

NO HELP WANTED: FIXING THE LABOR
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BARRIERS TO AN EFFECTIVE EMPLOYMENT
IMMIGRATION SYSTEM

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NO HELP WANTED: FIXING THE LABOR CERTIFICATION PARADOX AND OTHER BARRIERS TO AN EFFECTIVE EMPLOYMENT IMMIGRATION SYSTEM

Christina Fulponi*

INTRODUCTION

“We cannot restore confidence in our immigration system until and unless we face up to reality, put ideology aside, and find solutions that will work to address the situation in which we find ourselves today.”¹ New York Senator Charles Schumer, then the Chairman of the Subcommittee on Immigration, Refugees, and Border Security, voiced this concern during a subcommittee hearing held in April 2009.² The effort to pass comprehensive immigration reform, initiated well before Senator Schumer’s remarks, remains unfinished. Senator Schumer emphasized that “[i]n the context of a rapidly changing global economy, our immigration laws must be reformed and brought up to date.”³ Yet over a decade later, large-scale immigration reform remains unaccomplished.⁴ In fact, even the Trump administration

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¹ *Comprehensive Immigration Reform in 2009: Can We Do It and How?: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of Hon. Charles E. Schumer, U.S. Senator of the state of New York), <https://www.govinfo.gov/content/pkg/CHRG-111shrg55034/pdf/CHRG-111shrg55034.pdf>.

² *Id.*

³ *Id.* at 11.

⁴ Claire Felter, Danielle Renwick & Amelia Cheatham, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL. (June 23, 2020), <https://www.cfr.org/backgrounder/us-immigration-debate-0>. Congressional gridlock has blocked promising reform efforts in recent years:

Congress has debated numerous immigration reforms over the last two decades, some considered comprehensive, others piecemeal. . . . The last time

acknowledged the lack of meaningful reform, noting that the United States has not substantially reformed its immigration system in more than fifty years.⁵ As a result, immigration courts are severely backlogged,⁶ and employers who rely on foreign workers must contend with lengthy processing times and an outdated quota system to secure essential business visas.⁷

The immigration crisis has been at the forefront of political debate, public discourse, and media reporting for decades now.⁸ After taking office in 2016, President Trump proposed several major policy initiatives to transform the backlogged U.S. immigration system.⁹ His proposals largely consisted of reactive and punitive measures aimed at strengthening border security and infrastructure in response to inflated fear and outrage at illegal border crossings.¹⁰ The plan also highlighted and proposed measures to address what he perceived as systematic abuse

legislators came close to significant immigration reform was in 2013, when the Democrat-led Senate passed a comprehensive reform bill that would have provided a path to citizenship for undocumented immigrants and tough border security provisions. The bill did not receive a vote in the Republican-controlled House of Representatives.

Id.

⁵ *President Trump's Bold Immigration Plan for the 21st Century*, WHITE HOUSE (May 21, 2019), <https://trumpwhitehouse.archives.gov/articles/president-trumps-bold-immigration-plan-21st-century/>.

⁶ See Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration System at Its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>.

⁷ AM. IMMIGRATION LAWYERS ASS'N, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL IMMIGRATION 16 (2018) [hereinafter DECONSTRUCTING THE INVISIBLE WALL] ("At the end of FY 2017, a total of 5.6 million applications and petitions were pending with USCIS as compared to 4.3 million at the end of FY 2016.").

⁸ See Felter et al., *supra* note 4; Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/>; *Immigration Becomes a Hot Topic for Both Parties*, CBS NEWS (Apr. 27, 2010, 10:38 AM), <https://www.cbsnews.com/news/immigration-becomes-a-hot-topic-for-both-parties/>.

⁹ See Esthimer, *supra* note 6.

¹⁰ See *President Trump's Bold Immigration Plan for the 21st Century*, *supra* note 5.

stemming from “chain-migration,”¹¹ the “exploited asylum process,”¹² and an alleged failure to protect American workers against internal competition from foreign workers.¹³

The majority of these concerns, however, are either a misunderstanding, a conflation of data, or unfounded beliefs stemming from societal fictions and prejudices that are likely products of partisan and interest group politics employed to achieve a desired political end.¹⁴ Foreseeably, policies based in political outrage and fiction are unlikely to serve as effective solutions. For example, “[b]y expanding enforcement priorities without a corresponding expansion of court personnel, President Trump’s policies [made] the backlog worse.”¹⁵

Border enforcement is not the only aspect of the immigration system the Trump administration sought to overhaul. As the American Immigration Lawyers Association (AILA) observed,

With respect to employment-based immigration, the business community has been hit with unprecedented scrutiny of nonimmigrant petitions for skilled workers, managers, executives, and others, a dramatic increase in Requests for Evidence (RFEs), the dismantling of rules to facilitate immigrant

¹¹ President Trump frequently used “chain migration” throughout his presidency to describe the U.S. family-based immigration system. See, e.g., *Remarks by President Trump in State of the Union Address*, WHITE HOUSE (Jan. 30, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-state-union-address/>.

¹² *President Trump’s Bold Immigration Plan for the 21st Century*, *supra* note 5.

¹³ *Id.*; see also *President Donald J. Trump is Taking Action to End Birth Tourism, Protect National Security, and Curb the Abuse of Public Resources*, WHITE HOUSE (Jan. 23, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-taking-action-end-birth-tourism-protect-national-security-curb-abuse-public-resources/>.

¹⁴ See Stuart Anderson, *The Myth of Chain Migration*, FORBES (Oct. 16, 2011), <https://www.forbes.com/sites/stuartanderson/2011/10/16/the-myth-of-chain-migration-2/#3f86631e4562>; *Myths and Facts about Immigrations and Immigration*, ADL, <https://www.adl.org/resources/fact-sheets/myths-and-facts-about-immigrants-and-immigration-en-espanol> (last visited Mar. 3, 2020). Part IV of this Note will address the misunderstanding of foreign competition via foreign workers and their impact on U.S. workers and the economy.

¹⁵ Melanie Huettman, *The Causes of Our Immigration Court Backlog, and How We Can Fix It*, NISKANEN CTR. (July 19, 2017), <https://www.niskanencenter.org/causes-immigration-court-backlog-can-fix-2/>.

entrepreneurship, new interview requirements, and proposals to eliminate work authorization for spouses of certain H-1B workers, among many other changes.¹⁶

These changes received little attention outside the legal community, in comparison to the media attention given to President Trump's travel ban or his attempted construction of a border wall.¹⁷ Yet, these changes placed significant strains on an already overburdened system.¹⁸

Notwithstanding disagreement over how the system should be fixed, the sentiment shared by the Trump administration and the public that the immigration system needs vast and immediate reform rings true—the immigration system has, in fact, reached its breaking point in many respects.¹⁹ The immigration court system is overburdened with removal cases, processing times and delays have significantly increased across the board, and the entire system lacks the necessary resources to do its job, particularly in regard to funding.²⁰ But most significantly, immigration law and policy are not equipped to efficiently handle the modern demand for visas and Permanent Resident Cards, also called “Green Cards.” In an increasingly globalized market, qualified foreign workers with specialized skills are in high demand to fill the gaps where there are not enough U.S. workers. Systematic immigration reform needs to be responsive to modern needs. Many immigration procedures and policies are outdated—even those that are well functioning need to be updated to ensure that they operate as efficiently as possible in the modern era, where administrative processing cannot keep up with demand.²¹ Visa quotas and processing times are significant areas where the need for reform is most pronounced.²²

¹⁶ DECONSTRUCTING THE INVISIBLE WALL, *supra* note 7, at 3.

¹⁷ *See id.*

¹⁸ *Id.* at 16–17.

¹⁹ Esthimer, *supra* note 6.

²⁰ *Id.*

²¹ *See Hearing on Policy Changes and Processing Delays at USCIS Before the H. Comm. on the Judiciary Subcomm. on Immigration and Citizenship*, 116th Cong. (July 16, 2019) (statements of Don Neufeld, Michael Valverde, and Michael Hoffer), <https://www.uscis.gov/tools/resources-for-congress/testimonies/hearing-on-policy-changes-and-processing-delays-at-uscis-before-the-house-committee-on-the-judiciary>.

²² *See infra* Part II.

