

# AMERICA'S INCOHERENT IMMIGRATION SYSTEM

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If the U.S. Congress and executive branch agencies formulated coherent policies, then here is what our immigration system would look like: highly skilled foreign nationals could be hired quickly and gain permanent residence, employers could hire foreign workers to fill niches in lower-skilled jobs, foreign entrepreneurs could easily start businesses in the United States, and close relatives of American citizens could immigrate in a short period of time. If all those things were true, then we wouldn't be talking about America's immigration system.

Many myths dominate perceptions about immigration. Perhaps the most common myth is that it's easy to immigrate to America. Often when discussing illegal immigration, a TV commentator will say, "Well, they should just leave the country and come back in legally." An astute viewer would ask themselves: "If it was that easy, then why would they have risked their lives crossing that desert in the first place?" In fact, as will be discussed, while immigrating legally in high-skilled fields, as an entrepreneur, or as a family member is not easy, it is particularly difficult to obtain a legal visa for "lower-skilled" jobs.

## Lower-Skilled Immigrant Workers

Members of Congress and the executive branch exhort U.S. employers to hire only individuals authorized to work in America, yet

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fail to provide the legal and regulatory structure to make this a realistic option. It remains difficult, if not impossible, for employers to hire foreign nationals to fill lower-skilled jobs legally in America on a long-term basis.

Few legal avenues exist for lesser-skilled workers to enter America, which is a prime reason for illegal immigration. The underutilized H-2A visa for seasonal agricultural workers is considered burdensome and litigation-prone by growers. "Employers must wade through a regulatory maze in order to achieve some sort of basic understanding of what is required of them," testified John R. Hancock, formerly the Department of Labor's chief of the agricultural certification unit responsible for administration of the H-2 program, before a 1997 House Immigration Subcommittee hearing. "The H-2A program is not currently a reliable mechanism to meet labor needs in situations where domestic workers are not available" (U.S. Congress, House 1997).

Employers have often used up the annual quota of H-2B temporary visas for non-agricultural workers. Such visas are limited to use by seasonal workers in places such as resorts, or in industries such as crab fishing and nurseries. Employers also consider these highly regulated visas difficult to use. Based on the U.S. Department of Labor's interpretation of the statute, H-2B visas cannot be used for long-term or permanent jobs, such as an in-home caregiver or maid in a hotel full-year round. Employers generally cannot sponsor such H-2B or H-2A workers for permanent residence (green cards) and, in any case, such immigrant visas in the "Other Workers" category are currently limited to only 5,000 a year (U.S. Department of State 2010).<sup>1</sup>

Most discussion of immigration these days focuses on illegal immigrants and the federal government's latest plan to stop them from working in America. Over the past two decades, these plans

<sup>1</sup>"Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program."

have been both ineffective and counterproductive. After years of legislation and increased enforcement, the illegal immigrant population in the United States increased from 3.5 million in 1990 (INS 2001: 10) to approximately 11 million today (Baker, Hofer, and Rytina 2011: 4).

This current state of affairs is unfortunate because expanded use of temporary visas represents far and away the best way to reduce illegal immigration and also prevent the deaths at the border of those seeking economic opportunity in America. The inability of foreign nationals to enter the United States legally to work in lower-skilled jobs has contributed to more than 4,000 men, women, and children dying while attempting to cross the border into America since 1998 (Anderson 2010a).

The actions of Mexican farm workers between 1953 and 1959 illustrate that allowing legal paths to work will reduce illegal immigration and save lives. "Without question, the *Bracero* program was . . . instrumental in ending the illegal alien problem of the mid-1940s and 1950s," wrote the Congressional Research Service (1980: 41). In short, history shows that combining sufficient legal avenues for work and immigration enforcement can dramatically reduce illegal immigration.

After enforcement actions by the INS in 1954 were combined with an increase in the use of the *Bracero* program, illegal entry, as measured by INS apprehensions at the border, fell by an astonishing 95 percent between 1953 and 1959. This demonstrated how access to legal means of entry could affect the decisionmaking of migrant workers.

