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**PETER APPROVED MY VISA, BUT PAUL DENIED IT:
AN ANALYSIS OF HOW THE RECENT VISA BULLETIN
CRISIS ILLUSTRATES THE MADNESS THAT IS U.S.
IMMIGRATION PROCEDURE**

Emily C. Callan and JohnPaul Callan*

Mr. Sourav Hazra, a national and citizen of India, presently lives with his wife in California where he works as a Senior Manager with an international software company.¹ Mr. Hazra's company began his green card application on May 9, 2011.² Although the first and second steps of his immigration process were completed more than four years ago, Mr. Hazra, due to his status as an Indian national, has been ineligible to receive his green card due to the severe backlog in green cards that many be allocated to foreign nationals of that country.³ Finally, on September 9, 2015, Mr. Hazra, along with hundreds of thousands of similarly situated foreign nationals, learned that he would at long last be able to submit the third and final step of his green card application, the Form I-485 Application, on October 1, 2015.⁴ To prepare for this submission, Mr. Hazra spent thousands of dollars on attorney fees, canceled an upcoming trip to India, took time off from work, and completed a required medical examination.⁵

Unfortunately, on September 25, 2015, less than one week before Mr. Hazra was scheduled to submit his application, he learned that he would no longer be eligible to file his green card application on October 1, 2015 – and that there was no way of predicting *when* he would again be eligible to do so in the future.⁶ Sadly, Mr. Hazra's experience is not unique in the slightest as an estimated tens of thousands of foreign nationals received the same

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¹ Compl. at 6-7, *Mehta v. United States Dept. of State*, No. 15-1543 (W.D. Wash., Sept. 28, 2015).

² *Id.* at 7.

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.* at 7.

⁶ *Id.* at 4.

disappointing news.⁷ This recent arbitrary handling (or arguably *mishandling*) of green card filing procedures is referred to as the Visa Bulletin Crisis, and is the latest example of federal immigration bureaucracy gone awry.

In the Immigration and Nationality Act of 1990, Congress set an annual limit on the number of green cards that may be allocated in every fiscal year, and further allotted a certain number of green cards per country, in order to ensure that no one country received all of the green cards in any particular year.⁸ Because there are many more Indian nationals who wish to immigrate to the United States than there are green cards available in a given year, the immigration categories for Indian nationals has become severely backlogged; with the result that these applicants must wait upwards of 10 years before they are eligible to receive their green cards.⁹ To find out when they will be eligible, the applicants must look to their *priority date*, which in most cases is the date that their employer submitted the Foreign Labor Certification Application ETA Form 9089 to the U.S. Department of Labor.¹⁰ The applicant is eligible to file the Form I-485 Application once any date *after* their own priority date is listed on the U.S. Department of State (DOS) monthly Visa Bulletin.¹¹

Part of the reason why this process is so confusing is because two government agencies are involved: the DOS publishes the Visa Bulletin – which informs potential applicants of who is and is not eligible to file the Form I-485 Application – and USCIS receives and processes the Form I-485 Applications. Unfortunately, the growing federal bureaucracy and the complexity of our immigration laws all but ensures that, at some point, these two agencies will disagree on what priority date should be listed in the Visa Bulletin. In fact, this very event occurred in 2007 and resulted in hundreds of thousands of premature Form I-485 Applications flooding USCIS – with the result that many of them remain adjudicated as of February 2016.¹²

Unfortunately, history has once again repeated itself with the Visa Bulletin crisis of September 2015. On September 9, 2015, the DOS published the Visa Bulletin for October.¹³ This bulletin contained priority dates that would have allowed Mr. Hazra and hundreds of thousands of other foreign nationals, to submit their

⁷ *Id.* at 3.

⁸ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

⁹ There are also significant backlogs for Chinese nationals, Mexican nationals, and Philippine nationals in the employment-based categories.

¹⁰ 8 C.F.R. § 204.5(d).

¹¹ *Id.*

¹² February 2016 Visa Bulletin

¹³ Compl., *supra* note 1, at 3.

