AMERICAN IMMIGRATION LAWYERS ASSOCIATION

August 6, 2014

Cecilia Muñoz
Assistant to the President and
Director of the Domestic Policy Council
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Director Muñoz:

The American Immigration Lawyers Association (AILA) appreciates President Obama's pledge to address as much of the broken immigration system as he can, given Congress's inability to move forward on much-needed and long-overdue legislative reforms. Toward that end, AILA offers the following list that, while far from all-inclusive, identifies many of the key areas in which the administration could pursue improvements to our immigration policies and systems that would be in our nation's best interest.

AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

While the implementation of our nation's complex immigration laws, regulations, and policies cuts across a multitude of cabinet-level departments, most of our focus here is within the jurisdiction of the Department of Homeland Security (DHS) and its component agencies. AILA believes the guiding principle for administrative actions should be to advance our national interest, which includes: supporting family unity, promoting economic growth, and improving processes. By taking action in the following areas, the administration would further those principles and achieve the President's goals.

Expand Deferred Action. The temporary grant of Deferred Action for Childhood Arrivals (DACA) is given in increments of two years and offers the chance for work authorization, in most cases a driver's license, and in some areas, in-state tuition for public colleges and universities. Deferred action should be expanded to include individuals with certain characteristics, such as:

- Parents of U.S. citizens;
- Parents of DACA-eligible individuals; and

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 I Fax: 202.783.7853 I *www.aila.org*

AILA InfoNet Doc. No. 14090349. (Posted 9/3/14)

- Individuals who have resided in the U.S. for three years or more.

Deferred action grants should include work authorization and advance parole to facilitate travel, without requiring the applicant to prove emergent circumstances.

Do Not Count Derivatives Toward the Overall Visa Quotas. Although derivative spouses and children have long been counted toward the visa quota, IMMACT90 deleted the statutory language that compelled their inclusion. Nevertheless, the government has continued to count derivatives toward the quota. Counting the principal immigrant and his or her derivatives as a single family unit for purposes of the worldwide cap set forth in INA §201 would reduce the current immigrant visa backlogs in both the employment- and family-based preference categories.

Expand the Use of Parole-in-Place. Section 212(d)(5) of the INA provides the Secretary of Homeland Security the authority to parole into the U.S. temporarily, under such conditions as he or she may prescribe on a case-by-case basis, for urgent humanitarian reasons or significant public benefit, any alien applying for admission to the United States. Policy on the application of this provision with respect to the alien family members of current and veteran military personnel was released in November 2013 and should be broadened to include parole-in-place for aliens with U.S. citizen or lawful permanent resident spouses, children, or parents.

Permit Individuals Who Are Eligible for Adjustment of Status to "Pre-Register" When an Immigrant Visa Petition Is Approved. Adjustment of status under INA §245(a)(3) is only permitted if an immigrant visa was immediately available at the time the I-485 adjustment application was filed. At present, if an I-485 application is filed before a visa number is available, the application will be rejected. Permitting adjustment applicants to "pre-register" immediately upon approval of an immigrant visa petition would provide much needed relief to individuals who are eligible for permanent resident status but for the massive visa backlogs. This would allow USCIS to more accurately account for the number of immigrants who are documentarily qualified for permanent residence while prospective immigrants who are lawfully in the U.S. and are otherwise eligible for adjustment could obtain interim work authorization and travel documents while waiting their turn in line. It also could provide a stream of revenue to support other initiatives that may need to be stood up before any fee revenues from them are realized.

Implement a More Expansive Interpretation of "Extreme Hardship" for Waiver Purposes, Including a Presumption of Extreme Hardship for Certain Groups of Individuals. USCIS should develop and implement a more generous interpretation as to what constitutes "extreme hardship." Factors that are relevant to the question of hardship include the existence or lack of family ties in the U.S. and in the country of removal, medical and mental health conditions, financial hardships, educational opportunities and losses, and the political, economic, and social

conditions in the country of removal. Though USCIS emphasizes that hardship is a case-specific determination founded on the facts and circumstances of each individual, the classic "extreme hardship" factors have traditionally been narrowly construed by the agency. USCIS should issue guidance to the field or utilize the AAO precedent decision process to set forth a generous evidentiary standard for establishing extreme hardship. In terms of the provisional waiver process, this would not only further promote USCIS's stated goal of promoting family unity, it would also avoid the unnecessary expense and delays in requiring individuals to repeat the entire waiver process while waiting outside the United States.

