

ARTICLES

ADMINISTRATIVE LAW THROUGH THE LENS OF IMMIGRATION LAW

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INTRODUCTION

Immigration law is a type of administrative law, but that is sometimes easy to forget. Immigration law can seem to be in its own world, divorced from the evolution of important legal concepts.¹ But this Article finds immigration law in step with administrative law regarding a major topic: nonlegislative rules.

By examining prominent controversies in immigration law related to the use of nonlegislative rules, this Article will explore the administrative law controversy surrounding agency use of these rules through the perspective of immigration law. Studying immigration nonlegislative rules exemplifies how general principles of administrative law manifest in immigration law. It also shows how attempts to reform the use of nonlegislative rules in immigration law must take into consideration the challenges that all agencies face regarding notice-and-comment rulemaking and also must acknowledge a debate that is much larger than immigration law itself.

Agencies formulate all kinds of rules, and not all of them are the product of notice-and-comment rulemaking. Nonlegislative rules (also called, among other things, sub-regulatory rules and guidance documents) consist of agency work product such as policy statements and interpretive statements. When agencies produce nonlegislative rules, the Administrative Procedure Act (APA) does not require the agency to seek out or to respond to public input. These sub-regulatory rules provide agencies with a flexible means to act and to communicate with agency employees and with regulated parties. These positive attributes are counterbalanced, however, by concerns that agencies overuse the exemptions for policy statements and interpretive rules to evade the procedural requirements of notice-and-comment rulemaking. Another concern is that these agency actions practically, even if not legally, bind regulated parties. A regulated party feels obligated to comply, because the agency is expressing its plans for enforcement, even if those plans are not legally binding. The practical binding effect of these rules made without public participation, along with an increase in agency reliance on nonlegislative rules, has made these rules

1. Scholars have referred to immigration law as a “constitutional oddity” and as a “neglected stepchild of our public law.” See Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 937 (1995); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992).

a prominent topic of debate in administrative law.

United States Citizenship and Immigration Services (USCIS), a part of the Department of Homeland Security (DHS), is an immigration agency that employs nonlegislative rules on a massive scale. Every day, USCIS adjudicates approximately 30,000 applications.² U.S. citizens, lawful permanent residents, and U.S. employers file paperwork in the hope of obtaining approval for a family member to gain legal immigration status or for a prospective employee to gain permission to work in the United States, and USCIS adjudicates those applications. USCIS adjudicators measure those applications against statutes, regulations, and a dizzying array of nonlegislative rules. The Administrative Appeals Office (AAO) within USCIS then hears administrative appeals of certain decisions made by front-line USCIS adjudicators.

This Article will analyze problems and innovations related to USCIS's use of nonlegislative rules to adjudicate applications for benefits. USCIS's use of guidance documents is problematic because of: (1) USCIS's own confused explanation of the proper use of such guidance; (2) underuse of the notice-and-comment rulemaking process by USCIS; (3) abrupt changes in adjudication standards introduced by USCIS through nonlegislative rules; and (4) confusion about the effect of USCIS's nonlegislative rules in appeals to the AAO. Recently, USCIS has acknowledged that its use of nonlegislative rules vexes its stakeholders and accordingly has implemented a draft memorandum for comment procedure. The draft memorandum for comment procedure allows stakeholders to comment on a guidance document before implementation, but does not grant the full procedural rights of notice-and-comment rulemaking to stakeholders.³

Examination of the controversy surrounding nonlegislative rules through the lens of immigration law serves both immigration specialists and administrative law generalists. Immigration specialists will discover that concerns about the use of nonlegislative rules in immigration law actually are concerns about administrative law, and that concerns about the use of guidance documents cut across administrative law. Immigration specialists will also discover that even USCIS's new draft memorandum for comment procedure is not exclusive to immigration law. This Article concludes that the new procedure is a pragmatic and positive advancement for immigration benefits adjudication. While positive, however, the procedure is not perfect, nor is it a substitute for notice-and-comment rulemaking. USCIS should still place higher priority on notice-and-comment

2. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *A DAY IN THE LIFE OF USCIS* (2010) [hereinafter *A DAY IN THE LIFE*], available at [http://www.uscis.gov/USCIS/About Us/day-in-the-life.pdf](http://www.uscis.gov/USCIS/About%20Us/day-in-the-life.pdf).

3. See *infra* Part II.B.

rulemaking.

Administrative law generalists will discover an overlooked corner of the debate over nonlegislative rules, including another example of an agency voluntarily subjecting itself to limited features of notice-and-comment rulemaking in its development of guidance documents. USCIS uses guidance documents to muddle through in the extremely sensitive context of immigration law, where USCIS makes fundamentally life-altering decisions that go beyond monetary penalties or disbursements. USCIS's decisions directly affect where and with whom an individual will live and work. The beneficiaries of USCIS's adjudications are individual foreign nationals, and in a major petition category reserved for family members, more than 70% proceed without representation.⁴

From the perspective of the individual foreign national, USCIS is a Goliath, using guidance documents to avoid setting legally binding rules and thus keeping stakeholders (and the public) on shaky ground. Employers find it difficult to predict whether a proposed employee will obtain permission to work. Family members worry that an agency decision will split up the family. Part I will explore the debate over the use of guidance documents in administrative law generally. Part II will then connect that debate to immigration law by examining how USCIS uses guidance documents problematically and by evaluating the new draft memorandum for comment procedure. By looking at administrative law through the lens of immigration law, the negative effects of guidance documents are cast in a new light, while also acknowledging that other forces may push USCIS to use such documents.

4. In response to a Freedom of Information Act request, for fiscal years 2007–2011, United States Citizenship and Immigration Services (USCIS) produced the total number of petitions or applications filed in certain categories and also the number of those petitions or applications that were accompanied by Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. *See infra* Appendix. The author calculated the percentage of receipts accompanied by Form-G-28. For Form I-130, Petition for Alien Relative, Form G-28 accompanied only 27% of receipts during fiscal year 2011. *See infra* Appendix. Form G-28 indicates either attorney representation or representation by an accredited nonprofit representative, so the calculation does not necessarily indicate the number of petitions with attorney representation. *See* 8 C.F.R. § 292.1(a)(4) (2011). Of the categories included in the Appendix, the representation rates are much lower for the family-based petition (Form I-130) and the naturalization application (Form N-400) than in the employment-based categories (Form I-129 and Form I-140). The representation rate for Form I-485, the Application to Register Permanent Residence or to Adjust Status (to permanent resident), which is used in both family-based and employment-based cases, was 47% in fiscal year 2011. *See infra* Appendix.

I. THE DEBATE OVER NONLEGISLATIVE RULES IN ADMINISTRATIVE LAW

A. *A Brief Introduction to Agency Rules*

Federal administrative agencies, while not a part of the Legislative Branch, perform legislative-like rulemaking functions. When Congress delegates power to an agency through a statute, it may include the power to create rules related to the enforcement of the statute. Agencies formulate all kinds of “rules” because the APA defines the word *rule* broadly.⁵ The APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”⁶ Agency rules serve various purposes. Some agency rules address details not directly addressed in the applicable statute. Others interpret terms used in the statute. Still others announce agency priorities and practices, and yet others set up procedural rules for agency adjudication.

Not only do agencies formulate rules to serve various purposes, but agencies also formulate different kinds of rules with varying levels of force. If an agency wishes to see its rule survive a potential future legal challenge, the procedure it uses to formulate the rule must be appropriate. Some rules have the force of law. This means that both the agency and regulated parties are bound by the rule.⁷ A legally binding rule is determinative on the issue. Other rules do not have the force of law and instead are advisory or provide guidance. Rules with the force of law must be developed according to certain procedures, while nonbinding rules are exempt from many procedural requirements.

Under the APA, generally two forms of rulemaking will produce a rule that carries the force of law—formal and informal rulemaking. Under formal rulemaking, the agency holds an actual hearing where evidence is received.⁸ Under informal rulemaking, the agency need not hold an actual hearing, but if an agency still wants a rule to carry the force of law, it must follow specific procedures.⁹ Usually an agency must publish a Notice of Proposed Rulemaking in the *Federal Register* and provide the public an opportunity to comment on the proposed rule.¹⁰ The agency must consider

5. See Administrative Procedure Act, 5 U.S.C. § 551(4) (2006).

6. *Id.*

7. The distinction between a force of law rule and a non-force of law rule also has implications for judicial review. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001).

8. See 5 U.S.C. §§ 556–557 (2006).

9. *Id.* § 553(b)–(d).

10. See *id.* § 553(b)–(c).

the public's comments and generally must publish a final version of the rule at least thirty days before the rule becomes effective.¹¹ This informal rulemaking is often referred to as "notice-and-comment" rulemaking. It is up to Congress to determine whether an agency must proceed through formal rulemaking or whether notice-and-comment rulemaking is an option, but Supreme Court precedent sets a high bar for statutes to meet to require the use of formal rulemaking.¹²

The APA allows for exemptions from the procedural requirements of notice-and-comment rulemaking. While using some of these exemptions results in a nonbinding rule, the use of others may still produce a binding rule. Notice in the *Federal Register* is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."¹³ Notice is also not required if the agency has good cause to decide that notice would be "impracticable, unnecessary, or contrary to the public interest."¹⁴ If notice is not required, then neither is the opportunity to comment, nor the opportunity for the agency to consider nonexistent comments. Also, separate exemptions exist for the requirement that a rule must be published at least thirty days before its effective date. The at-least-thirty-day rule does not apply where the agency has good cause, to interpretive rules and policy statements, or to rules that grant exemptions.¹⁵

This Article focuses on policy statements and interpretive rules. Policy statements and interpretive rules are exempted from the requirement of soliciting and considering comments and from the thirty-day requirement, but invoking these exemptions means that any rule promulgated will not have the force of law.¹⁶ Interpretive rules advise the public of the agency's interpretation of a statute while policy statements advise the public of how the agency plans to exercise its power.

Distinguishing between nonlegislative and legislative rules is one of the most complex tasks in administrative law.¹⁷ An agency may justify the announcement of a policy without providing advance notice or any opportunity for comment by explaining that the content of the policy

11. *See id.* § 553(d).

12. *See United States v. Fl. E. Coast Ry.*, 410 U.S. 224, 227–28 (1973) (holding that an agency need not use formal rulemaking unless the statute explicitly provides that the rule be made after a hearing on the record).

13. 5 U.S.C. § 553(b).

14. *Id.*

15. *Id.* § 553(d).

16. *See William Funk, A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322–23 n.2 (2001).

17. It is not unusual to find judges referring to this area of law as extremely complex. *See, e.g., Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (referring to this area of the law as "enshrouded in considerable smog").

statement does not have the force of law and that an agency official remains free to exercise his or her discretion. To a regulated party, however, the policy statement may function practically as a legally binding rule, leaving the regulated party feeling that the procedure does not match the effect.

Despite language that a policy statement is not intended to bind agency adjudicators, a regulated party may understandably view a memorandum from a high-ranking agency official as announcing a firm standard from which agency adjudicators will not deviate. From the regulated party's perspective, the agency skirted the procedural rules and protections of notice and the opportunity to comment to achieve the same practical effect as a legally binding rule. Policy statements and interpretive rules, however, are technically open to challenge in agency adjudications or before a court. They stand in contrast to agency rules that are legally binding; the wisdom of those rules is not on the table.¹⁸

Deciding whether an agency has properly used the policy statement or interpretive rule exemptions from notice-and-comment rulemaking is very difficult.¹⁹ A court will only attempt to decide if an agency properly invoked an exemption after the fact. If an agency issues a rule via a policy statement or enforces a statute or regulation based on the contents of a policy statement, a regulated party might challenge the agency's decision to promulgate by policy statement or to enforce based on the contents of the policy statement. The regulated party might argue that the agency made a procedural error and should have engaged in notice-and-comment rulemaking procedures.²⁰ Only then will a court make the determination. The next section takes a closer look at the tools and approaches courts use to make such determinations.

B. A Taxonomy of Agency Rules and Distinguishing Between Different Types of Agency Rules

Since the enactment of the APA, judges and scholars have sought to create a taxonomy of rules and to clarify how to distinguish between binding and non-binding rules. The effort continues in the twenty-first century. Cases from the U.S. Court of Appeals for the D.C. Circuit are a good guide to explore the struggle.

A "taxonomical guide"²¹ is necessary. The binding rules discussed above

18. Such rules may be challenged on other grounds, such as a constitutional violation. But the regulated party may not argue that the agency should pick a different rule to apply.

19. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

20. See Funk, *supra* note 16, at 1324.

21. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the*

are called “legislative rules” and have the force and effect of law.²² Non-binding rules are called “nonlegislative rules” and, as discussed above, do not have the force and effect of law.²³ Two examples of nonlegislative rules are policy statements and interpretive rules. At times, other names are used to refer to nonlegislative rules, such as *guidance document*, *sub-regulatory rule*, or the name of a more specific type of guidance document, such as a reference to an agency manual, a guidance letter, or operating instructions.

While policy statements and interpretive rules are both examples of nonlegislative rules, they do retain their own independent characteristics, despite “the tendency of courts and litigants to lump [them] together”²⁴ As explained above, policy statements lay out an agency’s proposed approach toward a particular issue. The D.C. Circuit has explained, “By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.”²⁵ Policy statements “[do] not seek to impose or elaborate or interpret a legal norm.”²⁶ Interpretive rules, on the other hand, reflect an agency’s interpretation of a “legal norm . . . that Congress has devised.”²⁷ When issuing an interpretive rule, the agency “does not claim to be exercising authority to itself make positive law.”²⁸ Instead of exercising its own authority to create a legal norm, the agency instead interprets an already existing norm.

There is also a distinction between “substantive” and “procedural” rules under the APA.²⁹ Under the APA, substantive rules are those that are not procedural,³⁰ but not all substantive rules are legislative rules. A policy statement, for example, may be substantive (if it does not establish a procedure) but it does not have the force of law and therefore earns the nonlegislative label.³¹

The taxonomy defines labels, but the task of placing those labels on

Like—Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1319 (1992).

22. See Funk, *supra* note 16, at 1322.

23. See *id.* at 1322–23.

24. Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 93–94 (D.C. Cir. 1997).

25. *Id.* at 94.

26. *Id.*

27. *Id.* Interpretive rules also may interpret a regulation. *Id.*

28. *Id.*

29. See Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec., 653 F.3d 1, 5 (D.C. Cir. 2011); see also JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 74 n.114 (4th ed. 2006).

30. *Elec. Privacy Info. Ctr.*, 653 F.3d at 5–6.

