or April 30, 2001.[22] The latter deadline requires the beneficiary to have been present in the United States on December 21, 2000.[23] A person who does not qualify for adjustment of status in the United States must apply for an immigrant visa abroad, regardless of whether he or she resides in the United States.[24]

The third step, the issuance of the immigrant visa, requires that the beneficiary establish that he is not inadmissible.[25] Under 8 U.S.C. § 1182, there are numerous grounds that may bar an individual from immigrating despite the fact that they are related to a U.S. citizen or Lawful Permanent Resident. There are bars for crimes,[26] immigration violations,[27] contagious diseases and mental disorders,[28] national security concerns,[29] and public charge.[30] A successful immigrant visa applicant is permitted to become a Lawful Permanent Resident and live in the United States.[31]

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20. 8 U.S.C. § 1201(a)(1) (2006).

21. *See* 8 U.S.C. § 1154(a), (c) (2006).

22. *Id.* § 1255(i)(1)(B).

23. *Id.* § 1255(i)(1)(C).

24. *Id.* § 1201; 8 C.F.R. § 204.2(a)(3) (2010); *see also* Ogbolumani v. U.S. Citizenship & Immigration Servs., 523 F. Supp. 2d 864, 869 (N.D. Ill. 2007).

25. 8 U.S.C. § 1255(a)(2). Admission is defined as the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2006). Persons may be denied admission by an immigration officer if they are "inadmissible" due to any number of factors listed in section 212 of the INA. These factors include health related grounds, drug use, economic grounds, criminal grounds, moral grounds, previous immigration violations, fraud or misrepresentation, and security grounds, among others. For many of these grounds of inadmissibility, a waiver may be obtained that waives the inadmissibility and allows for admission into the United States.

26. 8 U.S.C. § 1182(a)(2) (2006). Inadmissibility on criminal grounds is broken down into crimes of moral turpitude (CMTs) and other offenses. CMTs are determined by the inherent nature of the crime as defined by statue and the record of conviction, not by the facts of each individual case. Omagah v. Aschcroft, 288 F.3d 254, 259-60 (5th Cir. 2002).

27. 8 U.S.C. § 1182(a)(6)-(9).

28. *Id.* § 1182(a)(1).

29. *Id.* § 1227(a)(4).

30. *Id.* § 1182(a)(4).

31. *Id.* § 1255(a).

II. JUMPING THE LINE: THE RISE OF UNDOCUMENTED MIXED STATUS FAMILIES IN THE UNITED STATES

I find it very, very easy to be true
I find myself alone when each day is through
Yes, I'll admit that I'm a fool for you
Because you're mine, I walk the line.[32]

If the beneficiary resides abroad, he or she is generally unable to visit or legally relocate to the United States prior to the third step in the process. There are no provisions in the INA that specifically permit family members with pending petitions to travel to the United States either to visit or remain. To legally enter the United States, the family member must qualify for a nonimmigrant or employment-based immigrant visa.[33] The problem for family members waiting to immigrate is that nonimmigrant visas require applicants to establish that they lack immigrant intent.[34] Even if the relative is years away from securing the family visa, consulates regularly use this provision to deny nonimmigrant visas.[35] Individuals, who avoid disclosing their pending immigrant petition and enter using a pre-existing, multiple-entry visa or the Visa Waiver Program, risk being denied admission at the port of entry,[36] subjected to expedited removal,[37] or accused of

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32. CASH, *supra* note 10.

33. Laura L. Lichter, A.L.I., *Nuts and Bolts of Family-Based Immigration*, SL010 ALI-ABA 195 (2006) (stating that a filed or even approved family-based petition does not confer any ability to enter the United States); *see also* 8 U.S.C. § 1154 (2006) (listing requirements for employment-based immigrant visa); 8 U.S.C. § 1184 (2006) (listing non-immigrant visa categories and requirements).

34. 8 U.S.C. § 1184(b). Immigrant intent refers to the presumption that all visa applicants, including those simply seeking a tourist visa, intend to come to the United States to remain here. The visa applicant must provide sufficient evidence to refute this presumption. *Id.*

35. *See, e.g.*, Maureen Donnelly, *Family Torn by Immigration Laws*, SILIVE.COM (Mar. 23, 2008), http://www.silive.com/news/index.ssf/2008/03/family_torn_by_immigration_law.html (indicating that applicants for visas must prove they will return home by showing strong work and family ties in their home country).

36. 8 U.S.C. § 1225(a)(3) (2006) ("All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers."). If during this inspection it is determined that the applicant has a pending immigration petition, he may be denied entry because the pending application is evidence of immigrant intent.

37. 8 U.S.C. § 1225(b)(1)(A)(i) ("In general if an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182 (a)(6)(C) or 1182 (a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.").

misrepresentation when they apply for immigrant status.[38] The other alternative, an employment-based immigrant visa, is not the focus of this paper and I will not discuss it further except to note that it is an even less promising option.[39]

The relative with status in the United States can travel to visit the beneficiary abroad,[40] but the visits cannot be prolonged, as extended stays outside the United States affect a Lawful Permanent Resident's admissibility[41] and ability to apply for naturalization.[42] Pursuant to 8 U.S.C. § 1101(a)(13)(C)(ii), Lawful Permanent Residents who travel abroad are not subject to the grounds of inadmissibility unless they are making a new admission. The admission statute is triggered when a Lawful Permanent Resident has been absent from the United States for over 180 days[43] if the re-entry is subject to other sections of the statute relating to prior criminal violations[44] or re-entry violations.[45] For some Lawful Permanent Residents, it is detrimental to trigger a new admission because it could render them deportable for a pre-existing ground of inadmissibility.[46]

However, the more common harm from an extended absence is a delay in eligibility for naturalization. Under 8 U.S.C. § 1427(a) an applicant for naturalization must be physically present in the United States for half of the period of residence eligibility.[47] For example, if the person is required to have five years of permanent residence in the United States to naturalize, he must be physically in the United States for two and a half of the preced-

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38. 8 U.S.C. § 1182(a)(6)(C) (2006) ("Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.").

39. For an article discussing the employment-visa process, see Brian Sullivan & Erin Bennet, *Stop and Go: The Changing Tempo of Business Immigration*, 31 VT. B.J. 24, 24-28 (2005). *See generally* Kate Kalmykov, *Immigration Obligations in Times of Economic Downturn: Consequences of Workforce Changes Involving Foreign Nationals*, 19 BUS. LAW TODAY (2010), *available at* http://www.abanet.org/buslaw/blt/2010-01-02/kalmykov.shtml.

40. 8 U.S.C. § 1101(a)(13)(C) (2006).

41. *Id.* § 1101(a)(13)(C)(ii).

42. 8 U.S.C. § 1427(a) (2006).

43. 8 U.S.C. § 1101(a)(13)(C)(ii).

44. *Id.* § 1101(a)(13)(C)(v).

45. *Id.* § 1101(a)(13)(C)(vi).