Form I-485 Applications on October 1, 2016.¹⁴ A little more than two weeks later, on September 25, 2015, the DOS –with no advance notice or warning – published a revised October 2015 Visa Bulletin with significantly different priority dates that disqualified the aforementioned applicants from completing the last step in their immigration process.¹⁵

After receiving the heartbreaking news, many applicants tried using honey to get the proverbial flies at USCIS to change their minds by sending bouquets of flowers to the USCIS adjudication officers.¹⁶ However, other affected individuals opted for the more serious approach of filing a class action lawsuit against the U.S. government for its arbitrary and capricious treatment of their immigration process. The class action, *Mehta et al v. U.S. Department of State et al*, requests that the court compel USCIS to accept the Form I-485 Applications of those applicants who were eligible to submit their applications per the originally published October 2015 bulletin.¹⁷

This class action is a perfect example of federal bureaucracy run amok, and the events giving rise to it would be comical if they weren't so disappointing. Since the Visa Bulletin crisis illustrates much of what is wrong with current immigration law, a closer examination of the crisis and the mechanisms behind it should be conducted. To do so, Part I briefly describes how the Visa Bulletin works and how it is used in immigration practice. Part II explains the problems caused by the Visa Bulletin crisis and posits a number of reasons why the DOS altered the priority dates. Finally, Part III analyzes what could and should be done to address the wrongs suffered by the plaintiffs and to prevent similar catastrophes in the future.

The Visa Bulletin crisis has provided the current administration and Congress with an excellent opportunity to revisit the stalled immigration reform legislation. By looking to the mechanics of the Visa Bulletin and how it is implicated in the green card procedures for hundreds of thousands of foreign nationals every year, the federal government can work together to arrive at a better system for this last step in the green card process that effectively and fairly fulfills the need for realistic immigration reform.

¹⁴ Compl., *supra* note 1, at 4.

¹⁵ *Id.*

¹⁶ Immigrants Fight Back With Flowers (available at <http://origins-video.beforeitsnews.com/politics/2015/10/immigrants-fight-back-with-flowers-2747902.html>).

¹⁷ Compl., *supra* note 1, at 5.

I. VISA BULLETIN BASICS

As briefly touched upon above, the Visa Bulletin is a tool used by the DOS to alert foreign nationals that their priority dates will be current in the next calendar month and therefore they are eligible to submit their Form I-485 Applications. The DOS publishes a new bulletin every month which lists the current priority dates for the *next* month. The point of this early posting is to give applicants time to gather the many different materials that are needed to submit their Form I-485 Applications. For example, the October 2015 bulletin was published on September 9, 2015, thereby giving applicants approximately three weeks of notice in order to gather the materials necessary to timely submit their applications.¹⁸

What made the September 9, 2015 bulletin so different was that, for the first time, the DOS had taken much anticipated steps to allow more foreign nationals to file their Form I-485 Applications, even though their priority dates were not current.¹⁹ To do so, the DOS posted two different sets of dates for the employment and family-based green card categories.²⁰ The first set of dates, called the Application Final Action Dates, show the true priority dates – meaning that applications with those priority dates could actually be adjudicated by USCIS officers. The second set of dates, called the Dates for Filing Visa Applications, provide dates on which applicants may *submit* their Form I-485 Applications to USCIS, but no officer would be assigned to review the case yet.²¹ This second set of dates basically amounted to much more current priority dates with as many as three *years* separating the first and second set of dates.²² Due to these second set of dates, applicants must now look at both charts to find out when they can submit their applications and when they can expect their application to be reviewed by USCIS.

The DOS has long been under pressure to move up the priority dates, especially for Indian and Chinese foreign nationals in the employment-based green categories. The reason for this pressure is because the submission of a Form I-485 Application carries with it significant immigration-related benefits. For example, by filing the application the foreign national and his/her dependents place themselves in a separate and ongoing authorized immigration status, which means they and their employers are no

¹⁸ Compl., *supra* note 1, at 3.

¹⁹ *Id.*

²⁰ *Id.* at 17.

²¹ *Id.* at 23.

