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COMMENT

THE MARRIAGE MYTH: WHY MIXED-STATUS MARRIAGES NEED AN IMMIGRATION REMEDY

INTRODUCTION

A common myth about immigration law is that marriage to a United States citizen will correct an immigrant's unauthorized status.¹ In reality, U.S. citizens have limited options to correct their spouses' status.² This myth often causes mixed-status families to feel confused and frustrated about their future in the United States.³ Jane and Eric illustrate this widespread predicament.⁴ Jane, a U.S. citizen by birth, fell in love with Eric, an unauthorized immigrant. Eric grew up in the United States, but is a citizen of El Salvador. When Eric was a child, his mother brought

¹ An "immigrant" is as a person who wishes to obtain residency in the United States, or a person a person who does not have residency but resides in and intends to remain in the United States. See Immigration and Nationality Act ("INA") § 101(a)(15), 8 U.S.C.A. § 1101(a)(15) (Westlaw 2008).

² Unauthorized status describes two types of immigrants: those who entered the U.S. legally but overstayed their visa and those who entered the U.S. illegally. Immigrants who entered without exception (EWI), or illegal immigrants, are the focus of this article. The terms illegal and unlawful do not correctly describe immigrants who are married to U.S. citizens, because such immigrants have a basis to become legal. Due to the three or ten year bar, discussed *infra* Part II.B, many "illegal" immigrants choose not to leave the country to correct their status. Therefore, the term unauthorized will be used to describe EWI immigrants.

³ The term "mixed-status" family is used to describe a family in which one spouse is a citizen and the other spouse is a non-citizen. Mixed-status families may also have citizen and non-citizen children. However, the term is used throughout this article to refer to the spouses' status.

⁴ The names in this story are fictitious; the story is true.

him into the United States without immigration documents. Therefore, Eric does not have lawful immigration status.

After getting married, Jane and Eric visited an immigration attorney to get help applying for Eric's green card.⁵ The attorney responded that because Eric did not enter the country lawfully they have three options: Eric can remain in unlawful status and risk deportation, Eric and Jane can leave the United States together for ten years, or they can separate for ten years while Eric remains outside of the country. The attorney said that for several years there was a remedy called section 245(i), after section 245(i) of the Immigration and Nationality Act.⁶ The 245(i) remedy permitted immigrants like Eric to pay a \$1,000 penalty and apply for permanent residence status from within the country, but it expired in April of 2001.⁷ Without such a remedy, Eric has to leave the United States to obtain permanent residence status. Because Eric lived in the United States without lawful status for more than one year, he will be forced to stay outside of the country for ten years before he can be granted any lawful immigration status.⁸

Jane asked if they could do anything to avoid Eric being outside the United States for ten years. The attorney told them about an extreme hardship waiver, but Eric would still have to leave the country to get this waiver. He said that the waiver's requirements can be difficult to meet and it is infrequently granted. Jane told the attorney that she is four months pregnant. The attorney said that Jane's pregnancy alone may not be enough to satisfy the requirements of extreme hardship. They will have to weigh the risk of leaving the country to correct Eric's status and remaining in the United States in unauthorized status.⁹

⁵ A green card is a common term used for legal permanent residence status. See 8 U.S.C.A. § 1255 (Westlaw 2008).

⁶ INA § 245(i), 8 U.S.C.A. § 1255(i) (Westlaw 2008). See *infra* Part I explaining the historical development of the 245(i) remedy.

⁷ From 1994 until 2001, INA section 245(i) provided a remedy for couples like Jane and Eric. INA § 245(i), 8 U.S.C.A. § 1255(i) (Westlaw 2008). The adjustment of status section of the INA of 1952 is section 245. INA § 245, 8 U.S.C.A. § 1255 (Westlaw 2008). The 245(i) remedy refers to the subsection of the adjustment of status section. See INA § 245(i), 8 U.S.C.A. § 1255 (2007). The final extension of the 245(i) remedy contains a grandfather clause. This means that if Eric or his parents had an immigrant petition filed for them before April 2001, Eric could apply for adjustment of status. See *infra* Section I explaining the historical development of the 245(i) remedy.

⁸ The three or ten year bar to reentry was enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 301, 110 Stat. 3009-546 (1996), which was codified at 8 U.S.C.A. § 1182(a)(9)(B) (Westlaw 2008). See *infra* Section I.B. explaining the three- and ten-year bars to immigration benefits.

⁹ Jane and Eric's story is one of many. See Daniel González, *U.S. Immigration Law Drives Husband, Wife Apart, U.S. Man's Mexican Wife Forced to Leave Country*, ARIZONA REPUBLIC, Feb. 17, 2008, <http://www.azcentral.com/arizonarepublic/news/articles/0217illegalbride0217.html>; see also Wendy Koch, "Mixed Status" Tears Apart Families, USA TODAY, Apr. 25, 2006, at A3,

Eric and Jane's story demonstrates how current immigration law burdens mixed-status marriages and promotes separation of the spouses in these marriages. Citizens are unable to correct their spouses' unauthorized status from within the United States.¹⁰ If the unauthorized spouse leaves the country to correct his or her status, that spouse will be barred from reentering the country for three or ten years.¹¹ This law causes U.S. citizens to live in fear that their spouses will be deported or that they will have to separate their families in order to correct their spouses' status.

In addition, this law has a negative economic impact for society as well as for mixed-status families. If U.S. citizens were permitted to correct their spouses' unlawful immigration status, economic benefits would be derived from greater workforce participation and higher tax revenue. If mixed-status spouses are allowed to remain intact, society would also gain economic benefits from reduced or shared child care costs and greater household incomes.

Immigration issues arouse a diversity of concerns including those of national security and fraud. However, not permitting U.S. citizens to correct their spouses' unauthorized status promotes separation and has a negative economic impact. This law begs for a solution. Such a solution exists in the repealed section 245(i) remedy. If 245(i) were reinstated only for spouses of U.S. citizens, mixed-status families would gain legal status in return for a \$1,000 penalty and undocumented spouses' disclose their personal, criminal, and biographical data. The 245(i) remedy could be reinstated in a way which addresses national security and immigration fraud concerns. In addition, reinstating section 245(i) would generate about \$200 million in revenue over a one-year period.¹²

Part I of this Comment reviews the history of adjustment of status, the expired 245(i) remedy, the three or ten year bar, and the extreme hardship waiver. Part II illustrates how current immigration law runs counter to United States pro-marriage policy, promotes separation of spouses in mixed-status marriages, and has a negative economic impact. Part III recommends reinstating a narrow version of the 245(i) remedy

available at http://www.usatoday.com/news/nation/2006-04-25-mixed-status_x.htm; Cindy Gonzalez, *A Family Broken at the Border*, OMAHA WORLD HERALD, Dec. 17, 2007, http://www.omaha.com/index.php?u_page=2798&u_sid=10211326.

¹⁰ Department of Homeland Security Waiver of Certain Grounds of Inadmissibility Regulation, 8 C.F.R. § 212.7 (2008).

¹¹ 8 U.S.C.A. § 1182(a)(9)(B) (Westlaw 2008).

¹² See *supra* Section II.B for the economic impacts of current immigration law as it applies to mixed-status families. See also *supra* Section III.C demonstrating that the Government would generate about \$200 million from reinstating the 245(i) remedy *only* for U.S. citizens' unauthorized spouses.

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only for U.S. citizens' unauthorized spouses and creating a marriage fraud enforcement division. Finally, Part IV concludes that creating a remedy for U.S. citizens would avoid the harmful impacts of the current law while generating about \$200 million of dollars in revenue.

I. DEVELOPMENT OF IMMIGRATION POLICY TO PROMOTE FAMILY UNITY: ADJUSTMENT OF STATUS AND SECTION 245(I)

For many years, immigration law was focused on family unification.¹³ The 1952 Immigration and Nationality Act ("INA") created the process for adjustment of status to lawful permanent residence, which was established to promote family unity.¹⁴ The adjustment of status process ("adjustment") eliminated the requirement that immigrants travel abroad and re-enter the country to gain permanent residence status.¹⁵ As originally passed, the INA of 1952 required an immigrant to prove: (1) that the immigrant legally entered the United States, (2) that he or she maintained lawful status and, (3) that an

¹³ Historically, Congressional concern was directed at "the problem of keeping families of United States citizens and immigrants united." See H.R. Rep. 85-1199, at 7 (1957); *reprinted at* 1957 U.S.C.C.A.N. 2016, 2020; H.R. Rep. 82-1365, at 29 (1952) *reprinted at* 1952 U.S.C.C.A.N. 1653, 1680 (statute implements "the underlying intention of our immigration laws regarding the preservation of the family unit"). The Supreme Court has also recognized the long history of Congressional intent to unite family members of U.S. citizens as "Congress has accorded a special 'preference status' to certain aliens who share relationships with citizens . . ." *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977). Family unification remains a major principle of United States policy for legal permanent immigration. See RUTH WASEM, CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS, (updated ed. May 12, 2006) <http://fpc.state.gov/documents/organization/66512.pdf>.

¹⁴ Lawful permanent residence is commonly referred to as a green card. The adjustment of status process, codified in 8 U.S.C.A. § 1255 (1952), was intended to promote family unity. See Emma O. Guzman, *The Dynamics of Illegal Immigration Reform and Immigrant Responsibility Act of 1996: the Splitting-Up of American Families*, 2 SCHOLAR 95, 103, 109 (2000) (stating that the Immigration and Nationality Act of 1952 was intended to reunite families); Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 354 (2005) (explaining that since the enactment of the INA of 1952, unifying families was a major goal of American immigration laws); Beth Stickney, *Whither Family Unity? A Post-IIRIA Update*, in *Immigration Briefings*, at 1 n.1 (Dec. 1998) (citing Conf. Rep. 82-2096 (1952), *reprinted at* 1952 U.S.C.C.A.N. 1753). For an overview of the historic developments of the adjustment of status procedure see Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 42-44 (1989); Tamara K. Fogg, *Adjustment of Status Under Section 245 of the Immigration and Nationality Act*, 20 SAN DIEGO L. REV. 165, 169-174 (1982).

¹⁵ Prior to the enactment of the adjustment of status procedure, an immigrant was required to leave the country to apply for permanent residence status. Tamara K. Fogg, 20 SAN DIEGO L. REV. at 169 n.17 (citing SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 140 (1968)).

immigrant visa was immediately available.¹⁶ Congress again emphasized the importance of family unification when it created a preference system for family-based immigration, which allowed spouses of U.S. citizens to immigrate more quickly than other relatives.¹⁷ In 1958, Congress removed the requirement that an immigrant maintain lawful status to be eligible for adjustment.¹⁸ This made adjustment available to immigrants who entered the United States legally, even if the original terms of the visa were later violated. However, adjustment is not available to immigrants who entered the United States illegally, regardless of whether the immigrant is married to a U.S. citizen.¹⁹

A. CREATION OF THE 245(I) REMEDY

In 1994, Congress recognized the need for unauthorized immigrants to remain in the United States during the permanent resident application process; accordingly, Congress created a remedy in section 245(i).²⁰ The

¹⁶ 8 U.S.C.A. 1101(a)(16) (Westlaw 2008); *see also* Fogg, 20 SAN DIEGO L. REV. at 170-173 (explaining the original language of the INA of 1956, and explaining that in 1976, Congress changed section 245 to require that a visa be *available* at the time the application was filed, rather than requiring visa availability both when filed and when approved).

