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Why Legal Immigration Is Nearly Impossible

U.S. Legal Immigration Rules Explained

The government's restrictive criteria render legal paths of immigration available in only the most extreme cases.

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America traditionally had few immigration restrictions, but since the 1920s, the law has banned most aspiring immigrants. Today, fewer than 1 percent of people who want to move permanently to the United States can do so legally. Immigrants cannot simply get an exception to immigrate any more than restaurateurs in the 1920s could simply get an exception to sell alcohol. Instead, just as Prohibition granted only a few exemptions for religious, industrial, or medical uses of alcohol, people seeking an exception to immigration prohibition must also fit into preexisting carve-outs for a select few.

Many Americans have the false impression that these carve-outs are realistic options for potential immigrants to join American society, but the

government's restrictive criteria render the legal paths available only in the most extreme cases. Even when someone qualifies, annual immigration caps greatly delay and, more frequently, eliminate the immigrant's chance to come to the United States. Legal immigration is less like waiting in line and more like winning the lottery: it happens, but it is so rare that it is irrational to expect it in any individual case.

This study provides a uniquely comprehensive, jargon-free explanation of U.S. rules for legal permanent immigration. Some steps are simple and reasonable, but most steps serve only as unjustified obstacles to immigrating legally. For some immigrants, this restrictive system sends them into the black market of illegal immigration. For others, it sends them to other countries, where they contribute to the quality of life in their new homes. And for still others, it requires them to remain in their homeland, often underemployed and sometimes in danger. Whatever the outcome, the system punishes both the prospective immigrants and Americans who would associate, contract, and trade with them. Congress and the administration can do better, and this paper explains how.

Introduction

For the first century after American independence, the United States had few restrictions on legal immigration.[1] Even when it finally adopted some rules in the late 19th century, immigrants were presumed eligible for permanent residence unless the government showed that they fell into specific and usually narrow ineligible categories.[2] In 1924, this presumption was flipped.[3] Today, all immigrants are presumed to be *ineligible*, and the burden shifted from the government to the immigrant to prove that they fall into certain narrow, eligible categories.[4] In this respect, current immigration policy is much like one of the few immigration-restricting laws of the earlier period, the infamous Chinese Exclusion Act—which also had some exceptions—but today's restrictive law applies to all nationalities.[5] The United States has enacted what amounts to a "Worldwide Exclusion Act."

This restrictive system has made becoming an American a nearly impossible challenge. Immigration is now prohibited in a similar way to alcohol during Prohibition.[6] Although it had exceptions for religious, medical, or industrial purposes, alcohol prohibition outlawed all other sales.[7] For both alcohol and immigration, the result of prohibition has been

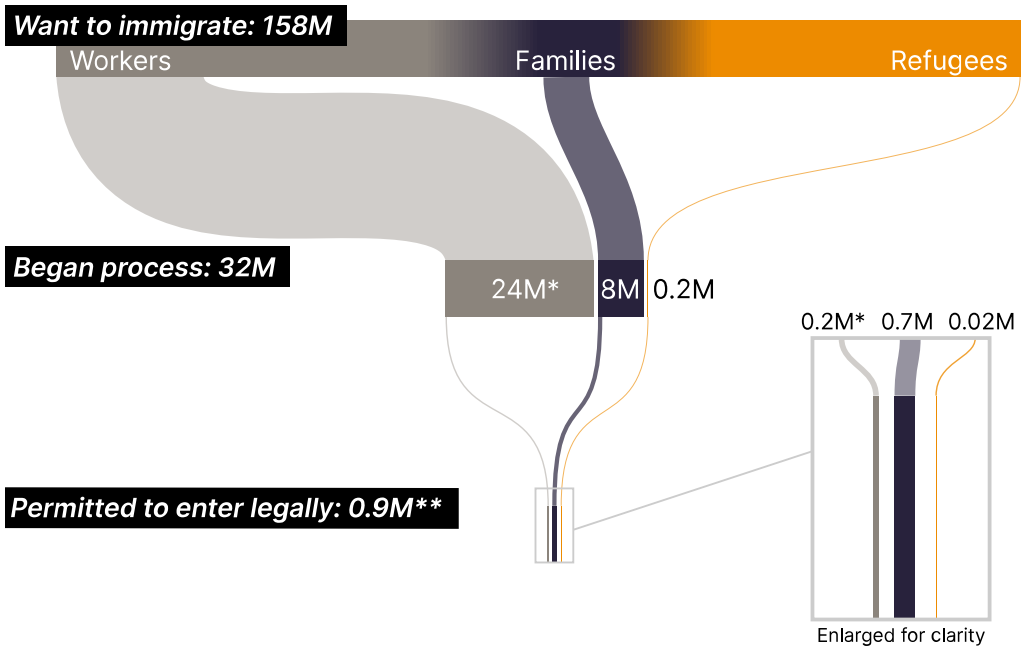
the same: widespread violations of the law, black markets, the spread of criminal organizations, arbitrary enforcement, government corruption, and massive government expenditures of taxpayer money to stop the violations.

Like alcohol prohibition, America's legal immigration "prohibition" also has some exceptions, which are often used as evidence that legal immigration is not strictly restricted. But this paper explains why those complicated exceptions to the immigration ban are irrelevant for nearly all people wishing to become Americans. Trying the legal immigration system as an alternative to immigrating illegally is like playing Powerball as an alternative to saving for retirement. People do win the lottery, but that does not make it a viable alternative to a 401(k) investment plan. Legal immigration is similar: many do get to immigrate legally, but the odds are so low that it is simply not rational to expect that any particular person will be selected.

According to a 2018 worldwide Gallup poll, 158 million adults who would like to immigrate permanently selected the United States as their top destination.[8] Of course, many of these people would ultimately choose not to immigrate even if U.S. law changed, but with more-open laws, many others would certainly take their place, including the families of those who would come and people who selected other countries as their top choices. Thus, while it is not perfect, Gallup's poll is the best available estimate of the demand for green cards. Meanwhile, administrative data indicate that roughly 32 million immigrants—adults and children—were attempting to become U.S. legal permanent residents in 2018,[9] and the United States granted legal permanent residence to only about 1 million people (see Figure 1).[10] This means that about 80 percent of people wanting to immigrate to the United States could not even attempt the process, and about 99.4 percent did not yet qualify that year. Even these percentages create the impression that the system is more open than it is because, although a select few have a small chance to immigrate through the law's carve-outs, the vast majority have no chance at all.

Figure 1

Number of immigrants to the United States by stage, 2018

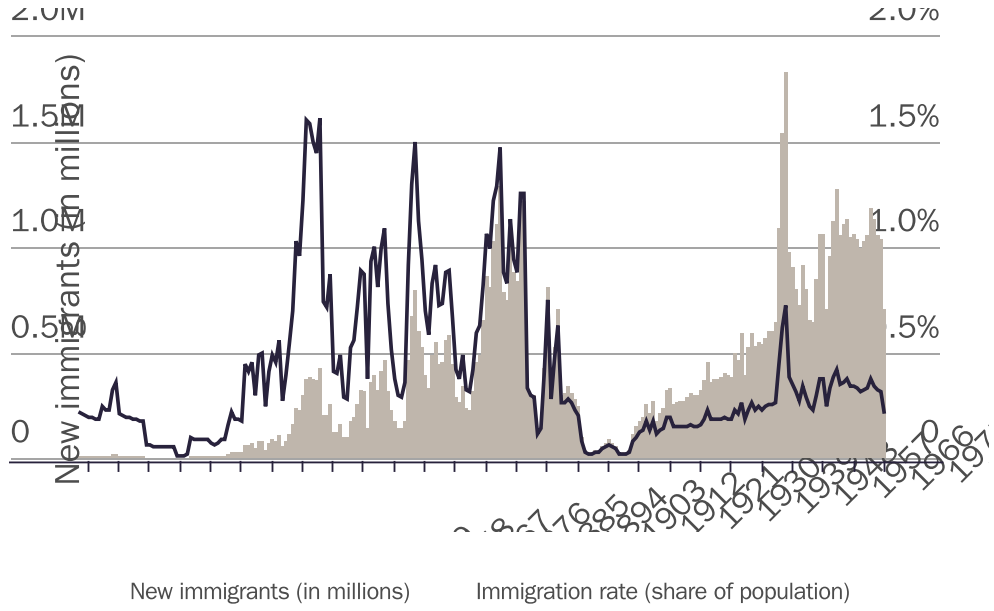


Sources: Neli Esipova, Anita Pugliese, and Julie Ray, "More than 750 Million Worldwide Would Migrate If They Could," Gallup, December 10, 2018; David J. Bier, "Family and Employment Green Card Backlog Exceeds 9 Million," Cato at Liberty (blog), Cato Institute, September 29, 2021; and "FY2021 Appropriations Reporting Requirement Refugee Data," U.S. Citizenship and Immigration Services, June 29, 2021.
Notes: * = Worker counts include diversity visa lottery entrants, the dependents of lottery entrants, and employer-sponsored applicants. ** = The United States granted permanent residence to about 1.1 million immigrants. Those legalized from illegal status in the United States or refugees admitted in earlier years are not shown.

The current U.S. immigration system is restrictive from the perspectives of both immigrants *and* Americans. In recent years, the United States has granted green cards to about 1 million immigrants annually. This amounts to about 0.3 percent of the U.S. population. As seen in Figure 2, the annual rate of legal immigration commonly exceeded 1 percent of the population in the late 19th and early 20th centuries before Congress capped legal immigration. In 2019, the immigration rate as a share of the U.S. population was 80 percent below that of the peak year of 1854. The only year when the rate approached those of the years of unrestricted immigration was 1990, when Congress waived the caps and allowed illegal immigrants to obtain green cards.

Figure 2

Immigrants becoming legal permanent residents, 1783–2020



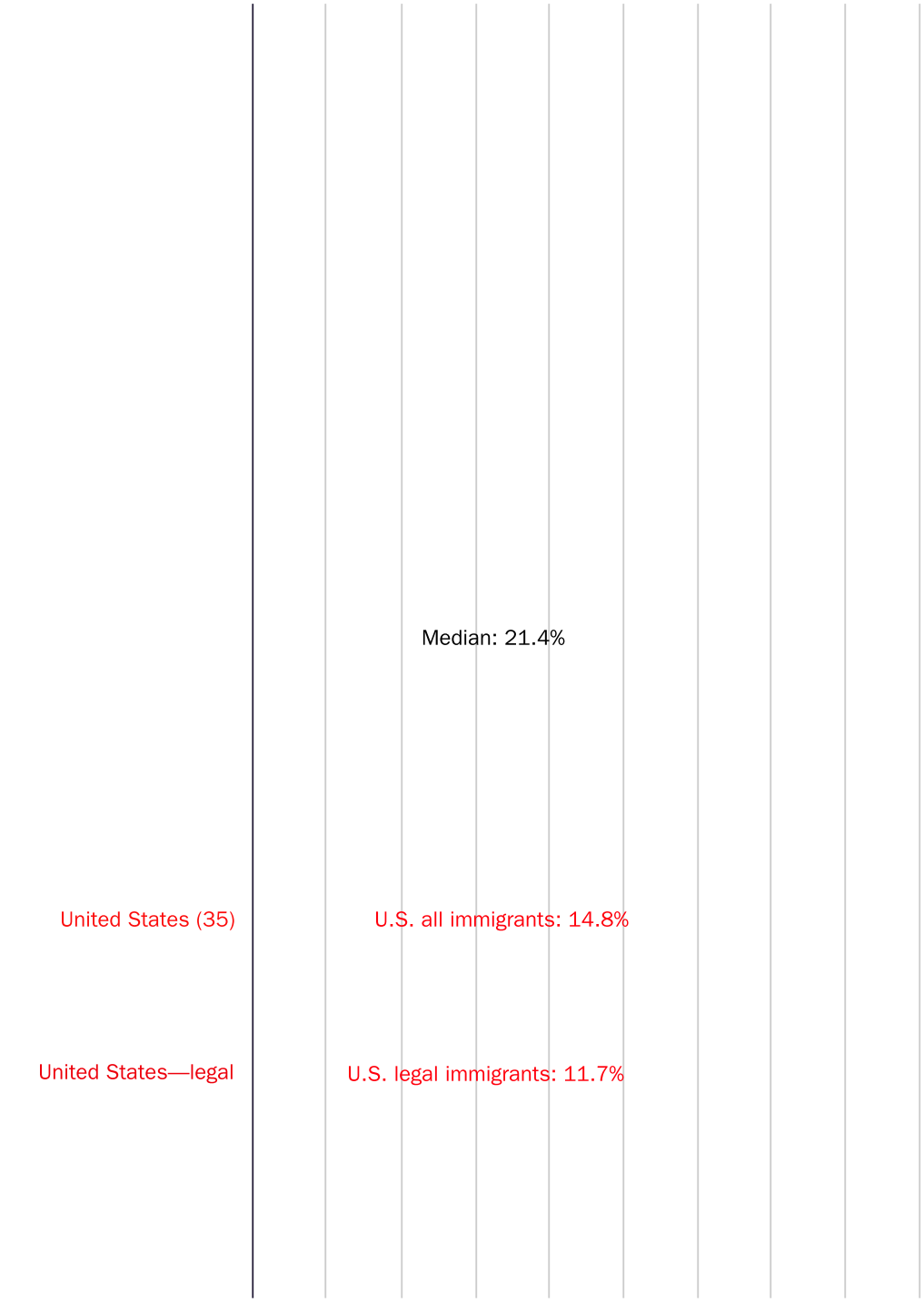
New immigrants (in millions) Immigration rate (share of population)

Sources: "Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016," from *Yearbook of Immigration Statistics 2016* (Washington: Department of Homeland Security, 2016); *Annual Report of the Superintendent of Immigration to the Secretary of the Treasury for the Fiscal Year Ended June 30, 1892* (Washington: Government Publishing Office, 1892); and Maldwyn Allen Jones, *American Immigration*, 2nd ed. (Chicago: University of Chicago Press, April 1992), p. 54.
Note: Individual years prior to 1820 are the author's estimates from David J. Bier, "Over 100 Million Immigrants Have Come to America since the Founding," *Cato at Liberty* (blog), Cato Institute, October 4, 2018.

Proponents of America's current immigration system often use comparisons to other countries to portray the U.S. system as relatively open. One common claim, for instance, is that "we allow more people into America legally than all other countries on the planet combined."[11] In reality, immigration to the United States accounted for just 7.5 percent of the growth of the worldwide immigrant population from 2015 to 2020, meaning that the vast majority of immigrants are not going to the United States.[12] Another similar assertion is, "We are by far the most generous nation in the world for legal immigration." Although the United States has accepted the most immigrants in absolute terms compared with other individual countries, fewer immigrants reside in the United States *as a share of its population* than in 55 other countries (or territories with independent immigration policies). The United States ranks in the bottom third among wealthy countries for the foreign-born share of its population (see Figure 3).[13]

Figure 3

Most wealthy countries accept more immigrants per capita than the United States does



Sources: "International Migrant Stock 2019," Population Division, Department of Economic and Social Affairs, United Nations, August 2019; *World Population Prospects 2019: Highlights* (New York: Department of Economic and Social Affairs, United Nations, 2019); "Per Capita GDP at Current Prices – US Dollars," UNData, United Nations Statistics Division, February 26, 2023; "GDP per Papita (Current US$)," World Bank, 2020; and "Real GDP per Capita," Central Intelligence Agency, updated 2022.
Note: Countries include semi-autonomous regions with independent immigration policies. The UN data include foreign-born people who received citizenship at birth through their parents to allow for cross-country comparisons with different citizenship rules. Also included are people born in the overseas territories of Denmark, the United Kingdom, France, the Netherlands, New Zealand, and the United States (e.g., Puerto Rico). These people were excluded in this analysis because they are not considered "born abroad" for purposes of the home country. These overseas territories were also not treated as separate countries except in cases where immigrants from the parent country are not considered citizens of the overseas territory, such as in the Netherlands' territories.

If all 32 million immigrants who attempted the U.S. process in 2018 were added to the U.S. population, it would only bring the immigrant share of the U.S. population to 22 percent—in line with Canada (21 percent). The only way to rival countries like New Zealand (28 percent), Switzerland (29 percent), and Australia (30 percent) would be to promptly admit a majority of the 158 million who told Gallup that they would want to come. On a more reasonable time horizon for natural inflows that accounted for the population growth of U.S.-born Americans, that scale would also be insufficient.

Other countries' policies, however, do not change the reality for people seeking to become Americans. From the average would-be immigrant's perspective, America's doors are legally shut. Many people would prefer to ignore the immigrant's viewpoint, but when legal immigration is hopeless, illegal immigration should surprise no one. Nonetheless, the myth that legal immigration is relatively easy or a matter of simply waiting a few years persists. The focus then becomes solely on how to deal with the symptom of the restrictions—people crossing illegally—rather than the restrictions themselves, and legal immigration reforms fall to the wayside. Although reform could come in many ways, this paper is a starting place to understand not only that nearly all immigrants cannot come legally to America but also why they cannot and what policymakers can do to liberate American immigration policy.

Overview of Legal Immigration

This paper will describe the requirements for would-be legal immigrants to the United States to obtain a green card, a document that denotes legal permanent residence (see Box 1). Legal permanent residence is the only status that authorizes an immigrant to live and work indefinitely in the United States and later apply to become a U.S. citizen.[14] The green card system was last reformed in a significant way in 1990, so this paper tracks the rules in effect in largely the same manner for over three decades.

Since 1990, no one outside the United States has been eligible for a green card unless they can prove that they fall into one of these five narrow exceptions:

1. **The refugee program:** Qualified refugees have less than a 0.1 percent chance of being selected for resettlement, and only a few nationalities are even considered.

2. **The diversity lottery:** Diversity applicants have a 0.2 percent chance of receiving a green card, and because the lottery excludes the top origin countries for legal immigrants, a majority of the world's population is ineligible to apply.

3. **Family sponsorship:** Aside from the spouses, minor children, and parents of adult U.S. citizens, family sponsorships are capped. The years of waiting caused by these caps mean that—except for sponsors of spouses and minor children of existing green card holders—most sponsors in these categories will die before their relatives can immigrate.

BOX 1

Basic legal immigration terms

- **Legal permanent residence:** Legal status authorizing an immigrant to live and work in the United States indefinitely; a prerequisite for U.S. citizenship.
- **Green card:** Document denoting legal permanent residence.
- **Immigrant visa:** Document issued abroad to authorize travel to the U.S. border to receive legal permanent residence.

Source: "Glossary," U.S. Citizenship and Immigration Services.

4. **Employment-based self-sponsorship:** These categories are only for those who are, in legal terms, "extraordinary," have work of "national importance," or can afford to make at least $800,000 in investments in the United States—not options for many.

5. **Employer sponsorship:** An almost insurmountable barrier of bureaucratic red tape restricts employer sponsorship, and these restrictions exclude nearly all workers without college degrees, while low caps will result in many applicants dying before they can receive green cards. Employers make only 1 in 1,500 hires through this system.

Table 1 shows the number of immigrants receiving legal permanent residence by category from 2011 to 2020. Nearly four out of five legal immigrants qualified for a green card through family connections, either through family in the United States (65 percent) or a family member who qualified under one of the nonfamily categories (14 percent). Another 3 percent were refugees, 2 percent were diversity lottery winners, 5 percent were employer-sponsored workers, 1 percent were employment-based self-sponsored immigrants, and 10 percent were immigrants legalized in the United States (along with their accompanying family).[15]

The term “legalized immigrants” here refers to immigrants whose green card category required their presence in the United States, such as legalization applicants, asylees, victims of crimes or trafficking, abandoned children, and family of U.S. citizens who were abused or would face extremely unusual hardship if their relative was denied or deported.[16]

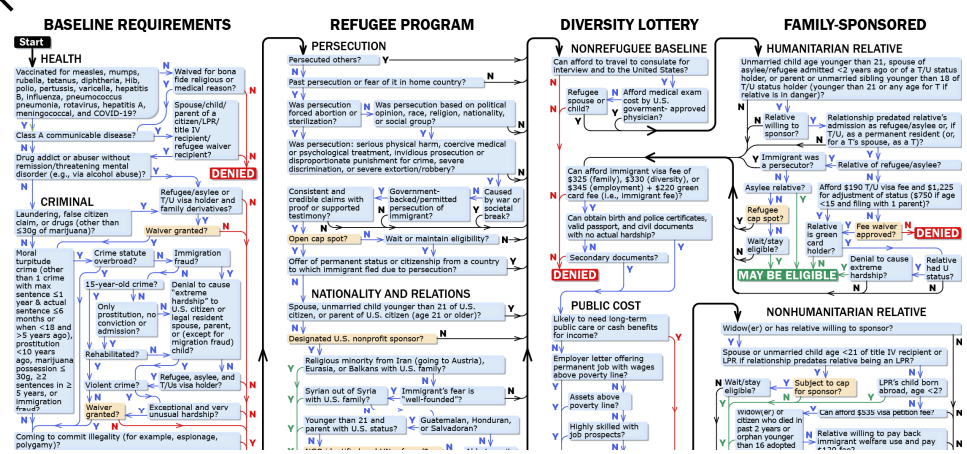
These categories are completely unavailable to immigrants seeking to immigrate legally from abroad and so will not be described in further detail in this paper. For the same reason, this paper will largely not explain the barriers to a green card after traveling legally to the United States in temporary statuses, except for temporary work visas that directly envision a temporary-to-permanent transition. It will also not explore the various paths for the roughly 3,000 immigrants annually who qualify through various U.S. government ties—primarily Afghans and Iraqis who worked with the U.S. military during wars in locations where U.S. presence has largely receded.[17]

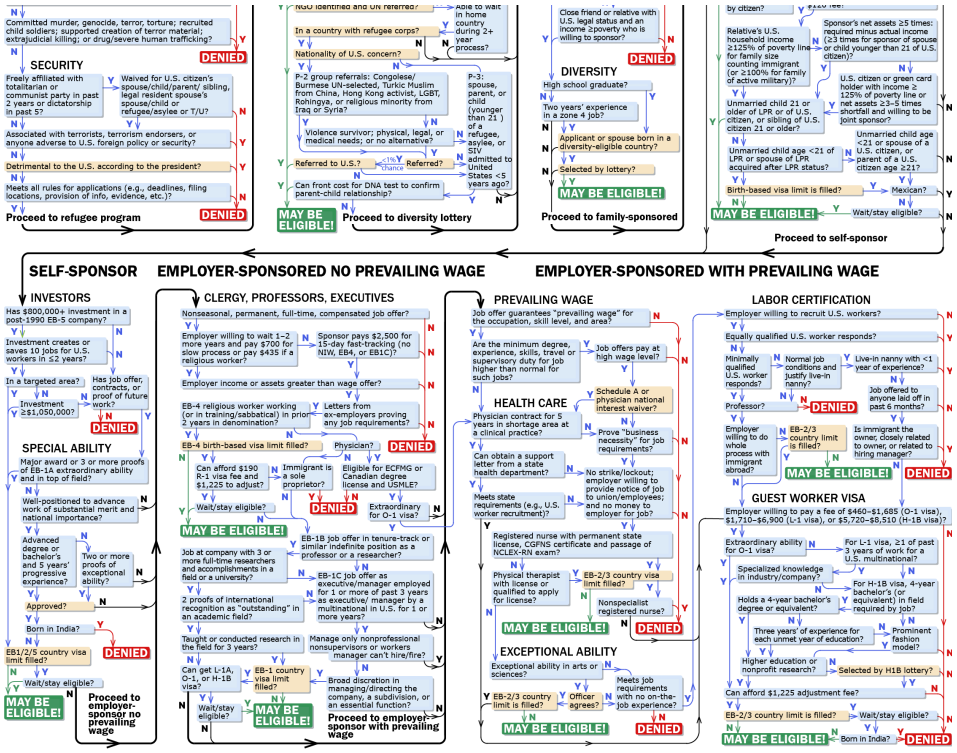
With these clarifications, the flow chart in Figure 4 previews the requirements for legal immigration to the United States from abroad. Appendix A provides citations for Figure 4, and Appendix B provides a summary of the major rules by type of immigrant. As the complicated flow chart indicates, legal immigration is a labyrinth that few can navigate, and a chart like this must necessarily simplify the more complex reality. It does not show, for instance, the complicated filing and admission process but rather the rules that the filing process is supposed to enforce.

Figure 4

United States legal requirements for permanent immigrants, applicants from abroad

Legal immigration to the U.S. for immigrants seeking permanent residence with no prior U.S. immigration history and no U.S. government association (starting the process in 2022).





Legend:

Government actions

May be eligible to immigrate

Ineligible to immigrate

Sources: 8 U.S.C. § 1182, 1151–57, 1184 (2022); 8 C.F.R. § 204.5 (2022); 20 C.F.R. § 656 (2022); and "Immigrant Visas," Foreign Affairs Manual, U.S. Department of State, 9 FAM 500.

Notes: LPR means legal permanent resident. IV recipient means immigrant visa recipient.

Almost every other word in the chart is a nesting doll of complicated distinctions, and this paper cannot possibly explore all of them. The most popular immigration law reference book is 2,656 pages, and its appendices contain nearly 300 pages of citations to thousands of statutes, regulations, memoranda, and legal decisions.[18] Instead, this paper offers a broad but not exhaustive overview of current immigration requirements. With each requirement, a larger percentage of the world's population loses its chance to immigrate legally, until nearly everyone who wants to come is eliminated.

Baseline Rules for Immigrants with No Prior U.S. Migration History

During nearly all the first full century after U.S. independence, the federal government imposed almost no legal immigration restrictions whatsoever.[19] Since 1875, however, it has mandated certain baseline requirements that all people must meet to immigrate to the United States.[20] While these rules have evolved, the baseline requirements today focus on these four broad categories:

- Health
- Criminal history
- Security profile
- Immigration law violations

Because this paper details the process for immigrants who have not already come to the United States, immigration law violations are beyond its scope. Box 2 shows a simplified version of the baseline criteria that apply to all immigrants abroad, and the first section of Figure 4 conveys this same information in a flow chart. Many of these requirements are reasonable, but others empower bureaucrats to deny Americans the right to associate with immigrants for arbitrary reasons.

