

SEEKING COMMON SENSE IN IMMIGRATION ENFORCEMENT

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I start my remarks commending those who serve in law enforcement on the front lines of protecting our nation from terrorists and those with criminal and mal intentions. The responsibility of Immigration & Customs Enforcement (ICE) agents and Customs and Border Protection (CBP) agents are great, and these agents and others in law enforcement are under tremendous pressure to ensure that the next 9/11 terrorist is not admitted and that those who have entered undetected are apprehended. It is my impression and experience that most agents carry out their vital responsibilities with courage while respecting the humanity of those they apprehend or become suspicious of. With that said, I have also occasionally observed abuses as described by colleagues in the field, the news media in high profile raids, and experienced during my twenty years of immigration law practice representing intending immigrant clients. Notwithstanding those incidents of inappropriate conduct by law enforcement agents, all of these front line agents are enforcing the laws which this society has promulgated for them to enforce. The laws, of course, come from the policies that elected officials seek to impose through our democratic processes. Respect for the law, rule of law, and common decency are bedrock principles within our civil society in this country. Indeed, countries which fail to provide these principles tend to be or become dysfunctional.¹

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AN OLD & SOMETIMES STILL RELEVANT SOLUTION:
I.N.A. SECTION 245(i)

There is often much ado about the term *illegal immigrant*. I prefer the term *intending immigrant*. Given a chance to legalize, support their families, and pay their taxes, most of these intending immigrants would do so. The motivations of those who migrate to the United States without the appropriate authorization to do so are likely many, but for most it involves the earnest desire to seek employment and support their families.² What a joy it was to stand with my Mexican client, a father of six children who originally entered without inspection in 1996 because he could not find work to feed his six children in Mexico. A skilled bricklayer, Juan faithfully sent money monthly to his wife in Mexico so that his kids, parents, and extended family could eat, have a roof over their heads, and receive an education. He paid his taxes in the United States. He did not commit any crimes. His employer was able to sponsor him through the 2000 Legal Immigration Family Equity Act (“LIFE Act”), which provided Immigration and Nationality Act (“INA”) § 245(i). This penalty provision required him to pay \$1,000 for his entry without inspection and his unlawful employment.³ He was not otherwise inadmissible, but because of quotas and the extremely slow US Citizenship and Immigration Service processing, Juan was unable to obtain his permanent resident *green card* until 2011. He promptly traveled to visit his wife and children for the first time in almost two decades. He is now in the process of filing the paperwork to lawfully bring his wife and children under the age of twenty-one to the United States. Some would consider Juan a criminal. I consider Juan a father whose inability to feed his six children while staying in Mexico motivated him to migrate north where he could find

honorary Doctor of Humanities upon Buwalda in May 2006. In 1991 she completed two Master’s Degrees at Regent University, one in Public Policy from the School of Government and the other in International/Cross-Cultural Communication. In 1990 Buwalda graduated from Regent University School of Law earning a Juris Doctor and since 2000 has served on the law school’s Alumni Board. In 1986 she graduated Summa Cum Laude from Liberty University earning joint majors in Business Administration and Political Science.

¹ See Basil Fernando, *How Can Lawyers Deal with Dysfunctional Systems of Justice?*, 11 ARTICLE 2, 2–3, 8–10 (2012), <http://www.article2.org/pdf/v11n01.pdf>.

² HANS JOHNSON & LAURA HILL, PUB. POL’Y INST. OF CAL., AT ISSUE: ILLEGAL IMMIGRATION 7 (2011), available at http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf.

³ 8 U.S.C. § 1255(i) (2012).

a job to feed his six children. The LIFE Act penalty provision known as “INA § 245(i)” sunset on April 30, 2001.⁴ There are only a few people like Juan left who are *grandfathered* under labor certifications or immigration petitions filed before April 30, 2001, and who are still able to legalize under this penalty provision. For those without INA § 245(i), legalization is just a dream.