31. See LUBBERS, *supra* note 29, at 74 n.114; Anthony, *supra* note 21, at 1323.

specific agency rules remains. During litigation, although the agency may have given a particular label to one of its rules, an opposing party may argue that the agency's label is incorrect.³² Therefore, the fundamental question is whether the agency properly invoked an exemption from notice-and-comment rulemaking.

How is a court to tell whether a particular rule really is nonlegislative?³³ Many tests exist, but no one test is completely satisfactory. Some tests apply when the task is to determine whether a rule truly is interpretive (and not a legislative rule),³⁴ while others are focused on determining whether a rule truly is a policy statement (and not a legislative rule).³⁵

To determine whether a rule truly deserves the interpretive label, courts have applied several approaches. One test, the legal effects test, asks whether the agency has created new law, or whether it has merely interpreted existing law.³⁶ If the promulgated rule creates new law, the rule is a legislative rule and should have been implemented using notice-and-comment rulemaking. A related test asks whether the rule creates a binding norm.³⁷ If so, it is a legislative rule. And another, more predominant, approach asks whether the rule effects substantive change or whether it is merely a clarification.³⁸ If it is a substantive change, the rule is legislative. Finally, yet another approach may apply if the agency is changing a prior interpretation through an interpretive rule.³⁹

A recent case on a controversial subject illustrates the task of distinguishing between interpretive rules and legislative rules. A privacy organization challenged the Transportation Security Administration's (TSA's) decision to screen airplane passengers with advanced imaging technology.⁴⁰ This technology allows screeners to create a "naked" full body scan image of each passenger. TSA implemented this technology

32. See, e.g., *Chamber of Commerce v. Dep't. of Labor*, 174 F.3d 206, 208 (D.C. Cir. 1999).

33. The major approaches adopted by courts are discussed here. Scholars have also suggested ways to tackle this distinction. See, e.g., Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994); Anthony, *supra* note 21, at 1311; David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010); William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000).

34. LUBBERS, *supra* note 29, at 78–93.

35. *Id.* at 94–104.

36. *Id.* at 79–81.

37. *Id.* at 81–85.

38. *Id.* at 85–89.

39. *Id.* at 89–93.

40. *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).

under a congressional directive to develop screening techniques that can detect non-metallic dangerous materials.⁴¹ After testing, TSA chose the body scan technology to meet this broad congressional directive.⁴² TSA gives passengers an option at checkpoints where the technology is in use: undergo the body scan or be subject to a pat down.⁴³

In challenging the decision to implement the body scan technology, the privacy organization argued that TSA violated the APA by failing to use notice-and-comment rulemaking to develop and implement the body scan requirement.⁴⁴ The D.C. Circuit agreed, concluding that the decision to use the technology did not fall under any of the exemptions to the requirement to use notice-and-comment rulemaking.⁴⁵

In response to TSA's argument that notice-and-comment procedures were not necessary because the decision to use the technology was merely an interpretive rule, the D.C. Circuit explained that distinguishing between interpretive rules and legislative rules requires asking whether the challenged agency action effects substantive change.⁴⁶ TSA argued that its decision merely reflected its interpretation of a congressional directive and did not effect substantive change.⁴⁷ The D.C. Circuit disagreed. It stated, "[W]e conclude the TSA's [decision] substantially changes the experience of airline passengers and is therefore not merely 'interpretative.'"⁴⁸ Illustrating the fine line between interpretation and substantive change, the D.C. Circuit conceded that there was "some merit" to TSA's argument that it was simply resolving an ambiguity present in Congress's statutory directive.⁴⁹ Nevertheless, the D.C. Circuit concluded that the APA "would be disserved" if TSA could interpret that broad statutory directive to bind "to a strict and specific set of obligations" without using notice-and-comment rulemaking.⁵⁰

In an attempt to summarize the D.C. Circuit's decisions addressing the interpretive rule/legislative rule divide, one panel concluded that "insofar as our cases can be reconciled at all," a purported interpretive rule should have been promulgated as a legislative rule if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of

41. *Id.* at 3.

42. *Id.*

43. *Id.*

44. *Id.* at 4.

45. *Id.* at 5–8.

46. *Id.* at 6–7.

47. *Id.*

48. *Id.* at 7.

49. *Id.*

50. *Id.*

duties.”⁵¹ Other indicators of a legislative rule are “whether the agency has published the rule in the Code of Federal Regulations, . . . whether the agency has explicitly invoked its general legislative authority, . . . [and] whether the rule effectively amends a prior legislative rule.”⁵² Under the first criterion, an agency letter that explained that certain x-ray results qualified as a “diagnosis” (an existing regulatory term), and thus must be reported, truly was an interpretive rule because the enforcement mandate came from the notice-and-comment regulation, and not from the letter.⁵³ The letter did not fill a legislative gap and create an enforcement baseline, but rather interpreted an existing term.

In contrast, an agency order was not properly labeled an interpretive rule when it substantively changed an already existing regulation. A Federal Communications Commission order effected substantive change because it required telephone carriers to allow customers to transfer a landline telephone number to a wireless carrier, in contrast to a previous order that did not require location portability.⁵⁴ Because the new order did more than “suppl[y] crisper and more detailed lines than the authority being interpreted,” it should have been promulgated as a legislative rule.⁵⁵

As the above examples show, determining whether an agency appropriately applied the interpretive rule label is an intensively case-specific inquiry. An agency will argue that it is merely interpreting part of the duties delegated to it, while the party challenging the lack of notice-and-comment rulemaking will argue that the purported “interpretation” in fact invokes substantive change. The line between interpretation and substantive change is a fine one that can be hard to locate. Scholars have debated the varying approaches to locating the line and have suggested alternative methods of drawing the line.⁵⁶

Courts also will engage in a case-by-case, statement-specific inquiry to determine whether an agency-labeled policy statement truly sets flexible guidance or creates something more like a binding norm. While similar to the interpretive rule inquiry in that it is case-specific and involves fine line drawing, the inquiry is different.

The D.C. Circuit has established general criteria for distinguishing between policy statements and legislative rules. Applying those general criteria in a particular case entails a close examination of the language of

51. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

52. *Id.*

53. *Id.*

54. *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005).

55. *Id.* at 38 (quoting *Am. Mining Cong.*, 995 F.2d at 1112).

56. *See supra* note 33.

the purported policy statement and also the agency's behavior regarding the statement. Further complicating matters is that the criteria have evolved over time, to the point where two sets of criteria exist in the D.C. Circuit. However, it is possible to conclude that the absence of mandatory language, flexible direction to agency subordinates, and a flexible, open-minded track record are the hallmarks of a policy statement.

In 1980, the D.C. Circuit laid out two criteria for courts to consider.⁵⁷ The first is that a true policy statement only operates prospectively.⁵⁸ A true policy statement may not have a present effect or create a binding norm.⁵⁹ The second is that a true policy statement must "genuinely leave[] the agency and its decision-makers free to exercise discretion."⁶⁰ The D.C. Circuit has recognized that identifying rules that genuinely allow for discretion, as opposed to those that practically bind, is an art rather than a science.⁶¹

The D.C. Circuit "scrutinized the language of the purported statement and the circumstances of its promulgation" to conclude that a pronouncement of the International Commerce Commission was not, in fact, a policy statement.⁶² Looking at the language of the pronouncement, the court emphasized its mandatory language, noting that "nothing in it even hints to those who will apply the statement that they may exercise any discretion in doing so," and that the language established a rule that would take immediate effect without any further agency action.⁶³ The D.C. Circuit also noted that the agency itself "regard[ed] the policy statement as binding."⁶⁴

Later cases reveal a second set of criteria.⁶⁵ These criteria are "(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."⁶⁶ Under these criteria, "the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a

57. *Am. Bus Ass'n. v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

58. *Id.* at 529.

59. *Id.* at 530.

60. *Id.* at 529.

61. *See id.* at 529–30.

62. *Id.* at 530–31.

63. *Id.* at 531–32.

64. *Id.* at 532.

65. *See Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (enunciating the criteria for consideration); *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (noting the differing tests); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (comparing the two sets of established criteria).

66. *Molycorp*, 197 F.3d at 545.

regulation, i.e., that it has the force of law.”⁶⁷ While it is not entirely clear when either set of criteria will govern, the D.C. Circuit has acknowledged that the two sets of criteria overlap in that they both aim to discover whether the purported policy statement is, in fact, binding.⁶⁸

A survey of some of the D.C. Circuit’s leading cases on this issue reveals that the court usually looks to the language of the agency rule and to the agency’s own behavior for clues.⁶⁹ In one case, the court determined that an agency guidance document was actually a legislative rule because its language and application revealed that it did “purport to bind applicants.”⁷⁰ The court cited the mandatory language of the document (providing that regulated parties must choose one of two assessment methods) and found that even though the document gave regulated parties two options for compliance, it required compliance with one or the other.⁷¹ Looking to the agency’s behavior, the court noted the absence of evidence showing that the agency had not treated the document as binding.⁷² Similarly, the court held a purported policy statement to be a legislative rule where the agency “enacted a firm rule with legal consequences that are binding on both petitioners and the agency, and petitioners will be afforded no additional opportunity to make the arguments to the agency.”⁷³ In so determining, the court discussed the document’s mandatory language (the agency “will not consider”).⁷⁴ Finally, the court discovered another faulty label by examining both the language of a document and the agency’s own actions.⁷⁵ Despite that the agency claimed discretion to deviate from the document, the D.C. Circuit held a document to be a legislative rule where the document also contained mandatory language (“will be used”) and where the agency’s behavior revealed it to be “close-minded and dismissive” on the issue.⁷⁶

Nevertheless, the D.C. Circuit has also agreed with an agency’s policy statement label. In one case, the court looked to the agency’s stated

67. *Id.*

68. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382–83 (D.C. Cir. 2002).

69. *See, e.g., id.* at 383; *Chamber of Commerce v. Dep’t of Labor*, 174 F.3d 206, 212–13 (D.C. Cir. 1999); *U.S. Tel. Ass’n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946–47 (D.C. Cir. 1987); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537–38 (D.C. Cir. 1986).

70. *Gen. Elec.*, 290 F.3d at 384–85.

71. *See id.* at 384.

72. *See id.* at 385.

73. *Croplife Am. v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003).

74. *Id.* at 881.

75. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988).

76. *Id.* at 1320–22.

purpose and to the flexibility of the pronouncement.⁷⁷ Deviations were possible and the statement did not appear to have any immediate effect.⁷⁸ In another case where the D.C. Circuit upheld an agency's policy statement label, the agency document reflected only the agency's views and contained conditional language ("*In general*, it is not appropriate . . .").⁷⁹ Because the agency had not "commanded, required, ordered, or dictated," but rather left room for discretion and did not definitely determine the outcome of any adjudication, the D.C. Circuit held the document to be a true policy statement.⁸⁰ Even a recommendation with an arguably practical coercive effect may be a true policy statement if "the practical effect of the agency action is not a certain change in the legal obligations of a party."⁸¹

Reviewing these opinions of the D.C. Circuit reveals that while it is possible to draw general conclusions about what the court tends to look for (absence of mandatory language, flexible direction to agency subordinates, and a flexible, open-minded track record), the individualized factual inquiry makes it difficult to predict whether the court will agree with any agency's particular use of the policy statement label. This lack of predictability has led scholars to present alternative methods of determining when a policy statement actually deserves the label.⁸²

C. Concerns About Nonlegislative Rules

Concern about agency use of nonlegislative rules goes beyond a disapproval of the predictability in labeling agency rules. Scholars and others have questioned whether agencies use the exemptions from notice-and-comment rulemaking too frequently to bind practically, even if not legally, and have also tied the use of nonlegislative rules to a concern about a shift away from notice-and-comment rulemaking. These efforts have led to proposals to reform the way that agencies use nonbinding rules.

A listing of the pros and cons of agency use of nonlegislative rules calls to mind the cliché, "can't live with them, can't live without them." Nonlegislative rules do provide agencies with needed flexibility and the ability to quickly share information with agency employees and the public

77. See *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 40 (D.C. Cir. 1974).

78. See *id.* at 40–41.

79. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 809 (D.C. Cir. 2006); see also *Catawba Cnty. v. EPA*, 571 F.3d 20, 33–35 (D.C. Cir. 2009).

80. *Ctr. for Auto Safety*, 452 F.3d at 809–10; see also *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545–46 (D.C. Cir. 1999) (explaining that the document at issue contained disclaimers stating that it was intended only to assist and that it was not a substitute for legal requirements).

81. *Nat'l Ass'n of Homebuilders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005).

82. See *supra* note 33.

at a relatively low cost.⁸³ If only legislative rules were available, there is no guarantee that agencies would (or could afford to) produce more legislative rules. Instead, agencies might communicate less often with the public and share less information overall, turning instead to more case-by-case adjudications.⁸⁴ Agency decisionmaking might become less transparent as regulated parties would have less of an indication about how an agency thinks internally about a particular issue or statutory term.⁸⁵ Adjudications could become less consistent also, as front-line adjudicators would receive less direction if there were no policy statements or interpretive rules.⁸⁶

But the usefulness and necessity of nonlegislative rules is countered by a nagging concern that when an agency issues a nonlegislative rule, it is cutting procedural corners.⁸⁷ Regulated parties may feel obligated to follow the directives of nonlegislative rules. The sense is that even if the agency says it is keeping an open mind, the safest course is to follow the direction the agency has laid out. A regulated party may find the path of least risk is to follow what the agency indicates it will do.⁸⁸ However, this gives the nonlegislative rule the same practical effect as a legislative rule without the procedural protections of notice-and-comment rulemaking. Also, the lack of warning through notice and of an opportunity for public comment allows new information contained in a nonlegislative rule to surprise and shock regulated parties and to lead regulated parties to perceive a need to quickly and dramatically change their behavior.⁸⁹

The idea that an agency may use a nonlegislative rule to bind practically is unacceptable to some. For example, Professor Robert Anthony argued that policy statements—as opposed to interpretive rules—should not be used to bind, whether legally or practically.⁹⁰ Professor Anthony recommended that agencies use legislative rule procedures “for any action in the nature of rulemaking that is intended to impose mandatory

83. See Sean Croston, *The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over “Regulation Through Guidance,”* 63 ADMIN. L. REV. 381, 382–84 (2011); Funk, *supra* note 16, at 1323; Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007).