Health

All immigrants must undergo a medical examination by a U.S. government–approved physician that shows the immigrant does not have any of 15 "Class A communicable diseases of public health significance" (e.g., COVID-19, syphilis, etc.).[21] Anyone who tests positive for one of the diseases can receive treatment and overcome the denial by testing negative.[22] Immigrants must also provide proof that they have received 13 vaccines against 16 different diseases, including COVID-19, unless the government-selected physician finds that a vaccine is medically inappropriate.[23]

If an immigrant opposes vaccination based on sincere moral or religious conviction, they may request a waiver of this requirement, but they must show that they oppose all vaccines.[24] Applicants seeking a waiver for any of the baseline requirements, including the vaccine requirement, must

usually wait about an additional year for the waiver request to be processed, and nonrefugee applicants must also pay an additional $930 (nearly triple the normal immigrant visa fee).[25] Moreover, waivers of the baseline criteria for legal immigration are discretionary, meaning that the government may refuse to grant one even if the applicant is qualified for it.[26]

The law also bars immigrants with any physical or mental disorder that threatens others.[27] This rule is often invoked for alcoholics who have engaged in multiple instances of drunk driving or alcohol-related violence, but it may also be invoked against mentally ill criminals. Immigrants who show they are capable of undergoing successful treatment for the disorder may apply for a discretionary waiver.[28] The one health requirement not focused on protecting the public prohibits "drug abusers or addicts" not in sustained remission (usually 12 months).[29] Some physicians may screen for drug use, and all physicians ask about it.[30] Because lying during the immigration process is a criminal offense, some applicants admit to having used controlled substances, particularly drugs like marijuana that are legal in some countries or states but can still trigger a denial.[31] Refugees

BOX 2

Baseline criteria for legal immigration

Health

- Negative tests for 15 diseases
  - Discretionary waiver for certain relatives
- Thirteen vaccinations against 16 diseases
  - Discretionary medical or religious waiver
- No dangerous mental disorders
  - Discretionary waiver for those in treatment
- No current drug addiction or abuse
  - Discretionary waiver of health grounds for refugees

Crimes

- No intent to come to commit an unlawful act
- No unwaivable crimes: murder, extrajudicial killing, torture, genocide, terrorism, material support for terrorism without a duress exemption, recruitment of child soldiers, severe human

can receive a waiver of the health grounds of inadmissibility if a waiver is deemed in the public interest or necessary for family unity or humanitarian reasons.[32] Again, waivers are discretionary, and the evaluation of the vague waiver criteria is subjective.

Crime

Anyone coming to violate any U.S. law is unequivocally barred.[33] Nine specific types of past criminal actions are also unwaivable, permanent bars to receiving legal permanent residence in the United States:

- Murder with a conviction or admission
- Extrajudicial killing
- Torture
- Genocide
- Terrorism
- Material support for terrorism without a duress exemption
- Recruitment of child soldiers
- Severe human trafficking
- Drug trafficking[34]

trafficking, or drug trafficking

- No money laundering or any drug crime (except for simple possession of 30 grams or less of marijuana)
  - Discretionary waiver possible for refugees
- No two crimes with total sentences greater than 5 years, no prostitution in the past 10 years, no possession of 30 grams or less of marijuana, and no crime of moral turpitude
  - Discretionary waiver for nonviolent or nondangerous crimes committed by (a) refugees; (b) spouses, parents, or children of U.S. citizens facing extreme hardship; or (c) rehabilitated offenders for 15-year-old crimes

Security

- No association with or endorsement of terrorists
- No family of terrorists or drug traffickers

- No aversion to U.S. foreign policy
- No recent totalitarian party membership
  - Discretionary waiver for spouses, parents, or children of U.S. citizens
- Entry not "detrimental" to the interest of the United States as defined by the president
- Meeting of all application requirements (filing locations, deadlines, evidence, etc.)

Source: See Appendix A.
Note: All criteria are for immigrants without U.S. government connections or prior U.S. migration history.

Money laundering and—except for simple possession of 30 grams or less of marijuana—any nontrafficking drug crime (with a conviction or admission) are also generally unwaivable offenses,[35] though refugees may receive a discretionary waiver (again only if it is deemed in the public interest or necessary for family unity or humanitarian reasons).[36]

Any two criminal convictions with aggregate sentences of more than 5 years, prostitution offenses in the past 10 years (including actions legal in the home country), simple possession of 30 grams or less of marijuana (with a conviction or admission), and crimes "involving moral turpitude" (with a conviction or admission) also presumptively bar immigration but may be waived in limited circumstances.[37] Moral turpitude involves an intent to commit a "morally reprehensible" offense.[38] The precise interpretation of this vague definition is a constantly evolving and shifting standard over time and between adjudicators.[39] The State Department lists about 47 crimes that will likely involve moral turpitude.[40] Some examples of crimes that courts have considered involving moral turpitude include most assaults, aggravated battery, sexual assault, adultery, bigamy, prostitution, theft, aggravated driving under the influence, and welfare or check fraud.[41]

Immigrants may request that the government waive the presumptive bars (i.e., not the unwaivable offenses) if the offense occurred more than 15 years ago (or 10 years for prostitution without a conviction or admission) and the immigrant can demonstrate full rehabilitation.[42]

Spouses, parents, and children of U.S. citizens and legal permanent residents can also receive a waiver of the presumptive bars by showing that a denial would cause their relative "extreme hardship," suffering far beyond the normal consequences of a denial.[43] If the government agrees it is necessary for family unity, humanitarian purposes, or the public interest, refugees may request a waiver for any crime except the unwaivable crimes and anything involving persecution of a protected group.[44] For all immigrants, however, the government will deny waivers for "violent or dangerous" crimes except in exceedingly unusual situations (e.g., a national security agency requests the waiver).[45]

Security

Aside from the criminal bars, the law also prohibits immigrants deemed security threats to the United States, even if their behavior is not necessarily criminal. This includes associates of government-designated terrorist organizations and anyone who publicly supports terrorism or a terrorist organization, as well as their immediate relatives who knew of their terrorist activities in the past five years.[46] Spouses and adult children of drug traffickers who knowingly benefited from the drug trafficking in the past five years are barred.[47] Anyone whom the secretary of state personally determines could have "potentially serious adverse foreign policy consequences" for the United States is also excluded.[48] The law also bars voluntary members of the Communist Party or another totalitarian political party, with an exception for applicants whose membership ended at least two years ago (or five years for a totalitarian dictatorship) if they are deemed not to be a threat to the United States.[49] A spouse, child, or parent of a U.S. citizen or a spouse or child of a legal permanent resident may request a waiver of this bar.[50] Presidents also have unfettered authority to ban anyone whom they determine to be "detrimental" to the interest of the United States.[51] This authority was used frequently during the COVID-19 pandemic to restrict travel, as well as by then president Donald Trump to limit immigrants from certain countries for alleged security concerns.[52]

Finally, all immigrants must meet numerous application filing requirements. These requirements include the need to file an application form at the designated locations and times with the requested information and evidence.[53] Immigrants must be willing to give the government detailed information about themselves and their families and to provide their photos and fingerprints.[54] Every year, the number one reason for an immigrant visa denial is the failure to file it properly or include the required evidence in the required manner.[55] From 1991 to 2020, 1.4 percent of immigrant visa

applications (195,053) received a final denial under the criminal (136,093), health (39,126), or nonprocedural security (19,834) grounds of ineligibility.[56] Meanwhile, 16 percent (2.5 million) received a final denial based on procedural grounds. Of course, some other immigrants never apply at all because they know that these bars would make them ineligible.

Evaluating the Baseline Criteria

Protecting the country against genuine threats to the health and safety of Americans is a reasonable exercise of government power, but the baseline criteria for legal immigration pose both substantive and procedural problems for nonthreatening immigrants. Substantively, several requirements bear no relationship to public health or safety. Personal drug use and voluntary prostitution are not behaviors that violate the rights of other people. They should not be grounds for a ban on legal permanent residence in this country at all—let alone be, in the case of drugs, one of the only criminal offenses that most immigrants can never have forgiven. Only crimes that truly threaten others should bar a person's right to immigrate to the United States.

Procedurally, the time it takes to conduct these health and safety checks ultimately means that immigrants cannot directly travel to the United States, even if they qualify and their lives depend on it. This was something that Afghan interpreters who helped the U.S. military discovered when trying to escape before the Taliban takeover in 2021.[57] Another issue is that the government may bar immigrants based on certain offenses without even a conviction. It may use secret evidence that applicants have no chance to review or rebut.[58] Some wrongfully accused people can also be denied based on a foreign country's claims, including claims made against political dissidents.[59] Finally, the fact that the president has the authority to ban anyone in the world for any reason at a whim leaves the entire system vulnerable to arbitrary restrictions.[60] Congress should restrict presidential authority to ban immigrants and should permit judicial review of those determinations.

Refugee Program

Summary: *Very few people can receive a green card through the refugee program because*

- *the program has a very low cap established by the president;*
- *the program narrowly defines who qualifies as a refugee;*
- *the program excludes most nationalities as not "of concern" to the United States; and*
- *refugees usually cannot apply directly without government selection.*

U.S. immigration law even bans immigrants who meet the baseline criteria unless they fall into one of the five narrow exceptions:

- the refugee program,
- the diversity lottery,
- family sponsorship,
- employment self-sponsorship, or
- employer sponsorship.

Figure 5 shows the number of new legal permanent residents receiving green cards from 2001 to 2020 by broad type. The first exception to the ban on legal immigration is for refugees subject to a cap determined annually by the president. From 2001 to 2020, 528,447 refugees (not including their spouses and children who qualify through their family relationship) became legal permanent residents, accounting for 3 percent of the green cards issued during that time.

At the most basic level, refugees are people who fear return to their homes.[61] According to the United Nations, about 100 million people were living in a state of forced displacement from their homes as of mid-2022, but hundreds of millions of people likely have good reasons to fear what may happen to them even if they have not yet moved.[62] Barely 1 in 5,000 displaced persons will be admitted to the United States under the refugee program. The U.S. refugee program excludes nearly all people fearing return because it has both few spots and restrictive criteria. Box 3 shows a simplified version of the refugee program's major requirements. The second section of Figure 4 shows these requirements in a flow chart.

As an initial matter, refugees must prove past persecution or a well-founded fear of future persecution in their home country (or a "credible basis for concern" in the case of religious minorities from Iran or the former Soviet states).[63] A well-founded fear includes even a 10 percent chance of future persecution.[64] Fear alone, however, is not enough to obtain admission through the U.S. refugee program. The other onerous requirements effectively bar almost every persecuted person in the world.

Although refugees may explain why they lack evidence for their claims, U.S. refugee officers want applicants to bring whatever evidence they could be expected to have when they apply, including items such as threatening letters or messages, medical or police reports, or other legal documents.[65] Every refugee applicant is interviewed at least three times and often other times along with their spouse and minor children who are coming with them.[66] All refugees must be deemed credible, and lacking complete consistency among all these interviews can trigger a denial even if the inconsistencies are irrelevant to proving the persecution.[67]

Even if the applicant establishes a well-founded fear, the U.S. government does not regard certain types of threats as persecution. The persecutor must be either a foreign government actor or someone whom the foreign government is unable or unwilling to control (such as a criminal organization that operates freely).[68] For instance, a man whom a gang twice attempted to kill was not considered a "refugee" despite his well-founded fear.[69] The U.S. government is often willing to credit even minimal efforts by the foreign government as evidence that it is able and willing to stop

BOX 3

Specific criteria for refugee program

- Refugee must meet legal immigration baseline criteria (see Box 2).
- Refugee experienced past persecution or a fear of persecution that is well founded,
  - or a credible concern of persecution for religious minorities from Iran or former Soviet states with U.S. sponsors.
- Refugee provides credible and consistent testimony.
- Persecutor is a government or an entity the government allows to operate.
- Persecution was serious physical harm, coercive medical or psychological treatment, invidious prosecution or disproportionate punishment for a criminal offense, severe discrimination,

private persecution. In one case, the fact that the government arrested the perpetrator, even though it promptly released that person, was enough to reject the applicant.[70] The government regularly demands that applicants show that they reported the persecution to the authorities, even in locations where the police often do nothing about it.[71]

Certain religious minorities from the former Soviet Union and Iran with U.S. sponsors may demonstrate concern about persecution based on more minor incidents,[72] but for other applicants, only five broad categories qualify as persecution:

- serious physical harm;
- coercive medical or psychological treatment;
- invidious prosecution or disproportionate punishment;
- severe discrimination; and
- severe criminal extortion or robbery.[73]

The government does not treat many actions that could provoke fear as persecution. Some

or severe criminal extortion or robbery.

- Persecution was a forced abortion or sterilization or was based on race, religion, nationality, political opinion, or membership in a particular social group.
- Persecution was not caused by societal breakdown or war.
- Refugee was never a persecutor.
- Refugee has access to a country with U.S. processing.
- Refugee resides outside origin country for duration of processing (two to five years).
  - Certain family-sponsored cases skip this rule.
- Refugee has no permanent status offer in country to which he or she fled.
- Refugee's nationality is of U.S. concern.

examples include verbal harassment, death threats, a single wrongful arrest, a single detention of several days, illegal searches, military conscription against conscientious objections, expulsion from public school, and legal discrimination not deemed "severe."[74] Moreover, persecution must be specifically targeted, so persecution sufficient to qualify for refugee status cannot arise solely as the result of societal breakdown, armed conflict, or war.[75] This means that victims of the biggest forced displacement events do not qualify for refugee status based on those events.

By itself, however, persecution is not enough. Except for victims of forced abortion or sterilization, a reason for the persecution must be one of five protected grounds:

- race,
- religion,
- nationality,
- political opinion, or
- membership in a particular social group whose membership is based on a characteristic that one either cannot change or should not be forced to change.[76]

- Refugee needs legal or physical protection or medical attention, is a survivor of torture or violence needing treatment, is a woman or child under threat, or has no hope of a durable alternative.
  - Except for P-2 or P-3 family-sponsored referrals or P-2 group referrals.
- Refugee meets any additional United Nations or U.S. criteria.
- Refugee has referral for resettlement (about 0.1 percent odds) to the United States (less than one-third of United Nations High Commissioner for Refugees referrals).
  - Certain family-sponsored cases skip this rule.
- U.S. refugee cap spot is available.
- Designated U.S. nonprofit (or an approved group of five approved sponsors) is able to sponsor.

Source: See Appendix A.

Notably, this list excludes age, disability, sex, and gender—common grounds for protections under U.S. employment law but which are not by themselves grounds for refugee status.[77] These characteristics could sometimes be defining features of a particular social group, but that is much more difficult to prove because the government requires that the applicant demonstrate that their home society recognizes this group as socially distinctive in some way.[78] For instance, the social group designation of "Iranian women" who are forced to wear certain distinctive coverings was deemed overbroad.[79] Separately, proving the intent of a persecutor can be very difficult. The government will not merely infer persecution on a protected ground when there is "violence plus disparity of views" between the parties.[80] Even victims of attempted assassinations who had received written threats for their political views have been rejected because they could not prove the connection between the two events.[81]

Immigrants who can prove a well-founded fear of persecution based on a protected ground are legally refugees, but U.S. law still does not authorize their admission. They must further show that they have not firmly resettled elsewhere, meaning that no country to which they have been forced to flee has given them permanent legal status.[82] Despite this mandate, the government also requires nearly all refugees to have already fled their home country.[83] The United Nations High Commissioner for Refugees (UNHCR) first figures out whether the refugees can return home. If they cannot return home, they may be referred to the U.S. government's refugee processing, which generally took more than two years pre-pandemic and was taking more than five years in 2022.[84] This means that the refugee must somehow be able to maintain residence in another country for several years—in some cases, more than a decade—yet not possess an offer of permanent resettlement during that time.

Refugees must also flee to specific countries where the United States conducts refugee processing. In 2019, U.S. refugee officers visited 56 of about 200 countries to conduct refugee interviews, but that number dropped to 10 countries in 2020.[85] In theory, U.S. embassies can refer refugees for resettlement, but they do not do so except in extraordinarily rare circumstances (mainly someone "personally known to the embassy," such as a prominent activist).[86] Without U.S. family, refugees must almost always obtain a referral from the UNHCR. Refugees must register at a UNHCR office and be determined to be a refugee before the UNHCR will consider referring them.[87] The UNHCR has personnel in about two-thirds of countries,[88] but as Figure 6 shows, only 32 countries were the points of

departure for 99 percent of the refugees whom the UNHCR referred to the United States in 2021.[89] A majority of UNHCR-referred refugees to the United States departed from just five countries: Tanzania, Turkey, Rwanda, Egypt, and Jordan.

The only exceptions to the requirement to flee to a third country or receive a referral from the UNHCR are for certain family-sponsored cases. Spouses, children, and parents of refugees, asylees, or special immigrant visa recipients (e.g., Afghans or Iraqis with U.S. military connections) can be classified as Priority 3 (P-3) refugees and can be admitted without a referral. Religious minorities in former Soviet states and Iran with immediate relatives in the United States (or, in some rare cases for Iranians, personal friends), and some Central Americans with U.S. family, can also be classified as Priority 2 (P-2) direct-access refugees and can be admitted without a referral.[90]

Except for the aforementioned categories and refugees under the P-2 group referral program (currently only certain Congolese or Burmese refugees), the UNHCR limits non-family-based refugee referrals to just six groups:

- survivors of torture or violence;

- refugees with unmet medical needs;
- refugees in need of legal or physical protection in their new country of residence (such as being threatened to return to their home country to be persecuted);
- women facing persecution in their new country;
- children or adolescents at risk in their country of residence; and
- refugees lacking any foreseeable durable alternative to resettlement (i.e., a protracted displacement situation with no hope for local integration).[91]

These categories would still include millions of people, so recognizing that countries will not accept that many refugees, the UNHCR usually restricts referrals to only those facing ongoing threats to life or basic liberties.

Refugees in the aforementioned narrow P-2 and P-3 categories who are not subject to these UNHCR referral restrictions or are able to apply to the program without a referral through family sponsorship accounted for about half of all refugees resettled from 2018 to 2020.[92] The odds of refugees outside those categories being resettled is even lower. Moreover, since referrals are based on the willingness of governments to accept them, barely 0.1 percent of refugees are referred anywhere in the world for resettlement,[93] and since refugees cannot choose their destinations, they could be referred to Europe, Canada, or elsewhere.[94] In 2021, just 28 percent of UNHCR referrals were to the United States.[95]

The United States will only accept refugees if they fit into a category of "special humanitarian concern" to the United States, a concept it has always intentionally defined narrowly to apply to certain nationalities.[96] Figure 7 shows the 30 countries of nationality for U.S. refugees in 2021.[97] Three-quarters came from just five countries: the Democratic Republic of the Congo (43 percent), Syria (11 percent), Afghanistan (8 percent), Ukraine (7 percent), and Burma (7 percent).

After a referral, the government still denied about 16 percent of refugees whom it permitted to go through the process from 2016 to 2021.[98] Finally, admissions will occur only if the United States has refugee slots available under the president's annual refugee limit determination.[99] In 2022, the United States is on pace to accept fewer than 25,000 refugees (and their spouses and minor children) worldwide.[100] Given the 100 million displaced persons and about 20 million UNHCR-recognized refugees outside their countries of origin, this is an acceptance rate of 0.02 percent of the forcibly displaced population and 0.1 percent of the UNHCR-recognized refugee population.[101]

Figure 8 shows the number of forcibly displaced persons and the number of refugees admitted to the United States. The rate of acceptance of displaced persons has fallen by 96 percent since 1990. The rate of acceptance varies widely between countries. In 2022, about 14 percent of Moldovans recognized as refugees by the UNHCR (507 of 3,620 individuals) were admitted as refugees to the United States.[102] Moldovan refugees were about 100 times more likely to be admitted than Iraqi refugees (0.14 percent), and Iraqi refugees were nearly 100 times more likely to be admitted than Cameroonian refugees (0.0014 percent). The higher rate for Moldovans is the result of the P-2 direct access program that does not require a referral for certain religious minorities from former Soviet states.

In October 2021, President Biden raised the refugee limit to 125,000 for fiscal year 2022.[103] The agencies admitted only about 25,000.[104] Although the president maintained the same cap for FY 2023, the government is currently taking so long vetting, interviewing, and otherwise processing most refugees that it will likely again be unable to process 125,000 in a single year. Processing is not the only issue; the final hurdle for refugees is that a refugee resettlement nonprofit must be willing and able to sponsor them.[105] Until January 2023, the government had prohibited any organization other than nine designated nonprofits from acting as the sponsor of a refugee.

In November 2021, the government suspended resettling refugees until January 2022 after the resettlement organizations said they lacked the resources to find refugees housing, jobs, and integration services.[106] Although other organizations insisted that they did have the resources to help them, the suspension guaranteed the failure to reach the refugee cap.[107] Partly in response to this situation, in January 2023, the Biden

administration began allowing groups of five private individuals to act as sponsors for individuals already referred for refugee resettlement.[108] The groups must raise $2,375 in cash and in-kind contributions per refugee sponsored and commit to support the refugees for 90 days.

Evaluating the Refugee Program

Low refugee caps eliminate the possibility of acceptance for nearly all refugees. U.S. presidents have established refugee caps that are largely based on congressional funding for refugee resettlement.[109] Ideally, refugees should be able to fly directly to the United States, but one way to vastly improve the current model would be to allow Americans to sponsor refugees outside the refugee limits if they agree to cover the cost of bringing those refugees to the United States. Under this model, churches, charities, and employers in need of workers could agree to bring refugees over if they met the refugees' basic needs for a given period, vastly increasing the country's capacity for resettlement. This would also remove the unnecessarily narrow referral criteria.

The Biden administration has already piloted a successful private sponsorship program for Ukrainians, but the program only grants parole, which is a temporary status, not a path to a green card. In October 2022, it created another parole sponsorship program for Venezuelans and, in January 2023, that program was expanded to Cubans, Haitians, and Nicaraguans. Separately, in January 2023, the State Department announced the creation of a program where U.S. sponsors can apply to cover the cost of resettling a refugee already referred to the program as a means to increase the capacity of the program to resettle refugees.[110] Although its announcement states that it plans to expand this model to allow sponsors to select specific refugees, it has not—as of March 2023—opened this path yet.

At the same time, the requirement for most applicants to be outside their countries of origin and the extremely prolonged process make the refugee program not an option for refugees fleeing immediate danger. The government must develop procedures to accept and adjudicate applications for those who claim an imminent threat in days, not years. The Ukrainian parole program is proving that it is possible for the government to vet applicants in far less time.[111] One way to expedite the process for referred refugees would be to recognize the UNHCR's refugee status determination. Another idea would be to allow refugees to apply to U.S. consulates or embassies once they have a UNHCR status determination

and then streamline the vetting process to investigate only criminal or security grounds of inadmissibility rather than the persecution claim.[112]

Nonrefugee Baseline Criteria

Nonrefugee immigrants must satisfy additional baseline requirements to apply (see Box 4). They must obtain a birth certificate, an unexpired passport, a police "certificate" from the domestic authority regarding any criminal history, and other civil documents relevant to their case (e.g., a marriage license).[113] Immigrants must produce police certificates from every local authority where the immigrant has resided for at least six months in their country of residence since the age of 16 as well as any other countries where the immigrant has resided for more than a year.[114] These various documents cost money in many countries, and some governments may take several months or even longer to produce them.[115] If the U.S. government deems the local documents "unreliable," it can also require the applicant to produce additional secondary evidence.[116]

Nonrefugee immigrants must also cover various costs of the immigration process and meet other economic requirements. The U.S. legal immigration system is largely supported by applicant fees. Nonrefugee applicants must afford the immigrant visa fee ($330 for the diversity lottery winners, $325 for family-sponsored immigrants, $205 for religious workers, and $345 for other employer-sponsored and self-sponsored workers[117]) and the $220 immigrant fee to receive their green cards after they arrive.[118] Also unlike refugees, they must afford the cost of traveling to an in-person interview with a consular officer.[119]

Nonrefugee immigrants must also cover the cost of the medical exam, which typically falls between $100 and $500.[120] The medical exams are in the city with the U.S. consulate or embassy and may require multiple appointments if the immigrant needs a series of vaccinations, which could necessitate obtaining repeated overnight housing. The United States has no immigrant visa processing consulates in nearly 70 countries (mostly on a permanent basis), so immigrants from those countries must obtain travel authorization to another country to apply, which is often difficult and expensive by itself.[121] These costs often require applicants to borrow money to cover them, which is a risk since there is no guarantee of approval.[122]

The law also states that nonrefugee immigrants may not become permanent residents if they are "likely" to become a "public charge" to the United States.[123] The government has defined this term to mean likely future use of cash public benefits as the immigrant's primary income or long-term institutionalization at public expense.[124] From FY 2000 to FY 2020, about 229,000 immigrants were initially denied an immigrant visa for being a likely public charge, but about 188,000 eventually overcame those denials.[125] The implementation of the public charge rule differs for family-sponsored immigrants, diversity lottery winners, and employer-sponsored immigrants, so it will be discussed in more detail in the following sections.

BOX 4

Baseline criteria for nonrefugee admission

- Meets baseline criteria for immigration (see Box 2)
- Birth certificate, unexpired passport, police certificate(s), and any other civil documents (e.g., marriage license)
- Fees: visa fee ($330 for the diversity lottery, $325 for family-sponsored admission, $205 for religious workers, and $345 for others) plus $220 green card fee
- Cost of medical exam ($100–$500) and travel to exam
- Cost of travel to visa interview
- Not likely to need cash welfare or public institutionalization

Source: See Appendix A.

Diversity Visa Lottery

Summary: *Few people can receive a green card through the diversity visa lottery because*

- *only certain nationalities can apply, excluding most of the world's population; and*
- *the lottery has an extremely low limit on the number of visas.*

The diversity visa lottery is the second exception to the U.S. ban on legal immigration. From 2001 to 2020, 471,302 immigrants received a green card through the lottery (not including their family members traveling with them), accounting for 2 percent of all green cards issued.[126] Other than the narrow employment self-sponsorship paths explained below, the diversity visa lottery is the only option for most potential immigrants to directly apply for green cards without lining up a U.S. sponsor (though the public charge rule commonly necessitates a sponsor anyway). Nonetheless, a diversity lottery green card is out of reach for nearly all immigrants because only certain countries can apply and its cap is extremely low. Box 5 summarizes its requirements. The third section of Figure 4 shows these requirements in a flow chart.

The public charge rule as applied to diversity lottery winners requires applicants to demonstrate their ability to support themselves and any accompanying family members at or above the poverty line.[127] For the continental United States in 2023, the poverty line was $14,580 annually for a single person or $30,000 annually for a family of four.[128] Consulates have wide discretion about what kind of evidence can be used to satisfy this requirement, and the quality of the evidence varies significantly among them. To show their ability to support themselves, applicants must have one of the following: a job offer, sufficient assets, U.S. sponsors, or education.