A ONE SIDED, OFTEN DESTRUCTIVE SOLUTION: “ENFORCEMENT ONLY”

I respectfully disagree with those individuals who view intending immigrants who have this aspiration to earn a living and support their families as committing the *unpardonable sin* when they do so without legal authorization by the government. At least it seems from the rhetoric of many on the *enforcement only* side of the immigration line that entering the United States illegally or overstaying a lawful entry and working without government permission are the unpardonable sins for which the only appropriate punishment is banishment from this country, even banishment from spouses and children for a decade or more. Too many on the enforcement only side of this issue turn a deaf ear to any appeals to family unity and such favorable factors as lack of any criminal conviction and payment of taxes or other contributions to society.⁵

Examples of the consequences to innocent U.S. citizen family members of *enforcement only* policies are replete. An example of one family that I represented includes many of the common hardship experiences. The husband from an Asian country lawfully entered as a student, eventually dropped out of school thus becoming *illegal*, and later married a U.S. citizen. His wife, only a high school graduate who grew up on the *other side of the tracks*, gave birth to their son. Being a good wife and mother were her life ambitions. She was so happy to have a stable family, since she grew up without a father around. Her husband provided a stable income for his wife and son as well as a safe home environment. Suddenly, her life crumbled—I will refer to her by the fictitious name of Nancy. Nancy’s husband was apprehended in their home by ICE for a misdemeanor conviction under Virginia law. Under federal law, this misdemeanor conviction which had occurred years earlier was considered an aggravated felony on account of the *twelve*

⁴ See *id.*

⁵ Press Release, Pub. Policy Polling, Gingrich Takes the Lead in Iowa (Dec. 5, 2011), http://www.publicpolicypolling.com/pdf/2011/PPP_Release_IA_1205925.pdf.

month sentence scribbled on the conviction order, although all of the terms of the sentence were suspended and only a fine paid.⁶ This *aggravated felony* subjected her husband to mandatory detention, and he opted to return to his Asian country rather than spend the resources and many months of detention without hope of release. From a poor Asian country, Nancy's husband was unable to send any support for his wife and son. She did her best to work two part-time jobs to support her son and pay rent on a tiny apartment, but without reliable transportation she quickly lost her jobs. With only a high school education, a son to take care of, and no family in the area to help her, she had no recourse but to seek welfare. She has become a single mom on welfare. To this day, her husband has failed to obtain the necessary waivers of inadmissibility to allow his return through an approved marriage-based visa petition. I can provide dozens of examples from my law practice in Northern Virginia of similar stories, some with petit misdemeanor convictions that are categorized as aggravated felonies under federal laws, but most without any criminal convictions. These are stories of husbands and wives who are intending immigrants who entered across our southern border without inspection or husbands and wives of U.S. citizens who overstayed their visas. Many of these families have ended in irreversible separation and many in divorce. These "Nancies" are often baffled by what happened to their husbands and why their husbands were deported. Their children are left fatherless, or in even worse situations.

SOLUTIONS WITH LIMITED RESULTS: BAND AIDS

I mentioned the *waiver of inadmissibility* that may be applied for in some situations by families like Nancy's family. Oh, dare I say that the one glimmer of hope announced in November or December of 2011 as a *proposal* by the Obama administration to mitigate the destruction of families which would permit the filing of one of the waivers of inadmissibility before the intending immigrant is banished outside of the country has been decried as an *amnesty*, despite the fact that I recall the ability to file these waivers at the INS District Office level in the 1990s for pre-adjudication before the alien departed the United States, and despite the fact that the burdens of proof have not changed and neither has the law.⁷ Another procedural change an-

⁶ See 18 U.S.C. § 3559 (2012).

⁷ See 8 U.S.C. § 1182(h) (2010) (showing lack of change in the law of waiver of inadmissibility); Aliens and Nationality, 8 C.F.R. § 1240.8(d) (2012); see also

nounced in August of 2011 to reduce the pressure on the overburdened immigration courts gave greater latitude and specific guidelines to ICE to exercise *prosecutorial discretion* not to place or not to proceed with removal of certain undocumented aliens without any criminal records.⁸ The mischaracterization by the *enforcement only* crowd of pundits on Fox News of these merciful procedural changes to permit a pre-adjudication of the waiver of inadmissibility or to permit prosecutorial discretion is a deplorable mischaracterization and is so dishonest.⁹ Why is this *enforcement only* crowd so determined to punish not just Nancy's husband but Nancy and their son? The heightened burdens of proof to obtain waivers of inadmissibility imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 are not enough, and some in this *enforcement only* crowd are all too eager to eliminate any and all possible waivers of inadmissibility.¹⁰

Recently several reports and statistics have been published as to what is happening to the children left behind after ICE raids and the removal of parents.¹¹ One report aired on ABC Nightline last month and entitled, "Stolen Babies, Immigrant Mother Loses Four Kids" found that 5,000 such U.S. citizen children have been placed in foster care.¹² Another story I recently read reported how some of these children have been placed for adoption, although the biological parents would never have relinquished their parental responsibility but for

Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1127 (9th Cir. 2007) (discussing the burden of proof).