46. Grounds of inadmissibility do not always mirror grounds of deportability and generally are more expansive. For example, a Lawful Permanent Resident is not deportable for a contagious disease, but a person seeking admission would need to be cured of the disease, or seek a waiver prior to entry because a person found in the United States, who should not have been admitted, is deemed deportable. *See* 8 U.S.C. §§ 1182(a)(1), 1227(a)(1)(A) (2006).

47. 8 U.S.C. § 1427(a) (2006).

ing five years.[48] In addition, Lawful Permanent Residents who are absent from the United States between six and twelve months, may be deemed to have broken their continuous presence and may be required to wait an additional four years and a day to regain naturalization eligibility.[49] Because petitions by U.S. citizens move more quickly in the family preference system, a delay in naturalization directly impacts the time it takes for the beneficiary to become eligible to immigrate.

The inability of family members to legally reunify in the United States and the uncertain length of the family petition process has social consequences. There can be a disruption in familial relationships as spouses and children residing abroad are separated for an extended and undetermined period of time.[50] The uncertainty of when a visa will become available is particularly detrimental to children, who see the lack of certainty as a lack of parental concern. Children living abroad with grandparents or extended families may develop a sense of abandonment and, as a result, adopt destructive behaviors. According to one parent, who lived in the United States before returning home, states,

> The problem is the age of my children here, they are in school. But, they were allowed to drink beer, they were allowed drugs, they didn't obey their mother . . . so, because they lacked a father, my children were not [being] good. Because I immigrated to the U.S., my children gave in to the beer and drugs a little.[51]

Opportunities to develop language, economic, and cultural ties to the United States are thus delayed. Professor Rubén G. Rumbaut has found that, "[i]n general, age at arrival, in conjunction with time in the United States and level of education, are the most significant predictors of the acquisition of English fluency among immigrants of non-English origin."[52] Sometimes, in an attempt to alleviate these social consequences, family members, including children, immigrate to the United States illegally—becoming part of the almost twelve million undocumented aliens living in

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48. 8 C.F.R. § 316.5(b)(5) (2010).

49. *Id.* § 316.5(c).

50. *See, e.g.*, Nina Bernstein, *A Fatal Ending for a Family Forced Apart by Immigration Law*, N.Y. TIMES, Feb. 11, 2010, http://www.nytimes.com/2010/02/12/nyregion/12family.html (chronicling the suicide of the husband of a U.S. citizen who spent three years attempting to navigate the family petition process).

51. David Piacenti, *For Love of Family and Family Values: How Immigrant Motivations Can Inform Immigration Policy*, 21 HARV. J. HISP. POL'Y 35, 47 (2009).

52. *Comprehensive Immigration Reform: Becoming Americans—U.S. Immigrant Integration, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 110-27 (2007) (statement of Mr. Rubén G. Rumbaut, Ph.D., Professor of Sociology, University of Ca., Irvine), *available at* http://www.judiciary.house.gov/hearings/May2007/Rumbaut070516.pdf.

the United States.[53] Every year, over 6000 children are arrested by the border patrol attempting to enter the United States illegally.[54] A number of these children are attempting to reunify with parents in the United States, who may have legal immigration status, but are not yet able to bring their children to the United States legally.[55]

Family petitions are not always filed for family members residing abroad. U.S. citizens and Lawful Permanent Residents regularly file applications for spouses, parents, or even their children who already reside illegally in the United States.[56] The number of applications for undocumented family members is growing because of several factors.[57] In the past, laborers from Latin America would travel to the United States to work but regularly return to their country of origin and to their families.[58] As undocumented immigrants find it more costly and dangerous to cross the U.S.-Mexico border, they have opted to remain in the United States.[59] Because

53. Jeffrey Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows are Down Sharply Since Mid-Decade*, PEW HISP. CTR., Sept. 1, 2010, http://pewhispanic.org/reports/report.php?ReportID=126.

54. *See* DIV. OF UNACCOMPANIED CHILDREN'S SERVS., OFFICE OF REFUGEE RESETTLEMENT, *DHS UAC Apprehensions Placed in ORR/DUCS Care* (2009), http://www.act.hhs.gov/programs/orr/programs/FY2009UAC_ApprehensionMap.pdf (listing total apprehensions in 2009 at 6074).

55. *See* Susan Carroll, *More Tots, Teenagers Are Crossing Border*, ARIZ. REPUBLIC, May 23, 2004, www.justicejournalism.org/projects/carroll_susan/carroll_052304.pdf.

56. *See, e.g.*, Mireya Navarro, *Immigration, a Love Story*, N.Y. TIMES, Nov. 12, 2006.

57. *See* U.S. DEP'T OF STATE, Table XX Immigrant and Nonimmigrant Visa Ineligibilities Fiscal Year 2008, *available at* http://www.travel.state.gov/pdf/FY08-AR-TableXX.pdf; *see also* U.S. DEP'T OF STATE, Table XX Immigrant and Nonimmigrant Visa Ineligibilities Fiscal Year 2007, *available at* http://travel.state.gov/pdf/FY07AnnualReportTableXX.pdf. The 2007 statistics show that 17,536 aliens seeking an immigrant visa that year were found inadmissible due to unlawful presence in 2007. This number nearly doubled just one year later in 2008 when 35,336 aliens attempted to obtain an immigrant visa after accumulating unlawful presence. All aliens found inadmissible must submit an I-601 waiver to be processed in their home country. The number of I-601 waivers submitted to the consulate in Ciudad Juarez, Mexico jumped from 3,280 in 2005 to almost 22,000 in 2008. *See* I-601 Waivers, Ombudsman Teleconference, http://www.uscis.gov/ (search "Ombudsman Teleconference; then follow "I-601 Waivers" hyperlink). Although the I-601 waiver is used to waive all grounds of inadmissibility, this trend in Ciudad Juarez is consistent with the large increase in applications for aliens with unlawful presence and indicates that more aliens are submitting petitions for undocumented relatives residing in the United States.

58. Bernstein, *supra* note 50.

59. FLORIAN K. KAUFMANN, POL. ECON. RES. INST., ATTRACTING UNDOCUMENTED IMMIGRANTS: THE PERVERSE EFFECTS OF U.S. BORDER ENFORCEMENT 6, 8 (Nov. 2008), *available at* http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_151-200/WP187.pdf; *see also* Deborah A. Boehm, *"For My Children:" Constructing Family and Navigating the State in the U.S.-Mexico Transnation*, 81 ANTHROPOLOGICAL Q. 777 (2008).

immigrant populations are generally young,[60] many undocumented aliens have established families in the United States, often from marrying someone who has legal status in the United States. Social science scholars studying immigration patterns have found that, "[p]olicy on immigration appears to have an impact on stay duration in the United States, as . . . policy changes and increased border patrol from the 1986 Immigration Reform and Control Act increased the number of years immigrants lived in the United States."[61]

