April 15, 2024

Mr. Fayrouz Saad
Assistant Secretary
Office of Partnership and Engagement
U.S. Department of Homeland Security

Re: INA 289 Change

Assistant Secretary Saad,

We reach out as Co-Chairs of the Jay Treaty Border Alliance (JTBA)[1], representing a collective voice of various federally-recognized Tribal governments in the United States and First Nation governments in Canada.[2] The U.S.-Canada border, as it stands today, intersects the lands of several Indian nations, dividing territories that were once unified. Recognizing the profound impacts such division would have on the familial ties, subsistence and economic practices, and cultural traditions of our peoples, Article III of the Jay Treaty acknowledged the inherent right of Indian peoples to move freely across what is now the U.S.-Canada border. These rights whether they are called inherent, Jay Treaty, or INA § 289, are the lifelines of our Tribal nations, ensuring the preservation of our cultures, economies, traditions, and familial bonds that predate U.S. imposed boundaries.

This letter comes in response to the Department of Homeland Security's (DHS) Dear Tribal Leader Letter, dated March 11, 2024, which proposes amendments to Section 289 of the Immigration and Nationality Act (INA § 289). While we commend DHS's initiative to eliminate the outdated and divisive 50% blood quantum requirement in INA § 289 and for its call to the Government of Canada to recognize a reciprocal right of entry for American-born Indians, we find ourselves compelled to express significant concern and dismay at the broader implications of the proposed amendments.

This Administration, through various initiatives and memorandums including the Reciprocal Indigenous Mobility initiative and the Memorandum of Understanding on Protecting Tribal and Treaty Rights, has voiced strong support for the principles that JTBA stands for. Yet, the proposed legislative amendments that your agency presented is an alarming departure from these commitments, undermining the trust and collaboration we hoped to see.

We were previously assured by your agency that DHS would work with JTBA to develop proposed amendments to INA § 289. This oversight not only contravenes the principles of nation-to-nation dialogue but also overlooks existing frameworks for nation-to-nation collaboration.

[1] The Jay Treaty Border Alliance is co-chaired by the Saint Regis Mohawk Tribe, the Kootenai Tribe of Idaho, then Mohawk Council of Akwesasne, and the Mohawk Council of Akwesasne.
[2] https://www.jaytreatyborderalliance.com

Notably, Canada has initiated a joint, collaborative process with the JTBA to draft right-of-entry legislation for American-born Indians to enter Canada, setting a precedent for constructive partnership, an endeavor in which we expected similar participation and support from your agency.

Rather than working with us, your agency has moved forward without our input, missing a crucial opportunity to learn from our experiences, insights, and other models of cross-border cooperation already in place. This oversight is a profound failure to respect the sovereign rights and expertise of Tribal nations, exacerbating the challenges we face and betraying the Biden Administration's own principles and promises, as discussed further below in response to your Dear Tribal Leader Letter questions.

1. Is the current INA § 289 statutory language legally sufficient from the viewpoint of your Tribe? If so, why? If it is not, what specific language or policy changes would you like to see, and why?

No, JTBA firmly asserts that the current statutory language, particularly the "50 Per Centum Blood of the American Indian Race" requirement, falls significantly short of legal sufficiency.

First, the U.S. reliance on "blood quantum" as a metric is unworkable and incompatible with Canadian practice. Canada does not track blood quantum, rendering it difficult for many Canadian-born American Indians to prove eligibility under this rule. This discrepancy creates a logistical impasse for many American Indians seeking to assert their cross-border rights under INA § 289.

Second, INA § 289 fails to account for the diverse ways in which Tribal nations determine membership. The principle of Tribal sovereignty, underscored by landmark cases, including *Santa Clara Pueblo v. Martinez,*[3] affirms that Tribes possess the inherent authority to define their membership criteria. While some Indian Nations track blood quantum, some do not. It is their recognized inherent right as a Tribal government to choose. Therefore, external imposition of blood quantum by U.S. immigration law, rather than Tribal membership, infringes upon this sovereign right of Tribal affiliation.

Third, the rationale behind the 50% blood quantum threshold lacks clarity and substantiation. Even the General Counsel for the Immigration and Naturalization Service (INS) in 1993 concluded that he had no idea why the blood quantum requirement was included.[4] If intended to serve border security or immigration control, its efficacy and fairness are questionable, especially considering that Indian identity is recognized as a political rather than racial status, as highlighted in the Supreme Court case *Morton v. Mancari*.[5] The use of blood quantum criteria not only diverges from the political recognition of Indian identity but also stands as a relic of outdated and discriminatory practices, including those corrected in the broader context of U.S. immigration law.