This Note focuses on the issues affecting the employment-immigration system and proposes reforms to ease the backlog of employment Green Card petitions, enabling the system to work more efficiently while still appropriately regulating and controlling immigration. First, Part I situates the current challenges facing immigration reform within the history of U.S. immigration policy. Part II explores the current issues impacting the efficacy of the immigration system. Next, Part III considers the relationship between the H-1B temporary worker visa and the employment-based Green Card as a pathway to citizenship. Within the employment-based Green Card application process, this Note narrowly focuses on the EB-2 and EB-3 visas and reforming and refining the permanent labor certification process.²³

Specifically, this Note outlines a two-part solution to address the backlog of both permanent employment-based Green Cards and temporary employment-based visas. First, and most significantly, Section III.A argues that the “minimally qualified” requirement should be removed from the permanent labor certification process. Section III.B notes that the way the Department of Labor (DOL) calculates the “prevailing wage” in its assessment of H-1B visa applications is in need of reform and asserts that H-1B visa and employment-based Green Card yearly quotas should be assessed and determined by the United States Citizen and Immigration Services (USCIS) and DOL, subject to congressional approval.

Finally, Part IV proposes a policy solution to alleviate employment-based visa and Green Card wait-times. This Note argues for implementing annual labor market-based calculations for determining the appropriate number of H-1B visas and employment-based Green Cards available each year. By modernizing and streamlining the employment-based immigration process, these policies will enable U.S. employers to compete in an increasingly globalized economy.

I. HISTORICAL CONTEXT OF IMMIGRATION REFORM

Immigration reform has occurred gradually throughout the years, in response to social, political, and significant historical events.²⁴ “Publications and works by academics, historians, and subject matter experts have continually guided the

²³ A nonimmigrant visa is a temporary pass that allows a person to enter the U.S. and stay for a limited amount of time. An immigrant visa, or Green Card, on the other hand, is a permit that allows a person to enter the U.S. and permanently remain in the country. *Requirements for Immigrant and Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas> (last visited Feb. 7, 2021).

²⁴ Brian Heslin, *Overstays: The Lesser-Known Illegal Immigration Issue*, HOMELAND SECURITY AFF. (EXECUTIVE SUMMARIES FROM CTR. FOR HOMELAND DEF. & SECURITY THESES), Dec. 2018, at 1, 4.

framework for immigration policy in the United States.”²⁵ However, the U.S. immigration system is overdue for reform.

To fully understand the need for comprehensive immigration reform, it is necessary to understand the historical context of immigration in the United States. In the country’s early years, unimpeded immigration was a significant factor in building the largely unpopulated United States.²⁶ Throughout the 1800s, the United States essentially had an open-door policy, encouraging and permitting primarily Western European immigrants to come to the country and settle on its lands, although notably at the exclusion of other specific regions or nationalities.²⁷ Some states passed their own immigration laws until 1876, when the Supreme Court declared the regulation of immigration a federal responsibility.²⁸

Mass immigration consistently grew until about 1920, by which time the outbreak of World War I had slowed European immigration, which did not resurge again until after the war.²⁹ In 1921, Congress enacted its first immigration policy—the national origins quota system.³⁰ This law was an emergency restrictive response to the anticipated immigration wave from Europe as a result of the end of WWI, intending to limit immigration to the U.S. to 3% of the U.S. native-born white population.³¹

Only a few years later, Congress passed the U.S. Immigration Act of 1924, which created the National Origins System,³² further restricting the number of the

²⁵ *Id.* at 5.

²⁶ STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 15 (7th ed. 2019).

²⁷ *Historical Overview of Immigration Policy*, CTR. FOR IMMIGR. STUD., <https://cis.org/Historical-Overview-Immigration-Policy> (last visited Feb. 8, 2021). The 1800s were also characterized by exclusions geared at particular racial and ethnic groups, most notably the Chinese Exclusion Law of 1882, which banned Chinese laborers from entering the U.S. and was not repealed until 1943. *Chinese Immigration and the Chinese Exclusion Acts*, OFF. HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Jan. 24, 2021).

²⁸ *Historical Overview of Immigration Policy*, *supra* note 27.

²⁹ *Id.*

³⁰ *Id.*

³¹ Karen Manges Douglas, *National Origins Systems*, in 2 ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 937, 937 (Richard T. Schaefer ed., 2008).

³² *Id.* The U.S. Immigration Act of 1924 is also known as the “Johnson-Reed Act.” *Id.*

country's entrants to only 2% of the U.S. native-born white population.³³ This legislation was designed to regulate the volume of immigration, as well as control "who" entered the U.S.—ideally white, northern Europeans.³⁴ In academic circles, it has been noted that "[t]he law accomplished this goal using three mechanisms: capping the overall number of immigrants allowed into the United States in a given month and year; favoring immigrants from certain countries; and screening out otherwise qualified immigrants as unsuitable to the United States during the visa screening process."³⁵

Non-white citizens residing in the U.S. were not included in this quota calculation in order to further exclude certain races and nationalities from future immigration considerations.³⁶ Thus, the 1921 and 1924 Acts implemented the first attempts at regulating U.S. immigration by nationality.³⁷ Simultaneously, Congress created the U.S. Border Patrol within the Bureau of Immigration in 1924.³⁸ This was followed by the Immigration and Nationality Act of 1952 (INA), which formalized immigration law and created the quota system.³⁹

By the 1960s, Congress began to liberalize its immigration policy in light of World War II, focusing on family reunification and employment preferences.⁴⁰ The Hart-Cellar Act of 1965 amended the INA and phased out the national origins quota system by eliminating nationality requirements in favor of giving immigration preference to direct relatives of American citizens and permanent residents and workers with special skills.⁴¹ The INA became the foundational structure of our modern immigration system and established family-based immigration as the

³³ *Id.*

³⁴ *Id.* at 938.

³⁵ *Id.*

³⁶ *Id.* at 939.

³⁷ *Id.*

³⁸ *Historical Overview of Immigration Policy*, *supra* note 27.

³⁹ LEGOMSKY & THRONSON, *supra* note 26, at 1. Established by the Immigration Act of 1990, the quota system limits the number of prospective immigrants who may be admitted annually by placing a cap on the number of immigrants per year.

⁴⁰ *Historical Overview of Immigration Policy*, *supra* note 27.

⁴¹ *The Legacy of the 1965 Immigration Act*, CTR. FOR IMMIGR. STUD. (Sept. 1, 1995), <https://cis.org/Report/Legacy-1965-Immigration-Act>.

cornerstone of the U.S. system.⁴² These changes were not expected to have any great impact on the immigration system at the time, but their enactment signaled the beginning of a massive wave of immigration.⁴³ The Hart-Cellar Act was the largest and most recent attempt at complete immigration reform.

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which amended the INA and was focused on amnesty and enforcement.⁴⁴ By the 1990s, immigration had begun to peak.⁴⁵ The Immigration Act of 1990 (IMMAC) was one of the most significant immigration statutes, passed to further define and finetune the requirements for employment-based immigration and make it easier for employers to sponsor foreign workers.⁴⁶ The IMMAC expanded the programs available for admitting employment-based immigrants and nearly doubled the ceiling for employment-based immigrants to 140,000.⁴⁷ However, IMMAC prioritized professional and highly skilled workers while curtailing the admission of unskilled workers.⁴⁸ In addition, the Act transferred some of the procedural steps from the court to the Immigration and Naturalization Service to reduce delays and overhauled the grounds of admissibility.⁴⁹

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) was enacted in response to a perceived growing problem of illegal immigration to the United States.⁵⁰ This Act was the most sweeping immigration reform to date and focused mostly on the removal of undocumented immigrants.⁵¹

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Historical Overview of Immigration Policy*, *supra* note 27.

⁴⁵ *Rise, Peak and Decline: Trends in U.S. Immigration 1992–2004*, PEW RES. CTR. (Sept. 27, 2005), <https://www.pewresearch.org/hispanic/2005/09/27/rise-peak-and-decline-trends-in-us-immigration-1992-2004/>.

⁴⁶ LEGOMSKY & THRONSON, *supra* note 26, at 21–22.

⁴⁷ *Id.* at 22, 386.

⁴⁸ *Id.* at 386.

⁴⁹ *Id.* at 22. Specifically, the Immigration Act of 1990 repealed a provision that had been used to exclude individuals who were not heterosexual and added new exclusion grounds for terrorism and other foreign policy interests. *Id.* In addition, the Act removed procedural safeguards available to noncitizens deportable on crime-related grounds. *Id.*

⁵⁰ *Id.* at 23.