Relatives who reside illegally in the United States and have family petitions pending also face social consequences. They live in fear of removal and are often victimized by employers and criminals. Undocumented immigrant workers are unable to avail themselves of workplace protections under either the Occupational Safety Health Administration (OSHA) or the National Labor Relations Act (NLRA). As noted by Professor Nessel, "the applicability of labor law to undocumented workers shows that labor law's promise of meaningful protection from exploitation in the workplace remains illusory."[62]

Moreover, workplace enforcement of immigration laws has been grow over the past several years.[63] There was a steep increase in the number of worksite raids under the Bush administration. According to a study by the Urban Institute, "[t]he number of undocumented immigrants arrested at workplaces increased more than sevenfold from 500 to 3,600 between 2002 and 2006."[64] The report also catalogued the severe trauma that workplace raids cause to the children of those arrested.[65] Workers arrested at raids for immigration violations regularly face federal and state criminal prosecution for document fraud, complicating any chance of obtaining immigration relief.[66]

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60. According to the Pew Hispanic March 2004 Population Survey, 89% of the undocumented population is under forty years old and 17% are under eighteen years of age. *See* JEFFERY S. PASSEL, PEW HISP. CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 10 (Mar. 21, 2005).

61. Piacenti, *supra* note 51, at 45.

62. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 348 (2001).

63. *See* Randy Capps et al., URB. INST. & NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 10 (2007), *available at* http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

64. *Id.*

65. *Id.* at 50-51 (finding that the children of undocumented workers suffer emotional trauma and psychological problems such as depression, fear, social isolation, stress, and changes in behavior following a raid).

66. *See* Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009) (holding that the government must show that the defendant knew that the means of identification at issue be-

Undocumented immigrants cannot feel safe even in their own homes. According to a study by the Immigration Justice Clinic at Cardozo School of Law,

> During the last two years of the Bush Administration, the U.S. Immigration and Customs Enforcement agency (ICE) vastly expanded its use of home raid operations as a method to locate and apprehend individuals suspected of civil immigration law violations. These home raids generally involved teams of heavily armed ICE agents making pre-dawn tactical entries into homes . . . .[67]

Undocumented aliens are easy targets for criminals. Undocumented aliens regularly carry money because they are paid in cash and have limited access to banking institutions. This makes them easy targets for theft.[68] In addition, they often do not report crime to the police for fear of being turned over to immigration authorities.[69] As states such as Arizona enact statutes requiring police to enforce immigration laws,[70] undocumented aliens' fear of authorities has escalated.

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longed to another person); *see also* Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47 (2010); Kristina Glithero, *Picking Numbers Out of Thin Air: Federal Aggravated Identity Theft*, 31 AM. J. CRIM. L. 69, 91 (2009).

67. Bess Chiu et al., CARDOZO IMMIGR. JUST. CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 1 (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf.

68. *See, e.g.*, Daniel Gonzales, *Deportation-wary Migrants Targets of Crime: Criminals Counting on Fear of Police, Experts Say*, ARIZ. REPUBLIC, Oct. 29, 2008.

69. Cecilia Menjívar & Cynthia L. Bejarano, *Latino Immigrants' Perceptions of Crime and Police Authorities in the United States: A Case Study from the Phoenix Metropolitan Area*, 27 ETHNIC & RACIAL STUD. J. 120, 134-36 (2004).

70. S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010). S.B. 1070 as originally introduced

> [r]equires officials and agencies of the state and political subdivisions to fully comply with and assist in the enforcement of federal immigration laws and gives county attorneys subpoena power in certain investigations of employers. Establishes crimes involving trespassing by illegal aliens, stopping to hire or soliciting work under specified circumstances, and transporting, harboring or concealing unlawful aliens, and their respective penalties.

S.B. 1070 would require state law enforcement authorities to make a "reasonable attempt" to determine a person's immigration status during "legitimate contact" if there is "reasonable suspicion" that the person is in the country illegally, verify immigration status with federal authorities, and then transfer the alien to a federal facility. *Fact Sheet for S.B. 1070*, 49th Leg., 2nd Reg. Sess. (Ariz. Jan. 15, 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/summary/s.1070pshs.doc.htm.

III. FORCED OFF THE LINE: THE DECLINING ABILITY OF BENEFICIARIES TO LEGALLY IMMIGRATE

As sure as night is dark and day is light
I keep you on my mind both day and night
And happiness I've known proves that it's right
Because you're mine, I walk the line.[71]

As dangerous and demeaning as it is to live in the shadows of society, undocumented immigrants often feel that their desire to be close to family leaves no option but to reside in the United States illegally. Unfortunately, for many undocumented immigrants, their decision to move to the United States to remain with their family members complicates or even eliminates their opportunity to regularize their immigration status.

A. Legislative Roadblocks to Remaining on Line and Advocacy Efforts to Remove Them

Congress has placed restrictions on the ability of family members living illegally in the United States to obtain family immigrant visas.[72] In 1996, Congress added numerous immigration penalties linked to illegal residence in the United States.[73] Aliens, who are unlawfully present in the United States for a continuous period of more than 180 days, but less than a year, and thereafter are removed or depart from the United States following the unlawful presence, are inadmissible for three years.[74] Aliens, who reside for a continuous period longer than a year and subsequently depart or are removed from the United States, are inadmissible for ten years.[75] Moreover, individuals who have been present in the United States without status for a cumulative total of one year, then depart or are deported from the United States, and subsequently re-enter illegally, are permanently inadmissible.[76]

Undocumented relatives with pending family petitions face a difficult choice between leaving the United States to process their visa applications

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71. CASH, *supra* note 10.

72. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

73. *See id.* § 301.

74. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006).

75. *Id.* § 1182(a)(9)(B)(i)(II).

76. *Id.* § 1182(a)(9)(C).

abroad and remaining out of status.[77] The choice not to leave is often economic and familial. If the beneficiary is the primary income earner in the family, the family will be substantially harmed by the loss of his or her wages. If the beneficiary is the primary caretaker of the family's young children, the lack of affordable child care may make it difficult for the wage earner to maintain the household in the United States and the beneficiary abroad. Although little research has been conducted on mixed immigration status marriages, anecdotal evidence abounds about spouses opting to remain out of status rather than risk a denial of an application abroad and then being unable to return to their families.[78]

The relative traveling abroad for adjudication of his visa petition faces the possibility of a lengthy wait while the request for a waiver of the unlawful bars is adjudicated and hopefully granted.[79] The beneficiary is not permitted to return to the United States without a grant of immigrant status, and if he illegally crosses back into the United States, the beneficiary is permanently barred from immigrating.[80]

These changes wreak havoc on the ability to utilize the family petition process to regularize the status of mixed-status families. Many individuals who would have been able to immigrate, despite their illegal residence in the United States, are no longer able to do so. The realization that legal status is no longer feasible does not persuade out-of-status family members to leave the United States. For many, living in the United States without status is a lesser moral harm than abandoning one's family and home, "immi-

77. *See* Leslie Berestein, *Couples Separated by False Assumptions; Some Binational Spouses Unable to Return to U.S.*, SAN DIEGO UNION-TRIB., July 28, 2009, at A1.

