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## Immigration and Naturalization

Kevin J. Fandl

Marina Bugallal Garrido

Sergio R. Karas

Melanie Glover

Jihan Hassan

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## Immigration and Naturalization

EDITED BY KEVIN J. FANDL;\* CONTRIBUTIONS BY MARINA BUGALLAL GARRIDO,  
SERGIO R. KARAS, MELANIE GLOVER AND JIHAN HASSAN\*\*

### I. Introduction

2014 was undoubtedly a busy year for immigration law and policy. Both the United States and Europe saw surges in the number of intending immigrations attempting to enter, fleeing violence, poverty, and other factors making life in their home countries difficult. The United States has struggled to find a unified approach to respond to the influx of migrants, largely from Central America. Accordingly, President Obama responded with Executive Action, which likely will be challenged in the courts in the upcoming year. Jihan Hassan considers the surge and the executive response in her contribution to this edition of the *Year in Review*.

While the United States addresses its unlawful migrant dilemma, other countries have been looking for ways to attract more lawful migrants. Marina Bugallal Garrido and Melanie Glover dig into new attempts by the Spanish Government to attract foreign entrepreneurs to help reinvigorate their struggling economy. And Sergio Karas leads off this issue with an exploration of the work permit process for specialized knowledge workers in Canada. The Committee's contribution to this edition of the *Year in Review* reflects the need to continually modify immigration law to address its constantly changing patterns and practice around the world.

#### A. MAJOR CHANGES FOR SPECIALIZED KNOWLEDGE WORKERS IN CANADA\*\*\*

On June 9, 2014, the Federal Government published Operational Bulletin (OB) 575, which expands guidelines for immigration officers assessing Work Permit applications for

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\* Assistant Professor, Fox School of Business, Temple University. Former Counsel to the Assistant Secretary, U.S. Immigration and Customs Enforcement. Ph.D., George Mason University, 2010. J.D., M.A., American University, 2003. B.A., Lock Haven University, 1998.

\*\* Authors of each section are noted accordingly.

\*\*\* Sergio R. Karas, principal of Karas Immigration Law Professional Corporation, is a Certified Specialist in Canadian Citizenship and Immigration Law by the Law Society of Upper Canada. He is current Co-Chair of the ABA-SIL Canada Committee, Past Chair of the Ontario Bar Association Citizenship and Immigration Section, Past Chair of the International Bar Association Immigration and Nationality Committee, and Editor of the *Global Business Immigration Handbook*. His comments and opinions are personal and do not necessarily reflect the position of any organization.

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Intra-Company Transferees with Specialized Knowledge. The OB provides direction to the officers as to how to evaluate the criteria under which those workers are granted Work Permits. The OB also makes it more difficult to use this exemption from the Labour Market Opinion (LMO) process as it now requires a higher threshold of advanced proprietary knowledge to qualify.<sup>1</sup>

Intra-Company Transferees admitted under the Specialized Knowledge category are LMO exempt. Following the federal government scrutiny of the Temporary Foreign Worker Program, applicants and their counsel have increasingly looked at ways to bring to Canada temporary foreign workers avoiding the cumbersome LMO process. One of the ways this often is done is by using the Intra-Company Transferee category, which allows the transfer of Senior Managerial and Executive personnel as well as Specialized Knowledge workers who comply with the prescribed criteria and are performing services for an employer in Canada that is a related entity to their employer abroad. Effective immediately, immigration officers are directed to use the new criteria to determine if the applicant possesses a high standard of specialized knowledge and is receiving wages consistent with the Canadian prevailing wage for that occupation.<sup>2</sup>

To have “Specialized Knowledge” and to meet the requirements of the new policy, an Intra-Company Transferee Specialized Knowledge applicant would be required to demonstrate, on a balance of probabilities, a high degree of *both* proprietary knowledge and advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does not qualify the applicant under this exemption. The onus is on the applicant to provide evidence that he or she meets this standard. Documentary evidence to substantiate this expanded level of knowledge may include the following: a resume, reference letters, letter of support from the employer, job descriptions outlining the level of training acquired, years of experience in the field, degrees or certifications obtained that are related to the field of work, list of publications and awards received by the applicant, and a detailed description of the work to be performed in Canada.<sup>3</sup>

The new definition articulates the elements of “Specialized Knowledge” as the following:

“Proprietary Knowledge” is company-specific expertise related to a company’s product or services. It implies the company has not divulged specifications that would allow other companies to duplicate the product or service.

