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Intubation and Incubation: Two Remedies for an Ailing Immigration Agency

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As Justice Louis Brandeis famously observed, "[s]unlight is said to be the best of disinfectants …."[1] U.S. Citizenship and Immigration Services (USCIS) – the agency within the Department of Homeland Security (DHS) that decides which foreign entrepreneurs, investors, professionals and scientists are allowed to work in America – has chosen to employ other, more recently developed remedies. It has opted for intubation (a means of introducing fresh air into an afflicted body) and business incubation (a way of providing fresh ideas and a supportive, nurturing environment to fledgling, unstable but promising enterprises)[2] as the best ways to cure many of the maladies that chronically sap this nine-year-old agency.

On October 11, 2011 USCIS Director Alejandro Mayorkas unveiled a novel business incubator program, "Entrepreneurs in Residence."[3] Although not the first federal program to marshal the savvy of the entrepreneurial set (that feather apparently goes to the Food and Drug Administration),[4] the immigration initiative "will utilize industry expertise to strengthen USCIS policies and practices" affecting foreign "investors, entrepreneurs and workers with specialized skills, knowledge, or abilities."

The professed goal of EIR is to enhance USCIS's "collaboration with industries, at the policy, training, and officer level, while complying with all current Federal statutes and regulations." As Director Mayorkas noted, the EIR "initiative creates additional opportunities for USCIS to gain insights in areas critical to economic growth. . . .[In addition, the] introduction of expert views from the private and public sector will help us to ensure that our policies and processes fully realize the immigration law's potential to create and protect American jobs."

The Entrepreneurs in Residence (EIR) program is an outgrowth of various Obama Administration initiatives in 2011 to spur foreign investment and U.S. job creation, namely:

- **The President's Council on Jobs and Competitiveness**,[5] announced on January 21. Comprised of 27 business leaders, union executives and scholars, the Council's mission is to "develop ideas to accelerate job growth and improve

1 The Brandeis quote, from Other People's Money, Chapter V ("What Publicity Can Do"), is available *here*: . (All links are active as of October 18, 2011.)

2 For background on business incubation, see "Principles and Best Practices of Successful Business Incubation ," from the National Business Incubation Association, available *here*.

3 See Oct. 11, 2011 USCIS news release, "USCIS Announces 'Entrepreneurs in Residence' Initiative," available *here*.

4 See October 6, 2011 article, "FDA Commissioner, Margaret Hamburg, is asking industry for help to reverse the lack of innovation," available *here*.

5 For background on the President's Council, see *here*.

the country's long-term position." On October 11 it issued an interim report[6] which, among other proposals, offered its "[b]ottom line" on immigration: "Highly skilled immigrants create jobs, they don't take jobs. And in a competitive and interdependent 21st century economy, we must attract these entrepreneurs to the United States."

- **The SelectUSA Initiative**,[7] established on June 15 by executive order and housed in the Commerce Department. Its stated mission is the facilitation of "business investment in the United States in order to create jobs, spur economic growth, and promote American competitiveness." The initiative creates an interagency working group and requires the cooperation and support of all executive-branch departments and agencies "that have activities relating to business investment decisions."

- **The Startup America Initiative**,[8] announced on Jan. 31, as a set of five "entrepreneur-focused policy" action items, designed with the goals of: "Unlocking Access to Capital; Connecting Mentors; Reducing Barriers; Accelerating Innovation; and Unleashing Market Opportunities." This effort also includes steps to "[reduce] barriers and [make] government work for entrepreneurs" and to date has involved "efforts to realize the potential of current immigration laws to attract the best and brightest from around the world to grow the U.S. economy and create American jobs." As part of the Startup America effort, on Aug. 2 DHS Secretary Janet Napolitano announced a number of changes and clarifications intended to make current immigration laws and regulations more user-friendly for entrepreneurs, investors and startup businesses.[9]

The EIR program consists of two components:

1. A "series of informational summits with industry leaders to gather high-level strategic input" and
2. A "tactical team comprised of entrepreneurs and experts, working with USCIS personnel, to design and implement effective solutions."