¹⁷ There are two major immigration categories family-based and employment-based. *See* Guzman, 2 SCHOLAR at 112; Tucker, 7 YALE L. & POL'Y REV. at 23.

¹⁸ Fogg, 20 SAN DIEGO L. REV. at 171 (citing Pub. L. No. 85-700, 72 Stat. 699(1958)); INA § 245, 8 U.S.C.A. § 1255 (Westlaw 2008). In 1958, 3,991 immigrants applied for adjustment of status. *Id.* at 171-172 (citing SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS at 152). In the year after the amendment, 9,796 immigrants applied for adjustment. *Id.*

¹⁹ An inadmissible immigrant, or alien, is defined as "an alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General." 8 U.S.C.A. § 1182 (a)(6)(A)(i) (Westlaw 2008). An immigrant who entered the United States without proper documentation is deemed inadmissible and cannot apply for adjustment of status, even if the immigrant otherwise qualifies for permanent residence status based on marriage to a U.S. citizen. 8 C.F.R. § 245.1 states the categories of aliens who are ineligible for legal permanent resident status:

- (1) Any alien who entered the United States in transit without a visa;
- (2) Any alien who, on arrival in the United States, was serving in any capacity on board a vessel or aircraft or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon;
- (3) Any alien who was not admitted or paroled following inspection by an immigration officer.

8 C.F.R. § 245.1(b) (2007) (emphasis added).

²⁰ The 245(i) remedy refers to the INA subsection of section 245 for adjustment of status. INA § 245(i), 8 U.S.C.A. § 1255(i) (2007). The 245(i) remedy was enacted in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1765-1766 (1994), which amended 8 U.S.C.A. § 1255 by adding the following subsection:

- (i)(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien

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remedy allowed unauthorized immigrants to pay a \$650 penalty in lieu of traveling abroad to a U.S. consulate to obtain an immigrant visa.²¹ Under section 245(i), all unauthorized immigrants who were physically present in the United States and eligible for an immigrant visa could file for adjustment of status to obtain permanent residence.²² This remedy was

physically present in the United States who

(A) entered the United States without inspection; or
 (B) is within one of the classes enumerated in subsection (c) of this section, may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling five times the fee required for the processing of applications under this section as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

See also Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y. REV. 349, 363 (2005); *see also* ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i) 3 (updated ed. Apr. 18, 2002), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-3165>.

²¹ The Appropriations Act of 1995, Pub. L. No. 103-317 (HR 4603), 108 Stat 1724, 1765-1766 (amending 8 U.S.C.A. § 1255); *see also* BRUNO, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i) at 3, 5 (explaining the penalty for the original enactment of the 245(i) remedy).

²² Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-317, 108 Stat 1724, 1765-1766 (amending 8 U.S.C. § 1255). Reasons for ineligibility for the 245(i) remedy included health concerns, criminal history or the possibility that the immigrant would become a public charge. INA § 212 (2007), 8 U.S.C.A. 1182 (Westlaw 2008). *See also* LARRY M. EIG & WILLIAM J. KROUSE, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(i) 2 (updated ed. Feb. 4, 1998), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-719> (explaining a historical overview of the 245(i) remedy and stating which immigrants were ineligible

available to the spouses, children, and parents of U.S. citizens or legal permanent residents as well as immigrants who qualified for employment-based permanent residence status.²³

A report from the Senate Appropriations Committee explained the reasoning behind INA section 245(i):

According to both the Department of State and the Immigration and Nationality Act, about 30 percent of persons who receive immigrant visas at consular posts overseas have been living in the United States prior to being issued an immigrant visa. . . . Although the current process was originally designed to dissuade aliens from circumventing normal visa requirements, it has not provided the intended deterrent effect and merely creates consular workload overseas.²⁴

The 245(i) remedy was intended to lighten the workload at the consular offices.²⁵ Indeed, the workload of the consulates was reduced by twenty-five percent and the U.S. Department of State saved approximately five million dollars in administrative costs from December 1994 through November 1996.²⁶ In addition, the remedy was intended to generate revenue for the government rather than the airlines that transported immigrants from the United States to their consulate interviews.²⁷ Denying adjustment to unauthorized immigrants, as it turned out, had never effectively persuaded immigrants to wait outside the United States during the permanent residence process in the first place.²⁸

The 245(i) remedy generated substantial funds for the Immigration and Naturalization Service ("INS"), the predecessor of the United States Citizenship and Immigration Service ("USCIS").²⁹ From October 1994

for the 245(i) remedy for adjustment of status).

²³ INA § 245(i), 8 U.S.C.A. § 1255(i) (2007).

²⁴ S. Rep. No. 103-309, at 134 (1994); *see also* EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 3 (detailing a historical overview of the 245(i) remedy).

²⁵ *Id.*

²⁶ EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 3 (reviewing the consulates' workload from Dec. 1994 to Nov. 1996).

²⁷ Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y. REV. 349, 363 (2005).

²⁸ EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 3 (stating that 3 million unauthorized immigrants maintained U.S. residency while waiting for their consular interviews for permanent residence status).

²⁹ U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO/GGD-95-162FS, INS INFORMATION ON ALIENS APPLYING FOR PERMANENT RESIDENT STATUS 2 (1995), <http://archive.gao.gov/t2pbat1/154380.pdf> (reporting data on how many people applied for adjustment of status under the 245(i) remedy and how much revenue was generated for the INS).

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to February 1995, the INS received approximately 15,900 applications for section 245(i) adjustments each month, representing forty-five percent of all applications for permanent residence status.³⁰ During the same period, fees paid with applications under section 245(i) accounted for eighty percent of INS revenue, totaling over forty-nine million dollars.³¹ Although the remedy permitted employment based adjustment and adjustment for spouses of legal permanent residents, seventy-five percent of immigrants who applied for relief under section 245(i) were spouses and children of U.S. citizens.³² The INS used the proceeds from 245(i) applications to expedite immigration petition processing, increase border safety, and improve detention facilities.³³ Although the 245(i) remedy benefited mixed-status families and was a major source of revenue, the remedy was scheduled to expire on September 30, 1997.³⁴

B. ENACTMENT OF THE THREE OR TEN YEAR BAR TO IMMIGRATION BENEFITS: HOW THE 245(I) REMEDY GREW IN SIGNIFICANCE

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress shifted the focus of immigration law from family unification to preventing and penalizing illegal immigration.³⁵ With the enactment of IIRIRA, Congress created what are known as the three and ten year bars, which have become major barriers to family unification.³⁶ Under IIRIRA, immigrants are barred

³⁰ *Id.*

³¹ H.R. Rep. 107-139, at 33 (2001).

³² 148 CONG. REC. H797-02, H810 (2001) (statement from Rep. Tom Davis reporting INS records).

³³ 8 U.S.C.A. § 1255(i)(3) (Westlaw 2008) (requiring funds collected from the 245(i) remedy be delegated to adjudication of immigration applications); *see also* EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 5 (stating that additional fees collected under the Immigration Reform and Immigrant Responsibility Act ("IIRIRA") amendments were to be deposited in a new Immigration Detention Account).

³⁴ The 103rd Senate proposed an amendment to the appropriations bill that contained a permanent change in the law to allow unauthorized immigrants to apply for adjustment of status. On July 22, 1994, the Senate passed the appropriations bill, with the amendment, by a voice vote; however, the House appropriations bill contained no such provision. At conference, the change was added to the appropriations bill with an expiration provision for the end of fiscal year 1997. 103 CONG. REC. HR 4603 § 506 Amendment No. 131, at H84991 (filed Aug. 16, 1994); *see also* H.R. Rep. 105-845, at 191 (1999) (stating the sunset provision of the 245(i) remedy).

³⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 301, 110 Stat. 3009-546 (1996). The three- and ten- year bars were intended to deter immigrants from remaining in the United States for more than 180 days without authorization. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y. REV. 349, 361 (2005); EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 4.

³⁶ *See* Emma O. Guzman, *The Dynamics of Illegal Immigration Reform and Immigrant*

from the United States for three years if they are present in the country unlawfully for more than 180 days or for ten years if they are here illegally for more than one year.³⁷ Although IIRIRA did not repeal the 245(i) remedy, it increased the 245(i) penalty from \$650 to \$1,000.³⁸ As the expiration date for section 245(i) approached, IIRIRA gave the remedy greater significance.³⁹ Without the 245(i) remedy, unauthorized spouses would have to travel abroad to obtain permanent residence status, and IIRIRA prohibited them from returning to the United States for three or ten years.⁴⁰ Thus, U.S. citizens had to remain outside the country or divide their families.

C. EXTENSIONS OF THE 245(I) REMEDY

After IIRIRA was enacted, the 245(i) remedy continued to facilitate familial unification and remained a solution available to spouses of U.S. citizens.⁴¹ Despite the continued use of the remedy and the continued generation of funds for the INS, the House and Senate were divided over whether to renew it.⁴² The House did not include an extension of section 245(i) in the 1998 Commerce, Justice, State, Judiciary, and Related Agencies ("Commerce, et al.") Appropriations Act.⁴³ Conversely, the

Responsibility Act of 1996: the Splitting-Up of American Families, 2 SCHOLAR 95, 120-24 (2000); Lofgren, 16 STAN. L. & POL'Y. REV. at 361. Both articles explain the major hurdles that IIRIRA created for family-based immigration.

³⁷ The term "unlawful presence" is used to describe the time an immigrant spends in the United States without lawful status. After more than 180 days of unlawful presence the three year bar is triggered when the immigrant leaves the United States, and the ten year bar is applied if the immigrant leaves the country after one year of unlawful presence. 8 U.S.C.A. § 1182(a)(9). See Ira J. Kurzban, IMMIGRATION LAW SOURCEBOOK 67-72 (10th ed. 2006) (explaining the grounds for inadmissibility as well as the unlawful presence bars).

³⁸ ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i) 5 (updated ed. Apr. 18, 2002) (citing H.R. 2202 and S. 1664) (stating that the fee increase was a compromise between the House and the Senate, as the House passed by voice vote an amendment that would have eliminated the 245(i) remedy).

³⁹ Lofgren, 16 STAN. L. & POL'Y. REV. at 363; EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(i) at 4.

⁴⁰ Lofgren, 16 STAN. L. & POL'Y. REV. at 361 n.13.

⁴¹ In 1996, the INS received about 80,972 adjustment applications under the 245(i) remedy from spouses of U.S. citizens, about 35.2 of the total number of 245(i) applications for that year. EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(i) at 4 (citing the INS Statistics Branch).

⁴² H.R. Rep. 105-845, at 192 (1999).

⁴³ The House passed an appropriations act that did not include an extension of the 245(i) remedy and allowed the remedy to expire. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, H.R. 2267 (1997); see also H.R. Rep. 105-845, at 192 (1999) (noting a timeline for the history of the 245(i) remedy extensions).

Senate unanimously passed a Commerce, et al. Appropriations Bill that included a provision to make the section permanent.⁴⁴ During this time, President William Clinton worked to make the solution permanent, and he signed two Continuing Resolutions that extended the remedy until November 7, 1997.⁴⁵ On November 13, 1997, the House and Senate agreed to renew section 245(i) until January 14, 1998.⁴⁶ When President Clinton signed the 1998 Commerce, et al, Appropriations Act, he acknowledged that the extension of section 245(i) would “help ensure that families remain together and businesses are not disrupted while persons already in the United States go through the immigration process.”⁴⁷ After January 14, 1998, section 245(i) expired and its remedy became unavailable for two years.

