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To: **Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, Headquarters (USCIS)**

Roxana C. Bacon, Chief Counsel, USCIS

From: **Alliance of Business Immigration Lawyers (ABIL)**

Re: **Employment-Based Immigration Proposals for Inclusion in Comprehensive (CIR) Legislation**

Date: **February 19, 2010**

About ABIL

The Alliance of Business Immigration Lawyers (ABIL) is pleased to submit suggested employment-based immigration reform proposals. ABIL is comprised of 20 of the top U.S. business immigration law firms, each led by a prominent member of the U.S. immigration bar. ABIL member firms employ over 200 attorneys (400+ total staff) devoted to business immigration in 22 major U.S. cities, plus Brussels, Cologne, Hong Kong, Istanbul, Lima, London, Mexico City, Montreal, Monterrey, Mumbai, Sao Paulo, Shanghai, Sydney, Tokyo, Toronto and Vancouver.[1]

ABIL'S Vision

ABIL believes that the current immigration system is broken and unworkable. Maintaining the status quo prevents U.S. businesses from competing effectively in the global economy. ABIL proposes expanded

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[1] All ABIL members are also members of the American Immigration Lawyers Association (AILA), and many have served in a variety of leadership positions with AILA. ABIL is not affiliated with AILA, however, and these proposals may differ from those that AILA may submit.

avenues for U.S. businesses to employ the best talent available globally. Employment-based immigration reforms should encompass changes in both nonimmigrant and immigrant visa categories so that the U.S. becomes the most attractive global destination for highly skilled and essential workers.

ABIL proposes legitimate avenues under the immigration laws for entrepreneurs to start U.S. businesses, large and small, and thereby obtain work visas and permanent residency. ABIL also proposes legalizing the status of the undocumented in the U.S. so that they may be employed lawfully and contribute to the growth of the economy and the welfare and well being of the nation and its citizens.

ABIL believes that immigrants significantly expand jobs and opportunities in the U.S. through their innovation, industry and tax contributions, and that expanded visa opportunities will result in more, not fewer, jobs for Americans. Under a reformed immigration system, ABIL expects that the government will fairly adjudicate requests for immigration benefits with respect for the rule of law and due process.

ABIL Proposals

ABIL offers the following proposals for inclusion in comprehensive immigration reform (CIR) legislation. Almost all of them could be achieved through agency notice-and-comment rulemaking under the Administrative Procedures Act or by Executive Order. Given that CIR's prospects are uncertain, USCIS should work with the Obama Administration to begin the process now to propose regulations or result in the issuance of Executive Orders that adopt the suggested immigration changes below.

1. Reforms to the Immigration Laws Must Support the Rule of Law.

A. Penalties Should be Eliminated That Chill the Right of Administrative and Judicial Appeal.

Non-frivolous appeals contribute material benefits to our nation's immigration jurisprudence by helping to develop, clarify and refine the law, particularly when they form the basis for precedent decisions that can be cited by USCIS or stakeholders. Under current law, the beneficiary has no right of appeal and no right to

remain in the United States or work while a non-frivolous appeal filed by the petitioner awaits adjudication.[2] The visa-voidance and 3/10-year bars under the unlawful presence provisions of the INA penalize legitimate employers and nonimmigrants because they cannot be certain of victory on appeal and thus beneficiaries have no choice but to depart, thereby rendering the appeal moot and pointless. The problem could be resolved quite simply by issuing a USCIS regulation that time spent in awaiting the results of administrative and judicial appeals shall be deemed a "period of stay authorized" by USCIS.

While USCIS and Congress may be concerned that allowing preservation of the status quo by the grant of employment authorization and the tolling of unlawful presence might produce a frivolous appeals, CIR legislation should permit non-frivolous appeals while using sanctions to penalize those appeals that lack a good-faith and tenable factual or legal basis, e.g., by reliance on the "falsely-made" document sanctions of INA § 274C(f), involving appeals that have no basis in fact or law.