²² *Id.*

longer required to extend their underlying nonimmigrant worker status such as H-1B or H-4.²³ Additionally, a Form I-485 Application may be accompanied by separate applications for travel authorization and work authorization, which would allow certain applicants to work legally in the United States and to travel internationally without the need for obtaining a visa at a U.S. embassy abroad (which can be a long and expensive process).²⁴

However, perhaps the best advantage of filing the Form I-485 Application is established in the American Competitiveness in the Twenty-first Century Act of 2000, commonly referred to as “AC21” by immigration lawyers.²⁵ Congress passed AC21 to address many problems with employment-based immigration regulations.²⁶ With regards to Form I-485 applicants, Section 106(c) of AC21 states:²⁷

A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.”

In lay terms, this section means that a foreign national who has submitted a Form I-485 Application can change employers (or start his/her own business) after the application has been pending for 180 days.²⁸ Most importantly, the new employer is not required to redo the first two steps of the foreign national’s immigration process as long as the national’s new job position is the same as or is similar to the green card position that was offered by the previous employer.²⁹

²³ 8 U.S.C. § 1255 (k).

²⁴ USCIS Instructions on Form I-765 Application for Employment Authorization (available at <http://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf>); USCIS Instructions on Form I-131 Application for Travel Authorization (available at <http://www.uscis.gov/sites/default/files/files/form/i-131instr.pdf>).

²⁵ “Analysis of The American Competitiveness in the 21st Century Act (AC21)”. Law Office of Carl Shusterman, in cooperation with the American Immigration Lawyers Association. Retrieved March 11, 2015.

²⁶ Memorandum from the Exec. Assoc. Comm’r for all Serv. Ctr. Dirs. (USCIS June 19, 2001).

²⁷ American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

²⁸ *Id.*

²⁹ *Id.*

Section 106(c) has proven to be a humongous and much sought-after benefit in the years since the enactment of AC21, especially for Indian nationals who have had to wait upwards of 10 years for their priority date to become current. It is precisely because of this green card backlog that made the publication of the September 9th Visa Bulletin so groundbreaking in immigration practice and so exciting to the affected foreign nationals.

However, the DOS giveth and the DOS taketh away. Due to these significant benefits that were arguably offered and then rescinded, the affected foreign nationals allege that they detrimentally relied on the September 9th Visa Bulletin and have been adversely affected upon its rescission.³⁰ The closer examination of the problems caused by the Visa Bulletin Crisis which are presented in the next Part may bolster the argument for getting rid of the bulletin altogether.

II. THE “HAPLESS BUREAUCRACY” - THE PROBLEMS CAUSED BY THE VISA BULLETIN CONTROVERSY AND THE REASONS BEHIND IT

The lawsuit documents filed with the court are very unforbearing in terms of how they describe the actions of the DOS and USCIS. For an example, one need only look to the opening sentence of the Complaint which reads, “This case is about what happens when thousands of law-abiding, highly skilled immigrants spend millions of dollars preparing to apply for green cards in reasonable reliance on an agency’s binding policy statement, only to find out at the last minute that a hapless federal bureaucracy has abruptly, inexplicably, and arbitrarily reneged on its promise.”³¹ The problems created by the plaintiffs’ reasonable reliance on the Visa Bulletin can be divided into two groups: the practical problems and the intangible problems.

The practical problems that the plaintiffs alleged are quite numerous. The Complaint first points to the financial cost of the Visa Bulletin blunder and argues that hundreds of thousands of foreign nationals spent *millions* of dollars in legal bills to pay immigration attorneys for preparing their Form I-485 Applications, to pay USCIS-designated civil surgeons for conducting the required immigration-related medical examination and performing any needed vaccinations; and to pay various translation companies to translate foreign language documents such as birth certificates and marriage certificates into English for inclusion in the Form I-

³⁰ Compl., *supra* note 1, at 3.

³¹ *Id.*

485 Applications.³² The Complaint also alleges that many plaintiffs incurred miscellaneous costs including taking time off of work to prepare the applications, postponing or canceling upcoming travel plans, etc.³³ Moreover, anecdotal testimonies from affected foreign nationals also indicate that many people cancelled or delayed weddings and other ceremonies, and began the home-buying and mortgage qualification process in reliance on the Visa Bulletin.