In 2000, Congress passed the Legal Immigration Family Equity Act (“LIFE Act”) which included a provision for 245(i) applications to be filed until April 30, 2001.⁴⁸ The Act eased immigration restrictions on an estimated 700,000 families.⁴⁹ In the early months of 2001, President George W. Bush pressured Congress to at least extend section 245(i).⁵⁰ On May 21, 2001, the House passed a bill to reinstate the remedy for 120 days.⁵¹ On July 20, 2001, the Senate Appropriations Committee included a permanent reinstatement of the remedy in the 2002 Appropriations

⁴⁴ On July 29, 1997, the Senate voted 99-0 to permanently extend section 245(i). Despite claims that the 245(i) remedy was susceptible to abuse, the Senate recognized that the remedy was “helpful to legitimate users of the program.” S. Rep. No. 105-48, at 32 (1997); *see also* H.R. Rep. 105-845, at 192 (1999); S. 1022, 105th Cong. § 113 (1997).

⁴⁵ Statement of President William J. Clinton Upon Signing H.R. 2267, 33 WEEKLY COMP. PRES. DOC. 1926 (Dec. 1, 1997), *reprinted at* 1998 U.S.C.C.A.N. 7; *see also* “Pub. L. No. 105-119, 111 Stat. 2440 (1997). President Clinton signed the first continuing resolution on October 1, 1997, and the second resolution was signed on October 23, 1997. H.R. Rep. 105-845, at 192 (1999).

⁴⁶ H.R. Rep. 105-845, at 192 (1999). The House approved the Conference Report on H.R. 227 by a vote of 282 to 110 and the Senate approved it unanimously. *Id.*

⁴⁷ *Id.*

⁴⁸ Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y. REV. 349, 363 n.75 (2005) (citing Pub. L. No. 106-554, tit. XV, § 1502, 114 Stat. 2763 (2000)). *See also* H.R. Conf. Rep. No. 106-1033 (2000).

⁴⁹ Statement of President William J. Clinton Upon Signing H.R. 4577, 36 WEEKLY COMP. PRES. DOC. 3167 (Dec. 21, 2000), *reprinted at* 2000 U.S.C.C.A.N. 2705 (stating that the extension relieved immigration restrictions for an estimated 700,000 families in the U.S.); *see also* H.R. Conf. Rep. No. 106-1033, at 570 (2000) (Conf. Rep.).

⁵⁰ *See* Statement of President George W. Bush Upon Signing H.R. 3525, 38 WEEKLY COMP. PRES. DOC. 820 (May 14, 2002), *reprinted at* 2002 U.S.C.C.A.N. 414; 148 CONG. REC. H797-02, H802-H810 (2002); *see also* RUTH WASEM, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION LEGALIZATION AND STATUS ADJUSTMENT LEGISLATION 1 (updated ed. Mar. 11, 2002), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-3162>.

⁵¹ RUTH WASEM, IMMIGRATION LEGALIZATION AND STATUS ADJUSTMENT LEGISLATION at 8 (stating that H.R. 1885 permitted 245(i) applicants who were physically present by December 21, 2000, when the LIFE Act was signed, to file for the remedy).

Act.⁵² However, on September 6, 2001, the Senate passed a slightly different version of the appropriation bill which included only a temporary reinstatement.⁵³ After the terrorist attacks on the World Trade Center and the Pentagon, the discrepancies between the House and Senate provisions reinstating the remedy were never resolved.⁵⁴

D. 245(I) AFTER THE SEPTEMBER 11TH TERRORIST ATTACKS

After the terrorist attacks of September 11, 2001, the debate over whether to extend the 245(i) remedy drastically changed. Prior to the 9-11 terrorist attacks, opponents of 245(i) called it an improper amnesty, while proponents called it a solution for family unification.⁵⁵ The debate over 245(i) changed from one focused on family unification versus amnesty to one that centered on whether the remedy compromised safety and security.⁵⁶ This shift was demonstrated during the House and Senate debates on the Enhanced Border Security and Visa Entry Reform Act of 2002.⁵⁷ The opposition to renewing 245(i) argued that it would compromise U.S. security by allowing potential terrorists to gain permanent residence, rewarding lawbreakers, and encouraging illegal immigration.⁵⁸ The opposition also stressed that U.S. consulates were better equipped than the INS to screen visa applications for potential threats to the United States' safety and security.⁵⁹ Congressman James Sensenbrenner stated that consular officers who are responsible for

⁵² *Id.* at 9; see Sen. Rep. 107-042, at 166 (2001); S. 1215, §110, 107th Cong. (2001) (as reported by Senate Committee on Appropriations).

⁵³ RUTH WASEM, IMMIGRATION LEGALIZATION AND STATUS ADJUSTMENT LEGISLATION at 9 (explaining that H.R. 1885 as passed by the Senate required the applicant be eligible for the 245(i) remedy by Aug. 15, 2001 and extended the remedy until Apr. 30, 2002, or 120 days after the regulation for the extension was promulgated).

⁵⁴ *Id.* at 9 (stating that efforts to extend section 245(i) failed on December 20, 2001).

⁵⁵ 148 CONG. REC. S1987-01, S1998 (2002) (Senator Byrd stating "Section 245(i) is an amnesty pure and simple If waiving tougher penalties for illegal aliens is not a form of amnesty, then I don't know what is."). Opposition to the Section 245(i) Provision and Amnesty for Illegal Aliens, 148 CONG. REC. S1987-01, S1988 (2002) (where Senator Byrd stated that 245(i) posed a threat to the security of the U.S.); 148 CONG. REC. H802-H810 (2002).

⁵⁶ *Id.*; see also Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y. REV. 349, 370-72 (2005).

⁵⁷ The debate concerned an amendment to the Border Security Act, which addressed a delay by the INS in issuing regulations for adjustment under the LIFE Act extension of the 245(i) remedy by extending the remedy until November 30, 2002. 148 CONG. REC. H797-02 (2002); 148 CONG. REC. S2916-01 (2002); 148 CONG. REC. H797-02, H802-H810 (an extension of 245(i) was the only amendment added to the act).

⁵⁸ 148 CONG. REC. H797-02, H802-H810 (statements by Reps. Dana Rohrabacher, Tom Tancredo, F. James Sensenbrenner Jr., John David Hayworth, Robert Filner).

⁵⁹ *Id.* (statements by Reps. Sensenbrenner and Rohrabacher).

“adjudicating visa petitions receive specialized training and [sic] effective screening of visa applicants who pose a potential threat to the safety and security to United States.”⁶⁰

Conversely, proponents focused on the unification of families and the burden on consulate offices.⁶¹ Congressman Dave Weldon stated that “not a single one of the September 11th attackers was eligible for adjustment under 245(i), but some were issued valid documents by our overworked U.S. consulates overseas.”⁶² Additionally, supporters argued that 245(i) applicants were screened for criminal offenses, health issues, public charge potential, fraud, misrepresentation, and other grounds for inadmissibility.⁶³ Proponents also argued that 245(i) allowed spouses of U.S. citizens to stay together in the United States, to reunite their families, and to fully participate in their adopted country.⁶⁴ Emphasizing the need for the 245(i) remedy to ensure family unification Senator Thomas Daschle, stated:

Many of these immigrants are married to Americans, and have children who were born in this country. Without Section 245(i), many of them face the impossible choice of leaving their families for up to 10 years, taking their families back with them to a country they may have fled to escape poverty or terror, or breaking the law, thus forgoing the chance to ever become a lawful permanent resident.⁶⁵

In the end, efforts to extend section 245(i) failed.⁶⁶ Without the 245(i) remedy, an unauthorized immigrant has limited options for correcting his or her status, even if the immigrant is married to a U.S. citizen.

E. EXTREME HARDSHIP WAIVER

After the expiration of the 245(i) remedy, the extreme hardship waiver became the only option for U.S. citizens to correct their spouses’

⁶⁰ *Id.* at H803. (statement by Rep. Sensenbrenner).

⁶¹ 148 CONG. REC. H797-02 (2002); 148 CONG. REC. S2916-01 (2002).

⁶² *Id.* at H807-H808 (statement by Rep. Weldon).

⁶³ *Id.* at H810 (statements by Reps. Bereuter and Tom Davis).

⁶⁴ *Id.* at H808-H810 (statements by Reps. Nadler and Jackson-Lee).

⁶⁵ 148 CONG. REC. S2916-01, S2929. Senator Thomas Daschle is a Democrat who represented South Dakota in the U.S. Senate and served as the Senate Majority Leader.

⁶⁶ RUTH WASEM, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION LEGALIZATION AND STATUS ADJUSTMENT LEGISLATION 9 (updated ed. Mar. 11, 2002) (stating that efforts to extend section 245(i) failed on Dec. 20, 2001), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-3162>.

unauthorized status.⁶⁷ This waiver requires an immigrant to prove that a denial would cause an extreme hardship, rather than a normal hardship, to the immigrant's citizen or lawful permanent resident spouse, parent, or child.⁶⁸ This waiver is risky for immigrants, because the decision to grant or deny the waiver is discretionary and the statute provides no clear articulation of what proof is required.⁶⁹ Furthermore, no court has jurisdiction to review an extreme hardship waiver decision.⁷⁰ This waiver is even more dangerous for unauthorized immigrants, since they entered the country without inspection and are ineligible for adjustment of status and they must file this waiver abroad at a U.S. consulate.⁷¹ If the waiver is denied, the decision cannot be appealed and the unauthorized immigrant will be subject to the three- or ten-year bar to reentry.⁷² Given these dangers the extreme hardship waiver is not a

⁶⁷ Unlawful presence may be waived by the Attorney General:

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

8 U.S.C.A. § 1182(a)(9)(B)(v) (2007) (emphasis added).

If the immigrant is put into removal proceedings, cancellation of removal is also available. *See supra* Part III.A.2. Depending on certain other factors such as employment, background, or education, an immigrant may be eligible for a national interest waiver. INA § 212(d)(1), 8 U.S.C.A. § 1182(d)(1) (Westlaw 2008). Alternative waivers are based on other factors independent of marriage to a U.S. citizen and are therefore outside the scope of this Comment.

⁶⁸ 8 U.S.C.A. § 1182(a)(9)(B)(v) (2007); *see also* Laurel Scott & Elizabeth Cannon, I-601 Waivers and Extreme Hardship: Strategies for Writing and Convincing Narrative for an Application for Waivers of Grounds of Inadmissibility 2 (rev. June 29, 2007) (outlining waivers of grounds of inadmissibility and ranking different factors for demonstrating extreme hardship), <http://www.visacentral.net/I601Memo.pdf>.

⁶⁹ INA § 212 (a)(9)(B)(v) (2007), 8 U.S.C.A. § 1182(a)(9)(B)(v) (Westlaw 2008).

⁷⁰ *Id.* A denial of a waiver of grounds of admissibility is filed with the Administrative Appeals Office ("AAO") and must be filed within thirty days of the denial. After the appeal is filed with the AAO, the USCIS no longer has jurisdiction over the waiver. An appeal to the AAO is a lengthy process that can take eighteen months or longer. Furthermore, a denial by the AAO may not be appealed, and no court has jurisdiction to review an AAO decision. *See e.g.* Scott & Cannon, *I-601 Waivers*, at 12 (describing the extreme hardship waiver appeal process). *See also* Kurzban, SOURCEBOOK, at 86-97 (outlining waivers for inadmissibility and the appeals of waiver denials).