USCIS should also create a presumption of extreme hardship for individuals with certain equities. For example, USCIS could establish a presumption of extreme hardship where the qualifying relative is a U.S. citizen or permanent resident spouse and the couple has been married for a minimum period of time (i.e., 3 years), or they have at least one U.S. citizen child. As explained in the February 12, 1999, Virtue Memorandum, "Limited Presumption of Extreme Hardship under Section 203 of NACARA," USCIS has the authority to establish such presumptions and in fact did so in the NACARA implementing regulations. 8 CFR §1240.64(d)(1) sets forth a rebuttable presumption of extreme hardship for certain Salvadorans and Guatemalans who apply for NACARA benefits.

Recognize that Individuals Who Have Been Granted Temporary Protected Status (TPS) Are Eligible for Adjustment of Status. USCIS can permit TPS beneficiaries to adjust status to lawful permanent residence if they are otherwise eligible to do so upon the approval of an immigrant visa petition. In *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), the Sixth Circuit recognized the sound legal arguments associated with this position. Unfortunately, USCIS does not recognize this reality for those living outside the jurisdiction of the Sixth Circuit. The *Flores* decision should be adopted nationally.

Finalize and Release Policy on Travel and Reentry for Advance Parolees: *Matter of Arrabally and Yerrabelly.* USCIS should finalize its policy on the effect of travel and reentry pursuant to a grant of advance parole on inadmissibility under the three- and ten-year unlawful presence bars and eligibility for adjustment of status. In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the BIA held that an alien who leaves temporarily on advance parole for purposes of returning to the U.S. to pursue a pending application for adjustment of status does not affect a "departure" for purposes of the ten-year bar. A generous *Arrabally* policy will provide measurable benefits to many individuals who have been present in the U.S. for lengthy periods of time, have built strong family and community ties, and are eligible for lawful permanent residence. USCIS should interpret *Arrabally* to apply to any individual who travels pursuant to a grant of advance parole, regardless of the underlying basis for issuing the parole document.

Create Better Nonimmigrant Pathways for Entrepreneurs. The innovative contributions of alien entrepreneurs are critical to the continuing recovery and advancement of the U.S. economy. Unfortunately many nonimmigrants have been denied visas because of the January 2010 "employer-employee relationship" memorandum.[1] Historically, immigration law has treated a corporation as an entity separate and apart from its shareholders, permitting an owner-entrepreneur to found a corporation and the corporation to petition for the owner as an employee.[2] The 2010 memorandum interprets the term "employer-employee relationship" for H-1B purposes and imposes a far more restrictive standard, making it much more difficult for an entrepreneur's company to petition for an H-1B visa on his or her behalf. The memo effectively requires an entrepreneur to surrender significant control to a corporate board of the sort not often found in entrepreneurial operations or to some other management entity in order to qualify for H-1B status. Requiring an entrepreneur to surrender control of his or her enterprise is a disincentive to remaining in the United States. USCIS should abandon the rigid construct adopted in the 2010 memo in favor of more flexible factors that can establish an "employer-employee relationship" that exist elsewhere in the law.

Moreover, USCIS should encourage more entrepreneurs to utilize the O-1 "extraordinary ability" nonimmigrant category by formally recognizing entrepreneurship as a valid basis for the O-1 and providing better information on the types of evidence that are unique to entrepreneurs that may establish eligibility for O-1 status. Similarly, entrepreneurs should be able to avail themselves of the EB-1 extraordinary ability category under the same criteria.

Finally, entrepreneurship, potential job creation, and potential economic development should be recognized as favorable factors when an I-140 "National Interest Waiver" (NIW) petition is adjudicated.