One of the unintended consequences of U.S. immigration policies is that they have encouraged illegal migrants to set down roots. Increasing the chances of being apprehended has made entering the U.S. more hazardous. That means individuals who enter successfully stay in America rather than travel back and forth to Mexico or Central America. "Not only have U.S. policies failed to reduce the inflow of people from Mexico, they have perversely reduced the outflow to produce an unprecedented increase in the undocumented population of the United States," writes Princeton University's Douglas Massey (2005: 8). "America's unilateral effort to prevent a decades-old flow from continuing has paradoxically transformed a circular flow of Mexican workers into a settled population of families and dependents."

While many members of Congress state publicly they wish to reduce the overall population of illegal immigrants in the United States, these same elected officials have refused to pursue the policies that would be most effective in accomplishing that goal. While the recent lackluster economic performance of the U.S. economy has tempered the growth in illegal immigration, policy-makers need to recognize that a significant expansion in the ability of low-skilled foreign workers to obtain jobs legally in the United States must be part of any long-term solution to reducing illegal immigration.

### Highly Skilled Immigrant Professionals and Researchers

If the U.S. government does not make it easy for employers to hire lower-skilled workers legally, then one might assume that must be because the emphasis in America's immigration system is on facilitating the entry of highly skilled individuals. That is not the case.

A bureaucratic process, high fees, frequent government audits, and low quotas are among the obstacles facing U.S. employers and the highly educated foreign nationals they may wish to hire. Anyone who thinks the process is easy or that U.S. employers go out of their way to hire foreign nationals has not spoken with those who have endured hiring a foreign-born professional and sponsoring him or her for permanent residence.

At over 2,000 pages, the American Immigration Lawyers Association's recently published book *Business Immigration Law & Practice* (Buffenstein and Cooper 2011) is a testament to both the arduous process and numerous traps for employers seeking to hire skilled foreign nationals. In an interview, Buffenstein (2011) noted:

Immigration processes are highly regulated and very complicated. Not only are the statutes and regulations very intricate, but they are further layered by a huge, and often inconsistent, patchwork of sub-regulatory agency guidance and administrative practices that are hard to find much less to piece together to provide a basis for sound advice.

The problem is particularly acute when hiring highly skilled individuals. The perception is widespread that it is a simple and easy

process for an American company to hire a foreign-born worker, but that perception is wrong:

An employer seeking to hire a skilled worker typically needs the assistance of an attorney who is very familiar with business immigration, and must go through a variety of steps and processes. These include identifying an appropriate visa category, ensuring that the proposed position in the United States and the prospective employee's background are consistent with that particular visa category, determining whether there are factors that affect the timing of availability of that category (such as the H-1B quota), preparing the application itself, filing the application with the appropriate government agency (typically U.S. Citizenship and Immigration Services, but sometimes the Department of Labor or Department of State in lieu of, or in addition to, USCIS), responding to any kind of request for additional information issued by the government, coordinating the process of obtaining an actual visa stamp at a U.S. Consulate abroad, and ensuring the individual has the correct information and documentation to be admitted to the United States by the officers at the port-of-entry [Buffenstein 2011].

There exists a separate process to obtain extensions or renewals of temporary (nonimmigrant) status and work authorization, and another process for obtaining permanent resident status. According to Buffenstein (2011), "Experienced attorneys in other areas of the law are often shocked to learn how complex immigration law can be, and how it can be fraught with negative consequences for what appear to be small and seemingly meaningless differences in approach or strategy."

The problems for a high-skilled foreign national and a potential employer start even before a job is offered. The typical method of petitioning for a foreign national with a BA or higher is an H-1B visa, which is generally good for a total of 6 years, renewable after three years.

The first issue an employer must face is whether an H-1B is even available. Under the law, the number of new individuals who may receive H-1B status in a year is 65,000, plus a 20,000 exemption from that quota for those who received a master's degree or higher from a U.S. university. The supply of H-1B visas has been

exhausted during or before each of the past 8 fiscal years, meaning during that period—sometimes several months at a time—no one new (as opposed to a renewal or a current H-1B visa holder changing employers) could be hired on an H-1B visa. Being unable to rely on the visa system makes it difficult for planning and encourages employers, if feasible, to move resources outside the United States, where they will not be subject to the vagaries of the immigration system.