78. I have conducted community outreach workshops for over fifteen years, and countless of mixed immigration status couples have expressed this fear. Journalists and attorneys practicing immigration also report similar experiences. *See, e.g.*, Mary Beth Sheridan, *When Home is Neither Here Nor There: Advocates on Both Sides of Immigration Debate Question Rules That Leave Many in Legal Limbo*, WASH. POST, Aug. 3, 2005, at B1.

79. Any alien who has been unlawfully present in the United States for more than 180 days, but less than one year, is inadmissible and subject to a three year bar. 8 U.S.C. § 1182(a)(9)(B). If aliens have more than one year of unlawful presence they are subject to a ten year bar. *Id.* Inadmissibility due to unlawful presence can be waived. *Id.* § 1182(a)(9)(B)(v). According to 9 F.A.M. 40.21(a) (2010), the waiver must be submitted at the consulate in the alien's country of citizenship to be adjudicated by a consular officer. The alien must depart to submit the waiver that triggers the three or ten year bar, and the waiver can take several months to process and is difficult to obtain. The aliens must wait for the waiver to be adjudicated. If they return, they will face a permanent bar. 8 U.S.C. § 1182(a)(9)(C). Many aliens do not believe the possible consequences of departing to submit the waiver are worth the risk.

80. 8 U.S.C. § 1182(a)(9)(C).

grating is, on the surface, a rational social action, but is underpinned by an emotional, family-based, absolute value system."[81]

The unlawful presence bars have been purported by immigrant advocates to be one of the biggest challenges for relatives living without status in the United States. Because these bars are only triggered if the individual leaves the United States, efforts have been made to enlarge the number of individuals residing in the United States who qualify to process their immigration visa in this country.[82] To this end, immigrant advocates have sought to expand the adjustment of status process by moving the qualifying dates pursuant to § 1255(i) or, more commonly known as, "245(i)."[83] Although a permanent extension came very close to passing, the events of 9/11 and subsequent xenophobia derailed that effort.[84] Further, the association of 245(i) with "amnesty" did not do the immigrant advocacy efforts any favors, as anything associated with "amnesty" or "rewarding immigrant law breakers" had become taboo.[85]

A second legislative option pursued by immigrant advocates was an attempt to revive the "V Visa Program" created as part of the Legal Immigration Family Equity (LIFE) Act of 2000.[86] Under the program, spouses and children of Lawful Permanent Residents, whose family petitions had been pending for three years, were legally permitted to reside in the United States and remain until their priority date became current, despite any unlawful presence problems.[87] To qualify, the petition for a family visa had

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81. *See* Piacenti, *supra* note 51, at 35.

82. 8 U.S.C. § 1255(i) (2006). A provision in the Act allows aliens who entered without inspection to adjust status to that of a lawful permanent resident without leaving the United States if a petition was filed on their behalf prior to April 30, 2001. In addition, they must prove presence in the United States on the date of enactment. This deviates from 8 U.S.C. § 1255(a) and (c), which require aliens who entered without inspection to return to their country of origin to obtain a visa, which triggers the three or ten year bar.

83. A permanent extension of 8 U.S.C. § 1255(i) never came close to congressional approval. However, an extension of the petition filing deadline proposed by Rep. Gekas (PA-D) came close to enactment. The 245(i) Extension Act was advancing through Congress when the events of 9/11 changed congressional course. *See* 245(i) Extension Act, H.R. 1885, 107th Cong. (2002). In March 2002, H.R. 1885 was joined with H.R. 3525, Enhanced Border Security and Visa Entry Reform Act of 2002. The provision was dropped from the final version of the law. *See* Enhanced Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543.

84. *See* Julia Malone, *Immigrant Legalization Plan Stalled; Alleged Leniency Sparked Uproar*, ATLANTIC J.-CONST., Apr. 11, 2002, at A4.

85. *See id.*

86. Pub. L. No. 106-553, 114 Stat. 2762, 2762A-142.

87. 8 U.S.C. § 1101(a)(15)(V) (2006).

to be submitted on or before December 21, 2000.[88] Annual admissions during the existence of the program hovered around 70,000 per year.[89]

The V Visa Program alleviated some of the problems associated with the backlogs. Families could reunify in the United States without fear of the dangers associated with unlawful status such as being deported. Even though the relative would likely remain on the priority waiting list for several more years, the V visa brought some normalcy to the lives of mixed-status families. V visa holders could work legally, establish credit and bank accounts, and obtain driver's licenses. Unlawful presence did not bar a person from a V visa.[90] Regrettably, the V visa only postponed and did not cure the unlawful presence bar. Advocates were not successful in their attempt to persuade U.S. Citizenship and Immigration Services (USCIS) to grant a waiver of the inadmissibility bars for V visa holders applying for immigrant visas.[91]

Unfortunately, the V Visa Program was short-lived, as it only provided status to individuals with pending petitions filed prior to December 21, 2000.[92] There were several failed attempts to revive the program.[93] Many members of Congress believe that comprehensive immigration reform is the best way to fix our immigration system, often rejecting proposals that change only small portions of the Immigration and Nationality Act. The V Visa Program does not face the same level of contentious debate that a 245(i) extension faces, making it a potential candidate for enactment if Congress abandons its stalemate over comprehensive immigration reform.[94]

Advocates have tried to minimize the effects of the unlawful presence bars through the circuit courts as well. In 2006, immigrant advocates successfully argued before the Ninth and Tenth Circuits that eligibility for adjustment of status pursuant to 245(i) cured inadmissibility based on unlaw-

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88. *Id.*

89. U.S. DEP'T OF HOMELAND SECURITY, USCIS YEARBOOK OF IMMIGRATION STATISTICS: 2004, *available at* http://www.dhs.gov/files/statistics/publications/YrBk04TA.shtm.

90. 8 C.F.R. § 214.15(e)(2) (2010).

91. AM. IMMIGRATION LAWYERS ASS'N, AILA COMMENTS ON V VISA REGULATIONS, AILA INFONET DOC. NO. 01111238 (posted Nov. 12, 2001), *available at* http://www.aila.org/content/default.aspx?docid=2100.

92. 8 U.S.C. § 1101(a)(15)(V).

93. *See* S. 3514, 110th Cong. (2008); H.R. 1823, 109th Cong. (2005); H.R. 3701, 108th Cong. (2004).