The Complaint references the intangible problem caused by the Visa Bulletin crisis but does not plainly characterize it as such – namely, that hundreds of thousands of people have been stripped of their rights to apply for work authorization and travel authorization, and to take advantage of the aforementioned AC21 benefits.³⁴

After looking to these problems caused by the Visa Bulletin, they absolutely beg the question why would the DOS undertake to so radically change the priority dates without so much as a whisper of a notice or warning? Why did the DOS fail to learn from its mistake in 2007 and the previous Visa Bulletin Crisis? The public may only guess at the motivations behind the agency's decision but the author's proposed reasons are two-fold: the ever-increasing politicization of immigration policy and the lack of foresight on behalf of the government agencies.

A. The Politicization of Immigration Policy.

In recent years, a person's opinions on immigration topics has become one of the strongest litmus tests for defining that person's political leanings. Democrats taunt Republicans with threats of committing political suicide should the Right not approve of every open-border and immigration-enhancing policy.³⁵ In the same vein, Republicans roundly criticize the Democrats for putting the needs, goals, and wants of foreign nationals over those of natural-born American citizens, and refer to their cohorts on the Left as unpatriotic.³⁶ Immigration policy has become so highly politicized that both sides are guilty of using it as an extremely flammable political football. For example, the President was

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ *Obama: GOP Immigration Stance Political 'Suicide'*, HUFFINGTON POST (Oct. 9, 2014) http://www.huffingtonpost.com/2014/10/09/republicans-immigration_n_5962340.html.

³⁶ Dr. Kevin Collins, *Democrats are Unpatriotic; Are They Immoral as Well?*, WESTERN JOURNALISM (Feb. 3, 2104) <http://www.westernjournalism.com/democrats-unpatriotic-immoral-well/>.

dissatisfied with his Republican Congress's slow movement on passing immigration reform and so he implemented his own executive actions.³⁷ Congress did not agree with his efforts, and so they urged the states to file a federal lawsuit to stop the implementation of the executive orders.³⁸

Though not as publicized as the aforementioned events, it can be argued that the Visa Bulletin crisis is merely one more illustration of the tension between America's political parties, and what lengths both sides will resort to in order to get their way. Evidence of the role the politicization of immigration policy played in the Visa Bulletin crisis can be readily found in the Complaint, which first points to President Obama's announcement of his groundbreaking executive actions in November 2015.³⁹ As part of that announcement, the President referenced his Memorandum on Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century.⁴⁰ This document makes specific mention of the need for and likely upcoming executive directive to the DOS to shorten the green card application wait-time experienced by foreign nationals by refining monthly allocation of visas, improving the numerically controlled immigrant visa appointments, and expanding protections available to foreign nationals who are beneficiaries of employment-based immigration petitions.⁴¹ In fact, the President specifically directed the DHS and DOS secretaries to come up with a plan to put these goals into action within 120 days.⁴²

So it appears that the urgent need to revolutionize the Visa Bulletin came straight from the executive horse's mouth. Acting under increasing political pressure, President Obama urged the respective secretaries to do *something* to show the interested parties that actions were being taken by the federal government to make immigration easier and faster for certain classes of foreign nationals.⁴³ Since the President cannot unilaterally increase the immigration quotas, the only option available to him to make good on his promise was to instruct the agencies to implement

³⁷ Carrie Dan, *Obama, Blaming Congress, Says He'll Go It Alone on Immigration*, NBC NEWS (June 30, 2014)

(<http://www.nbcnews.com/politics/white-house/obama-blaming-congress-says-hell-go-it-alone-immigration-n144656>).

³⁸ Compl., *supra* note 1, at 20.

³⁹ *Id.* at 21.

⁴⁰ *Id.* at 20.

⁴¹ Modernizing & Streamlining Our Legal Immigration System for the 21st Century, THE WHITE HOUSE WASHINGTON (July 2015), https://www.whitehouse.gov/sites/default/files/docs/final_visa_modernization_report1.pdf.

⁴² Compl., *supra* note 1, at 21.

⁴³ *Id.* at 21.

regulatory changes that would nearly accomplish the same goal; thereby proving that common sense does not always prevail in the face of mounting political pressure and, perhaps more tellingly, an upcoming election contentious season.