84. See Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 576 (1977).

85. See Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 727–28 (2007).

86. Cf. Croston, *supra* note 83, at 383; Mendelson, *supra* note 83, at 409.

87. See Croston, *supra* note 83, at 384–87; Funk, *supra* note 16, at 1323.

88. See Mendelson, *supra* note 83, at 400, 407, 412.

89. See Croston, *supra* note 83, at 385–87. There are additional concerns about nonlegislative rules related to judicial review. See Johnson, *supra* note 85, at 704.

90. See Anthony, *supra* note 21, at 1315.

obligations or standards upon private parties, or that has that effect.”⁹¹ To implement a truly nonbinding policy statement, Professor Anthony stated that an agency “should stand ready to entertain challenges to the policy in particular proceedings to which the document may apply, and should observe a disciplined system for maintaining an ‘open mind’ when passing upon such challenges.”⁹²

To Professor Anthony, a nonlegislative rule with practical binding effect is one that the agency “treats [in] the same way it treats a legislative rule—that is, as dispositive of the issues that it addresses—or leads the affected public to believe it will treat the document that way.”⁹³ Evidence of the agency’s treatment includes: an enforcement action to implement the standard expressed in the nonlegislative rule; the agency’s regular application of the standard; an absence of an opportunity to be heard on the standard before it is applied; and whether “affected private parties are reasonably *led to believe* that failure to conform will bring adverse consequences.”⁹⁴ An agency expression that it retains discretion, despite its issuance of the guidance document, would not sway Professor Anthony’s position.⁹⁵ His focus on the practical binding effect settles on whether the regulated parties’ discretion has been constrained, and is less concerned with restrictions on the agency’s discretion.⁹⁶

The disadvantages of using nonlegislative rules to bind practically are enhanced by an agency’s increased reliance on nonlegislative rules.⁹⁷ Explanations of why agencies tend to favor nonlegislative rules over notice-and-comment rulemaking usually lead to a discussion about ossification. While the assertion is contested,⁹⁸ many have argued that the procedural

91. *Id.*

92. *Id.* at 1316. Professor Anthony elaborated on the procedure:

[T]he agency should afford the affected party a fair opportunity to challenge the legality or wisdom of the statement, or to suggest that a different policy be adopted in its stead, in a forum that assures adequate presentation of the affected person’s positions and consideration of those positions by agency officials possessing authority to take or recommend final action upon them.

Id. at 1375. *But see* Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1499 (1992) (responding to Professor Anthony’s approach and noting that it may discourage agencies from providing guidance).

93. Anthony, *supra* note 21, at 1328.

94. *Id.* at 1328–30.

95. *Id.* at 1360.

96. *Id.* at 1360–61.

97. *See generally* Johnson, *supra* note 85, at 695; Mendelson, *supra* note 83, at 398–99.

98. *See, e.g.,* Stephen M. Johnson, *Ossification’s Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008) (examining EPA rules to determine whether notice-and-comment rulemaking has in fact been ossified and finding that the claims of ossification require more conclusive research); Connor N. Raso, Note, *Strategic or*

requirements of notice-and-comment rulemaking push agencies to use the exemptions.⁹⁹ The argument is that because notice-and-comment rulemaking has become more complex and time-consuming through statutory requirements, Executive Order obligations, and the complexities of judicial interpretation of the APA's obligations,¹⁰⁰ agencies seek refuge in the form of nonlegislative rules. Professor Todd Rakoff has argued that this movement toward nonlegislative rules is part of a larger phenomenon where "less formal modes of regulation" become more formal over time and are eventually replaced by less formal modes of regulation once those previously informal modes become too formal.¹⁰¹

Concern about agency use of guidance documents is not new. In 1965, Congress considered eliminating the exemptions to informal rulemaking.¹⁰² In 1977, Professor Michael Asimow proposed a statutory change to the APA that would require an opportunity for the public to submit comments on a nonlegislative rule after its adoption.¹⁰³ The Administrative Conference of the United States (ACUS) adopted the substance of his proposal.¹⁰⁴ In the early 1980s, during the Reagan Administration, there was a push to narrow the exemptions from notice-and-comment rulemaking and to require more pre-adoption public participation in the

Sincere? *Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010) (finding evidence suggesting that agencies do not use guidance documents to avoid rulemaking); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (cautioning that ossification may stem from courts' hard-look review but that a mere relaxation of judicial review is also unwarranted).

99. See, e.g., Johnson, *supra* note 85, at 700–01 ("There is a general consensus that the notice and comment rulemaking process for legislative rules has become 'ossified' over the last few decades as Congress, courts and the executive branch have imposed substantial new procedural requirements on the APA notice and comment process." (footnotes omitted)); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473–78 (2008) (discussing the role of ossification in the decline of final rules by 61% and in the decline of proposed rules by 48% from 1979 to 2005); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (evaluating alternatives to deossify rulemaking and in the process highlighting sources of ossification).

100. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 164–65 (2000) (noting the increased burden that rulemaking provisions accrued throughout the years); Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 536 (2000) (organizing the increased requirements of administrative rulemaking by the corresponding Executive Order or legislation); OFFICE OF INFO. & REGULATORY AFFAIRS, *The Reg Map*, available at <http://www.reginfo.gov/public/reginfo/Regmap/index.jsp>.

101. Rakoff, *supra* note 100, at 170.

102. See Asimow, *supra* note 84, at 575–76 n.262.

103. See *id.* at 578–84.

104. See *id.* at 578 n.266.

creation of nonlegislative rules.¹⁰⁵ Professor Asimow critiqued those proposals and renewed his call for post-adoption public participation.¹⁰⁶

ACUS again addressed nonlegislative rules in 1992.¹⁰⁷ ACUS expressed its concern about “situations where agencies issue [guidance documents] which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.”¹⁰⁸ In response to this concern, ACUS recommended that agencies not use guidance documents “to impose binding substantive standards or obligations.”¹⁰⁹ When an agency does issue a guidance document, ACUS recommended that the agency make clear to agency staff and to the public that the document is non-binding.¹¹⁰ To allow for feedback from affected parties, ACUS further recommended that agencies allow “requests for modification or reconsideration” of agency guidance documents.¹¹¹ Such a procedure not only would allow affected parties a chance to challenge the contents of a guidance document, but also could serve as a signal to an agency that the subject of the guidance document is better addressed through notice-and-comment rulemaking.¹¹²

The Office of Management and Budget (OMB), under President George W. Bush, published a final bulletin in 2007 establishing “Agency Good Guidance Practices” in response to concerns “that agency guidance practices should be more transparent, consistent and accountable.”¹¹³ OMB recognized the promise of agency guidance—constraining agency discretion and increasing efficiency and fairness—but also acknowledged the existence of “poorly designed or improperly implemented” guidance documents, as well as the lure of overusing guidance documents in lieu of

105. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 381.

106. *See id.* at 410–25. Professor Asimow has also critiqued California’s requirement of pre-adoption notice-and-comment procedures for nonlegislative rules, stating:

In an ideal world, perhaps, all rules should be adopted only after prior notice and comment procedure . . . But we live in a less than ideal world, in which administrative agencies have austere budgets and drastically limited staff resources; they must constantly establish priorities among the possible uses of those resources. Yet agencies must grapple with regulatory problems that require intensive use of their resources and quick responses.

Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 45 (1992).

107. Administrative Conference of the United States, 1 C.F.R. § 305.92-2 (1993).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007).

engaging in legislative rulemaking.¹¹⁴ OMB expressed that the Good Guidance Practices aimed to “ensure” that guidance documents are “[d]eveloped with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements.”¹¹⁵

OMB’s Good Guidance Practices implemented special requirements for the issuance of “significant guidance documents” and “economically significant guidance documents.”¹¹⁶ Under the Good Guidance Practices, agencies must establish internal clearance procedures for significant guidance documents, not deviate from significant guidance documents without justification and supervisory approval, and must conform to certain practices in drafting significant guidance documents, including a prohibition on mandatory language.¹¹⁷ Agencies also must create “adequate procedures for public comments on significant guidance documents and to address complaints regarding the development and use of significant guidance documents.”¹¹⁸ For significant guidance documents, the Good Guidance Practices do not require an agency to respond to comments, nor do they mandate a pre-adoption opportunity to comment.¹¹⁹ For economically significant guidance documents, however, the Good Guidance Practices do require pre-adoption comments and an agency response to comments.¹²⁰

A debate over the Good Guidance Practices ensued. The debate addressed such weighty issues as the President’s control over executive agencies, the actual effects of procedural restraints on agencies, and the need for OMB oversight over agency use of nonlegislative rules.¹²¹ One

114. *Id.*

115. *Id.* at 3433. President Obama rescinded an Executive Order tied to the Good Guidance Practices, Executive Order 13,422, but the Office of Management and Budget (OMB) Good Guidance Practices remain (apparently). *See* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Guidance for Regulatory Review (Mar. 4, 2009) (explaining that President Obama “restored the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007,” and that “[d]uring this period, [OMB] reviewed all significant proposed or final agency actions, including significant policy and guidance documents”).

116. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007). *See also* Mendelson, *supra* note 83, at 401 (tracing the “good guidance” from Congress’s mandate to the Food and Drug Administration to implement good guidance practices, which ultimately inspired OMB’s Good Guidance Practices).

117. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3436–38.

118. *Id.* at 3437.

119. *See id.* at 3437–38.

120. *See id.* at 3438.

121. *See* Connor Raso, Introductory Comment, *Symposium: Reflections on Executive Order 13,422*, 25 YALE J. ON REG. 77, 80–82 (2008).

critique expressed a concern that the Good Guidance Practices could ossify the production of nonlegislative rules and would not necessarily increase the amount of notice-and-comment rulemaking.¹²² Additional concerns included a lack of statutory authority for the requirements and a fear that regulated parties could use the comment-and-review process to push for unjustifiable rollbacks of regulatory burdens.¹²³

While not in the federal sphere, the 2010 Model State Administrative Procedure Act (MSAPA) presents another reform approach. The MSAPA hinges the acceptability of the use of nonlegislative rules on whether a regulated party is afforded “an adequate opportunity to contest the legality or wisdom of a position taken in the [guidance] document.”¹²⁴ According to the MSAPA, an agency guidance document may contain binding instructions to agency staff as long as the opportunity to contest exists.¹²⁵ It also provides that if an agency diverges from a standard announced in a guidance document in a particular adjudication, the agency must explain why it is following a different course. The explanation must include “a reasonable justification for the agency’s conclusion that the need for the variance outweighs the affected person’s reliance interest.”¹²⁶

In addition to these reform proposals, scholars continue to express concern about guidance documents and to propose changes accordingly.¹²⁷ For example, Professor Stephen Johnson recommends amending the APA to encourage opportunities for public participation, as well as rewarding agencies that allow public participation by giving them more deference when a nonlegislative rule is challenged in court.¹²⁸ Professor Nina Mendelson has evaluated several reform proposals, including her own proposal to amend the APA to allow petitions for amendment or repeal of nonlegislative rules, and Professors John Manning’s and Peter Strauss’s proposals to treat guidance documents like precedent.¹²⁹

The use of nonlegislative rules continues to vex the practice and study of administrative law. Courts struggle with the task of evaluating agency decisions to invoke the notice-and-comment exemptions, and reform proposals by scholars and organizations continue to reflect a discomfort with agency use of guidance. Agency guidance is designed under the APA

122. See Johnson, *supra* note 85, at 696–97.

123. *Id.* at 732–33.

124. Model State Administrative Procedure Act § 311(b) (2010).

125. See *id.* § 311(c).

126. *Id.* § 311(d).

127. See, e.g., Johnson, *supra* note 85; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); Mendelson, *supra* note 83; Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011).

128. See generally Johnson, *supra* note 85, at 697.

129. See Mendelson, *supra* note 83, at 438–46.

to provide a flexible and efficient method for agencies to express themselves and to engage with stakeholders; however, these attributes must be balanced against concerns that agencies overuse nonlegislative rules to achieve a practically binding effect without public participation. As Part II reveals, these same concerns extend to immigration law.

The debate over agency use of nonlegislative rules also invokes a broader, deeper debate over the appropriate amount of power delegated to administrative agencies. Reaction to the use of guidance can be tied to a general distaste for regulation. In fact, some major reform efforts, such as the Bush Administration's Good Guidance Practices, are tied to a desire to decrease agency activity.¹³⁰ While not all who caution against agency guidance are anti-regulatory, there is a connection between a distaste for guidance and a distaste for regulation generally. That connection must be considered in the context of the debate over the use of nonlegislative rules in immigration law. Part II also explores this connection.

II. CONNECTING IMMIGRATION LAW TO ADMINISTRATIVE LAW

Every day, individuals and employers file paperwork with the hope of obtaining approval for a family member to gain legal immigration status or for a prospective employee to gain permission to work in the United States. This is a huge undertaking. United States Citizenship and Immigration Services, a part of the Department of Homeland Security, reported that on any given day it processes 30,000 applications for benefits.¹³¹

USCIS's adjudication framework includes both an initial decisionmaking level and an administrative appeal level. USCIS adjudicators rely on the Immigration and Nationality Act, other federal statutes, federal regulations, and a dizzying array of agency guidance materials, such as the Adjudicator's Field Manual, Operation Instructions, and individual memoranda. When front-line USCIS adjudicators receive an application for a particular immigration benefit, they may approve the application, issue a Request for Evidence for more information, or deny the application.

The Administrative Appeals Office within USCIS hears administrative appeals of certain decisions made by front-line USCIS adjudicators. The AAO is one of eleven program offices that report to the Director of USCIS.¹³² By default, the AAO's decisions are not precedential, but they

130. President Bush's Executive Order 13,422 required agencies to identify specific market failures before regulating, among other restrictions on agency activity. See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763 (Jan. 23, 2007).

131. See A DAY IN THE LIFE, *supra* note 2.

132. See USCIS Organizational Chart, USCIS, <http://www.uscis.gov/> (follow "About us" hyperlink; then follow "USCIS Organizational Chart" hyperlink in the "More Information" box to the right).

may be designated as precedential through a complex and lengthy process that requires the approval of entities outside of USCIS.¹³³

This Part connects both problems and innovations related to USCIS's use of nonlegislative rules to administrative law. USCIS's use of guidance is problematic because of: (1) USCIS's own confused explanation of the proper use of such guidance; (2) underuse of the notice-and-comment rulemaking process by USCIS; (3) abrupt changes in adjudication standards introduced by USCIS through nonlegislative rules; and (4) confusion about the effect of USCIS's nonlegislative rules in appeals to the AAO. Recently, however, USCIS has acknowledged that its use of nonlegislative rules vexes its stakeholders¹³⁴ and has implemented a draft memorandum for comment procedure to reform its use of nonlegislative rules.