⁸ See American Immigration Council, *DHS Announces Expansion of Prosecutorial Discretion Guidelines* (Aug. 18, 2011), <http://www.americanimmigrationcouncil.org/newsroom/release/dhs-announces-expansion-prosecutorial-discretion-guidelines>; see also Memorandum from John Morton, Dir., U.S. Immigrations and Customs Enforcement 1, 4 (June 19, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁹ See Mark Krikorian, *Illegal Aliens Find a New BFF in President Obama*, FOX NEWS (Feb. 21, 2012), <http://www.foxnews.com/opinion/2012/02/21/illegal-aliens-find-new-bff-in-president-obama/>; Bob Dane & Kristen Williamson, *How Obama has Stealthily Dismantled America's Immigration Enforcement Laws*, FOX NEWS (Jul. 24, 2012), <http://www.foxnews.com/opinion/2012/07/24/how-obama-has-stealthily-dismantled-america-immigration-enforcement-laws/>.

¹⁰ See 8 U.S.C. § 1182(h) (2010) (stating that a waiver of inadmissibility requires a showing of extreme hardship upon the U.S. resident family member).

¹¹ See Hirokazu Yoshikawa & Carola Suarez-Orozco, Op-Ed., *Deporting Parents Hurts Kids*, N.Y. TIMES (Apr. 20, 2012), http://www.nytimes.com/2012/04/21/opinion/deporting-parents-ruins-kids.html?_r=1.

¹² Lauren Gilger et al, *Stolen Babies? Immigrant Mother Loses Four Kids*, ABC NEWS (Feb. 2, 2012), <http://abcnews.go.com/Blotter/stolen-babies-mother-loses-kids/story?id=15491886#.UDsPdkfeySo>.

their deportation from the United States.¹³ How about this new state method for punishing undocumented immigrants? Many who are in this *enforcement only* crowd claim to also have pro-life and pro-family values. How is this possibly a pro-family policy? These are inconsistent value claims.

THE NUCLEAR SOLUTION: SELF-DEPORTATION

We have recently been hearing more about the concept of *self-deportation*. Six states have promulgated immigration enforcement laws after federal comprehensive immigration reform efforts broke down in 2007.¹⁴ The idea of *self-deportation* is that if a state or local community can make the living conditions so unbearable, those intending immigrants without legal papers will leave. Alabama has accomplished this goal with its new state law, HB 56, which went into effect in September 2011, but to the detriment of its economy.¹⁵ On February 14, 2012, Elizabeth Dwoskin authored an article in the Bloomberg Businessweek which cites a study and report released by Dr. Samuel Addy, an economist and director of the Center for Business & Economic Research at the University of Alabama.¹⁶ Ms. Dwoskin writes

The statute, which among other things requires police to question people they suspect of being in the U.S. illegally, has prompted thousands of immigrants to flee the state. The law's backers believed out-of-work Alabamians would snap up the jobs those immigrants once held. It hasn't turned out that way.¹⁷

¹³ See Lauren Gilger et al, *Adoption Battle Over 5-Year Old Boy Pits Missouri Couple Vs. Illegal Immigrant*, ABC NEWS (Feb. 2, 2012), <http://abcnews.go.com/Blotter/adoption-battle-year-boy-pits-missouri-couple-illegal/t/story?id=15484447>.