⁷¹ Extreme hardship waivers may be filed with the U.S. Consulate, USCIS District Office, or an Immigration Judge 8 C.F.R. § 212.7 (2007). An applicant must file form I-601 to apply for waiver under section 212. Such waivers are commonly called I-601 waivers. All I-601 waivers are adjudicated by USCIS officers, even though the waiver is filed at a consulate. *See e.g.* Scott & Cannon, *I-601 Waivers*, at 8; Emma O. Guzman, *The Dynamics of Illegal Immigration Reform and Immigrant Responsibility Act of 1996: the Splitting-Up of American Families*, 2 SCHOLAR 95, 119 (2000).

⁷² 8 U.S.C.A. § 1182(a); INA § 212(a) (Westlaw 2008). *See* Guzman, 2 SCHOLAR at 119. *See also* Section II.B above explaining the three- and ten-year bars to immigration benefits.

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viable remedy for many mixed-status families. To correct their spouses' unauthorized status, U.S. citizens face the difficult choice between leaving the United States or separating their families.

II. CURRENT IMMIGRATION LAW IS COUNTER TO PRO-FAMILY POLICY AND IS HARMFUL TO THE UNITED STATES ECONOMY

Present immigration law allows for eligible lawful immigrants to use the adjustment of status procedure to gain lawful permanent residence ("LPR") status without having to leave the country.⁷³ Adjustment is not available for mixed-status families like Eric and Jane, where one spouse is a citizen and the other is an unlawful immigrant. Instead, an unauthorized spouse must travel abroad to obtain an immigrant visa from a consulate and then reenter the United States with that visa to obtain LPR status.⁷⁴ An unauthorized spouse who leaves the country is prohibited from reentering the United States for three or ten years, unless he or she is granted an extreme hardship waiver.⁷⁵ This promotes separation of U.S. citizens from their unauthorized immigrant spouses and inflicts a high penalty on U.S. citizens. Moreover, the potential economic costs of this law outweigh the potential benefits. By amending current immigration law to allow citizens' unauthorized spouses to obtain LPR status, Congress can promote family unity while generating over \$200 million of dollars in revenue annually.⁷⁶

A. IMMIGRATION LAW PROMOTES SEPARATION OF MARRIAGE BETWEEN CITIZENS AND UNAUTHORIZED IMMIGRANTS AND INFLECTS A HIGH PENALTY ON CITIZENS

Although immigration law does not control the right to marry based on lawful or unlawful status, it forces U.S. citizens who are married to

⁷³ 8 U.S.C.A. § 1255(a) (Westlaw 2008). "Eligible lawful" immigrants who may adjust their status to permanent residence status are defined in 8 U.S.C.A. § 1255 (Westlaw 2008). See *supra* Section I for a description of adjustment requirements.

⁷⁴ 8 U.S.C.A. § 1255(a) (2007).

⁷⁵ 8 U.S.C.A. § 1182(a) (2007); see 8 U.S.C.A. § 1182(a)(9)(B)(v) (2007); see also *supra* Section I.B, explaining the three- and ten-year bars to immigration benefits, and *supra* Part I.E, discussing the extreme hardship waiver.

⁷⁶ By amending immigration law to allow U.S. citizens' unauthorized spouses to gain lawful permanent residence status, revenue will be generated from immigration applications and penalties. See also *infra* Part III.C for an estimation of the funds that could be generated from a change in this law. Revenue will also be generated from taxes paid by such immigrants. As demonstrated below, many mixed-status families live below the poverty line. Granting unauthorized spouses valid working status would allow them to gain higher-paying jobs, better support their families, and pay more taxes.

unauthorized immigrants to make the difficult decision to live in fear of deportation, divide their families, or move to a foreign country. This runs counter to pro-marriage policies in the United States, which promote marriage by recognizing the value of the marital relationship and providing advantages for married couples.⁷⁷ For example, marriage is promoted through the marital privilege of confidentiality; couples who are not married enjoy no such privilege.⁷⁸ Tax laws provide advantages for couples who file joint returns.⁷⁹ State intestacy laws value the surviving spouse over other relatives based on the marital relationship.⁸⁰ Immigration law also provides advantages for married persons, unless the marriage is between a U.S. citizen and an undocumented immigrant. For mixed-status spouses, immigration law promotes separation.

Congress has permitted immigrants who are married to U.S. citizens to receive preferential treatment, because those spouses are classified as immediate relatives.⁸¹ As such, they fall under the highest preference for family-based immigration, and they are exempt from numerical visa limitations.⁸² This allows an unlimited number of spouses of U.S.

⁷⁷ Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1087 (1987) (citing I.R.C. § 6013 (1986)) (stating that married persons are given preference taxation, trusts and estates as well as immigration).

⁷⁸ Spouses are provided with a special privilege of confidentiality for their private marital communications between the spouses during their marriage. UNIF. R. EVID. Rule 504 (amended 2005). The marital communications privilege survives death and divorce. *Pereira v. United States*, 347 U.S. 1, 6 (1954) (citing JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 2341(2) (1904) (finding that “while divorce removes the bar of incompetency, it does not terminate the privilege for confidential marital communications.”) The Supreme Court has also held that private marital communications are presumed to be confidential. *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (stating that “the basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”)

⁷⁹ Internal Revenue Code section 6013 allows husbands and wives to file joint returns. IRC § 6013 (Westlaw 2008). For example, under IRC section 222(d)(4), only married people who file a joint return are allowed to claim tuition and related expense deduction. IRC § 222(d)(4) (Westlaw 2008).

⁸⁰ In California, the surviving spouse takes more under state intestacy laws than other family members. See CAL. PROB. CODE §§ 6401, 6402 (Westlaw current with urgency legislation through Ch. 6 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess., and Props. 98 and 99). The same is true in Massachusetts and under the Uniform Probate Code. See e.g. MASS. GEN. LAWS ANN. Ch. 190 §§ 1, 2, 3 (Westlaw current through Chapter 85 of the 2008 2nd Annual Sess.); UNIF. PROBATE CODE §§ 2-101, 2-102 (amended 2008).

⁸¹ Under the INA, “immediate relatives” include spouses, minor children, and parents of U.S. citizens. INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (2007); see also RUTH WASEM, CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS 3 (updated ed. May 12, 2006).

⁸² The INA limits the annual worldwide level LPR and it provides the following categories for LPR status: family-sponsored, employment-based, diversity, asylees and refugees. WASEM, U.S.

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citizens to obtain LPR status each year.⁸³ Immigration law provides more advantages for U.S. citizens' spouses than for other immigrants, unless the spouse is an unauthorized immigrant. Contrary to the policy of promoting marriage, immigration law promotes separation of marriages between U.S. citizens and unauthorized immigrants. Citizens are unable to correct their spouses' unauthorized status from within the country. If they leave, the unauthorized spouse must remain outside of the United States for three to ten years. This rule promotes separation of such families.

Traditionally, one of the worst punishments that can be inflicted on a person is the forced separation from family.⁸⁴ The Supreme Court has recognized that familial relationships are of great importance to U.S. history and are fundamental to American society.⁸⁵ Deportation is not a punishment for a crime; rather, it is a decision that the immigrant does not have the right to remain in the United States.⁸⁶ However, from the citizen spouse's point of view forced separation or separation by choice is a harsh punishment. As Supreme Court Justice David J. Brewer stated "by all the authorities the banishment of a citizen is punishment, and punishment of the severest kind."⁸⁷ If the citizen leaves the country with his or her spouse, the citizen will have effectively suffered punishment of

IMMIGRATION POLICY ON PERMANENT ADMISSIONS at 3. Only aliens who are immediate relatives, refugees and asylees are exempt from numerical limitations to obtaining permanent residence status. Lynskey, 41 U. MIAMI L. REV. at 1116 n.3 (citing 8 U.S.C. § 1151(b) (1982)). See also Emma O. Guzman, *The Dynamics of Illegal Immigration Reform and Immigrant Responsibility Act of 1996: the Splitting-Up of American Families*, 2 SCHOLAR 95, 112 (2000); WASEM, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS at 3.

⁸³ 8 U.S.C.A. § 1151(b) (Westlaw 2008).

⁸⁴ Guzman, 2 SCHOLAR at 104 n.35 (citing Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 376 (1996) (portraying the separation of mothers from their children as evil and harmful to families); Enid Trucios-Haynes, *Family Values 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family*, 36 BRANDEIS J. FAM. L. 241, 241 (1997) (describing how the new immigration laws emphasize only the nuclear family and will eventually cause the separation of extended families).

⁸⁵ *Moore v. City of E. Cleveland*, 431 U.S. 494, 509 nn.6-7 (1977).

⁸⁶ *Fong Yue Ting v. United States*, 149 U. S. 698, 730 (1893). The Court found that deportation is

[A] method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.

Id.

⁸⁷ *United States v. Ju Toy*, 198 U.S. 253, 269 (1905) (Brewer, J., dissenting).

the severest kind. If the U.S. citizen chooses to leave he or she suffers a harsh penalty, but if spouses choose to separate their marriage suffers. A solution exists: reinstate section 245(i). Reinstatement of the 245(i) remedy would better reflect the value that the United States places on valid marriages while addressing the concerns that the three or ten year bar was established to address. By paying a monetary penalty, the unauthorized spouse is punished while the U.S. citizen spouse will avoid the penalty of separation.

Litigation is not a viable option for U.S. citizens to challenge the immigration law. Although the United States Supreme Court has recognized the value of marriage, there is a conflict between the right to marry and the government's need to regulate immigration. The Court has placed a high value on marriage by interpreting the Bill of Rights to provide a fundamental right to marital privacy.⁸⁸ In *Griswold v. Connecticut*, Justice Douglas, writing for the Court, stated:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁸⁹

Justice Douglas's words describe how marriage is an association that is valued by society. However, marriage is valuable only if it is able to continue.

The Court also valued marriage in holding that the Due Process Clause provides a fundamental liberty right to marry.⁹⁰ In *Zablocki v. Redhail*, the Court stated that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests

⁸⁸ The Supreme Court held a Virginia statutory scheme forbidding any white man from marrying any colored person with American Indian blood violated the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 2 (1967). In *Loving*, the Court stated that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness of free men." *Id.* at 12. The Supreme Court has also interpreted the Bill of Rights to provide a fundamental right to marital privacy. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that a married couple's choice to use birth control was protected right of privacy under the Fourth Amendment). See also, Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1112-13 (1987).

⁸⁹ *Griswold*, 381 U.S. at 486.

⁹⁰ *Lynskey*, 41 U. MIAMI L. REV. at 1113; see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

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and is closely tailored to effectuate those interests.”⁹¹ However, the Court was careful to clarify that “only those regulations that have a direct and substantial impact on the right to marry will be strictly scrutinized.”⁹² Strict scrutiny is a high standard of judicial review which is used when courts review federal law to weigh the government’s asserted interest against a constitutional right.⁹³ Immigration law does not interfere with the act of marriage itself, so strict scrutiny would probably not apply to citizens’ challenge of this law. Furthermore, U.S. citizens generally lack the standing to challenge immigration law.⁹⁴ The Court has also stated that the “power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”⁹⁵ The Government has a constitutional grant to regulate immigration in the United States Constitution,⁹⁶ whereas, the fundamental right to marry is a court interpreted right. The Government’s interest in regulating immigration outweighs U.S. citizens’ right to correct their spouses’ unauthorized immigration status.

If a citizen’s unauthorized spouse is put into removal proceedings, there is a serious threat that the marriage will be separated or that the

⁹¹ *Zablocki*, 434 U.S. at 388.

⁹² *Lynskey*, 41 U. MIAMI L. REV. at 1113; *see also Zablocki*, 434 U.S. at 387.