B. The Agencies' Lack of Foresight.

Even if the DOS and the DHS were working towards a common goal of simplifying and streamlining the overly complicated immigration process, their good intentions cannot eclipse the fact that their combined lack of foresight and short memories have truly adversely affected hundreds of thousands of people.⁴⁴ Surely two government agencies that are staffed with some of the best and brightest minds in the entire country could have predicted that, once hundreds of thousands of foreign nationals would finally qualify to file the Form I-485 Applications, that *all* – or at least the *vast majority* – would choose to do so. After all, wasn't the entire point of the rapid priority date movement in the Visa Bulletin to allow all of these foreign nationals to do just that?

Some may argue that the DHS was trying to stave off an even bigger catastrophe by preventing its service centers from being inundated with more applications than its workers could process. However, in looking to very recent implementation of new immigration policies and the resulting actions taken by the agency in preparation thereof, this excuse is a bit too kind and does not hold water. For example, DHS opened a whole new service center for the sole purpose of accepting and processing the thousands of DACA applications that were filed in 2015.⁴⁵ This new Potomac Service Center staffs approximately 650 workers and has already begun accepting transfer cases from other service centers in order to assist those centers in processing their surplus cases.⁴⁶

⁴⁴ *Id.* at 3.

⁴⁵ *Questions and Discussion Topics USCIS – California Service Center Open House* (June 11, 2015), http://www.nafsa.org/_/File/_uscis_june_5_2015.pdf.

⁴⁶ *Id.*; see also *Hearing on "Oversight of U.S. Citizenship and Immigration Services" before the House Judiciary Subcommittee on Immigration and Border Security on December 9, 2016 by USCIS Director Leon Rodriguez*, USCIS (Dec. 9, 2015), <http://www.uscis.gov/tools/resources/hearing-oversight-us-citizenship-and-immigration-services-house-judiciary-subcommittee-immigration-and-border-security-december-9-2016-uscis-director-leon-rodriguez>.

Moreover, the top brass at USCIS routinely shift files and transfer cases amongst the Service Centers to better balance workloads and employee availability as a way to manage reasonable processing timeframes.⁴⁷ Additionally, the USCIS leadership clearly knows how to take even more preemptive measures to cope with a known drastic increase in applications as evidenced by how the Service Centers often suspend or delay some sort of processing during the busiest immigration season, H-1B quota season.⁴⁸ Likewise, just last year USCIS also hired several hundred new workers in anticipation of the 179,600 employment authorization applications the agency expected to receive at the beginning of its new program for H-4 visa holders.⁴⁹

Therefore, in the face of all the other protective measures that USCIS has often taken in order to address predictable significant influxes of submitted applications, the disingenuous justification that the DHS was simply trying to prevent an increased workload should completely fail.

What absolutely escapes all reason is why, in the face of so many applicants preparing to submit their cases, would the DHS refuse to adhere to the published Visa Bulletin and instead simply accept the applications in October and then retrogress the dates back in order to allow the DHS workers sufficient time to process the cases. This is exactly the remedy employed by the DHS in 2007 during the first Visa Bulletin crisis.⁵⁰ There is no logical reason for the distinction in treatment between the 2007 Form I-

⁴⁷ *Transferring Cases From Vermont Service Center to California Service Center*, USCIS

(Aug. 24, 2015), <http://www.uscis.gov/news/transferring-cases-vermont-service-center-california-service-center>; see also *Workload Transfer within Service Center Operations*, USCIS (Mar. 26, 2015), <http://www.uscis.gov/news/alerts/workload-transfer-within-service-center-operations>.

⁴⁸ See *USCIS Temporarily Suspends Premium Processing for Extension of Stay H-1B*

Petitions, USCIS (May 25, 2015), <http://www.uscis.gov/archive/archive-news/uscis-temporarily-suspends-premium-processing-extension-stay-h-1b-petitions>.

⁴⁹ *DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent*

Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence, USCIS (Feb. 24, 2015), <https://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence>.

⁵⁰ *Visa Bulletin Shows How USCIS Can Change its Policy*, ZHANG & ASSOCIATES, P.C. (Sept. 11, 2007), <http://www.hooyou.com/news/news091107change.html>.

485 applicants and the 2015 Form I-485 applicants. As explained in the subsequent section, further action is needed to both provide redress to the current plaintiffs and to ensure that a third Visa Bulletin crisis is avoided.

