U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Field Operations Directorate (MS 2110)
Washington, DC 20529-2110

U.S. Citizenship and Immigration Services

# Memorandum

TO: Alejandro N. Mayorkas, Director

FROM: Denise A. Vanison, Policy and Strategy
Roxana Bacon, Office of the Chief Counsel
Debra A. Rogers, Field Operations
Donald Neufeld, Service Center Operations

SUBJECT: Administrative Alternatives to Comprehensive Immigration Reform

## I. Purpose

This memorandum offers administrative relief options to promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization. It includes recommendations regarding implementation timeframes and required resources.

## II. Summary

In the absence of Comprehensive Immigration Reform, USCIS can extend benefits and/or protections to many individuals and groups by issuing new guidance and regulations, exercising discretion with regard to parole-in-place, deferred action and the issuance of Notices to Appear (NTA), and adopting significant process improvements.

To promote family unity, USCIS could reinterpret two 1990 General Counsel Opinions regarding the ability of Temporary Protected Status (TPS) applicants who entered the United States (U.S.) without inspection to adjust or change status. This would enable thousands of individuals in TPS status to become lawful permanent residents. Similarly, where non-TPS applicants have been deemed inadmissible under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act") for having entered without inspection, USCIS could grant "parole-in-place" (PIP) in the exercise of discretion to create a basis for adjustment in the U.S.

To foster economic growth, USCIS could work more aggressively with the Department of Commerce (DOC) to complement important economic initiatives such as *Invest in America*. By establishing a working group with the DOC, USCIS should consider creative ways to make the EB-5 program more accessible to foreign investors and to administer it.

For workers in the U.S. whose occupations require frequent travel, or who are seeking permanent residence, USCIS could also build on a regulation issued by the former INS that, among other things, relieved H and L non-immigrants with pending adjustment applications from having to secure advance parole before departing the U.S. Expanding this "dual intent" concept to cover other long-term non-immigrants, including F, O, TN, P, and E visa holders would enable these workers to maintain valid nonimmigrant status and travel overseas without advance parole while their adjustment applications are pending. They would also be allowed to maintain their nonimmigrant status if USCIS denies their adjustment applications. The agency could also consider extending employment authorization to the dependent spouses of certain skilled workers. For example, USCIS could allow employment authorization for H-4 dependent spouses of H-1B principals where the principals are also applicants for lawful permanent residence and have extended their nonimmigrant status under the provisions of AC21. Finally, the agency should afford workers admitted to the U.S. in nonimmigrant status a reasonable period of time to conclude their affairs and depart after expiration of their authorized period of employment, performance, training, or vocational activity. The current 10-day "grace period" is insufficient. USCIS could amend its regulations to permit longer periods ranging from 45 to 90 days depending on employment category and overall time spent working in the U.S.

Where no relief appears available based on an applicant's employment and/or family circumstances, but removal is not in the public interest, USCIS could grant deferred action. This would permit individuals for whom relief may become available in the future to live and work in the U.S. without fear of removal. A corollary to this exercise of agency discretion is for USCIS to issue Notices to Appear (NTAs) strategically, rather than across the board. If relief is potentially available in removal, USCIS should consider issuing an NTA. On the other hand, where no relief exists in removal for an applicant without any significant negative immigration or criminal history, USCIS could avoid using its limited resources to issue an NTA.

Finally, for applicants who have requested relief from USCIS, whether in-country or abroad, and whose applications require a waiver of inadmissibility, USCIS could issue guidance or a regulation lessening the "extreme hardship" standard. This would encourage many more spouses, sons and daughters of U.S. citizens and lawful permanent residents to seek relief without fear of removal. It would also increase the likelihood that such relief would be granted.

## II. Options

The following options - used alone or in combination - have the potential to result in meaningful immigration reform absent legislative action. Each requires the development of specific written guidance and/or regulatory language, implementation protocols, outreach and training within USCIS and coordination among Department of Homeland Security (DHS) immigration components.

## A. To Promote Family Unity

### 1. Allow TPS Applicants Who Entered without Inspection to Adjust or Change Status

Individuals in TPS continue to be deemed ineligible to adjust or change status in the U.S. based on legal opinions rendered in the early 1990s by a General Counsel of the former Immigration and Naturalization Service (INS). Given the current definition of "admission" in section 101(a)(13)(A) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(13)(A), the USCIS Chief Counsel has expressed her view that these legal opinions no longer reflect a correct interpretation of the statute. *See **January 14, 2010 Memorandum from Roxana Bacon, Chief Counsel, to David Martin, Principal Deputy Counsel** (attached).*

Thus, USCIS should no longer adhere to the 1990 General Counsel opinions, and instead permit individuals in TPS to adjust or change status. Opening this pathway will help thousands of applicants obtain lawful permanent residence without having to leave the U.S.