“Advanced proprietary knowledge” would require an applicant to demonstrate uncommon knowledge of the firm’s products or services and its application in international markets, or an advanced level of expertise or knowledge of the enterprise’s processes and procedures such as its production, research, equipment, techniques, or management.

“Advanced level of expertise” is also necessary, which would require specialized knowledge gained through significant and recent experience with the organization and used by the individual to contribute significantly to the employer’s productivity. “Significant” is not defined and is not always a meaningful indicator, but it relates to the length of experience possessed by the foreign worker. “Recent” is defined as experience obtained within the last five years.

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1. CANADIAN CITIZEN. & IMMIG. CANADA, Op. Bulletin 575 (2014).

2. *Id.*

3. *Id.*

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In assessing the “Advanced level of expertise,” officers must consider the following:

1. abilities that are unusual and different from those generally found in a particular industry and that cannot be easily transferred to another individual in the short-term;
2. the knowledge or expertise must be highly unusual both within the industry and within the host firm;
3. it must be of a nature such that the applicant’s proprietary knowledge is critical to the business of the Canadian branch and a significant disruption of business would occur without the applicant’s expertise;
4. the applicant’s proprietary knowledge of a particular business process or methods of operation must be unusual, not widespread across the organization, and not likely to be available in the Canadian labour market.<sup>4</sup>

It must be noted that skill in implementing an off-the-shelf product would not by itself be considered to be specialized knowledge, unless the product has suffered significant modifications to the point that it has become quite unique. So, for example, if an individual is very skilled at customizing a commonly available computer program, that, by itself, would not be sufficient to qualify the person as a Specialized Knowledge worker. However, if the product is combined with other products to achieve a customized and unique solution that is proprietary to the employer, that may be considered as a qualifying degree of expertise.

The new criteria will require Specialized Knowledge to be “unique and uncommon,” held by only a small number or small percentage of employees of a given enterprise. Under the new criteria, Specialized Knowledge workers must demonstrate that they are key personnel, not simply highly skilled.<sup>5</sup>

In addition, Specialized Knowledge workers will have to demonstrate that:

- they are employed by and under the direct and continuous supervision of the host company;
- they will not normally require training at the host company related to the area of expertise; and
- the specialized knowledge will not be readily available within the Canadian labour market, and cannot be readily transferred to another individual.

It must be noted that, where a treaty such as the NAFTA, or the Canada-Chile Free Trade Agreement (CCFTA), or the Canada-Peru Free Trade Agreement provides a different definition of Specialized Knowledge, that definition will still apply.<sup>6</sup>

1. *Introduction of Mandatory Wage Floor*

A completely new element in the Specialized Knowledge category has been introduced. The policy now requires that the employee claiming to possess Specialized Knowledge be remunerated at a level commensurate with the position. In order to introduce some objectivity to the definition of a mandatory wage floor, the new criteria requires that the foreign worker should receive, as a minimum, the prevailing wage for the specific occupa-

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4. *Id.*

5. *Id.*

6. *See id.*

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tion and region of work as listed in the Employment and Skills Development Canada “Working in Canada” Website tool to determine prevailing Canadian Wage.<sup>7</sup>

While the authorities have been using wage levels as an indication of specialization for some time, this is the first attempt to codify its use.

Non-cash payments such as hotel, transportation, and other benefits cannot be taken into consideration when evaluating the prevailing wage. Only allowances compensated in monetary form and paid directly to the employee can be included.<sup>8</sup>

The mandatory wage policy does not apply to Specialized Knowledge workers entering Canada pursuant to NAFTA or to other international free trade agreements. Nevertheless, officers still must consider wages as an indicator of specialization in their overall assessment.<sup>9</sup>

These important changes restrict the use of the Intra-Company Transferee Specialized Knowledge category and make it more difficult for employers to transfer technical personnel involved in Canadian projects. Changes to the Temporary Foreign Worker Program are ongoing, and it is expected that further restrictions may be introduced in the future. Given the evolving nature of the program, employers are encouraged to discuss specific cases with legal counsel to ensure applications are made based on current and timely analysis of existing policies and programs.