94. *See* Cicero A. Estrella, *Laws Could Help Unite Immigrant Families/Green Card Carriers Have Hardest Time Visiting Spouses*, S.F. CHRON., Dec. 12, 2005, at B1; Sheridan, *supra* note 78.

ful presence.[95] Unfortunately, a year later, the Board of Immigration Appeals (BIA) issued an opinion holding that 245(i) did not cure the unlawful presence bars.[96] USCIS could have chosen to continue to apply the *Acosta* and *Padilla-Caldera* holdings in their respective circuits,[97] but instead USCIS adopted the BIA's interpretation nationwide in subsequent memoranda.[98]

It may seem odd for some that an agency would overstep the circuit courts, but federal agencies often have opportunities to do so. The U.S. Supreme Court ruled in 1984 that where Congress has not clearly delineated how a particular statute ought to be interpreted, it is left to the agency in charge of carrying out the wishes of Congress to fill the statutory gap.[99] In 2005, the Supreme Court again revisited the ability of administrative agencies to interpret statutes. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[100] the Court held that agencies can adopt a different interpretation of an ambiguous provision in a statute, so long as the contrary court holding does not specifically state that "the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill."[101] The Court's *Brand X* decision has limited immigrant advocates' ability to utilize circuit courts to gain more favorable interpretations of immigration statutes and regulations.[102] The BIA decision in *In re Briones* and the subsequent USCIS memorandum voided the Ninth and Tenth Circuits' interpretation of 245(i).[103]

Given the power agencies have in interpreting congressional statutes, immigrant advocates have also pushed for immigrant friendly interpretations from USCIS. A number of unpublished USCIS Administrative Ap-

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95. *See* Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006); Padilla-Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2006).

96. *In re* Briones, 24 I. & N. Dec. 355 (BIA 2007).

97. BIA traditionally has been required to follow circuit precedent in BIA cases arising in the circuit's jurisdiction. Ladha v. INS, 215 F.3d 889, 896 (9th Cir. 2000).

98. Interoffice Memorandum from Donald Neufeld et al., U.S. Citizenship and Immigration Servs., to Field Leadership, U.S. Citizenship and Immigration Servs., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009) [hereinafter Neufeld], *available at* http://www.uscis.gov/ (search "consolidation of guidance concerning unlawful presence"; then follow the first hyperlink).

99. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

100. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

101. *Id.* at 982-83.

102. *See, e.g.*, Ali v. Mukasey, 521 F.3d 737, 742 (7th Cir. 2008) (allowing admissibility of record of conviction); Duran-Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1242 (9th Cir. 2007) (regarding prior removal reentry waiver under 8 U.S.C. § 1182(a)(9)(C)(iii)); Fernandez v. Keisler, 502 F.3d 337, 351 (4th Cir. 2007) (defining "national").

103. Colin-Silva v. Holder 347 F. App'x 310 (9th Cir. 2009) (adopting *In re Briones*).

peals Office (AAO) decisions have held that the three and ten year bar periods start running from the date the person triggers the ineligibility, regardless of whether the person is inside or outside the United States.[104] Although this interpretation has limited application because an illegal re-entry triggers the permanent bar, there are circumstances where the interpretation remains beneficial. For instance, individuals have received advance parole to travel and return to the United States, only to discover that traveling with permission does not protect against the unlawful presence bars.[105]

In May 2009, USCIS issued a fifty-page memorandum on the unlawful presence bars. The memorandum mostly compiled the agency's policies on the unlawful presence bars into one agency policy memorandum.[106] Unfortunately, the agency did not articulate whether a person, who was inadmissible based on unlawful presence, could cure the bar through time spent unlawfully in the United States. The agency's failure to discuss the AAO interpretations in the May memorandum leaves unclear whether the AAO interpretations will become agency policy.

B. Life's Roadblocks to Remaining on Line and Advocacy Efforts to Remove Them

Although the unlawful presence bars only affect family visa beneficiaries who reside, or have resided, unlawfully in the United States, the growing backlogs increase the risk that beneficiaries will encounter other types of immigration roadblocks. The long wait between filing a petition and receiving an immigrant visa raises the probability that the petitioner may die, a marriage may end, or a minor child of a Lawful Permanent Resident (2A) may reach age 21 and be moved to the longer "adult son of a lawful permanent resident" (2B) visa priority category.[107] Congress has enacted minor statutory changes to patch up these problems; however, these changes have been less than perfect solutions.

In 2000, Congress enacted the Child Status Protection Act (CSPA).[108] It allowed the children of U.S. citizens, who were petitioned as minors, to

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104. *See e.g.*, *In re* Robson Vaz, 2007 Immig. Rptr. LEXIS 8834 (BIA Mar. 22, 2007).

105. *In re* Hiralal, 2008 Immig. Rptr. LEXIS 4667 (BIA Oct. 15, 2008) (holding that it is the physical exit from the United States that triggers the unlawful presence bars, not manner of exit and re-entry).

106. Neufeld, *supra* note 98.

107. Under the Visa Preference System, a son or daughter of a Lawful Permanent Resident who is younger than twenty-one years old is classified as a 2A under the family preference system and a son or daughter over twenty-one is categorized as a 2B. Currently a 2B beneficiary is waiting five years longer than a 2A beneficiary to immigrate. *See Visa Bulletin for August 2010*, *supra* note 15.

108. Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002).

remain as immediate relatives, even if the visa application was processed after their twenty-first birthday.[109] Immigrant advocates hoped that Congress would also allow beneficiary children of Lawful Permanent Residents to remain under the traditionally shorter 2A category, but that did not happen.[110] The CSPA instead was interpreted to only allow preference beneficiaries to subtract the period of time the petition application was pending in calculating the priority date, rather than to freeze their chronological age at the time of application.[111]

Unfortunately, not only did Congress fail to provide more complete protection, the USCIS initially interpreted the statute rather narrowly. The USCIS decided that the statute was not retroactive and, therefore, could not benefit minors who had not "aged-out" prior to the enactment of CSPA.[112] Affected families turned to the courts. The BIA in *In re Avila-Perez* ruled that the congressional record did not lend itself to such interpretation, and reversed immigration decisions relying on said reading of the statute.[113] Following that decision, the USCIS issued a memorandum adopting the BIA's decision.[114] Similarly, the USCIS originally interpreted the CSPA not to freeze the age of beneficiary children of naturalized citizens at the time of their naturalization.[115] The USCIS reversed its position two years later.[116]

Congress has also created provisions to allow the beneficiary of a visa petition to immigrate even if the petitioning relative dies before the visa application is approved. For instance, the widow or widower of a U.S. citi-

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109. 8 U.S.C. § 1153(h) (2006).

110. *See Change in Law Will Help Speed Children's Applications*, SAN JOSE MERCURY NEWS, Aug. 21, 2002, at B2; Press Release, Office of Sen. Feinstein, *Senate Judiciary Committee Unanimously Approved Feinstein Legislation to Protect Immigrant Children From "Aging Out" of Visa Eligibility* (June 14, 2002), *available at* http://feinstein.senate.gov/Releases02/ageout02.htm. *But see* Circuit City Stores v. Adams, 121 S. Ct. 1302, 1311 (2001) (holding that statements by members of Congress outside the official congressional reports not relevant to determining congressional intent).

111. 8 U.S.C. § 1153(h), (i).

112. *See In re* Avila-Perez, 24 I. & N. Dec. 78, 79 (BIA 2007).