The SPC is poised to review this issue in May. Depending on its final decision, implementation of this option could begin immediately following the development of written field guidance and an external communication plan. Rather than imposing any additional financial cost, allowing TPS applicants to adjust or change status will increase USCIS revenue in the form of fee receipts. While initial outreach related to the implementation of field guidance may require dedicating staff/resources, this would likely be a short-term need. Actual adjudication of new applications and petitions could be handled by field offices already experiencing lower than normal receipts.

### 2. Expand the Use of Parole-in-Place

USCIS has the discretionary authority under section 212(d)(5)(A) of the Act to parole into the U.S. on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit" any applicant for admission. Section 235(a)(1) of the Act provides that an alien present in the U.S. who has not been admitted shall be deemed an applicant for admission. Granting parole to aliens in the U.S. who have not been admitted or paroled is commonly referred to as "parole-in-place" (PIP).[1]

By granting PIP, USCIS can eliminate the need for qualified recipients to return to their home country for consular processing, particularly when doing so might trigger a bar to returning. For years, USCIS has used PIP on a very limited basis. Last month, however, the SPC approved the broader use of PIP for qualified military dependents to:

---

[1] Individuals who were lawfully admitted to the United States but whose authorized period of admission is about to expire or has expired are not eligible for parole-in-place.

- Preserve family unity and address Department of Defense concerns regarding soldier safety and readiness for duty,
- Avoid the need for spouses and children of active duty military service members to depart the U.S. and wait in foreign, often very dangerous jurisdictions for consulate processing, and
- Enable these same individuals to remain on military installations in the U.S. where they can receive housing, medical and dental, and other support services based on the active duty service member's status.

Other individuals/groups amenable to PIP include applicants for admission who entered the U.S. as minors without inspection, and whose return to their home country for consular processing would impose an extreme hardship on qualified family members. By statute, such family members, include a U.S. citizen or lawful permanent resident parent, spouse, son or daughter. For example, where the applicant is the spouse of a U.S. citizen and also the primary caretaker of a disabled child or children, PIP could be used to enable adjustment in the U.S. Other applicants, including those who are elderly or who have lived for many years in the U.S., and for whom consular processing would impose a formidable financial burden, could likewise be granted PIP.

In terms of implementation costs and required resources, although PIP has been granted by USCIS without requiring the filing of any form or fee, the agency should alter this approach for wider use. The Form I-131, Application for Travel Document, presents the most logical application and presently involves a mandatory filing fee of $305.00.

### 3. Amend the Unlawful Presence Policy for Adjustment Applicants

Under current USCIS interpretation, an adjustment applicant who departs the United States and returns on advance parole authorization triggers the 3-year or 10-year bar unlawful presence ground of inadmissibility. Because USCIS generally issues advance parole for adjustment applicants liberally and the fee for the advance parole document is now included with the fee for adjustment of status, the public perceives that: 1) USCIS authorizes the departure of such alien and 2) USCIS deceives individuals into triggering their own inadmissibility.

To address these issues, OP&S is currently examining the feasibility of policy options so that individuals would not be deemed to have triggered the bar upon departure with prior authorization from DHS. The options include possibilities reexamining past interpretations of terms such as "departure" and "seeking admission again" within the context of unlawful presence and adjustment of status.

Implementation Method: Interim Policy Guidance; Rulemaking
Resources/Considerations: Coordination with DHS.
Target Date: September/October 2010 (Policy Guidance); June/July 2011 (Rulemaking)]

### 4. Lessen the Standard for Demonstrating "Extreme Hardship"

The Act at 212(a)(9)(B)(i)(I) and (II) renders inadmissible for 3 or 10 years individuals who have been unlawfully present in the U.S. for 180 days or one year respectively, and then depart. By statute, DHS has discretion to waive these grounds of inadmissibility for spouses, sons and daughters of U.S. citizens or lawful permanent residents if the refusal to admit such individuals would result in extreme hardship to their qualifying relatives. Generally, the "extreme hardship" standard has been narrowly construed by USCIS.

To increase the number of individuals applying for waivers, and improve their chances for receiving them, CIS could issue guidance or a regulation specifying a lower evidentiary standard for "extreme hardship." This would promote family unity, and avoid the significant human and financial costs associated with waiver denial decisions born of an overly rigid standard. This revised standard would also complement expanded use of PIP as set forth in B.