B. All Interested Parties Must be Allowed a Right of Meaningful Participation in Requests for Immigration Benefits and in Administrative Appeals.

Under current law and regulations, many parties with a tangible legal interest in the outcome of an immigration-benefits request have no right to make an appearance in person or through legal counsel before USCIS. As immigration law has evolved, legislation and regulations have increased the actual and potential conflicts of interests. As a result, situations increasingly arise where a variety of individuals and entities have distinct legal interests to protect in an immigration matter. These parties in interest can include, among others:

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[2] For similar reasons, individuals should be granted eligibility for employment authorization (without a showing of economic need) during the pendency of removal proceedings to permit the submission of non-frivolous appeals and requests for relief to the Immigration Judge, the Board of Immigration Appeals and the Federal District and Circuit Courts of Appeal.

- beneficiaries of an I-129 or an I-140 petition (who currently cannot get a copy of the petition to show that they were in compliance of the law, to qualify under the 245(i) grandfathering provisions, or to port to an approved Employment based petition);
- Regional Centers in EB-5 immigrant investor petitions, which cannot enter appearances to demonstrate that their investments qualify under the initial EB-5 determination or the removal of conditions phase, even though an RFE might challenge the Regional Center's investment or its job-creation calculation;
- the corporate employer in the success of its foreign workers' I-485 adjustment of status cases or the workers' family members' applications for extension or change of status, as the employer may be injured by loss of the employee's services; and
- the guardian of a child's interest or an estranged spouse in a derivate employment-based immigration matter involving the principal applicant.

The G-28 — indeed, the USCIS's regulations and the INA — should be modified to recognize and allow separate legal representation of each of the parties with legitimate legal interests to protect. Failure to do so prevents USCIS from getting all the facts and considering all the legal issues raised in immigration matters. That USCIS's current technology infrastructure lacks the capacity to provide notices, decisions and correspondence to multiple parties in interest and their respective attorneys is no reason to deny procedural and substantive due process.

C. An Expansive Definition of Immigration Successorship in Interest Should be Adopted.

A recent USCIS Headquarters memorandum, without analysis, eliminates the salutary successorship-in-interest principle for EB1-2 Outstanding Researchers and EB1-3 Multinational Managers and Executives. It also espouses a restrictive interpretation that would terminate a petition if minor changes occur in job duties or requirements that would have had no materially adverse effect on the I-140 petition if the company had not undergone a merger or acquisition. Finally, the memorandum leaves uncertain the extent to which immigration successorship applies to the nonimmigrant

work-visa categories. CIR legislation or the withdrawal and replacement of the current USCIS Headquarters memorandum should adopt a broad and flexible definition of immigration successorship in order to allow a broad array of legitimate forms of corporate restructuring to occur without unnecessary and unwise immigration impediments.

D. An Agency to Support and Protect the Economic Benefits of Immigration Should be Created within the Department of Commerce or Another Suitable Cabinet-Level Department.

Existing Executive-Branch Departments protect and promote important national interests: foreign policy (State), homeland security (DHS), labor (DOL). No Department performs a similar function to promote and defend the economic benefits of immigration as a means of fostering innovation and prosperity.

"Fortress-America" policies and those that go too far in protecting domestic labor interests without recognizing the job-creating capabilities of employment-based immigration do a disservice to important national interests. CIR should create within the Department of Commerce or another suitable department an agency to support and protect the economic benefits of immigration. Meantime, USCIS should take steps to espouse, protect and defend encroachments on the job-creating power of business-related immigration laws.

E. Explicit Immigration Protections and Benefits for Small Businesses Should be Created.

President Obama reminded us at his recent business/labor job summit of the importance of small businesses to the economy:

> Over the past 15 years, small businesses have created roughly 65 percent of all new jobs in America. These are companies formed around kitchen tables in family meetings, formed when an entrepreneur takes a chance on a dream, formed when a worker decides it's time to become one's own boss. These are also companies that drive innovation, producing 13 times more patents per

> employee than large companies. And it's worth remembering, every once in a while a small business becomes a big business — and changes the world.