Amend the Definition of "Affiliated or Related" to Provide Greater Relief from the Restrictions of the H-1B Cap. USCIS received approximately 172,500 cap-subject H-1B petitions during the filing period for FY2015. Due to the statutory limitations, less than half of these beneficiaries will actually receive new H-1B visas this year. USCIS could ease the unprecedented demand on H-1Bs by implementing a more generous interpretation of "affiliated or related" for purposes of cap exemption. 8 CFR §214.2(h)(19)(iii)(B) defines affiliated or related non-profit entity as "[a] nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary." This definition is too narrow and has had a negative impact

[1] http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf

[2] *Matter of M*--, 8 I&N Dec. 24 (BIA, 1958; A.G., 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r, 1980).

on H-1B adjudications for teaching hospitals and other nonprofit petitioners related to or affiliated with institutions of higher education. The regulation should be amended to adopt a more flexible definition that accounts for a broader range of relationships between universities and nonprofit entities.

This broader definition of "affiliated or related" should include startup incubators that are connected to public institutions such as colleges and universities. These startup incubators strive to create, innovate, and grow small, entrepreneurial businesses with promising ideas by providing them with the financial, technical, and other support services needed to succeed.

Clarify that Established Facts Should Not Be Readjudicated Absent Fraud or True Gross Error. Petitions to extend nonimmigrant status, where there has been no change in the underlying job or employer, should be streamlined and should not be subjected to requests for evidence (RFEs) on facts that have been established in the prior adjudication absent fraud or clear error (i.e., not as a matter of judgment). Such RFEs cause considerable delay and unnecessary hardships for both the employer and the employee, and are not the most efficient use of USCIS's limited resources. And, certainly, petitions in these circumstances should not be denied. Businesses and employees need to be able to plan for both the long term and short term, and denials of extensions when there have been no changes in relevant facts are highly disruptive, and serve as a powerful disincentive for investment and job creation in the U.S. Similarly, established facts should not be readjudicated in cases involving the same employee and employer when reviewing an immigrant visa petition for an individual who is currently in a parallel nonimmigrant category (i.e., an EB-1 executive or manager for a beneficiary who is currently in L-1A status for the same petitioning employer; or an EB-1 alien of extraordinary ability currently in O-1 status for the same petitioning employer).

Expand Premium Processing to Include More Employment-based Benefit Requests.

Under "premium processing," for an additional filing fee, USCIS will conduct an initial review of certain employment-based immigrant and nonimmigrant benefit requests within 15 calendar days. Presently, premium processing service is only available for benefit requests in a limited number of employment-based visa categories. Expand the availability of premium processing service to encompass benefits requests in all employment-based visa categories

Issue Guidance That Expressly States that the Nationality of a Petitioner or Beneficiary Is Not to Be Taken into Consideration During the Course of an Adjudication. According to a March 2014 report by the National Foundation for American Policy (NFAP), the overall rate of L-1 denials continues to increase, with the majority of denials impacting India-based petitioners

and Indian beneficiaries.[3] USCIS denied more new L-1B petitions for Indians in FY2009 (1,640) than in the previous 9 fiscal years combined (1,341 denials between FY2000 and FY2008).[4] According to the report, employers and attorneys indicate that problems with L-1B petitions involving Indian nationals have continued. In order to avoid the appearance of impropriety, USCIS should issue guidance that affirms that the nationality of a petitioner or beneficiary shall not be taken into consideration when adjudicating an application or petition for immigration benefits, unless that nationality is a factor in the legal criteria for the benefit, such as for an E or H-1B1 visa.

Though this list is not exhaustive, it does present a number of the more impactful ways our immigration policies can be improved by administrative action in light of Congress's inability to pass immigration reform legislation. We appreciate any opportunity to further explore with you the above-listed ideas. I will be out of town August 6-23, but please contact Robert Deasy at rdeasy@aila.org, 202-507-7612, in my absence.

Sincerely,

Crystal Williams,
Executive Director

cc: Felicia Escobar, Special Assistant to the President for Immigration Policy
Julie C. Rodriguez, Deputy Director of Public Engagement

[3] http://www.nfap.com/pdf/NFAP%20Policy%20Brief%20L-1%20Denial%20Rates%20Continue%20March%202014.pdf
[4] *Id*. at 6.