During an October 11 telephonic press conference to answer media questions about EIR, Mr. Mayorkas declined to name any participants in the "informational summits" or "entrepreneurs and experts" who will serve on the "tactical team," noting that all of these individuals must first be screened for conflicts of interests.

Inordinately finicky conflicts screening, however, may doom this otherwise salutary effort. Undoubtedly, "industry leaders" and "entrepreneurs" will harbor a strong interest in an expansive reading of the employment-based immigration laws. Their likely interpretation would view the immigration laws as offering many opportunities to grow startup and established businesses in the U.S. by harnessing the innovations and skills of bright, energized and talented non-citizens. Prospective EIR participants with such interests and perspectives probably will have already used and intend to use again the employment-based immigration laws to secure USCIS's permission to hire foreign workers.

If the agency wants high-quality business incubation, USCIS should not use the potential benefits to be gained through the submission of pending or future work-visa petitions as a basis to "conflict-out" potential EIR team members from the private sector. Similarly, experienced business immigration lawyers should not be excluded, since they are most likely the best equipped to challenge agency policy-makers by showing the agency how to implement its policies and practices in a way that better "accelerate[s] job growth and improves the country's long-term position" while still "complying with all current

6 The Jobs Council's interim report is available *here.*

7 Information on SelectUSA is available *here*.

8 To learn more about StartupAmerica, see the White House website *here*.

9 For a discussion and critique of the changes announced by Secretary Napolitano Aug. 2, see Karin Wolman, "USCIS Entrepreneur Initiatives—Do They Really Help?," Aug. 22, 2011, accessible *here*.

Federal statutes and regulations."

External EIR participants who survive the conflicts screening will likely be given the chance to gorge themselves on much low-hanging fruit. USCIS – one of three immigration agencies born of the Homeland Security Act of 2002 from the bad seeds of the much-maligned former Justice-Department agency, the Immigration and Naturalization Service (INS) – is beset with inherited, self-perpetuated and external problems that have gravely hurt entrepreneurs, startups, established businesses and investors. Although Director Mayorkas has laudably embarked on numerous salutary improvements and reforms like no predecessor at INS or USCIS before him, persistent problems within the agency include:

- **USCIS mission creep and mission miasma**. The Homeland Security Act (HSA) divided the immigration function – which had previously been the province of the former INS - in three ways: (1) border enforcement (conferred on U.S. Customs and Border Protection (CBP)), (2) interior enforcement (conferred on U.S. Immigration and Customs Enforcement (ICE)), and (3) the adjudication of requests for such immigration benefits as visa petitions, work permits, green cards and naturalization – a responsibility which the HSA conferred on USCIS. The HSA's division of responsibilities likely results from earlier Congressional hearings on the conflicting missions (namely, immigration law enforcement and the grant of immigration benefits) and resulting dysfunctions of the INS. Having forgotten or ignored this prior history, USCIS established an investigative unit known as Fraud Detection and National Security (FDNS) which has conducted numerous, unannounced "site visits" of employers who petition for foreign workers. FDNS now employs over 700 internal investigators and an unknown number of private sleuths – a clear example of mission creep. Their investigations have resurrected the old tensions between enforcement and benefits that plagued and conflicted the INS, thereby clouding the focus of USCIS adjudicators – mission miasma – who should be intent upon granting immigration benefits to deserving parties and denying them to person or entities that are unqualified under the immigration laws. The duty of law enforcement and necessary investigation, on the other hand, should be confined to the appropriately tasked units under the HSA, namely, ICE and CBP. [10]

- **The USCIS's failure to follow the rule of law or ensure procedural due process**. The Administrative Procedure Act (APA)[11] provides a process for notice of proposed rulemaking and the opportunity for comment by interested members of the public before an agency issues a final regulation. Similarly, the Regulatory Flexibility Act (RFA)[12] requires an analysis of a proposed rule in order to "minimize any significant economic impact of the rule on a substantial number of small entities." Moreover, in enabling legislation over several years, Congress has tasked the agency with the responsibility to issue regulations offering its interpretation of the statute in question. Rather than comply with the APA, RFA and several substantive immigration laws creating new rights or new restrictions, USCIS has adopted a practice of issuing proposed guidance and offering the public a few weeks to respond before the guidance becomes agency "policy." This abbreviated approach circumvents the protections of the APA and RFA, allows for no vetting of the rules by the public, no apparent role for the White House Office of Management and Budget, and no opportunity to analyze the agency's rationale for the policy decisions and legal interpretations developed in policy guidance. Moreover, USCIS has not issued regulations or policies governing the conduct of its investigative unit, FDNS, whose practices are not consistent with agency regulations on prior notice to the petitioning business or its counsel of record and the conduct of interviews, thereby flouting procedural due process.