A second problem area in high-skill immigration is the fees. Data from U.S. Citizenship and Immigration Services obtained by the National Foundation for American Policy (NFAP 2011) show from FY 2000 to FY 2011, employers have paid over \$2.3 billion to the federal government in H-1B scholarship/training fees (generally \$1,500 per individual). In addition, a \$500 anti-fraud tax/fee on each H-1B and L-1 visa has cost employers more than \$700 million. Including visa adjudication levies, premium processing fees and costs associated with dependent family members the amount employers paid to the federal government to hire H-1B visa holders approaches \$4 billion since 2000 (NFAP 2011: 1). Employers must also typically pay legal fees of \$1,800 to \$2,500 per H-1B temporary visa, as well as staff time, while sponsoring an individual for a green card (permanent residence) can be as high as \$35,000 (Anderson 2010b: 6). All these costs are on top of being required to pay a foreign national the same as a comparable Americans.

The third problem for employers is government oversight. In the past year, U.S. Citizenship and Immigration Services has conducted 15,000 on-site audits of employers that hire H-1B visa holders. To give an idea how many audits 15,000 represent, consider the following: in FY 2009, there were only about 27,000 employers of new H-1B visa holders and 26,300 hired 10 or fewer foreign-born professionals (Anderson 2010b: 31). In fact, 18,747 employers hired only one H-1B visa holder each. It seems hard to believe that thousands of employers who are hiring only one foreign national each are engaging in fraud. Moreover, large employers with recognizable household names have received six or more visits within the past year, according to the American Council on International Personnel (Anderson 2010b). Rather than enforcement based on real evidence of wrongdoing, these types of audits are essentially fishing expeditions that cause companies to spend time and resources to answer questions and supply documents rather than focusing on competing

in global markets. The site visits over the past year show a rate of fraud or technical violations far lower than a questionable 2008 agency report.

A fourth problem for employers and skilled foreign nationals is bureaucratic. To obtain a green card for a skilled foreign national a company must generally obtain labor certification. Under the Department of Labor's regulations the process can take several months and cost up to \$25,000. It involves "testing" the labor market to show a U.S. worker is unavailable, often through highly prescribed methods, including placing advertisements. In essence, the federal government forces employers to recruit again for positions already filled. If a U.S. worker who responds to the advertisement is minimally qualified, then it's possible the foreign national will be unable to obtain a green card. The process has grown so complex over the years that the Buffenstein and Cooper (2011) book published by AILA devotes nearly 300 pages just to explaining labor certification to other practicing attorneys.

The final key problem is a lack of green cards. Under U.S. law, employment-based green cards (for permanent residence) are limited to 140,000 in a fiscal year. However, that number includes both the principal sponsored immigrant and his or her family members. There has also been a per country limit that generally prevents no more than 7 percent of the visas in an employment-based immigration category from going to any one country. Given its large population of skilled professionals, this has affected workers from India most of all. The combination of the low quotas and the demand from certain countries has meant the wait for an Indian immigrant sponsored today could exceed 20 years, absent changes in the law (NFAP 2009). For other countries it exceeds 6 years, depending on the category. This means, in practice, skilled foreign nationals must first be hired to work on a temporary visa, such as an H-1B visa, and wait for years for a green card while working in the United States. However, frustration and apprehension at such long waits can encourage skilled individuals to leave the United States and pursue other opportunities.

## Immigrant Entrepreneurs

If America does not make it easy for either low-skilled or high-skilled workers to be hired or stay on a long-term basis, then surely

our government must provide a smooth pathway for foreign-born entrepreneurs who want to create jobs and businesses in the United States. Once again, the answer is no.

The immigrant investor visa category, also known as EB-5 (the fifth employment-based “green card” preference), became part of the Immigration and Nationality Act in 1990. When Congress created the category it anticipated significant use of the visa and substantial job creation. For a number of reasons, including the statute itself, the visa has not been widely used, nor has job creation from the visa been significant.

The primary problem is that both the statute and regulations work against job creation. “The statutory requirements of the EB-5 visa category are onerous,” conclude attorneys Yale-Loehr et al. (2009: 17). “Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, tax, investment, and immigration law are all required.” If one is interested in adding new jobs to the economy, then requiring large amounts of capital, as the current immigrant investor visa category does, represents a backwards policy approach. Simply put, job creation is a natural offshoot of business creation, not an end in itself for entrepreneurs. To get more startups in the United States one needs to make it easier for such businesses to begin. But by establishing such high capital requirements—\$500,000 or more—the immigrant investor visa category is facilitating only a portion of the businesses and jobs that otherwise could be created.