The discussion below reveals that immigration law is in step with administrative law when it comes to its nonlegislative rules troubles and innovations. Simply put, complaints about USCIS's use of guidance documents are complaints about administrative law. A desire to reform USCIS's practices regarding nonlegislative rules cannot be separated from the larger debate about the use of such rules in administrative law generally. Even USCIS's draft memorandum for comment procedure is not exclusive to immigration law. Its role as an important and necessary advancement in immigration law is clear once it is viewed through the broader administrative law debate about guidance documents. That said, USCIS (and the Department of Homeland Security) must be careful not to view nonlegislative rules as the only tool available. Both must also place increased priority on notice-and-comment rulemaking.

133. See Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 72–73 (2011) (discussing the role of the Department of Homeland Security General Counsel and of several units of the Department of Justice in designating an Administrative Appeals Office (AAO) decision as precedential).

134. U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTIONS AND ANSWERS: USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, APRIL 7, 2011 1 (2011), available at http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/April%202011/AILA%20_040711.pdf (“Many AILA members and other stakeholders consider the current employment benefit adjudications environment to be the most difficult and challenging experienced in decades.”). In 2010, USCIS announced an agency-wide policy review and sought stakeholder input to prioritize its review. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *USCIS Announces First Ten Areas of Focus for Agency-wide Policy Review*, USCIS (July 26, 2010), <http://www.uscis.gov> (follow “News” hyperlink; click “News Releases” hyperlink on the left-hand side; then scroll down to “July 2010”). USCIS Director Alejandro Mayorkas said, “As an agency, we must achieve consistency in the policies that guide us and in how we implement them for the public benefit.” *Id.*

A. *The Troubles with Nonlegislative Rules in Immigration Law Are
Administrative Law Problems*

USCIS's use of nonlegislative rules frustrates private immigration attorneys. The American Immigration Lawyers Association (AILA) has expressed its concern over the use of such rules in immigration law.¹³⁵ AILA has complained to USCIS about changing adjudication standards, confusion as to the binding effect of guidance documents, and a lack of transparency accompanying the use of guidance.¹³⁶ One attorney aptly described her confusion and frustration with the use of guidance in immigration law:

I was confused. For years, I kept trying to figure out what the consequences were if someone travels during the pendency of certain applications and petitions. There aren't many regulations one can turn to, and what guidance is available is found in aging memoranda, timeworn letters to practitioners, scattered minutes of liaison meetings between the American Immigration Lawyers Association (AILA) and the legacy Immigration and Naturalization Service (INS) and now the U.S. Citizenship and Immigration Services (USCIS), the U.S. Department of State (DOS), U.S. Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). Then, there are minutes of AILA meetings and telephone conferences with Service Center Operations and the four individual Service Centers (with their idiosyncratic ways of dealing with travel issues), and statements of government officials at AILA conferences. If that's not enough, add to the mix the word-of-mouth exchanges among immigration practitioners, not to mention the advice given on a variety of listservs, and in a second, you'll understand why, with no single repository to turn to for answers, one is left with the vague feeling that somewhere, at some time, someone said something about the issue you're now facing.¹³⁷

The practice of immigration law includes a dearth of firm rules.¹³⁸ This lack of stability can be disconcerting when advising a client about major life

135. See U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTIONS AND ANSWERS: USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, MARCH 19, 2009 2-3 (2009), available at http://www.uscis.gov/files/native/documents/aila_aao_qa_19march09.pdf. The American Immigration Lawyers Association is the premier organization representing the interests of private bar immigration attorneys. See AM. IMMIGRATION LAWYERS ASS'N, *About AILA*, AILA.ORG, <http://www.aila.org/content/default.aspx?docid=1021> (last visited Aug. 6, 2012).

136. QUESTIONS AND ANSWERS: USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, MARCH 19, 2009, *supra* note 135, at 2-3.

137. Naomi Schorr, *Didn't Somebody Say Something About That Somewhere? Travel During the Pendency of Applications and Petitions*, 12 BENDER'S IMMIGR. BULL. 1817 (2007). This excerpt raises a related problem of access to guidance documents. While USCIS does post guidance documents on its website by topic, it does not appear to post historical documents.

138. See generally Family, *supra* note 133.

decisions that could affect family unity or employment.

While it may present cold comfort, immigration law practitioners and scholars should realize that they are not alone in their frustration about agency use of nonlegislative rules. Other agencies routinely vex their own stakeholders with guidance documents. For example, one scholar has described the Federal Aviation Administration's (FAA's) use of guidance in a way that will sound very familiar to immigration lawyers:

Imagine that you are the owner of a small business operating private charter flights . . . If the FAA issues interpretive guidance stating that your current business practices fail to comply with applicable legal standards, you could elect to disobey the FAA's guidance and challenge its policies during any enforcement proceeding against you. However, doing so may result in the FAA temporarily seizing your aircraft or suspending your FAA certification pending the outcome of the proceeding. Moreover, the likelihood of persuading an agency hearing officer or a court that your actions comply with the applicable legal standards appears slim, as both will accord the FAA's interpretive guidance a high degree of deference.¹³⁹

Other agencies also use guidance to a great extent. For example, the Food and Drug Administration has relied on guidance to regulate prescription drug advertising instead of amending regulations dating to the 1960s;¹⁴⁰ the Environmental Protection Agency reported that it issued over two thousand guidance documents from 1996 to 1999;¹⁴¹ and the Department of Education primarily has relied on guidance documents to implement Title IX.¹⁴²

As Part I reveals, frustration with guidance documents is not unique to immigration law. Administrative law generally grapples with the rush to use guidance documents over notice-and-comment rulemaking, misuse of the notice-and-comment exemptions, and the negative effects of nonlegislative rules on stakeholders. The proper use of guidance documents is an unresolved issue that is fundamental to all of administrative law, even at the state level. The issue of the use of nonlegislative rules in immigration law cannot be unhinged from the debate about nonlegislative rules generally. Therefore, this Part analyzes USCIS's troubles with guidance documents from the broader perspective of administrative law.

139. Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 344 (2009) (footnote omitted).

140. Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 905 (2008).

141. Mendelson, *supra* note 83, at 399.

142. *See id.* at 404 (describing that since the enactment of Title IX, the Department of Education has issued only one notice-and-comment rule).

There are a few general considerations to keep in mind while exploring USCIS's troubles with guidance documents. First, because USCIS uses guidance documents problematically, it is easy to forget that nonlegislative rules can serve a positive purpose. An area of the law as technical and as fast-moving as immigration law could never be administered effectively by only notice-and-comment rulemaking. USCIS needs flexible tools to keep up with the demands of extremely complex statutes that are not static and that are administered by a diffuse and large group of low-level adjudicators around the country. USCIS needs mechanisms to communicate with adjudicators in a more nimble manner than notice-and-comment rulemaking allows, and guidance documents are at least more transparent than word-of-mouth conversations between low-level adjudicators and supervisors.

Nevertheless, guidance also has its downsides, such as its inherent uncertainty. But this drawback need not always outweigh the benefits of guidance. Guidance documents do provide a window into the agency's outlook and attitude. Without some guarantee of other insights, it would be a mistake to dismiss guidance documents whole-handedly. Without guidance, there would still be uncertainty in adjudication, and there would be less information available about how the agency would likely act in a given scenario.

Second, it is important to recognize that arguments against the use of guidance documents in immigration law are connected to arguments against the use of guidance generally. In arguing for greater restrictions on USCIS's use of guidance, proponents must recognize that their argument is a part of a much larger debate with wide-ranging reach, and that some calling for more restricted use of guidance documents do so because of an anti-regulatory agenda. If USCIS should not use guidance, then presumably it should be more difficult for all agencies to act.¹⁴³

143. Is it possible that only certain agencies should be restricted in their use of guidance? While comprehensive treatment of this question is beyond the scope of this Article, there is some precedent for this proposition. Congress has mandated certain guidance practices for the Food and Drug Administration (FDA) through its authorizing statute. *See id.* at 401 (describing how Congress required some public participation and ordered the FDA to issue the Good Guidance Practices). The answer may be that Congress should take a more active role and specifically rein in USCIS's use of nonlegislative rules. After all, USCIS is a Goliath compared to the individual foreign nationals who are seeking benefits from it. And the nature of the benefits they seek—the right to live with family, for example—certainly signals a need to make sure there is sufficient awareness of the applicable rules. Perhaps Congress should specifically restrict USCIS's use of guidance, but not other agencies'. While this Article defers answering the question of whether greater external controls are needed in immigration law, this Article recognizes that such questions are part of a wide debate with far-reaching repercussions that cut to the heart of our administrative state.

This broader perspective helps to diagnose USCIS's troubles with nonlegislative rules. It also frames a broader perspective on internal efforts by USCIS to reform its use of guidance documents through the draft memorandum for comment.

1. *USCIS's Problematic Explanation of Nonlegislative Rules*

The Adjudicator's Field Manual (the Manual) "comprehensively details USCIS policies and procedures for adjudicating applications and petitions."¹⁴⁴ In addition to collecting those policies and procedures, the Manual instructs adjudicators how to use the information contained in it. The Manual contains a section titled "Adherence to Policy" that instructs USCIS adjudicators about a difference between correspondence and policy.¹⁴⁵ According to the Manual:

It is important to note that there is a distinction between "correspondence" and "policy" materials. Policy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material. On the other hand, correspondence is advisory in nature, intended only to convey the author's point of view. Such opinions should be given appropriate weight by the recipient as well as other USCIS employees who may encounter similar situations. However, such correspondence does not dictate any binding course of action which must be followed by subordinates within the chain of command.¹⁴⁶

As examples of "policy," the Manual lists statutes and regulations, field manuals, operations instructions, precedent decisions, and memoranda bearing the label "P," for policy.¹⁴⁷ Examples of correspondence include non-precedent decisions and memoranda not bearing the label "P."¹⁴⁸

The Manual uses terminology that is not only inconsistent with the APA, but also appears to take a position that is plainly at odds with it. The Manual names statutes and regulations as types of "policy." Also, the Manual explains that some guidance documents, such as memoranda bearing the label "P," are binding on the agency. This seems to contradict the APA; policy statements do not have the force of law. Also, placing "P"

144. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Introduction to the Adjudicator's Field Manual*, USCIS (2011) [hereinafter *Field Manual Introduction*], <http://www.uscis.gov> (follow "Resources" hyperlink; then under "Other USCIS Links" follow "Immigration, Handbooks, Manuals and Guidance" hyperlink; then follow "Adjudicator's Field Manual" hyperlink).

145. U.S. CITIZENSHIP & IMMIGRATION SERVS., *ADJUDICATOR'S FIELD MANUAL* § 3.4 (2011).

146. *Id.* § 3.4(a).

147. *Id.*

148. *Id.*

memoranda in the same category as statutes gives the impression that they are of equal weight. To further complicate matters, the Introduction to the Manual states, “Important Notice: Nothing in this manual shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”¹⁴⁹ Under the Manual’s own version of administrative law, statutes and regulations belong in the same category as some guidance documents. Certain guidance documents are binding on the agency, but those documents do not create any legally enforceable right. The agency must rely on those documents, but the public may not.

One commentator argued that this language in the Manual does not indicate that the agency is bound to a “P” stamp memorandum in the sense that it is law, but rather indicates that agency employees are bound to look at memoranda bearing the “P” stamp and to thereafter exercise their own discretion.¹⁵⁰ If that is true, and this portion of the Manual does simply present a “managerial directive,”¹⁵¹ where does that leave correspondence? If the “P” stamp is merely a managerial directive that adjudicators must read and consider the memorandum, are adjudicators not even obligated to read correspondence (including memoranda not bearing the “P” stamp?) That does not seem so, considering that the Manual instructs adjudicators to give correspondence its “appropriate weight.”¹⁵² The better reading of the Manual is that it expects adjudicators to toe the line when it comes to “policy,” but that there is discretion when it comes to correspondence.

This commentator also argued that because agency management remains free to change any memorandum bearing the “P” label, the existence of mandatory terms directed toward lower-level agency adjudicators does not transform the memorandum into law.¹⁵³ This argument triggers the debate referenced in Part I—how does one tell when a legislative rule is masquerading as a policy memorandum?

The mandatory language would appear to work against the nonlegislative rule label under the D.C. Circuit precedent discussed in Part I, but the application of that precedent is unpredictable.¹⁵⁴ For example, one district court held that when the Manual states that “policy material is binding on all USCIS officers,” that “simply refers to the fact that an

149. *Field Manual Introduction*, *supra* note 144.

150. Geoffrey Forney, *The AAO and USCIS Policy Memoranda*, 16 BENDER’S IMMIGR. BULL. 821, 828 (2011).

151. *Id.*

152. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL § 3.4(a) (2011).

153. Forney, *supra* note 150, at 829.

154. *See generally* *Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006).

agency's interpretation of its own regulations is binding, not that the guidelines establish an independent source of binding legal authority."¹⁵⁵ Even if the Manual's explanation of guidance prevails in court, however, that does not excuse USCIS's description of administrative law. The description in the Manual leads to the impression that "P" stamp policy memoranda are special and that they are binding on the agency.

The inherent confusion about nonlegislative rules, a feature of mainstream administrative law, is evident in USCIS's own language in the Manual. The Manual's use of the terms "correspondence" and "policy," including the description of some guidance documents as binding policy, creates unnecessary confusion in an already baffling area of the law. At the very least, the Manual should be revised to conform to more recognized terminology and to the structure of the APA. It should explain the taxonomy of the APA and that nonlegislative rules are not binding on anyone, even the agency. While such a revision cannot magically erase the fundamental bewilderment surrounding the use of nonlegislative rules, it would at least eliminate the additional confusion presented by an inaccurate description of this corner of administrative law. This is especially important given the low representation rates in some categories. The Manual misleads stakeholders into believing that at least some guidance documents belong in the same category as statutes and regulations, thus presenting nonlegislative rules as binding, when the law says otherwise.¹⁵⁶

2. *USCIS's Controversial Uses of Nonlegislative Rules*

Beyond a controversial description of nonlegislative rules, USCIS also uses guidance in ways that result in strife. First, USCIS seems to favor guidance over notice-and-comment rulemaking. Second, the agency abruptly changes adjudication standards through guidance. Third, the Administrative Appeals Office has refused to follow guidance issued by other facets of USCIS.

155. *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 246 (D.D.C. 2010) (citation omitted).