III. STRIKE 1, STRIKE 2 – PREVENTING A STRIKE OUT BY FIXING THE IMMIGRATION SYSTEM

Multiple solutions to the visa backlog problem have been put forth over the years, and this issue was also one of the central points of the failed comprehensive immigration reform bill, The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013.⁵¹ Due to space and brevity concerns, this section is limited to discussing what are, in the author's opinion born from nearly eight years of practice in immigration law, the four solutions that are best-suited to fixing the visa backlog and, arguably more importantly, are poised to ensure the backlog does not recur in the future.

A. The Easiest Institutional Fix - Stop Allowing the Submission of Multiple Form I-485 Applications.

One of the major issues plaguing many of the more troublesome aspects of this area of the law is that it is difficult - if not impossible - to gauge the true severity of the immigration-related problems. For example, by nature of the inquiry, it is literally impossible to calculate precisely how many foreign nationals are in the country without lawful immigration status. Because of this impossibility, every day the number of this population changes, with reports ranging from 11 million⁵² to as high as 30 million.⁵³

There is a similar plight going on at the USCIS service centers which process the Form I-485 Applications. Current USCIS policy permits foreign nationals to file more than one Form I-485 Application, which has no doubt contributed to the already insurmountable amount of cases that are pending with the

⁵¹ Senator Chuck Schumer introduced the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 on April 16, 2013, and the Senate passed the bill on June 27, 2013. Congress has not moved forward on the bill since that date. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013).

⁵² Albert R. Hunt, *Facing the Facts on Illegal Immigration*, N.Y. TIMES (July 9, 2015).

⁵³ Brandon Darby, *30 Million Illegal Immigrants in US, Says Mexico's Former Ambassador*, BREITBART (Aug. 18, 2015).

agency.⁵⁴ Even though preparing and submitting duplicate Form I-485 Applications is expensive, many foreign nationals decide to file multiple times because they think doing so will result in a faster approval for their case.⁵⁵

If USCIS were to implement a new policy that prohibited the same foreign national from filing multiple Form I-485 Applications, this one small action would at least help to stem the incoming flow of applications, which would in turn allow the adjudications officers to keep their heads above water once they finally broke the surface with the currently pending cases. Ceasing to accept duplicate filings would clearly not fix the visa backlog, but it would certainly be a tremendous step in the right direction towards stopping the problem from simply continuing to grow every year.

B. Sometimes the Best Medicine Tastes the Worst - Impose a Temporary Moratorium on the Submission of Form I-485 Applications.

The only way to come up with a viable solution to a longstanding problem is to fully understand all of the reasons why the problem exists – immigration problems are no different. One of the reasons for the dramatic backlog in Form I-485 adjudications is simply because there are so many applications pending for the officers to review. USCIS estimates that there are currently 418,907 Form I-485 applications pending with the various Service Centers.⁵⁶ This figure takes into account the Form I-485 Applications that are filed pursuant to employment-based green card petitions, family-sponsored petitions, investment-based petitions, and asylum-based petitions.⁵⁷ Moreover, USCIS predicts that its service centers will continue to receive at least an

⁵⁴ The author affirms that just in her own personal experience, clients have elected to file two, three, and even four separate Form I-485 Applications.

⁵⁵ The author affirms this justification is put forth on a regular basis pursuant to anecdotal evidence provided by other attorneys.

⁵⁶ *Pending Employment-Based I-485 Inventory as of 10/13/15*, USCIS (Oct. 13, 2015), http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/I-485%20Employment-Based%20Inventory%20Statistics/EB_I_485_Pending_Inventory_10202015.pdf.

⁵⁷ *Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location July 1*, USCIS (Sept. 30, 2015), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485_performedata_fy2015_qtr4.pdf

additional 72,087 new applications every year for the foreseeable future.⁵⁸

One way to assist the adjudications officers in catching up with their work is to temporarily stop the acceptance of new Form I-485 Applications entirely for a designated period of time. For example, let's say USCIS decides to not accept any new Form I-485 Applications from 2017 to 2018. During that two-year period, all adjudication officers in that department will only be required to focus on reviewing the applications currently pending with USCIS, and will not need to continuously shift their focus, attention, and energy to processing the veritable flood of incoming applications that are received every year. (Of course, for this solution to truly work, USCIS would need to have the gumption to continue to impose moratoriums once the floodgates reopen in order to stop history from repeating itself once again.)