First, applicants may prove their ability to support themselves using a job offer if it is an immediate offer of year-round, nonseasonal, nontemporary employment in the United States that will provide an annual income equal to or exceeding the poverty line.[129] Applicants usually need to submit notarized letters from prospective employers describing the job and the skills that qualify the applicants for the position.[130] These are not easy tasks because it is difficult to get a job guarantee from abroad, particularly when the immigrant cannot know in advance when or whether they will receive an approval. Second, if a job offer is unavailable or insufficient, lottery applicants may show assets sufficient to support their household to make up for having no job or a low-paying job.[131] No uniform rule for the total value of these assets (e.g., savings, stocks, real estate, etc.) exists across consulates, and individual consulates are not transparent about what value is required. A general rule seems to be that the assets plus prospective income should at least be close to the poverty line.[132] However, some consulates set significantly higher thresholds.[133]

Third, without sufficient jobs or assets, immigrants may submit an affidavit of support from a U.S. family member or close personal friend who has

a U.S. immigration status that enables them to work legally for an indefinite period.[134] The sponsors must meet the income or asset thresholds based on a household size that includes the immigrant's family, and they also must agree to allow the government to share their financial information with welfare agencies.[135] The government restricts the use of affidavits from casual friends, so some portion of the diversity lottery is effectively family-sponsored immigration.[136] Diversity lottery immigrants can sometimes struggle to find a sponsor since they are exclusively from countries with low immigration rates to the United States and are less likely to have U.S. contacts. Fourth, some consulates, mostly in developed countries, allow diversity immigrants to qualify based on higher education and enough cash for a couple of months to find a job.[137]

In addition to the nonrefugee baseline requirements, the diversity lottery requires applicants to have either a high school diploma (or foreign equivalent) or two years' job experience within the past five years in an occupational category requiring two years of experience or training (see Box 5).[138] Some foreign high school degrees do not qualify as

BOX 5

Specific diversity lottery requirements

- Meets the legal immigration baseline criteria (see Box 2) and nonrefugee baseline criteria (see Box 4)
- Wage offer equal to or greater than the poverty line or assets roughly equal to the shortfall, or possession of
  - a high education and cash for a period sufficient to find a job or
  - a U.S. sponsor who is a relative or close friend with sufficient income
- High school diploma or two years of experience within the past five years in a job requiring two years of experience (typically requiring a bachelor's degree)
- Birth or spouse's birth in a country with total immigration flows to the United States of less than 50,000 in the past five years; for fiscal

"equivalent": for instance, those requiring less than 12 years of education to obtain, those from part-time schools, those from fully vocational schools, and those from schools that would not immediately qualify the immigrant to apply to a university.[139] The government interprets two years of training to mean jobs generally requiring a bachelor's degree.[140] Without a high school degree, for instance, a mobile heavy equipment mechanic does not qualify, even though the Department of Labor says it requires "one or two years of training," because the low end of the range is less than two years.[141] Nonetheless, diversity lottery winners commonly do have a college degree because college graduates are more likely to hear about and afford the fees and other financial requirements.[142]

year 2023, not any of the following:
    - Bangladesh, Brazil, Canada, China (including the Hong Kong Special Administrative Region), Colombia, the Dominican Republic, El Salvador, Haiti, Honduras, India, Jamaica, Mexico, Nigeria, Pakistan, the Philippines, South Korea, the United Kingdom (except Northern Ireland) and its dependent territories, Venezuela, and Vietnam

- Win the visa lottery (roughly 0.2 percent odds)

Source: See Appendix A.

The lottery requires the participant (or their spouse) to have been born in a "low immigration" country, defined as anywhere from which fewer than 50,000 individuals received U.S. legal permanent residence through family- or employment-based categories in the most recent five-year period.[143] For FY 2023, this rule excluded 19 countries and the United Kingdom and its dependent territories as well as Hong Kong (see Figure 9).[144] The two largest countries in the world in terms of population (India and China) have always been excluded, and for FY 2023, the most common origin countries for illegal border crossers (Mexico, El Salvador, Guatemala, and Honduras) were also excluded.[145] Altogether, the majority of the world's population

cannot apply for the diversity visa lottery solely because of their county of birth.

Even if applicants meet all these requirements, they must still win the lottery, which is supposed to award almost 55,000 green cards each year.[146] But the government regularly wastes a significant portion of this amount by not processing the applications before the end of the year. In 2019, 22.2 million people (including spouses and minor children of the applicants) entered the lottery, and only 45,889 individuals received permanent residence through the program.[147] In 2020, 23.2 million entered, and only 19,125 received green cards because the government refused to process diversity visas at many consulates abroad during the pandemic.[148] Given the falling odds, the number of people who entered the lottery dropped to 11.8 million in 2021, and only 18,912 green cards were issued that year.[149] Thus, the overall odds of winning the lottery and obtaining a green card were between 0.1 and 0.2 percent in those years (see Figure 8).

Diversity lottery green cards are allocated first by region and then by country, with no single country able to receive more than 7 percent of the total.[150] These quirks and differences in application rates between countries mean that the odds for applicants differed widely, from 0 percent for immigrants from several countries to over 8 percent for those from the Democratic Republic of the Congo.[151] Thanks to increasing awareness of and participation in the lottery around the world, the overall odds of entering the lottery, winning it, and obtaining a visa have fallen by nearly 90 percent since the first worldwide lottery was held for FY 95 (see Figure 10).[152]

Evaluating the Diversity Lottery Program

The financial and education requirements, ineligible country list, and the low visa cap render the diversity lottery program an unrealistic option for nearly all potential immigrants. Before the Immigration Act of 1990, immigrants in any country could theoretically "get in line" for a green card as long as they met the baseline requirements.[153] Starting in 1925 for the Eastern Hemisphere and in 1969 for the Western Hemisphere, the United

States assigned a green card cap to each country.[154] Within the cap, certain immigrants—mainly family members of U.S. citizens and certain employees of U.S. businesses—would move to the front of the line, but anyone meeting the baseline criteria could apply and receive an immigrant visa after waiting. However, starting in 1978, these "preference" categories consumed the entire cap, which meant that for the first time ever, all immigrants had to fall into one of the preference categories.[155]

FEATURED TESTIMONY

In 1990, Congress formally eliminated the chance to apply outside the specified categories.[156] To partially remedy the fact that immigrants from countries with fewer immigrants here already would not be able to immigrate through a primarily family-based system, Congress created the diversity lottery program but added the educational (or employment) requirement on top of the baseline criteria.[157] The diversity lottery program demonstrates how extremely restrictive America's legal immigration system is. There was never any reason to eliminate the ability to apply for a green card under the baseline requirements or to cap the number of green cards. Even though the diversity lottery program imposes the additional education and work history requirements, immigrants who qualify cannot simply receive a green card.

Congress should eliminate the program's cap and country restrictions. No social or economic research has demonstrated that the United States has reached the optimal amount of immigration,[158] and a substantial body of evidence indicates that the United States would benefit from a greatly expanded flow of immigration.[159] All nonrefugee immigrants already must demonstrate their ability to support themselves, so a cap only arbitrarily denies legal immigrants who would, by the government's assessment, contribute to the United States. Economic demand would provide the final say on the number of green cards, not a majority of congressional members decades ago. Even if Congress adopted this reform for only the Western Hemisphere, largely reversing the cap it imposed in the 1960s, it could greatly reduce illegal immigration and provide a pool of workers for U.S. businesses that need them.

Family-Sponsored Immigration from Abroad

Summary: *Few people can receive a green card through family sponsorship because*

- *most potential immigrants have no qualifying U.S. citizen or legal permanent resident relative in the United States;*
- *the law limits qualifying relationships to a small number of close relatives; and*
- *family sponsorships have a low, outdated cap last updated in 1990.*

Family-sponsored immigrants received about 79 percent of green cards from 2011 to 2020 (see Table 1).[160] The most basic family-sponsored requirement for immigrants coming from abroad is that, except for widows or widowers of U.S. citizens, a qualifying relative must be willing to sponsor the immigrant and, usually, petition the government to request that the immigrant family member receive a green card.[161] Setting aside refugees and certain legalized immigrants (e.g., asylees), all relative sponsors must be either a U.S. citizen or a legal permanent resident.

Figure 11 shows the relationships that can qualify an immigrant for family sponsorship, but the fine print contains significant restrictions on these relationships. The relationships include only the following:

- spouses;
- parents, if the sponsor is a U.S. citizen over the age of 21, including stepparents if the stepparent married the sponsor's parent when the sponsor was younger than 18;
- siblings, if the sponsor is a U.S. citizen older than 21, including stepsiblings if the stepparent married the sponsor's parent before the sibling was 18;
- brothers- or sisters-in-law, only as a dependent applicant of a sponsored sibling;
- nieces and nephews, only as dependents of a sponsored sibling and only if unmarried and younger than 21;

- children, excluding married children aged 21 or older of legal permanent residents and including stepchildren if the sponsor married their parent before the child was 18;

- children-in-law, only as dependents of a sponsored child (except for a legal permanent resident's child younger than 21); and

- grandchildren, unmarried and younger than 21 only as dependents of a sponsored child.[162]

Many relations are never eligible: grandparents, parents-in-law, a sponsor's child's parent who is not married to the sponsor (i.e., a coparent), aunts or uncles, cousins, second cousins, great-grandparents, great-grandchildren, grandchildren-in-law, second nieces or nephews, and more-distant relations. It is worth emphasizing that siblings-in-law and children-in-law also only qualify as a dependent applicant of their spouses. Likewise, nieces, nephews, and grandchildren only qualify as dependents of their parents if their parents are qualified and if they are unmarried and younger than 21.[163] A common problem for these dependent children is that though they might be younger than 21 when their relative's petition was approved, they can turn 21 and "age out" of eligibility during the long wait for a cap spot to become available before they have the chance to apply.[164]

Table 2 summarizes the requirements for these immigrants. Children born to legal permanent resident mothers during a temporary trip abroad (or a parent with a valid immigrant visa who has yet to travel to the United States) have the easiest path, which has effectively no requirements besides coming to the United States before the child turns two years old or during the validity period of the immigrant visa.[165] Their parents do not even need to apply for them before they travel to the United States.

Table 2

Requirements for nonrefugee family-sponsored immigrants by type

Source: See Appendix A.
Notes: For immigration purposes, "child" indicates someone younger than 21. "Adult" indicates someone 21 or older. Step-relationships count if the marriage creating the relationship occurred before the child turned 18.

Other sponsors must generally pay a $535 fee to petition for relatives to be granted permanent residence.[166] This is separate from the $325 fee that the immigrant must pay to receive an immigrant visa after the petition is approved. Aside from children born abroad to permanent residents, the only other fee exemption is for dependents—spouses and unmarried children younger than 21—coming with a primary applicant (including a non-family-sponsored immigrant). After paying the fee, two groups can receive a green card outside any caps without any other restrictions: orphans younger than 18 who were fully adopted by U.S. citizens before age 16 and widows or widowers of U.S. citizens who died in the past two years.[167]

Other than orphans, widows, and the aforementioned children born abroad, all other nonrefugee family-sponsored immigrants from abroad (and employer-sponsored immigrants, if a relative has a significant ownership interest in the employer) must fulfill the unique family-sponsored public charge rules to prove that the sponsor can support them once here.[168] First, the sponsor must be willing to pay $120 and submit an "affidavit of support."[169] The affidavit is a legally enforceable contract between the U.S. government and the sponsor. It attests to the sponsor's willingness to reimburse the federal government for any federal means-tested benefits the immigrant may use until they are either (a) credited with the equivalent of 10 years of work in the United States or (b) become a U.S. citizen.[170] Although no administration has attempted to enforce these contracts, the regulations permit an immigrant to sue a U.S. sponsor for the promised support.[171] The contract continues to have effect even after, for example, a divorce, and the immigrant has no responsibility to attempt to support themself.[172] These risks may discourage family sponsorships.

Sponsors must further prove that they have household incomes of at least 25 percent above the poverty line, including the immigrant's family as part of the sponsor's household.[173] For instance, a U.S. citizen with a spouse and two dependent children sponsoring a sibling who also has a spouse and two dependent children must demonstrate a household income of 25 percent above the poverty line for a family of eight ($63,200 in 2023).[174] If the new immigrant will be part of the sponsor's household when they receive a green card, the regulations allow them to contribute to the required household income, but they can only use income from a job or source that will continue *after* they immigrate.[175] The government does not accept offers of employment as proof of income that will continue, so immigrants from outside the United States (this paper's focus) cannot

contribute to the required income amount at all through a U.S.-based job.[176]

If the sponsor and immigrant cannot prove the required income, they have two options. First, they can show that net savings (cash or assets easily convertible to cash minus liabilities) for the immigrant and sponsor collectively equal five times the shortfall, or three times in the case of a spouse or child of a U.S. citizen.[177] For instance, if the required income were $63,200 and the household income were $35,000, net assets would need to be $141,000 (or $84,600 for a citizen's spouse or child). Second, if assets are inadequate, they can recruit a joint sponsor who can be any adult U.S. citizen or legal permanent resident living in the United States who can fully meet the income or savings requirements and is willing to sign the affidavit of support contract with the government.[178] If the joint sponsor's income is insufficient to cover the immigrant, other joint sponsors must be recruited for the spouse and children, or the family will have to separate.

Beyond the limited types of qualifying relatives, the most important restriction on family-sponsored immigration is the cap. Just four types of relatives have no numerical limit:

- children younger than 2 born abroad to legal permanent residents or immigrant visa holders;
- spouses of U.S. citizens (includes widow[er]s);
- unmarried children younger than 21 of U.S. citizens (includes fully adopted orphans); and
- parents of U.S. citizens if the sponsor is aged 21 or older.[179]

Unsurprisingly, the uncapped categories have accounted for nearly half of all green cards in recent years. Although they have no cap, their numbers are subtracted from the 480,000 annual cap available for other family-sponsored immigrants until the cap reaches a floor of 226,000, at which level the family-sponsored cap has stayed every year since the early 1990s.[180]

In 1992, when the most recent update to the caps took effect, the capped categories (213,000) received only slightly fewer green cards than the

uncapped categories (237,000). But since the law allowed the uncapped categories to fluctuate with demand, soon their numbers more than doubled. In 2016, they reached a high of nearly 567,000. Meanwhile, the cap permitted almost no growth in the capped categories, and their backlog grew dramatically from about 3.3 million in 1992 to 6.9 million in 2021 (see Figure 12).[181] If Congress had merely allowed the cap to grow proportionately to the growth in the uncapped categories, an additional 5 million family-sponsored green cards would have been issued, and the backlog would be far less severe.

The capped refugee, family-sponsored, employer-sponsored, and self-sponsored categories all permit primary applicants to sponsor their spouses and unmarried children younger than 21.[182] These spouse and minor child "dependents" cannot come with immigrants under the uncapped categories (for spouses, minor children, and parents of U.S. citizens).[183] This rule creates problems. If an adult U.S. citizen's parent remarried before the sponsor turned 18, for instance, the parent's new spouse is considered "a parent," but otherwise the stepparent will not qualify for an uncapped green card and cannot immigrate immediately with the parent.[184] Similarly, only if a U.S. citizen's spouse's children were younger than 18 at the time of the marriage are they also considered the U.S. citizen's children and able to receive an uncapped green card. An unmarried child younger than 21 of a U.S. citizen with a child of their own (a grandchild of the citizen) would have to leave the child behind to use an uncapped immigrant visa to obtain a green card. But if the child of a U.S. citizen were an adult or married and so were subject to the cap, the minor child would qualify as a dependent, but both would have to wait years for a cap spot.

If the dependent's spouse or parent is a non-family-sponsored immigrant, they will be subject to the caps on diversity lottery winners (see "**Diversity Visa Lottery**") or employment-based immigrants (see "**Employment-Based Green Card Caps**").[185] Otherwise, capped family-sponsored immigrants are subject to the family-sponsored cap, which is distributed among five categories (see Table 3).[186] Because each type of family-sponsored immigrant has a different cap, each faces a different wait time for a green card. In addition, immigrants from no single birth country can receive more than 7 percent of the family-sponsored cap.[187] Three-quarters of the green cards under the F-2A category for spouses and unmarried minor children of permanent residents do not count toward the country limit. The F-2A category differs from spouse and minor child "dependents" in that the sponsor married or adopted them *after* receiving permanent residence. The country caps mean that immigrants are effectively in separate lines based on their birth countries within each category, and wait times vary considerably between them. For eligibility for diversity-, family-, or employment-based green cards, the only relevant factor is an immigrant's birthplace, not their citizenship.[188] A person cannot obtain citizenship in another country to avoid the country caps, though they can use the birth country of their spouse if it is more favorable.[189]

Table 3 shows the number of backlogged family-sponsored immigrants subject to the caps, along with the number of visas made available by category and country as well as the estimated future wait times if it were possible to remain in line forever. The caps include the spouses and minor children of those relatives (i.e., children-in-law, grandchildren, siblings-in-law, nieces, and nephews). As of November 2021, the family-sponsored capped categories had a combined backlog of 6.9 million applicants.[190] As it shows, F-2A spouses and unmarried minor children of legal permanent residents are the only immigrants who wait the same length of time regardless of birth country, and they can also expect the shortest wait

time (about seven years). While still very long, the wait is shortest because F-2A immigrants receive by far the largest portion of the family-sponsored green cards (39 percent), and the F-2A backlog has multiple growth limits since legal permanent residents can apply to become U.S. citizens after three to five years and then sponsor these family members without limit. Furthermore, children who reach age 21 can "age out" of eligibility for the category.

Other family-sponsored immigrants face astoundingly long waits that range from 14 years to 224 years. In fact, using normal mortality tables, it is possible to estimate that nearly 39 percent of new 2022 sponsors will die before cap space opens for a green card. Setting aside F-2A immigrants, a majority (57 percent) of all family sponsors will die before their relatives receive green cards. The situation is worse for specific countries. Three-quarters of new non-F-2A Filipino immigrants will not immigrate because of the deaths of their sponsors, and Mexicans will effectively be completely shut out.[191]

The caps and rules also penalize marriage. If a legal permanent resident's child marries, they are disqualified entirely. The same is true for the dependent children of the immigrant visa recipients (the sponsor's grandchildren, nieces, and nephews; or the children of refugees, employment-based immigrants, or diversity lottery winners). Minor children of U.S. citizens face a minimum of 32.6 years of additional waiting if they choose to get married because they would have no cap otherwise. For an adult child of a U.S. citizen who gets married, the additional wait is at least 18 years. Marriage penalizes Filipino adult children of U.S. citizens with an additional 48 years of waiting.

Evaluating Family-Sponsored Immigration

The family-sponsored system suffers from two significant unnecessary constraints. First, the types of relatives eligible to sponsor are far more limited than the diversity of family relationships among immigrants. Many immigrants traveling to the U.S.-Mexico border, for instance, come with an aunt, uncle, grandparent, or parents-in-law.[192] Many of these types of relatives do act as financial sponsors by filling in as a joint sponsor for a qualifying relative, but nonetheless the relative in these other family relationships is not permitted to receive legal permanent residence based on their sponsorship alone. This needlessly closes off pathways for immigrants to come legally. Canada, for instance, allows sponsorship of immigrants by grandparents in some circumstances.[193] The United

Kingdom has a path for parents of its citizen children, even if the parent is not married to a UK citizen.[194]

Second, the law imposes a wholly unnecessary cap on family sponsorship. Before the 1920s, U.S. law did not have annual caps on immigrants, and while it did have the public charge rule, anyone—including any family member—could act as a sponsor for the immigrant. As Table 3 shows, these arbitrary caps have effectively ended much of the family-sponsored immigration system as a means for future legal immigration. A process that takes longer than the normal working lives of many people is not a valid alternative to illegal immigration. Moreover, Congress last updated the caps in 1990,[195] and in the three decades since, the number of U.S. households has increased from 93 million to 128 million.[196] If the caps remain, they should automatically increase with the number of U.S. households. Congress should also exempt spouses and minor children (dependents) from the annual caps. Dependents use roughly half the cap, and it makes no sense to slash the number of primary applicants just because they happen to be married or have children. This reform alone would have prevented both the employer- and family-sponsored backlogs from growing since 1990.[197]

Employment-Based Immigration

Everyone who is not a refugee, a diversity lottery winner, or a family-sponsored immigrant must obtain a green card under a very restrictive employment-based system. Employment-based immigration is largely impossible for most aspiring immigrants because the categories are so limited, the process is so expensive that few immigrants can qualify, and the caps are far lower than the demand. Figure 13 shows the nine types of employment-based green cards with brief descriptions of each. As it shows, most categories are extremely narrow—mostly reserved for specific, relatively rare, highly skilled occupations; individuals who have projects of national importance; or those who are deemed “extraordinary.” Meanwhile, the government chokes off the one category open to all workers—the basic labor certification—with complex protectionist regulations.

This employment-based system can be divided into two categories: self-sponsored and employer-sponsored. Table 4 shows the number of approved green cards for primary applicants (not their spouses and minor children) under the employment-based categories by type for fiscal year 2019 (the last "normal" pre-pandemic year for which numbers were available at the time of writing). About 22 percent were granted under the employment-based categories that do not require an employer sponsor ("self-sponsored"), and 78 percent were granted under the employer-sponsored categories.[198]

Self-Sponsored Employment-Based Immigration

Summary: *Few people can receive a green card through self-sponsored employment-based categories because*

- *those cards are limited to extraordinarily successful individuals; and*
- *self-sponsorship green cards are capped.*

The U.S. government provides three employment-based pathways to green cards that do not require an employer sponsor:

- major immigrant investors of between $800,000 and $1.05 million;
- immigrants with “extraordinary ability”; and
- immigrants with advanced degrees or “exceptional ability” whose activities are deemed in the national interest.

These tracks are extremely restrictive. The fourth section of Figure 4 shows their requirements in a flow chart. Figure 14 shows the number of self-sponsored employment-based immigrants by type. Only about 13,452 green cards were authorized under these categories in 2019. Although the self-sponsored system has grown in importance in recent years, it still provided only about 1 percent of all green cards in the United States.

EB-5 Investors

The only way to qualify for an employment-based green card with no imminent job prospect is as a major investor under the EB-5 category (see Box 6). EB-5 immigrants must invest in a commercial enterprise that began on or after November 29, 1990.[199] In 2022, Congress raised the required minimum investment amounts from $1 million to $1.05 million. For investments in a "targeted employment area," it raised them from $500,000 to $800,000.[200] A targeted employment area includes a rural area with a population of less than 20,000 or any census tract area with an unemployment rate of at least 150 percent of the national average on its own or when combined with an adjacent area.[201]

EB-5 immigrants must show that their investments will create at least 10 jobs for U.S. workers within two years,[202] and, to avoid losing status after two years, they must have actually created 10 jobs.[203] Applicants may prove job creation by increasing employment by 10 jobs or by preserving 10 jobs from a "troubled business," defined as one losing 20 percent of its net worth in the prior two years.[204]

The two-stage nature of the EB-5 program means that investors have two chances to receive a denial. The subjective assessments of future or past job creation mean that denial rates fluctuate significantly (see Figure 15). In 2021, about 21 percent of EB-5 petitions were denied, and another 9 percent of investors (and their spouses and children) lost status after the two-year period.[205] This means that more than 1 in 5 immigrants trying to invest significantly in the United States is turned down, and 1 in 10 who actually do invest and move to the United States is asked to leave the country after two years.

BOX 6

EB-5 investor green card criteria

- Meets the legal immigration baseline criteria (see Box 2) and nonrefugee baseline criteria (see Box 4)
- Investment in a company founded after 1990 of $1.05 million or $800,000 in a "targeted employment area"
- Creation or saving of 10 jobs for U.S. workers within two years
- Availability of EB-5 cap space
- Availability of EB-5 country cap space

Source: See Appendix A.

Future job creation was so difficult to prove under the first iteration of the EB-5 program that Congress created the Regional Center Program, which allows immigrants to pool their investments under a job creation plan preapproved by the government.[206] Unlike other investments, regional center investments also account for "indirect job creation"—that is, jobs created outside the new commercial enterprise itself.[207] The regional center took a significant portion of the risk out of the EB-5 program, and in 2019, about 95 percent of all investors had invested through a regional center.[208]

The EB-5 program has an annual cap of 9,940, and demand has exceeded the cap every year since 2015. The investors' spouses and children younger than 21 count against the cap, and the families of investors typically use about two-thirds of the cap.[209] As with the family-sponsored categories, immigrants from no single birth country can receive more than 7 percent of the employment-based green cards, and because the greatest demand historically has come from China, Chinese investors face very long waits. In September 2021, 45,167 Chinese investors and their families were waiting for cap space to become available (see Table 7), and in 2019, before pandemic restrictions temporarily closed visa processing abroad, only 4,327 Chinese received EB-5 green cards, implying a 10-year wait at that time.[210]

EB-1A Immigrants with Extraordinary Ability

The next category for employment-based immigrants without a sponsor is for immigrants with "extraordinary ability in the sciences, arts, education, business, or athletics" (known as EB-1A).[211] Employers may sponsor or petition for their employees under EB-1A (and the EB-2 national interest waiver category described below),[212] but immigrants are not *required* to have an employer sponsor.[213] While no job offer is necessary, the EB-1A immigrant must still prove that they will continue their work in their field in the United States and that this work will substantially benefit the United States in the future.[214] Future work can be shown by job offers, contracts, affidavits with planned projects, letters from collaborators, or similar evidence.[215] Substantial benefit is more difficult. Simply playing in the Olympics and wanting to continue to play in the United States is not sufficient.[216]

Applicants must demonstrate that they are part of a "small percentage who have risen to the very top of the field of endeavor" (see Box 7).[217] Extraordinary ability must be demonstrated by "sustained national or international acclaim" and "recognized in the field through extensive documentation."[218] "Sustained" clarifies that just being at the top of a field *at one time* is not sufficient to obtain an EB-1A green card.[219] Similarly, the government takes a narrow view of "field" such that, for example, an Olympic gold medalist gymnast would not qualify if coming to teach or coach gymnastics.[220]

Extraordinary ability may be proved by possessing a one-time internationally recognized achievement such as a Nobel Prize, Pulitzer Prize, Oscar, or Olympic medal in the field or by meeting at least 3 of 10 specific criteria from a list that the government agrees shows extraordinary ability (e.g., scientific, scholarly, artistic, athletic, or business-related contributions of major significance).[221] Applicants may only use "comparable evidence" not from the list when the profession is outside the plain text of the regulations.