Current USCIS practices, interpretations and adjudication trends have imposed unfair burdens and obstacles on law-abiding small businesses. Working owners who have established corporate entities are denied approval of employment-based petitions by their companies by a piercing-the-corporate-veil contrivance founded on a supposed lack of an employer/employee relationship; I-140 petitioners are subjected to intense scrutiny of their ability to pay the offered wage even if they have been managing to pay it for years; employers who undergo the expense of hiring an H-1B worker are subjected to intense scrutiny of whether they need the worker, and if successful, may lose the worker when another officer disagrees when an extension is submitted; employers of functional managers are deprived of their services as L-1's if they perform the function and do not merely oversee others doing it. For a more complete catalogue of these inequities see Angelo Paparelli, "Third Letter to USCIS Ombudsman."

The new VIBE initiative will likely exacerbate the problem because small businesses and start-ups, even those supported by venture capitalists and ingenious and profitable business models, will not yet be reflected in Dun and Bradstreet's database.

In addition to conferring on a cabinet-level Department the power to advocate and defend employment-based immigration, CIR should create an Office of Small Business Immigration Advocacy and should enact meaningful protections that take into account the special needs, obstacles and challenges that small businesses face under current immigration law.

F. An IRS-Style "Revenue-Ruling" Procedure for Immigration Stakeholders Should be Established.

The Internal Revenue Service has long provided a formal mechanism for individual stakeholders to gain reliable guidance on the agency's views concerning the legal consequences of a particular transaction. A request for a private letter ruling can lead to a published ruling that is binding solely on the party making the

request.[3] Because private letter rulings are published, the public, however, can better ascertain the agency's views in comparable situations and then, with advice of legal counsel, make reasoned determinations of the potential legal consequences of a particular course of conduct or transaction.

This process, if adopted by USCIS, would be far superior to the unhelpful and at times poorly-considered nonbinding letters issued by legacy INS and USCIS officials over the years at the request of inquiring lawyers. The publication of private letter rulings would also be superior to the ersatz advisory opinion process[4] that exists under the E-2 regulations involving substantive changes, an adjudication which does not result in a formal written decision offering analysis, but merely a less-than-clear I-797 approval notice.

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[3] A Private letter ruling is "[a] written statement issued to the taxpayer by the Internal Revenue Service in which interpretations of the tax law are made and applied to a specific set of facts. [The] [f]unction of the letter ruling, usually sought by the taxpayer in advance of a contemplated transaction, is to advise the taxpayer regarding the tax treatment he can expect from the I.R.S. in the circumstances specified by the ruling." *Black's Law Dictionary*, p. 1196 (6th ed. 1990)(West Publishing Company)(citing *U.S. v. Wahlin*, D.C.Wis., 384 F.Supp. 43, 47.) ". . . [U]nless the Secretary establishes otherwise by regulations, a "written determination" may not be used or cited as precedent by another taxpayer. Sec. 6110(j)(3); sec. 301.6110-7(b), Proced. & Admin. Regs. Written determinations include both private rulings and technical advice memoranda . . . . Sec. 301.6110-2(a), Proced. & Admin. Regs." *Lucky Stores, Inc. v. Commissioner*, T.C. Memo. 1997-70 (1997).

[4] § Sec. 214.2(e)(8)(v): "(v) Advice . To ascertain whether a change is substantive, an alien may file Form I-129, with fee, and a complete description of the change, to request appropriate advice. (Amended effective 7/6/09; 74 FR 26933). In other words, USCIS does not provide explanation or advice; it either provides an approval notice or not.