- **The lack of guidance and absence of employment-based immigration interpretations, policies and procedures.** At the outset of USCIS Director Mayorkas's tenure, he wisely commissioned an analysis of agency "policies" and canvassed the public on the need for specific policy development and guidance. While the policy review has been

10 For background on the HSA and FDNS see Ted J. Chiappari and Angelo A. Paparelli, "Looking for Fraud in All the Wrong Places H-1Bs Working From Home," New York Law Journal (Aug. 24, 2011), and Angelo A. Paparelli's blog, http://www.NationOfImmigrators.com, (Paparelli Blog), "A Cancer Within the Immigration Agency," Aug. 27, 2011.

11 5 U.S. Code § 500 *et seq.*

12 U.S. Code § 601 *et seq*.

concluded, most of the extant policies from years back remain in place. Because these policies have largely been issued without notice-and-comment rulemaking, and are often poorly reasoned, incomplete, contradictory or wholly non-existent, the stakeholder community has been at the mercy of agency adjudicators who are free to menu-pick or simply "boldly assert and plausibly maintain"[13] the ostensive legal basis underlying a denial of eligibility for the requested immigration benefit.

- **The proclivity of numerous USCIS adjudicators to go beyond the requirements.** The federal courts have repeatedly chided USCIS for adding extra requirements beyond the text of existing immigration law or regulations.[14] Still, the fabrications persist. Three examples are the "out of the blue" reinterpretations of the L-1B (specialized knowledge) visa category for intracompany transferees issued in a 2008 unpublished Administrative Appeals Office (AAO) decision, known as the "GST decision," which was not designated as a precedent,[15] the revised successor in interest policy guidance depriving previously eligible First Preference green card applicants of permanent status,[16] and the "employer-employee relationship" memorandum dramatically restricting use of the H-1B category by consultants and working owners of small businesses.[17]

The USCIS Adjudicator's Field Manual, § 3.4B ("Binding Nature of Policy on Employees") provides:

All material which is designated as policy material is binding upon all employees of USCIS, unless or until it is specifically superseded by other policy material. There are no exceptions to this rule. To the extent that one policy document appears to be in conflict with another, the "higher" authority is controlling, but clarifications should always be sought in such a situation.

Nonetheless, as the 2011 Ombudsman report noted, problems persist in the USCIS's failure "to address unclear and conflicting guidance."

- Inadequate initial and refresher training of USCIS personnel. The Office of the USCIS Ombudsman recommended in its 2010 Report to Congress that additional training be provided to USCIS adjudicators concerning the "more-probable-than-not" preponderance of the evidence standard to be applied in adjudicating immigration-benefits requests. "Missing from both USCIS' training modules and the [Adjudicators Field Manual]," the Ombudsman noted, "are focused analyses of factual scenarios representing real world filings, with discussions arranged by petition and application type." USCIS Director Mayorkas, in his response, agreed that his agency "recognizes the benefit of additional training for Immigration Services Officers (ISOs) on the standards of evidence, and USCIS is implementing this recommendation." In her 2011 Report to Congress, however, the Ombudsman noted that the problem has not been adequately addressed:

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13 Aaron Burr, Jr. , U.S. Vice-President under Thomas Jefferson, and also remembered for having ended the life of Alexander Hamilton in a duel, reportedly has said that "[l]aw is whatever is boldly asserted and plausibly maintained."(Source: Burton Stevenson, *Home Book of Proverbs, Maxims and Familiar Phrases* (1948).