156. USCIS has also communicated misleading information to AILA. When AILA complained about the AAO's refusal to follow policy memoranda, USCIS said in response:

The AAO, like any other adjudicative program within USCIS, is required to follow applicable law, regulations, binding decisions and agency policies. If AILA is aware of decisions that are contrary to existing statutes, regulations, binding case law, precedent decisions, or applicable policy guidance, USCIS requests those decisions be brought to the attention of the AILA liaison.

USCIS-AILA Liaison Committee Agenda, October 28, 2008, 13 BENDER'S IMMIGR. BULL. 1487, 1534 (2008).

a. *Use of Nonlegislative Rules Instead of Notice-and-Comment Rulemaking*

USCIS relies on guidance to a great extent. In fact, from the founding of the Department of Homeland Security in 2003 to November 2011, USCIS placed twenty-one proposed rules in the *Federal Register*.¹⁵⁷ About half of those notices deal with procedural issues (such as the adjustment of application fees) and the establishment of a genealogy program.¹⁵⁸ As far as regulations are concerned, many questions remain unanswered. Even when regulations are developed, the wait can be very long. For example, USCIS issued a notice of proposed rulemaking in 2011 addressing an issue Congress asked it to address in 2002.¹⁵⁹

There are, however, significant immigration law issues that are governed by nonlegislative rules.¹⁶⁰ While agencies do have discretion to decide whether to use guidance or to implement notice-and-comment rulemaking (as long as the guidance truly is guidance), USCIS's use of guidance in the absence of regulation is often controversial.¹⁶¹ Two examples that set the

157. Searching for USCIS "proposed rules" since the inception of the agency through November 4, 2011, on www.regulations.gov reveals twenty documents. A broader search for USCIS "rules" within the same timeframe reveals forty-eight documents, which includes one proposed rule apparently mistakenly not classified as a proposed rule in the system, twenty-four rules invoking some exception from informal rulemaking (eleven interim rules, five final interim rules, three final rules with a request for comments, and five final rules with no request for comments), eleven corrections or re-openings, one rule suspension, and eleven final rules generated as the product of a notice of proposed rulemaking.

158. *See supra* note 157.

159. Treatment of Aliens Whose Employment Creation Immigrant (EB-5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998, 76 Fed. Reg. 59,927, 59,929 (Sept. 28, 2011) (to be codified at 8 C.F.R. pts. 216, 245).

160. USCIS is a part of the Department of Homeland Security. Congress delegated rulemaking authority to the Secretary of the Department of Homeland Security. 8 U.S.C. § 1103(a)(3) (2006).

161. As described by two prominent immigration attorneys:

The Administrative Procedure Act (APA) provides a process for notice of proposed rulemaking and the opportunity for comment by interested members of the public before an agency issues a final regulation. Similarly, the Regulatory Flexibility Act (RFA) requires an analysis of a proposed rule in order to "minimize any significant economic impact of the rule on a substantial number of small entities." Moreover, in enabling legislation over several years, Congress has tasked the agency with the responsibility to issue regulations offering its interpretation of the statute in question. Rather than comply with the APA, RFA and several substantive immigration laws creating new rights or new restrictions, USCIS has adopted a practice of issuing proposed guidance and offering the public a few weeks to respond before the guidance becomes agency "policy." This abbreviated approach circumvents the protections of the APA and RFA, allows for no vetting of the rules by the public, no apparent role for the White House Office of Management and Budget, and no opportunity to analyze the agency's rationale for the policy decisions and legal interpretations developed in policy guidance.

tone for usual immigration law practice involve a complete lack of legislative rulemaking to implement a major statutory change and heavy use of guidance to resolve a multitude of issues regarding significant bars from entering the United States.

The first example demonstrates the use of guidance in the complete absence of regulation. The American Competitiveness in the Twenty-First Century Act of 2000 (AC-21),¹⁶² among other things, allows certain temporary workers to extend their stay past a six-year cap and makes their visas more portable from employer to employer.¹⁶³ No less than five USCIS memoranda exist on this topic, but there are no notice-and-comment regulations.¹⁶⁴ None of the agency work-product is in the form of

Angelo A. Paparelli & Ted J. Chiappari, *Intubation and Incubation: Two Remedies for an Ailing Immigration Agency*, NATION OF IMMIGRATORS, http://www.nationofimmigrants.com/Intubation%20and%20Incubation%20Two%20Remedies%20for%20an%20Ailing%20Immigration%20Agency_10%2024%2011%20%282%29.pdf (last visited Aug. 6, 2012) (footnotes omitted); *see also* OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, RECOMMENDATIONS TO IMPROVE THE QUALITY IN EXTRAORDINARY ABILITY AND OTHER EMPLOYMENT-BASED PETITION ADJUDICATION 7 (2011), *available at* http://www.dhs.gov/xlibrary/assets/cisomb-rec_extraordinaryability_petitions.pdf (recommending notice-and-comment rulemaking over guidance documents to create adjudicatory standards).

162. Pub. L. No. 106-313, 114 Stat. 1251 (2010) (to be codified at 8 U.S.C. § 1184).

163. *Id.* §§ 105–106.

164. Memorandum from Michael A. Pearson, Exec. Assoc. Comm'r Office of Field Operations, Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396) (June 19, 2001), *available at* <http://www.uscis.gov/files/pressrelease/ac21guide.pdf>; Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Aug. 4, 2003) [hereinafter Continuing Validity], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/i140_ac21_8403.pdf; Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Sunset of Additional \$1,000 Filing Fee Imposed by American Competitiveness and Workforce Improvement Act (ACWIA) and Return to 65,000 Annual Limit on H-1B Petition Approvals (Sept. 15, 2003) [hereinafter Sunset of Filing Fee], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/h1b_091503.pdf; Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the AC21 Act (May 12, 2005) [hereinafter Interim Guidance], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm051205.pdf; Memorandum from Donald Neufeld, Acting Assoc. Dir. for Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-

a notice-and-comment regulation, despite continuing assurances over the past nine years from the agency that rulemaking is in the works,¹⁶⁵ and despite that AC-21 has produced some tricky procedural and legal issues.¹⁶⁶ While stakeholders appear to be satisfied with the content of the AC-21 memoranda, one commentator has described “this happy situation” as “tenuous at best, since a new memorandum could be approved at any time that could completely change USCIS’ extra-legal, unofficial interpretation of regulation-free AC-21.”¹⁶⁷ Additionally, this commentator acknowledged that when (if ever) USCIS issues regulations addressing AC-21, those regulations could “disregard[] not only . . . AC-21 . . . memoranda, but the decade-long history of how AC-21 has operated in this legal vacuum.”¹⁶⁸

The second example involves a ground of inadmissibility known as the three- and ten-year bars.¹⁶⁹ This ground of inadmissibility provides that if an individual has accrued certain amounts of “unlawful presence” in the United States and then leaves the United States, that individual will be subject to either a three- or a ten-year bar from legally reentering the United States, even if the individual otherwise has legal means of entering (such as through marriage to a U.S. citizen).¹⁷⁰ The meaning of the statutory phrase “unlawful presence” is a significant immigration issue largely governed by memo.¹⁷¹

1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (May 30, 2008), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/ac21_30may08.pdf.

165. Pearson, *supra* note 164 (“The following guidelines establish interim procedures for use by Service personnel in the processing of new benefits under AC21 and the related legislation. Forthcoming regulations will promulgate substantive standards to be utilized in the adjudication of these new benefits.”); Neufeld, *supra* note 164, at 2 n.2 (“At a future date, USCIS plans to incorporate all previous still applicable guidance into forthcoming rulemaking relating to various AC21 . . . statutory provisions.”).

166. See, e.g., H. Ronald Klasko, *American Competitiveness in the 21st Century: H-1Bs and Much More*, 77 INTERPRETER RELEASES 1689, 1693 (2000).

167. Brandon Meyer, *The Administrative Procedures Act and USCIS Adjudications: Following the Law?*, IMMIGR. BRIEFINGS, May 2009, at 4, 6.

168. *Id.*

169. 8 U.S.C. § 1182(a)(9)(B) (2006).

170. *Id.*

171. A search for the terms “unlawful presence” and “unlawfully present” in the Code of Federal Regulations yielded a handful of regulations that address some narrow issues regarding the meaning of unlawful presence, but no regulation that generally addresses its meaning. Perhaps the broadest regulation is one that provides that time spent in removal proceedings has no effect on determining unlawful presence. 8 C.F.R. § 239.3 (2012). The others address narrow issues related to specific nonimmigrant categories. See *id.* § 214.2(h)(5)(xi)(B); *id.* § 214.2(h)(5)(xii); *id.* § 214.2(h)(6)(i)(C) (providing a thirty-day grace

The statute containing the unlawful presence bars provides that “an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the [Department of Homeland Security] or is present in the United States without being admitted or paroled.”¹⁷² In certain instances the application of this statutory provision is relatively straightforward. A temporary worker admitted until a specific date, for example, begins to accrue unlawful presence “the day following the date the authorized period of admission expires.”¹⁷³

But determining when unlawful presence begins to accrue in other circumstances is not as clear. For example, not all types of temporary admissions specifically designate admission until a certain date. Students are admitted for the duration of their status.¹⁷⁴ This fact makes for a more complicated scenario for determining when unlawful presence begins to accrue. If USCIS determines there has been a status violation (such as not attending a course of study) while adjudicating another petition for an immigration benefit, unlawful presence begins to accrue the day after the new petition is denied.¹⁷⁵ Similarly, if an immigration judge finds that there was a status violation, unlawful presence begins to accrue the day after the immigration judge’s order is issued.¹⁷⁶ In explaining these outcomes, USCIS has stated, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹⁷⁷ Therefore, in the

period from unlawful presence for certain temporary workers when a petition is revoked); *id.* § 214.14(d)(3) (providing that those on the waiting list for a U visa—available to victims of certain crimes—do not accrue unlawful presence while waiting); *id.* § 214.15(i)(3) (clarifying unlawful presence in the context of the V nonimmigrant visa, which is available to those with certain petitions pending on or before December 21, 2000); *id.* § 245.10(m) (discussing unlawful presence in the context of section 245(i) of the Immigration and Nationality Act, which provides special procedures for those with petitions pending on or before April 30, 2001); *id.* § 245.23(c)(3) (providing an exception to the accrual of unlawful presence in the context of T nonimmigrant status, which is available to victims of human trafficking); *id.* § 245.18(d)(2) (addressing the accrual of unlawful presence in the context of a doctor serving in a medically underserved area).

172. 8 U.S.C. § 1182(a)(9)(B)(ii) (2010).

173. Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act 25 (May 6, 2009), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

context of a student admitted for the duration of his or her status, unlawful presence does not begin to accrue at the moment of a violation, but rather begins to accrue later, after official recognition of the violation.

Another example of a complex unlawful presence calculation stems from an exception. According to the statute, no unlawful presence accrues while a foreign national is waiting to hear back from USCIS on a non-frivolous application for a change or extension of status.¹⁷⁸ In a typical scenario, a foreign national will file an application to change or extend his or her legal immigration status before the current status expires, but USCIS may not adjudicate the application before the current status expires. The statutory tolling would kick in to provide that even though the individual's current status has expired, this individual would not accrue unlawful presence while USCIS considers the application. The statute actually only provides for 120 days of tolling,¹⁷⁹ but USCIS policy is that no unlawful presence will accrue "during the entire period a properly filed [Extension of Status] or [Change of Status] application is pending,"¹⁸⁰ even if it is longer than 120 days.

These agency unlawful presence principles are not contained in a notice-and-comment rule, but rather in a fifty-one page memorandum, dated May 6, 2009, which is a consolidation of no less than six memoranda governing the concept of unlawful presence.¹⁸¹ The breadth of the memorandum is impressive. In addition to the examples discussed above, it includes twenty-four pages of information about different ways to figure out whether a particular individual has accrued or will accrue unlawful presence.¹⁸² There is no broad legislative rule addressing these issues.

The three- and ten-year bars are especially significant because they can either trap an individual inside the United States or catch an unknowing individual off guard once he or she exits the United States. Even the spouse of a U.S. citizen may be subject to the bars if the spouse entered the United States without inspection. For example, an individual brought across the border without inspection as a child, who then resides in the United States into adulthood, and who then marries a U.S. citizen, is stuck. If the foreign national spouse leaves the United States, an unlawful presence bar to return will kick in.¹⁸³ If the foreign national spouse stays, there is no way to

178. 8 U.S.C. § 1182(a)(9)(B)(iv) (2010).

179. *Id.*

180. Neufeld, *supra* note 173, at 35.

181. *Id.* at 1.

182. *Id.* at 9–32.

183. There is the potential for an "extreme hardship" waiver of the unlawful presence bar, but such a waiver is not easy to obtain. *See* 8 U.S.C. § 1182(a)(9)(B)(v).

legalize status based on the marriage to the U.S. citizen.¹⁸⁴ Because the three- and ten-year bars kick in upon an individual's exit from the United States, many with unlawful presence are afraid to leave the United States for fear of not getting back in, which can perpetuate unlawful residence. Some also leave without knowledge of how unlawful presence works and find themselves unable to return.¹⁸⁵ Thus, understanding the "rules" about how unlawful presence is accrued is very important to foreign nationals and to attorneys. USCIS should reconsider how it formulates and presents the "rules," especially when so few proceed with representation in family-based cases. While the memorandum on unlawful presence does contain some policy decisions that are favorable to foreign nationals, all of the understanding about unlawful presence contained in this memo could vanish overnight.

Concerns about overreliance on guidance are borne out in immigration law. There are no notice-and-comment regulations, and only guidance, to implement AC-21. Also, USCIS has used nonlegislative rules to implement the application of the crucial statutory term "unlawful presence." Even if the agency action qualifies as an interpretive rule that effects no substantive change and derives its enforcement power from the statute, this is a term that carries the extremely harsh consequence of potential close familial separation for three or ten years, but yet has not received the benefits of notice-and-comment rulemaking.

A dearth of notice-and-comment rulemaking is an issue facing all of administrative law, as explained in Part I. While the generalized nature of the problem does not expunge USCIS's troubles with guidance documents, understanding the forces at work against notice-and-comment rulemaking sheds some light on why USCIS may rely on guidance. As Part I describes, administrative law scholars argue that notice-and-comment rulemaking has become "ossified;" that is, so burdened with procedural obligations that it has become too slow and resource-demanding such that it is unappealing to agencies.¹⁸⁶ Before a Notice of Proposed Rulemaking is even published in the *Federal Register* (which sets in motion the long process of public comment and agency response to public comment) an agency like USCIS must fulfill many obligations. According to USCIS, from a broad perspective, it

184. Under 8 U.S.C. § 1255(a), adjustment of status to lawful permanent residence based on a marriage to a U.S. citizen is not available if the foreign national spouse was not inspected or admitted at the border.