**B. UPDATE: ONE YEAR AFTER THE PASSING OF SPAIN’S LAW IN SUPPORT OF FOREIGN-NATIONAL ENTREPRENEURS<sup>10</sup>**

In the fall of 2013, Spain passed the Law in Support of Foreign-National Entrepreneurs (“Law”)<sup>11</sup> to entice foreign nationals to invest in Spain in exchange for residency permission. According to the latest information from the Spanish Ministry of Economy (“Ministry”), the granting of visas associated with this Law’s provisions recently increased in 2014. From September 2013 to September 2014, the Ministry granted 3,266 visas, whereas in the month of March 2014, when the Spanish Ministry of Economy released data on visas issued through that month, only 818 visas had been granted.<sup>12</sup>

Of the visas issued through September 2014, 285 have been granted to foreign nationals to invest in Spain for residency (“investment visa”). This includes those foreign investors who opt for the purchase of real estate in Spain, the purchase of Spanish public debt, or the launching of an entrepreneurial project—all of which are investment options for foreign nationals as presented in the Law in exchange for residency permission in Spain.<sup>13</sup>

Considering these 285 visas, 260 of them related to the purchase of property by foreign investors; 17 related to the acquisition of capital by foreign investors; and eight related to

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7. See *Explore Careers by Wages*, GOV’T CAN., [http://www.jobbank.gc.ca/wage-outlook\\_search-eng.do?reportOption=wage](http://www.jobbank.gc.ca/wage-outlook_search-eng.do?reportOption=wage) (last visited Mar. 30, 2015).

8. Op. Bulletin 575, *supra* note 1.

9. *Id.*

10. Marina Bugallal Garrido (Mariscal Abogados & Asociados, Madrid, Spain) and Melanie Glover (Alticor, Inc., Ada, Michigan, U.S.A.).

11. Law to Support Entrepreneurs and Their Internationalization, (B.O.E. 2013, 14/2013) (Spain).

12. Carlos Molina, *Los visados para atraer capital y empleo extranjero se multiplican por cuatro (Visas to Attract Capital and Foreign-National Workers by Four)*, CINCO DIAS (Sept. 29, 2014), [http://cincodias.com/cincodias/2014/09/26/economia/1411748251\\_823690.html](http://cincodias.com/cincodias/2014/09/26/economia/1411748251_823690.html).

13. *Id.*

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foreign investors' entrepreneurial projects in Spain. According to the first estimations of the Ministry, the investment in these projects is already rising to 497 million euros, and the labor associated with these projects has resulted in 4,446 jobs.<sup>14</sup>

Unlike the investment associated with property and financial assets, entrepreneurial projects are facing gradual implementation. According to the predictions for these businesses, an investment of 226 million euros and the creation of 2,410 jobs are predicted. If the growth continues, entrepreneurial projects could become the most significant investment option under the Law, in addition to foreign investment in Spanish property, for which the expense of 218 million euros is predicted. To apply for the investment visa and obtain residency in Spain, a foreign national must carry out a "significant investment of capital" in Spain.<sup>15</sup>

A "significant investment of capital" is an initial investment:

- of an amount equal to or greater than two million euros in Spanish public debt securities, or of an amount equal to or greater than one million euros in shares, company shares of Spanish businesses, or bank deposits in Spanish financial entities;
  - of a value equal to or greater than 500,000 euros in the acquisition of property in Spain;
- or,
- an entrepreneurial project for development in Spain that is considered and recognized as pertaining to "general interest."<sup>16</sup>

For the creation of an entrepreneurial project of general interest, the completion of at least one of the following conditions will be valued: the creation of jobs; the performing of an investment with socio-economic impact of relevance in the geographic environment in which the activity is going to be developed; and support relevant to the scientific and/or technologic innovation.

To demonstrate eligibility for the investment visa, a foreign national must confirm that he or she:

- i. is not present in Spain for any unlawful reason;
- ii. is of legal age (at least 18 years of age);
- iii. has no previous criminal record in Spain or in the countries in which he or she has resided for the last five years;
- iv. is not listed as objectionable in the Schengen countries;
- v. has public or private medical insurance;
- vi. has sufficient economic resources for himself or herself as well as for the members of his or her family for the period of residence in Spain.<sup>17</sup>

The investment visa allows a foreign national to reside in Spain for at least one year. If the foreign national is interested in living in Spain for more than one year, he or she may apply for the Authorization of Residence for foreign investors. This Authorization lasts two years, and it is renewable for two additional years. For this application, a foreign national must have first obtained the investment visa. Alternatively, a foreign national