⁵¹ *Id.*

Specifically, it resulted in the hiring of more border patrol agents and combined deportation and exclusion proceedings into a single removal proceeding.⁵² This Act also created the infamous “three- and ten-year bar,” which prohibits individuals from returning to the United States for either three or ten years if they depart the U.S. after having previously been in the country unlawfully.⁵³ Those who have been unlawfully present in the U.S. for more than 180 days but less than one year are barred from re-admittance into the U.S. for three years.⁵⁴ Unlawful presence for one year or more results in a ten-year bar.⁵⁵ Rather than risk these penalties, many undocumented people remained in the U.S., leading to a significant increase in the U.S.’s undocumented population.⁵⁶

The last substantial set of reforms to the immigration system following IIRAIRA were national security measures enacted after September 11, 2001.⁵⁷ These changes included a reorganization of the executive branch immigration agencies.⁵⁸ They were largely structural and enforcement-focused, such as enhancing border protection, increasing information sharing, and expanding detention.⁵⁹ In the years since, immigration reform has been at a much smaller, or less comprehensive, scale.⁶⁰

⁵² *Id.* at 23, 513, 641.

⁵³ *The Three- and Ten-Year Bars*, AM. IMMIGR. COUNCIL (Oct. 28, 2016), <https://www.americanimmigrationcouncil.org/research/three-and-ten-year-bars>; Immigration Nationality Act § 212(a)(9)(B)(i)(I)-(II), 8 U.S.C. § 1182(a)(9)(B)(i)(I)-(II) (2018).

⁵⁴ *Unlawful Presence and Bars to Admissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-bars-to-admissibility> (last updated July 23, 2020).

⁵⁵ *Id.*

⁵⁶ Jeffrey S. Passel, *Measuring Illegal Immigration: How Pew Research Center Counts Unauthorized Immigrants in the U.S.*, PEW RES. CTR. (July 12, 2019), <https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/>. Though the undocumented population significantly increased following IIRAIRA, it is worth noting that it has now been decreasing over the past decade. *Id.*

⁵⁷ LEGOMSKY & THRONSON, *supra* note 26, at 24.

⁵⁸ *Id.* Notably, some of the national security and anti-terrorism programs enacted during this time have since been abandoned. *Id.* at 1095.

⁵⁹ *Id.* at 1100, 1111.

⁶⁰ See *Historical Overview of Immigration Policy*, *supra* note 27.

II. MODERN IMMIGRATION CHARACTERIZED BY SYSTEM BACKLOG

Employment visas are among the most misunderstood and backlogged aspects of the immigration system. Foreign workers who apply for legal permanent residence to work in the United States will face two different types of waits: first, administrative processing consisting of the time it takes the government to process their petition and application, and second, if applicable, the additional time it takes the Green Card for permanent legal residence to become available under the immigration quota system.⁶¹ Administrative processing includes a review of the sponsors' petition, which often involves bureaucratic processing delays and takes approximately a year and a half.⁶² The second type of wait is a product of congressionally-determined numerical limits (or quotas), which place per-country⁶³ and worldwide limits⁶⁴ on the number of immigrants who can receive a Green Card each year.⁶⁵ These quotas function as ceilings rather than floors.⁶⁶ Both of these waits mean that, in addition to waiting for approval of their Green Card petition, foreign workers must then wait for their priority date to become "current," i.e., for a Green Card to become available, before they can actually apply.⁶⁷ In other words, the applicant must wait for a slot to open before submitting their own application for approval.⁶⁸

⁶¹ David J. Bier, *Immigration Wait Time Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and Inequitable*, CATO INST. (June 18, 2019), <https://www.cato.org/publications/policy-analysis/immigration-wait-times-quotas-have-doubled-green-card-backlogs-are-long> (noting that only one-third of immigrant applications will face the second type of wait pertaining to Green Card quotas, depending on the type of Green Card sought. This wait occurs between their sponsor's (such as their employer's) petition and their own application) [hereinafter Bier, *Immigration Wait Time Quotas*].

⁶² *Id.*

⁶³ Also known as nationality limits. When nationals reach their per-country limit, nationals from other countries who have not yet met their per-country limit will essentially "pass them in line." *Id.*

⁶⁴ Also referred to as a category limit. Each category has a total number of visas available for that particular year, regardless of one's nationality. If not all the Green Cards in a particular category have been used, nationalities that have already reached their per-country limits are able to receive their Green Cards above their per-country limits. *See id.*

⁶⁵ *Id.*

⁶⁶ LEGOMSKY & THRONSON, *supra* note 26, at 326.

⁶⁷ *See* Bier, *Immigration Wait Time Quotas*, *supra* note 61.

⁶⁸ *Id.*

In the aggregate, this process often results in multidecade waits, depending on one's nationality.⁶⁹ "The country limits—which cap the number of Green Cards for any particular nationality at 7 percent of the total number—artificially inflate the longest waits, while artificially deflating the *average* wait."⁷⁰ Applicants from India, China, Mexico, and the Philippines have the longest wait times because these countries typically have a greater number of applicants and max out their country limits.⁷¹ The country limit functions like a list, where one must join the queue and wait for a slot to become available before submitting an application.⁷² So, for example, the system allows someone from Thailand (assuming the 7% country limit has not yet been met) to apply for and receive a Green Card before an applicant from India (where the 7% country limit has been filled and no slots are currently available), even if the applicant from India has been waiting "in line" longer.

For Indian applicants in any visa category, this wait in 2018 was an average of eight years and six months.⁷³ In January of 2021, foreign workers from India whose applications for EB-2 visas were approved in October 2009 finally became eligible to receive Green Cards—over eleven years later. Conversely, applicants from countries that had not yet met the country limit could receive Green Cards immediately upon approval.⁷⁴ The interaction between category and nationality limits results in wildly disparate outcomes.⁷⁵ While this wait might be shocking to many, it is even more difficult to fathom when considering the sheer number of people who are at various stages in their wait times. In fact, data indicates that "[t]he backlog of people whose immigration petitions have been approved for entry but who have not yet been admitted is now nearing 4 million."⁷⁶

On the other hand, a large number of foreign workers applying for legal permanent residence Green Cards already hold temporary nonimmigrant visas, such

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN FOR JANUARY 2021 2 (2021).

⁷⁵ Bier, *Immigration Wait Time Quotas*, *supra* note 61.

⁷⁶ David Frum, *How Much Immigration is Too Much*, ATLANTIC: IDEAS (April 2019), <https://www.theatlantic.com/magazine/archive/2019/04/david-frum-how-much-immigration-is-too-much/583252/>.

as the H-1B visa.⁷⁷ The H-1B visa is a nonimmigrant visa for the temporary admission of professional workers with at least a bachelor's degree, or the "equivalent" of a bachelor's degree, for up to six years.⁷⁸ Notably, "the H-1B visa is [] treated as a pathway to citizenship for qualified employees who contribute to the American workforce in a positive way."⁷⁹ This is because the H-1B visa is one of the few nonimmigrant visas that allow for dual intent,⁸⁰ meaning that those who have it are eligible to apply for permanent residence.⁸¹

This Note focuses on one of the first steps in the employment immigration process known as labor certification.⁸² The INA created the labor certification requirement and broadly states that if a person comes to the U.S. to perform skilled or unskilled labor, they must complete the labor certification process in order to be admissible for lawful permanent residence.⁸³ U.S. employers seeking to hire either temporary or permanent foreign nationals must first meet the DOL's labor certification requirements before filing a visa petition with U.S. Citizenship and

⁷⁷ David J. Bier, *Why The Legal Immigration System Is Broken: A Short List of Problems*, CATO INST.: CATO AT LIBERTY (July 10, 2018, 9:25 AM), <https://www.cato.org/blog/why-legal-immigration-system-broken-short-list-problems> [hereinafter Bier, *A Short List of Problems*].

⁷⁸ Immigration Nationality Act §§ 101(a)(15)(H)(i)(b), 8 U.S.C. § 1184(g)(4), 1184(i)(1)(B).

⁷⁹ Deborah D'Souza, *The H-1B Issue Explained*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/news/h1b-visa-issue-explained-msft-google/>; see also Bier, *A Short List of Problems*, *supra* note 77.

⁸⁰ Typically, all nonimmigrant visas require the petitioner to have "nonimmigrant intent" (temporary intent), meaning that they only intend to reside and work in the U.S. for the duration of their visa and will leave upon its expiration. The H-1B visa creates an exception by allowing for dual intent, meaning the person simultaneously intends to be in the U.S. both temporarily and permanently. So, the visa holder has temporary intent but can also have permanent intent and apply for a Green Card. See, e.g., LEGOMSKY & THRONSON, *supra* note 26, at 457.