185. In January 2012, USCIS published its intent to propose a rule that would establish a provisional waiver adjudication procedure that may partially alleviate this problem. Provisional Waivers of Inadmissibility for Certain Immediate Relatives of U.S. Citizens, 77 Fed. Reg. 1040, 1040 (Jan. 9, 2012) (to be codified at 8 C.F.R. pt. 212).

186. See *supra* notes 99–101 and accompanying text.

engages in the following steps before it publishes a Notice of Proposed Rulemaking:

- USCIS leadership meets regularly to prioritize rules and decide on whether to initiate new rulemakings.
- Subject matter experts at USCIS draft rules, engaging all interested offices within the agency.
- Rulemaking teams (including economists, privacy specialists, etc.) develop and draft associated rulemaking documents, such as economic evaluations, privacy documents, and Paperwork Reduction Act materials.
- USCIS often holds public stakeholder meetings to obtain views from the public, consistent with Executive Order 13,563.
- During the development process for a rulemaking, USCIS may engage with other components within DHS or with other federal agencies.
- There is a clearance process at USCIS and DHS for leadership to approve rulemakings.
- For regulatory actions that are “significant” under Executive Order 12,866, the Office of Management and Budget (OMB) has up to 90 days to review the regulatory action.¹⁸⁷

USCIS’s pre-publication obligations stem from administrative law. The analyses USCIS must complete regarding costs and benefits, privacy effects, effects under the Paperwork Reduction Act, and Executive Orders 13,563 and 12,866 are administrative law requirements that apply across the board, and not just to immigration law. Lengthy waits for intra-agency approvals are not uncommon.

The action steps listed above are only pre-publication obligations and do not include the procedural obligations of notice, comment, and announcement of a final rule. These pre-publication obligations also do not include any time or effort expended in defending a final rule through potential litigation. Passing judgment on nonlegislative rules is not merely a question of immigration law, but also requires greater engagement in a broader discussion about the state of notice-and-comment rulemaking generally.¹⁸⁸

b. Changing Standards Through Nonlegislative Rules

A different, but related, controversy arises when USCIS dramatically

187. E-mail from William Wright, USCIS Office of Communications, to author (Dec. 2, 2011) (on file with author).

188. While there certainly may be hurdles peculiar to USCIS regarding notice-and-comment rulemaking difficulties, the general challenges remain.

shifts course by memo.¹⁸⁹ Without warning, a new memo may surface that contains a wholly new approach to a particular issue. This phenomenon is related to the absence of rulemaking because a usual argument against this practice is that any changes should have been accomplished through notice-and-comment rulemaking rather than by memo.¹⁹⁰ Without notice-and-comment rulemaking, there is no advance notice of a coming change and there is no opportunity to comment on a proposed change. Shifting course by memo is also related to the absence of rulemaking because such an overnight shift in course highlights the fragility of guidance-based rules.

A memorandum that changed the adjudication standard for a high-profile temporary worker status exemplifies this controversy. One visa category for highly skilled workers is called H-1B.¹⁹¹ This is a nonimmigrant category that allows temporary admission to an individual coming to the United States to fill a specialty occupation.¹⁹² A specialty occupation is one that requires “theoretical and practical application of a body of highly specialized knowledge” and requires the “attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”¹⁹³ As a part of an H-1B application to USCIS, the potential employer must submit a petition to USCIS seeking H-1B status for a potential employee (or seek renewal of that status).¹⁹⁴ The petition must also include a Labor Condition Application approved by the Department of Labor.¹⁹⁵

While there are legislative rules governing the H-1B category,¹⁹⁶ there are also many policy memoranda that address it.¹⁹⁷ Of particular controversy is a nineteen-page memorandum dated January 8, 2010, from Donald Neufeld, the Associate Director for Service Center Operations for USCIS.¹⁹⁸ This “Neufeld Memo” (the Memo) to USCIS Service Center

189. Paparelli & Chiappari, *supra* note 161 (“Because these policies have largely been issued without notice-and-comment rulemaking, and are often poorly reasoned, incomplete, contradictory or wholly non-existent, the stakeholder community has been at the mercy of agency adjudicators . . .”).

190. *See* Alaska Prof'l. Hunters Ass'n., Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).

191. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006).

192. *Id.*

193. *Id.* § 1184(i)(1)(A)–(B).

194. 8 C.F.R. § 214.2(h)(1)(i) (2011).

195. *Id.* § 214.2(h)(4)(ii)(B)(1).

196. *See, e.g., id.* § 214.2(h).

197. *See, e.g.,* Pearson, *supra* note 164; Interim Guidance, *supra* note 164; Memorandum from Barbara Q. Velarde, Chief, Serv. Ctr. Operations, U.S. Citizenship & Immigration Servs., Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation (May 20, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/health_care_occupations_20may09.pdf.

198. Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations

Directors changed the standard used to determine whether an H-1B petitioner (potential employer) would hold the necessary employment relationship with the H-1B beneficiary (potential employee).¹⁹⁹

For purposes of the H-1B category, a regulation defines an employer as:

[A] person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;* and
- (3) Has an Internal Revenue Service Tax identification number.²⁰⁰

The Neufeld Memo addresses what constitutes an employer-employee relationship for the purpose of adjudicating H-1B petitions. As the Neufeld Memo explains, prior to the issuance of the Memo, USCIS relied on common law principles and Supreme Court cases in adjudicating whether the appropriate relationship existed for H-1B purposes.²⁰¹ According to the Memo, the absence of agency guidance on the subject caused problems, “in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.”²⁰² The Memo made it more difficult for self-employed entrepreneurs and staffing firms to prove an employer-employee relationship exists, thus narrowing access to the H-1B category.

The Neufeld Memo established a vision of control—that is, petitioner control over the beneficiary—that calls into question employment arrangements other than the classic scenario of an employer offering a job to an employee to work on the employer’s premises. The Memo instructs that in adjudicating H-1B petitions, “[t]he petitioner must be able to establish that it has the **right to control** over when, where, and how the beneficiary performs the job,”²⁰³ and it lists eleven factors that USCIS “will consider” in adjudicating these petitions.²⁰⁴ The Memo further advises that these factors are a part of a totality of the circumstances test aimed at establishing a right of control throughout the length of the beneficiary’s

Directorate, U.S. Citizenship & Immigration Servs., Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010) [hereinafter Neufeld Memo], available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

199. *Id.*

200. 8 C.F.R. § 214.2(h)(4)(ii) (emphasis added).

201. Neufeld Memo, *supra* note 198, at 2.

202. *Id.*

203. *Id.* at 3 (footnote omitted).

204. *Id.*

proposed stay in H-1B status.²⁰⁵

Despite the Neufeld Memo's acknowledgement that this inquiry is inherently case-specific, it presents scenarios that would fail the totality of the circumstances test. First, self-employed beneficiaries fail the test because the petitioning company, despite that it may be a separate corporate entity, is the beneficiary, and thus there is no evidence that the petitioning company will have control over the beneficiary.²⁰⁶ Second, independent contractors fail the test where, for example, a salesperson engaged by the petitioner also sells other products and the petitioner does not set the work schedule or conduct performance reviews of the salesperson.²⁰⁷ Third, the Memo establishes that third-party placements fail the test.²⁰⁸ The Memo provides an example of a third-party placement: a computer consulting company that contracts with other companies to provide staff to the other company, and where the other company, and not the petitioning consulting company, supervises the employees' daily work.²⁰⁹

Stakeholders have described the requirements of the Neufeld Memo as "demanding, burdensome and commercially unreasonable," and as having been formulated "without APA compliance or policy rationale."²¹⁰ The American Immigration Lawyers Association described the Memo as "significantly alter[ing] USCIS's definition of the employer-employee relationship."²¹¹ Ironically, USCIS stated that the purpose of the Memo was to increase transparency and consistency, not to change policy.²¹² Instead, it created a firestorm of protest, confusion,²¹³ and at least one

205. *Id.* at 3–4.

206. *Id.* at 5–6. USCIS may be backing away from this position. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions*, Q12, USCIS, <http://www.uscis.gov> (follow "News" hyperlink; then follow "Public Releases by Topic" hyperlink; then follow "Visas: H-1B" hyperlink and scroll down to "August 2011") (last updated Mar. 12, 2012).

207. Neufeld Memo, *supra* note 198, at 6.

208. USCIS may be backing away from this position. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions*, Q13, USCIS, <http://www.uscis.gov> (follow "News" hyperlink; then follow "Public Releases by Topic" hyperlink; then follow "Visas: H-1B" hyperlink and scroll down to "August 2011") (last updated Mar. 12, 2012).

209. Neufeld Memo, *supra* note 198, at 6–7.

210. Angelo A. Paparelli & Ted J. Chiappari, *New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms*, 15 BENDER'S IMMIGR. BULL. 641, 641, 644 (2010).

211. *USCIS Holds Stakeholders Session on New H-1B Employer-Employee Relationship Memorandum*, 87 INTERPRETER RELEASES 1, 438 (2010) (alteration in original).

212. *Id.*

213. Although, as at least one immigration attorney has mentioned, the issuance of the Neufeld Memo did corral into one place an explanation of what adjudicators should

lawsuit.²¹⁴

In the lawsuit, the plaintiffs argued, among other things, that the Neufeld Memo violated the notice-and-comment provisions of the APA; in other words, that the contents of the Neufeld Memo should have been enacted through notice-and-comment rulemaking.²¹⁵ As Part I explains, this argument presents a common conundrum for administrative law. The district court held that the Neufeld Memo was not final agency action because it is not a legislative rule.²¹⁶ The court held it is not a legislative rule because it is not binding on its face or as applied.²¹⁷ To support its holding that the Neufeld Memo is not binding on its face, the court referred to its text, which states that the Memo only intends to provide guidance and then directs adjudicators to consider the totality of the circumstances.²¹⁸ Moreover, the court referenced USCIS adjudication outcomes that indicate that the Memo is also nonbinding as applied.²¹⁹

The Neufeld Memo is another manifestation of the perils of guidance; it exemplifies concerns that guidance does a poor job at setting stable rules and about guidance's practical binding effect. Even if the Neufeld Memo legitimately is a nonlegislative rule, its existence and the non-transparent process used to create it nevertheless cause confusion and frustration within the benefits adjudication system.²²⁰ Either adjudicators will effectively treat the Neufeld Memo as binding, which will cause frustration because it technically is not binding, or adjudicators will stray from the Memo, causing confusion as to what exactly is the standard for adjudication. Stakeholders expressed distress that the changes wrought by the Memo were issued without any opportunity for notice and comment.²²¹ The lawsuit challenging the Neufeld Memo alleged that the Memo "changed

consider. Gus Shihab, *The January 8, 2010 Neufeld Memo, a Reason to Panic or Breathe the Sigh of Relief?*, IMMIGR. VISA LAWYER BLOG (Jan. 25, 2010), <http://www.immigration-visa-lawyer-blog.com/2010/01/the-january-8-2010-neufeld-mem.html>.

214. *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240 (D.D.C. 2010).

215. *Id.* at 242.

216. *Id.* at 246.

217. *Id.*

218. *Id.* at 245.

219. *Id.* at 247.

220. For example, one immigration attorney posted this response to the government's argument that the Neufeld Memo is merely guidance: "Can you see the milk shooting out my nose? . . . Are they really saying that Service Center Adjudicators are free to ignore this 'contour refining guidance'? Really?" Charles H. Kuck, *Don't Get So Uptight. It's Only a Guideline*, IMMIGR. DAILY (July 6, 2010), <http://www.ilw.com/articles/2010,0708-kuck.shtm>.

221. *Id.*

existing law” in the absence of rulemaking.²²² This allegation shows frustration with the Neufeld Memo, and also displays the general confusion wrought by guidance documents. Guidance documents do not change law.

The H-1B Neufeld Memo also raises another issue common to administrative law: whether an agency may bounce from guidance document to guidance document as a method for changing rules. There is some case law that suggests that, at least in certain circumstances, the answer is no. The D.C. Circuit has held that the FAA could not change a long-standing, authoritative nonlegislative interpretation of a notice-and-comment regulation through another nonlegislative rule.²²³ Recognizing that a changed agency interpretation of a statute presents a different scenario, the court stated, “When an agency has given its *regulation* a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”²²⁴ The existence of a long-standing,²²⁵ authoritative interpretation²²⁶ is a prerequisite to application of this duty to change through notice-and-comment rulemaking. Conditional statements do not establish an authoritative interpretation.²²⁷ In the FAA case, regulated parties had relied on a particular definitive rule for almost thirty years.²²⁸

c. Agency Appeals and Nonlegislative Rules

There is also confusion and frustration among immigration attorneys about the effect of USCIS nonlegislative rules in appeals to the Administrative Appeals Office.²²⁹ The AAO has overturned years of established guidance that practitioners believed had more staying power. The AAO is a component of USCIS that has no exalted status within the agency. It is listed in the USCIS organizational chart as the same level of the bureaucracy as the front-line adjudicators whose work the AAO

222. Complaint at 2, *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240 (D.D.C. 2010) (No. 10-cv-0941).

223. *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034, 1036 (D.C. Cir. 1999).

224. *Id.* at 1033–34 (emphasis added).

225. See *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002) (explaining that a guidance document is not a “departure from the past” if the guidance document speaks to issues not yet addressed).

226. See *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509–10 (D.C. Cir. 2009) (holding that the reasoning of *Alaska Professional Hunters* did not apply where the agency has not established “definitive and authoritative interpretations”).

227. *Id.*

228. *Alaska Prof'l Hunters*, 177 F.3d at 1035–36.

229. See *USCIS-AILA Liaison Committee Agenda*, *supra* note 156, at 1534.

reviews.²³⁰ Despite its bureaucratic placement on par with front-line adjudicators, the AAO does not hold itself bound to USCIS guidance.²³¹

The AAO has caused controversy by not following USCIS policy. In the first example provided here, the AAO changed the adjudication standard governing what types of investments qualify under the immigrant investor visa. In the second example, the AAO changed the adjudication standard governing what constitutes specialized knowledge under the intracompany transferee visa.