However, even if the applicant meets these requirements, the government will still subjectively reassess the application in its entirety to determine if the immigrant truly meets the "high level of expertise required" to be among the "small percentage" at the top of a field.[222] The extremely high requirements and the subjective analysis applied to them have yielded a high denial rate: 44 percent in 2019 (see Figure 16).[223] The increase in recent years is partly because the subjective standards allow for new administrations to quickly change practices. The backlogged employer-

sponsored system may also drive more immigrants to apply for the self-sponsored green card to avoid the lengthy waits there.

The EB-1A category is subject to both the overall category limit for EB-1 (which includes employer-sponsored EB-1B and EB-1C immigrants described below) and the EB-1 per-country limit. Both must have space available for the immigrant to receive a green card. As of February 2022, no countries had reached their country caps, and the overall cap has not been reached either.[224] Even if the cap were filled, an EB-1A immigrant with an agent or employer to sponsor them can qualify for an O-1 extraordinary

BOX 7

EB-1A extraordinary ability self-sponsored process criteria

- Meets the legal immigration baseline criteria (see Box 2) and nonrefugee baseline criteria (see Box 4)
- Proof of "sustained" national or international acclaim
- One-time major international prize or 3 of 10 measures of "extraordinary ability":
  - lesser nationally or internationally recognized prizes or awards in the field of endeavor;
  - member of associations that require outstanding achievements;
  - material about the applicant published in professional or major trade publications or other major media, relating to the applicant's work in the field for which classification is sought;

ability work visa.[225] The O-1 visa has no cap and, assuming the immigrant still qualifies, can be renewed until EB-1 green card cap space is available—which has never taken more than a couple of years for any country—and then the immigrant can transition to permanent residence.[226] Immigrants in a variety of fields can obtain an EB-1A green card. Former first lady Melania Trump, for instance, qualified under EB-1A as a prominent fashion model.[227] Its restrictive criteria, however, meant that just 4,053 immigrants obtained permanent residence using the extraordinary ability category in 2019.[228]

EB-2 Immigrants with Projects in the National Interest

The final category of self-sponsored immigrants is for those eligible for an EB-2 national interest waiver. EB-2 immigrants must have "exceptional ability," advanced degrees, or bachelor's degrees plus five years of "progressive" experience during which the immigrant's role grew over time. Applicants can prove exceptional ability by meeting three of seven criteria shown in Box 8.[229] EB-2 immigrants can receive a green card without a job offer when it is in the "national interest."[230] Proving

- action as a judge of the work of others;
- original scientific, scholarly, artistic, athletic, or business contributions of major significance;
- authorship of scholarly articles in professional or major trade publications or other major media;
- display of works at artistic exhibitions;
- leading or critical role for organizations that have a distinguished reputation;
- significantly high remuneration for services relative to others in field; or
- commercial successes in the performing arts.
- If the above measures are not applicable to the field, presentation of comparable evidence

national interest requires meeting a three-pronged test. First, the immigrant's proposed work must have "both substantial merit and national importance."[231] Second, the immigrant must be "well positioned" to advance this work. Third, "it would be beneficial to the United States" to waive the usual employer-sponsored requirements.

Each of the three prongs is highly subjective, and the government takes a narrow view of these concepts. In 2018, for instance, it denied a clinical laboratory scientist working with highly contagious diseases who was sometimes the only qualified staff member to prepare the laboratory for patient testing because the project was not of "national importance."[232]

- Proof of the high level of expertise to be in the small percentage at the top of a field
- Proof of continued work in the field
- Availability of EB-1 category space
- Availability of EB-1 country space
- If cap is filled, obtaining of an O-1 visa with agent or employer sponsor

Source: See Appendix A.

As a consequence of the high, subjective standard—which has undergone abrupt changes in interpretation—national interest waiver applications have seen wild fluctuations in their denial rate, reaching an exceptionally high rate of 19 percent in 2020 (see Figure 17).[233] Only 6,114 national interest waivers were approved in the entire fiscal year of 2019, excluding 495 for physicians who may use a different process (see "**Physicians and Physician National Interest Waivers**").[234] Even if the national interest waiver petition is approved, the immigrant still needs cap space to be available under the annual limit for both the EB-2 category and for the immigrant's birth country to obtain a green card. As has been the case for nearly two decades, no cap space is immediately available for new EB-2 applicants from India and China, and national interest waiver applicants must wait in line with other EB-2 applicants (see "**Employment-Based Green Card Caps**").[235]

EB-2 national interest waiver applicants could qualify for temporary work visas to allow them to work while waiting for green cards to become available under the EB-2 category and country limits. Many EB-2 national

interest waiver applicants can qualify for an O-1 extraordinary ability visa. Many others must obtain an H-1B visa, which means that most end up being subjected to all the employer-sponsored H-1B requirements, including the prevailing wage rule (see "**Employer-Sponsored Immigration with the Prevailing Wage**"). When no green card cap space is available, non-Indian EB-2 applicants can decide to work in these statuses and eventually receive a green card, but the number of EB-2 applicants from India is so great that no new Indian applicant will likely ever qualify for an EB-2 green card without a change in law (see Table 7).

BOX 8

EB-2 self-sponsored national interest waiver process criteria

- Immigrant meets the legal immigration baseline criteria (see Box 2) and nonrefugee baseline criteria (see Box 4).
- Work has substantial merit and national importance.
- Immigrant is "well positioned" to advance work of national import.
- Waiving of labor certification and job offer would benefit the United States.
- Immigrant has an advanced degree (or a bachelor's degree plus five years of progressive experience) or meets three of seven criteria of exceptional ability and can prove a "high degree of expertise," which includes
  - a degree, diploma, certificate, or similar award in area of expertise;

Evaluating Nonsponsored Employment-Based Immigration

America's self-sponsored employment-based immigration tracks are intentionally too narrow for anyone but a tiny elite to access, and even then, these immigrants still face numerical caps. Congress should remove caps on all employment-based immigration, but particularly for these elite few. The fact that very few immigrants can initiate the green card process makes legal immigration subject to the willingness of employers to initiate it. It also makes it much more difficult for entrepreneurs to obtain permanent residence. A complementary model would allow any immigrant to initiate the process, regardless of the requirements. Employees, for instance, could provide independent data or analysis showing that their employment would have no "adverse effect" rather than relying solely on an employer-conducted labor certification (see "**Permanent Labor Certification**").

Another reform would simply expand on the national interest waiver or extraordinary ability tracks to include other measures of contributions to the country. Some countries use this method

- at least 10 years of full-time experience in the occupation;
- license or certification for the profession or occupation;
- a high salary or other remuneration;
- member in a professional association;
- recognition by peers, government, or business for significant contributions to the industry or field; or
- other comparable evidence.

- EB-2 cap space is available.
- EB-2 country cap space is available.
- If the cap is filled, immigrant can obtain an employer sponsor and an H-1B or O-1 temporary visa.

Source: See Appendix A.

by awarding "points" for certain qualifications and then issuing permanent residence to those above a given threshold. This could include level of education, the existence of a job or job offer, the applicant's wage, entrepreneurship, the length of U.S. residence or employment, age, language ability, family ties, or other factors. This system would be easier to administer, would result in fewer denials, and would help facilitate the immigration of talented people who will contribute to the United States.

Employer-Sponsored Immigration

Summary: *Few people can receive a green card through employer-sponsored categories because*

- *they either are limited to very narrow occupational categories or are too costly and time-consuming for most employers to manage (or both); and*
- *employer-sponsored green cards have a low cap.*

Employer-sponsored immigration is the final and most complex option for legal immigrants. Just 1 in 1,500 new hires in the United States are made through the employer-sponsored green card system (see Figure 18). Very few immigrants can qualify for employer-sponsored immigration because the law either limits the number of applicants to extremely narrow classifications or imposes so many costs that few employers will even participate in the legal process. All employer-sponsored immigrants must meet additional baseline requirements (see Box 9) beyond the baseline requirements for all immigrants (see Box 2) and for nonrefugee immigrants (see Box 4). The final section of Figure 4 provides the employer-sponsored rules in a flow chart.

The threshold requirement for employer-sponsored immigration is that the immigrant has a job offer from an employer willing to sponsor them, which requires paying a fee of at least $700 to petition for them to receive permanent residence in the United States.[236] In 2023, the administration was working to finalize a new regulation to increase this fee to $1,315.[237] Religious workers have a lower fee of $435 (that the administration is planning to increase only to $515 in 2023),[238] and they may submit the petition and pay the fee on their own if their employer is unwilling to do so. If it is infeasible or undesirable to wait an additional year for regular processing (see Table 6), an employer may pay a "premium processing" fee of $2,500 for a 15-day turnaround time.[239] This fast-track option is currently unavailable for religious workers.[240] Multinational executives or managers and national interest waiver cases are only guaranteed a 45-day turnaround.[241]

Only year-round, nontemporary jobs offering full-time employment of at least 35 hours per week qualify if they are available to the applicants within a short period of their approval for permanent residence.[242] Seasonal or part-time jobs and those with a definite end date do not qualify for permanent residence. Under the public charge rule, employer-sponsored immigrants must prove their ability to support their family at the poverty line.[243] The agencies rarely deny employer-sponsored immigrants for this reason.[244] The poverty line for a single person in the continental United States in 2021 ($12,880) was less than the income from a full-time job at the federal minimum wage, so the public charge rule could only ever come up for lower-paid, employer-sponsored immigrants with larger families.

All employers must show net income or assets capable of covering the wage that they have offered,[245] and immigrants must show that they meet the employer's job experience requirements, usually through letters from prior employers. These letters can sometimes be challenging to obtain from foreign, bankrupt, or disgruntled former employers, and sometimes companies just have a blanket policy against providing detailed information on their positions.[246] Employers generally have no incentive to produce

detailed letters like these for former employees, so this requirement can severely delay the process. In such cases, workers will need to provide alternative evidence, such as signed affidavits from former coworkers.[247]

Employer-Sponsored Immigration without the Prevailing Wage

Even if the immigrant has a valid job offer and meets all the other requirements to immigrate, they cannot qualify for employer-sponsored immigration unless they fall into a specific employer-sponsored category. Figure 19 shows the number of employer-sponsored green cards by type. There are six broad types: EB-4 religious workers, EB-1C executives and managers, EB-1B outstanding professors and researchers, EB-2 national interest waiver physicians, Schedule A shortage workers (primarily nurses and physical therapists), and workers with approved labor certifications. Only the final category is theoretically open to all workers. There were about 46,916 employer-sponsored immigrants in 2019 (again, not including their spouses and children who qualify through their family relationship).

BOX 9

Employer-sponsored baseline criteria

- Immigrant meets the legal immigration baseline criteria (see Box 2) and nonrefugee baseline criteria (see Box 4).
- Employer is willing to pay a fee of either
  - $700 (or $435 for religious workers) and wait extra year for processing, or
  - $2,500 for expedited 15-day processing (not available for a religious worker, multinational executive, or national interest waiver).
- A job offer is immediately available, full-time, year-round, nontemporary, and compensated.
- Job offers 35 hours of work per week.
- Employer must prove ability to pay.
- Immigrant must prove qualifications through

letters from past employers.

Source: See Appendix A.

Table 5 summarizes the major requirements for the employer-sponsored categories, which will be explained in more detail below. The last three categories, which are more onerous, usually require a special minimum wage or wage floor known as the “prevailing wage,” while the first three streamlined options—which are described next—do not.

Religious Workers

Religious workers have the easiest employer-sponsored path to green cards through the EB-4 category for "special immigrants," which includes various other immigrants not covered by this paper, such as abandoned children and certain immigrants with U.S. government connections.[248] Congress has prioritized religious workers by not subjecting them to several other burdensome employer-sponsored requirements, including the prevailing wage and the labor certification, which are used to determine whether qualified U.S. workers are available. In fact, unlike all other situations where an employer's job offer is required, religious workers are even able to initiate the process for a green card on their own without the employer's direct involvement, beyond supplying the worker with proof of the job offer and other qualifications.[249] Nonetheless, most do start with direct employer sponsorship because most religious workers first obtain an R-1 temporary work visa, which requires an employer petition but has faster processing times. The religious worker path is easier than others, but very few individuals are actually eligible.

Box 10 summarizes the EB-4 religious worker requirements. Religious workers include ministers, nuns, monks, sisters, missionaries, counselors, translators, religious instructors, cantors, and other pastoral care providers who are sponsored by a bona fide nonprofit religious organization in the United States or an organization affiliated with a religious denomination in the United States. As long as the applicant has been employed for two years in the denomination and is offered a compensated position, they are immediately eligible for green cards if their EB-4 cap is unfilled.[250] Religious workers are subject to the EB-4 cap of 9,940 for "special immigrants."[251] New EB-4 applicants from Mexico, Guatemala, Honduras, or El Salvador, however, are not currently eligible to receive EB-4 green cards, because these countries' caps are full.[252] As of May 2022, the government was only processing EB-4 applicants who applied in April 2020 for Mexicans and May 2017 for those from the other three countries.[253] Backlogged EB-4 immigrants can work around the cap by obtaining an R-1 religious worker temporary work visa for themselves and their families.[254] They can pay the $190 R-1 nonimmigrant visa fee, and the workers first enter as R-1 temporary workers before then paying $1,225 to adjust their status to permanent residence in the United States when a cap number is available.[255] These fees replace the immigrant visa fee and immigrant fee described above, but they are still about $850 more than the fee for directly processing abroad. If these waits become too much longer, however, immigrants from these countries could face problems because the R-1 visa has a five-year limit, and they would be required to return home for at least a year.[256] Just 443 religious workers became permanent residents in 2019—0.5 percent of all religious workers in the United States.[257]

Outstanding Professors and Researchers

The next simplest path for an employer-sponsored green card is to qualify under the EB-1B category for outstanding professors and researchers.[258] Box 11 summarizes the EB-1B requirements. Outstanding professors under the EB-1B category need a job offer from a university, other institution of higher education, or private employer with at least three full-time researchers, and the applicants must be pursuing tenure or a comparable research position and have at least three years of experience.[259]

They must also prove that they have obtained "international recognition for outstanding achievements in an academic field."[260] Proof must include two of six measures of outstanding achievement (e.g., "receipt of major prizes or awards for outstanding achievement"). Even if they have the required evidence, the government will subjectively reassess the application in its

entirety to determine whether they are truly outstanding.[261] EB-1B immigrants are subject to the EB-1 cap, which also includes EB-1A and EB-1C categories described elsewhere, but given the restrictive criteria for these categories, the cap was unfilled for all countries as of November 2022. Just 1,982 professors and researchers obtained green cards through this path in 2019, 0.1 percent of all postsecondary teachers in the United States.[262]

Multinational Executives and Managers

The final employer-sponsored option that does not require the "prevailing wage" is for multinational executives or managers (EB-1C). These immigrants must be employed for at least one of the past three years outside the United States by the petitioning employer in a managerial or executive capacity,[263] and the employer must be doing business in both countries.[264] Box 12 summarizes the EB-1C requirements. While the statute would seem to permit an employee of a multinational company to move to the United States to open a new office for the first time here, the government has imposed a requirement through regulation that the U.S. business must have been operating for at least one year.[265] This requirement forces these entrepreneurial immigrants

BOX 10

Specific criteria for EB-4 religious workers

- Worker meets the legal immigration baseline criteria (see Box 2), nonrefugee baseline criteria (see Box 4), and employer-sponsored baseline criteria (see Box 9).
- Job offer is as a "religious worker."
- Worker has two years' experience as a religious worker in the denomination.
- Employer is a nonprofit religious organization or is affiliated with one.
- EB-4 country cap must be unfilled.
- The overall EB-4 "special immigrant" category cap must be unfilled.
- If cap is full (or worker wants to obtain faster processing), worker must obtain an R-1 temporary work visa and pay $1,225 to later

to first obtain an L-1 temporary work visa (see "**Temporary Work Visas**") to open the new office and use the EB-1C category later to adjust to permanent residence in the country.

adjust status when cap space is available.

Source: See Appendix A.

Obtaining permanent status in exchange for attempting to start a new office in the United States would encourage new business creation and spur economic growth, yet the government frets that some new enterprises would fail and that the immigrants would still receive permanent status. Similarly, the government prohibits immigrants who are sole proprietors from using this category to obtain a green card for themselves. It merely states that this would constitute an impermissible "self-petition."[266]

One big restriction on the EB-1C category is how immigration law defines a manager. Rather than adhering to what the government calls the "common understanding," the legal definition of manager does not include all workers who manage or supervise other workers.[267] Instead, managers must also exercise day-to-day control over the entire organization or a division, component, or function of the organization, and they must either manage an "essential function" of the business or manage "professional" workers in jobs requiring college degrees, not merely lesser-skilled workers.[268] This criterion eliminates the ability of business managers in many industries from using the EB-1C executive or manager category, even if their businesses have an international presence. Just 9,639 executives and managers obtained an EB-1C green card in 2019, 0.1 percent of the nearly 9 million managers and executives in the United States.[269]

Employer-Sponsored Immigration with the Prevailing Wage

If an employer-sponsored immigrant is not a religious worker, a multinational executive or manager, or an outstanding professor or researcher,[270] they must have a job that the government determines offers the "prevailing wage."[271] The prevailing wage is supposed to represent the wage paid to similar employees in the same occupation in the same area at a comparable skill level as determined by the government, and its ostensible purpose is to prevent adverse effects on the wages of U.S. workers. But since permanent residents are economic free agents, they

receive the market wage for their labor and create an equivalent demand for labor elsewhere, so this requirement only further restricts and excludes legal immigrants for no legitimate reason. The prevailing wage requirement bans any immigrant who has a wage offer below the prevailing wage, excluding many job opportunities from forming a basis for a green card application.

The first difficulty with the prevailing wage is determining the type of job. Except for wages governed by a collective bargaining agreement (union wage), the prevailing wage is almost always based on an annual survey of wages from the Bureau of Labor Statistics' Occupational Employment and Wage Statistics (OEWS) program.[272] Employers must select from a list of 822 occupational categories with descriptions that the government culled down from a much larger list of nearly 13,000 job descriptions by clumping together related categories.[273] This can mean that specific jobs do not fit neatly into the government's descriptions, leading to erroneous wage requirements. Even with an attorney's help, it is often difficult for employers to precisely place their job within a single category, and in 2021, the government

BOX 11

Criteria for EB-1B outstanding professors

- Immigrant meets the legal immigration baseline criteria (see Box 2), nonrefugee baseline criteria (see Box 4), and employer-sponsored baseline criteria (see Box 9).
- Job offer from university, institution of higher education, or private employer with three full-time research positions
- Proof of "international recognition"
- Immigrant meets two of six measures of "outstanding achievements" in an academic field:
  - major prize or award for outstanding achievement in the academic field;
  - member of an academic association requiring outstanding achievements;
  - published material in professional

rejected an employer's selected job classification about 24 percent of the time.[274] If the job combines multiple categories, the required wage is equal to the highest prevailing wage of any job category in which the worker may be employed, regardless of the percentage of time in each category.[275] This can inflate wages beyond the usual level wherever workers work in multiple positions. For instance, one task for a "construction laborer" (median wage: $37,770) is pouring cement, but he becomes a "cement mason" (median wage: $47,340) if he smooths the poured cement.[276]

Even more contentious is how the government determines the worker's skill level.[277] Because the OEWS program does not collect any information on job requirements, the government somewhat arbitrarily divides the reported wages for an occupation into four levels at roughly the 17th, 33rd, 50th, and 67th percentiles, with the lowest level corresponding to the entry-level wage. Because the lowest prevailing wage level is the 17th percentile, this means that whenever the prevailing wage level is required, about 17 percent of jobs in the United States are automatically ineligible for employer sponsorship,

publications written by others about the immigrant's work in the academic field;

- action as a judge of the work of others;
- original scientific or scholarly research contributions to the academic field; or
- authorship in scholarly journals with international circulation.

- Experience of at least three years
- Entry to pursue tenure, a tenure-track position, or a comparable position
- If cap space is not immediately available, obtaining of an O-1 or H-1B visa
- Unfilled EB-1 country cap
- Available cap space for the overall EB-1 category

Source: See Appendix A.

including those for which lesser-skilled immigrants are most in demand.

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Another problem arises when deciding which job requirements match which wage levels. The basic framework is that the government will require a higher wage whenever it deems the job requirements to exceed the minimums "normally" required in the occupation. The government uses four job requirement metrics: years of experience or training, level of education, supervisory duties, and other skills, licenses, or certificates.[278] The wage will increase one level for each category in which the job requirements exceed the low end of the common range for the skill category. For example, if jobs in the occupational category normally require one to two years of experience or training and the employer requires two years, the wage will be increased from level one (17th percentile) to level two (34th percentile). If the employer requires three years, the wage level will increase again to level three (the 50th percentile). A similar process is applied for other job requirements.

This framework can cause problems for several reasons. The government has not empirically analyzed its methodology to see if it produces wages that correspond to the actual wages paid to those types of workers.[279] It relies on often outdated sources for normal minimum job requirements that were developed to help educate workers about job opportunities (not for the prevailing wage[280]), and it deems certain job duties, such as travel, to be restrictive requirements that could just as easily be deemed to be job perks for some applicants.[281] Each wage level can be significant. For accountants in New York City, for instance, the difference between each level is more than $20,000, but there is no evidence that accounting jobs requiring workers to travel pay $20,000 more than ones that do not.[282] Even for construction workers, the difference is nearly $15,000 (see Figure

20). The result is that the prevailing wage is inflated higher than the wages normally required for the job, pricing many immigrants out of the employer-sponsored legal immigration pathway.

The rule poses numerous other difficulties for employers and immigrants. For one, the wage is set using *base* salary only,[283] so it excludes any nonguaranteed wages, such as bonus or incentive-based compensation. Because the OEWS survey includes all pay, this rule further skews the accuracy of the prevailing wage while also making it more difficult for employers to use many common compensation strategies that rely on incentives.[284] Finally, the data on which the government relies ignore differences in wages between small and large businesses as well as between industries, with the exception of universities and research organizations.[285]

Physicians and Physician National Interest Waivers

Even if they offer the prevailing wage, employers wishing to sponsor a foreign worker must still advertise the job to U.S. workers and obtain a permanent labor certification in a complicated and lengthy process that usually requires significant attorney involvement and legal costs (see the permanent labor certification section below).[286] Besides the categories

previously described, the regulations for employer-sponsored immigrants permit just two exceptions to this general rule: EB-2 physician national interest waivers and Schedule A shortage occupation designations.

The first option is the EB-2 physician national interest waiver, which is very different from the self-sponsored national interest waiver described earlier. Box 13 summarizes the physician national interest waiver requirements. All physicians immigrating to the United States need to be competent in oral and written English,[287] which they must demonstrate by having passed the U.S. Medical Licensing Examination parts I and II.[288] This is an onerous requirement to ask of a practicing physician.

The most important requirement—again applicable to all physicians whether they are seeking a national interest waiver or not—is possessing a license or authorization to practice in the state of intended employment. Every state licensing law requires immigrant physicians to have graduated from a medical school recognized by the Educational Commission for Foreign Medical Graduates and, importantly, completed a year or more of postgraduate training—often referred to as residency—at an accredited program *in the United States*.[289] The only exception to U.S.-based postgraduate training is if they graduated from a non-U.S. medical school accredited by the Association of American Medical Colleges, which only accredits foreign schools in Canada.[290]

This means that virtually all foreign graduates of non-Canadian medical schools cannot immigrate to be employed as a nontrainee physician, no matter how experienced they are. They essentially have to restart their careers. For non-Canadian applicants, therefore, an offer for accredited medical postgraduate training is a prerequisite for an EB-2 physician national interest waiver, and only a defined number of training slots become available each year.[291] This means that an immigrant physician may often be unable to obtain a residency in the specialty that they practiced abroad.[292]

The government will only issue green cards based on permanent jobs, not temporary jobs like postgraduate training positions. Two temporary work visas can be used for postgraduate medical training, the J-1 and H-1B,[293] but the J-1 visa requires applicants to have a foreign residence that they have no present intent of abandoning and that they currently intend to depart at the end of their program.[294] Although it does not require applicants to show that their intention is unlikely to change, judging "present intent" is highly subjective. If the physician was completely open about their desire to use the J-1 visa to obtain employer sponsorship for

a green card, it is possible to be denied.[295] Regardless, work in J-1 status cannot be used to obtain a physician national interest waiver.[296]

Thus, the H-1B is the only fully legal option for physicians in postgraduate training who are explicitly requesting a temporary visa to obtain a green card and the only option at all for physicians abroad seeking a national interest waiver. [297] But obtaining an H-1B visa presents its own problems. Although the J-1 is far more restrictive *for the physician*,[298] the H-1B is more restrictive for the employer. Employers are less willing to hire trainees on an H-1B visa since the employer must cover all the H-1B fees,[299] and the H-1B is capped for clinical practices outside of universities and related nonprofit entities.[300]

In addition to navigating all of this, a physician who wants a physician national interest waiver must find work in a clinical practice and provide primary or specialty care for five years in a medically underserved area or at a Veterans Affairs facility.[301] While jobs at a Veterans Affairs facility require federal endorsement, the federal government will otherwise only credit time spent working in an underserved area if the immigrant obtains a letter of

BOX 13

Requirements for all clinical physicians

- Meeting of the legal immigration baseline criteria (see Box 2), nonrefugee baseline criteria (see Box 4), and employer-sponsored baseline criteria (see Box 9)
- Possession of state license to practice medicine, which also requires:
  - graduation from an accredited university; and
  - U.S.-based postgraduate training, except for graduates of Canadian schools
- Completion of the U.S. Medical Licensing Examination
- Competency in oral and written English

Specific requirements for physician national interest waivers

- Job offer in a clinical practice

need from a state department of health stating that a waiver would be in the public interest. Each state sets unique requirements for obtaining a recommendation letter.[302] Some states require employers to recruit U.S. workers for the position, undermining the streamlined purpose of the waiver program,[303] and others require the physician to already be working in a temporary work visa status in the state.[304] Some states also refuse to credit time spent in postgraduate training toward the five-year period.[305]

The physician national interest waiver process to obtain a green card is not technically employer-sponsored. Workers can file the waiver without an employer's petition, but even qualifying physicians still need to obtain a temporary work visa on which to enter the country to begin the required five-year working period,[306] and the only visas that can be used for a national interest waiver are the employer-sponsored O-1 and H-1B visas.[307] The physician national interest waiver also technically does not require the prevailing wage, but since the H-1B visa does, nearly all applicants end up subject to it.[308] While the O-1 does not require any particular wage, some states will only issue letters

- Contract to provide primary or specialty care for five years
- Job in a medically underserved area or at a Veterans Affairs facility
- Recommendation from a state health department
  - Fulfills requirements of specific state (e.g., prior state work experience, U.S. worker recruitment)
  - Obtaining of an H-1B or O-1 temporary work visa
- Payment of the prevailing wage if the H-1B visa is used
- Willingness to work for five years in a shortage area
- Availability of EB-2 country cap space
- Availability of EB-2 cap space

Source: See Appendix A.

for H-1B workers,[309] and the O-1 is unobtainable for all ordinary physicians and trainees because it requires "extraordinary ability" based on "sustained national or international acclaim."[310]

The H-1B cap imposes another significant restriction on physician national interest waiver applicants because many qualified physicians still cannot immigrate. Even if a physician has received a physician national interest waiver and obtained an H-1B visa, green cards must still be available under the annual cap on green cards (see "**Employment-Based Green Card Caps**") for the immigrant's country of birth and the immigrant's broad employment-based category (EB-2 for all immigrants with exceptional ability, advanced degrees, or the equivalent). These caps mean that most new Indian physician applicants face a virtual lifetime of waiting. In 2019, there were just 528 national interest waivers approved for physicians—0.07 percent of all physicians in the United States.[311]

Schedule A Shortage Workers

The last option to avoid the costly labor certification process is classification as a Schedule A "shortage" occupation—that is, one that the government preemptively precertifies as inherently in short supply.[312] There are two types of Schedule A: Group I and Group II. Box 14 shows the requirements for these immigrants. For the past three decades, the government has determined only two occupations that have "shortages" warranting Group I precertification for a green card: physical therapists and registered nurses. For immigrants in one of these two occupations sponsored by an employer, a green card may be immediately available unless they were born in India or China, because the caps for those countries are currently full.[313]

Because most employers cannot afford to keep a job open for years waiting for cap space to become available, nearly all nurses and physical therapists from India and China need a temporary work visa to enter and wait for a green card. The problem is that to qualify for an H-1B temporary work visa, workers must have offers of employment in jobs normally requiring a college degree.[314] Physical therapists can meet this requirement,[315] but the government claims (debatably) that registered nurses do not require a four-year bachelor's degree unless they are specialists.[316] Thus, despite qualifying under a shortage occupational category, most registered nurses from the world's two most populous countries cannot legally immigrate through employer sponsorship.