⁸¹ *Id.*

⁸² In order to avoid confusion, this Note will often use "permanent labor certification" to refer to labor certification during the Green Card process and "labor condition" to refer to the labor certification process for the H-1B nonimmigrant visa. While both processes are sometimes more generally referred to as labor certification, this Note will distinguish them by using these different terms. Both labor certification and labor condition processes are similar, but permanent labor certification imposes additional requirements, which this Note will discuss in detail.

⁸³ See Immigration Nationality Act § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A) (2018).

Immigration Services (USCIS).⁸⁴ In 2005, the DOL created PERM,⁸⁵ or Program Electronic Review Management, to streamline the Labor Certification process within employment-based immigration.⁸⁶

However, in recent years, it has become more difficult to complete this process. President Trump emphasized the “Buy American, Hire American” slogan and promised to protect American trade and bring back American jobs—jobs which many view as being taken by foreign workers.⁸⁷ In response, President Trump took action to make legal employment-based immigration to the United States increasingly difficult.⁸⁸ Under the Trump administration, immigration application denial rates skyrocketed 37% from 2016 to 2018.⁸⁹

More specifically, the denial rate of employment authorization documents, such as Labor Certification documents, increased from 6% in 2016 to 9.6% by 2018.⁹⁰ In the same period, the denial rate for I-485 employment-based adjustment of status to permanent residence rose from 5.9% to 7.9%.⁹¹ By 2019, USCIS denied immigration forms at an increasingly higher rate each quarter since late 2016, with only one exception in 2018.⁹² The first quarter of fiscal year 2019 saw a denial rate

⁸⁴ *See id.*

⁸⁵ This Note will not refer to the labor certification process as “PERM” because PERM refers more broadly to the process and system used for obtaining labor certification.

⁸⁶ *Permanent Labor Certification*, U.S. DEP’T. LABOR, <https://www.foreignlaborcert.doleta.gov/perm.cfm> (last visited Jan. 6, 2020). PERM was created in 2005 to make the labor certification process more efficient and address the growing backlog at the time. LEGOMSKY & THRONSON, *supra* note 26, at 392. The details of PERM are laid out in 20 CFR § 656 (2020).

⁸⁷ D’Souza, *supra* note 79.

⁸⁸ *See* Sinduja Rangarajan, *In Trump’s America, the H-1B Dream Has Turned into a Bureaucratic Nightmare for Skilled Indians*, QUARTZ INDIA (Dec. 3, 2019), <https://qz.com/india/1760097/in-trumps-us-the-h-1b-dream-has-become-a-bureaucratic-nightmare/>.

⁸⁹ David J. Bier, *Immigration Application Denials Jump 37% Under Trump*, CATO INST.: CATO AT LIBERTY (Nov. 15, 2018), <https://www.cato.org/blog/immigration-application-denials-jump-37-percent-under-trump>.

⁹⁰ *Id.*

⁹¹ *Id.* (noting, however, that the statistic refers to all employment-based adjustments of status to permanent residence (Green Cards) and that the applications are primarily from employees of U.S. businesses under H-1B visas).

⁹² David J. Bier, *Immigration Form Denials Rise Every Quarter Except One Under Trump, Up 80% Overall*, CATO INST.: CATO AT LIBERTY fig.1 (May 15, 2019), <https://www.cato.org/blog/immigration-form-denials-rise-every-quarter-except-one-under-trump-80-overall>.

80% higher than the first quarter of fiscal year 2017 (President Obama's final fiscal quarter).⁹³ In fact, the first fiscal quarter of 2019 represented the highest denial rate in the history of USCIS.⁹⁴

In summary, immigration applications under the Trump administration were denied at higher rates than under past administrations.⁹⁵ Not only did denials increase, but application delays and wait times also increased.⁹⁶ USCIS also increased its issuance of Requests for Evidence (RFEs) after fiscal year 2018.⁹⁷ An RFE is used by the USCIS to demand more evidence before it makes a decision to admit or deny.⁹⁸ Such a request can occur at any point in the employment visa or Green Card process, including during Labor Certification approvals.⁹⁹ At their discretion, USCIS can issue an RFE for any number of reasons after an initial case review, such as if the petitioner did not establish the minimum requirements for the position, or the employer did not properly establish how the foreign worker meets all the position's minimum requirements.¹⁰⁰ An RFE slows the process by requiring the petitioning employer to submit additional evidence to reconcile the discrepancy within 12 weeks.¹⁰¹ Otherwise, the Labor Certification will be denied and the employment-based Green Card petition process cannot continue. Under past administrations, it was rare to receive RFEs, and it was extremely rare for Labor

⁹³ *Id.*

⁹⁴ The denial rate in the first fiscal quarter of 2019 was the highest for any quarter for the period that USCIS has published records. *Id.*

⁹⁵ D'Souza, *supra* note 79 (stating that research from the Migration Policy Institute found that denials for H-1B dependent companies have increased from 4% in 2016 (under the Obama administration) to 42% in 2018 (under the Trump administration)).

⁹⁶ Bier, *Immigration Wait Time Quotas*, *supra* note 61.

⁹⁷ See Melissa Manna, *USCIS Data Confirms Increase in RFEs and Denials, Especially for H-1Bs*, OGLETREE DEAKINS (Feb. 27, 2019), <https://ogletree.com/insights/2019-02-27/uscis-data-confirms-increase-in-rfes-and-denials-especially-for-h-1bs/>.

⁹⁸ Kristina Gasson, *How to Handle a Request for Evidence (RFE) From USCIS*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-handle-request-evidence-rfe-from-uscis.html> (last visited Mar. 9, 2021).

⁹⁹ See Manna, *supra* note 97.

¹⁰⁰ Bier, *Immigration Wait Time Quotas*, *supra* note 61.

¹⁰¹ *Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018*, USCIS, <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf> (last visited Mar. 9, 2021).

Certifications to be denied.¹⁰² Under the Trump administration, however, RFEs nearly tripled, from roughly 22% in 2015 to approximately 60% in 2019.¹⁰³

In addition, the time spent waiting to apply for employment-based quota Green Card categories has almost doubled: from 1991 to 2018, the average wait increased from 2 years and 10 months to an average of 5 years and 8 months.¹⁰⁴ “Behind those immigrants who applied for Green Cards in 2018 stand nearly five million people waiting in the application backlog,” and the average wait time for employment-based categories grew sevenfold since 1991.¹⁰⁵ Projected wait times will be even longer for those applying for Green Cards this year, as the backlog has continued to grow.¹⁰⁶ Some have lamented that “[t]he waits are so long that many people waiting for Green Cards will die before they can even apply.”¹⁰⁷ The consequence of these delays and denials is a broken system in further disrepair. Two ways to fix the immigration system backlogs are to address the excessive restrictiveness of the application process and to disregard the static immigration quotas in favor of more flexible, labor market-responsive quotas.¹⁰⁸

III. EMPLOYMENT-BASED GREEN CARDS AND THE PERMANENT LABOR CERTIFICATION PROBLEM

The first three employment-based preference categories for permanent residence have different requirements; however, both the EB-2 and EB-3 categories

¹⁰² Bier, *A Short List of Problems*, *supra* note 77.

¹⁰³ Manna, *supra* note 97, at fig. “H-1B Petitions.”

¹⁰⁴ Bier, *Immigration Wait Time Quotas*, *supra* note 61.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* As David J. Bier explains,

Hard caps make little sense in a world that is constantly changing. Since Congress passed the Immigration Act of 1990 that determined the current quotas, the U.S. population has grown by a third and the U.S. economy has more than doubled in size. It makes sense to link the overall family preference quotas to population growth because the need for family-sponsored green cards grows with the population. On the other hand, if the U.S. population begins to decline and America’s growing economy needs even more workers, the employment-based preference quotas should be tied to growth in U.S. GDP.