⁹³ BLACK’S LAW DICTIONARY 1462 (8th ed. 2004).

⁹⁴ U.S. citizens generally lack the standing to challenge immigration law, because the U.S. Constitution grants Congress the power to regulate immigration. On a few occasions, the Supreme Court has allowed citizens to challenge the constitutionality of immigration laws. For example, in *Fiallo v. Bell*, the Supreme Court granted standing to a citizen father who argued that an immigration provision “infringe[d] upon the constitutional rights of citizens. . . without furthering legitimate governmental interests.” *Fiallo v. Bell*, 430 U.S. 787, 798 (1977). The Court disregarded the appellants’ argument as a consequence of a Congressional decision which is “solely for the responsibility of the Congress and wholly outside the power of this Court to control.” *Id.* at 799. Thus, the Court focused on Congress’ power to regulate immigration and not on the harm immigration law causes to the citizens. Citizens’ constitutional rights are overshadowed by the Court’s focus on Congress’ power to regulate immigration. This focus too greatly restricts the lawful marriages between citizens and unauthorized immigrants, as citizens effectively lack the power to challenge immigration provisions that either prohibit citizens from correcting their spouses’ unlawful status or force families to remain outside the country for 3 or 10 years. For a discussion of Congress’ plenary power over immigration see Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 377-90 (2004); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990).

⁹⁵ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 603-604 (1889) (stating that Congress has the absolute power to exclude aliens from the United States and to impose the terms and conditions on which they come in).

⁹⁶ U.S. CONST. art. I, § 8, cl. 4.

citizen will suffer a de facto deportation.⁹⁷ De facto deportation occurs when an immigrant's deportation also causes another family member to be deported.⁹⁸ When de facto deportation is asserted by the unauthorized spouse, courts examine whether the immigrant qualifies for cancellation of removal.⁹⁹ For cancellation to apply, the immigrant must prove that his or her deportation would cause "exceptional and extremely unusual hardship" to the U.S. citizen spouse.¹⁰⁰ In addition, the unauthorized spouse must prove that he or she has (1) maintained continuous presence in the United States no less than ten years, (2) exhibited good moral character, and (3) committed no aggravated felonies.¹⁰¹ The INA provides no definition of what constitutes "hardship" or "exceptional and extremely unusual" hardship.¹⁰² Immigration judges grant or deny cancellation on a discretionary basis.¹⁰³ Cancellation is an insufficient

⁹⁷ Removal proceedings are administrative hearings at Immigration Court to determine if the immigrant is removable, otherwise known as deportable. INA § 240, 8 U.S.C.A. § 1229 (Westlaw 2008).

⁹⁸ See Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1114 (1987).

⁹⁹ See, e.g., *Garay v. I.N.S.*, 620 F.Supp.11, 13 (D.C. Cal.1985) (finding no *de facto* deportation of a citizen when there was no evidence that the spouse could not relocate and the immigrant had no children or other family to support, and finding mere separation did not constitute extreme hardship); see also *Okoroha v. I.N.S.*, 715 F.2d 380, 384-85 (8th Cir. 1982) (remanding the case to the Board of Immigration Appeals to examine if a deportation order caused the U.S. citizen *de facto* deportation based on a showing of extreme hardship to the citizen). Several circuits have rejected the *de facto* deportation argument as it relates to U.S. citizen spouses and children. See, e.g., *Ayala-Flores v. I.N.S.*, 662 F.2d 444, 445-446 (6th Cir.1981) (per curiam); *Davidson v. I.N.S.*, 558 F.2d 1361, 1362 (9th Cir. 1977); *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir.1977); *Gonzalez-Cuevas v. I.N.S.*, 515 F.2d 1222, 1224 (5th Cir.1975); *Encisco-Cardozo v. I.N.S.*, 504 F.2d 1252, 1254 (2d Cir.1974). For example, the Sixth Circuit rejected the *de facto* deportation argument when it held that deporting the parents of a U.S. citizen child did not violate the child's constitutional right to citizenship. *Newton v. I.N.S.*, 736 F.2d 336, 343 (6th Cir. 1984). In *Newton*, the court reasoned that the child's citizenship would not be lost if he or she left the country, and the deportation order did not require the parents to take their child with them. *Id.* The court further explained that to hold otherwise would create "a substantial loophole in the immigration laws, allowing all deportable aliens to remain in this country if they bear children here." *Id.* Such a loophole would not, however, be created if U.S. citizens were permitted to correct their spouses' unauthorized status. Unlike citizen children, the citizen spouses make a clear decision to exercise their right to marry. Children do not decide where they are born, whereas adults choose whom they marry.

¹⁰⁰ Under a plea for cancellation, the unauthorized immigrant must prove that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States." INA § 240A(b), 8 U.S.C.A. § 1229b(b) (Westlaw 2008). "Cancellation of removal" refers to the cancellation of an immigrant's deportation. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*; see e.g. B. John Ovink, *The Hardship of Proving Hardship*, IMMIGRATION & NATIONALITY LAW HANDBOOK 114 (2006) (stating that the INA provides no definition of what constitutes extreme hardship.).

¹⁰³ Emma O. Guzman, *The Dynamics of Illegal Immigration Reform and Immigrant Responsibility Act of 1996: the Splitting-Up of American Families*, 2 SCHOLAR 95, 103, 119 (2000)

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remedy for U.S. citizens and their unauthorized spouses, because it is decided on a discretionary basis and it is vague. In addition, the ten-year residence requirement also makes the relief unavailable to many immigrants. If cancellation is not granted, the unauthorized spouse will be deported and the citizen spouse must decide either to move to a foreign country or to separate his or her family.

Over the past decade, immigration law has constrained the national policy of promoting marriages. As a result, mixed-status spouses face hard choices which cause these families to endure additional marital stress. Yet, U.S. citizens in mixed-status marriages do not have an effective litigation option to improve their situation. Reinstatement of the 245(i) remedy would provide a means to support the U.S. policy of promoting marriage.

B. THE ECONOMIC BENEFITS OF ALLOWING UNITED STATES CITIZENS TO CORRECT THEIR SPOUSES' UNAUTHORIZED STATUS OUTWEIGH THE COSTS

Evaluating the economic impact of immigration is a complicated task, because immigration has an effect that spans generations.¹⁰⁴ This makes distinguishing between immigration's economic impacts and other economic forces difficult.¹⁰⁵ However, economists have found that immigration has a positive effect on the U.S. economy.¹⁰⁶ Although

(stating that obtaining of cancellation depends on several factors and it is not helpful to aliens who could not fulfill the exceptional and extreme unusual hardship requirement); see e.g. Laura L. Lichter, *Introduction to Practice Before the Executive Office of Immigration Review*, in IMMIGRATION LAW: BASICS AND MORE 2003, at 169, 179 (ALI-ABA Course of Study SH079, 2003) (explaining that "cancellation of removal results in permanent residence for those fortunate enough to meet the high standard. Applicants must have been physically present in the United States for ten years . . . [I]ssuance of the NTA cuts off the accrual of time.") One study estimated that, in 2005, only 6,060 cases were granted cancellation of removal, including battered spouse cases. Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 4 n.5 (2006) (citing EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, FY 2005 STATISTICAL YEARBOOK B1 (2006), <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf> (reviewing the crisis in Immigration Court and the number of cases decided in FY 2005)).

¹⁰⁴ Council of Economic Advisers, Executive Office of the President, *Immigration's Economic Impact*, June 20, 2007, at 1, http://www.whitehouse.gov/cea/cea_immigration_062007.pdf. See also RANDY CAPPS ET AL., THE URBAN INSTITUTE, *TRENDS IN THE LOW-WAGE IMMIGRANT LABOR FORCE, 2000 – 2005* 1 (2007), <http://www.urban.org/publications/411426.html> (evaluating the trends in the low-wage and immigrant workforce and stating that "there is also no consensus on the overall economic and fiscal impact on immigrants").

¹⁰⁵ Council of Economic Advisers, *Immigration's Economic Impact*, June 20, 2007, at 1.

¹⁰⁶ Economists have made some important findings on immigration's positive impact, including the following: U.S. natives tend to benefit from immigration; immigration has a positive

there are no definitive data on how many U.S. citizens are married to unauthorized immigrants, an estimated eleven to twelve million unauthorized immigrants live in the United States.¹⁰⁷ In addition, about one in ten children in the United States live in mixed-status families, with one or more non-citizen parent or sibling.¹⁰⁸ Given these estimates, the actual number of U.S. citizens who are married to unauthorized immigrants is likely large.

Mixed-status spouses, like Eric and Jane, have three choices: remain in the country with the fear of the unauthorized spouse being deported, separate their families for three or ten years, or leave the country for three or ten years. When one examines each of the options available to couples like Eric and Jane, one finds that the costs outweigh the benefits. If immigration law is changed, society would gain greater economic benefits and the Government could generate about \$200 million.¹⁰⁹ In

influence on the U.S. economy; immigrants are critical to the U.S. workforce, as they contribute to productivity and growth; immigration slightly improves the solvency of pay-as-you-go entitlement programs, such as Social Security; and immigration has a positive long-term impact on public budgets. See Council of Economic Advisers, *Immigration's Economic Impact*, June 20, 2007, at 3 n.2 (citing JAMES P. SMITH & BARRY EDMONSTON, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* (1997) (stating that U.S. natives benefit from immigration through the supply of skilled and unskilled labor which increases the overall capital in the economy)); see also Harry J. Holzer, *Testimony on Economic Impacts of Immigration to the H. Comm. on Education and the Workforce*, Nov. 16, 2005, at 2 http://www.urban.org/uploadedpdf/900908_Holzer_111605.pdf (stating that immigrants, as consumers and laborers, strengthen the U.S. economy by demanding and supplying goods and services, and that immigrants generally compete with less-educated Americans for lower-wage jobs); Immigration Policy Center, *The Economic Impact of Immigration*, Dec. 2007, at 2-6, <http://www.aifl.org/ipc/factchecks/Economics07.pdf> (explaining the various ways that immigration is beneficial to the United States).

¹⁰⁷ The Department of Homeland Security Office of Immigration Statistics estimated that 11.6 million unauthorized immigrants lived in the United States as of January 1, 2006. Michael Hoffer et al., Office of Immigration Statistics, Department of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006*, Aug. 2007, at 1, http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf. Other immigration analysts estimate that twelve million unauthorized immigrants live in the United States. JEFFREY S. PASSEL, PEW HISP. CENTER, *SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1* (2006), <http://pewhispanic.org/reports/report.php?ReportID=61>; Stephen Ohlemacher, *Number of Illegal Immigrants Hits 12M*, Mar. 7, 2007, http://www.breitbart.com/article.php?id=D8G6U2ko8&show_article=1; Adam Davidson, *Q&A: Illegal Immigrants and the U.S. Economy*, NAT'L PUB. RADIO, Mar. 30, 2006, <http://www.npr.org/templates/story/story.php?storyId=5312900>.

¹⁰⁸ MICHAEL E. FIX & WENDY ZIMMERMAN, THE URBAN INSTITUTE, *ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM*, (1999), <http://www.urban.org/UploadedPDF/409100.pdf>; Michael Fix & Jeffery Passel, *U.S. Immigration at the Beginning of the 21st Century, Testimony Before the Subcomm. on Immigration and Claims, H. Comm. on the Judiciary*, Aug. 2, 2001, <http://www.urban.org/url.cfm?ID=900417>.