113. *Id.*

114. Neufeld, *supra* note 98.

115. Interoffice Memorandum from Joe Cuddihy, Dir. of International Affairs, U.S. Citizenship and Immigration Servs., to Overseas District Directors, U.S. Citizenship and Immigration Servs., Section 6 of the Child Status Protection Act (March 23, 2004), *available at* http://www.uscis.gov/ (search "Cuddihy Child"; then follow the first hyperlink).

116. Interoffice Memorandum from Michael Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., to Service Center Directors et al., U.S. Citizenship and Immigration Servs., Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under the Child Status Protection Act Section 6 and Form I-539 Adjudications for V Status (June 14, 2006), *available at* http://www.uscis.gov/ (search "Aytes Aging Out"; then follow the first hyperlink).

zen could self-petition, as long as the couple had been married within two years of the citizen's death.[117] In 2001, USCIS also enacted a regulation to permit beneficiaries to continue with the family immigration process, despite the death of the petitioner.[118] The reinstatement regulation mostly benefits individuals in the third and fourth visa preference categories, for which the waiting lists are twelve to eighteen years long. Hence, there is a higher likelihood that the petitioner may die while the relative is waiting for a visa.[119] But, beneficiaries of shorter waiting period petitions, most notably the widows and widowers of U.S. citizens who were not married for two years prior to the death of the petitioner, have also found themselves in need of humanitarian reinstatement.[120]

Even though the intent of the reinstatement statute was to address a gap in eligibility,[121] USCIS enacted a regulation and promulgated memoranda that limited eligibility.[122] USCIS required that beneficiaries requesting reinstatement of a petition include a substitute affidavit of support from an individual who qualifies under 8 C.F.R. § 213A(f)(5)(B).[123] The substitute sponsor had to be either the U.S. citizen or Lawful Permanent Resident over 18 who was the spouse, child, sibling, grandparent, grandchild, or in-law of the beneficiary.[124] A number of widows and widowers were unable to secure a qualifying sponsor and media stories about their dilemmas circulated.[125] Concerned over mounting bad publicity regarding the treatment of widows, USCIS enacted a program permitting widows to remain in the

117. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC) (2006).

118. *Id.* § 1154(*l*).

119. *See supra* note 16.

120. If the petitioner dies before the visa is approved, the beneficiary cannot use the reinstatement regulation. *In re* Sano, 19 I. & N. Dec. 299 (BIA 1985). Similarly, if the widow has not reached two years of marriage prior to the death of the citizen spouse, she does not qualify for the widow provision. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

121. The Supreme Court has itself construed ambiguities in deportation statutes in favor of aliens. INS v. St. Cyr, 533 U.S. 289, 320 (2001); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). *But see* INS v. Elias-Zacararias, 502 U.S. 478, 482 (1992).

122. 8 C.F.R. § 213a.2 (2010); Interoffice Memorandum from Mike Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., to Field Leadership, U.S. Citizenship and Immigration Servs., Effect of Form I-130 Petitioner's Death on Authority to Approve the Form 1-130 (Nov. 8, 2007), *available at* http://www.uscis.gov/ (search "Aytes I-130"; then follow the first hyperlink).

123. Aytes, *supra* note 122, at 7.

124. 8 C.F.R. § 213a.2 (2010).

125. Editorial, *End the Widow Penalty*, N.Y. TIMES, Apr. 27, 2009, at A2; *60 Minutes: Immigrant Widow Left in Limbo* (CBS television broadcast Nov. 23, 2008), *available at* http://www.CBSnews.com (search "immigrant widow"; then follow first hyperlink).

U.S. under deferred action while the problems with humanitarian reinstatement provisions were resolved.[126]

Shortly thereafter, as part of the 2010 Department of Homeland Security Appropriations Act,[127] Congress modified 8 U.S.C. § 1154(1) and § 1183(a)(f)(5). Under the new statute, petitions filed by U.S. citizens for their spouses are no longer automatically revoked, and the surviving beneficiaries are treated as self-petitioning widows and children of U.S. citizens.[128] In May 2010, USCIS circulated for comment a memorandum discussing changes to regulations reflecting the congressional law.[129] In the memo, the USCIS proposes to interpret "a qualified individual" in accordance with 8 C.F.R. § 213a.3(D),[130] which means that all other beneficiaries seeking reinstatement must still submit a substitute affidavit from a qualified relative.[131]

Although the courts and USCIS have provided some positive results, immigrant advocates have ultimately found themselves regularly returning to Congress for additional clarification and expansion. This would seem to be a futile option, given that we often think that there is a complete stalemate over immigration reform in Congress. Yet, that is not exactly the case. Although comprehensive immigration reform and new immigrant programs have been shelved,[132] Congress has passed some laws that improve, if only so slightly, the ability of immigrants to obtain status in the United States. Fortunately, the current impasse on immigration reform has

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126. Press Release, U.S. Citizenship and Immigration Servs., USCIS Issues Guidance for Surviving Spouses of U.S. Citizens: Deferred Action Authorized for Certain Spouses and Children (Aug. 31, 2009), *available at* http://www.uscis.gov/ (search "interim relief for widows"; then follow first hyperlink).

127. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83 (Oct. 29, 2009).

128. 8 U.S.C §1154(a)(1)(A)(iii)(II)(cc) (2006).

129. Policy Memorandum, U.S. Citizenship and Immigration Servs., Approval of Petitions and Applications after the Death of the Qualifying Relative; New INA Section 204(l) Updates the AFM with New Chapter 20.6 and an Amendment to Chapter 21.2(h)(1)(c) (May 17, 2010) (Draft) [hereinafter Approval of Petitions], *available at* http://www.uscis.gov/ (search "approval of petitions"; then follow the first hyperlink); *see also* AM. IMMIGRATION LAWYERS ASS'N, COMMENTS ON USCIS DRAFT MEMORANDUM: APPROVAL OF PETITIONS AND APPLICATIONS AFTER THE DEATH OF THE QUALIFYING RELATIVE; NEW INA SECTION 204(*l*) UPDATES THE AFM WITH NEW CHAPTER 20.6 AND AN AMENDMENT TO CHAPTER 21.2(h)(1)(c), AILA INFONET DOC. NO. 10060363 (June 1, 2010), *available at* http://www.aila.org/content/default.aspx?docid=32167.

130. Approval of Petitions, *supra* note 129, at 2.

131. 8 C.F.R. § 213a.2(a) (2010).