¹⁴ See Elizabeth Dwoskin, *Alabama's Immigration Law Could Cost Billions Annually*, BLOOMBERG BUSINESSWEEK (Feb. 14, 2012), <http://www.businessweek.com/articles/2012-02-14/alabamas-immigration-law-could-cost-billions-annually>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

According to Ms. Dwoskin, Dr. Samuel Addy found in his study that Alabama's annual economy will shrink "by at least \$2.3 billion and will cost the state not less than 70,000 jobs."¹⁸

Most of the damage will come from reduced demand for goods and services provided by Alabama businesses patronized by immigrants. Addy projects that 40,000 to 80,000 immigrants will vacate their jobs.... Those positions support other jobs, leading to a net employment loss of 70,000 to 140,000. As a result, Addy estimates, the state's gross domestic product will decline by \$2.3 billion to \$10.8 billion for every year the law is in effect and will cost \$56.7 million to \$264.5 million in [lost] tax revenue.¹⁹

Immediately after the law took effect in September, in some school districts up to fifteen percent of the children promptly stopped attending because the law also has a provision that the immigration status of parents must be disclosed to state authorities.²⁰ Parents simply stopped sending their children to school.²¹ Because this Alabama law also makes it a crime to enter into any contractual relationship with an *illegal immigrant*, I had read reports that water and electric services have been cut off to trailer parks where Latinos live, and even clerks at Walmart refuse to checkout merchandise sold to Latinos because they may be illegal.²² Efforts in May 2012 at revising HB 56 by the State's Senate and Legislature failed, despite calls by Republican Governor Robert Bentley for striking two of the worst of the provisions.²³ Until August 20, 2012, children enrolling in Alabama schools could still be interrogated by their teachers and principals about the immigration status of their parents.²⁴ On that date, the Eleventh Circuit Court of Appeals in Atlanta released its opinion that this provision violated the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Ben Forer, *Alabama Immigration Law Causes Hispanics to Leave Schools*, ABC NEWS (Oct. 4, 2011), <http://abcnews.go.com/US/alabama-immigration-law-hispanics-leave-schools/story?id=14663550>.

²¹ *Id.*

²² See Elise Foley, *Luther Strange, Alabama AG, Argues Against Denying Water Under Immigration Law*, HUFFINGTON POST (Dec. 5, 2011, 3:36 PM), http://www.huffingtonpost.com/2011/12/05/luther-strange-alabama-immigration-law-should-not-require-documentation-for-basic-services_n_1129982.html; J. F., *Democracy in America: A State of Enforcers*, ECONOMIST (Feb. 15, 2012, 8:01 PM), <http://www.economist.com/blogs/democracyinamerica/2012/02/immigration-law-0>; Ingrid Chapman, *Dispatch from Alabama: Organizing Against HB 56*, LEFT TURN (Feb. 16, 2012), <http://www.leftturn.org/alabama-organizing-against-hb-56>.

²³ H.B. 658, 2012 Reg. Sess. (Ala. 2012).

²⁴ H.B. 56, 2011 Reg. Sess. (Ala. 2011).

Fourteenth Amendment's Equal Protection Clause.²⁵ The Eleventh Circuit also temporarily blocked the section forbidding citizens from entering contracts with undocumented persons, although it upheld the section of the law which forbids state business transactions with *illegal immigrants*.²⁶ Thus municipalities may not be switching on water or electricity to the homes of the undocumented, but at least shopping at Walmart may resume. The Eleventh Circuit enjoins the requirement that everyone in Alabama carry identification, although it permits the provision requiring Alabama police to question individuals and ascertain their immigration status.²⁷

Alabama's HB 56 has contested with Arizona's SB 1070, legislated in April 2010, as to which is tougher on enforcement.²⁸ SB 1070 had also required individuals to carry proof of citizenship at all times, and gives local police the power to question individuals about their immigration status even if stopped for a routine offense, such as a traffic violation.²⁹ In July 2010, the Justice Department brought federal action to enjoin portions of Arizona's SB 1070 which it argued intruded on a federal area of enforcement and policy.³⁰ On June 25, 2012, in a five to three ruling, the U.S. Supreme Court struck down the three most controversial of Arizona's four enforcement provisions seeking state enforcement.³¹ Unambiguously, the Supreme Court stated that Sections 3, 5(C), and 6 of the SB 1070 are preempted by federal law.³² It adhered closely to the federal government's *scheme* of determining that certain violations are subject to civil penalties only and are not subject to criminal penalties. The attempt of a state to impose a criminal penalty on the same conduct, such as unauthorized employment, was deemed to be an "obstacle to the regulatory system Congress chose."³³ This decision's clear re-statement by the Supreme

²⁵ United States v. Alabama, No. 11-14532, 2012 WL 3553503, at *4 (11th Cir. Aug. 20, 2012).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Differences Between the Alabama and Arizona Racial Profiling Laws*, NAT'L IMMIGR. L. CTR., http://www.nilc.org/ALvAZ_laws.html (last visited on September 3, 2012).