**5. Publish final regulations related to relief for unaccompanied minors, and for victims of human trafficking, domestic violence, and other criminal activities**

These rules would help regularize the immigration status of minors in foster care or in the process of being adopted. They would further clarify the derivative family members for whom a victim of human trafficking can petition, implement provisions allowing such individuals to enter the U.S. based on the danger of retaliation, and establish procedures for victims of elder abuse to seek relief.

Implementation method: Proposed and interim final regulations.
Resources/considerations: Coordination necessary with various federal agencies, including DOJ and DOS.
Target delivery date: FY10-FY11

**B. To Foster Economic Growth**

**1. Partner with Department of Commerce (DOC) to administer the EB-5 Immigrant Investor Program**

The EB-5 program allows certain aliens who have made investments in US businesses and who created at least ten jobs to obtain LPR status. Due to a number of factors the EB-5 program has been under utilized and, as a result, job creation under this program has been limited. USCIS views the EB-5 program as an important tool in assisting the U.S. economy as our country continues to recover from the recent recession. Currently, an opportunity exists for USCIS and the DOC to work together in promoting the EB-5 Immigrant Investor Pilot Program (Pilot Program). The goals of the Pilot Program and the goals of certain DOC components, such as *Invest in America*, seem to provide a natural starting point for agency collaboration. OPS proposes setting up a working group with the DOC to determine how DOC might assist USCIS

in making the EB-5 program more accessible to foreign investors thorough administrative efficiencies and promotion.

Implementation Method: Working group sessions between DOC and USCIS. Probable rulemaking to codify joint administration of the EB-5 Program once parameters are agreed upon between the two agencies.
Resources/Considerations: DHS and USCIS leadership agree that the partnership with DOC would be beneficial to USCIS as well as the EB-5 stakeholder community. Need to coordinate with DOC.
Target Date: To be determined. [We can begin cooperating with Invest in America immediately.] Allow 3-9 months so that the low hanging fruit can be harvested first.

**2. Expand the Dual Intent Doctrine**

Most non-immigrants who apply for adjustment of status are presumed to be intending immigrants and are no longer eligible to maintain nonimmigrant status. Section 214(h) of the Act permits H-1 temporary workers in specialty occupations, L-1 intra-company managerial or executive transferees, and their spouses and children to maintain their nonimmigrant status while their adjustment applications are pending.

USCIS should consider expanding the dual intent concept to cover other long-term non-immigrants, including F, O, TN, P, and E visa holders. These long-term non-immigrants often need to make short overseas travels during their authorized stay. Under the "dual intent" doctrine, these non-immigrants would be able to maintain valid nonimmigrant status and travel overseas without advance parole while their adjustment applications are pending. They would also be allowed to maintain their nonimmigrant status if USCIS denies their adjustment applications.

Implementation Method: NPRM.
Resources/Considerations: Coordinate with other DHS components and DHS Headquarters as well as the Department of State.
Target Date: Minimum of 12 months to issue final rule.

**3. Extend employment authorization to H-4 dependent spouses of H-1B principals where the principals are also applicants for lawful permanent residence under AC 21.**

USCIS Senior Leaders have already approved this course of action; it is therefore recommended in the context of identifying administrative relief options that their decision be communicated to the Department of Homeland Security and to the White House.

Implementation Method: Notice of Proposed Rulemaking (NPRM).

Resources/Considerations: Coordinate with DHS Policy and White House prior to rule drafting. USCIS systems (CLAIMS, etc.) will need to be modified to accommodate EADs for this group of H-4s.
Target Date: Minimum of 12 months to issue final rule.

**4. Expand existing "grace periods" to depart the U.S. for E-1, E-2, E-3, H-1B, H-1B1, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q, R, and TN workers and their dependents.**

Non-immigrant workers whose period of employment authorization has expired should be afforded a reasonable period of time to conclude their affairs and leave the U.S. The current 10-day "grace period" for departure is insufficient and should be expanded by regulation to permit between 30-90 days for departure depending on employment category and length time the individual has been authorized to work in the U.S. Proposed H-2A regulations recognize this problem and include a 30-day period of authorized stay after the H-2A employment period expires.

Implementation Method: NPRM
Resources/Considerations: Coordinate within other DHS components.
Target Date: Minimum of 12 months to issue final rule.

**C. To Achieve Process Improvements**

**1. Expand the Availability of Premium Processing Service**

Expand availability of premium processing service to additional employment-based classifications (specify which ones need to be added, to include applications to change or extend nonimmigrant status, applications for employment authorization and advance parole, and all employment-based immigrant petitions). We have no backlogs now, and we can do it operationally.