Nearly all visas through the immigrant investor category utilize “Regional Centers,” which are magnets for attracting additional investment to existing projects. “Approximately 90 to 95 percent of individual Form I-526 petitions filed each year are filed by Alien Investors who are investing in Regional Center-affiliated commercial enterprises,” according to U.S. Citizenship and Immigration Services (2010a). In other words, the visa is generally used for ongoing projects, rather than for starting new ventures. An immigrant investor visa can lead to permanent residence, commonly called a green card. (This is different from temporary visas, which allow individuals to stay in the United States only while they remain in that temporary status, such as an F-1 student visa.) Under EB-5, an adjudicator examines an application and the principal comes before U.S. Citizenship and Immigration Services after a two-year period to determine if he or she has met the

conditions of the visa, such as proving 10 jobs were created indirectly or directly through the individual's investment. At that time, the individual can be awarded permanent residence.

The EB-5 category has seen some extremely low admission totals in some years. For example, in 2003 only 65 people immigrated under the category. In 1997, 1,361 people immigrated under EB-5. To illustrate the contrast: Between 1996 and 1998, an average of 1,040 people immigrated under EB-5; between 2001 and 2003, only an average of 136 people immigrated (DHS 2011).

The reason for the low usage in a number of years is that the immigrant investor visa category has provided great latitude to regulators and adjudicators at the Immigration and Naturalization Service and its follow-on agency for the service side, U.S. Citizenship and Immigration Services. One can see that regulation and adjudication became so tight in some years, based on fear of fraud, that virtually no immigrant investor cases were approved.

Unfortunately, other existing categories are unsuitable for many would-be foreign entrepreneurs. The E-2 visa excludes nationals of India and China and individuals must prove they intend to return to their native countries to receive visas. In the past, businesses have been able to obtain H-1B temporary visas for company founders. But U.S. Citizenship and Immigration Services declared in a 2010 policy memorandum that it would no longer permit H-1B approvals for such founders, a direct policy impediment to foreign entrepreneurs starting businesses in the United States (USCIS 2010b).

## Sponsoring Family-Member Immigrants

A common criticism of the U.S. immigration system is it tilts heavily toward family admissions. This rests on the false notion that any close relations sponsored by U.S. citizens quickly come to America.

The wait times for sponsoring a close family member are long, in some cases extremely long. In a November 2010 report, the State Department tabulated more than 4.5 million close relatives of U.S. citizens and lawful permanent residents on the immigration waiting list who have registered for processing at a U.S. post overseas (U.S. Department of State 2010). That does not include individuals waiting inside the United States, such as those in a temporary visa status, who would gain a green card via adjustment

of status at a U.S. Citizenship and Immigration Services office. Counting such individuals as well would likely increase the waiting list to over 5 million.<sup>2</sup>

In general, a U.S. citizen can sponsor for permanent residence a spouse, child, parent, or sibling. A lawful permanent resident (green card holder) can sponsor a spouse or child. The wait times and quotas vary for the categories, with the application of per-country limits creating much longer waits in some preference categories for nationals of Mexico and the Philippines.

For example, the wait time for a U.S. citizen petitioning for a brother or sister from the Philippines exceeds 20 years. The U.S. Department of State (2011) *Visa Bulletin* for July 2011 stated the U.S. government would process only applications filed prior to May 15, 1988, for siblings from the Philippines. In other words, American citizens with brothers or sisters in that country who filed while Ronald Reagan was still president of the United States and before the Berlin Wall fell are still waiting for their relatives to join them. For siblings from countries other than Mexico and the Philippines the wait times based on priority dates are closer to 10 years.

The expected waiting times are quite long for other family categories as well. A U.S. citizen petitioning for either a married (3rd preference) or unmarried (1st preference) son or daughter (21 years or older) from Mexico can expect to wait about 18 years. There is a similar wait time for married sons and daughters from the Philippines. The wait is an estimated 7 years for U.S. citizens with unmarried sons and daughters in other countries (U.S. Department of State 2011).