²⁹ S.B. 1070, 49 Leg., 2d. Sess. (Ariz. 2010).

³⁰ United States v. Arizona, 703 F. Supp. 2d 980, 988 (D. Ariz. 2010) *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. 2011), *aff'd in part, rev'd in part and remanded*, 132 S. Ct. 2492 (U.S. 2012), *aff'd in part, rev'd in part*, No. 10-16645, 2012 WL 3205612 (9th Cir. Aug. 8, 2012).

³¹ Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

³² *Id.*

³³ *Id.* at 2505.

Court of federal preemption of immigration enforcement should prevent other states from imposing criminal penalties when federal law has not.

States would do better to decide more *common sense* approaches to their foreign-born populations. For example, the Commission to Study the Impact of Immigrants in Maryland, a state panel coordinated by the University of Maryland, evaluated the economic contributions of the state's foreign-born and the cost of government services for them.³⁴ The Commission released its report in early 2012.³⁵ It also studied the education experience of the children of immigrants, immigration law enforcement issues facing local communities, and the use of the federal E-Verify system to verify workers' immigration status.³⁶ The panel's final report, *The Impact of Immigrants in Maryland*, says the state's foreign-born workers accounted for more than fifty-seven percent of workforce expansion from 2000 to 2010.³⁷ This was well above the national average of forty-five percent.³⁸ Also, the report urges legislators to take a long view of immigration, which will show that the benefits significantly outweigh the costs, even the short run fiscal costs of providing state and local services.³⁹ It says the state would be "foolhardy" to shortchange the education of immigrants' children, who will be part of the state's future workforce.⁴⁰

WHY A COMMON SENSE SOLUTION IS STILL NEEDED

I would like to close my remarks with one more type of case that my law practice has all too frequently encountered—the *overstay* intending immigrant who tried to legalize but whose petitions or applications were botched by a prior lawyer or *notario* (my term for a non-lawyer who irreparably harmed an otherwise authentic petition). My most recent example occurred a couple of weeks ago when I spoke to a gathering of Hispanic church leaders of a wonderful evangelistic denomination. During a break time, one of the pastors approached me confidentially and told me how he properly had the R-1 non-

³⁴ Staff of Comm'n to Study the Impact of Immigrants in Md., 425th Gen. Assemb., 1, 14 (Comm. Print 2012), available at http://www.inforum.umd.edu/mdimmigration/content/md_immigration_commission_finalreport.pdf.

³⁵ *Id.* at 1.

³⁶ *Id.* at 26–27.

³⁷ *Id.* at 12.

³⁸ *Id.*

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 21.

immigrant religious worker visa until about one year ago. Meanwhile, a *notario* irreparably botched his permanent special immigrant religious minister petition. He was told he was still in the United States legally and able to work legally, although the lawyer attempted to appeal the botched petition (instead of re-filing it and cleaning up the mess). The long appeal time of over two years at the Administrative Appeals Office lead to the exhaustion of the five permissible years in the R-1 non-immigrant religious worker status while the appeal of his permanent petition was pending. With the passing of over one year's time since the R-1 status lapsed, this pastor cannot re-instate to any other visa, he cannot re-file a new permanent petition because the 2008 religious minister visa regulations prohibit an approval of a petition when the pastor has had any unauthorized employment, and the pastor is now subject to a ten year bar to returning if he departs.⁴¹ Despite paying thousands of dollars to stay legal, without a law change, this pastor will have no hope of legalizing while remaining in the United States and little hope of returning for ten years if he departs the United States. Easy answer, you say, "obey the law and leave." Not so easy for this pastor considering the high unemployment rate in El Salvador, the rampant gang related violence in El Salvador which has already taken the life of a relative, the deficient educational system for his children, the sub-standard medical care system, compared with the astonishingly fruitful ministry and growing church he is pastoring here in the United States which he would have to leave behind.

An immigration system that gives otherwise law-abiding, hard-working, parents of U.S. citizen children no means to legalize is a broken system and requires comprehensive reform.

⁴¹ 8 U.S.C. § 1182(a)(9)(C)(ii) (2010) (10 years required to reapply after the date of the alien's last departure from the United States); 8 U.S.C. § 1255(c)(2) (2010) (unauthorized employment requires the removal of the alien).