Implementation Method: Federal Register Notice (for classifications not previously designated as eligible for Premium Processing Service), and website posting and update to "turn on" Premium Processing Service availability for classifications previously designated by Federal Register Notice as eligible for Premium Processing Service.
Resources/Considerations:
Target Date: Immediate for classifications previously designated as eligible for Premium Processing Service. For classifications which have not been previously designated, a Federal Register Notice will need to be published, which could take 60-90 days.

2. Implementation of the Validation Instrument for Business Enterprises (VIBE) Program

VIBE is a web-based tool for adjudicators that will enable USCIS to independently validate the viability and current level of business operations of companies and organizations filing employment-based immigrant and nonimmigrant petitions.

By providing information about a petitioning company/organization's level of business operations, VIBE will enhance USCIS' ability to more easily distinguish eligible petitioners from those that are ineligible and/or fraudulent.

VIBE is expected to eventually lessen the need for petitioners to repeatedly submit voluminous paper documentation to establish petitioner viability. This, in turn, will likely reduce the number of RFEs issued to otherwise eligible petitioners.

Additionally, by providing the same petitioner information to all four Service Centers, VIBE will promote consistency in the adjudication of employment-based immigrant and nonimmigrant petitions. Overall, the additional information provided by VIBE will improve the integrity of employment-based immigrant and nonimmigrant programs which will ultimately provide eligible petitioners greater access to legal foreign workers.

Implementation Method: USCIS Update and pre-implementation stakeholder meeting.
Resources/Considerations: Coordinate with OIT and other USCIS Offices.
Target Date: Spring/Summer 2010.

**2. H-2B Cap Allocation Options**

An options paper has been prepared by USCIS which discusses alternative ways to distribute the limited number of H-2B cap numbers available per fiscal year.

Currently, the statute require that H-2B cap numbers be allocated semi-annually, with 33,000 visa numbers allocated during the first six months of the fiscal year, and 33,000 allocated during the last six months of the fiscal year. Options include a quarterly distribution, a monthly distribution, or a "peak period" distribution. Options are currently under review within USCIS and DHS. USCIS will likely seek to hold public engagement events to solicit ideas from stakeholders.
Implementation Method: No regulation required. Consultation with H-2B stakeholders recommended prior to any decision being made.
Resources/Considerations: Coordinate with other DHS components and the Department of State.
Target Date: Implementation in six months.

**3. Automatic Extension of Employment Authorization Documents (EADs)**
Permit an automatic extension of EADs for up to 240 days when an application to extend the EAD has been filed prior to its expiration. We currently permit this for nonimmigrant worker visa petitions. (SCOPS)
Implementation Method: No rulemaking required. Operational changes will be necessary to implement.
Resources/Considerations: Coordinate with DHS and conduct outreach with stakeholders.

Target Date: 60 to 90 days.

**4. 2-year EADs - Issue Employment Authorization Cards valid for 2 years in wider circumstances.** (SCOPS)
Implementation Method: No rulemaking required.
Resources/Considerations: Coordinate with DHS.
Target Date: 60 to 90 days. SCOPS should weigh in here.

**5. Reengineering of Civil Surgeon Process**

USCIS proposes to implement a new process to govern the designation and revocation of civil surgeons, who are physicians authorized to conduct legally required medical examinations of aliens applying for certain immigration benefits. The new process would:

- Create uniform standards and procedures for civil surgeon designation and revocation.
- Designate an application form, a fee for civil surgeon designation, and a centralized civil surgeon processing center.
- Require civil surgeons to be board certified in their medical specialty.
- Authorize blanket designations for health departments and Armed Forces physicians in certain circumstances.
- Grant the USCIS Director authority to designate civil surgeons in emergent or unforeseen circumstances.

The new process would enhance the caliber of civil surgeons, improve the quality of immigrant medical examinations, and strengthen DHS' commitment to safeguarding public health.

Implementation Method: Rulemaking
Date: June 2011
Resources/Considerations: Coordinate with DHS and Health and Human Services.
Target

**6. Internal Policy Review & Enhancement**

U.S. Citizenship and Immigration Services (USCIS) currently provides policy guidance as memoranda, standard operating procedures (SOP), manuals, and training materials. Inconsistent interpretation and application of guidance and the lack of a central reference point for internal and external stakeholders often results in disconnected information and lack of transparency. Local and national policy guidance within USCIS is distributed across multiple sources; such as the USCIS intranet, an internal version of the Adjudicator's Field Manual, training materials, and the i-link reference disk. This creates a tremendous burden for USCIS employees and the public in trying to access relevant information.