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14. *Id.*

15. *Id.*

16. *Id.*

17. Commission Regulation 265/2010, 2010 O.J. (L 85) 1 (EU).

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may apply for the Authorization within 90 days of the expiration date of the investment visa in addition to proving that the foreign national has:

- i. travelled to Spain at least once during the authorized period of residence to confirm that the investment has maintained a value of equal or greater value than that originally invested, and
- ii. complied with Spanish tax and Social Security obligations.<sup>18</sup>

The investment visa does not allow foreign nationals to work, but the Authorization does. If the foreign national proves a continued residence for five years in Spain, he or she may apply for a residence of a longer duration.

Considering the visa options and current market conditions in Spain, investment in Spain is attractive. Costs of housing have fallen by 40 percent, and according to the analysis gathered by Bankinter, property investment in Spain has increased by 15.5 percent in the first nine months of 2014 from the figure of 2013. In 2013, the cost of property investments rose 112 percent, until it reached 3,800 million euros. Currently, the total cost of the investments until September 2014 is 10,400 million euros. Of this figure, 4,900 million euros come from non-commercial assets; 1,500 million euros come from the investment in offices; and 1,150 million euros come from commercial assets. Madrid holds 55 percent of foreign investment for the year 2013, which is a total of 8,635 million euros.<sup>19</sup>

According to the Commercial Spanish Secretary of State, Jaime García-Legaz, Spain is the “country of the euro zone that [has] attracted most direct foreign investment.” He added that the attraction of Spain came from the fact that it allows access to the European market, the largest in the world ahead of either the U.S. or China. Five-hundred million consumers form the country with rent per capita of about 25,810 euros (about US\$32.00) and a “powerful network of free commerce” with countries from all over the world.<sup>20</sup>

Investing in Spain is becoming profitable. Spain is an attractive European country in which to invest in the property market, after the United Kingdom and Germany, and Madrid is placed as the second most-preferred European city for investing in property assets.<sup>21</sup> Barcelona also finds itself among the ten most-preferred cities for foreign nationals to invest in property assets.<sup>22</sup>

In summary, Europe seems to be attracting foreign investors once again. According to the CBRE report,<sup>23</sup> 70% of the foreign investors choose Western Europe as the most attractive global region to invest in property assets.

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18. Law to Support Entrepreneurs and Their Internationalization, *supra* note 11.

19. See *Investor Presentation*, COMUNIDAD DE MADRID (Feb. 27, 2015), <http://www.madrid.org/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-disposition&blobheadername2=cadena&blobheadervalue1=filename%3D2015++FEBRUARY+27++Investor+Presentation.pdf&blobheadervalue2=language%3Des%26site%3DInversor&blobkey=id&blobtable=MungoBlobs&blobwhere=1352867180536&ssbinary=true>.

20. See *Spanish Secretary of State “Now is the time to invest in Spain”*, ESADE (Feb. 8, 2013), <http://www.esade.edu/web/eng/about-esade/today/news/viewelement/277141/1/spanish-secretary-of-state-for-trade-jaime-garcia-legaz-now-is-the-time-to-invest-in-spain>.

21. *European Real Estate Investor Intentions 2014*, CBRE <http://www.cbrecapitalmarkets.com/EN/KnowledgeCentre/Pages/European-Real-Estate-Investor-Intentions-2014.aspx> (last visited Mar. 30, 2015).

22. *Id.*

23. *Id.*

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C. DEVELOPMENTS IN THE UNITED STATES

1. *U.S. Supreme Court Considers Limits of Executive Power in Immigration Cases, but Questions Remain over Naturalization*<sup>24</sup>

In 2014, two U.S. Supreme Court immigration cases highlighted the tension between executive supremacy and judicial oversight of U.S. immigration law decision-making. The Supreme Court's decisions to weigh-in on the question of executive power over immigration power is important and timely in light of President Obama's November 20, 2014, announcement of broad immigration reform through executive action.<sup>25</sup>

a. *Scialabba v. Cuellar de Osorio*

First, in June 2014, the Supreme Court exhibited deference to the Executive Branch's interpretation of immigration law in *Scialabba v. Cuellar de Osorio*,<sup>26</sup> maintaining the Board of Immigration Appeals' (BIA) interpretation of the Child Status Protection Act (CSPA).<sup>27</sup> Specifically, the Supreme Court upheld the agency's interpretation that CSPA only safeguards the priority dates of a small subset of children who are listed as derivative beneficiaries on their parents' family-based immigrant visa petitions, but who turn twenty-one years old and "age out" while waiting for visas to become available.