132. A number of different proposals have been introduced in Congress over the past several years attempting to reform the immigration system. For an article discussing the proposals, see Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 304-20 (2008).

not closed the door on these types of legislative proposals. Since 2005, Congress has addressed problems in a number of programs, such as the VAWA self-petition,[133] as well as the U, T, and J visa programs.[134]

C. The Score Card on Efforts to Place Relatives Back on Line

Although the advocacy efforts outlined in this paper have benefited individuals waiting to immigrate through the family petition process, these efforts have failed to fully redress the family visa program either in the drafting of the statute or in the interpretation. Congressional actions have often fallen short because a need to secure votes for passage leads to drafting compromises. It is difficult to expect elected officials to move through Congress pro-immigration statutes detailed and clear enough to avoid a narrow interpretation by USCIS. For example, when the V Visa Program was introduced, it contained a provision waiving the unlawful presence bars; however, the provision was removed prior to passage, probably to secure passage.[135]

Moreover, USCIS often has developed policies that limit, rather than expand, the number of individuals who can benefit from legislation purported to help immigration applicants.[136] A plausible, beneficial reading by the circuit courts, which would allow applicants eligible for § 245(i) adjustment to overcome the unlawful presence bars, was rejected over a more narrow reading of the statute.[137] The experience with widows and widowers of U.S. citizens demonstrates that, at times, it is only after a "legislative fix" fails a sympathetic immigrant that Congress takes the focused steps necessary to address the problem.

Clearly a more pro-eligibility interpretation of statutes by USCIS would enable individuals to benefit from the programs without having to resort to the courts or Congress. A change in policy will not be politically effortless. Although USCIS has not received much congressional backlash for narrow interpretations, the opposite has occurred when Congress has sought to create broad interpretations. A draft memorandum was leaked in which the agency discussed regulatory actions that could be utilized to increase eligi-

133. For an article discussing the changes the VAWA self-petitioning program has undergone since it was created, see Laura Carothers Graham, *Relief for Battered Immigrants Under the Violence Against Women Act*, 10 DEL. L. REV. 263, 264-66 (2008).

134. Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044.

135. *See* H.R. 5548, 106th Cong. (1999).

136. *See supra* notes 72-135 and accompanying text.

137. *See* Neufeld, *supra* note 98.

bility for immigration benefits.[138] The memorandum proposed a number of administrative interpretations that would increase the number of individuals eligible for adjustment of status in the United States despite the unlawful presence bars.[139] The memorandum suggested that individuals who are in the United States pursuant to Temporary Protective Status[140] could be re-categorized as having been admitted and, therefore, eligible for § 245(i), provided that they met the additional requirements.[141] Another suggestion was to utilize "Parole in Place."[142] Under 8 U.S.C. § 1182(d)(5)(A), Congress gave the Attorney General power to permit an otherwise removable alien to remain in the United States for humanitarian or public policy reasons.[143] Because parole permits individuals to qualify for adjustment of status, granting parole to immediate relatives of U.S. citizens, who were eligible to immigrate, would eliminate the need for beneficiaries to return to their country for consular processing.

Swiftly, seven Republican Senators, led by Senator Charles Grassley of Iowa, sent a letter to the President warning that such agency action would be deemed to "circumvent Congress' constitutional authority to legislate immigration policy."[144] Nevertheless, it is possible that transparent, well-reasoned statutory interpretations, which happen to benefit an increased number of applicants, will be as acceptable to a larger membership in Congress as those that limit eligibility have been. The backlash against the memorandum may just have been a byproduct of current political rifts between Republicans and the Obama administration.

Part of the blame for narrow regulatory interpretation may be placed on the number of governmental agencies involved in drafting immigration regulations. Regulations often need to be approved by the Department of Justice, Homeland Security, and the State Department before they can go into effect. There is often conflict between the agencies. The USCIS may

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138. Memorandum from Denise A. Vanison et al., U.S. Citizenship and Immigration Servs., to Alejandro N. Mayorkas, Director, U.S. Citizenship and Immigration Servs., Administrative Alternatives to Comprehensive Immigration Reform, at 1-2 (Undated Draft), *available at* http://www.ilw.com/immigrationdaily/news/2010,0802-mayorkas.pdf (last visited Aug. 20, 2010).

139. *Id.* at 4.

140. 8 U.S.C. § 1254(a) (2006).

141. *See* Vanison, *supra* note 138, at 3.

142. *Id.* at 3-4; *see also* 8 U.S.C. § 1182(d)(5)(A) (2006).

143. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243-44 (2010).

144. Press Release, Office of Sen. Hatch, No Parole or Deferred Action for Illegal Aliens, Hatch, 7 Others Tell Obama (June 21, 2010), *available at* http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=5c7c629c-1b78-be3e-e0c6-81b26b437781&Month=6&Year=2010.

believe that a statute should be interpreted differently from how the Department of Justice proposes.[145] To obtain the greatest consensus, regulations must often be narrow in scope and substance. [146]

IV. REDRAWING THE LINE: MINIMIZING FAMILY REUNIFICATION FAILURES

You've got a way to keep me on your side
You give me cause for love that I can't hide
For you I know I'd even try to turn the tide
Because you're mine, I walk the line.[147]

Americans still seem open to the idea of providing avenues for immigration, but are decreasingly tolerant of individuals they perceive to be lawbreakers.[148] Interestingly enough, one of the common statements made by critics of immigration reform is that those who violate immigration laws should get in line or be placed at the end of the line.[149] Ironically, a substantial number of undocumented aliens would have been in line or further up the line, but for the detrimental problems in the family petition process discussed in this paper. In addition, the argument that a regularization program is needed because undocumented immigrants have no choice but to walk outside the law is not carrying much power.[150] Therefore, advocates must turn to solutions that open more opportunities for undocumented immigrants to regularize their status through working with and reshaping existing laws. This is not untraveled territory. As this essay chronicles, advocates have successfully chipped away at obstacles for the past fifteen

145. For example, the Department of Justice and the USCIS have had a prolonged dispute about domestic violence asylum regulations. *See* Karen Musalo, *Protecting Victims of Gender Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL'Y & L. 119, 125 (2007).

146. For a discussion regarding the infighting among the agencies and the harmful effects, see Andrew Becker, *Tension Over Obama Policies Within Immigration and Customs Enforcement*, WASH. POST, Aug. 27, 2010, at B03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606561.html (discussing the internal divisions within the branches of Homeland Security and backlash against Obama initiatives).

147. CASH, *supra* note 10.

148. Mike Mokrzycki, *ABC News Poll: Nearly 6 in 10 Back Arizona Immigration Law*, ABC WORLD NEWS (June 17, 2010), http://abcnews.go.com/images/WN/1110a8%20Immigration.pdf.

149. Charles E. Schumer & Lindsey O. Graham, *The Right Way to Mend Immigration*, WASH. POST, March 19, 2010, at A23.

150. *See* Mokrzycki, *supra* note 148.

years by concentrating on solutions that open pathways within existing programs.

The Obama administration appears to be interested in partnering with advocates to use this approach. The draft memorandum that was leaked in July reflects a desire for favorable statutory interpretations.[151] In April 2010, USCIS conducted a stakeholder survey asking practitioners, nonprofit agencies, and others what programs should be given regulatory priority.[152] Although a large number of the respondents were business immigration attorneys, there was a strong sentiment that the family petition process needed to be a priority for the agency.[153] In August 2010, the Department of Homeland Security issued a memorandum requiring ICE to collaborate with USCIS to expedite the family petitions of individuals who are in removal proceedings.[154]

Unfortunately, pro-immigrant USCIS interpretations of statutes face two obstacles. The Obama administration may not be able to make enough regulatory changes during its tenure, and a subsequent, less immigrant-friendly administration may reverse the course. More permanent solutions will need to come from Congress. In the present environment however, administrative solutions may need to suffice as legislators may be concerned that some immigration proposals may deem them unelectable in anti-immigrant districts. It is against this backdrop that I address the question of what needs to be done to "fix" U.S. immigration policies by first suggesting the following modest, but achievable, regulatory changes to the current family visa system.