G. A Streamlined, Fast-Track Process for Immigration Rulemaking Should be Developed.

The current process for announcing changes in interpretation and procedure does not provide immigration stakeholders with a meaningful opportunity to comment before changes are finalized.

The issuance of policy memoranda, FAQs, press releases, fact sheets and advisory letters – none of which permit lasting reliance by stakeholders and all of which lack stakeholder vetting in advance – flouts the rule of law and sows confusion about the already opaque immigration laws. The current APA rulemaking process, to be sure, is cumbersome and slow. It is in USCIS's and the public's interest that a fast-track process be created, perhaps involving two tiers – one for significant rules (the current APA process) and the other for rules of importance but of less consequence to large segments of the stakeholder population. The 1986 IRCA process of issuing a series of communiqués without meaningful stakeholder input in advance must not be repeated with CIR in 2010.

H. CIR Should Either Eliminate the Unlawful Presence Penalties of INA § 212(a)(9) or Broaden the Waiver in INA § 212(a)(9)(B)(v).

The current unlawful-presence penalties operate in perverse fashion to increase the presence of undocumented persons in the United States. Individuals who have obtained petition approvals to immigrate are understandably unwilling to depart for an immigrant visa interview for fear of triggering the 3/10-year bars.

ABIL proposes that the unlawful-presence penalties either be completely eliminated (ABIL's preference), or in the alternative, the waiver provision be amended to allow affected individuals to demonstrate hardship to themselves rather than extreme hardship to a narrow range of qualifying relatives, presently limited to a spouse and parents who are U.S. citizens or permanent residents. At the very least, ABIL proposes the inclusion of children as qualifying relatives. Certainly some substantial weight should be accorded a beneficiary of an approved immigrant petition. As it is,

that carries no weight at all. Strangely, a nonimmigrant visitor has an easier burden obtaining a nonimmigrant waiver of inadmissibility than an immigrant with close ties to the United States who needs an unlawful-presence waiver.

I. USCIS's Proposals Should Allow Outside Subject Matter Experts (SMEs) to Conditionally Adjudicate and Approve Petitions Where Substantive Knowledge or Expertise is Necessary or Desirable.

Many nonimmigrant and immigrant visa categories involve knowledge of highly sophisticated and rapidly changing business, artistic or academic subjects. Examples include petitioners and beneficiaries under the Extraordinary Ability Alien (O-1 and EB1-1), the Outstanding Professor or Researcher, the Multinational Executive or Manager, the EB-2 Exceptional Ability Alien, the EB-2 National-Interest Waiver beneficiary and the EB-2 petition involving the Schedule A, Group II labor-certification exemption.

USCIS's officers cannot be, and should not be, expected to grasp every field of knowledge or human activity for which outstanding accomplishment can be attained.

Instead, much like the process of EB-5 regional-center designation, USCIS should allow for the accreditation of recognized experts (not labor unions that are predisposed to protect their own interests) to determine which beneficiaries in their respective fields of knowledge or expertise satisfy the statutory standard.

Once SME organizations are accredited by USCIS, they should be authorized to grant petition approvals, subject to a review for gross error by USCIS. This proposal, if adopted in CIR legislation, would eliminate the frequent criticism leveled against USCIS when an adjudicator's decision is attacked as a superficial and unknowing rejection of a substantively qualified and statutorily-eligible petitioner and beneficiary. The legislation could include anti-fraud safeguards and periodic reaccredidation so that only legitimate SME organizations are allowed to participate. This proposal is a variant of the Founder's Visa proposal espoused by venture capitalist, Paul Graham, which on its own terms is an idea well worth considering.

2. CIR Should Reform the Employment-Based Nonimmigrant and Immigrant Visa Categories.

Nonimmigrant Visa Changes:

A. Expand job flexibility to the H-1B worker and other appropriate nonimmigrant work visa categories to allow a change of jobs or employers.