Congress created a category of legal, permanent immigration open to foreign nationals who are willing to invest in the United States.²³² Under 8 U.S.C. § 1153(b)(5), green cards are available through a category known as Employment Based Fifth Preference (EB-5) to those “seeking to enter the United States for the purpose of engaging in a new commercial enterprise.”²³³ The immigrant investor must have invested, or be in the process of investing, \$1 million, or less (now \$500,000) if the investment is made in a targeted employment area.²³⁴ The investment must also “benefit the United States economy” and create at least ten full-time jobs.²³⁵

Implementation of this statutory category has been notoriously unpredictable.²³⁶ Both the United States Government Accountability Office (GAO) and the USCIS Ombudsman have highlighted the roller-coaster history of the program as reasons for the category’s historical failure to attract applicants.²³⁷ Even USCIS reported to the GAO that the

230. See Family, *supra* note 133, at 69, 94–95.

231. *In re Izummi*, 22 I. & N. Dec. 169, 196 (BIA 1998). This is one of a small number of AAO precedent decisions.

232. There are other investor-based categories that allow for a temporary stay, but the Employment Based Fifth Preference (EB-5) program allows beneficiaries to become lawful permanent residents of the United States.

233. 8 U.S.C. § 1153(b)(5)(A) (2006).

234. *Id.* § 1153(b)(5)(C)(i). A targeted employment area is “a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” *Id.* § 1153(b)(5)(B)(ii).

235. *Id.* § 1153(b)(5)(A)(ii). A full-time job is one “that requires at least 35 hours of service per week at any time.” *Id.* § 1153(b)(5)(D).

236. For more information on the history and development of the EB-5 program, see David H.E. Becker, *Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply its Decisions Retroactively?*, 52 ADMIN. L. REV. 219 (2000); William P. Cook, *The Demand for Rulemaking: The Saga of the EB-5 Program Continues*, in IMMIGRATION LAW—BASICS AND MORE, (ALI-ABA Course of Study, May 6, 1999); and Leslie K. L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV’T L. REV. 103 (2010).

237. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-256, IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS (2005) [hereinafter IMMIGRANT INVESTORS]; OFFICE OF CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, EMPLOYMENT CREATION IMMIGRANT VISA (EB-5)

uncertainty inherent in the program is likely a contributing factor to the limited interest in the category.²³⁸ Average use of the category—about 700 visas per year—is far below the yearly statutory cap of 10,000 visas.²³⁹

As the USCIS Ombudsman has noted, uncertainty has “[p]laged” the immigrant investor program “since inception.”²⁴⁰ Congress created the EB-5 category in 1990.²⁴¹ A seismic shift developed from late 1997 through 1998, when concerns about fraud led the agency to reconsider its original program implementation.²⁴² In November 1997, the United States Immigration and Naturalization Service (INS) (the predecessor to USCIS) placed a hold on the adjudication of certain EB-5 petitions.²⁴³ The INS General Counsel issued an opinion the following month explaining, “Over the last several years, a number of serious issues have arisen regarding the legality of certain types of business arrangements” contained in EB-5 petitions.²⁴⁴ The General Counsel reviewed these types of business arrangements and found them not to qualify under the EB-5 statute and regulations.²⁴⁵ The suspect arrangements, which raised questions about whether the foreign national’s investment was truly at risk, included: the use of promissory notes as investment vehicles; the use of installment plans as a means of making an investment; the use of an option given to sell or buy the investment at a fixed price; and the use of guaranteed returns.²⁴⁶

After the issuance of the General Counsel’s legal opinion, INS continued to delay adjudication of EB-5 cases that contained these types of business arrangements.²⁴⁷ Next, INS ordered its first-tier adjudicators to select four EB-5 petitions containing these types of business arrangements, to immediately remove the hold, and to adjudicate them.²⁴⁸ INS instructed

PROGRAM RECOMMENDATIONS, at 6–10 (2009) [hereinafter EB-5 RECOMMENDATIONS], http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf.

238. IMMIGRANT INVESTORS, *supra* note 237, at 9.

239. OFFICE OF CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2011, at 25 (2011) [hereinafter ANNUAL REPORT 2011], <http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf>.

240. EB-5 RECOMMENDATIONS, *supra* note 237, at 7.

241. *Id.* at 3.

242. *Id.* at 7 n.22, 8.

243. Cook, *supra* note 236, at 1–2. In December 2007, the Department of State decided to suspend processing of these types of EB-5 cases. *Id.*

244. Memorandum from INS Office of the Gen. Chief Counsel to Paul W. Virtue, Acting Exec. Assoc. Comm’r, Office of Programs (Dec. 19, 1997), *available at* <http://shusterman.com/eb5investorsinsmemo1998.html>.

245. *Id.*

246. *Id.*

247. Cook, *supra* note 236, at 4–5.

248. *Id.*

those first-tier adjudicators to then forward the newly adjudicated petitions to the AAO.²⁴⁹

The AAO adjudicated the four selected cases and issued four precedent decisions from late June through July 1998.²⁵⁰ According to the USCIS Ombudsman, these decisions “altered the previously issued guidance and substituted new and more restrictive interpretations of the law.”²⁵¹ The 1998 AAO precedent decisions made the EB-5 program harder to access and shifted the ground under people who were in the process of making, or had already made, investments that were no longer acceptable under the program.

While agencies do have substantial discretion to decide whether to create new rules through rulemaking or adjudication,²⁵² the abrupt change in course here, without prior notice, had negative effects on stakeholders. The change in standards injected intense uncertainty into the EB-5 program and angered stakeholders. As one commentator wrote in 1999:

Essentially instead of presenting clear guidelines, the AAO opted to dispose of seven (7) years of established EB-5 precedent in favor of a complete reversal of accepted practice and blithely disavowed dozens of the Service’s own pronouncements about practices it long held acceptable in the EB-5 Program. And worse, the Service laid down the gauntlet that it fully intended to apply these new rules retroactively to cases long since approved, even to those cases where visas had been issued without [the immigration agency’s] objection.²⁵³

The change in standards, combined with the retroactive applications of those standards, sent a signal to current and potential investors that the decisions of the agency could not be relied upon, and that the law could change without notice. In this EB-5 scenario, the AAO, through precedent opinions, overturned existing guidance from agency officials. Those opinions did provide firmer ground, but did so by injecting a lack of confidence in the system. The precedent decisions overturned existing practices and applied the new standards retroactively.

A changed agency approach to what constitutes specialized knowledge presents a more recent example of shifting adjudication standards. The Immigration and Nationality Act provides a category of legal, temporary

249. *Id.*

250. *In re Ho*, 22 I. & N. Dec. 206 (BIA 1998); *In re Hsiung*, 22 I. & N. Dec. 201 (BIA 1998); *In re Izummi*, 22 I. & N. Dec. 169 (BIA 1998); *In re Soffici*, 22 I. & N. Dec. 158 (BIA 1998).

251. EB-5 RECOMMENDATIONS, *supra* note 237, at 8.

252. *See SEC v. Chenery*, 332 U.S. 194, 202–03, 207, 209 (1947).

253. *See Cook*, *supra* note 236, at 11; *Becker*, *supra* note 236, at 203 (calling the changes “unexpected and drastic”).

immigration for an intracompany transferee who has specialized knowledge that will be used in a position in the United States.²⁵⁴ Known as the L-1B visa, an individual seeking this visa must show possession of the requisite specialized knowledge and employment abroad by the petitioning employer for one year within the past three years.²⁵⁵ There is information about what constitutes specialized knowledge in the statute and in a legislative rule, but those legal rules still leave questions unanswered.²⁵⁶

In determining whether a foreign national possessed specialized knowledge rather than just skilled knowledge, the AAO, in 2008, refused to abide by a memorandum known as the “Puleo Memorandum,” issued in 1994 and, according to the foreign national’s counsel, implemented since then.²⁵⁷ The Puleo Memorandum presented an understanding of specialized knowledge that the counsel argued was more generous than the standard being applied in the case before the AAO.²⁵⁸ The AAO took a dismissive view of the Puleo Memorandum, explaining that it “is not legally binding on the agency.”²⁵⁹ According to the AAO, the Puleo Memorandum merely “articulate[d] internal guidelines for agency personnel; [it did] not establish judicially enforceable standards.”²⁶⁰ While the AAO recognized “that the memorandum received wide mention in the immigration press,” the AAO determined that “even where an agency memorandum or General Counsel opinion is publicized and discussed in a widely circulated immigration periodical, the document will not be considered as rulemaking that a petitioner may rely on.”²⁶¹

As far as administrative law is concerned, agencies have flexibility to determine the effect of a guidance document in adjudication.²⁶² It is important to remember that policy statements are not legally binding rules. In fact, one of the hallmarks of a true guidance document is agency behavior exhibiting an attitude that the agency does not consider itself bound to the rule expressed in the policy statement. Nonlegislative rules are not meant to be binding.²⁶³

These ideas are more complex in practice, however. If the pertinent

254. 8 U.S.C. § 1101(a)(15)(L)(1)(B) (2006).

255. *Id.*

256. *Id.* § 1184(c)(2)(B); 8 C.F.R. § 214.2(l)(1)(ii)(D) (2011).

257. Matter of GST Technical Servs., WAC 07 277 53214, at 19–21 (AAO Jul. 22, 2008).

258. *Id.*

259. *Id.* at 21.

260. *Id.*

261. *Id.*

262. Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 713–20 (2005).

263. *Id.* at 713–18.

question is whether an agency acts like it is bound to a rule expressed in a policy statement, precisely which agency actor's actions count? If we are to look at the actions of all levels of agency adjudicators, then all adjudicators, including appellate administrative adjudicators like the AAO, should maintain an open mind and not consider themselves bound by an agency nonlegislative rule. On the other hand, demanding an open mind of all levels of agency adjudicators leads to the shifting ground problem.

The shifting ground problem in turn leads to an argument that adjudicators like the AAO should be bound by agency guidance documents. As explained by Professor Charles Koch, the difference between legislative and nonlegislative rules "should be reflected in the weight given [to them] by an agency's adjudicators."²⁶⁴ According to Professor Koch, the difference results in providing adjudicators with more leeway when it comes to applying nonlegislative rules, but that adjudicators "should be mindful of the effect policy pronouncements have on the public."²⁶⁵ Citing the practical binding effect of nonlegislative rules, Professor Koch wrote that "administrative judges should feel some pressure to follow a pronouncement's language."²⁶⁶

The AAO's specialized-knowledge decision exemplifies the concern raised by Professor Koch. While the AAO may not be bound to a guidance document, the AAO's decision left immigration attorneys with a familiar uncertainty as to the adjudication standards for a major visa category.²⁶⁷ Two prominent immigration attorneys, including a former General Counsel of the INS, described the AAO's decision as "effectively ignor[ing] nearly two decades of . . . interpretive guidance."²⁶⁸ While the AAO may be permitted to ignore that guidance, the AAO shows tone-deafness to the practical binding effect of guidance documents when it does so.

A further complication is that the AAO did not issue this specialized knowledge decision as a precedent decision. The AAO's decision that policy memoranda should not be relied upon, should itself not be relied upon because the opinion is not precedential and therefore is mere "correspondence" under the Adjudicator's Field Manual.²⁶⁹ But is the

264. *Id.* at 715.

265. *Id.* at 718.

266. *Id.*

267. See generally Austin T. Fragomen, Jr. & Bo Cooper, *The Shifting Sands of L-1B Specialized Knowledge*, 1768 PLI/CORP 225 (2009); Kate Kalmykov, *An Overview of the Changing Definition of Specialized Knowledge*, A.B.A. SEC. OF INT'L L. IMMIGR. & NATURALIZATION COMM. NEWSL. 5 (2009), <http://meetings.abanet.org/webupload/commupload/IC925000/newsletterpubs/ImmigrationNewsletterSummer2009.pdf>; Frank A. Novak, *The Life and Times of the L-1B*, IMMIGR. BRIEFINGS, Nov. 2008, at 1.

268. Fragomen, Jr. & Cooper, *supra* note 267, at 234.

269. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 3.4

Adjudicator's Field Manual binding? No matter the legality of the agency's action, it is easy to understand the frustrations of an immigration attorney attempting to advise a client as to the state of the law.

B. USCIS's Draft Memorandum for Comment Procedure Is a Pragmatic and Necessary Advancement in the Mainstream of Administrative Law

USCIS itself recognizes the confusion caused by its use of nonlegislative rules. In 2010, USCIS announced an agency-wide policy review and sought stakeholder input to prioritize this review.²⁷⁰ USCIS Director Alejandro Mayorkas said, "As an agency, we must achieve consistency in the policies that guide us and in how we implement them for the public benefit."²⁷¹

USCIS is in a period of innovation when it comes to stakeholder outreach. In addition to the agency-wide policy review, USCIS has held teleconferences with stakeholders, is engaged in an effort to craft, with stakeholder input, templates for certain adjudicatory actions, and has even released a draft document proposing changes to processing procedures for immigrant investor cases.²⁷² Most important to the issue of the use of nonlegislative rules is a new effort, beginning in May 2010, to post draft guidance memoranda for comment on the agency's website.²⁷³

(2011). Front-line adjudicators do appear to be following the decision, however. Fragomen, Jr. & Cooper, *supra* note 267, at 235.

270. U.S. CITIZENSHIP & IMMIGRATION SERVS., *USCIS Announces First Ten Areas of Focus for Agency-wide Policy Review*, USCIS (July 26, 2010), <http://www.uscis.gov> (follow "News" hyperlink; click "News Releases" hyperlink on the left-hand side; then scroll down to "July 2010").

271. *Id.*

272. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., *Conversations with the Director, EB-5 Immigrant Investor Program*, USCIS (Sept. 14, 2011), <http://www.uscis.gov> (follow "Outreach" hyperlink; then follow "Notes from Previous Engagements" hyperlink; then follow "Next" hyperlink at the bottom of the webpage until you get to "September 2011") (providing a review of a small group conversation with stakeholders); U.S. CITIZENSHIP & IMMIGRATION SERVS., *Listening Session—Request for Evidence (RFE) Review and Revision*, USCIS (Apr. 30, 2010), <http://www.uscis.gov> (follow "Outreach" hyperlink; then follow "Notes from Previous Engagements" hyperlink; then follow "Next" hyperlink at the bottom of the webpage until you get to April 2010) (announcing the Request for Evidence project, which will "engage stakeholders in a concerted effort to review and revise the RFE templates"); U.S. CITIZENSHIP & IMMIGRATION SERVS., *PROPOSED CHANGES TO USCIS'S PROCESSING OF EB-5 CASES* (2011), available at <http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Operartional%20Proposals%20for%20Comment/EB-5-Proposal-18May11.pdf>. Notice of upcoming teleconferences may be found on USCIS' website, <http://www.uscis.gov>, by clicking on "Outreach" and then "Upcoming National Engagements."