[3] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
[4] *See* INS General Counsel's Opinion No. 93-65 (Aug, 27, 1993); UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ADJUDICATOR'S FIELD.
[5] *Morton v. Mancari*, 417 U.S. 536 (1974).

Fourth, the 1928 codification of the Jay Treaty offered a more legally robust framework than its current version. This earlier law, enacted on April 2, 1928, effectively enshrined the Jay Treaty rights by stipulating, "[T]he Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: Provided, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption."

Given these concerns, JTBA calls for (1) removal of the blood quantum language from INA § 289, and (2) adoption of criteria based on Tribal membership/Indian Status and (3) acknowledgement of the political, rather than racial, nature of Indian identity. The JTBA endorses various legislative efforts previously introduced in past sessions of Congress[6], as well as the most recent proposal by the 118th Congress (H.R. 7805), which has garnered support from JTBA alongside other Tribal nations and inter-Tribal organizations.

H.R. 7805 also clarifies that eligible Indians are considered lawful permanent residents by simply residing in the United States, which is consistent with current regulation in 8 C.F.R. § 289 and 22 C.F.R. § 42.1(f). Under current law, Canadian Indians do not need an immigration visa to enter the United States. 22 C.F.R. § 42.1(f). They are lawful permanent residents simply by residing in the United States. 8 C.F.R. § 289.2. They cannot be deported for any reason. *Matter of Yellowquill*, 16 I. & N. Dec. 576, 578 (B.I.A. 1978). Current regulations are sufficient, and we support no change in 8 C.F.R. § 289 and 22 C.F.R. § 42.1(f).

2. Does the U.S. DHS proposed draft legislative amendments articulate appropriate eligibility requirements?

No, DHS's INA § 289 proposal is highly offensive and goes far beyond the necessary amendments needed to uphold its legal obligations that govern the relationship between the United States and Tribal nations. Despite the removal of the "50 Per Centum Blood of the American Indian Race" requirement—an action that JTBA recognizes as a step towards rectifying longstanding injustices— and the call on the Government of Canada to recognize a reciprocal right of entry, the overall proposal introduces criteria that risk encumbering the inherent rights of American Indians to freely navigate their ancestral lands.

DHS's eligibility requirements, which seem to prioritize bureaucratic control over recognizing and supporting Tribal sovereignty, contradict the commitments made by this Administration and DHS itself. The proposed amendments introduce unnecessarily stringent eligibility criteria, imposing barriers to the free movement of American Indians across the U.S.-Canada border.

Many Tribal nations and groups, including our own, are bisected by the U.S.-Canada border, with members frequently crossing for familial, cultural, and ceremonial reasons. Introducing a visa system complicates these crossings and disrupts longstanding practice. The visa application process, status adjustment requirements, and potential waivers introduce a significant

[6] 114th Congress H.R. 5412; 115th Congress H.R. 6598; 116th Congress H.R. 2496; 117th Congress H.R. 4228.

administrative burden for Tribal members, requiring navigation through complex immigration processes that were previously unnecessary.

In 2021, President Biden signed an Executive Order 14058 directing federal agencies to reduce administrative burden and improve the customer service experience. As mentioned in that EO, "[e]very interaction between the Federal government and the public … should be seen as an opportunity for the Government to save an individual's time (and thus reduce "time taxes") and to deliver the level service that the public expects and deserves." In line with Executive Order 14058, to reduce administrative burden and reduce the "time tax" on Tribal members, the only legislative change needed is clear and straightforward: eliminate the outdated "blood quantum" requirement and instead recognize Tribal membership and/or Indian status as the basis for eligibility.

Contrary to Executive Order 14058, DHS's proposal does not reduce administrative burden, in increases it and further strains the service experience between Tribes, Tribal members, and the U.S. federal government. We do not need additional bureaucratic processes that will require time on our Tribal members to apply for a visa and wait for approval. Aside from the blood quantum requirement, the INA § 289 has been successfully implemented for decades and our Canadian-born Indian relatives have been able to exercise their inherent rights and live, work and study in the United States.

Moreover, given the commitments outlined in the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights—which your agency has signed and pledged to uphold by integrating Tribal treaty and reserved rights into DHS's decision-making processes— we question whether your INA § 289 proposed changes were developed in consideration of our Treaty and reserved rights. By adding restrictions onto the right of entry, then it is no longer a free passage right as was promised in the Jay Treaty, and contrary to our inherent rights that existed long before this country was established and before U.S.-Canadian border was put in place. Per the MOU that your agency signed, did your agency in fact integrate the consideration of Tribal treaty and reserved rights when it decided to publish this consultation process in the Dear Tribal Leader Letter dated March 11, 2024?