Imposing a temporary moratorium on Form I-485 Application submissions will likely be wildly unpopular with both the foreign national community and USCIS itself - the former because of the resultant delay in obtaining lawful permanent residence, and the latter because of a much less humanitarian and more self-interested reason: USCIS operations (including staff salaries) are funded almost entirely by the application fees that the agency receives.⁵⁹ The agency sets the filing fee for each type of

⁵⁸ This figure is offered by averaging the amount of Form I-485 Applications received by USCIS in the past three years: *Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location July 1*, USCIS (Sept. 30, 2015),

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485_performedata_fy2015_qtr4.pdf; *Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location, Oct. 1*, USCIS (Dec. 31, 2014);

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485_performedata_fy2015_qtr1.pdf; *Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location Oct. 1*, USCIS (Dec. 31, 2013),

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485_performedata_fy2014qtr1.pdf.

⁵⁹ William A. Kandel, *USCIS Funding and Accountability to Congress*, FEDERATION OF AMERICAN SCIENTISTS (Feb. 19, 2015), <https://www.fas.org/sgp/crs/homsec/IN10233.pdf>; see also Prakash Khatri, *Citizenship and Immigration Services Ombudsman Annual Report 2007*, HOMELAND SECURITY (Jun. 11, 2007), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

application and the present filing fee for the Form I-485 Applications is \$1,070⁶⁰ (or \$635 if the applicant is younger than 14 years old).⁶¹ Therefore, it is *highly* unlikely that the agency would support a solution - no matter how temporary - that would cut its operating budget by hundreds of thousands of dollars overnight.

Although this option would likely be one of the better if not the best option for the agency to pursue, it is highly unlikely that it will do so for the reasons outlined above. Since the agency has already shown that it cannot cope with the visa backlog crisis on its own, it is time for the legislative and executive branches of the government to finally step in and fix the crisis through the enactment of the much-needed and long-overdue immigration reform.

C. Taking a Step in the Right Direction – Recapturing Unused Green Cards to Reduce the Priority Date Backlog.

President Obama may be able to take a critical step in the right direction toward eliminating the priority date backlog by issuing an executive order commanding the DOS to recapture the green cards that went unused from 1992 to 1997.⁶² According to Charlie Oppenheim, the chief of Visa Control and Reporting at the DOS, approximately 220,000 allotted green cards were not used between 1992 and 1997 and therefore are available to add to the current number of green cards in 2016.⁶³

The reason that so many green cards went unused during that time period is because of the dramatic increase in the green card quota that resulted from the passage of the Immigration and Nationality Act of 1990 (INA).⁶⁴ That bill increased the green card quota from 500,000 to 700,000 which effectively eliminated any previous backlogs and wiped the immigration slate clean in 1992. From 1992 to 1997, U.S. employers did not file as many immigration petitions for foreign workers which resulted in the

⁶⁰ *I-485, Application to Register Permanent Residence or to Adjust Status*, USCIS (Nov. 6, 2015), <http://www.uscis.gov/i-485>.

⁶¹ *I-485, Application to Register Permanent Residence or to Adjust Status*, USCIS (Nov. 6, 2015), <http://www.uscis.gov/i-485>.

⁶² Tahima Watson, *An Easy Fix for Obama to Ease Immigration Backlog*, THE SEATTLE GLOBALIST (Nov. 17, 2014), <http://www.seattleglobalist.com/2014/11/17/immigration-backlog-obama-visa-rollover/30646>.

⁶³ *Id.*

⁶⁴ *Id.*

significant number of available green cards that could be rolled over to subsequent years.⁶⁵

President Obama would likely be well within his presidential authority to instruct the DOS to recapture those unused green cards because the INA also established a new rule that *requires* all unused green cards to be rolled over and put to use in subsequent fiscal years.⁶⁶ In fact, the aforementioned failed immigration reform bill even included a provision that would have instructed the DOS to recapture all of the unused green cards from 1992 to 2013.⁶⁷ Of course, it must be emphasized that since the green card backlog far outstrips the amount of unused green cards, this solution is not truly a *solution* but instead is one way to merely reduce the magnitude of the problem. However, in doing so, the DOS would be able to at least drastically reduce the backlog and, if combined with enacting the other solutions described in this section, ensure that *future* fiscal years can begin with a clean immigration slate.