273. USCIS posts the drafts on a section of its website called Draft Memorandum for Comment, which is available by visiting USCIS's website, <http://www.uscis.gov>, clicking on

This opportunity to provide feedback on nonlegislative rules before they are implemented is an innovative development for immigration law. Under the program, USCIS posts a draft memorandum on its website and invites comments from stakeholders and the general public. USCIS is issuing both draft memoranda for comment and interim memoranda for comment through this program. The explanation of the process on the USCIS website contains the following disclaimers:

USCIS seeks your input on draft policy memoranda. . . . These memos are drafts of proposed or revised guidance to USCIS Field Offices and Service Centers. They are not intended as guidance for the general public, nor are they intended to create binding legal requirements on the public. Until issued in final form, the draft memos do not constitute agency policy in any way or for any purpose.

. . . .

. . . In a continued effort to promote transparency and consistency in our operations, USCIS will periodically post policy memos for public comment to assist USCIS in improving immigration services. USCIS will not post memos containing information that is law enforcement sensitive, confidential or otherwise protected from disclosure under the Freedom of Information Act. USCIS is not required to solicit public comment on the draft policy memos under the Administrative Procedure Act. This informal comment process does not replace any statutory or other legal requirement for public comment on agency action.²⁷⁴

Comments are submitted by email and must be submitted before a closing date posted on the draft document, usually a maximum of fifteen days. As of November 2011, the USCIS website does contain a section called “Feedback Updates,” which lists the number of comments received, but does not include detailed analysis of the comments.²⁷⁵ USCIS has posted more than thirty-five draft memoranda (draft and interim) for comment on its website.²⁷⁶ These memoranda address a wide range of issues.²⁷⁷

“Outreach,” and then clicking on “Feedback Opportunities.”

274. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Draft Memorandum for Comment*, USCIS (Dec. 15, 2011), <http://www.uscis.gov/> (follow “Outreach” hyperlink; then follow “Feedback Opportunities” hyperlink; and then follow “Draft Memoranda for Comment” hyperlink).

275. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Feedback Updates*, USCIS (last updated Aug. 2, 2012), <http://www.uscis.gov/> (follow “Outreach” hyperlink; then follow “Feedback Opportunities” hyperlink; and then follow “Feedback Updates” hyperlink).

276. Draft documents whose comment period has closed may be found on the “Feedback Updates” page. *Id.* Some of the draft documents listed are not interim or draft memoranda but instead are operational proposals or document templates for comment. *Id.* Draft documents with open comment periods may be found under “Feedback Opportunities.”

277. *Id.*

The USCIS Ombudsman reported that “many” stakeholders have “welcomed” the new draft memorandum for comment process “as a significant departure from USCIS’s historical approach to policy-making.”²⁷⁸ Stakeholders, however, have complained about the short period to respond to the request for comments and have also asked USCIS to release responses to the comments received.²⁷⁹ The Ombudsman reported that stakeholders are “discouraged when final policy guidance does not reflect their input or USCIS consideration of it.”²⁸⁰

While soliciting pre-adoption comments on policy memoranda is not required by the APA, this feedback opportunity is an interesting development for immigration law. The creation of the opportunity signals that USCIS recognizes that its use of nonlegislative rules is far-reaching. It also acknowledges the need for stakeholder input to blunt the effect of a new policy memorandum.

While innovative for immigration law, USCIS’s draft memorandum for comment is not unique to administrative law. Other agencies have been using similar techniques to depart from the requirements for nonlegislative rules for some time, and OMB’s Good Guidance Practices call for a similar procedure for economically significant guidance documents. At least nine other agencies have circulated draft guidance documents for comment: The Department of Health and Human Services;²⁸¹ The Department of Interior;²⁸² The Department of Labor;²⁸³ The Department of Transportation;²⁸⁴ The Environmental Protection Agency;²⁸⁵ The Federal Aviation Administration;²⁸⁶ The Food and Drug Administration;²⁸⁷ The

278. ANNUAL REPORT 2011, *supra* note 239, at 5–6.

279. *Id.* at 6.

280. *Id.*

281. Mantel, *supra* note 139, at 399 n.278.

282. Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183, 32,183 (June 12, 1997) (seeking comments on proposed policy).

283. Mantel, *supra* note 139, at 399 n.278.

284. *Id.*

285. See ENVTL. PROT. AGENCY, EPA 233-B-03-002, PUBLIC INVOLVEMENT POLICY, (2003), available at <http://epa.gov/publicinvolvement/policy2003/finalpolicy.pdf>; National Pollutant Discharge Elimination System, Wet Weather Discharges, 70 Fed. Reg. 76,013, 76,013 (Dec. 22, 2005) (to be codified at 40 C.F.R. pts. 122–23) (seeking comments on proposed policy memorandum).

286. See FED. AVIATION ADMIN., *Aviation Safety Draft Documents Open for Comment*, FAA http://www.faa.gov/aircraft/draft_docs/ (last updated July 24, 2012); FED. AVIATION ADMIN., *Draft Airports Series 150 Advisory Circulars (ACs)*, FAA, http://www.faa.gov/airports/resources/draft_advisory_circulars/ (last updated Oct. 3, 2011); see also Mendelson, *supra* note 83, at 428 (describing a FAA draft advisory circular comment process where comments are accepted only from a limited recognized group of industry stakeholders).

287. Mendelson, *supra* note 83, at 426; Jonathan Stroud, Comment, *The Illusion of*

Nuclear Regulatory Commission;²⁸⁸ and The United States Department of Agriculture (USDA).²⁸⁹ The idea of soliciting input on nonlegislative rules is also not new, as scholars have raised the possibility since at least the 1970s as a method to ease the guidance dilemma.²⁹⁰ Most of these proposals have focused on creating a post-adoption opportunity for public comment. A pre-adoption opportunity to comment is a more substantial procedural requirement that the Good Guidance Practices reserve only for economically significant guidance documents.

While stakeholders have responded positively to USCIS's efforts to better engage the public, there have been complaints about the draft memorandum for comment process. Stakeholders have expressed concern about the length of time allotted for response and have expressed an uncertainty whether comments received are actually considered. Because USCIS does not publish responses to the comments it receives, stakeholders are not assured that USCIS has carefully considered the public submissions. These concerns reflect a natural desire for more procedural protections.

The struggle for greater protection has led to at least one lawsuit challenging an agency's use of a draft guidance document for comment.²⁹¹ In 1999, the USDA invited comments on a draft policy related to the care of nonhuman primates.²⁹² The USDA decided not to adopt the draft policy.²⁹³ The Animal Legal Defense Fund sued the USDA, arguing that the decision not to adopt the draft policy was arbitrary and capricious.²⁹⁴ The U.S. Court of Appeals for the Ninth Circuit, en banc, vacated a three-judge panel opinion that held the decision not to adopt the policy did constitute final agency action ripe for review.²⁹⁵ While this lawsuit was unsuccessful, it does represent a stakeholder inclination to seek greater participation in agency decisionmaking, despite the reality that an agency is already departing from the law of nonlegislative rules.

The stakeholders' doubts about USCIS's draft memorandum for

Interchangeability: The Benefits and Dangers of Guidance-Plus Rulemaking in the FDA's Biosimilar Approval Process, 63 ADMIN. L. REV. 599, 630 (2011).

288. See U.S. NUCLEAR REGULATORY COMMISSION, *Documents for Comment*, U.S. NRC, <http://www.nrc.gov/public-involve/doc-comment.html> (last updated Mar. 29, 2012).

289. See *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 830 (9th Cir. 2006), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007) (challenging decision of the United States Department of Agriculture to not adopt a draft policy it had circulated for comment).

290. See *supra* notes 103–128 and accompanying text.

291. See *Veneman*, 469 F.3d at 830.

292. *Id.*

293. *Id.* at 829.

294. *Id.*

295. *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 726 (9th Cir. 2007) (en banc).

comment process reflect a concern that is larger than that narrow process itself. The desire for more public participation largely stems from the fact that the draft memorandum for comment process, while commendable, is a poor substitute for notice-and-comment rulemaking. Even if the agency was to add more public participation to the draft memorandum for comment process, that would not address all of the problems caused by a lack of legally binding rules. The impediments to notice-and-comment rulemaking, however, signal that the draft memorandum for comment device is a necessary and positive step toward improving the way that USCIS muddles through with guidance documents.

Soliciting pre-adoption comments on nonlegislative rules can be productive and is a pragmatic response to USCIS's troubles with guidance documents. The agency can test the waters for change, stakeholders get some kind of notice as to changes that may be coming, and the resulting guidance document could be the result of a truly collaborative effort. While increased public participation in the creation of guidance documents can be a good thing, it should not be a reason to continue to neglect or further abandon notice-and-comment rulemaking. The benefits of soliciting pre-adoption comments on nonlegislative rules are the advantages of notice-and-comment rulemaking. The reason why pre-adoption comments are attractive is because it makes the process seem more like notice-and-comment rulemaking.

Seeking stakeholder input on draft nonlegislative rules also signals concerns. If guidance documents are not binding, then why is there a need to solicit public input before the nonlegislative rule is adopted? In fact, the use of a pre-adoption opportunity to comment is a signal that the agency at least recognizes the practical binding effect that results when an agency adopts a nonlegislative rule. Also, if stakeholders are starved of and craving the participation level of notice-and-comment rulemaking, then the more limited participation afforded by the guidance document comment process will never be satisfactory. Without a response to public comments, stakeholders will wonder if the agency actually considered public input. If the agency adds a response to the comments to the procedure, that is simply another indication that the agency should be using notice-and-comment rulemaking. Also, adding a response feature may increase the time and effort it takes to issue a nonlegislative rule, thus detracting from its flexibility and efficiency.

A further concern is whether the pre-adoption input process will provide additional incentive for USCIS to shy away from notice-and-comment rulemaking. While there clearly are roadblocks to USCIS's use of notice-and-comment rulemaking, the composition of these obstacles is unclear at this point. Is it the ossification of notice-and-comment rulemaking

generally? Is an agency culture of not using notice-and-comment rulemaking to blame? Does the Department of Homeland Security give low priority to USCIS's efforts to use notice-and-comment rulemaking? Whatever the causes, they should be revealed and fixed. Notice-and-comment rulemaking needs to be a priority for USCIS (and the Department of Homeland Security). The pre-adoption opportunity for comment should be a way to ease a temporary problem of not enough notice-and-comment rulemaking; it is not a permanent excuse to abandon legislative rules.

That being said, the reality is that nonlegislative rules are a recognized and appropriate method for agency action, even in the face of an active docket of legislative rules. If USCIS places value on providing opportunity for public involvement in the development of guidance documents, this should be respected and welcomed. The goal is to reach a point of a healthy balance between the use of legislative and nonlegislative rules.²⁹⁶ After all, the inherent dilemma of nonlegislative rules probably is impossible to resolve. Their nature demands confusion and a corresponding lack of firm ground. If USCIS chooses to ease the transition from guidance document to guidance document through public involvement, the innovation should be recognized.

CONCLUSION

The use of nonlegislative rules in the adjudication of immigration benefits is problematic. United States Citizenship and Immigration Services, the agency charged with adjudicating applications for immigration benefits, needs to clarify its own explanation of the proper use of guidance documents. The underuse of notice-and-comment rulemaking in this area has persisted for too long and needs to be addressed. Additionally, stakeholders are vexed by the Agency's tendency to abruptly change standards through nonlegislative rules and by confusion over the role of guidance documents in administrative appeals.

USCIS has recognized its troubles with nonlegislative rules and has implemented a new draft memorandum for comment procedure to solicit stakeholder feedback. Through this pragmatic program, the Agency posts draft guidance documents for comment on its website before the Agency adopts the nonlegislative rule. USCIS is voluntarily subjecting itself to some of the concepts behind notice-and-comment rulemaking, but not all of its procedural protections.

296. The line demarcating the healthy balance may be hard to locate and may vary from agency to agency. What is clear, however, is that such a healthy balance does not exist in immigration law.

While this Article analyzes troubles and advancements with immigration nonlegislative rules, it also connects immigration law and its use of guidance documents to the general debate about the use of nonlegislative rules in administrative law. By looking at administrative law through the lens of immigration law (and vice versa), the Article uncovers that, on the subject of administrative guidance, immigration law is in the mainstream. Complaints about the use of guidance documents in immigration law are truly complaints about administrative law; even USCIS's draft memorandum for comment process fits squarely into mainstream developments in this area. The debate over the use of nonlegislative rules in immigration law is a part of a much broader debate with far-reaching consequences for all regulation. The problems in immigration law regarding guidance documents deserve focused attention as the more general debate progresses. USCIS is using nonlegislative rules to muddle through in an extremely technical and sensitive context. USCIS guidance documents leave individual foreign national beneficiaries and U.S. citizen petitioners on shaky ground when it comes to questions at the core of life's meaning: where and with whom one will live and work.

APPENDIX²⁹⁷

Form Number	FY 2007		
	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	448,443	305,213	68%
I-130	941,933	236,634	25%
I-140	235,039	209,472	89%
I-485	1,106,867	647,757	59%
N-400	1,389,176	121,015	9%

Form Number	FY 2008		
	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	410,061	277,011	68%
I-130	630,886	184,979	29%
I-140	101,420	88,313	87%
I-485	573,846	287,875	50%
N-400	536,123	69,906	13%

297. U.S. Citizenship & Immigration Servs., Office of Performance & Quality, *Petition for a Nonimmigrant Worker (I-129), Petition for Alien Relative (Form I-130), Immigrant Petition for Alien Worker (Form I-140), Application to Register Permanent Residence or Adjust Status, Application for Naturalization (N-400): Total Receipts & Total Receipts with a G-28* (Feb. 1, 2012) (on file with author).

FY 2009			
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	353,655	250,254	71%
I-130	687,462	195,069	28%
I-140	57,467	49,949	87%
I-485	589,185	285,511	48%
N-400	548,756	70,941	13%

FY 2010			
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	344,799	235,029	68%
I-130	743,322	194,880	26%
I-140	80,959	70,822	87%
I-485	663,320	306,435	46%
N-400	718,518	88,326	12%

FY 2011			
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	364,782	260,027	71%
I-130	824,855	218,782	27%
I-140	87,179	74,550	86%
I-485	678,669	319,855	47%
N-400	762,618	97,897	13%