Furthermore, the establishment of the Reciprocal Indigenous Mobility Initiative by this Administration promised to identify and remove barriers that impede the access of Tribal nations to border-crossing rights and benefits, including those that impede access to revitalizing and strengthening familial, Tribal, linguistic, cultural, religious, and spiritual ties. It is unclear how your INA § 289 amendments reflect an assessment of barriers or incorporate the feedback and needs of Tribal Nations. Was a report of identified barriers ever completed to inform DHS's INA § 289 proposal?

As discussed in the White House Tribal Nations Summit Progress Reports from 2022 and 2023, this Administration, and DHS in particular, have committed to strengthening the nation-to-nation relationship. As part of that effort, your agency implemented new Tribal consultation policies and well as new tribal advisory committees to ensure that Tribal leaders have direct and consistent contact with federal agency decision makers. Consultation principles established by the November 2022 Memorandum on Uniform Standard for Tribal Consultation state that Tribal consultation is a two-way, Nation-to-Nation exchange of information and dialogue between

official representatives of the United States and of Tribal Nations regarding Federal policies that have Tribal implications. Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations. Agencies were directed to do this work with direct input from Tribal Nations.[7]

According to this Administration's published commitments and rules for working with Tribal nations, and as part of our two-way exchange, we would like answers as to: (1) how your agency considered our Tribal Treaty and reserved rights when it drafted its INA § 289 proposal and (2) what barriers did DHS identify as it relates to Section 289 border crossings?

Since 2017, JTBA has spent a significant amount of time and resources educating DHS and Congress about federal Indian law and policy, our sovereign rights, and about how the U.S. Constitution views treaties as the Supreme law of the land. Therefore, it is deeply unsettling, and frankly, quite shocking, that this Administration would consider designating American Indians as "aliens," all while working to implement a visa regime to govern our travel across the U.S.-Canada border. Such a move is unprecedented and takes us back to some of the most regressive federal policies witnessed since the termination era of the 1950s.

DHS's proposal compounds the indignity already faced by being the sole demographic required to substantiate their identity through blood quantum—a practice reminiscent of antiquated, dehumanizing policies. At a time when we should be moving forward, such a proposal makes us worry about being labeled as alien immigrants in our ancestral lands. These are the very lands our ancestors and our Tribal members have defended, even in service to the United States military, underscoring our enduring commitment to protect and steward these territories for generations. DHS's proposed INA § 289 change overlooks our deep connections to these lands and the sacrifices our people have made. Your INA § 289 does not just ignore our history. It feels like it's trying to erase it.

Lastly, JTBA has serious concerns about DHS's proposed eligibility criteria under INA § 289. As written, the proposed amendments can be interpreted to broadens the scope of individuals eligible to enter the United States. Specifically, Section (b)(3), clause (W)(ii), mentions that an "Alaska Native entity" could utilize INA § 289. This language is troubling for two reasons. First, we are concerned that DHS is incorrectly referring to Alaska Native Tribal Governments as "Alaska Native entities". Alaska Native Tribal governments are currently included in the definition of a "federally recognized Indian Tribe" pursuant to the Federally Recognized Indian Tribe List Act[8] and as published in the Federal Register on an annual basis.[9] Second, including "members of an Alaska Native entity" expands upon the current definition of who is eligible to utilize INA § 289 beyond members of U.S. federally recognized Tribal governments to include shareholders of

[7] White House Policy Council, *2023 Progress Report for Tribal Nations* (Dec. 4, 2023), available at https://www.whitehouse.gov/wp-content/uploads/2023/12/2023.12.04-TNS-Progress-Report.pdf.
[8] P.L. 103-454, 25 C.F.R. Part 83.
[9] Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 89 FR 944 (Jan. 8, 2024), available at https://www.federalregister.gov/documents/2024/01/08/2024-00109/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of.

Alaska Native Corporations. Alaska Native entities and Alaska Native Tribal governments are not the same.

Additionally, the proposed Section (IV) provides "a member of another *indigenous* people of Canada recognized by the Secretary of Homeland Security, … [is] eligible for the benefit of this subparagraph". First and foremost, the term "indigenous" has no meaning in U.S. federal law. We are concerned that DHS is unnecessarily expanding who the INA § 289 right applies to.

In conclusion, DHS's proposed amendments should be revised to articulate eligibility requirements that truly facilitate the free and inherent rights of American Indians to move across their ancestral lands. This revision should align with this Administration's commitments to reduce administrative burdens, respect Tribal sovereignty, and Tribal treaty and reserved rights. We urge DHS to express support for the Tribal Border Crossing Parity Act (H.R.7805). Such a measure would eliminate unnecessary barriers and would align with U.S. policy, the spirit of the Jay Treaty, and the principles of Tribal sovereignty and self-determination.