¹⁰⁹ See *supra* Part II.B for the economic impacts of current immigration law as it applies to mixed-status families. See also *supra* Part III.C demonstrating that the Government would generate

addition, changing immigration law would provide greater social benefits from these families remaining together.

1. Economic Impacts of Mixed-status Families Remaining in the United States

The economic benefits of mixed-status families remaining in the United States are significant. Society observes enhanced economic benefits when marriages remain intact.¹¹⁰ Generally, children with married parents fare better in life than those who grow up in single-parent families.¹¹¹ Mixed-status families that remain united are better able to contribute to the economy simply because there are two wage earners, or one earner and one child caretaker.¹¹² The marriage partnership can generate more income to be spent on things like consumer or durable goods, children, and education. Immigrants who are married to U.S. citizens are more likely to assimilate faster, which leads to improved employment options and higher wages.¹¹³

about \$200 million from reinstating the 245(i) remedy *only* for U.S. citizens' unauthorized spouses.

¹¹⁰ Married families "hold greater wealth than cohabitating families, and marriage reinforces the promoting effect of transfers on wealth, whereas cohabitation weakens such effect." Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269, 271, 286-87 (1996) (stating that "[f]amily structure has been found to be an important determinant of family economic well-being." In addition, this article concludes that "marriage may enhance family wealth . . . and marriage reinforces the promoting effect of transfers of wealth."); see also The Urban Inst., *Wedding Bells Ring in Stability and Economic Gains for Mothers and Children*, Sep. 5, 2002, at 1, <http://www.urban.org/url.cfm?ID=900554> (stating that "families with two married parents encounter more stable home environments, few years in poverty, and diminished hardship"); ROBERT I. LERMAN, *IMPACTS OF MARITAL STATUS AND PARENTAL PRESENCE ON THE MATERIAL HARDSHIP OF FAMILIES WITH CHILDREN 14-16* (2002), http://www.urban.org/UploadedPDF/410538_MaterialHardship.pdf (finding that married parents are more likely to escape poverty).

¹¹¹ Children who grow up in single-parent families suffer economic disadvantage throughout their lives. See Hao, 75 SOC. FORCES at 287-288 (concluding that marriage "may promote the economic and developmental well-being of children."); see also SARA McLANAHAN & GARY D. SANDEFUR, *GROWING UP WITH A SINGLE PARENT WHAT HURTS, WHAT HELPS I* (1994); Nan Marie Astone & Sara S. McLanahan, *Family Structure, Parental Practice and High School Completion*, 56 AM. SOC. REV. 309, 309 (1991) (citing various sources in support of the statement that children who grow up in single-parent families are less likely to finish high school or college).

¹¹² Many parents in the United States provide exclusive care for their children, even if both parents work and nonparental child care is available. Jutta M Joesch & Bridget G. Hiedemann, *The Demand for Nonrelative Child Care Among Families with Infants and Toddlers: A Double Hurdle Approach*, 15 J. POPULATION ECON. 495, 495-496, 517-518 (2002); see LERMAN, *IMPACTS OF MARITAL STATUS AND PARENTAL PRESENCE ON THE MATERIAL HARDSHIP OF FAMILIES WITH CHILDREN* at 10-11 (stating that two-parent families have more resources to care for children and are better able to contribute to the workforce and thus escape poverty).

¹¹³ Xin Meng & Robert G. Gregory, *Intermarriage and the Economic Assimilation of Immigrants*, 23 J. LABOR ECON. 135, 135-75 (2005), available at <http://econrsss.anu.edu.au/Staff/gregory/pdf/interm.pdf> (concluding that intermarriage is an

Additionally, children of mixed-status families complete more years of schooling and earn higher wages than children with two immigrant parents.¹¹⁴ Allowing mixed-status spouses to correct their status, would insure that the national economy would retain these benefits.

If mixed-status families are able to correct their status, the national economy and these families will avoid the costs associated with separation. Mixed-status families suffer if one spouse suffers from low labor mobility.¹¹⁵ Society also suffers from unauthorized spouses' low labor mobility, because mixed-status families' earning power is restricted.¹¹⁶ Unauthorized spouses' limited labor mobility essentially freezes the earning power of mixed-status families and holds these families at or near the poverty line.¹¹⁷ Mixed-status families' are less able to invest in their children. Under such circumstances, these families also have less money to return to the gross domestic product.¹¹⁸

"important input into the economic and social assimilation of immigrants" and intermarried immigrants earn higher wages than non-intermarried immigrants); *see also* Delia Furtado, HUMAN CAPITAL AND INTERETHNIC MARRIAGE DECISIONS 2 (2005), available at <http://www.sp.uconn.edu/~def05003/pdfs/interethnicFURTADO.pdf>.

¹¹⁴ BARRY CHISWICK & NOYNA DEBBURMAN, INST. FOR THE STUDY OF LABOR, DISCUSSION PAPER NO. 731, EDUCATIONAL ATTAINMENT: ANALYSIS BY IMMIGRANT GENERATION 23 (2003), available at <http://opus.zbw-kiel.de/volltexte/2003/214/pdf/dp731.pdf> (stating that children with one citizen parent and one immigrant parent complete more years of schooling than children with two immigrant parents, and finding a major gap in the education of assimilated immigrants than those who are less assimilated in the host country).

¹¹⁵ Labor mobility is the ease with which workers can take advantage of their economic opportunities. Unauthorized immigrant parents earn lower wages and are generally less educated than native parents. The Urban Institute, *Children of Immigrants: Facts and Figures*, May 16, 2006, at 1, http://www.urban.org/UploadedPDF/900955_children_of_immigrants.pdf.

¹¹⁶ Undocumented workers earn low wages, which restricts productivity gains. *Id.* at 2 ("Undocumented workers earn considerably less than working U.S. citizens. About two-thirds of undocumented workers earn less than twice the minimum wage, compared with only one-third of all workers. Undocumented workers make up less than 10 percent of the 43 million low-wage workers in the United States."); *see also* RANDY CAPPS ET AL., THE URBAN INST., IMMIGRANT FAMILIES AND WORKERS 1 (2003), <http://www.urban.org/url.cfm?ID=310880> (finding that two out of five low-wage immigrant worker is undocumented); RANDY CAPPS ET AL., THE URBAN INST., TRENDS IN THE LOW-WAGE IMMIGRANT LABOR FORCE, 2000-2005 2 (2007), <http://www.urban.org/publications/411426.html> (stating that in the United States "unauthorized immigrants compose almost one-tenth of low-wage workers and almost one-quarter of lower-skilled workers.").

¹¹⁷ The poverty line includes incomes below 200 percent of the federal poverty level. RANDY CAPPS ET AL., THE URBAN INST., NEW NEIGHBORS: A USER'S GUIDE TO DATA ON IMMIGRANTS IN U.S. COMMUNITIES, MIXED-STATUS FAMILIES IN AN ERA OF REFORM 21 (2003), <http://www.urban.org/url.cfm?ID=310844>.

¹¹⁸ The gross domestic product, or GDP, is a way to measure the size of a region's economy. The GDP includes the total market value of all goods and services produced in a given period, which is typically a calendar year. *See* Press Release, Bureau of Economic Analysis, U.S. Dept. of Commerce, Gross Domestic Product: Fourth Quarter 2007 (Preliminary), Feb. 28, 2008, <http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm> ("Real gross domestic product –

Healthcare is also a potential economic cost for society. Although immigrants do not necessarily strain the U.S. healthcare system,¹¹⁹ some mixed-status families may be unable to afford health insurance and experience less access to health care if they are insured.¹²⁰ Non-citizens, including legal and illegal immigrants, are largely ineligible for public assistance.¹²¹ Without insurance, individuals are likely to delay seeking assistance until they face crisis conditions and are forced to get treatment in emergency rooms, rather than using lower cost preventative measures. Providing uncompensated care costs an estimated \$40.7 billion dollars each year.¹²² Hence, uninsured mixed-status families pose a potential cost for the United States.

the output of goods and services produced by labor and property located in the United States. . .”).

¹¹⁹ Immigration Policy Center, *The Economic Impact of Immigration*, Dec. 2007, at 2 n.6, <http://www.aifl.org/ipc/factchecks/Economics07.pdf> (citing Alexander N. Ortega et al., *Health Care Access, Use of Services, and Experiences Among Undocumented Mexicans and Other Latinos*, 167 ARCHIVES INTERNAL MED. 2354, 2354-60 (2007) (stating undocumented Latino immigrants “reported less use of health care services and poorer experiences with care compared with their U.S.-born counterparts”); *Id.* at 2 n.7 (citing Sarita A. Mohanty, Am. Immigration Law Foundation, *Unequal Access: Immigrants and U.S. Health Care*, IMMIGRATION POLICY IN FOCUS, July 2006, at 3, available at <http://immigration.server263.com/images/File/infocus/Unequal%20Access.pdf> (relying on data from Sarita A. Mohanty et al., *Health Care Expenditures of Immigrants in the United States: A Nationally Representative Analysis*, 95 AM. J. PUB. HEALTH 1431, 1431 (2005) (stating that immigrants received less health care services than natives)); see also Kathryn Pitkin Derosé et al., *Immigrants and Health Care: Sources of Vulnerability*, 26 HEALTH AFF. 1258, 1258-68 (2007) (concluding that “overall, immigrants have lower rates of health insurance, use less health care, and receive lower quality of care than U.S. born populations”).

¹²⁰ Leighton Ku & Sheetal Matani, *Left Out: Immigrants’ Access to Health Care and Insurance*, 20 HEALTH AFF. 247, 249 (2001), available at <http://content.healthaffairs.org/cgi/reprint/20/1/247> (stating low-income non-citizens are less likely to be insured, due to low incomes, and have less access to care if they are insured, than U.S. citizens).

¹²¹ RUTH WASEM, CONGRESSIONAL RESEARCH SERVICE, NON-CITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW AND TRENDS 4 (2007), http://www.immigrationforum.org/documents/CRS/PublicAssistance_CRS_3-17-04.pdf. (stating that immigrants are ineligible for Medicaid, Temporary Assistance to Needy Families, Supplemental Security Income, or food stamps. After ten years of paying into the Social Security and Medicare systems, legal permanent residents are eligible to receive benefits); see also Immigration Policy Center, *The Economic Impact of Immigration* at 1.

¹²² JACK HADLEY, MISSOURI FOUNDATION FOR HEALTH, COVER MISSOURI PROJECT REPORT ONE: CONSEQUENCES OF THE LACK OF HEALTH INSURANCE ON HEALTH EARNINGS 15 (2006), http://www.urban.org/UploadedPDF/1001001_CoverMo1.pdf (citing JACK HADLEY & JOHN HOLAHAN, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *THE COST OF CARE FOR THE UNINSURED: WHAT DO WE SPEND, WHO PAYS, WOULD FULL COVERAGE ADD TO MEDICAL SPENDING* 3 (2004), <http://covertheuninsured.org/media/research/KaiserReport.pdf>). In addition, doctors have an ethical duty to do their best to provide adequate treatment to all patients, and doctors are not permitted to discriminate against any class or category of patient. Susan Coyle, *Providing Care to Undocumented Immigrants*, THE HOSPITALIST, July/Aug. 2003, at 25 n.1, available at http://www.acponline.org/running_practice/ethics/case_studies/care_imm.pdf (citing American College of Physicians, *Ethics Manual*, (4th ed. 1998), in 128 ANN INTERN MED. 576, 587 (1998),

In addition, society must bear the administrative costs of enforcing immigration laws against U.S. citizens' unauthorized spouses. These administrative costs fall on U.S. taxpayers, whereas the costs of allowing U.S. citizens to correct their spouses' status would fall on the individual families. These costs are especially heavy, considering that the amount that could be generated from changing the law is about \$200 million per year.¹²³ In total, the potential economic benefits of mixed-status families remaining intact are great. The economic costs of not allowing citizens to correct their spouses' unauthorized status do not justify denying adjustment to mixed-status spouses. The greatest economic benefit would come from permitting U.S. citizens to correct their spouses' unauthorized status.