The spouses and children of lawful permanent residents (green card holders) also experience long waits for legal immigration. In the 2nd preference (2A), the wait time is estimated to be about 3 years, with longer waits for Mexicans. The wait for unmarried sons and daughters of lawful permanent residents (2B) is about 8 years for all countries except Mexico, which has a 19-year wait,

<sup>2</sup>One can estimate the additional individuals not counted in the State Department document by examining the proportion of individuals in each family preference category who are listed as adjustments, rather than “new arrivals,” in Table 7 of the annual *Yearbook of Immigration Statistics*, published by the U.S. Department of Homeland Security.

and the Philippines, where the wait is approximately 11 years (U.S. Department of State 2011).<sup>3</sup>

An “immediate relative” of a U.S. citizen can immigrate to America without being subjected to an annual quota. This is important, since it is the relatively low quotas in the family and employer-sponsored preference categories that lead to waits of often many years for would-be immigrants. While there is no numerical limit in the immediate relative category, processing would still normally take several months. The three primary immediate relatives included in the category are: spouses of U.S. citizens; unmarried children of a U.S. citizen (under 21 years old, under 16 if adopted, or under 18 if a natural sibling of a child who has been adopted under the age of 16); and parents of U.S. citizens, if the petitioning citizen is at least 21 years old (Fortino-Brown 2007).

The policy rationales offered for eliminating family immigration categories in recent years fail to hold up under scrutiny, appearing more contrived than substantive. For example, some have argued that the wait times in some of the family categories are so long that it gives people “false hope.” But this argument strikes one as crying crocodile tears for those waiting in line. The fact that long waits exist in some categories simply means that Congress has not raised the limits to correspond with the demand. The solution is not to eliminate categories and thereby guarantee Americans in the future could never reunite with certain loved ones.

The more rational approach is to raise the quotas, as the Senate did in its immigration bill passed in 2006. In that legislation, Senators raised the quotas for both employment-based and family-based immigrants, demonstrating there is no real “tradeoff” that exists between these two types of immigration. If one argues that long waits encourage individuals to jump ahead in line, then destroying all hope of immigrating legally would provide even more incentive for people to come to the United States and stay illegally. It makes little policy sense to decry illegal immigration by arguing

<sup>3</sup>The spouses and minor and adult children of Permanent Residents category is 114,200 annually “plus the number (if any) by which the worldwide family preference level exceeds 226,000.” Seventy-five percent of spouses and minor children of lawful permanent residents are exempt from the per-country limit. Wait times are approximate as of May 2010 (U.S. Department of State 2011).

people should immigrate legally and at the same time to further restrict the country's most viable options for legal immigration.

While it is true approximately 65 percent of U.S. legal immigration is family-based, more than half of family immigration is actually the spouses and minor children of U.S. citizens, categories no one has proposed eliminating. Of total U.S. legal immigration, married and unmarried adult children of U.S. citizens accounted for only about 2 percent each; siblings of U.S. citizens accounted for only 6 percent (DHS 2009: 6). Eliminating these categories would produce only a small drop in overall legal immigration and lead to great hardship for tens of thousands of Americans and their loved ones.

While preventing American citizens from sponsoring a son, daughter, or sibling for immigration would bring about personal pain to those affected by it, such a policy would not result in any corresponding practical or policy-oriented benefits to the United States. Satisfying the possible nativist urges of an elected official or organized group is not a national interest.

## Conclusion

Fixing problems with the U.S. legal immigration system does not involve raising or reducing federal spending, or designing elaborate new agencies or policies. In general, much can be accomplished by simply raising the quotas for temporary visas for both low- and high-skilled workers and increasing the number of green cards available for family and employer-sponsored immigrants. In addition, federal agencies must abandon the practice of making hiring foreign nationals so arduous that it either encourages illegal immigration, at the low end, or placing more resources outside the United States, at the high end. Finally, Congress should establish a new entrepreneur visa with little or no capital requirements to enable foreign-born job creators to pursue their American dream and make the country richer in the process.

Immigration is a source of great strength for America, filling niches in the labor market, strengthening families and opening the door for some of the most talented and enterprising individuals in the world. Yet America's immigration system could be so much more. Every day individuals, employers, and their attorneys must grapple with our complex and convoluted immigration system. We are fortunate so many manage to do so successfully.

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