Id.

require the sponsoring employer to acquire a document called a permanent labor certification from the Department of Labor.¹⁰⁹ Obtaining a labor certification is a lengthy and often expensive process designed to ensure that foreign workers do not displace or adversely affect American workers.¹¹⁰

Under the EB-2 category, employers may hire foreign workers who are “members of the professions holding advanced degrees or their equivalent,” and immigrants with “exceptional ability in the sciences, arts, or business” pursuant to the INA.¹¹¹ An employer seeking to hire a foreign worker to permanently work in the United States under the “professionals holding advanced degrees or their equivalent” category must obtain a labor certification.¹¹² Similarly, applicants who qualify under the EB-3 preference category must also complete a labor certification.¹¹³ This preference category contains three applicant sub-prongs: immigrants who perform “skilled labor” for which qualified U.S. workers are not available; immigrants who have baccalaureate degrees and are members of the listed professions; and “other workers” who perform unskilled labor for which qualified U.S. workers are not available.¹¹⁴ However, INA § 203(b)(3)(B) only permits a maximum of 10,000 of the “other workers” visa preference category in a single fiscal year.¹¹⁵

The permanent labor certification process ensures that an applicant’s employment will not “displace nor otherwise disadvantage” workers in the United States.¹¹⁶ For the permanent labor certification filing process, the employer must complete the labor certification application from the DOL’s Employment and

¹⁰⁹ LEGOMSKY & THRONSON, *supra* note 26, at 388, 390. Note that INA § 203(b)(2)(A) requires an applicant to first demonstrate a job offer from an American employer to qualify for this employment-based immigration category. *Id.* INA § 212(a)(5)(A)(C) lays out the Labor Certification requirement. *Id.* However, for applicants that fall within the “exceptional ability in the sciences, arts, or business” category, the government can use its discretion to waive the job offer requirements in the national interest. *Id.* at 389.

¹¹⁰ *Id.* at 388–89.

¹¹¹ Immigration Nationality Act § 203(b)(2), 8 U.S.C. § 1153(b)(2) (2018).

¹¹² See LEGOMSKY & THRONSON, *supra* note 26, at 390.

¹¹³ *Id.* Labor Certification is required pursuant to Immigration Nationality Act §§ 203(b)(3)(C), 212(a)(5)(C).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 391; see also Immigration Nationality Act § 212(a)(5)(A).

Training Administration (ETA), otherwise known as ETA Form 9089.¹¹⁷ Permanent labor certification approval by the Secretary of Labor certifies to the USCIS that (1) there are not sufficient U.S. workers who are “able, willing, qualified, and available” to accept the job opportunity and perform the required duties of the available job, and, furthermore, that (2) the employer has met the prevailing wage requirement, or in other words, that hiring the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.¹¹⁸

Essentially, permanent labor certification for employment-based Green Cards signifies to USCIS that the company has taken the requisite measures to search in good faith for a U.S. worker to fill the position and has determined that there are no minimally qualified U.S. workers available to do the job—meaning, the employer can then fill the position with a foreign worker without directly displacing a qualified and able U.S. worker.¹¹⁹ The way to go about advertising for the position is outlined in 20 C.F.R. § 656.17(e)(1)(i), which includes posting a job order with the relevant State Workforce Agency, two Sunday advertisements, and three additional recruitment efforts included but not limited to postings on job search websites, on-campus recruitment, and local newspaper ads.¹²⁰ According to immigration attorneys, “[t]he advertisements must be carefully drafted to ensure that U.S. workers are appraised of the position and also to demonstrate what the minimum qualifications are for the role.”¹²¹ Employers may only reject U.S. workers for not possessing the listed skills, or not meeting the minimum education or experience requirements.¹²²

Once all the appropriate steps have been taken and the Permanent Labor Certification has been approved, thereby “certifying” the employment application, the employer must continue with the visa application by filing a Form I-140.¹²³ The

¹¹⁷ *Permanent Labor Certification Details*, U.S. DEP’T. LABOR, https://www.foreignlaborcert.doleta.gov/perm_detail.cfm (last updated Jan. 6, 2020).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Cyrus Mehta & Sophia Genovese, *Labor Certification: Mustn’t the US Job Applicant Be Able to Perform the Job Even If Qualified on Paper?*, THE INSIGHTFUL IMMIGR. BLOG (Nov. 6, 2018), <http://blog.cyrusmehta.com/2018/11/labor-certification-mustnt-the-us-job-applicant-be-able-to-perform-the-job-even-if-qualified-on-paper.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Permanent Labor Certification Details*, *supra* note 117.

Form I-140 is the Immigrant Petition for the Alien Worker, or the final step in the petition process, which must be filed with USCIS within 180 days of the date that the application is certified.¹²⁴

Labor certification is a critical part of the employment-based immigration process because it is an initial step in the Green Card application where employers are susceptible to a number of pitfalls.¹²⁵ These pitfalls include incomplete recruitment efforts by the employer; failure to accurately describe the job duties by inflating the requirements or exaggerating the level of education needed; failure to pay the prevailing wage rate; and preclusion from sponsoring a foreign worker if the employer has laid off or furloughed employees.¹²⁶ Under the Trump administration, many employment-based Green Card applications were significantly delayed or even denied at the labor certification phase in an attempt to curtail legitimate immigration under the facade of protecting U.S. workers. Specifically, USCIS issued RFEs with greater frequency, questioning whether the professional positions advertised are really “specialty occupations.”¹²⁷ The next Section proposes labor certification reform as part of the solution to remedy the backlog of employment-based Green Card applicants.

A. Removing the “Interested and Minimally Qualified” Requirement of the Permanent Labor Certification

Current labor certification requirements prevent U.S. companies from hiring and sponsoring a foreign worker if there is an interested and *minimally* qualified U.S. worker for the position, regardless of whether the U.S. candidate is less qualified or less suited for the position than the foreign worker.¹²⁸ The U.S. Department of Labor created this condition within the labor certification process to protect U.S. workers by ensuring that hiring foreign workers does not adversely affect employment rates, nor take jobs from qualified U.S. workers. However, because this condition does not

¹²⁴ *Id.*

¹²⁵ Kyle Knapp, *Why Labor Certification is Denied*, ALLLAW, <https://www.alllaw.com/articles/nolo/us-immigration/why-labor-certification-denied-employment-visas.html> (last visited Mar. 9, 2021).

¹²⁶ *Id.*

¹²⁷ DECONSTRUCTING THE INVISIBLE WALL, *supra* note 7, at 9–10 (noting that the Trump administration specifically targeted declassifying computer engineers as a “specialty occupation,” but also went after other professions, “including engineers, accountants/controllers, lawyers, and physicians, with some RFEs questioning wages well beyond Level 1 and into six figures”).

¹²⁸ Mehta & Genovese, *supra* note 120.

require the U.S. company to actually hire the U.S. worker in place of the foreign worker, it does not necessarily protect the interests of U.S. workers.

This limitation is significant because employers are often seeking to sponsor foreign workers who already live and work in the United States.¹²⁹ For example, a company may already have an employment relationship with a foreign worker who entered as a temporary worker with an H-1B visa, which is valid for a maximum of six years.¹³⁰ Having trained and developed a relationship with this individual, the company may seek to sponsor her for permanent residency. If the labor certification is denied, the company, preferring to hire the foreign worker, can simply not fill the position:

PERM labor certification operates outside of the realm of typical real world recruitment efforts. Whereas employers in the real world normally look to hire the most qualified applicant, PERM requires employers to only assess whether a worker is minimally qualified for the position, regardless of whether they're a good fit for the job.¹³¹

Immigration policy analyst, David J. Bier, describes the perils of the labor certification paradox:

[T]he law requires employers to post what are essentially fake advertisements for ghost positions, but they receive *real* applicants who they have to interview and otherwise fool into believing this is a real position only to then reject them. In other words, the system wastes the time of not only employers and government adjudicators—it directly harms the very people it is supposed to help.¹³²

By removing the provision that requires employers to ascertain whether there are minimally qualified U.S. workers interested in the position, Congress would

¹²⁹ Bier, *A Short List of Problems*, *supra* note 77 (“88 percent of immigrants sponsored by their employers for permanent residence already live in the United States. Most of them entered as temporary workers on H-1B temporary visas.”).

¹³⁰ *Id.*

¹³¹ Mehta & Genovese, *supra* note 120.

¹³² Bier, *A Short List of Problems*, *supra* note 77. Mr. Bier notes that “ghost positions” are often already filled by the very foreign employee for whom the company is petitioning, in his or her capacity as a temporary worker. *Id.*

enable companies to choose the most qualified job candidate who will perform the position best. If anything, this requirement potentially harms U.S. companies by making them less competitive and less efficient in their markets. Additionally, its removal would put an end to this “theater” of asking an employer to pretend that they do not already have a candidate in mind, and one who has already been doing the job.¹³³

Striking the minimally qualified worker provision would not leave U.S. workers unprotected. Employers would still be required, under INA § 212(a)(5)(A)(i)(II), to demonstrate that employing the foreign worker will not “adversely affect the wages and working conditions of workers in the United States.”¹³⁴ These safeguards protect the interests of the U.S. worker, while balancing them against the needs of the market and economy. These provisions could be enhanced to mirror those applicable to employers seeking H-1B temporary worker visas. These employers must submit a labor condition application.¹³⁵ As discussed in the next Section, the H-1B labor condition requirement *better* protects U.S. workers by requiring that foreign workers are paid at least the prevailing wage to ensure that U.S. worker wages are not negatively affected; it does not also force employers to advertise for positions that are already filled. This condition alone is sufficient to protect U.S. worker interests, without the additional minimally qualified requirement, which overcomplicates the process and unnecessarily decreases healthy labor market competition.¹³⁶ For these reasons, the minimally qualified candidate requirement within the permanent labor certification process should be eliminated and function like the H-1B labor condition requirement, which relies on the prevailing wage provision to protect U.S. workers. The minimally qualified requirement is an undue burden on employers and creates an unnecessarily cumbersome barrier to employment-based Green Cards.