2. *Separating Mixed-Status Families*

Divided families present a major cost to society without commensurate benefits. If the three- or ten-year bar is triggered or if a spouse is deported, the mixed-status family may choose to separate.¹²⁴ The separation from one's spouse may diminish the family's earning power, particularly if the remaining spouse is a woman.¹²⁵ In addition, "children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or

available at <http://www.annals.org/cgi/content/full/128/7/576>).

¹²³ See *infra* Part III.C estimating the revenue from reinstating the 245(i) remedy *only* for spouses of U.S. Citizens.

¹²⁴ See *supra* Part I.B for a description of the three- and ten-year bars to immigration benefits.

¹²⁵ The effects of separation of mixed-status family are analogous to the effects of marital dissolution, because both situations separate two people who are or were married. Divorced women without children suffer more economic setbacks than their male partners. However, both women and men suffer some economic disadvantage from separation or divorce. See MARY JANE MOSSMAN & MORAG MACLEAN, *FAMILY LAW AND SOCIAL ASSISTANCE PROGRAMS: RETHINKING EQUALITY* 117 (1997) (stating that, after divorce, women and children suffer a disproportionate economic disadvantage compared to men); see also Diane Galarneau & Jim Sturrock, *Family Income after Separation*, STATISTICS CANADA PERSPECTIVES ON LABOUR AND INCOME, 18, 19-24 (1998), available at <http://www.statcan.ca/english/studies/75-001/archive/1997/pear1997009002s2a03.pdf>; Dorien Manting & Anne Marthe Bouman, *Short- and Long-Term Economic Consequences of the Dissolution of Marital and Consensual Unions. The Example of the Netherlands*, 22 EUROPEAN SOC. REV. 413, 414-22 (2006), available at <http://esr.oxfordjournals.org/cgi/content/full/22/4/413>; Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE FAM. 115, 115-127 (1984) Janet Wilmoth & Gregor Koso, *Does Marital History Matter? Marital Status and Wealth Outcomes Among Preretirement Adults*, 64 J. MARRIAGE FAM. 254, 254 (2002) (stating that "individuals who are not continuously married have significantly lower wealth than those who remain married throughout the life course.").

educational background.”¹²⁶ Children who grow up in separated mixed-status families will suffer as they move into adulthood, and society will have to bear the costs that accrue. For example, adolescents who lived with only one parent during part of their childhood are “twice as likely to dropout of high school, twice as likely to have a child before the age of twenty, and one and a half times as likely to be ‘idle’ — out of school and out of work — in their late teens and early twenties.”¹²⁷ In addition, child care is a major cost for American families.¹²⁸ About four in ten children under age five spend thirty-five hours or more per week in childcare.¹²⁹ If one parent is deported or barred from re-entry, the U.S. citizen parent is more likely to need public assistance to care for their children. Compared to the costs of families separating, the benefits of their division are disproportionate. The only potential economic benefit of a divided mixed-status family is the savings from possible healthcare costs of the unauthorized spouse, assuming that spouse was uninsured. Mixed-status families who are divided present great economic and social cost with little benefit.

3. *Mixed-Status Families Leave the United States*

Mixed-status families who leave the United States present minimal economic costs or benefits. The supply of labor in the market may be tightened as mixed-status families leave the United States. Furthermore, tax revenues may be less, assuming that these workers would have been paying taxes. The reduction in healthcare costs or use of public services, which are only available to citizens, may provide some marginal economic benefit.¹³⁰ These costs and benefits may be negligible to the

¹²⁶ SARA McLANAHAN & GARY D. SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 1 (1994); see also ROBERT I. LERMAN, *IMPACTS OF MARITAL STATUS AND PARENTAL PRESENCE ON THE MATERIAL HARDSHIP OF FAMILIES WITH CHILDREN* 1 (2002), http://www.urban.org/UploadedPDF/410538_MaterialHardship.pdf (finding that children of one-parent families are more likely to live in poverty and “children growing up without two natural parents do worse on a variety of social and economic outcomes”).

¹²⁷ McLANAHAN & SANDEFUR, *GROWING UP WITH A SINGLE PARENT WHAT HURTS, WHAT HELPS* at 2.

¹²⁸ JOAN C. WILLIAMS, CENTER FOR WORK LIFE LAW, UNIVERSITY OF CALIFORNIA, HASTINGS COLL. OF THE LAW, *ONE CHILD AWAY FROM BEING FIRED: WHEN “OPTING OUT” IS NOT AN OPTION* 10 (2006), http://www.uchastings.edu/site_files/WLL/onesickchild.pdf (stating that the average cost of child care for a one-year-old is greater than the average cost of tuition at a state college and that working class families lack the funds to pay for adequate care).

¹²⁹ *Id.*

¹³⁰ Unauthorized immigrants are ineligible for public services. See RUTH WASEM, CONGRESSIONAL RESEARCH SERVICE, *NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW AND TRENDS* 4 (2007); Immigration Policy Center, *The Economic Impact of Immigration*, Dec. 2007, at 1, <http://www.aifl.org/ipc/factchecks/Economics07.pdf>.

nation, but the costs to the U.S. citizen who leaves the United States are significant. U.S. citizens may face difficulties of language and cultural barriers in their spouses' home country. The U.S. citizen will have to leave behind their community and available employment for a country where he or she may have neither.

III. A REMEDY IS NEEDED FOR U.S. CITIZENS AND THEIR UNAUTHORIZED SPOUSES

Current immigration law presents two problems for mixed-status marriages: U.S. citizens are prohibited from applying for their unauthorized spouses to obtain permanent residence from within the United States,¹³¹ and traveling to a U.S. consulate office for an immigrant visa, to gain legal permanent residence status, may subject the unauthorized spouse to the three- or ten-year bar to reentry.¹³² Congress could remedy this problem by creating a waiver for all unauthorized immigrant spouses of U.S. citizens. Essentially, the section 245(i) remedy was such a waiver. It is a model for action that Congress can take to ensure that immigration law does not excessively burden citizens' marriages. Although the remedy applied to adjustment of status based on employment and other family relationships, it could easily be narrowed to *only* include unauthorized immigrants married to U.S. citizens. Reinstating section 245(i) is a realistic option, because USCIS is familiar with adjudicating 245(i) applications and immigration practitioners are familiar with preparing such applications.¹³³ In addition, the remedy generated substantial funding for the Immigration and Naturalization Service (now the USCIS).¹³⁴ Opponents of the 245(i) remedy are concerned that it promotes marriage fraud and weakens national security, and to address those concerns section 245(i) could be further modified. In addition, a marriage fraud enforcement division should be created to ensure that the remedy is not abused.

¹³¹ 8 C.F.R. § 245.1; *see also supra* Part I for a discussion of adjustment eligibility.

¹³² 8 U.S.C.A. § 1182(a)(9)(B) (Westlaw 2008); *see supra* Part II.B for a discussion of the three- or ten-year penalty.

¹³³ Section 245(i) was available to all qualifying applicants from 1994 through 1997, and was further extended for periods until 2001. 8 U.S.C.A. § 1255. The 245(i) remedy was enacted in the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-317 § 506, 108 Stat. 1724, 1765-1766 (1994). After 2001, any immigrant who was in the U.S. and qualified for the 245(i) remedy could apply after the deadline. *See supra* Part I for a discussion of the history of the 245(i) remedy.

¹³⁴ *See supra* Part I.A, which discusses the amount of funding generated for INS from 245(i) adjustment applications.

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A. FOCUS ON CITIZENS' NEED FOR A REMEDY

The 245(i) remedy has been mischaracterized as an amnesty provision for unauthorized immigrants.¹³⁵ Amnesty is defined as a “pardon extended by the government to a group or class of persons, usually for political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.”¹³⁶ Unauthorized immigrants violate immigration law when they come into the country without permission. A person’s illegal entry into the country is not a crime for which criminal sanctions can be imposed. However, citizens need a pardon for their spouses’ unlawful immigration status to avoid being separated from their spouses or facing the choice of leaving the country for three or ten years.¹³⁷

If the 245(i) remedy is reinstated *only* for U.S. citizens’ unauthorized spouses, the focus would shift to the marriage between a U.S. citizen and an unauthorized immigrant. For instance, critics charge that 245(i) permitted unauthorized immigrants to “skip the line” to get immigration benefits.¹³⁸ However, there is no line for U.S. citizens spouses, because spouses are given the highest preference under immigration law and are not subject to yearly numerical visa limitations.¹³⁹ Another argument against the 245(i) remedy is that it promotes more illegal immigration.¹⁴⁰ This argument fails to consider

¹³⁵ Fed’n for Am. Immigration Reform (FAIR), *What’s Wrong With Illegal Immigration?*, updated Mar. 2005, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters7443 (itemizing how illegal immigration harms America); Edwin Meese III et al., Heritage Found., *Alternatives to Amnesty: Proposals for Fair and Effective Immigration Reform*, June 2, 2005, http://www.heritage.org/Research/LegalIssues/bg1858.cfm#_ftn14 (which generally opposing amnesty provisions for immigration reform); FAIR, *THE TRUTH BEHIND 245(i) AMNESTY: HOW ILLEGAL IMMIGRANTS ARE TAKING OVER OUR LEGAL IMMIGRATION SYSTEM 1* (2002), <http://www.fairus.org/site/DocServer/ACF2C67.pdf?docID=381> (stating that 245(i) served as an amnesty for illegal immigrants which was harmful to the U.S.).

¹³⁶ BLACK’S LAW DICTIONARY 35 (2d Pocket ed. 1996).

¹³⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

¹³⁸ FAIR, *What’s Wrong With Illegal Immigration?*; Meese et al., *Alternatives to Amnesty*.

¹³⁹ Spouses of U.S. citizens are given the highest preference under immigration law as they are not subject to numeric limitations for permanent residence status; thus, they do not have to wait in line for a visa number. Aliens who are not immediate relatives of U.S. citizens are subjected to numerical limitations to obtaining permanent residence status. See Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1116 n.3 (1987) (citing 8 U.S.C. § 1151(b) (1982); Emma O. Guzman, *The Dynamics of Illegal Immigration Reform and Immigrant Responsibility Act of 1996: the Splitting-Up of American Families*, 2 SCHOLAR 95, 112 (2000). See also *supra* Part I about the history of adjustment of status and requirements for immigrant visas.

¹⁴⁰ FAIR, *What’s Wrong With Illegal Immigration?*, at 1; FAIR, *THE TRUTH BEHIND 245(i)*

the requirement that there be a valid marriage between a U.S. citizen and an undocumented immigrant. As noted below, immigration law requires a valid legal marriage for adjustment, and the Immigration Marriage Fraud Act ("IMFA") imposes penalties on people who enter into fraudulent marriages to circumvent immigration laws.¹⁴¹ Marriage fraud laws must be enforced to effectively deter fraudulent marriages. To facilitate such enforcement, the funds from a reinstated 245(i) remedy should be used to fight immigration fraud.¹⁴²

The 245(i) remedy has also been criticized for harming the American workforce and burdening taxpayers.¹⁴³ Unauthorized immigrants overwhelmingly fill low-wage jobs, many of which go unfilled by citizens.¹⁴⁴ One way to insure compliance with wage and hour laws is to legalize U.S. citizens' unauthorized spouses. An immigrant who is married to a U.S. citizen is unlikely to leave the United States, unless by deportation, so society is best served by allowing the immigrant to fully assimilate by working legally and paying taxes.¹⁴⁵ Reinstatement of the 245(i) remedy would permit the unauthorized spouse to remain in the United States and gain valid working status in exchange for paying a penalty.