Schedule A, Group II is for immigrants with "exceptional ability" in the sciences or arts. Science or art is defined as "any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill."[317] By this definition, exceptional ability in business or education qualifies for a Schedule A, Group II.[318] However, Group II applicants must prove widespread acclaim and international recognition by recognized experts in the field and document at least two of seven other measures of exceptional ability (e.g., internationally recognized awards).[319] Precise statistics are not available. However, because it requires the prevailing wage and an employer sponsor, this category has seen little use because the similar self-sponsored categories for EB-2 national interest waivers and EB-1A extraordinary ability may often be better options for immigrants who could qualify for the Schedule A category.[320] Even if they meet this high and subjective metric, they still need to have a green card number available under the EB-2 or EB-3 country limit.[321] The government has not published statistics on the exact number of Schedule A immigrants, but in 2019, 5,677 registered nurses and physical

BOX 14

Schedule A criteria

- Applicant must meet the legal immigration baseline criteria (see Box 2), nonrefugee baseline criteria (see Box 4), and employer-sponsored baseline criteria (see Box 9).
- Employer must pay the prevailing wage.
- Hire cannot occur during a strike or lockout notification.
- Employer must notify union or employees for 10 days about job.
- Job offer must be as a physical therapist or registered nurse (Group I), or applicant must meet two of six measures of exceptional ability in sciences or arts (Group II).
- EB-3 cap space must be available.
- EB-3 country cap space must be available.

therapists received prevailing wage determinations—the first stage in the process—0.2 percent of all nurses and physical therapists.[322]

- If cap space is not available, applicant must meet qualification for an H-1B visa as a physical therapist or a specialty nurse.

Source: See Appendix A.

Permanent Labor Certification

If an employer-sponsored immigrant is required to be paid the prevailing wage but is ineligible for a national interest waiver or a Schedule A precertification, they must have their employer obtain an individual permanent labor certification.[323] The purpose of the permanent labor certification is to deny a green card to an employer-sponsored immigrant if any U.S. worker is minimally qualified, able, willing, and available in the area to perform the job. In other words, the labor certification is government-mandated discrimination against foreign workers seeking *legal* employment. The labor certification creates a perverse incentive for employers to hire illegal workers both because hiring illegally can be more efficient and because it can be difficult to determine work eligibility. Although the regulations define "U.S. worker" to exclude illegal foreign workers, employers must accept documents that "reasonably appear to be genuine."[324] Given the widespread availability of fraudulent or borrowed documents, the labor certification prioritizes foreign workers with fake documents over workers trying to immigrate legally.[325]

Unlike the other employer-sponsored categories, the labor certification is still theoretically open to any job and any worker. Nonetheless, the number of certifications is far below the number of immigrants seeking U.S. jobs because most employers will not undertake the difficult process; workers cannot initiate the process on their own; and they cannot cover any of the employer's costs of obtaining a certification.[326] The rules are intentionally biased against those immigrants for whom employers are most likely to want to file a labor certification. If the immigrant is an owner, key manager, employee in a small business, or relative of an owner, officer, board member, or director, the government assumes that, without substantial evidence to the contrary, the job opportunity is not bona fide (i.e., open and available to U.S. workers).[327]

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For instance, the government denied one founder because "it is likely the corporation would cease to exist" without him.[328] Entrepreneurs effectively must prove that they are *not* indispensable to the businesses. Owners cannot avoid problems simply by resigning as a member of the corporation and limiting their roles to management.[329] The government will also deny managers who never owned the business if they supervise the person doing the recruitment.[330] Although the government will often approve relatives of the owner, it is still more likely to deny them. For instance, it rejected a sister-in-law of a small business owner, citing the fact that she lived with the owner.[331] Sole proprietors are always barred.[332]

Although the labor certification requires recruitment, few employers use the process to find a worker to fill an open position. Employers have usually already found the worker they want through their normal process and are going through the labor certification because it is required for the worker to receive permanent employment authorization. Indeed, as described below, immigrants subject to the labor certification requirement typically start working for the employer under a temporary work visa before the labor certification process even begins.[333] The government calls the labor certification a "test of the labor market,"[334] and the test subjects are U.S. workers. The test is effectively an experiment performed on job seekers to prove that if the employer took reasonable steps, no minimally qualified worker would be available, able, or willing to do the job. Employers are not required to hire any applicant,[335] but if a minimally qualified U.S. worker applies, the government will deny the application, and the employer must wait six months to try again.[336] Employers cannot honestly tell job seekers that the job is already filled because that would disrupt the experiment.[337]

As summarized in Box 15, the labor certification requires employers (except for colleges hiring instructors) to post the job for 30 days with a state job bank, interview applicants referred from the job bank, notify existing workers about the job, take out two ads in Sunday print newspapers, and recruit in at least 3 of 10 other specified ways if it is a job typically requiring a bachelor's degree or higher.[338] The newspaper advertisements commonly cost between $500 and $3,000, depending on the amount of detail used in the ad and the size of the marketplace.[339] The state

agencies referring U.S. workers to these jobs have no obligation to screen out illegal immigrant workers, placing that obligation on the employer, and some applicants referred by state agencies are only applying as a condition of unemployment insurance and have no genuine interest in the position.[340] Because it is labor intensive, interviewing U.S. applicants can also be costly. Interviewing must be conducted if the résumé meets what the government deems to be the "basic" job requirements for experience and education, even if they are actually not qualified for the position overall.[341]

Although the employers are never required to hire anyone, the government will deny a labor certification if a U.S. applicant is *minimally* qualified, even if the foreign worker is far more qualified. The only exception to this rule is for college instructors who can be hired if they are the most qualified candidate, and colleges can also recruit instructors using their normal competitive recruitment efforts.[342] Employers cannot simply set all their own job standards, either. The government decides whether the standards are "normal" for the occupation or, if not, justified by a legitimate business necessity.[343] This means that the labor certification is biased against employers hiring the most talented foreign workers with unusual skill sets.[344]

Even if the employer can justify the higher standard as a business necessity, the prevailing wage rules (see "**Employer-Sponsored Immigration with the Prevailing Wage**") dictate a wage level increase for requirements not deemed "normal," so employers will incur a higher cost either way. U.S. applicants who fail to meet even these reduced requirements can still trigger a denial if the government believes that they could meet them with a "reasonable period" of on-the-job training.[345] If the employer fails to list even common-sense requirements in the application, such as not having negative reviews from past employers, and rejects U.S. workers for those reasons, the certification may be denied.[346] To keep the job open for a foreign worker, the employer cannot find a completely new role for a U.S. worker, even an objectively better one, unless they can prove the role existed before starting the labor certification process.[347]

Labor certification adds substantial cost, time, and risk to the process of hiring a worker. Virtually all employers need immigration counsel to navigate the complex labor certification. A leading reference book on the subject is nearly 600 pages.[348] Often only subject-matter experts can even learn about the rules. Officials revealed their interpretation of how much experience is "normal" for each occupation only in verbal comments at a conference for attorneys in 2002.[349] Given this type of rulemaking,

the government is prone to abrupt changes in how it applies these rules. For many years, employers never needed to list required licenses under the application form's section for an immigrant's qualifications, but without notice the government started denying applications that failed to do so for several years before finally confirming the change in statements to attorneys at a conference in 2014.[350] Attorney costs are a significant constraint on applying for permanent labor certification, and they can vary widely depending on the attorney, complexity of the case, and location. Several sources indicate that fees of $2,000–$6,000 are common, and employers often pay much more for a complicated case.[351]

The time that a labor certification takes is as important as its monetary costs. The employer-sponsored green card labor certification filing process is a multistep labyrinth, which—without getting into the details of each step—is depicted in Figure 21. The labor certification part of the process by itself currently adds an average of roughly a year and a half to the immigration process.[352] Before a labor certification can be filed, the employer and employee must gather all the required information about the position

BOX 15

Labor certification employer-sponsored green card process for immigrating permanently from abroad

1. Immigrant meets the legal immigration baseline criteria (see Box 2), nonrefugee baseline criteria (see Box 4), and employer-sponsored baseline criteria (see Box 9).
2. Immigrant is paid the higher of union wage or prevailing wage.
3. U.S. employer is willing to advertise to and interview U.S. workers.
4. U.S. employer pays for two print newspaper advertisements (often around $1,500).*
5. No minimally qualified U.S. workers apply (or equally qualified for college instructors).
6. Hire cannot occur during a strike or lockout.
7. Employer must notify union or post job for

and the employee's history. The attorney must take time to validate this information because small errors can derail the entire application. For instance, failing to put the exact day a prior job started and ended as opposed to just the month can lead to a denial.[353] Collecting and validating information—including letters from former employers—by itself can take several weeks to several months.[354]

Figure 21

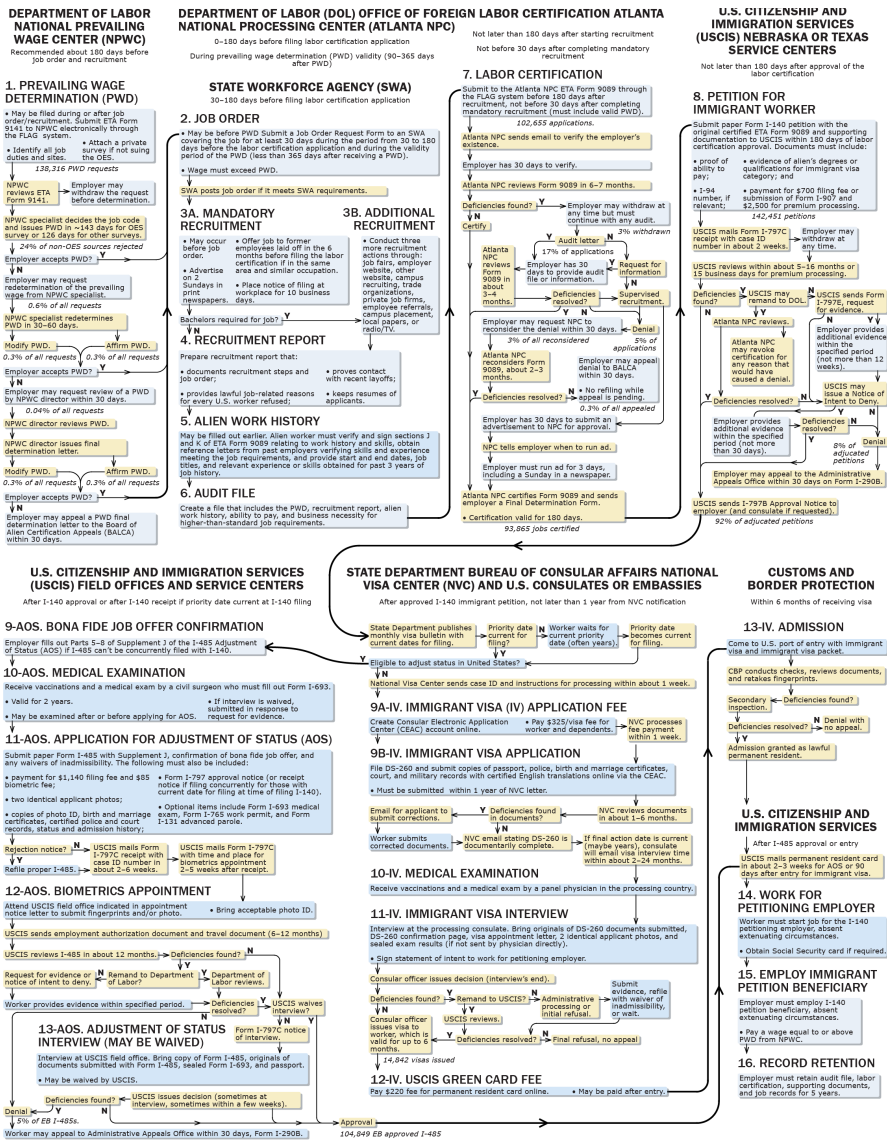
Basic permanent labor certification and employment-based green card process

employees.

8. Employer cannot lay off U.S. workers in the same job within six months.*
9. Employer can justify any job requirements deemed unusual.*
10. Immigrant cannot be the owner or relative of owners or key decisionmakers if the relative can control hiring decision.
11. EB-2 or EB-3 cap space is available.
12. EB-2 or EB-3 country cap space is available.
13. Immigrant is able to pay $1,225 to adjust to permanent residence.
14. Immigrant usually obtains an L-1 (intra-company transfer) or H-1B work visa (specialty occupation).

*Does not apply for college instructors.

Source: See Appendix A.



Legend:

Employer actions

Worker actions

Government actions: NPWC, SWA, OFLC/ Chicago NPC, USCIS, consular or CBP

Sources: 20 C.F.R. § 656 (2022); 8 C.F.R. § 204.5 (2022); "I-485, Application to Register Permanent Residence or Adjust Status," U.S. Citizenship and Immigration Services, May 26, 2023; and "Employment-Based IV Classifications," Foreign

Affairs Manual, U.S. Department of State, 9 FAM 502.4, April 13, 2023.

Once the attorney has the necessary information, the labor certification has three stages. First, the government verifies the occupational classification and determines the prevailing wage (average of 145 days in 2021).[355] Second, the employer follows the recruitment steps (average of 160 days in 2021).[356] Third, the government adjudicates the labor certification application (average of 231 days in 2021)—for a total of 536 days (Table 6). Some employers can complete this final step in less time, while others—such as smaller employers or those with lesser-skilled jobs—take much longer. For instance, the government took 57 additional days to adjudicate applications for employers with five or fewer employees in 2021 and 77 additional days for jobs not requiring any formal education.

Moreover, this time comes in addition to a combined wait of one to two years for the rest of the employer-sponsored green card processing. With several months of preparation time, a labor certification green card will *usually* take two and a half years and sometimes much longer. All this processing time excludes the wait for a cap spot to become available (typically only for Indian and Chinese applicants).[357] This compares to just two months to fill a job under most businesses' normal hiring process.[358] Figure 22 shows how the wait times have actually grown significantly longer in recent years.

The labor certification is only valuable to employers if the expected benefit —profit from the employee's future work multiplied by expected days of work—exceeds the costs.[359] But the expected days of work are highly uncertain because employees may leave their employers immediately after they receive a green card or in some cases not work for them at all.[360] In fact, the labor certification costs for employers grow as the expected benefits fall because labor certification applications for jobs without any educational requirements are four times more likely to be denied.[361] With fewer skills, however, less is produced for employers, so the benefits of filing an application are fewer. Lower-paid jobs also have higher turnover, so not only is the expected profit per day from the worker lower but the expected days of work are also lower.[362]

The regulations exacerbate the risk because employers must name the *specific* worker who will fill the job when they apply for a labor certification, and the rules prohibit substituting a different worker if the

original worker becomes unavailable.[363] If the worker abandons the process, becomes sick, or takes another job, the employer cannot use the fact that no U.S. worker responded to the advertising to hire a different worker. If they end up having no need for the certification following the long process, they also cannot convey it to another company.[364] In the same way, the immigrant cannot transfer the certification to another immigrant.[365]

If the employer rescinds the job offer before the worker receives a green card, the immigrant cannot use the approved labor certification to find a job elsewhere if they are applying from abroad. Immigrant workers already inside the United States working on a temporary work visa can use their approved labor certification to switch jobs, but only at the very end of the process—after the certification is approved, the employer petition is approved, a green card cap number becomes available, and the worker's green card application has been pending for more than 180 days.[366] The inability to substitute or exchange the labor certification greatly undermines its value for both employers and employees.

For jobs offering wages below a certain threshold, it becomes nearly impossible to use the labor certification process to hire a foreign worker directly from abroad because the cost exceeds the expected benefit of filling the job.[367] Consider a simplified hypothetical example for two workers: a food server with wages at about the 25th percentile for all jobs in the United States ($29,500) and an investment analyst with wages at about the 90th percentile ($103,020).[368] Median job tenure for food service is 1.9 years, and finance is 4.7 years.[369] Assuming something like an annual rate of return on their investments of 10 percent, the employers might expect to make $5,871 during the server's tenure and $58,370 during the analyst's.[370] If labor certification costs are more than $5,871—as they commonly are—it would not be profitable to hire the server unless the worker is required to stay longer or the cost of filing is reduced.[371]

Regardless of the type of worker, however, employers are generally unwilling to wait for years while going through this process for a specific worker who may or may not arrive and who may or may not leave them if they do. However, they may still be willing to hire the foreign worker if they can obtain a temporary work visa comparatively quickly to allow the worker to start the job and work during the green card process. For example, the H-1B visa enables employers that win the H-1B lottery (see temporary work visas below) to hire certain skilled foreign workers in about

seven months and temporarily bypass the more burdensome and time-consuming labor certification until the hire is complete.[372]

The labor certification does not depend on a temporary visa, but temporary work visas enable the employer to follow the lengthy process while the worker is already employed by them. Because sponsoring an H-1B worker is highly regulated and H-1B workers cannot easily find new sponsors, the employer increases the odds that the worker will stay with them during the permanent residence process. Thus, temporary work visas decrease risk while increasing expected days worked and so increase the benefit of sponsoring the worker. It is no surprise, then, that in 2019, 93 percent of approved labor certifications were for immigrants already in the United States—a percentage relatively constant in recent years (see Figure 23).[373] A significant portion of the remaining 7 percent are for immigrants en route to the United States on a temporary work visa.[374] For the rest, consulates abroad deny a very significant share of immigrants with approved labor certifications (or Schedule A precertifications) who are trying to come without a temporary work visa because the consular official claims to have found a problem with their job offer or does not believe they intend to work that particular job.[375]

Given the high denial rate and limited employer willingness to undertake the labor certification, a direct-to-green-card labor certification job is extremely rare.[376] The unusual exceptions are generally for cases in which the employers have a particularly unique interest in bringing an immigrant to the United States, such as a family or personal connection (which—as noted earlier—also makes it more difficult for them to be approved).[377] Everyone else subject to the permanent labor certification, outside the country, and ineligible for a temporary work visa effectively cannot immigrate permanently to the United States through employer sponsorship. With very rare exceptions, this includes everyone without a four-year bachelor's degree because there is no temporary work visa for noncollege graduates seeking to immigrate permanently with a labor certification (see "**Temporary Work Visas**"). About 70 percent of jobs in the United States do not require a bachelor's degree,[378] and only about 10 percent of the world's population has a four-year college degree, making the lack of a temporary, year-round work visa for lesser-skilled workers among the most significant restrictions in America's employer-sponsored immigration system.[379]

Notwithstanding the costs, many employers will file labor certifications for lesser-skilled workers if the workers are already at work in the United States. For instance, when Congress opened a brief window for just a couple of months in 2001 to file labor certifications for illegal immigrant workers, employers quickly filed 235,000 applications.[380] But Congress has not renewed this provision, and the lack of a year-round, lesser-skilled temporary work visa for immigrants applying for a labor certification means that their employers continue to hire people who reside in the country illegally. Even if a temporary work visa did exist, however, workers with jobs that require less than two years of training or experience (the equivalent of an associate degree) face a hard cap of just 10,000 annually.[381]

Overall, only about 28,000 immigrant workers received green cards through the individual labor certification process in 2019 (Table 5), accounting for 0.02 percent of all workers in the United States.[382]

Temporary Work Visas

The time-consuming labor certification effectively requires nearly all immigrants seeking employer-sponsored green cards abroad to obtain temporary work visas. Only four temporary work visa categories are directly relevant for immigrants who are applying or intending to apply for

an employer-sponsored green card: the R-1 for religious workers (discussed earlier), the O-1 for immigrants with "extraordinary ability," the L-1 for intracompany transfers, and the H-1B for specialty occupation workers.[383] No other temporary visa may be issued if the applicants are planning to stay in the United States beyond their temporary period of authorized stay to adjust to legal permanent residence.[384] With one minor exception, other temporary visas for students, business travelers, exchange visitors, and workers also must demonstrate "nonimmigrant intent"—that is, proof of a foreign residence that they have no present intention of abandoning.[385]

About 25 percent of international students, for instance, were denied a visa in 2019, mostly for having immigrant intent.[386] Nonetheless, many immigrants do use these other categories to get a foot in the door and find an employer willing to sponsor them. They may claim to have changed their intent to immigrate after they received their visa and entered the United States. But this is a semilegal workaround for a system with a contrary design. Only the O-1, R-1, L-1, and H-1B visas are explicitly designed to legally accommodate temporary-to-permanent transitions. Even these visas do not directly lead to permanent residence. Immigrants must still meet all the relevant permanent residence requirements in addition to the requirements for the temporary visa. Table 7 summarizes the rules for these types of visas.

The O-1 visa is for temporary workers with "extraordinary ability," and the requirements track the EB-1A "extraordinary ability" self-sponsored green card category (discussed above).[387] The main differences are that the O-1 requires sponsorship by an employer (or an agent for workers where agents are common), and unlike a green card, the O-1 visa holder must demonstrate their qualifications and renew O-1 status every year, starting three years after admission. Unlike the EB-1A category, O-1 visas have no cap.[388] If they cannot obtain an EB-1A green card because of its higher standard, O-1 visa holders commonly try to receive a national interest waiver green card (described above). Given these easier options, the O-1 visa is almost never used for immigrants who need a labor certification.[389]

The next most common temporary visa for employer-sponsored immigrants is the L-1 visa (see Box 16). The L-1 is only for intracompany transfers of employees transferring from a branch of a U.S. multinational firm abroad to a U.S. affiliate in the United States.[390] Using the L-1 visa, a U.S.

multinational firm can bring over certain employees without a cap and have them work in the United States temporarily for at most five years (for specialized knowledge workers) or seven years (for executives or managers). Although they are not required to do so, employers may simultaneously use the labor certification and sponsorship process to obtain a green card for these employees.[391] U.S. multinational firms had about 14 million workers abroad in 2017, but the L-1 category is far too restrictive to allow for a significant shift of employment to the United States.[392]

The L-1 visa criteria are almost the same as the EB-1C category for multinational executives and managers (described above). However, rather than accepting only executives and managers who qualify for green cards under the EB-1C category, the L-1 is also available for any employee sponsored by a U.S. multinational firm who has "specialized knowledge" defined by what is "generally found in the particular industry" or "generally found within the employer."[393] This nebulous and difficult standard has led to an extremely high rate of denials (33 percent in 2020) for specialized knowledge workers (known as L-1B).[394] Such a high denial rate acts as a deterrent even to employers whose employees may qualify. While the L-1 does not explicitly require a college degree or its equivalent in job experience to qualify, it is rare for the government to accept claims of "specialized" knowledge by anyone else.[395] The L-1 visa requires employers to pay additional fees of between $960 and $7,960 per worker, depending on the employer's characteristics and processing speed requested, further disincentivizing moving employees to the United States.[396] In 2023, the administration was working to finalize a new regulation to increase these L-1 fees.[397]

The H-1B visa is the main visa category used by employers that sponsor their foreign workers for a green card using the labor certification process. Box 17 summarizes its requirements. The H-1B visa is open to any employee in a "specialty occupation" or a fashion model with a high degree of notoriety.[398] All H-1B workers must receive the higher of the prevailing wage or the actual wage paid to similar employees. If the employer is an H-1B dependent employer—defined for companies with at least 50 workers as having 15 percent or more of its workers in H-1B status—the job must offer at least $60,000 annually in wages or the employer must recruit U.S. workers for the position.[399] About a quarter of H-1B requests are filed by H-1B dependent employers, but only 6 percent of H-1B workers have job offers below the $60,000-per-year threshold.[400] The fees for the H-1B visa are more substantial than for the L-1 visa: between $5,720 and $8,510, depending on the size of the employer, how many H-1B workers they

already have, and the processing time needed.[401] In 2023, the administration was working to finalize a new regulation to increase these H-1B fees.[402]

To qualify as a specialty occupation worker, the employee must have a bachelor's degree or foreign equivalent.[403] Some foreign degrees that conclude in less than four years do not qualify as "equivalent," but three years of experience in an occupation requiring a bachelor's degree can substitute for every one year of college missed.[404]

Not only does the job need to normally require a four-year bachelor's degree, but it must also require the workers to have a degree in a specific specialty.[405] The government has denied H-1B petitions, to take two examples, for an event planner and for a public relations specialist because these jobs do not normally require a degree in a specific specialty.[406]

Immigrants can also have a degree not specific enough for the type of job. For instance, the government has denied an H-1B visa to a restaurant manager who had a general business administration degree because the degree was not in a specific specialty related to the job.[407]

BOX 16

L-1 visa requirements

- Job offer is from U.S. multinational firm that is not a sole proprietorship owned by the immigrant.
- Immigrant must have worked for the multinational firm at least one of past three years abroad.
- Job is as an executive, manager (excluding managers of nonprofessionals), or worker with specialized knowledge for industry or company.
- Work must be controlled by U.S. company.
- Employer is willing to pay fees between $960 and $7,960.