B. *Improving the H1-B Prevailing Wage Requirement*

For the prevailing wage requirement to effectively protect U.S. workers, the DOL must properly set prevailing wage rates. Critically, the DOL and trade unions have long feared that H-1B visas are not adequately protecting the interests of U.S.

¹³³ *Id.*

¹³⁴ Immigration and Nationality Act § 212(a)(5)(A)(i)(II).

¹³⁵ LEGOMSKY & THRONSON, *supra* note 26, at 458; Immigration and Nationality Act §§ 101(a)(15)(H)(i)(b).

¹³⁶ *See infra* Part IV.

workers.¹³⁷ The main concern has been that employers are not paying the foreign workers the *proper* prevailing wage.¹³⁸ The prevailing wage requirement is designed to protect the wages of college-educated U.S. workers from deflation and to protect foreign workers from being underpaid.¹³⁹ Recent wage survey data, collected from the Bureau of Labor Statistics' Occupational Employment Statistics survey, indicates that companies are able to save labor costs by hiring H-1B workers and, as this Section will explain, legally underpaying them relative to U.S. workers in similar occupations in the same region.¹⁴⁰ Thus, H-1B workers can be paid less than their U.S. worker counterparts at the median minimum market rate. While the interests of U.S. workers are important and must be balanced against the demand for professional foreign workers, the H-1B prevailing wage issue stems from the DOL's own prevailing wage calculation error, rather than a need for additional safeguards or increased labor certification requirements.

The DOL has the discretion to determine the minimum wage that employers must pay their H-1B workers, which includes factoring in the worker's occupation and the region where the worker will be employed.¹⁴¹ The DOL does this by establishing four prevailing "wage levels" that the employer must pay their H-1B workers.¹⁴² Notably, two of these wage levels are below the median minimum market rate.¹⁴³ Economic policy analysts note that "[b]y setting two of the four wage levels below the median—and thereby not requiring that firms pay market wages to H-1B workers—DOL has in effect made wage arbitration a feature of the H-1B program."¹⁴⁴ Companies can legally underpay H-1B workers because the lowest

¹³⁷ LEGOMSKY & THRONSON, *supra* note 26, at 459 (explaining that after a 1996 audit, the Inspector General of the Department of Labor criticized the H-1B petition process as mere "paper shuffles," insinuating that Labor Certification is a front that does not protect U.S. workers).

¹³⁸ *Id.* (These fears stem in part from the 1996 audit that reported some employers had been abusing the H-1B process by not paying the prevailing wage. However, these findings have been criticized as inaccurate and the auditors' political motives were called into question.); *see, e.g.*, Stuart Anderson, *Widespread Abuse of H-1Bs and Employment-Based Immigration? The Evidence Says Otherwise*, 73 NO. 19 INTERPRETER RELEASES 637 (1996).

¹³⁹ Daniel Costa & Ron Hira, *H-1B Visas and Prevailing Wage Levels*, ECON. POL'Y INST. (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

prevailing wage categories are significantly lower than local median salaries.¹⁴⁵ Consequently, employing an H-1B worker who is paid below the median minimum market rates could undercut U.S. workers and exert downward pressure on U.S. wage rates in H-1B occupations.¹⁴⁶

Policy recommendations include having the DOL use its existing authority to increase the lowest wage levels to reflect the national median wage for the occupation, thereby making the prevailing wage realistically reflect market wage levels and adequately protect U.S. workers.¹⁴⁷ It is also suggested that Congress could ensure the longevity of this prevailing wage security by passing legislation that sets reasonable minimums for H-1B wage levels and requires additional audits to be conducted to prevent future abuse.¹⁴⁸ In addition, since 2017, the DOL has taken action to “aggressively [confront] entities committing visa fraud and abuse.”¹⁴⁹ These measures include more civil investigations to enforce labor protections, increased review of investigatory forms to better identify systematic violations, and greater coordination amongst supervisory and enforcement departments.¹⁵⁰

The H-1B prevailing wage issue does not refute this Note’s proposal that the permanent labor certification’s minimally qualified candidate requirement be eliminated. To the contrary, the prevailing wage discussion and policy solutions highlight that proper prevailing wage determinations can be effective in protecting the interests of U.S. workers, without the need for additional burdensome labor certification requirements. Furthermore, there is sufficient data to suggest that H-1B workers, and a college-educated foreign workforce in general, can positively contribute to the labor market (at least in particular industries) and create new economic growth and opportunity.¹⁵¹ Raising the prevailing minimum wage for

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* It is not necessarily a certainty that U.S. workers would be undercut by H-1B workers but a possibility, which depends on a number of factors.

¹⁴⁷ *Id.* This Note does not focus on H-1B prevailing wage reform; however, it was important to note this issue in order to understand criticism of labor certification and labor condition requirements. Specifically, it is important to understand that the H-1B labor condition requirement is an effective means of protecting U.S. worker interests if the DOL properly employs prevailing wage rates.

¹⁴⁸ *Id.*

¹⁴⁹ *Protecting American Workers*, DEP’T OF LABOR: WAGE & HOUR DIVISION, <https://www.dol.gov/agencies/whd/immigration/protecting-american-workers> (last visited Sept. 6, 2020).

¹⁵⁰ *Id.*

¹⁵¹ *See infra* Part IV.

employment-based immigration to accurately reflect the national median wage for the occupation and region, in tandem with eliminating the minimally qualified labor certification requirement, could adequately protect U.S. workers without overburdening employers or discouraging the employment of professional foreign workers.

IV. REFORMING EMPLOYMENT-BASED H-1B VISA AND EMPLOYMENT-BASED GREEN CARD ANNUAL QUOTAS

The nonimmigrant H-1B visa is a visa category for skilled and educated individuals who are employed in specialized occupations and allows foreign workers to temporarily work in the U.S. for up to six years, pending approval of extension applications.¹⁵² There are three basic requirements for H-1B eligibility: (1) the person must have at least a bachelor's degree in a directly relevant or equivalent discipline; (2) the job itself must require at least a bachelor's degree; and (3) the immigrant must be paid at or above the prevailing wage.¹⁵³ The current congressional cap on annual H-1B visas is 65,000 annually.¹⁵⁴

Temporary employment-based visas, like most employment-based Green Cards, require that the prospective U.S. employer files a visa petition on the applicant's behalf.¹⁵⁵ There are many different categories of temporary visas, but the H-1B visa category is one of the most sought-after visas by international students, recent graduates, and other classes of foreign workers seeking employment in the United States.¹⁵⁶ Unlike employment-based Green Cards, H-1B visas only require approval of a labor condition application.¹⁵⁷ This labor condition differs from the Green Card permanent labor certification process in that it requires the employer to

¹⁵² AM. IMMIGRATION COUNCIL, *THE H-1B VISA PROGRAM: A PRIMER ON THE PROGRAM AND ITS IMPACT ON JOBS, WAGES, AND THE ECONOMY 1* (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf.

¹⁵³ Immigration Nationality Act § 101(a)(15)(H)(b), 8 U.S.C. § 1101 (a)(15)(H)(b) (2018).

¹⁵⁴ LEGOMSKY & THRONSON, *supra* note 26, at 459.

¹⁵⁵ *Temporary Worker Visas*, U.S. DEPT. OF STATE, <https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html> (last visited Mar. 9, 2021).

¹⁵⁶ Andy J. Semotiuk, *Recent Changes to the H1B Visa Program and What is Coming in 2019*, FORBES (Jan. 2, 2019, 9:35 AM), <https://www.forbes.com/sites/andyjsemotiuk/2019/01/02/recent-changes-to-the-h1b-visa-program-and-what-is-coming-in-2019/#445a33404a81>.