Rosalina Cuellar de Osorio and her family, natives of El Salvador, waited seven years for immigrant visas to permit them to come to the United States to join Rosalina's U.S.-citizen mother.<sup>28</sup> When the family was informed that they were next in line for immigrant visas, they were told that the applicant's son, who had turned twenty-one while waiting for a visa to become available and, therefore, was no longer a "child" under U.S. immigration law and was not eligible for a visa, and thus could not immigrate with his family to the United States.<sup>29</sup> The Ninth Circuit, in an *en banc* decision, found that because the plain language of the CSPA unambiguously granted automatic conversion and priority date retention to aged-out derivative beneficiaries in all family visa categories, and the BIA's narrow interpretation of CSPA was not entitled to deference.<sup>30</sup>

In reviewing the case, Supreme Court focused on the following questions: (1) whether CSPA's automatic conversion and priority date retention provision<sup>31</sup> grants relief to all noncitizens who qualify as "child" derivative beneficiaries when a visa petition is filed but

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24. Jihan M. Hassan is an attorney with the Chicago office of Fragomen, Del Rey, Bernsen, & Loewy LLP, a global corporate immigration law firm.

25. President Barack Obama, Address to the Nation on Immigration Reform (Nov. 20, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

26. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

27. *Matter of Xinyi Wang*, 25 I. & N. Dec. 28 (BIA 2009) (holding that automatic conversion and priority date retention applied to some family-based visa categories but did not apply to individuals who "age out" of eligibility as the derivative beneficiary of a fourth-preference family petition).

28. Kevin Johnson, *Opinion Analysis: Another Stop at the Chevron Station & Deference to the BIA*, SCOTUSBLOG (Jun. 9, 2014, 3:26 PM), *available at* <http://www.scotusblog.com/2014/06/opinion-analysis-another-stop-at-the-chevron-station-and-deference-to-the-bia/>.

29. *Id.*

30. *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012), *reversed by Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

31. Section 203(h) of the Immigration and Nationality Act provides that, "[i]f the age of an alien is determined . . . to be 21 years of age or older . . . , the alien's petition shall automatically be converted to the

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age out of qualification by the time the visa becomes available to the primary beneficiary; and (2) whether the BIA reasonably interpreted the statute.<sup>32</sup>

Justice Kagan, announcing the judgment of the Court and delivering the plurality opinion, reversed the Ninth Circuit decision, finding the statute ambiguous and that the BIA's interpretation was reasonable and consistent with the statute's purpose.<sup>33</sup> The plurality held that most children who are listed as derivative beneficiaries<sup>34</sup> on their parents' family-based immigrant petitions, but who turn twenty-one years old and "age out" while waiting for visas to become available, will not be able to retain their original priority dates and be granted permanent residency along with their parents.<sup>35</sup> Rather, they will need to start the process anew by having their parents file a new immigrant petition once they become lawful permanent residents.<sup>36</sup>

The Supreme Court decision resolves a three-way circuit split over the statutory construction of our nation's complex immigration laws.<sup>37</sup> Additionally, it represents the latest in a long line of Supreme Court cases giving broad discretion to the executive branch in the interpretation and execution of U.S. immigration law.<sup>38</sup> Commenting more broadly

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appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

32. *Cuellar de Osorio*, 134 S. Ct. at 2191.

33. *Id.*

34. A "principal beneficiary" is an individual who has a qualifying relationship with a U.S. citizen or Lawful Permanent Resident ("LPR") petitioner, who files a visa petition on behalf of the principal beneficiary. Derivative beneficiaries, defined as the spouse or minor child of the principal beneficiary, may also be named in the principal beneficiary's visa petition, and are entitled to the same preference status, and the same priority date, as the principal alien. U.S. Dep't of State, Foreign Affairs Manual, 9 FAM § 42.31 n. 2.

35. *Cuellar de Osorio*, 695 F.3d at 2191.