Source: See Appendix A.

For a qualifying immigrant, the most difficult part of the H-1B process is finding an employer willing to undergo the costly sponsorship process. Because the fees and attorney costs can exceed $10,000 and employees are prohibited from covering these costs, only select employers are willing

to initiate the H-1B process for certain very high-performing employees.[408] In 2021, the median H-1B worker had a higher salary than 93 percent of U.S. workers.[409] The overwhelming majority of H-1B workers hired abroad—that is, not poached from other companies in the United States or recruited from U.S. university campuses—are employees of multinational firms with offices in their home countries (most commonly India).[410] They are hired at offices abroad and brought to the United States in situations where an L-1 is not an option. Immigrants from countries without a significant U.S. multinational presence face extremely long odds to obtain an H-1B visa.

Even if an immigrant can qualify and find a willing employer, the law caps H-1B visas at 85,000 (with 20,000 reserved for applicants with advanced degrees), and the visas are usually assigned through a lottery six months before the start of the year.[411] The law exempts employees of nonprofit or government research organizations, universities, and university-affiliated nonprofits from the cap.[412] Nonetheless, in 2022, the number of cap-subject H-1B requests for FY 2023 reached 483,927, meaning that 82 percent of H-1B requests will

BOX 17

H-1B visa requirements

- Worker must be paid the higher of the prevailing wage or the actual wage paid to similar employees.
- Employer must be willing to either pay H-1B worker $60,000 per year or recruit U.S. workers if they are an H-1B dependent employer.
- Employer is willing to pay fees between $5,720 and $8,510 to sponsor worker.
- Worker must hold specialty occupation (a bachelor's degree in a specific field required) or be a prominent fashion model.
- Worker must be a fashion model or have a four-year bachelor's degree (or three years of experience for every missing college year).
- Worker must win the H-1B lottery or work in higher education or

certain nonprofit research.

Source: See Appendix A.

not result in an H-1B visa being issued (see Figure 24).[413] Once a worker obtains H-1B status and completes the labor certification process, H-1B and L-1 workers face a much steeper fee to receive permanent residence than if they had immigrated directly from abroad with an immigrant visa: $1,225 versus $565.[414] The administration plans to increase this fee to $1,540 in 2023.[415]

The result of the labor certification, temporary work visa process, and green card caps is that foreign workers face a virtual gauntlet of bureaucratic procedures before they can receive permanent residence. Every step in the process creates new opportunities for denials or

problems that could result in workers being denied or employers giving up on the process altogether.

The H-1B lottery has a 74 percent rejection rate.[416] The labor condition application to the Department of Labor is practically a formality, but nearly half a percent are rejected.[417] The H-1B visa has a 7 percent denial rate.[418] Another 4 percent of H-1B employer petitions are denied.[419] Then, only about 44 percent of H-1B workers are sponsored for green cards by their employers.[420] Of course, some workers never asked their employers for a green card and some get green cards through other means (such as marriage to a U.S. citizen), but regardless, the best evidence is that many workers never get sponsored. Then, even if they do, 4 percent of labor certifications are denied,[421] and 51 percent of green card applicants are from India and face an insurmountable wait time for a green card cap spot.[422] Even if a cap spot is available, 4 percent of employer petitions are denied.[423] Finally, 5 percent of green card applications are denied.[424] A simple path to an employer-sponsored green card does not exist for most immigrants.

Employment-Based Green Card Caps

Even if an employee can win the lottery, obtain an H-1B visa, and later receive an approved labor certification, they will still be subject to the annual green card limits. Figure 25 shows the backlog of employment-based green card applicants (employer-sponsored and self-sponsored) and the number of employment-based green cards issued under the caps (which include the spouses and minor children of the applicants). The backlog—which includes immigrants in every stage of the process—was about 1.4 million in 2021.[425] This was higher than the 1.2 million in 2018—the first year that the government released statistics on the employer-sponsored backlog (see Figure 25).

Congress has capped the number of employer-sponsored and self-sponsored employment-based green cards in two ways. First, immigrants are grouped into five broad categories (EB-1–EB-5) and one subcategory (EB-3O), and each category has a cap that includes immigrants' spouses and minor children.[426] Second, immigrants from each country receive an allotment of 7 percent of the total number of green cards available, plus unused numbers for that country in other categories and any unused visas by any other country in that category.[427]

Table 8 shows the caps, the country limits, the backlog awaiting a cap number, and the top backlog nationality. In fiscal year 2022, 875,550 employment-based petitions (including dependent family members) were awaiting a cap number—more than six times the normal worldwide limit.[428] For the most common categories (EB-2 and EB-3), the backlog was nearly 10 times the normal worldwide limit. But because of the country limits, the backlog is not equally distributed, and immigrants born in India represent 82 percent of the employment-based backlog. Usually, these employer-sponsored caps affect only Chinese and Indian applicants plus Central Americans in the EB-4 category.

In September 2021, the EB-1 category—which has a cap of 40,040 and includes outstanding professors and multinational executives and managers along with the nonsponsored immigrants with extraordinary ability—had effectively no backlog because of the caps.[429] Although the next two employer-sponsored categories (EB-2 and EB-3) had no backlog for most countries, they had a combined backlog of 60,853 for Chinese and 719,737 for Indians, including their spouses and children immigrating with them.[430] In 2019, the last normal pre-pandemic year, Chinese and Indians received just 7,051 and 7,991 EB-2 and EB-3 green cards, respectively, both somewhat higher than their country caps because they received some green cards that would otherwise go unused.[431] Nonetheless, these numbers imply future wait times of nine years for Chinese and 90 years for Indians.

For Chinese, those who apply now could use the H-1B visa to enter first and work in the United States until a number is available. For Indians, the wait is now so long it is effectively the equivalent of a prohibition on green cards for new applicants. With a 90-year wait, effectively 100 percent of all new EB-2 and EB-3 Indian employer-sponsored applicants will die before they receive a green card. The EB-4 category for religious workers who are waiting with other "special immigrants" is backlogged for Guatemalans, Hondurans, Salvadorans, and Mexicans who will have to wait between 3 and 14 years. The EB-5 category was backlogged for all countries, but most especially for Chinese, who will have to wait about eight years.

Evaluating Employer-Sponsored Immigration

Employer-sponsored immigration is extremely constrained. Figure 26 shows the number of employer-sponsored green cards by type as a percentage of total employment in the occupations the category covers. Religious workers are the most common in their occupation at a still-minuscule 0.5 percent, but the other categories are even smaller. Not surprisingly, the most regulated—the labor certification—is the least represented among all jobs. If employer-sponsored workers overall were as utilized as the religious worker category, more than 700,000 workers would receive green cards through it each year, compared with fewer than 30,000.[432] Despite its massive potential, the rules on employer-sponsored immigration have relegated the system to a far less significant contribution than it could have with fewer bureaucratic obstacles. The restrictions on the employer-sponsored immigrants are particularly unjustified because the job offer requirement already demonstrates a market demand for their skills.

Because temporary visas are such an important gateway to an employer-sponsored green card, Congress should allow immigrants in any temporary visa category to intend to seek a green card. Requiring student visa holders, for example, to prove an intention to return home after graduation sends many students to other countries where they will contribute. Temporary visa applicants should not be denied as long as they can show that they intend to follow the visa's rules—including returning home if they cannot receive a green card. The R-1, O-1, L-1, and H-1B visas show that this level of scrutiny is sufficient.

What is perhaps the most important restriction is nowhere laid out in law or regulation: the time it takes for the bureaucracy to approve an immigrant visa (Table 6). The fact that it can take up to three years to receive an approved immigrant visa necessitates using the more restrictive temporary work visas. The government can maintain essentially the same requirements and process but finish them in an expedited manner. In the case of H-2A seasonal farm workers, for instance, the labor certification, petition approval, and visa issuance can take as little as 45 days, but H-2A workers cannot simultaneously immigrate permanently because the jobs are seasonal, not permanent.[433]

Unlike the permanent labor certification process, the H-2A program also does not require the employer to "name" the specific foreign worker that it wants to hire until the worker applies for a visa—the last stage—and even then, the employer can immediately replace the worker with another if the worker is denied a visa, abandons the process, becomes sick, or is no longer needed.[434] These features greatly reduce the risk of employers undertaking the process only to never obtain any worker at all. Moreover, the H-1B does not require employers to obtain a "prevailing wage determination."[435] Employers can simply look up the government-approved wage for their occupation and submit their application, cutting out nearly half a year from the process.[436]

The H-1B also has no labor certification that is mandatory for all H-1B employers, so most employers may use whatever recruitment process that they normally rely on to find a worker.[437] They do not need to find the worker and then start over again, recruiting U.S. workers to a job that is already filled and hoping that no one "minimally qualified" applies. Employers should not have to conduct burdensome, duplicative recruitment since green card holders create demand for other jobs for U.S. workers. The labor certification also forces employers and immigrants to rely unnecessarily on temporary work visas, delaying the period before the immigrant receives a green card. Before Congress made the labor certification mandatory for most employer-sponsored immigrants in 1965, about 84 percent of employer-sponsored immigrants entered on immigrant visas and became permanent residents right away.[438] Today, more than 90 percent are already in the United States.[439]

Even if a labor certification is required, the government should not require the employer to incur the costs of obtaining one, as it does now.[440] By imposing the full cost of the entire process on the employer, it drastically reduces the incentive for employers to sponsor workers and denies immigrants the ability to control their immigration pathway. The government should also allow immigrants to obtain a labor certification and cover its costs without going through the employer at all, such as by presenting relevant data on labor needs in the area. An even better reform would shift the burden of proof for showing that an adverse effect would occur to the government, so that no action is taken unless the government proves that an adverse effect will actually occur.

The R-1, L-1, and O-1 visas take the streamlining a step further by not requiring the prevailing wage.[441] There is no reason to have a mandatory minimum wage to obtain a green card. If green card holders are underpaid,

they can leave, change jobs, or negotiate for higher pay on equal footing with any American. To reduce illegal immigration, however, Congress must also create a streamlined work visa program for year-round, lesser-skilled workers. Employers cannot afford to hire lesser-skilled immigrants through the lengthy and expensive green card process, and the lack of a temporary work visa for year-round workers without a bachelor's degree makes it impossible for these immigrants to come through employer sponsorship.

Most importantly, Congress should repeal both the overall and country-based employer-sponsored caps. The country caps irrationally discriminate based on birthplace, and the overall caps keep workers either out of the country or, if they have a temporary work visa, stuck in roles that may be less suited to their skills. The worker has already demonstrated that they will be contributing to the U.S. economy and has already counted against the H-1B cap in most cases, so Congress should at least eliminate the caps on employees adjusting to permanent residence already in the United States. Even more absurd is the fact that Congress has not even slightly modified the cap structure in over three decades. If Congress does keep the caps, it should reform them to make them automatically increase or decrease in conjunction with economic growth.

Conclusion

The U.S. legal immigration system is extremely restrictive. By design, it excludes the vast majority of potential immigrants. The basic presumption of the current legal immigration system is that no one may immigrate legally unless they fall into very narrow exceptions. By walking through these exceptions, this paper demonstrates that the strict criteria keep out nearly all immigrants who wish to come. The administration should loosen all the restrictions that it has imposed above and beyond what Congress has required, and Congress should overhaul the system to open legal immigration for any person willing to work to contribute to the success of the United States.

Appendix

Citation

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NOTES

1. Andrew M. Baxter and Alex Nowrasteh, "**A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day**," Cato Institute Policy Analysis no. 919, August 3, 2021.

2. See "If on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land." **Immigration Act of 1882**, Pub. L. No. 47–376, 22 Stat. 214 (1882). Once a determination was made that the immigrant was ineligible, the burden shifted to the immigrant to "affirmatively and satisfactorily show[] on special inquiry that such person does not belong to one of the foregoing excluded classes." See **Immigration Act of 1891**, Pub. L. No. 51–551, 26 Stat. 1084 (1891).

3. This began with Section 23 of the **Immigration Act of 1924**, Pub. L. No. 68–139, 43 Stat. 153 (1924).

4. 8 U.S.C. § 1361 (2020).

5. The Chinese Exclusion Act excluded Chinese "laborers," not artisans or professionals, and exempted those previously in the United States. See "**An Act to Execute Certain Treaty Stipulations Relating to Chinese**," Pub. L. No. 47–126, 22 Stat. 58 (1882).

6. Mark Thornton, "**Alcohol Prohibition Was a Failure**," Cato Institute Policy Analysis no. 157, July 17, 1991.

7. See **Volstead Act of 1919**, Pub. L. No. 66–66, 41 Stat. 305 (1919).

8. Neli Esipova, Anita Pugliese, and Julie Ray, "**More than 750 Million Worldwide Would Migrate if They Could**," Gallup, December 10, 2018.

9. David J. Bier, "**Family and Employment Green Card Backlog Exceeds 9 Million**," *Cato at Liberty* (blog), Cato Institute, September 29, 2021; and "**Diversity Visa Program, DV 2016–2018: Number of Entries Received during Each Online Registration Period by Country of Chargeability**," U.S. Department of State, 2018.

10. Excluding legalized immigrants. See ***Yearbook of Immigration Statistics 2018***, Office of Immigration Statistics (Washington: U.S. Department of Homeland Security, November 13, 2019).

11. Ian K. Kullgren, "**Does the U.S. Admit More Legal Immigrants than the Rest of the World Combined?**," PolitiFact, May 24, 2013.

12. David J. Bier, "**The United States Does Not Permit More Immigration than the Rest of the World Combined**," *Cato at Liberty* (blog), Cato Institute, July 13, 2022.

13. David J. Bier, "**US Foreign-Born Share Ranks Low & Is Falling among Wealthy Countries**," *Cato at Liberty* (blog), Cato Institute, July 27, 2022.

14. 8 U.S.C. § 1427 (2020).

15. Except for the rare cases where the relatives are abroad.

16. Legalized categories are the following: family-sponsored self-petitioning adjustments and their dependents; immigrants protected under the Chinese Student Protection Act; juvenile court dependents; Cuban refugees; non-Cuban spouses or children of Cuban refugees; asylees and their dependents; parolees, all types; Liberian Refugee Immigration Fairness applicants and dependents; immigrants covered under the Nicaraguan Adjustment and Central American Relief Act, all types; cancellation of removal; Immigration Reform and Control Act legalization; individuals born under diplomatic status; Hong Kong, Cuban, and Haitian entrants; T and U nonimmigrants except new arrival dependents; late amnesty applicants; registry cases; crewmen; and private bills.

17. This list also includes various EB-4 special immigrants: International Broadcasting Bureau and U.S. Broadcasting Board of Governors (now the Agency for Global Media) employees, former employees of the Panama Canal Company or Canal Zone Government, employees of the U.S. government abroad, retired employees of international organizations (and surviving spouses), and retired NATO-6 civilian employees.

18. Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook*, 17th ed. (Washington: American Immigration Council, 2020).

19. Andrew M. Baxter and Alex Nowrasteh, "**A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day**," Cato Institute Policy Analysis no. 919, August 3, 2021.

20. "**An Act Supplementary to the Acts in Relation to Immigration**," Pub. L. No. 43–141, 18 Stat. 477 (1875).

21. A government-approved physician is also known as a panel physician if abroad, or a civil surgeon if in the United States. See 8 U.S.C. § 1201(d) (2020). The list is active tuberculosis, infectious syphilis, gonorrhea, infectious leprosy (Hansen's disease), cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, influenza caused by novel or reemergent influenza viruses (pandemic flu), polio, severe acute respiratory syndrome (SARS), or COVID-19; 8 U.S.C. § 1182(a)(1)(A)(iii) (2020). See Centers for Disease Control and Prevention, "**Frequently Asked Questions about the Final Rule for the Medical Examination of Aliens—Revisions to Medical Screening Process**," January 6, 2020.

22. "**Table XIX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal under the Immigration and Nationality Act) Fiscal Year 2020**," U.S. Department of State, 2021.

23. The list is mumps, measles, rubella; polio; tetanus and diphtheria toxoids; pertussis; Haemophilus influenza type B; and hepatitis B, varicella; influenza; pneumococcal pneumonia; rotavirus; hepatitis A; meningococcal; and COVID-19. 8 U.S.C. § 1182(a)(1)(A)(ii) (2019); "**Chapter 9—Vaccination Requirement**," Policy Manual, U.S. Citizenship and Immigration Services, 8 USCIS-PM B.9(A). Although refugees don't legally need to prove vaccination until after they arrive in the United States, "the U.S. routinely administers pre-departure vaccines in most locations to U.S. bound refugees with of goal of reaching 100% of U.S. bound refugees by 2020." See United Nations High Commissioner for Refugees, "**Country Chapter: The United States of America**," *UNHCR Resettlement Handbook* (Geneva, Switzerland: United Nations, 2011), revised May 2018; 8 U.S.C. § 1182(a)(1)(A)(ii) (2020). There are six medical exemption categories: not age appropriate; insufficient time interval between doses (except for COVID-19); contraindicated; not routinely available; not fall (flu) season; and known chronic hepatitis B virus infection. See "(U) **Ineligibility Based on Health and Medical Grounds**—INA 212(A)(1)," Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.2–6(B)(2), August 24, 2022.

24. For religious and moral convictions, see 8 U.S.C. § 1182(g)(2)(C) (2020); "**Vaccination Requirements**," U.S. Citizenship and Immigration Services, last updated December 21, 2022; and "**Chapter 3—Waiver of Immigrant Vaccination Requirement**," Policy Manual, U.S. Citizenship and Immigration Services, 9 USCIS-PM D.3, October 1, 2021.

25. "**Check Case Processing Times**," U.S. Citizenship and Immigration Services, February 3, 2021; and "**I-601, Application for Waiver of Grounds of Inadmissibility**," U.S. Citizenship and Immigration Services, November 2021.

26. "Chapter 5—Discretion, Part A. Discretionary Factors," Policy Manual, U.S. Citizenship and Immigration Services, 9 USCIS-PM A.5 (2022), July 22, 2022.

27. 8 U.S.C. § 1182(a)(1)(A)(iii) (2020).

28. 8 U.S.C. § 1182(g)(3) (2020); and "**Chapter 4—Waiver of Physical or Mental Disorder Accompanied by Harmful Behavior**," Policy Manual, U.S. Citizenship and Immigration Services, 9 USCIS-PM D.4(A) (2021), July 22, 2022.

29. 8 U.S.C. § 1182(a)(1)(A)(iv) (2020); and "**Mental Health**," Centers for Disease Control and Prevention, July 1, 2021.

30. "**All about the Green Card Medical Exam Drug Test**," JacksonWhite Attorneys at Law, June 26, 2019.

31. "**Warning for Immigrants about Medical and Legalized Marijuana**," Immigrant Legal Resource Center, May 21, 2021.

32. 8 U.S.C. § 1157(c)(3) (2020).

33. 8 U.S.C. § 1182(a)(3)(A)(ii) (2020). Special inquiries are made about plans to engage in espionage or polygamy. 8 U.S.C. § 1182(a)(3)(A)(i) (2020); 8 U.S.C. § 1182(a)(10)(A) (2020); 8 U.S.C. § 1182(a)(2)(I) (2020); 8 U.S.C. § 1182(a)(2)(H)(i) (2020); 8 U.S.C. § 1182(a)(2)(D) (2020); 8 U.S.C. § 1182(a)(2)(B) (2020); 8 U.S.C. § 1182(a)(2)(D) (2020); 22 C.F.R. § 40.24(c) (2020); 8 U.S.C. § 1182(a)(2)(A)(i) (2020); 8 U.S.C. § 1182(a)(2)(A)(ii) (2020).

34. Murder: 8 U.S.C. § 1182(h)(2) (2020). In theory, refugees can receive an 8 U.S.C. § 1157(c)(3) (2020) waiver of murder, but the government has said it will almost never allow this. See ***Matter of Jean***, 23 I&N Dec. 323 (A.G. 2002); extrajudicial killing: 8 U.S.C. § 1182(a)(3)(E)(iii)(II) (2020); 8 U.S.C. § 1157(c)(3) (2020); torture: 8 U.S.C. § 1182(a)(3)(E)(iii)(I) (2020); 8 U.S.C. § 1157(c)(3) (2020); genocide: 8 U.S.C. § 1182(a)(3)(E)(ii) (2020); 8 U.S.C. § 1157(c)(3) (2020); terrorism: 8 U.S.C. § 1182(a)(3)(B)(i) (2020). Terrorism is defined in 8 U.S.C. § 1182(a)(3)(B)(i) (2020) and includes the following offenses: "(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle). (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person. (IV) An assassination. (V) The use of any—(a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. (VI) A threat, attempt, or conspiracy to do any of the foregoing." With material support for terrorism, the government can also waive this crime for certain terrorist groups. See Jonathan Scharfen to the Office of Administrative Appeals Associate Directors, Chief, and Chief Counsel, "**Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Support to Certain Terrorist Organizations**," memorandum, U.S. Citizenship and Immigration Services, May 24, 2007; recruitment of child soldiers: 8 U.S.C. § 1182(a)(3)(G) (2020); severe human trafficking: 8 U.S.C. § 1182(a)(2)(H)(i) (2020); drug trafficking: 8 U.S.C. § 1182(a)(2)(C) (2020); and refugee waiver forbidden under 8 U.S.C. § 1157(c)(3) (2020).

35. 8 U.S.C. § 1182(a)(2)(I) (2020); 8 U.S.C. § 1182(a)(2)(A)(i) (2020); and any spouse, son, or daughter of a drug trafficker is also barred if that relative benefited from the trafficking, but only for five years since the benefit was received, 8 U.S.C. 1182(a)(2)(C)(ii).

36. 8 U.S.C. § 1157(c)(3) (2020).

37. Aggregate sentences of more than five years: 8 U.S.C. § 1182(a)(2)(B) (2020); prostitution: 8 U.S.C. § 1182(a)(2)(D) (2020); 22 C.F.R. § 40.24(c)

(2020); simple possession of marijuana: 8 U.S.C. § 1182(a)(2)(A)(i) (2020); moral turpitude: 8 U.S.C. § 1182(a)(2)(A)(ii) (2020).

38. Conspiracies, attempts, aiding and abetting, and accessories to commit crimes will also trigger the bars. See *Matter of Gonzalez Romo*, 26 I&N Dec. 743, 746 (BIA 2016); and *Romo v. Barr*, 933 F.3d 1191 (9th Cir. 2019).

39. "**Chapter 5—Conditional Bars for Acts in Statutory Period**," U.S. Citizenship and Immigration Services, July 22, 2022. Crimes involving moral turpitude exclude a single offense when the maximum potential sentence was one year or less and the actual imposed sentence was six months or less, and they exclude a crime if it was more than five years ago and the offender was under the age of 18. 8 U.S.C. § 1182(a)(2)(A) (2020). Convictions under statutes that criminalize actions involving moral turpitude will not trigger the bar if the specific statutory element for which the immigrant was convicted also has a "realistic probability" of criminalizing conduct *not* involving moral turpitude (e.g., offenses that may include an intent to harm someone but do not necessarily require such an intent). See *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 822 (2007).

40. "**(U) Ineligibility Based on Criminal Activity, Criminal Convictions and Related Activities—INA 212(A)(2)**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.3–2(B)(2)(U), October 26, 2022.

41. Assault: *Altayar v. Barr*, No. 17–73308 (9th Cir. 2020); aggravated battery: *Sosa-Martinez v. U.S. Attorney General*, 420 F.3d 1338; sexual assault: *Mehboob v. U.S. Attorney General*, 549 F.3d 272 (3d Cir. 2008); adultery: *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); bigamy: *Matter of V-L-*, 3 I&N Dec. 314 (BIA 1947); prostitution: *Matter of Ortega-Lopez*, 27 I&N Dec. 382, 390–91 (BIA 2018) citing *Matter of W-*, 4 I&N Dec. 401 (C.O. 1951); theft: *Robles-Garcia v. Barr*, 944 F.3d 1280 (10th Cir. 2019); aggravated DUI: *Mormolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009); and welfare and check fraud: Ilona Bray, "**What's a Crime of Moral Turpitude According to U.S. Immigration Law?**," Nolo, 2021.

42. 8 U.S.C. § 1182(h) (2020). Or if a denial would cause "extreme hardship" to a spouse, child, or parent of a U.S. citizen or legal permanent resident (or just spouse or child in the case of misrepresentation in the visa process).

43. 8 U.S.C. § 1182(h)(1)(B) (2020). The denial must cause "extreme hardship" to a spouse, parent, son, or daughter of a U.S. citizen or legal

permanent resident.

44. 8 U.S.C. § 1157(c)(3) (2020). See ***Matter of C-A-S-D-***, 27 I&N Dec. 692 (BIA 2019); and 8 U.S.C. 1101(a)(42) (2020).

45. Examples of violent or dangerous crimes include "beating and shaking a nineteen-month-old child to death" (*Matter of Jean*, 23 I&N Dec. 323 (A.G. 2002)); sexual battery against a minor (*Torres-Valdivias v. Lynch*, 787 F.3d 1147 (9th Cir. 2015)); robbery, false imprisonment, and attempt to injure (*Matter of C-A-S-D-*, 27 I&N Dec. 692, 699 (BIA 2019)); armed robbery with a firearm (*Rivera-Peraza v. Holder*, 684 F.3d 906 (9th Cir. 2012)); second degree assault (*Waldron v. Holder*, 688 F.3d 354 (8th Cir. 2012)); assault (*Gonzalez v. Garland*, 856 Fed. Appx. 101 (9th Cir. 2021)); delaying medical care to a child (*Franco-Bardales v. Holder*, 599 Fed. Appx. 684 (9th Cir. 2015)); rape (*Matter of A-A-Z-* (AAO 2016)); statutory rape (*In Re: 13692305* (AAO 2021)); robbery (*In Re: 13572104* (AAO 2021)); aggravated robbery (purse snatching) (*In Re: 12458443* (AAO 2021)); and sexual interference and uttering threats (*In Re: 13213289* (AAO 2021)). Except in extraordinary circumstances such as where national security is an issue or where a denial would cause exceptional and extremely unusual hardship—a near-impossible standard—and even if applicants could prove such harm, the regulation still cautions that a denial is likely. See *Matter of Jean*, 23 I&N Dec. 323 (A.G. 2002); 8 C.F.R. § 212.7(d); 8 C.F.R. § 212.17(b)(2); and 8 C.F.R. § 212.16(b)(3) (2019).