B. RECOMMENDATIONS TO ADDRESS SECURITY CONCERNS

Opponents of the 245(i) remedy argue the remedy weakens national security.¹⁴⁶ Indeed, more can be done to insure that the 245(i) remedy protects national security. Currently, all applicants for adjustment are required to provide evidence of their criminal history, their birth certificate, a copy of their passport, passport photos, and a sealed medical

AMNESTY, at 1, 3.

¹⁴¹ 8 U.S.C.A. § 1325 (Westlaw 2008). Marriages entered into for the sole purpose of evading immigration law is not valid, and immigration fraud is taken very seriously by USCIS. See e.g. In re Aldecoatelara, 18 I. & N. Dec. 430 (BIA 1983).

¹⁴² See *infra* Part III.C.

¹⁴³ FAIR, *What's Wrong With Illegal Immigration?*.

¹⁴⁴ RANDY CAPPS ET AL., THE URBAN INSTITUTE, TRENDS IN THE LOW-WAGE IMMIGRANT LABOR FORCE, 2000–2005 1 (2007), <http://www.urban.org/publications/411426.html> (stating that between 2000 and 2005 the number of low-wage native-born workers declined by 1.2 million and immigrants off-set this decline); see also Center for American Progress, *Immigration by the Numbers*, May 9, 2007, http://www.americanprogress.org/issues/2007/05/numbers_immigration.html (reporting that 65% of Americans think immigrants do not take jobs that Americans want).

¹⁴⁵ See *supra* Parts III.B and III.C.

¹⁴⁶ FAIR, *What's Wrong With Illegal Immigration?*; FAIR, THE TRUTH BEHIND 245(i) AMNESTY: HOW ILLEGAL IMMIGRANTS ARE TAKING OVER OUR LEGAL IMMIGRATION SYSTEM 3 (2002), <http://www.fairus.org/site/DocServer/ACF2C67.pdf?docID=381>.

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examination.¹⁴⁷ Despite these requirements, critics of the 245(i) remedy argue that the consular offices are better able to prevent security threats, because they personally interview visa applicants, are familiar with methods to authenticate documents, and are aware of potential security issues.¹⁴⁸ An immigration officer is required to interview every applicant for marriage-based adjustment.¹⁴⁹ However, as an added insurance against security threats, 245(i) applicants could be required to file police records from their country of citizenship. This requirement would give immigration officers information similar to what is available to consular officers.

Additionally, longer waiting periods for conditional permanent residence as well as a mandatory second interview could be established in lieu of forcing the immigrant to leave the country to be interviewed at the U.S. Consulate. Conditional legal permanent resident status is granted if a couple has been married for less than two years at the time of filing the adjustment application.¹⁵⁰ This conditional status is granted for a two-year period, after which the immigrant must again prove that the marriage is valid.¹⁵¹ To ensure the marriage is valid, unauthorized spouses who file for 245(i) adjustment should only be issued conditional permanent resident status, even if the couple has been married for more than two years. As an additional marriage fraud test, a second interview should be conducted before the conditional residency period is lifted. This mandatory conditional residency period and additional interview would serve as added assurance that the marriage was not entered into solely for obtaining legal immigration status.

National security is a natural concern for immigration laws. However, current immigration law regarding U.S. citizens who marry unauthorized immigrants does not necessarily protect the nation's security any better than it would with a limited 245(i) remedy, because the undocumented spouse could remain in the country unknown or undiscovered for years. If the law is changed to allow such a remedy, national security would be better served, because the government would discover unauthorized immigrant spouses' presence and history. Instead

¹⁴⁷ 8 C.F.R. §§ 245.2(B), 211(2007). A medical exam is required under 8 C.F.R. § 245.5 (2007).

¹⁴⁸ 148 Cong. Rec. H797-02 (2002); FAIR, *Section 245(i): "Adjustment of Status" Mini-Amnesty*, July 2002, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters326f.

¹⁴⁹ 8 C.F.R. § 245.6 (2007).

¹⁵⁰ 8 U.S.C.A. § 1186a(1) (Westlaw 2008).

¹⁵¹ If the condition is not removed, then the resident status expires. 8 U.S.C.A. § 1186(a) (Westlaw 2008). The condition may be removed by a joint petition of the two spouses but some exceptions apply. *Id.*; see also James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 682 (1997).

of remaining in the shadows unknown to the government, unauthorized spouses would disclose his or her presence and background information.

C. PENALTIES AND PREVENTION OF MARRIAGE FRAUD

At the time the 245(i) remedy was repealed the penalty that applicants were required to pay was \$1,000 plus filing fees.¹⁵² The 245(i) penalty should not be increased, because the recently increased filing fees and a \$1,000 penalty are sufficient to prevent and detect marriage fraud as well as to meet the public safety and national security concerns. On July 30, 2007, USCIS increased the adjustment of status filing fees for U.S. citizens' spouses from \$515 to \$1,365.¹⁵³ The fee increase was intended to "enable USCIS to meet national security and public safety concerns, prevent and detect fraud, and invest in comprehensive transformation efforts — all leading to a more efficient and effective immigration system."¹⁵⁴ The \$1,000 penalty for 245(i) applications should not be increased, because a penalty increase would be a heavy burden on mixed-status families who may already suffer from economic hardship caused by the immigrant spouse's unauthorized working status.

In 1996, after two years of 245(i) applications, an estimated 80,972 spouses of U.S. citizens had applied for adjustment under the 245(i) remedy.¹⁵⁵ Mixed-status spouses have not had a remedy for over seven years,¹⁵⁶ so the most conservative number of applications under a remedy would be about 80,000.¹⁵⁷ Based on prior data, a conservative estimate

¹⁵² INA § 245(i), 8 U.S.C.A. § 1255(i) (Westlaw 2008); *See also supra* Part II.C.

¹⁵³ On July 30, 2007, the USCIS filing fees increased. A U.S. citizen must file an I-130 relative petition to prove the underlying relationship, such as marriage, for immigration benefits. Now the I-130 petition filing fee is \$355. The non-citizen spouse or relative must also file an I-485 application for adjustment of status to legal permanent residence. The fee for an I-485 application is now \$1,010, which includes filing and biometric fees. The USCIS fee schedule is available at <http://www.uscis.gov/files/nativedocuments/FinalUSCISFeeSchedule052907.pdf>.

¹⁵⁴ *See* U.S. Citizenship and Immigration Services, *Questions and Answers: USCIS Sets Final Fee Schedule to Build an Immigration Service for the 21st Century*, May 29, 2007 (revised May 30, 2007), <http://www.uscis.gov/files/pressrelease/FinalFeeRuleQsAs052907.pdf>.

¹⁵⁵ LARRY M. EIG & WILLIAM J. KROUSE, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) 4 (updated ed. Feb. 4, 1998), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-719>.

¹⁵⁶ There has not been a remedy for unauthorized spouses of U.S. citizens since Apr. 30, 2001. *See supra* Part I.C describing the last extension of the section 245(i) remedy.

¹⁵⁷ In 1996, the number of 245(i) applications filed by spouses of citizens was 80,972, about 35.2% of the total number of 245(i) applications for that year. EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 4.

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for the revenue generated from a reinstatement of 245(i) *only* for citizens' spouses would be almost \$200 million per year.¹⁵⁸

Prior to the repeal of section 245(i), revenue generated by the remedy was used to improve the security of the immigration system.¹⁵⁹ Similarly, this revenue could be used by USCIS to train officers how to better detect marriage fraud. The additional revenue could also be used to create a marriage fraud enforcement division within USCIS. Enforcement of marriage fraud laws is essential to prevent fraudulent marriages and to insure that the 245(i) remedy does not become, as some opponents have suggested, a mini amnesty.¹⁶⁰ A marriage fraud enforcement division could better enforce existing marriage fraud laws against both U.S. citizens and immigrants who get married to circumvent immigration laws.¹⁶¹ Under the IMFA, immigrants who are found to have committed marriage fraud are permanently barred from obtaining U.S. visas.¹⁶² Citizens who enter into such marriages are subject to up to five years of imprisonment and a fine of \$250,000.¹⁶³ These penalties could be more widely enforced by a marriage fraud division. Such a division would be able to more strictly enforce the marriage fraud laws, which may have some deterrent value.

Reinstating the 245(i) remedy for the sole purpose of providing a means for citizens to correct their spouses' unauthorized immigration status would ensure that citizens' right to marry are fully realized. Citizens would no longer bear the burden of the three- or ten-year bar to their spouses' obtaining lawful status. The 245(i) remedy could easily be changed to address the concerns about national security and marriage fraud. Such a remedy would allow Congress to provide mixed-status

¹⁵⁸ 80,000 (number of 245(i) applications filed in 1996) x \$2,365 (\$1,365 adjustment filing fee + \$1,000 for the 245(i) penalty) = \$189,200,000.

¹⁵⁹ 8 U.S.C.A. § 1255(i)(3) (requiring funds collected from the 245(i) remedy be delegated to adjudication of immigration applications); *see also* EIG & KROUSE, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(I) at 5 (stating that the funds from the \$1000 penalty increase were to be deposited in a new Immigration Detention Account).

¹⁶⁰ FAIR, THE TRUTH BEHIND 245(i) AMNESTY: HOW ILLEGAL IMMIGRANTS ARE TAKING OVER OUR LEGAL IMMIGRATION SYSTEM 1 (2002), <http://www.fairus.org/site/DocServer/ACF2C67.pdf?docID=381> *The Truth Behind 245(i)*, at 1 (stating that previous 245(i) requirements were easily violated).

¹⁶¹ Marriage fraud is an intentional act that requires lying to the government in paper and in person at interview. *See* Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified as amended at 8 U.S.C.A. §§ 1154, 1184, 1186(a) (Westlaw 2008)).

¹⁶² 8 U.S.C.A. § 1182(C) (Westlaw 2008).

¹⁶³ 8 U.S.C.A. § 1325(c) (Westlaw 2008).

families with a needed remedy while generating millions of dollars in revenue.

IV. CONCLUSION

Current immigration law causes mixed-status spouses like Eric and Jane face a difficult and frustrating decision to continue to live in fear of deportation, or to leave the United States or divide their families for three to ten years. This law is counter to pro-marriage policy in the United States as it promotes the separation of mixed-status spouses. For several years section 245(i) provided a remedy for mixed-status spouses, and reinstating this remedy is a reasonable solution. Allowing mixed-status spouses to apply for 245(i) would require payment of a penalty fee for unlawful entry into the United States, proof of a valid marriage to a U.S. citizen, and extensive disclosure of the immigrant's personal information. The 245(i) remedy could be reinstated with changes that address national security and immigration fraud concerns. Not only would mixed-status families benefit from reinstating section 245(i), society would also benefit from the unauthorized spouses would gain legal working status which would allow them to contribute more taxes, better participate in the workforce, and provide for their families. The economic benefits of reinstating section 245(i) are further enhanced by the \$200 million in revenue that would be gained from 245(i) applications.

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