3. **The proposed draft legislative amendments address specific U.S. DHS enforcement authority. Are there outstanding concerns for clarity, efficacy, and efficiency that should be considered?**

The JTBA strongly urges DHS to reconsider its proposed amendments to INA § 289. We contend that these amendments, as currently proposed, do not reflect this Administration's commitments to Tribal sovereignty, self-determination, or the need to reduce administrative burdens on Tribal nations and their members. Our apprehensions center around the eligibility criteria as discussed above and the following key issues:

First, we are concerned about the practicality and fairness of notifying individuals currently residing in the U.S. under INA § 289 about the proposed legal changes. Section 2(c)(1) of DHS's proposal, which mandates that these individuals must apply for nonimmigrant status within one year of the law's enactment, raises significant concerns about DHS's ability to effectively communicate these changes. Recent dialogue with between JTBA and both DHS and the Government of Canada have revealed a significant gap in tracking the utilization of INA § 289, which suggests that the responsibility of informing affected Tribal members will disproportionately fall upon Tribal governments. This expectation is both unrealistic and unfair, particularly in the absence of federal resources to support such an endeavor. Instead of requiring an adjustment of status, we support codification of the existing practice of becoming a Lawful Permanent Resident (LPR) when working in the U.S.[10]

Second, while we understand the desire of the DHS to issue a Canadian Indian entrant a valid U.S. travel document, we are concerned that Sec. 1(c) fails to recognize U.S. Tribal

[10] 8 C.F.R. Sec. 289.2. Lawful admission for permanent residence. *Any American Indian born in Canada who at the time of entry was entitled to the exemption provided for such person by the Act of April 2, 1928, (45 Stat.401), or section 289 of the Act, and has maintained residence in the United States since his entry, shall be regarded as having been lawfully admitted for permanent residence.*
To obtain LPR, an individual must request a creation of a record of admission. This process is outlined in Chapter 5 of the U.S. DHS' U.S. Citizenship and Immigration Services policy manual. More information can also be found here: https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-an-american-indian-born-in-canada.

government identification cards as evidence of work authorization, that they are admitted to the United States, and more. Currently, DHS recognizes Tribal identification cards when entering the United States.[11] However, there is no recognition of this current practice being reflected in the DHS' legislative proposal.

Third, additional concerns arise from the proposed expansion of eligibility criteria under INA § 289. The inclusion of terms and categories that lack clear definition or precedent in U.S. federal law, such as "another indigenous people of Canada" or "Alaska Native entity" threatens to dilute the specific rights and recognition traditionally afforded to Tribal Nations.

In conclusion, the overarching aim of our concerns and recommendations is to ensure that any legislative amendments not only respect but also actively support the free and unencumbered movement of American Indians to cross the U.S.-Canada border. We highlight issues related to notifying affected individuals of legal changes, the recognition of Tribal government identification cards, the expansion of eligibility criteria in ways that may dilute Tribal rights, the inappropriate characterization of American Indians as "aliens", and overly the burdensome and unprecedented visa requirement for INA § 289.

To ensure that any legislative changes reflect a deep respect for Tribal rights and cultures, we strongly recommend that DHS closely examines current U.S. federal Indian law and policy and considers the guidance provided by the United Nations Declaration on the Rights of Indigenous Peoples, particularly Articles 36 and 22. By doing so, DHS can truly honor its commitments to Tribal nations, uphold the spirit of the Jay Treaty, and support the unimpeded movement of American Indians across their ancestral lands. We stand ready to engage in meaningful nation-to-nation dialogue to achieve these ends.

Sincerely,

Chief Michael Conners
Saint Regis Mohawk Tribe
Co-Chair of the Jay Treaty Border Alliance

Chairwoman Jennifer Porter
Kootenai Tribe of Idaho
Co-Chair of the Jay Treaty Border Alliance

Grand Chief Abram Benedict
Mohawk Council of Akwesasne
Co-Chair of the Jay Treaty Border Alliance

Grand Chief Kahsennenhawe Sky-Deer
Mohawk Council of Kahnawake
Co-Chair of the Jay Treaty Border Alliance

[11] U.S. CUSTOMS & BORDER PROT., *U.S. Citizens - Documents needed to enter the United States and/or to travel Internationally* (Mar. 3, 2024), available at https://help.cbp.gov/s/article/Article-3618?language=en_US#:~:text=U.S.%20Passport%20or%20U.S.%20Passport,**%2C%20NEXUS%2C%20or%20SENTRI.