46. 8 U.S.C. § 1182(a)(3) (2020).

47. 8 U.S.C. § 1182(a)(2)(C)(ii) (2020).

48. 8 U.S.C. § 1182(a)(3)(C) (2020).

49. 8 U.S.C. § 1182(a)(3)(D) (2020).

50. 8 U.S.C. § 1182(a)(3)(D)(iv) (2020).

51. 8 U.S.C. § 1182(f); and *Trump v. Hawaii*, No. 17–965, 585 U.S. ___ (2018).

52. See Proclamation No. 9993, 85 Fed. Reg. 15045 (March 11, 2020); Proclamation No. 9984, 85 Fed. Reg. 6709 (January 31, 2020); Proclamation No. 9992, 85 Fed. Reg. 12855 (February 29, 2020); Proclamation No. 10143, 86 Fed. Reg. 7467 (January 25, 2021); E.O. 13769 of January 27, 2017; E.O.

13780 of March 6, 2017; Proclamation No. 9645, 82 Fed. Reg. 45161 (September 24, 2017); and Proclamation No. 9983, 85 Fed. Reg. 6699 (January 31, 2020).

53. 8 C.F.R. § 103.2 (2019).

54. 8 C.F.R. § 103.16 (2019).

55. "**Table XIX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds of Refusal under the Immigration and Nationality Act) Fiscal Year 2020**," U.S. Department of State, 2021.

56. Excluding denials that were later overturned. See "**Annual Reports: Report of the Visa Office**," U.S. Department of State, 1990–2020.

57. "**Recommendations on the Reform of the Special Immigrant Visa Program for U.S. Wartime Partners**," International Refugee Assistance Project, June 2020.

58. Stephen Townley, "The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom," *Yale Journal of International Law* 32 (2007): 219.

59. Andrea Castillo, "**How ICE Uses Interpol to Deport Immigrants Who Could Be Wrongly Accused of Crimes**," *Los Angeles Times*, September 17, 2021.

60. David J. Bier and Alex Nowrasteh, "**Immigration Policy by Presidential Decree**," Cato Institute, December 2, 2020.

61. 8 U.S.C. 1101(a)(42) (2020).

62. "**Figures at a Glance**," UNHCR. Data for figures come from *Global Trends* (Copenhagen, Denmark: UNHCR, 2021).

63. 8 U.S.C. 1157; 8 U.S.C. 1157, note; 8 U.S.C. 1101(a)(42) (2019).

64. See ***INS v. Cardoza-Fonseca***, 480 U.S. 421 (1987).

65. International Refugee Assistance Project, "**How Can I Prepare for an Interview for U.S. Resettlement?**," 2021.

66. Refugees are usually interviewed by the UNHCR, the Resettlement Support Center, and the USCIS refugee officer. See International Refugee Assistance Project, "**How Can I Prepare for an Interview for U.S. Resettlement?**," 2021.

67. "**RAIO Directorate—Officer Training**," U.S. Citizenship and Immigration Services, June 20, 2016; and ***Xiu Xia Lin v. Mukasey***, 534 F.3d 162 (2d Cir. 2008).

68. See *Cornejo-Merida v. Ashcroft*, No. 03–73601, 116 Fed. Appx. 900 (9th Cir. 2004); *Uribe v. Ashcroft*, No. 03–70606, 105 Fed. Appx. 941 (9th Cir. 2004); and Charles S. Ellison and Anjum Gupta, "Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act," *Columbia Human Rights Law Review* 52, no. 2 (2021).

69. ***Matter of W-G-R-***, 26 I&N Dec. 208, 224 n.8 (BIA 2014).

70. ***Garcia v. Holder***, 746 F.3d 869 (8th Cir. 2014).

71. ***Gonzalez Ortiz et al. v. Garland***, No. 20–4248 (6th Cir. 2021).

72. Miriam Jordan, "**Soviet-Era Program Gives Even Unoppressed Immigrants an Edge**," *New York Times*, August 26, 2017.

73. "**Elements of Asylum Law**," Immigration Equality, 2021.

74. These examples come from the U.S. asylum system, which uses the same refugee definition to provide legal status to refugees already in the United States. Denials under the refugee program are not publicized because the refugee program has no appeals process. Verbal harassment: **Bucur v. Immigration Naturalization Service**, 109 F.3d 399 (7th Cir. 1997); death threats: **Li v. Attorney General of the United States**, 400 F.3d 157 (3d Cir. 2005); *Silva v. U.S. Attorney General*, 448 F.3d 1299 (11th Cir. 2006); wrongful arrest: U.S. Citizenship and Immigration Services, "**Definition of Persecution and Eligibility Based on Past Persecution**," November 20, 2019; detention: U.S. Citizenship and Immigration Services, "**Definition of Persecution and Eligibility Based on Past Persecution**," November 20, 2019; illegal searches: **Mikhailevitch v. Immigration Naturalization**, 146 F.3d 384 (6th Cir. 1998); military conscription: **Matter of Canas**, A-26790253 (1988); expulsion from public school: **Ying v. Gonzales**,

246 F. Appx. 25 (2d Cir. 2007); and non-"severe" legal discrimination: **Bucur v. Immigration Naturalization Service**, 109 F.3d 399 (7th Cir. 1997).

75. *Sivaainkaran v. INS*, 972 F.2d 161, 165 (7th Cir. 1992); *Velasquez v. Ashcroft*, 342 F.3d 55, 58 (1st Cir. 2003); *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000); *M.A. v. INS*, 899 F.2d 304, 314–15 (4th Cir. 1990) (en banc); and *In re Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988).

76. 8 U.S.C. 1101(a)(42) (2019).

77. U.S. Equal Employment Opportunity Commission, "**Who Is Protected from Employment Discrimination?**," November 12, 2021.

78. Stephen Legomsky, "**Gender-Related Violence Should Be Grounds for Asylum. Congress Must Fix This for Women**," *USA Today*, January 2, 2019.

79. *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994).

80. *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).

81. *Silva v. U.S. Attorney General*, 448 F.3d 1299 (11th Cir. 2006).

82. 8 U.S.C. 1157(c)(1) (2020); *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013); U.S. Citizenship and Immigration Services, "**Firm Resettlement—RAIO Directorate—Officer Training**," December 20, 2019; and **8 C.F.R. § 207.1(b)** (2019).

83. Andorra Bruno, "Refugee Admissions and Resettlement Policy," Congressional Research Service, December 18, 2018; and "**Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021**," 86 Fed. Reg. 21160 (April 22, 2021).

84. Zolan Kanno-Youngs and Miriam Jordan, "'**They Forgot About Us': Inside the Wait for Refugee Status**," *New York Times*, October 19, 2022. The State Department said 18–24 months from 2014 to 2016, but it is widely acknowledged that the process slowed during the 2017–2021 period. See "**Refugee Resettlement in the United States**," Bureau of Population, Refugees, and Migration, U.S. Department of State, May 23, 2014. See, for instance, Betsy Fisher, "**Trump's New Refugee Vetting Rules Will All but Stop the Resettlement Process**," *ACLU Blog of Rights* (blog),

ACLU, October 26, 2017. The time span 18 months to 3 years according to World Relief, "**Who Is a Refugee and What Do They Go Through to Get to the U.S.?**," December 4, 2015. For P-3 processing, see "often more than 2 years," as cited in "**US Family Reunification**," UNHCR.

85. U.S. Citizenship and Immigration Services, "**Refugee Processing Circuit Rides**," March 29, 2021.

86. "**U.S. Embassy Referrals to the U.S. Refugee Program**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 203.4–2, March 7, 2016.

87. Amien Kacou, "**How to Get a Referral to the U.S. Refugee Admissions Program**," Nolo, 2022.

88. Some 137 countries out of about 200. See "**Where We Work**," UNHCR, 2022.

89. "Resettlement Data Finder (RDF)," UNHCR, 2021.

90. Some Cubans and Iraqis associated with the U.S. military were exempt from this requirement, but those programs were still suspended as of 2021: U.S. Department of State, "**Report to Congress on Proposed Refugee Admissions for Fiscal Year 2022**," September 20, 2021.

91. "**Chapter 6—UNHCR Resettlement Submission Categories**," *UNHCR Resettlement Handbook* (Geneva, Switzerland: United Nations, 2011).

92. Ryan Baugh, "**Fiscal Year 2020 Refugees and Asylees Annual Flow Report**," Office of Immigration Statistics, U.S. Department of Homeland Security, March 8, 2022.

93. "Resettlement Data Finder (RDF)," UNHCR, 2021.

94. Annelisa Lindsay, "**Surge and Selection**," *Forced Migration Review*, 2021.

95. "Resettlement Data Finder (RDF)," UNHCR, 2021.

96. 8 U.S.C. 1158(a)(3) (2020).

97. "**Admissions and Arrivals**," Refugee Processing Center, Bureau of Population, Refugees, and Migration, U.S. Department of State, April 2022.

98. "**FY2021 Appropriations Reporting Requirement Refugee Data—FY2018 to FY2021**," U.S. Citizenship and Immigration Services, June 29, 2021.

99. "**Report to Congress on the Proposed Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021**," U.S. Department of State, February 12, 2021.

100. "**Admissions and Arrivals**," Refugee Processing Center, Bureau of Population, Refugees, and Migration, U.S. Department of State, April 2022.

101. "**Figures at a Glance**," UNHCR. Data for figures come from *Global Trends* (Copenhagen, Denmark: UNHCR, 2021).

102. "**Admissions and Arrivals**," Refugee Processing Center, Bureau of Population, Refugees, and Migration, U.S. Department of State, April 2022; and "Resettlement Data Finder (RDF)," UNHCR, 2021.

103. "**FY 2022 Notice of Funding Opportunity for Reception and Placement Program**," U.S. Department of State, April 19, 2021.

104. "**Admissions and Arrivals**," Refugee Processing Center, Bureau of Population, Refugees, and Migration, U.S. Department of State, April 2022.

105. 8 C.F.R. § 207.2(c) (2019); and "**Resettlement Process: Steps of the U.S. Refugee Admissions Program**," Refugee Council USA, 2022.

106. Camilo Montoya-Galvez, "**U.S. Curtails Refugee Admissions to Focus on Resettling Afghan Evacuees**," CBS, November 16, 2021.

107. Danae King, "**Biden's Pause on Refugee Resettlement Worries Agencies, Advocates in Greater Columbus**," *Columbus Dispatch*, November 30, 2021.

108. "**Frequently Asked Questions**," WelcomeCorps.

109. Michelle Hackman and Tarini Parti, "**Biden Immigration Policy Marred by Internal Rifts: 'A Recipe for Disaster**,'" *Wall Street Journal*, November 18,

2021.

110. "**Frequently Asked Questions**," WelcomeCorps.

111. Adam Shaw, "**Nearly 6,000 Ukrainians Approved to Enter US through Biden Admin's Parole Program**," Fox News, May 10, 2022.

112. Technically, refugees can apply at consulates, but the State Department criteria for processing them are extremely narrow. See "**U.S. Embassy Referrals to the U.S. Refugee Program," Foreign Affairs Manual, U.S. Department of State, 9 FAM 203.4–2, March 7, 2016**.

113. 8 U.S.C. § 1202(b) (2019); 8 U.S.C. § 1182(7)(A)(i) (2019); "**Basic Document Requirements**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 504.4–4(A)a, December 9, 2022; and 8 U.S.C. § 1157(c)(3) (2019) (refugees exempt).

114. 22 C.F.R. § 42.65(c)(1) (2019).

115. "**Police Clearance Certificate for US Immigrant Visa**," VisaPro Immigration Attorneys, 2021. If these are unobtainable without actual hardship to the applicant—beyond normal delays and costs—immigrants may provide comparable, secondary documentary evidence to establish their identities. See 22 C.F.R. 42.65(d); and "**Unobtainable/Unreliable Documents**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 504.4–4(F), March 28, 2022.

116. U.S. Embassy Tegucigalpa, U.S. Department of State, "**Immigrant Visa Interview Special Requirements**," 2021.

117. "**Step 3: Pay Fees**," U.S. Department of State, 2021.

118. "**USCIS Immigrant Fee**," U.S. Citizenship and Immigration Services, 2021.

119. "**Requirement for an Interview**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 504.7–2, December 13, 2021; and 22 C.F.R. 42.62 (2020).

120. "**Ineligibility Based on Health and Medical Grounds**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.2–3(A)f, May 17, 2022

(refugee cost covered). For cost, see, for instance, "The standard fee is $270.... Vaccination fee varies from $20 to $200 depending on the applicant's age and the vaccines required," as cited in "**Medical Requirements**," U.S. Embassy and Consulates in Turkey, U.S. Department of State, 2021; "**The Immigration Medical Exam, Explained**," Boundless Immigration Inc., 2021; and "**What Happens at an Immigration Medical Exam**," CitizenPath, January 26, 2021.

121. These countries are Afghanistan; Andorra; Antigua and Barbuda; Azerbaijan; Belarus; Bhutan; Botswana; Brunei; Burundi; Central African Republic; Chad; Comoros; Denmark; Dominica; Equatorial Guinea; Eritrea; Eswatini; The Gambia; Grenada; Guinea; Guinea-Bissau; Iran; Iraq; Kiribati; Korea, North; Lesotho; Libya; Liechtenstein; Luxembourg; Macau Special Administrative Region; Maldives; Mali; Malta; Marshall Islands; Mauritania; Mauritius; Micronesia, Federated States of; Monaco; Montenegro; Mozambique; Namibia; Nauru; Norway; Palau; Palestine, State of; Portugal; Russia; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Samoa; San Marino; São Tomé and Príncipe; Seychelles; Solomon Islands; Somalia; South Sudan; Suriname; Syria; Tajikistan; Timor-Leste; Tonga; Tuvalu; Uganda; Ukraine; Vanuatu; Venezuela; and Yemen. "**Visa Issuing Posts**," U.S. Department of State, 2022; "**Visas**," U.S. Embassy and Consulates in Russia, U.S. Department of State, 2022; "**Visas**," U.S. Embassy and Consulates in Iraq, U.S. Department of State, 2022; "**Visas**," U.S. Embassy in Ukraine, U.S. Department of State, 2022; "**Visas**," U.S. Embassy in Venezuela, U.S. Department of State, 2022; "**Visas**," U.S. Embassy in Kyrgyz Republic, U.S. Department of State, 2022; and "**Consular Services Available at U.S. Embassy Havana**," U.S. Department of State, May 3, 2022.

122. "**Fraud Risks Complicate State's Ability to Manage Diversity Visa Program**," U.S. Government Accountability Office, September 2007.

123. 8 U.S.C. 1182(a)(4) (2020).

124. 87 Fed. Reg. 55472 (September 9, 2022); "**Definition of Public Charge**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(1)a(1), July 29, 2022; and "**Field Guide on Deportability and Inadmissibility on Public Charge Grounds**," 64 Fed. Reg. 28689 (March 26, 1999).

125. "**Annual Report of the Visa Office**," U.S. Department of State, 2000–2020, Tables VI and XX.

126. "Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019," DHS, September 20, 2020.

127. 8 C.F.R. § 212.22 (2021).

128. "I-864P, 2021 HHS Poverty Guidelines for Affidavit of Support," U.S. Citizenship and Immigration Services, August 31, 2021.

129. "Determining 'Totality of Circumstances,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(2)(f)(i), July 29, 2022. Embassies ask applicants to specify whether the job offer is for a seasonal, temporary, or permanent position and whether it will be immediately available. See, for example, "Instructions for Diversity Visa Applicants," U.S. Embassy and Consulates in Turkey, 2016; and "(U) Public Charge – INA 212(A)(4)," Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8, July 29, 2022; "Determining 'Totality of Circumstances,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(2)(a), July 29, 2022.

130. "Determining 'Totality of Circumstances,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(2)(f)(i), July 29, 2022; and "Instructions for Diversity Visa Applicants," U.S. Embassy and Consulates in Turkey, 2016.

131. "Determining 'Totality of Circumstances,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(2)(e), July 29, 2022.

132. Simon Paul, "All about Public Charge, Affidavit of Support, I-134," BritSimonsSays, September 2021.

133. Sometimes as high as five times the difference between the poverty line and the applicant's job offer or projected income, which is the family-sponsored rule. This could be because the rule for the family-sponsored system is that assets be three to five times the difference between the applicant's projected income and the poverty line, and consular officers don't distinguish between the two. See "Required Supporting Evidence," Foreign Affairs Manual, U.S. Department of State, 9 FAM 601.14–6, May 12, 2022.

134. "**Determining 'Totality of Circumstances**,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(3)(c)(vi), July 29, 2022. For immigration status, see "**Humanitarian or Significant Public Benefit Parole for Individuals outside the United States—The Need for a Sponsor**," U.S. Citizenship and Immigration Services, 2021.

135. "**Form I-134 Affidavit of Support—Instructions**," U.S. Citizenship and Immigration Services, April 25, 2022.

136. See, for example, "Another common problem that we have seen is that consular officers have become less willing to accept affidavits of support from non-family members. Some of this concern is understandable, as a 'black market' for sponsors has developed," as cited in "**212(a)(4)(A) Public Charge**," White & Associates. In "**Determining 'Totality of Circumstances**,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(3)(c)(vi), July 29, 2022, the rule states, "an affidavit submitted by a casual friend or distant relative who has little or no personal knowledge of the applicant has more limited value" and requires consideration of "relationship to the applicant" (e.g., relative by blood or marriage, former employer or employee, schoolmates, or business associates) and "the length of time the sponsor and applicant have known each other." Both factors would discount nonfamily support.

137. "**Determining 'Totality of Circumstances**,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)e–f, July 29, 2022.

138. 8 U.S.C. 1153l(2) (2020).

139. "Diversity Visa Eligibility," Foreign Affairs Manual, U.S. Department of State, 9 FAM 502.6–3c(2)–(3), November 30, 2022.

140. 8 U.S.C. §1153(c)(2)(B) (2020); and "Diversity Visa Eligibility," Foreign Affairs Manual, U.S. Department of State, 9 FAM 502.6–3d(3)(b), November 30, 2022. It must be a Job Zone 4 or 5 occupation. See "**Diversity Visa Program Step 4: Confirm Your Qualifications**," U.S. Department of State.

141. "**49–3042.–0 — Mobile Heavy Equipment Mechanics, Except Engines**," O*NET OnLine, 2021.

142. Logan B. Ikubolajeh and Kevin J. A. Thomas, "**The U.S. Diversity Visa Programme and the Transfer of Skills from Africa**," *International Migration*

50, no. 2 (April 1, 2012): 1–19; "**U.S. Diversity Visas Are Attracting Africa's Best and Brightest**," Population Reference Bureau, July 1, 2001; and Ruth Ellen Wasem, ***Diversity Immigrant Visa Lottery Issues*** (Washington: Congressional Research Service, 2010).

143. 8 U.S.C. 1153(c)(1)(2020).

144. Bangladesh, Brazil, Canada, China (including Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Mexico, Nigeria, Pakistan, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam; "**Instructions for the 2022 Diversity Immigrant Visa Program (DV-2022)**," U.S. Department of State, 2022.

145. "**Nationwide Encounters**," U.S. Customs and Border Protection, 2022.

146. 8 U.S.C. 1151(e) (2021).

147. "**Diversity Visa Program, DV 2019–2021: Number of Entries during Each Online Registration Period by Region and Country of Chargeability**," U.S. Department of State, 2021.

148. "**Legal Immigration and Adjustment of Status Report Quarterly Data**," U.S. Department of Homeland Security, July 2, 2018.

149. David J. Bier, "**The Government Wasted about 400,000 Visa Cap Slots in FY 2021**," *Cato at Liberty* (blog), Cato Institute, October 27, 2021.

150. 8 U.S. Code § 1153(c)(1)(E) (2020).

151. "**Table VII Immigrant Number Use for Visa Issuances and Adjustments of Status in the Diversity Immigrant Category Fiscal Years 2010–2019**," U.S. Department of State, 2019; and "**Diversity Visa Program, DV 2019–2021: Number of Entries during Each Online Registration Period by Region and Country of Chargeability**," U.S. Department of State, 2021.

152. Rachel L. Swarns, "**A Futile Rush in Desperation for Green Card**," *New York Times*, January 31, 1996.

153. **Pub. L. No. 89–236, 79 Stat. 911** (1965).

154. Eastern Hemisphere: **Pub. L. No. 68–139, 43 Stat. 153** (1924); and Western Hemisphere: **Pub. L. No. 89–236, 79 Stat. 911** (1965).

155. U.S. Immigration and Naturalization Service, ***1986 Statistical Yearbook of the Immigration and Naturalization Service*** (Washington: Government Printing Office, 1987).

156. **Pub. L. No. 101–649, 104 Stat. 4978** (1990).

157. "**The Diversity Immigrant Visa Program: An Overview**," American Immigration Council, November 2017.

158. Michael A. Clemens and Lant Pritchett, "**The New Economic Case for Migration Restrictions: An Assessment**," *Journal of Development Economics* 138 (2019): 153–64.

159. National Academies of Sciences, Engineering, and Medicine, ***The Economic and Fiscal Consequences of Immigration***, ed. Francine D. Blau and Christopher Mackie (Washington: The National Academies Press, 2017).

160. This system can be divided into two parts. The first part consists of the spouses and minor children of refugees—as well as immediate family of certain "legalized" immigrants granted status in the United States—who are not subject to the public charge rule and may be exempt from the other nonrefugee baseline requirements (the left half of the family-sponsored portion of Figure 4). The second and much larger part is nonrefugee family-sponsored immigrants (the right half of the family-sponsored portion of Figure 4).

161. 8 U.S.C. 1154 (2020).

162. Spouses: 8 U.S.C. § 1151(b)(2)(A)(i) and 8 U.S.C. § 1153(a)(2)(A) (2020); parents: 8 U.S.C. § 1151(b)(2)(A)(i) and 8 U.S.C. § 1101(b)(1)(B) (2020); siblings: 8 U.S.C. § 1153(a)(4) and 8 U.S.C. § 1101(b)(1)(B) (2020); siblings-in-law: 8 U.S.C. § 1153(a)(4), (d) (2020); nieces and nephews: 8 U.S.C. § 1153(a)(4), (d) (2020); children: 8 U.S.C. § 1151(b)(2)(A)(i); 8 U.S.C. § 1153(a)(1), (2)(B), (3); 8 U.S.C. § 1101(b)(1)(B) (2020); children-in-law: 8 U.S.C. § 1153(d) (2020); and grandchildren: 8 U.S.C. § 1153(a) and 8 U.S.C. § 1153(d) (2020). Not available if the person is a grandchild of an unmarried child of a U.S. citizen under the age of 21 who is seeking to enter cap-exempt. 8 U.S.C. § 1151(b)(2)(A)(i) (2020).

163. 8 U.S.C. 1101(b); and 8 U.S.C. 1153(d) (2020).

164. The rules for determining the age of children subtract the days that the relative's petition is pending, so the child can be over the age of 21 but still be eligible for, in some cases, years. 8 U.S.C. § 1153(h)(1) (2020).

165. 8 U.S.C. § 1181(a) (2020); and 8 C.F.R. § 211.1(b)(1) (2021).

166. 8 C.F.R. § 103.7(b)(1)(I)(K)–(L) (2019).

167. Orphans: 8 U.S.C. § 1101(b)(1)(E) (2020) and "**Affidavit of Support Requirement**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 601.14–3(b)(1), May 12, 2022; widow(er)s: 8 U.S.C. § 1151(a)(2)(A)(i) and 8 U.S.C. § 1431 (2020).

168. For employer-sponsored immigrants, see 8 U.S.C. § 1183a(f)(4) (2020).

169. Fee authority in 8 U.S.C. § 1183a note, added by Pub. L. No. 106–113, Div. B, 1000(a)(7) [Div. A, Title II, sec. 232], 113 Stat. 1536 (1999), 1501A-425, as amended Pub. L. No. 107–228, Div. A, Title II, sec. 211(b), 116 Stat. 1365 (2002).

170. If they already meet these conditions or will meet them when they arrive in the United States, they are exempt from the affidavit of support. 8 U.S.C. § 1183a(a)(2)–(3) (2020). So long as they are not receiving any benefits, married immigrants are credited with the work of their spouses, and immigrants younger than 18 are credited for the work of their parents. 8 U.S.C. § 1183a(a)(3)(B) (2020).

171. For an explanation for why they haven't been enforced, see **85 Fed. Reg. 62432, 62442** (October 2, 2020). But nonrefugee green card holders are typically ineligible for nearly all federal means-tested benefits for five years, and the sponsor's income is added to their own when determining their eligibility for benefits, which reduces their access to benefits. 8 U.S.C.§ 1611 (2020); and 8 C.F.R. 213a.2(d) (2021).

172. *Erler v. Erler*, 824 F.3d 1173, 1177 (9th Cir. 2016).

173. Or 100 percent of the poverty line for active-duty military. 8 U.S.C. § 1183a(f)(3) (2020).

174. 8 U.S.C. § 1183a(f)(6) (2020).

175. "**Determining 'Totality of Circumstances**,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)(h)(1), July 29, 2022; and 8 C.F.R. § 213a.1 (2020).

176. "**Household** Size," Foreign Affairs Manual, U.S. Department of State, 9 FAM 601.14–8(c)(1), May 12, 2022.

177. Net savings can include, for example, stocks, bonds, CDs, a second car, and real estate. "**Required Supporting Evidence**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 601.14–6(d)(2), May 12, 2022. The savings need only equal the shortfall for a child coming for adoption. "**Household** Size," Foreign Affairs Manual, U.S. Department of State, 9 FAM 601.14–8(d)(3), May 12, 2022.

178. 8 C.F.R. 213l(c)(2lii)(C) (2021). A joint sponsor is required if the primary sponsor is living abroad or is younger than 18. "**Sponsors**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 601.14–5(a)(2), May 12, 2022.

179. 8 U.S.C. § 1151(b)(2)(A)(i) (2020).

180. 8 U.S.C. § 1151(c) (2020).