¹⁵⁷ *H-1B Program*, U.S. DEPT. LABOR, <https://www.dol.gov/agencies/whd/immigration/h1b> (last visited Sept. 29, 2020).

demonstrate that it plans to pay the employee at or above the prevailing wage, which compels the prospective employer to show the DOL that hiring the foreign worker will not adversely affect the wages of U.S. workers.¹⁵⁸ However, as detailed above, the employer is not subject to the minimally qualified requirement and need not go through the process of externally advertising the position and interviewing other candidates. Thus, the labor condition application allows for a more efficient hiring process.

H-1B visa holders play a critical role in the United States labor market, most significantly in STEM fields: science, technology, engineering, and math.¹⁵⁹ Contrary to popular belief,¹⁶⁰ these H-1B visa holders do not take jobs away from their native-born counterparts.¹⁶¹ In fact,

[f]oreign-born workers of all types and skills, from every corner of the globe, have joined with native-born workers to build [the U.S. economy]. Skilled immigrants' contributions to the U.S. economy help create new jobs and new opportunities for economic expansion. Indeed, H-1B workers positively impact our economy and the employment opportunities of native-born workers.¹⁶²

Thus, H-1B visa holders complement professional U.S. workers and “fill employment gaps in many STEM occupations.”¹⁶³

Significantly, research has indicated that increasing the number of H-1B visas available would actually result in the creation of approximately 1.3 million jobs by 2045, resulting in an estimated \$158 billion increase in GDP.¹⁶⁴ The Bureau of Labor

¹⁵⁸ *Id.*

¹⁵⁹ AM. IMMIGRATION COUNCIL, *supra* note 152, at 6 (“Nearly two-thirds of requests for H-1B workers are for STEM occupations.”).

¹⁶⁰ See Chris Fuchs, *What is the H-1B Visa?*, NBC NEWS (Mar. 30, 2019), <https://www.nbcnews.com/storyline/smart-facts/what-h-1b-visa-n987211>.

¹⁶¹ AM. IMMIGRATION COUNCIL, *supra* note 152, at 3 (“Despite suggestions to the contrary, overwhelming evidence shows that H-1B workers do not drive down wages of native-born workers, with some studies showing a positive impact on wages overall.”).

¹⁶² *Id.*

¹⁶³ *Id.* at 1.

¹⁶⁴ Frederick R. Treyz, Cory Stottlemeyer & Rod Motamedi, *Key Components of Immigration Reform: An Analysis of Economic Effects of Creating Pathways to Legal Status, Expanding High-Skilled Visas, and Reforming Lesser-Skilled Visas*, REMI (July 17, 2013), <https://www.remi.com/wp-content/uploads/2017/>

Statistics projects that employment in the computer and tech fields will grow 12% from 2014 to 2024.¹⁶⁵ By placing such a low, arbitrary cap on annual H-1B visa availability, the United States is missing an important economic opportunity to capitalize on this growth and expand its professional workforce, particularly in tech-related fields.¹⁶⁶

In addition, empirical research has shown that H-1B workers do not drive down wages for college-educated, native-born workers.¹⁶⁷ Some studies have even shown a positive impact on wages at various times, particularly for college-educated, native-born workers.¹⁶⁸ For those who still are not convinced that the labor market can handle a higher degree of immigration than current quotas allow, the U.S. net immigration rate ranks at the bottom third of the top fifty countries with the highest GDP per capita.¹⁶⁹ At the same time, the U.S. birth rate is at its lowest recorded levels and, similarly, population growth is at its lowest since the Great Depression.¹⁷⁰ In fact, for the majority of the twentieth century, the U.S. has welcomed far fewer immigrants than it has at any other point in its history.¹⁷¹ The restrictiveness of the current immigration system and its subsequent low visa quota limits clearly do not reflect the nation's capacity to handle increased immigration in its labor market. Rather, the system reflects archaic policy decisions made in response to political pressure—policies that do not provide a mechanism to respond to the changing economy and cannot regularly self-adjust to meet labor market demands.

10/50-Key-Components-of-Immigration-Reform.pdf (demonstrating that the H-1B visa cap does not meet the needs of the economy or labor market, considering the cap was 65,000 in 2013 and has remained at that cap even today).

¹⁶⁵ D'Souza, *supra* note 79.

¹⁶⁶ GIOVANNI PERI, KEVIN SHIH, CHAD SPARBER & ANGIE MAREK ZEITLIN, CLOSING ECONOMIC WINDOWS: HOW H-1B VISA DENIALS COST U.S.-BORN TECH WORKERS JOBS AND WAGES DURING THE GREAT RECESSION 4 (2014), https://www.newamericaneconomy.org/wp-content/uploads/2014/06/pnae_h1b.pdf.

¹⁶⁷ AM. IMMIGRATION COUNCIL, *supra* note 152, at 3.

¹⁶⁸ *Id.* (noting that after the creation of the H-1B visa program in 1990, increases in H-1B visa holders employed in the U.S. “were associated with a significant increase in wages for college-educated, U.S.-born workers in 219 U.S. cities”).

¹⁶⁹ Bier, *Immigration Wait Time Quotas*, *supra* note 61 (highlighting a 2015–2017 study).

¹⁷⁰ *Id.* The U.S. birth rate is expected to drop even more due to the COVID-19 pandemic. Joe Pinsker, *Here Comes the COVID-19 Baby Bust*, ATLANTIC (Nov. 24, 2020), <https://www.theatlantic.com/family/archive/2020/11/covid-19-pandemic-births-baby-bust/617149/>.

¹⁷¹ Frum, *supra* note 76.

The second part of this Note's solution addresses the shortage of H-1B visas available and the resulting backlog problem. This proposed solution involves USCIS and the DOL working together to determine the number of H-1B visas and employment-based Green Cards available each year and then jointly establishing a floor, or a minimum number of H-1B visas available for that fiscal year, subject to congressional approval. Currently, Congress creates quotas by dividing applicants into groups and assigning numerical caps to each group.¹⁷² The INA sets forth statutory annual worldwide limits on employment-based visas.¹⁷³ The overall limit on employment-based immigration is set at 140,000 per year,¹⁷⁴ which is then further divided into five preference categories.¹⁷⁵ Currently, only 65,000 H-1B visas are available each year, with an additional 20,000 made available to those who recently graduated from a U.S. institution with either a master's or doctorate degree.¹⁷⁶

Notably, there were no congressionally determined numerical limits on any categories of nonimmigrant visas (like the H-1B visa) until 1990.¹⁷⁷ A few years after Congress created the 65,000 H-1B visa cap, an economic boom in the tech industry resulted in an immediate economic need for more professional workers, which U.S. professional workers were unable to fill.¹⁷⁸ The H-1B visa cap impeded employers' abilities to fill their professional workforce.¹⁷⁹ In response, Congress temporarily increased the H-1B cap to 115,000 for the 1999–2000 fiscal year and to 107,500 in fiscal year 2001 by passing the American Competitiveness and Workforce

¹⁷² LEGOMSKY & THRONSON, *supra* note 26, at 328–29.

¹⁷³ Immigration and Nationality Act § 214(g)(1, 2); *see also* LEGOMSKY & THRONSON, *supra* note 26, at 330; CARLA N. ARGUETA, CONG. RESEARCH SERV., R42048, NUMERICAL LIMITS ON PERMANENT EMPLOYMENT-BASED IMMIGRATION: ANALYSIS OF THE PER-COUNTRY CEILINGS 2 (2016) (“The INA provides for a permanent annual worldwide level of 675,000 LPRs, which is further broken down by specific levels for each preference category.”).

¹⁷⁴ AM. IMMIGRATION COUNCIL, *How the United States Immigration System Works* 4 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/how_the_united_states_immigration_system_works.pdf (mentioning that this numerical limit includes visa availability for the spouses and unmarried minor children of the immigrant receiving the visa, meaning that fewer applicants will receive a visa than the 150,000 slots).

¹⁷⁵ *Id.*

¹⁷⁶ Immigration and Nationality Act § 214(g)(5)(C); AM. IMMIGRATION COUNCIL, *supra* note 152, at 1.