14 See, *e.g., Kazarian v. USCIS*, 596 F.3d 1115, C.A.9 (Cal.), March 04, 2010 (NO. 07-56774).

15 A discussion of the AAO's GST decision, together with a link to its text, can be found at Paparelli Blog in "Off-Message Immigration Bureaucrats Undermine the President's Jobs Push by Refusing L-1 Specialist Visas to Indian Citizens," accessible *here*. The decision declined to treat as binding prior headquarters policy memoranda. More recently, USCIS Director Mayorkas maintained in a November 9, 2010 reply to the USCIS Office of the Ombudsman (AILA InfoNet Doc. No. 10112460) that the GST decision "does not conflict with" the prior L-1B policy memoranda but his response did not address the decision's rejection of agency policy memoranda as binding guidance on which the public may rely. This may be because, as suggested earlier in the text, the agency, when it issues proposed policy guidance (in lieu of regulations) only provides the public with a limited opportunity to comment prior to its effective date. Public comment is of dubious value, however, if the public may not then rely on the ultimately published policy guidance.

16 See, Angelo A. Paparelli, "Bothersome Immigration Buzz Spells Trouble for M&A Deals," Business Law Today, Jan.-Feb. 2010, available *here*.

17 See Angelo A. Paparelli and Ted. J. Chiappari, "New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms," New York Law Journal (February, 2010), available *here*.

Elevated RFE [Request for Additional Evidence] rates are impeding legitimate business operations. Specifically, they have a corrosive impact on the "specialized knowledge" category as a viable means for employers to access essential personnel for U.S. operations. Focused and timely efforts are needed to address unclear and conflicting guidance, insufficient training on the application of the preponderance of the evidence standard, and quality assurance.

- **The high rejection rate of petitions by small businesses.** Immigration practitioners have complained for many years about a heightened level of USCIS scrutiny and rejection of work-visa and green-card petitions submitted by small business enterprises. The problem has worsened with the adoption of a third-party online verification system to assist in determining the *bona fides*, characteristics and viability of small business petitions known as VIBE (Validation Instrument for Business Enterprises).[18] The third-party database often contains outdated, incomplete or incorrect information on small businesses. As a result, USCIS adjudicators routinely issue RFEs, which then require the petitioning small business to request hastily the updating of the third party's data (for an expedite fee) in order that a response to the RFE can be timely submitted to USCIS.

- **Funding deficiencies caused by poorly conceived legislation and unfunded mandates.** Congress is not without fault in the dysfunctionality that befalls USCIS. Often, new legislation is passed without regard to the burden on USCIS to implement the new law. Rather than authorizing appropriations, Congress has opted to require USCIS to adopt a user-fee funding vehicle which has often proved inadequate. EIR experts should pay careful attention to shortfalls in USCIS operations caused by inadequate funding and make clear to Congress that the agency's troops cannot fulfill their statutory mission without sufficient financial support.

- **Improper Congressional meddling in agency operations.** USCIS has its hands full in attempting to fulfill its statutory duties, while also responding to legitimate requests from the chairpersons and ranking members of the duly constituted oversight committees. The agency ought not be burdened, however, with demands from individual senators and representatives for time-consuming investigations and reports. Although such requests lack the force of law, they tend nonetheless to redirect USCIS resources. A prime example is the action of Sen. Charles Grassley who has caused USCIS to devote substantial resources in investigating what he perceives as high levels of fraud and technical violations of the H-1B visa category. This has led, in part, to the FDNS site visit program and its dispensation with appropriate rulemaking and compliance with existing regulations. [19]

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Justice Brandeis was certainly right about the salubriousness of sunlight: Greater transparency at USCIS is sorely needed – particularly in connection with rulemaking and adjudicatory requirements and procedures. But for USCIS to be a healthy, vibrant participant in federal initiatives to make our nation stronger and more competitive, bolder steps must be taken. Entrepreneurial intubation and incubation may well be the first robust steps toward achieving healthier behaviors within the agency, and thus, greater economic vitality for the nation.

18 USCIS information on VIBE can be obtained *here*. For critique of VIBE, see the USCIS Ombudsman's Annual Report to Congress, p. 23 et seq., June 2011, accessible *here.*

19 For a recent example of Sen. Grassley's interference, see Paparelli Blog, "First, Do No (Immigration) Harm (to Business Visitors), June 5, 2011, available *here*.

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