36. *Id.*

37. *Compare Mayorkas*, 695 F.3d at 1003 (holding that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries in all family visa categories), *and Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011), *abrogated by Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (concluding that Congress plainly made automatic conversion and priority date retention available to derivative beneficiaries in all family-based preference categories), *with Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011) (finding the CSPA's "automatic conversion" clause was unambiguous but coming to the same conclusion as the BIA that an earlier family preference priority date could not apply to a later family preference petition made by a different petitioner). The three circuit courts applied a two-part analysis set forth in the influential Supreme Court decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 853 (1984). First, the reviewing court determines whether the statute's language is clear on its face. If Congress has directly answered the question at issue, the analysis ends there. If, on the other hand, the language or congressional intent is ambiguous, a reviewing court proceeds to the second step of analysis and defers to the agency's interpretation, assuming it is reasonable. Charles Wheeler, *Automatic Conversion and Retention of Priority Date for Aged-Out Derivatives: Circuit Courts Only Add to the Confusion*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., available at <http://cliniclegal.org/sites/default/files/Automatic%20Conversion%20and%20Retention%20of%20Priority%20Date%20for%20Aged.pdf> (last visited June 27, 2014).

38. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 628 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."), *citing* *Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016 (1893); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512 (1952); *see also Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other

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on the proper scope of executive power over immigration, Justice Kagan stated that, “judicial deference to the Executive Branch is especially appropriate in the immigration context, where decisions about a complex statutory scheme often implicate foreign relations.”<sup>39</sup>

The Supreme Court decision in *Cuellar de Osorio* is disappointing for many “aged out” derivative beneficiaries who had hoped to retain the priority dates of their earlier petitions. These “aged out” young people sometimes wait decades for a visa to become available only to lose their place in line upon turning twenty-one years old. However, there may still be hope for a remedy to this restrictive rule in the future through legislative or administrative action.

One possibility is that Congress could redraft the CSPA to clarify that all “aged out” derivative beneficiaries are entitled to priority date retention. This was part of the comprehensive immigration reform bill passed by the Senate, which ultimately stalled in the House of Representatives, making it unlikely that comprehensive immigration reform will be passed soon or in its current form.<sup>40</sup> Alternatively, even in the absence of comprehensive reform, Congress could amend the rule through piece-meal legislation.

A final option is that the current rule may be reversed through administrative action. The plurality in *De Osorio* agreed that a narrow reading of INA § 203(h) was not compelled by the statute, but rather that its meaning was ambiguous and, therefore, subject to administrative deference.<sup>41</sup> Therefore, the BIA may change course and reverse its position in *Matter of Wang*.<sup>42</sup> Moreover, since the BIA acts on behalf of the Attorney General, the Attorney General may push back against *Matter of Wang* and adopt a broader interpretation of INA § 203(h).<sup>43</sup>

b. *Kerry v. Din*

More recently, on October 2, 2014, the Supreme Court granted certiorari in a second immigration case involving the struggle between executive and judicial power, *Kerry v. Din*.<sup>44</sup> The Supreme Court’s decision to hear the case represents an opportunity for the Court, for the first time in more than forty years,<sup>45</sup> to rethink the long-standing doctrine

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realities. Agencies in the Department of Homeland Security play a major role in enforcing the country’s immigration laws.”).

39. *Cuellar de Osorio*, 134 S. Ct. at 2203, citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439 (1999) (internal quotes omitted); see also *INS v. Abudu*, 485 U.S. 94, 110, 108 S.Ct. 904 (1988).

40. Austin T. Fragomen, Jr., Careen Shannon, & Daniel Montalvo, *Prospects for Immigration Reform in 2014*, IMMIGR. LEGIS. HANDBOOK § 1:1 (April 2014).

41. See *Cuellar de Osorio*, 134 S.Ct. at 2206 (noting that “we hold only that §1153(h)(3) permits—not that it requires—the Board’s decision to so distinguish among aged out beneficiaries”).

42. Cyrus D. Mehta & David A. Isaacson, *Scialabba v. Cuellar De Osorio: Does The Dark Cloud Have a Silver Lining?*, ILW (June 10, 2014), available at <http://discuss.ilw.com/content.php?3214-Article-Scialabba-V-Cuellar-De-Osorio-Does-The-Dark-Cloud-Have-a-Silver-Lining-By-Cyrus-D-Mehta-and-David-A-Isaacson>, citing *Nat’l Cable & Telecomm. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (finding that where a statute is ambiguous and entitled to *Chevron* deference, the agency may reconsider its interpretation even after the courts have approved of it).