¹⁷⁷ LEGOMSKY & THRONSON, *supra* note 26, at 459.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Improvement Act of 1998.¹⁸⁰ The cap was supposed to revert back to 65,000 in 2002, but this plan changed when the increased caps were still insufficient to meet the economic demand for professional workers.¹⁸¹

In 2001 to 2003, Congress passed the American Competitiveness in the Twenty-First Century Act of 2000, which increased the H-1B visa cap to as high as 195,000 annually.¹⁸² In addition, this Act also amended the INA by exempting nonprofit and governmental research institutions from the visa caps.¹⁸³ By 2004, economic slowdown and layoffs led Congress to amend the cap once again, returning it to only 65,000 H-1B visas annually.¹⁸⁴ Remarkably, for fiscal years 2014–2021, the current cap was reached within only the first five business days after the petition submission period began.¹⁸⁵ When this happens, USCIS uses a lottery to randomly determine which employers' petitions for H-1B visas will be processed.¹⁸⁶ Despite the 65,000 H-1B visa cap, plus 20,000 additional visas for recent U.S. graduates, and a \$4,000 application fee increase, USCIS reportedly received approximately 201,011 petitions within five days of the petition submission period in 2019.¹⁸⁷

As these statistics demonstrate, arbitrary and enduring congressional determinations of visa and Green Card availability are not based upon any *accurate* determination of labor market demand. While Congress has historically been responsive to economic needs, legislative action is a slow and arduous process. Furthermore, as history demonstrates, even temporary congressional increases to the visa caps in response to labor gaps were insufficient to meet the needs of the

¹⁸⁰ *Id.*; American Competitiveness and Workforce Improvement Act of 1998 § 411, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998).

¹⁸¹ LEGOMSKY & THRONSON, *supra* note 26, at 460.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ AM. IMMIGRATION COUNCIL, *supra* note 152, at 3; Neil G. Ruiz, *Key Facts About the U.S. H-1B Visa Program*, PEW RES. CTR. (Apr. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/>. However, the COVID-19 pandemic significantly reduced the number of H-1B visa holders who were able to come to the United States, and USCIS held a second lottery in August 2020 for fiscal year 2021. Gregory A. Wald, *H-1B Cap Season Opens March 9: Random Cap Registration Selection Returns For FY2022*, NAT'L L. REV. (Feb. 9, 2021), <https://www.natlawreview.com/article/h-1b-cap-season-opens-march-9-random-cap-registration-selection-returns-fy2022-us>.

¹⁸⁶ *Id.*

¹⁸⁷ D'Souza, *supra* note 79.

economy. Rather than allowing Congress to reactively speculate visa need while labor market demand unfolds, visa availability would be better determined jointly by USCIS and DOL, who have access to accurate statistics and greater resources to gage the appropriate number of visas to balance both these interests. In this way, economic need could be more precisely predicted and annual visa caps could better reflect market demand.

Using the available data and uniting their resources, both USCIS and DOL could calculate the market saturation point for visa availability (such as the H-1B visa) and recommend this number to Congress, who could then choose to use that recommendation as the floor for that particular year, or choose a moderate increase of visas as they see fit. Alternatively, Congress could amend the INA to be more flexible to market needs by removing static visa caps and implementing language that allows for USCIS and DOL to determine the caps annually, in consideration of economic growth. H-1B visa quotas would then be more responsive to the nation's changing labor needs, rather than based on uninformed speculations, which often reflect political sentiments, instead of reflecting the reality of the economy and labor market. To follow either recommendation, the INA provision setting forth the annual ceiling for legal permanent residents would need to be amended by Congress, substituting a more flexible calculation procedure involving DOL and USCIS.¹⁸⁸

In addition, Congress should exempt derivative applicants, such as spouses and minor children of primary applicants, from the visa and Green Card quotas.¹⁸⁹ David J. Bier recommends exempting derivative applicants within quota calculations because they detract from Green Card availability for primary applicants (the employees) and substantially contribute to backlogs and wait times.¹⁹⁰ Bier notes that “[i]n 2017, about 45 percent of all [G]reen [C]ards in the preference categories went to derivatives, not the primary applicant.”¹⁹¹ In fact, Bier posits that including derivatives within Green Card quotas is one of the primary reasons that the employment-based Green Card backlog developed in the first place.¹⁹²

These policy recommendations—in particular having the DOL and USCIS jointly set annual quotas based on economic need—are logistically difficult, as they

¹⁸⁸ Immigration Nationality Act § 201, 8 U.S.C. § 1151 (2018) (setting numerical limits).

¹⁸⁹ See Bier, *Immigration Wait Time Quotas*, *supra* note 61 (proposing the same policy solution).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

will require significant bipartisan immigration legislative reform and joint efforts across multiple large agencies. While this task is no simple undertaking, the lack of any substantial modern immigration reform highlights a serious need for immediate congressional action. Unprecedented visa and Green Card backlogs offer evidence that the system cannot continue as-is for much longer. Drastic measures are needed.

Notably, Congress has been building momentum towards addressing these issues. The U.S. House of Representatives passed H.R. 1044, the Fairness for High-Skilled Immigrants Act, in July 2019 and the U.S. Senate passed a modified version of the bill, S. 386, in December 2020.¹⁹³ This proposed legislation sought to reduce lengthy employment-based Green Card waits by eliminating per-country quota caps.¹⁹⁴ As these bills were not reconciled before the end of the 116th Session of Congress, they will need to be reintroduced in order to be considered again.¹⁹⁵

More recently, the Biden administration introduced H.R. 1177, the U.S. Citizenship Act, on February 18, 2021, which includes several provisions aimed at alleviating immigration backlogs.¹⁹⁶ Like the Fairness for High-Skilled Immigrants Act, the U.S. Citizenship Act would eliminate per-country quota caps.¹⁹⁷ In addition, this legislation would increase the current 140,000 cap on employment-based Green Cards available each fiscal year to 170,000.¹⁹⁸ However, these additional 30,000 visas would only be available for “other workers” in the EB-3 category, increasing that cap from 10,000 to 40,000.¹⁹⁹ This is a step in the right direction, but—without an increase in the overall number of visas available—it does not relieve the source of the burden. This relief can only be achieved by increasing the worldwide annual quota to meet the market demand. While it is true that some years may necessitate a lower worldwide cap in order to protect U.S. workers during market fluctuations where labor demand is lower, it is better to let the market determine the caps than

¹⁹³ H.R. 1044, 116th Cong. (2019); S. 386, 116th Cong. (2020); Tieranny L. Cutler, Marissa E. Cwik, Andrea C. Davis & Melissa Manna, *Congress Considers Removing Country Caps for Employment-Based Immigrant Visas and Proposes Changes to H-1B Visa Program*, NAT'L L. REV. (July 11, 2019), <https://www.natlawreview.com/article/congress-considers-removing-country-caps-employment-based-immigrant-visas-and>.

¹⁹⁴ Cutler et al., *supra* note 193.

¹⁹⁵ *Featured Issue: Legislation Impacting the Per-Country Numerical Limitation*, AM. IMMIGR. LAW. ASS'N (Dec. 23, 2020), <https://www.aila.org/advo-media/issues/all/featured-issue-legislation-impacting-per-country>.

¹⁹⁶ H.R. 1177, 117th Cong. (2021).

¹⁹⁷ *Id.* § 3403.

¹⁹⁸ *Id.* § 3101.

¹⁹⁹ *Id.* § 3404; *see* Part III.

allow congressional members with partisan political interests to choose arbitrary numbers that do not ease the burden on the immigration system. Only a more flexible and responsive system will achieve these ends.

V. CONCLUSION

In summary, a number of key reforms would significantly improve the efficiency of the U.S. employment immigration system. Alleviating employment-based Green Card barriers created by labor certification requirements will decrease the petition processing time as well as eliminate an unnecessary burden to employers. This reform can be accomplished by eliminating the minimally qualified permanent labor certification requirement that forces employers to engage in empty recruitment efforts. In addition, amending the EB-2 and EB-3 labor certification process to mirror the H1-B labor condition process and adjusting the prevailing minimum wage rates for employment-based immigration categories (particularly for H-1B visa holders) to accurately reflect the national median wage for the occupation and region could adequately protect the interests of U.S. workers, without needing the additional minimally qualified labor certification requirement. These policy solutions together will eliminate barriers to employment visas without substantially harming the interests of U.S. workers.

In addition, by implementing annual labor market-based calculations for determining the appropriate number of H-1B visas and employment-based Green Cards available each year, the system will be more responsive to the country's fluctuating economic needs. Rather than allowing arbitrary congressional determinations from decades ago to dictate annual immigration limits to the United States, USCIS and DOL should work together to establish meaningful, dynamic annual quota caps. These caps will be more responsive to labor market needs, better balance U.S. worker interests, and help increase access to employment-based visas. Finally, Congress should exempt derivative applicants, such as spouses and minor children of primary applicants, from the H-1B visa and Green Card quotas. Jointly, these reforms will ease the backlog of employment Green Card petitions, which will enable the system to work more efficiently while still appropriately regulating and controlling immigration.