Greater job flexibility would put the worker on the same footing as a U.S. worker and not tie the nonimmigrant to the same employer for years. Once the nonimmigrant worker arrives to work for the company that sponsored the nonimmigrant, the requirement that a new employer repeat the same tedious petition procedure should be eliminated if the worker is in the same or similar occupation. Nonimmigrant workers should be free to work for another company or even to start their own companies in the same or a similar occupation without the need to file a new petition.

In addition, while this worker is sponsored for permanent residency, he or she could be allowed to continue the green card process if working in the same occupation much sooner than the law allows presently. Presently, Section 204(j) of the INA only allows "green card" portability at the final stage of the process, when the adjustment application has been filed and has been pending for over 180 days. Thus, a person born in India waiting in the EB-3 queue may be required to wait for over a decade before s/he is allowed to file an adjustment of status application and then port to a new employer.

The law should be changed to allow job flexibility much earlier in the green card process. With this change, a nonimmigrant worker will be on the same footing as a U.S. worker. The employer will have less of an incentive or ability to keep a nonimmigrant worker captive and instead be incentivized to provide more attractive wages, benefits and working conditions. The market will determine the wage to be paid to a nonimmigrant worker who would have an easier access to another employer. If nonimmigrant work visas become truly portable, the protection of the market, via occupational mobility, replaces the false protection of the LCA.

B. Allow dependents on H-4s and on other nonimmigrant work visas to obtain EADs like L-2s and Es.

C. Allow greater flexibility for O-1 and P artists and entertainers who work for arts organizations that affiliate and collaborate with related venues, and clarify the definition of "cultural uniqueness" to allow for the fusion of distinct cultures into new cultural forms for P-3 purposes.

D. Reform the H-2A temporary agricultural worker visa program consistent with the AgJOBS Act of 2009 to make it workable for small farmers and landscapers who critically need seasonal workers and to allow unauthorized farm workers to legalize their status.

E. Reform the H-2B temporary non-agricultural worker program to make it a meaningful, viable and expedited solution for employers who cannot find skilled and unskilled workers, while ensuring mechanisms to protect the U.S. workforce. The present emphasis on "temporary need" has made the current H-2B program unworkable for many employers with critical worker shortages.

<u>Employment-Based Immigrant Visa Changes</u>:

A. Recapture, on an automatic basis without new enabling legislation, unused immigrant visa numbers from past and future years.

B. Exclude the counting of all derivative family members as subject to the immigrant employment and family visa quotas.

C. Eliminate per country limits.

D. Exempt advanced degree holders (especially STEM graduates) and "super immigrants" such as those who are EB-1 Priority Workers or who have obtained National Interest Waivers, from the quotas.

E. Provide administrative relief, even if Congress does not act, for applicants caught in future quota

backlogs by allowing the filing of an I-485 whether or not the priority date is current.

F. If a Congressional amendment is needed to de-link the filing of an I-485 with a current priority date, then grant parole and EADs to those who may be ineligible to file for adjustment of status.

There is ample authority under INA 212(d)(5) to grant parole to those with approved I-130 or I-140 petitions to either enter or remain in the United States. Moreover, Congress has already provided the government with broad authority to provide work authorization to any non-citizen under INA 274A(h)(3)(B). See: Gary Endelman and Cyrus Mehta, "The Path Less Taken: Is There an Alternative to Waiting for Comprehensive Immigration Reform?"

G. Adopt other proposals.

There are a host of administrative actions that could be taken to reverse senseless or outdated administrative rules, interpretations and decisions that frustrate the proper functioning of the law. For example, the INS has rendered the N-470 process a nullity by requiring that permanent residents with long-term international jobs be unable to preserve their status unless they have spent a year residing in the U.S. without one day of travel. Countless other examples can be enumerated. For further examples, see: Angelo Paparelli, "Immigration Reform with the Stroke of a Pen".

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ABIL appreciates the opportunity to submit these proposals and welcomes the chance to discuss them with the leadership of USCIS.