43. See *id.*

44. *Kerry v. Din*, 135 S. Ct. 44 (2014), from *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013), cert. granted, 82 U.S.L.W. 3712 (U.S. Oct. 2, 2014) (No. 13-1402).

45. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); see also Gary Endelman & Cyrus D. Mehta, *Kerry v. Din: An Opportunity for the Supreme Court to Reconsider the Doctrine of Consular Nonreviewability*, Insightful

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of consular non-reviewability, which prevents courts from reviewing decisions of U.S. Department of State consular officers regarding immigration law.<sup>46</sup> Specifically, the Court will review whether a consular official's refusal of a visa to a U.S. citizen's non-citizen spouse impinges upon a constitutionally protected interest of the citizen.

Ms. Din, a U.S. citizen, filed a visa petition on behalf of her husband, Mr. Berashk, an Afghan citizen. His visa was denied under INA section 212(a)(3)(B), the terrorism-related inadmissibility grounds.<sup>47</sup> The Consulate added, "it is not possible to provide a detailed explanation of the reasons for the denial," citing INA section 212(b)(3), which indicates that the requirement under INA section 212(b)(1) that an alien be notified of the reason for a visa denial does not apply to any alien inadmissible under criminal activity or terrorist grounds. Subsequently, the Ninth Circuit held that the government had not offered a facially legitimate and bona fide reason for the visa denial.<sup>48</sup>

The government appealed the Ninth Circuit decision to the Supreme Court, arguing that the court "erred in ruling that Din has a liberty interest in her marriage, protected under the Due Process Clause, that is implicated by denial of a visa to her alien spouse abroad."<sup>49</sup> Ms. Din argues that she is entitled to challenge the refusal of a visa to her husband and that to sustain the refusal, the government must identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.<sup>50</sup>

Oral arguments in *Kerry v. Din* took place in February 2015 and a decision is expected later this year. The pending Supreme Court case is important not only because it allows the Court to weigh in on the controversial doctrine of consular non-reviewability<sup>51</sup> but also because whatever the outcome, the case will almost certainly produce additional discussion regarding the scope of executive authority and judicial review over immigration matters.

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Immigration. Blog: Commentaries on Immigration Policy, Cases & Trends (Oct. 6, 2014), available at <http://blog.cyrusmehta.com/2014/10/kerry-v-din-opportunity-for-supreme.html>.

46. Stephen H. Legomsky, *Fear & Loathing in Congress & the Courts: Immigration & Judicial Review*, 78 Tex. L. Rev. 1615, 1616-17 (2000).

47. In general, any individual who is a member of a "terrorist organization" or who has engaged or engages in terrorism-related activity as defined by INA § 212(a)(3)(B) is "inadmissible" (not allowed to enter) the United States and is ineligible for most immigration benefits. The definition of terrorism-related activity is relatively broad and may apply to individuals and activities not commonly thought to be associated with terrorism. *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CIS (Oct. 1, 2014), available at <http://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-trig>.

48. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013), cert. granted, 135 S. Ct. 44 (2014). The Ninth Circuit cited the Supreme Court in *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), recognizing a limited exception to the doctrine of consular non-reviewability in cases where the visa denial implicates the constitutional rights of an American citizen. In such cases, courts exercise "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason."

49. Petition for Writ of Certiorari, *Kerry v. Din*, 135 S. Ct. 44 (2014) (No. 13-1402).

50. Respondent Brief in Opposition, *Kerry v. Din*, 135 S. Ct. 44 (2014) (No. 13-1402); see also 91 No. 39 Interpreter Releases 1807, 1808.

51. See Brief for Professors & Academics as Amici Curiae Supporting Petitioners, *Cardenas v. U.S.*, No. 13-35957, 2014 WL 1878645 ("The doctrine of consular non-reviewability has never had a cogent justification. To the contrary, Supreme Court case law allows for significant, if not robust, judicial review of consular decisions. Such review—including at least review to ensure that the consular officer follows the governing statutes and regulations, that there is some factual basis for findings made by the consular office, and that fundamentally fair procedures are used—is essential to ensure that the laws passed by Congress are followed.")