To address these issues, USCIS has prioritized a comprehensive review of all policy documents to ensure that guidance is consistent throughout the Agency. The review will examine all existing policy within the Agency and provide access to the most up-to-date guidance to both internal and external stakeholders. Once the policy guidance is reviewed and revised, it will be posted on a central and searchable web-based repository.

Implementation Method: Rulemaking
Resources/Considerations: USCIS Working Groups, USCIS Senior Policy Council
Target Date: Incremental Implementation; All USCIS policies reviewed and enhanced by June 2012.

### D. To Protect Certain Individuals or Groups from the Threat of Removal

#### 1. Increase the Use of Deferred Action

For individuals already admitted to the U.S. (and therefore ineligible for PIP), USCIS can increase the use of deferred action. Deferred action is an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time.[2] A grant of deferred action does not confer any immigration status, nor does it convey or imply any waivers of inadmissibility that may exist. Likewise, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. Periods of time in deferred action do, however, qualify as periods of stay authorized by the Secretary of DHS for purposes of sections 212(a)(9)(B) and (C) of the Act, and may be extended indefinitely. Individuals who have been granted deferred action may apply for employment authorization. Within DHS, USCIS, Immigration and Customs Enforcement, and Customs and Border Protection all possess authority to grant deferred action.

USCIS has previously allowed the use of deferred action to provide relief to non-immigrants whose periods of admission had expired, or otherwise had failed to maintain lawful immigrant status. In the aftermath of Hurricane Katrina, USCIS instituted a policy of deferred action for non-immigrants impacted by this natural disaster. USCIS has also granted deferred action for particular groups including applicants for interim relief related to the U visa program. Most recently, the SPC approved the use of deferred action for certain military dependents for whom a visa number is not currently available and who are ineligible for PIP.

While it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, not to mention expensive. Presently no specific application form or fee is required to request or receive deferred action. Were USCIS to increase significantly the use of deferred action, the agency would either require a separate

---

[2] *See*, US Citizenship and Immigration Ser vices, *Adjudicator's Field Manual*, at section 40.9.2(b)(3)(J), added May 6, 2009. Factors to be considered in evaluating a request for deferred action are also discussed in the November 17, 2000 memorandum entitled "Exercising Prosecutorial Discretion" by former Immigration and Naturalization Services Commissioner, Doris Meissner at footnote 1.

appropriation or independent funding stream.[3] Alternatively, USCIS could design and seek expedited approval of a dedicated deferred action form and require a filing fee.

Rather than making deferred action widely available to hundreds of thousands and as a non-legislative version of "amnesty", USCIS could tailor the use of this discretionary option for particular groups such as individuals who would be eligible for relief under the DREAM Act (an estimated 50,000), or under section 249 of the Act (Registry), who have resided in the U.S. since 1996 (or as of a different date designed to move forward the Registry provision now limited to entries before January 1, 1972).

**2. Issue NTAs Strategically to Promote DHS Priorities**

Under Policy Memorandum 110 (attached) USCIS issues NTAs for denied cases where such issuance is prescribed by regulation. This includes, but is not limited to, denials of the Form I-751 Petition to Remove Conditions on Residence; Form I-829, Petition by Entrepreneur to Removal Conditions; and Form I-817, Application for Family Unity Benefits and Form I-821 Application for Temporary Protected Status. See 8 CFR 216.3(a), 8 CFR 236.14(c) and 8 CFR 244.5(a). USCIS also issues an NTA after termination of an alien's refugee status by the District Director. See 8 CFR 207.9.

Aside from these situations, USCIS has discretion regarding whether or not to issue NTAs. In practice, and in accordance with the spirit of Policy Memorandum 110, the agency typically issues NTAs for any/all denial decisions without weighing the likely impact on the applicant or the Executive Office for Immigration Review.

To promote the expressed priorities of ICE's Secure Communities Initiative (attached) regarding increased docket efficiency and a focus on individuals who pose a danger to the community; USCIS should issue NTAs strategically, rather than across the board. If relief is potentially available in removal, USCIS should consider issuing an NTA. On the other hand, where no relief exists in removal for an applicant without any significant negative immigration or criminal history, USCIS should avoid using its limited resources to issue an NTA. Denied cases should, however, be referred to ICE given that agency's enforcement responsibilities.

---

[3] Under Sections 262, 263, and 264 of the Act, USCIS may develop and implement a registration program for individuals who are unlawfully present in the U.S. The goal of such a program could be to offer potential discretionary relief options including deferred action while simultaneously gathering basic biometric data and conducting comprehensive security checks.