D. Is Now the Time for Equal Opportunities in Immigration Applications? Eradicating the Per-Country Quota.

An individual with limited knowledge of immigration law may be surprised to learn that this is one area of legislation that treats similarly situated people differently based entirely on their nationality - treatment that would arguably be considered racist, unfair, or unconstitutional if employed in other areas of the law.

This unequal treatment is arguably an unintended consequence of the Immigration and Nationality Act of 1965. This law established that no more than 170,000 green cards could be issued per fiscal year and also instituted a per-country-quota system to ensure that applicants from any single country did not receive more than 7% of the annually allotted green cards.⁶⁸ It is ironic that this provision was instituted in order to end the racially problematic system then in place, referred to as the National

⁶⁵ *Id.*

⁶⁶ *Id.*; see also Immigration and Nationality Act of 1990, Section 206, Pub. L. No. 89-

236, 79 Stat. 916 (codified as amended at 8 U.S.C. § 1156 (1965), <https://www.gpo.gov/fdsys/pkg/STATUTE-79/pdf/STATUTE-79-Pg911.pdf>).

⁶⁷ Herbie Ziskend, *This Single Reform Would Improve the U.S. Immigration System and Grow the Economy*, HUFFINGTON POST (June 1, 2015), http://www.huffingtonpost.com/herbie-ziskend/green-card-recapture_b_6984076.html.

⁶⁸ The Immigration and Nationality Act of 1965, Section 202, Pub. L. 89-236, 79 Stat. 911, (codified as amended at 8 U.S.C. § 1156 (1965)).

Origins Formula, which worked to exclude Asian and African immigration in favor of welcoming Western and European foreign nationals.⁶⁹

The irony lies in the fact that this section of the law is the reason why so many Indian and Chinese foreign nationals have been waiting for their priority dates to become current for ten years or more.⁷⁰ The disproportionate amount of Indian and Chinese green card applicants as compared to the 7% per country green card allocation is what resulted in the backlogged visa bulletin in the first place. Therefore, the provision of the law that was supposed to welcome foreign nationals from all countries equally has in reality worked to detrimentally affect those from the two nations whose people want to come to the United States in the largest numbers.

It should be pointed out that this solution has already been offered to Congress in the form of H.R. 3012, The Fairness for High-Skilled Immigrants Act of 2011.⁷¹ However, this bill met the same unfortunate fate as all of the other comprehensive immigration reform legislation, and died in committee.⁷²

IV. CONCLUSION

Mr. Hazra and the other plaintiffs in *Mehta et al v. U.S. Department of State* truly have been adversely impacted by the Visa Bulletin Crisis. They and their families will continue to wait for their priority dates to become current once again, but will likely proceed with more caution and suspicion the next time around in order to not get their hopes up too high once again.

This foregoing explanation of the visa bulletin's function in immigration law and how it came to cause so many problems for so many foreign nationals has clearly illustrated the overwhelming need for immediate immigration reform. Since the DOS missed its opportunity to address the green card backlog in the Visa Bulletin Crisis, the best available recourse now rests with the legislative and executive branches. As the nation continues to wait for

⁶⁹ John F. Kennedy, President of the United States, Remarks to Delegates of the American Committee on Italian Migration, (Jun. 11, 1963) (transcript available at The

American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=9269>).

⁷⁰ Stuart Anderson, *Increase Labor Mobility And End Per Country Limits For High-Skilled Immigrants*, FORBES (Nov. 7, 2015), <http://www.forbes.com/sites/stuartanderson/2015/11/07/increase-labor-mobility-and-end-per-country-limits-for-high-skilled-immigrants/#3e8d9c914415>.

⁷¹ Fairness for High-Skilled Immigrants Act, H.R. 3012, 112th Cong. (1st Sess. 2011).

⁷² *Id.*

Congress to act on the wider issue of immigration reform, it is ardently hoped that our lawmakers will create a solution to eliminate the green card backlog and wipe the immigration slate clean once and for all.