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2. *Executive Authority and Judicial Review of Naturalization Denial*

*Cuellar de Osorio* and *Din* bring attention to a third, yet-unresolved legal question involving the conflict between executive authority and judicial oversight—judicial review of naturalization denials. The unsettled legal question concerns the availability and scope of judicial review in cases where U.S.CIS denies an applicant’s naturalization application and then places the applicant in removal proceedings. Under INA § 310(c), if an application for naturalization is denied by the agency, the applicant has the right to de novo review in a district court “after a hearing before an immigration officer.”<sup>52</sup> However, under INA § 318, when removal proceedings are pending against an applicant for naturalization, the agency is prohibited from considering her application.<sup>53</sup> Thus, where the agency denies an applicant’s request for naturalization and then initiates removal proceedings, the agency has relied on INA § 318 to refuse to provide the applicant with an administrative hearing. As no administrative hearing has taken place, the applicant has not “exhausted” her administrative remedies, and many courts have held that the applicant no longer has a statutory right to judicial review of the denial in a district court. In other words, the agency effectively strips *itself* of jurisdiction over the person’s naturalization application and prevents the applicant from obtaining an administrative appeal.<sup>54</sup>

The question of whether the commencement of removal proceedings strips district courts of jurisdiction to review naturalization denials has recently become the subject of a four-way circuit split. Specifically, nine circuit courts have considered the issue and have come to four separate conclusions over whether and how the initiation of removal proceedings affects judicial jurisdiction to review naturalization applications. The Fourth, Fifth, and Eleventh Circuits concluded that the right to judicial review granted by INA § 310(c) is limited by INA § 318 once removal proceedings begin.<sup>55</sup> In contrast, the Tenth Circuit, in an unpublished decision, held that INA § 318 “does not strip district courts of jurisdiction over petitions regarding naturalization applications.”<sup>56</sup> However, the court found that as soon as removal proceedings begin, the judicial proceeding becomes moot and the suit must be dismissed for lack of a case or controversy.<sup>57</sup> The Second, Sixth, and Ninth Circuits held that INA § 318 does not deprive courts of jurisdiction, but does prevent the courts from providing a remedy, so judgment must go for the agency

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52. INA § 310(c) provides that “[a] person whose application for naturalization [ . . . ] is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court [ . . . ] in accordance with [the Administrative Procedure Act.] Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.”

53. INA § 318 provides in relevant part that “no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act.”

54. INA § 318.

55. *Barnes v. Holder*, 625 F.3d 801, 806 (4th Cir. 2010); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 339-40 (5th Cir. 2007); *Huang v. Sec’y U.S. Dep’t of Homeland Sec.*, 468 Fed.Appx 932, 935 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1460 (U.S. 2013).

56. *Awe v. Napolitano*, No. 11-5134, 2012 WL 3553721, at \*4 (10th Cir. Aug. 20, 2012) (unpublished opinion).

57. *Id.*

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on the merits.<sup>58</sup> Most recently, the Third and Seventh Circuits reached a different conclusion. According to these courts, district courts not only retain jurisdiction over the cases before them, but also retain the ability to provide a remedy—a declaratory judgment of entitlement to citizenship.<sup>59</sup>

Despite the existence of a wide circuit split, the Supreme Court thus far has refused to weigh in on the issue and resolve confusion in federal courts over the proper application of INA § 310(c) and INA § 318.<sup>60</sup> Supreme Court review of the issue would clear up confusion between circuits as to the judiciary’s role in naturalization. It also would provide an opportunity for the Court to prevent the agency from using the statutes protective provisions, INA §§ 310(c) and 318, to create “a mechanism for the government to deny immigrants their day in court.”<sup>61</sup>

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58. *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008); *Zayed v. United States*, 368 F.3d 902 (6th Cir. 2004); *Bellajaro v. Schiltgen*, 378 F.3d 1042 (9th Cir. 2004).

59. *Klene v. Napolitano*, 697 F.3d 666, 670 (7th Cir. 2012); *Gonzalez v. Sec’y of Dep’t of Homeland Sec.*, 678 F.3d 254, 259 (3d Cir. 2012).

60. *See Hong Huang v. Napolitano*, 133 S. Ct. 1460 (2013) (denying Petition for Writ of Certiorari).

61. *Petition for Writ of Certiorari, Huang v. Secretary U.S. Dept. of Homeland Sec.*, 2012 WL 5884899 (U.S.), \*10.