Individuals seeking to reinstate a petition following the death of the petitioner should not be required to obtain a substitute affidavit of support from a family member. Although 8 U.S.C. § 1154 instructs USCIS that the amended statute should not be "construed to limit or waive any ground of removal, basis for denial of petition or application, or other criteria for adjudicating petitions or applications,"[155] USCIS's additional requirement,

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151. *See generally*, Vanison, *supra* note 138.

152. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, USCIS POLICY REVIEW SURVEY RESULTS 2010, *available at* http://www.uscis.gov/USCIS/Outreach/Feedback%20opportunities/Policy_Survey_Report_2010.pdf.

153. *Id.*

154. *See* Memorandum from John Morton, Dep't of Homeland Sec., Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010), *available at* http://www.ice.gov/doclib/dro/pdf/aliens-pending-applications.pdf.

155. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142 (2009).

that a substitute affidavit of support by a family member be submitted,[156] unnecessarily limits, rather than expands, the number of individuals who benefit from the legislative change. The United States' interests are protected, even if the substitute sponsor is not a relative, because a sponsor has a contractual obligation to provide for the immigrant beneficiary, which in no way rests on a familial relationship. It is quite feasible for the USCIS to reinterpret the statute. Resolving the problem through a court challenge, on the other hand, is difficult because Congress did not override the substitute affidavit regulation when it modified the humanitarian reinstatement statute to provide relief to widows and widowers. Therefore, an agency reinterpretation is the best option.

Unlawful presence should be constructed in the same fashion for the permanent bar as it is constructed for the unlawful presence bar, so as not to punish minors who entered and exited the United States. Section 1282(a)(9)(C) fails to include a definition of "unlawful presence." The USCIS has interpreted this to mean that there is no tolling of unlawful presence for the permanent bar.[157] This reading is detrimental for minors, who are not subject to the unlawful presence bars, because they do not accumulate unlawful presence while they are minors. If the child traveled outside the United States after living illegally and returned illegally, he or she is subject to the permanent bar, regardless of the exception to the unlawful presence bar. Moreover, the person must remain outside the United States for ten years before he or she can request a waiver of the permanent bar.

What makes these changes promising is the fact that they address "unintended consequences" of the immigration laws and problems that the average American sees as "just not fair." Spending time pursuing these less than ambitious options may sacrifice or delay the ability of the larger pools of individuals, who are affected by restrictive immigration statutes, to obtain relief. But the unfortunate reality is that, by concentrating on righting the wrongs committed against the family visa population in an era of immigrant hostility, we are continuing to make that number of wrongs larger.

As for long term solutions, increasing the number of visas available, reviving § 245(i), and eliminating the unlawful presence bars have often been suggested as desirable improvements to the family visa petition system be-

156. 8 C.F.R. § 205.1(a)(3)(C)(2) (2010).

157. Neufeld, *supra* note 98, at 13-14, 28-29 (stating that the exceptions to unlawful presence (tolling of unlawful presence) only apply to 8 U.S.C. § 1282(a)(9)(B), which covers the three and ten year bars, but does not apply to 8 U.S.C. § 1282(a)(9)(C), which covers the permanent bar).

cause of the number of potential beneficiaries.[158] But, unless some dramatic changes occur in Washington, a limited number of visas, adjustment eligibility restrictions, and unlawful presence bars will continue to be part of the status quo for some time to come. If any good can come from these policies, it is that the consequences arising from their legacy will hopefully inform future family visa immigration reform. Already, the social consequences of these statutes demonstrate that restrictive and punitive immigration measures increase the undocumented population. A long wait without a clear end results in families reunifying by other means, and the desire of mixed status families to remain together eclipses the consequences of living in the shadows of U.S. society.

Experiences with these obstructions also inform what modest, effective provisional changes can be made to the family visa immigration process. Accordingly, I would suggest three critical changes for when the political climate is ready for more ambitious reform. First, family visa quotas should be correlated with reasonable total waiting time targets instead of total annual admissions. The long and chronic fluctuation in waiting times is harmful to families. The inability to know when a family member will be eligible for his or her visa leads to anxiety and an inability to make necessary decisions on education, resources, and future plans. Second, family members with pending visa applications should be allowed to reside legally in the United States. This is especially critical for spouses and children of Lawful Permanent Residents. We have seen the damage family separation has on children and how critical the time of arrival in the United States is to a person's ability to acclimate to American society.[159] The V Visa Program serves as a good model for such a program. Lastly, even though it does not seem likely that Americans' desire to punish those who live in the United States illegally will ease any time in the near future, it may be possible to alter the punishment for unlawful presence. One possibility is to punish violators by adding additional time to their visa waiting time. Shorter waiting periods overall and the ability to reside legally while the petition is pending will reduce the hardship of the punishment and still punish the person for the violation.

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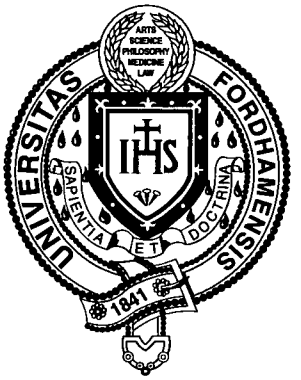
158. *See generally* Samuel W. Bettwy, *A Proposed Legislative Scheme to Solve the Mexican Immigration Problem*, 2 SAN DIEGO INT'L L.J. 93 (2001); Emma O. Guzman, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95 (2000); Arshil Kabani, *Separation Anxiety: Uniting the Families of Lawful Permanent Residents*, 10 SCHOLAR 169 (2008); Julie Mercer, *The Marriage Myth: Why Mixed-Status Marriages Need an Immigration Remedy*, 38 GOLDEN GATE U. L. REV. 293, 293-94 (2008).

159. *See supra* notes 33-70 and accompanying text.

Just as it is important to make these changes to the family petition system, it is also important to change the culture at USCIS. Too often, the USCIS has interpreted statutes to reduce the number of individuals eligible to benefit from Congress's attempts to increase the number of people eligible to immigrate. We cannot take one step forward with legislative changes, only to take two steps back with administrative regulations. Immigration agency interpretations need to adopt the spirit of these legislative cures, not that of the vague drafting compromises caused by the legislative enactment process. Past regulatory drafting experiences with family immigration statutory changes almost mirror the experience shoppers have with coupons and rebates. You must buy the exact product and abide by the fine print of the offer or you do not benefit. Unfortunately, in this case we are not talking about fifty cents off a can of soup. We are talking about the ability of a family to live together legally in the United States.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