Big-Picture, Clean-Slate Immigration Reforms for the Biden-Harris Administration

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As a new administration takes office on January 20, and the tantalizing prospect of enlightened immigration reforms looms on the horizon, an intriguing question has surfaced on Twitter:

"Is there a progressive version of Stephen Miller? Someone who has (1) put in the time to understand how the immigration system works in great detail, (2) relentlessly committed to changing the system, and (3) is actually politically effective?" Austin Kocher, PhD

As grizzled and tireless proponents of a just immigration system, we humbly nominate ourselves for (1) and (2), and for (3) propose the American Immigration Lawyers Association (AILA). To be sure, our audacity notwithstanding, others are more worthy. Many experts have suggested ways to restore America's historic stature as a welcoming nation of immigrants. For example, consider recent proposals by Doris Meissner and Michelle Mittelstadt of the Migration Policy Institute, Alexander Aleinikoff, Donald Kerwin and other marquee immigration experts who collaborated with the Zolberg Institute on Migration and Mobility, David J. Bier at the Cato Institute, and the collective efforts of the National Immigration Forum, Immigration Hub and America's Voice, and AILA.

Here then, with unbridled chutzpah, we offer four fresh ideas or tweaks of others' already-suggested proposals. Some can be announced quickly by executive order or presidential proclamation. Others might require rulemaking. None would require congressional action:

- **Restore the customer-service ethos and recognition of our heritage as a nation of immigrants in the USCIS mission statement.** The mission statement of U.S. Citizenship and Immigration Services (USCIS) should reflect our nation's heritage and values. It should also inspire USCIS employees to recognize and foster the benefits of legal immigration in their work (family unity, refugee and labor protection, and promotion of economic prosperity). By changing the mission statement, the agency would send a message of inspiration to its personnel, immigration stakeholders, the nation and the world. In tandem, the new administration should instruct USCIS to: (1) restore its former deference policy on affirming previously approved grants of immigration benefits when extensions of status involve no material change in the facts; (2) stop rejecting properly filed forms that fail to put "not applicable" or "none" where such notations are unnecessary (e.g., requiring the "current location" of "deceased relatives"); (3) stop using instructions on immigration forms – which have the force and effect of a regulation under 8 C.F.R. § 103(a)(1) – as an end run around formal notice-and-comment rulemaking under the Administrative Procedure Act (APA); and (4) cease issuing boilerplate, kitchen-sink requests for evidence or notices of intent to deny or revoke immigration benefits unless the request or notice expressly articulates an examination of the relevant evidence presented, cites relevant legal authority (no more making stuff up), limits the "ask" to unresolved issues, acknowledges eligibility criteria

that have been satisfactorily established, and offers a clear explanation for the agency's action, including a rational connection between the facts found and the agency choice made. Moreover, USCIS adjudicators, just like immigration judges and members of the Board of Immigration Appeals, must be required to sign their name to their decisions (or a pen name, if necessary for security purposes). This way rogue adjudicators who do not comply with these new requirements could be re-educated or rooted out.

- **Take USCIS out of investigations and limit its role to adjudicating requests for immigration benefits.** The Homeland Security Act of 2002 (HSA) states that USCIS should engage in only limited activities. As a recent amicus brief filed by the Alliance of Business Immigration Lawyers explained, the HSA allows USCIS to decide requests for immigration benefits (e.g., asylum, visa petitions, work permits, permanent residency and naturalization), but not to conduct investigations and intelligence-gathering activities. USCIS should therefore be ordered to shutter its Fraud Detection and National Security (FDNS) directorate, or limit that unit's role to data collection and analysis. To the degree that immigration officials suspect crimes or fraud, Immigration and Customs Enforcement should conduct any investigation that may be warranted, as the HSA provides – subject to the new Administration's enforcement priorities and under even-handed procedural due process protections, such as issuing advance notice of inspection in writing (except where imminent harm or solid evidence of crimes require dispensing with prior notice). USCIS should end unannounced FDNS site visits.

- **Authorize virtual or in-person attorney representation at U.S consular posts abroad and ports of entry, and allow legal representation of other parties with legitimate interests in USCIS benefits adjudications.** In a 2017 petition for rulemaking under the APA, AILA urged the Departments of State and Homeland Security to allow in-person or electronic participation of legal counsel during consular visa interviews and in applications for admission to the United States. That effort proved fruitless, but the need for legal representation persists. Experience has shown that visa applicants at consular interviews and persons seeking entry to the United States have only a few minutes to persuade a federal immigration official of their eligibility. Routinely, these decisions are made without the safeguards that attorney representation would ensure. Also barred from attorney representation under USCIS procedures are stakeholders with a legitimate interest in a particular immigration proceeding. For example, employment-and family-based petitioners may be represented by counsel, but individual beneficiaries may not. Similarly, an EB-5 regional center or project developer may not be represented in an immigrant investor's initial petition or a conditional permanent resident's petition to remove conditions on residency. Lawyers safeguard fairness and due process in immigration proceedings. They should be expressly allowed to actively and directly protect their clients' legal interests. (We also believe in the need to review consular visa denials, but that is a bridge too far for this post.)

- **Establish a single administrative tribunal that decides all immigration-related legal issues across all federal agencies.** Many have espoused moving immigration judges and the Board of Immigration Appeals from the Justice Department to a freestanding Article I immigration court. That would require congressional action. In the meantime, the new administration already has authority to create an impartial administrative tribunal within the Department of Justice, but protected from political interference by executive order or

regulation. Immigration and Nationality Act (INA) § 103(a) states that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." At present, an alphabet soup of agencies, departments, and subordinate components within the federal government make decisions interpreting the INA and agency regulations and practices. These decisions often conflict, leaving immigration stakeholders to infer, interpret, and sometimes just guess at what the law requires or permits. Of course, interagency cooperation and funding (perhaps with existing user-fee authority) will be necessary. These potential hurdles can be overcome. The existing legal disharmony is unsustainable. Immigration law must be reconciled and proclaimed consistently across federal immigration agencies so that the public will know how to plan their affairs and comply with the laws, and thus better protect reliance interests.