181. For a description of how this number was identified, see David J. Bier, "**1.6 Million Family-Sponsored Immigrants Will Die before They Can Immigrate**," *Cato at Liberty* (blog), Cato Institute, March 10, 2020.

182. 8 U.S.C. § 1153(d) (2020).

183. 8 U.S.C. § 1151(b)(2)(A)(i) (2020).

184. 8 U.S.C. § 1101(b)(1)(B) (2020).

185. *Wang v. Blinken*, No. 20–5076 (D.C. Cir. 2021), interpreting 8 U.S.C. § 1153(d) (2020) as applying the caps on primary applicants to dependents.

186. 8 U.S.C. § 1153(a) (2020).

187. Plus any visas that would otherwise go unused, though this never happens for family-sponsored cases: 8 U.S.C. § 1152(a)(2), (4) (2020).

188. 8 U.S.C. 1152(a)(2) (2020).

189. 8 U.S.C. 1152(b) (2020).

190. For a description of how this number was identified, see Bier, "**1.6 Million Family-Sponsored Immigrants Will Die before They Can Immigrate**," *Cato at Liberty* (blog), Cato Institute, March 10, 2020.

191. Some immigrants can remain in line notwithstanding the sponsor's death, but only if they were already in the United States when the sponsor died. 8 U.S.C. § 1154(l) (2020).

192. Nomaan Merchant, "**Children Packed into Border Patrol Tent for Days on End**," Associated Press, March 12, 2021.

193. "**Sponsor Your Parents and Grandparents: After You Apply**," Government of Canada, 2022.

194. "**Family Visas: Apply, Extend or Switch**," GOV.UK, 2022.

195. **Immigration Act of 1990**, Pub. L. No. 101–649, 104 Stat. 4978 (1990).

196. "**Total Households [TTLHH]**," Federal Reserve Bank of St. Louis, U.S. Census Bureau, May 2, 2022.

197. David J. Bier, "**Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and Inequitable**," Cato Institute Policy Analysis no. 873, June 18, 2019.

198. "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, September 20, 2020.

199. 8 C.F.R. § 204.6 (2022).

200. **Pub. L. No. 117–103, 136 Stat. 49** (2022).

201. 8 U.S.C. § 1153(b)(5) (2019).

202. 8 U.S.C. § 1153(b)(5)(A) (2019).

203. 8 U.S.C § 1186b(d)(2)(A) (2019).

204. "**Eligibility Requirements**," U.S. Citizenship and Immigration Services.

205. "**Number of Service Wide Forms by Quarter, Form Status, and Processing Time, Fiscal Year 2021, Quarter 3**," U.S. Citizenship and Immigration Services, 2021.

206. **Pub. L. No. 102–395, 106 Stat. 1828** (1992).

207. "**Eligibility Requirements**," U.S. Citizenship and Immigration Services.

208. "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, September 20, 2020.

209. "**China Employment Final Action Dates**," U.S. Department of State, 2021.

210. Only 1,564 were approved in 2020; "**Form I 140, I 360, I 526 Approved Employment Based Petitions Awaiting Visa Availability by Preference Category and Country of Birth as of September 2021**," U.S. Citizenship and Immigration Services, December 15, 2021; and "**Table V (Part 1): Immigrant Visas Issued and Adjustments of Status Subject to Numerical Limitations Fiscal Year 2019**," *Report of the Visa Office 2019* (Washington: U.S. Department of State, 2019).

211. 8 U.S.C. § 1153(b)(1)(A) (2019).

212. 8 C.F.R. § 204.5(h)(1) (2019).

213. 8 C.F.R. § 204.5(c) (2019). Given the time-consuming process of obtaining a green card, many EB-1A immigrants do obtain an employer-sponsored work visa first. The DHS's *Yearbook of Immigration Statistics* shows that 85 percent adjusted to permanent residence while already in the United States, which is typically impossible without a temporary work visa. See "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, September 20, 2020.

214. 8 U.S.C. 1153(b)(1)(A)–(iii) (2019).

215. 8 C.F.R. § 204.5(h)(5) (2019).

216. ***Noroozi et al v. Napolitano et al***, No. 1:2011cv08333, (S.D.N.Y. 2012).

217. 8 C.F.R. § 204.5(h)(2) (2019).

218. 8 U.S.C. § 1153(b)(1)(A)(i) (2019).

219. "**Chapter 2—Extraordinary Ability**," Policy Manual, U.S. Citizenship and Immigration Services, 6 USCIS-PM F.2(A), February 2, 2023.

220. *Integrity Gymnastics & Pure Power Cheerleading v. USCIS*, 131 F. Supp. 3d 721 (May 8, 2000).

221. "(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor; (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields; (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation; (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought; (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field; (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media; (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases; (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation; (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. (4) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." 8 C.F.R. § 204.5(h)(3) (2019).

222. 8 C.F.R. § 204.5(h)(2) (2019); *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010); *Amin v. DHS*, No. 21–20212 (5th Cir. 2022); and "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14," policy memorandum, U.S. Citizenship and Immigration Services, PM-602-0005.1 (December 22, 2010).

223. Sinduja Rangarajan, "**Melania Trump Got an 'Einstein Visa.' Why Was It So Hard for This Nobel Prize Winner?**," *Mother Jones*, February 27, 2020.

224. "**Immigrant Numbers for October 2021**," U.S. Department of State, October 2021.

225. "**Agents as Petitioners**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 402.13–6(F), October 13, 2022.

226. 8 U.S.C. § 1101(a)(15)(O)(i) (2019).

227. Miriam Jordan, "**Did Melania Trump Merit an 'Einstein Visa'? Probably, Immigration Lawyers Say**," *New York Times*, March 4, 2018.

228. "**FAQs about the L-1 by Employers**," Peng & Weber U.S. Immigration Lawyers, 2011; and "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, September 20, 2020.

229. "**Employment-Based Immigration: Second Preference EB-2**," U.S. Citizenship and Immigration Services.

230. 8 U.S.C. § 1153(b)(2)(B)(i) (2020); and 8 C.F.R. § 204.5(k) (2020).

231. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

232. Administrative Appeals Office, U.S. Citizenship and Immigration Services, *Matter of F-O-O-* (August 3, 2018).

233. Data obtained by author via Freedom of Information Act. See Freedom of Information Act request COW2020000194, "**Count of Form I-140 National Interest Waivers**," U.S. Citizenship and Immigration Services, 2020.

234. Data obtained by author via Freedom of Information Act. See Freedom of Information Act request COW2020000194, "**Count of Form I-140 National Interest Waivers**," U.S. Citizenship and Immigration Services, 2020.

235. "**Visa Bulletin for May 2022**," U.S. Department of State, May 2022; and "**Immigrant Visa Statistics**," U.S. Department of State, 2022.

236. 8 C.F.R. § 103.7(b)(1)(I)(N) (2019).

237. 88 Fed. Reg. 402 (January 4, 2023).

238. 88 Fed. Reg. 402 (January 4, 2023).

239. **Pub. L. No. 116–159, 134 Stat. 709** (2020).

240. **87 Fed. Reg. 18227** (March 30, 2022).

241. "**USCIS Announces Final Phase of Premium Processing Expansion for EB-1 and EB-2 Form I-140 Petitions and Future Expansion for F-1 Students Seeking OPT and Certain Student and Exchange Visitors**," U.S. Citizenship and Immigration Services, January 12, 2023.

242. 8 C.F.R. § 204.5; "Chapter 7–Schedule A Designation Petitions," Policy Manual, U.S. Citizenship and Immigration Services, 6 USCIS-PM E.7, February 2, 2023.

243. "**Determining 'Totality of Circumstances**,'" Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.8–2(B)(3)g(2)(a), July 29, 2022.

244. See, for instance, from the stricter but now-rescinded public charge from the Trump administration, "Most employment-based immigrants are coming to work for their petitioning employers; DHS believes that by virtue of their employment, such immigrants should have adequate income and resources to support themselves without resorting to seeking public benefits." **83 Fed. Reg. 51114, 51123** (October 10, 2019).

245. "**Ability to Pay**," Policy Manual, U.S. Citizenship and Immigration Services, 6 USCIS-PM E.4, February 2, 2023.

246. Alexandra Crandall, "**PERM 101: Employment Verification Letters**," JDSupra, May 27, 2021.

247. Alexandra Crandall, "**PERM 101: Employment Verification Letters**," JDSupra, May 27, 2021.

248. 8 U.S.C. § 1153(b)(4) (2020); and 8 U.S.C. § 1101(a)(27)(C) (2020).

249. 8 C.F.R. § 204.5(m)(7) (2020).

250. 8 C.F.R. § 204.5(m) (2020).

251. These immigrants include religious workers; Special Immigrant Juveniles; certain broadcasters; certain retired officers or employees of a G-4 international organization or NATO-6 civilian employees and their family members; certain employees of the U.S. government who are abroad and their family members; members of the U.S. armed forces; Panama Canal company or Canal Zone government employees; certain physicians licensed and practicing medicine in a U.S. state as of January 9, 1978; Afghan or Iraqi translators or interpreters; Iraqis who were employed by or on behalf of the U.S. government; and Afghans who were employed by the U.S. government or International Security Assistance Force.

252. "**Mexico Employment Final Action Dates, Fiscal Year 2021**," U.S. Department of State, 2022.

253. "**Visa Bulletin for May 2022**," U.S. Department of State, May 2022.

254. 8 U.S.C. § 1101(a)(15)(R) (2019).

255. "**I-485, Application to Register Permanent Residence or Adjust Status**," U.S. Citizenship and Immigration Services, November 8, 2021.

256. "**R-1 Nonimmigrant Religious Workers**," U.S. Citizenship and Immigration Services, January 15, 2020. Loss of status can also happen when the government delays in processing the case. See Senator Susan Collins et al., "**Letter to Secretary Mayorkas and Secretary Blinken, United States Senate**," November 2, 2021.

257. "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, September

20, 2020; and "**May 2021 National Occupational Employment and Wage Estimates United States**," U.S. Bureau of Labor Statistics, March 31, 2022.

258. 8 U.S.C. § 1153(b)(1)(B) (2019).

259. 8 C.F.R. § 204.5(i)(2) (2019).

260. 8 C.F.R. § 204.5(i)(2) (2019).

261. *Matter of* _____, TSC (AAO, May 21, 2010); and "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14," policy memorandum, U.S. Citizenship and Immigration Services, PM-602-0005.1 (December 22, 2010).

262. "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, September 20, 2020; "**May 2021 National Occupational Employment and Wage Estimates United States**," U.S. Bureau of Labor Statistics, March 31, 2022.

263. 8 U.S.C. § 1153(b)(1)(C) (2019).

264. 8 C.F.R. § 204.5(j)(2) (2019).

265. 8 C.F.R. § 204.5(j)(3)(i)(D) (2019).

266. 6 USCIS-PM F.4, "**Chapter 4—Multinational Executive or Manager**," U.S. Citizenship and Immigration Services, May 18, 2021.

267. 8 U.S.C. § 1101(a)(44)(A) (2020); and 6 USCIS-PM F.4, "**Chapter 4—Multinational Executive or Manager**," U.S. Citizenship and Immigration Services, May 18, 2021.

268. 6 USCIS-PM F.4, "**Chapter 4—Multinational Executive or Manager**," U.S. Citizenship and Immigration Services, May 18, 2021.

269. ***Yearbook of Immigration Statistics*** *2019*, Office of Immigration Statistics (Washington: DHS, 2019), Table 7; and "**Occupational Employment and Wages, May 2021, 11–0000 Management Occupations (Major Group)**," U.S. Bureau of Labor Statistics, March 31, 2022.

270. The only other exception for immigrants coming from abroad is for a very small number of physicians who receive an O-1 visa for persons with extraordinary ability and who use the physician national interest waiver program (described below) to obtain a green card. Otherwise, physician national interest waiver applicants need an H-1B visa, which does require the prevailing wage (see "**Temporary Work Visas**"). 20 C.F.R. § 655.731 (2019), though most H-1B employers can look it up as opposed to going through the determination process with the Department of Labor.

271. 20 C.F.R. § 656.40 (2019).

272. 92 percent of the time in 2021. "**Performance Data**," U.S. Department of Labor, 2022.

273. "**FLC Data Center–Downloadable Files**," Office of Foreign Labor Certification, July 1, 2021; and "**O*Net: The Occupational Information Network**," U.S. Bureau of Labor Statistics, 1999.

274. "**Performance Data**," U.S. Department of Labor, 2022.

275. Employment and Training Administration, "**Prevailing Wage Determination Policy Guidance**," U.S. Department of Labor, November 2009.

276. "**Occupational Employment and Wages, May 2021, 47–2061 Construction Laborers**," U.S. Bureau of Labor Statistics, March 2022; and "**Occupational Employment and Wages, May 2021–47–2051 Cement Masons and Concrete Finishers**," U.S. Bureau of Labor Statistics, March 2022.

277. 8 U.S.C. 1182(p) (2020).

278. Employment and Training Administration, "**Prevailing Wage Determination Policy Guidance**," U.S. Department of Labor, November 2009.

279. "**Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States**," 86 Fed. Reg. 3608 (2021).

280. Cyrus D. Mehta and Isabel Rajabzadeh, "**No Longer in Use: How Changes in SOC Systems Affect Employment-Based Immigration**," *Insightful Immigration Blog* (blog), July 19, 2021.

281. Linda Rose and David Ware, "**DOL Practice Alert: PERM Travel Bug Advisory**," American Immigration Lawyers Association, April 7, 2014.

282. Foreign Labor Certification Data Center, "**Online Wage Library**," U.S. Department of Labor, 2022.

283. 20 C.F.R. § 656.10(c)(2) (2020).

284. "**Occupational Employment and Wage Statistics, Frequently Asked Questions**," U.S. Bureau of Labor Statistics, 2022; Gary Endelman and Cyrus D. Mehta, "**Follow the Money: What the OES Counts That You Can't**," *Insightful Immigration Blog* (blog), August 26, 2010; and 20 C.F.R. § 655.731 (2019).

285. For universities and related nonprofit entities, nonprofit research organizations, and government research organizations. 20 C.F.R. § 656.40(d), (e) (2021).

286. 20 C.F.R. § 656.17.

287. Unless they are of national or international renown. "(U) Unqualified Physicians—INA 212(A)(5)(B)," Foreign Affairs Manual, U.S. Department of State, 9 FAM 302.1–6(B)(3)(a), August 27, 2021; and 8 U.S.C. § 1101(a)(42) (2020).

288. Technically, parts I and II of the National Board of Medical Examiners examination (NBME) or equivalent. Because the NBME was phased out in 1992, the U.S. Medical Licensing Examination has been recognized by the secretary of the Department of Health and Human Services as an equivalent. 8 U.S.C. § 1182(a)(5)(B) (2019); "**Chapter 6—Physician**," Policy Manual, U.S. Citizenship and Immigration Services, 6 USCIS-PM F.6, February 2, 2022; and **57 Fed. Reg. 31717** (July 17, 1992).

289. "**State Specific Requirements for Initial Medical Licensure**," Federation of State Medical Boards, 2021.

290. In fact, "approximately 75 percent of the U.S. states require foreign medical school graduates to complete additional post-graduate medical training or residencies beyond that required for U.S. medical school graduates." See "**Chapter 6—Physician**," Policy Manual, U.S. Citizenship and Immigration Services, 6 USCIS-PM F.6(A), 2022. Only Montana has a partial exception to this rule for physicians trained at World Health Organization–affiliated entities. See **Montana Rule 24.156.607**, 2014.

291. Elayne J. Heisler et al., "**Federal Support for Graduate Medical Education: An Overview**," Congressional Research Service, December 27, 2018.

292. ***Hearing before the Subcommittee on Immigration and Citizenship, House Committee on the Judiciary***, 117th Cong. (2022) (statement of Jeffrey A. Singer, senior fellow in Health Policy Studies at the Cato Institute).

293. "**Visa Options for Graduate Medical Training**," Siskind Susser, 2021.

294. "If the classification is subject to a residence abroad requirement, then travel to the United States with no intent to return to one's residence or for the specific purpose of adjusting status would be inconsistent with that visa classification." See "**Intent to Adjust Status**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 401.1–3(C), October 14, 2021.

295. "If the classification is subject to a residence abroad requirement, then travel to the United States with no intent to return to one's residence or for the specific purpose of adjusting status would be inconsistent with that visa classification." See "**Intent to Adjust Status**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 401.1–3(C), October 14, 2021.

296. 8 C.F.R. § 1245.18(e)(2) (2020).

297. The State Department's policy for officers states, "You must be satisfied that the applicant, at the time of visa application: (1) Has a residence abroad; (2) Has no immediate intention of abandoning that residence; and (3) Intends to depart from the United States upon completion of the program." See "**(U) Residence Abroad**," Foreign Affairs Manual, U.S. Department of State, 9 FAM 402.5–6(F), September 13, 2022.

298. J-1 physicians must either return home for two years after completing their training or obtain a J-1 waiver, which requires working in a medically underserved area and meeting other state criteria.

299. 8 U.S.C. § 1182(n)(2)(C)(vi)(II) (2021); and 20 C.F.R. § 655.731(c)(9)(C) (2021).

300. "**Visa Options for Graduate Medical Training**," Siskind Susser, 2021.

301. 8 U.S.C. § 1153(b)(2)(B) (2020).

302. See for instance, Division of Public Health Services, Bureau of Public Health Systems, Policy, and Performance, and State of New Hampshire Department of Health and Human Services, "**National Interest Waiver (NIW) Request for a Letter of Attestation Guidelines**," January 22, 2022.

303. In Alabama, for instance, see Scott Harris, MD, "**Administrative Revision to Alabama Guidelines and Procedures, Requests for National Interest Waiver (NIW) of Attestation for Alien Physicians**," Alabama Department of Public Health, November 7, 2017. In Idaho, see **Idaho Statutes tit. 39, ch. 61** (2022).

304. See Georgia and Arkansas, for example, State Office of Rural Health and Primary Care, "**National Interest Waiver**," Georgia Department of Community Health, May 2018; and J-1 Visa Waiver Program, Arkansas Department of Health, "**Arkansas J-1 Visa Waiver Program National Interest Waiver (NIW) Letter of Attestation**," July 11, 2022.

305. "**National Interest Waiver Letters of Support Information Sheet**," Ohio Department of Health, 2021.

306. Health Professional Shortage Area, Mental Health Professional Area (for psychiatrists only), a Medically Underserved Area, or a Veterans Affairs facility, or for specialists in a Physician Scarcity Area. "**National Interest Waivers for Physicians**," Siskind Susser, 2021.

307. Sole proprietors cannot obtain an H-1B visa. "**Questions & Answers: Memoranda on Establishing the 'Employer-Employee Relationship' in H-1B Petitions**," U.S. Citizenship and Immigration Services, January 9, 2019.

308. 20 C.F.R. § 655.731(a)(2) (2019).

309. "**Arkansas J-1 Visa Waiver Program National Interest Waiver (NIW) Letter of Attestation**," J-1 Visa Waiver Program, Arkansas Department of Health, July 11, 2022.

310. 8 U.S.C. 1101(a)(15)(O)(i) (2019). Even for those who can meet this requirement, an alternate nonsponsored path to a green card is available under the EB-1A category for immigrants with extraordinary ability (described below). The only reason for using the EB-2 national interest waiver would be if the EB-1A was denied (which is possible because it has a slightly higher standard of evidence than the O-1 extraordinary ability standard).

311. These are approved petitions by the employer. The exact number of green cards approved based on national interest waivers is not publicly available. Some of those were nonsponsored national interest waivers (described above). Some of the approved physicians did not receive a green card because of the caps, including all the physicians born in India. See "Approvals and Denials for National Interest Waiver Petitions in Healthcare," Office of Performance and Quality, U.S. Citizenship and Immigration Services, December 2021 (unpublished data obtained by author).

312. 20 C.F.R. § 656.5.

313. "**Visa Bulletin for October 2021**," U.S. Department of State, October 2021.

314. 8 U.S.C. § 1184(i) (2019).

315. "How to Become a Physical Therapist," Occupational Outlook Handbook, U.S. Bureau of Labor Statistics, April 18, 2022.

316. "**Adjudication of H-1B Petitions for Nursing Occupations**," Office of the Director, U.S. Citizenship and Immigration Services, February 18, 2015.

317. 20 C.F.R. § 656.5(b)(1) (2021).

318. *Matter of K–R–*, ID# 4340279 (AAO October 2, 2019), cited in Charles Gordon et al., Immigration Law and Procedure: Business Immigration Module (Danvers, MA: Matthew Bender & Company, 2022).

319. The measures are (a) internationally recognized prizes or awards, (b) membership in prestigious international associations, (c) professional publications about the immigrant's work, (d) prestigious panels judging the work of others, (e) original scientific or scholarly research of major significance, (f) scientific or scholarly publications in international professional journals, and (g) display of work at artistic exhibitions in multiple countries.

320. Charles Gordon et al., ***Immigration Law and Procedure: Business Immigration Module*** (Danvers, MA: Matthew Bender & Company, 2022).

321. "**Visa Bulletin for October 2021**," U.S. Department of State, October 2021.

322. Although prevailing wage determinations may be used on behalf of multiple workers and need not result in a petition being filed, the number of determinations for non-Schedule A occupations closely tracks the number of permanent labor certifications, which would be the next step in the process. See "**Performance Data**," U.S. Department of Labor, 2022; and "**May 2021 National Occupational Employment and Wage Estimates United States**," U.S. Bureau of Labor Statistics, March 31, 2022. One bill from December 2019 allotted 4,400 immigrant visa numbers for Schedule A occupations. It is possible that this number reflects the number of Schedule A immigrants each year. See "**Featured Issue: Legislation Impacting the Per-Country Numerical Limitation**," AILA Doc. No. 19080632, American Immigration Lawyers Association, June 3, 2021.

323. 8 U.S.C. § 1182(a)(5)(A) (2020).

324. 20 C.F.R. § 656.3; and 8 C.F.R. § 274a.1(l)(2) (2021).

325. "The I-9 process was effectively undermined by the ready availability of genuine-looking fraudulent documents." As found in Andorra Bruno, "**Electronic Employment Eligibility Verification**," Congressional Research Service, June 6, 2018; "**Fraudulent Documents Undermining the Effectiveness of the Employment Verification System**," General Accounting Office, July 22, 1999; and "**Challenges Exist in Implementing a Mandatory Electronic Employment Verification System**," Government Accountability Office, May 6, 2008.

326. 20 C.F.R. § 656.12(b) (2020). Some consulates appear to interpret this requirement to exclude paying someone to *find* a labor certification job. DOL's language on this point is vague, requiring payment for "the use of legal services, and any other action associated with the preparation, filing, or pursuit of an application." See "**FAQs on Final Rule to Reduce the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity of May 17, 2007**," U.S. Department of Labor, July 13, 2007. See also "Paying Fees to an Agent to Find an EB-3 Position for Sponsorship," in Kate Kalmykov, "**Permanent Residency through EB-3 Program: What's Lawful and What's Not**," *National Law Review* 6, no. 103 (April 2016).

327. 20 C.F.R. § 656.17(l) (2020); and *Matter of Modular Container Systems Inc.*, 89-INA-228 (July 16, 1991) (en banc).

328. ***Hall v. McLaughlin***, 864 F.2d 868, 870 (D.C. Cir. 1989). See also ***Matter of Step by Step Day Care LLC***, 2012-PER-00737 (September 25, 2015).

329. *Matter of West End Publishing LLC*, 2011-PER-01046 (July 16, 2012).

330. *Matter of Nakano Warehouse & Transportation Corp.*, 92-INA-337 (November 23, 1993).

331. ***In the Matter of Marie Jean Fabroa***, 2010-PER-01071 (November 3, 2011).

332. *Bulk Farms Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992).

333. This is a long-standing practice. See "Three-fourths of the aliens were already working for the petitioning employer," as cited in "**Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Program**," Office of the Inspector General, U.S. Department of Labor, September 30, 2003.

334. "**Permanent Labor Certification Program Supervised Recruitment: Overview and Best Practice Tips**," U.S. Department of Labor, March 7, 2018.

335. See "They wanted to explain to their employer-clients that there is no legal obligation actually to hire qualified U.S. workers that respond to

recruitment.... The Department agreed that such advice would be legally permissible," as cited in ***Fragomen, Del Rey, Bernsen & Loewy LLP v. Elaine L. Chao***, "Declaration of William Carlson," Civil No. 1:08cv01387 (RMU), (D.D.C. 2008).

336. "**Green Card through PERM Roadmap**," Curran, Berger & Kludt Immigration Law, 2021; 20 C.F.R. § 656.17(h) (2021); and Robert H. Cohen et al., "**Practice Pointers in Resolving PERM Conundrums: Job Requirements, Degree Equivalencies, Experience with Same Employer, and Timelines**," *Immigration & Nationality Law Handbook* (Washington: American Immigration Lawyers Association, 2007).

337. "**BALCA Benchbook—Chapter 13 Supplement (January 1997)**," U.S. Department of Labor, January 1997; and "**PERM Labor Certification Recruitment and the Disqualification of Applicants**," Monique Kornfeld Immigration Attorney, December 10, 2017.

338. 20 C.F.R. § 656.17 (2020). The recruiting methods are (a) job fairs, (b) employer's website, (c) job search website, (d) on-campus recruiting, (e) trade or professional organization, (f) private employment firm, (g) employee referral program with incentives, (h) campus placement offices, (i) local and ethnic newspapers, and (j) radio and television.

339. Maria R. Benitez, "**Newspaper Ad Costs & Factors Affecting How Much You Pay**," Fit Small Business, April 22, 2022; "**PERM Advertising Cost**," PERM Ads Immigration Advertising, 2022; "**PERM Labor Certification** 2023," VisaNation, 2022; and "PERM—Attorney Services," USAVisaNow .com, 2021.

340. This is different from the H-2A program that does attempt to screen out illegal immigrant workers. 20 C.F.R. § 655.1302(j) (2021); and Joel Stewart, Esq., "**Legal Rejection of U.S. Workers**," *Immigration Daily* (blog), ILW.com, April 24, 2000.

341. "USDOL/OALJ: BALCA Benchbook—Chapter 13, Divisions I to III," U.S. Department of Labor, May 1992.

342. 8 U.S.C. § 1182(a)(5)(ii) (2019); and 20 C.F.R. § 656.18 (2020).

343. 20 C.F.R. § 656.17(h) (2020); and Robert H. Cohen et al., "**Practice Pointers in Resolving PERM Conundrums: Job Requirements, Degree**

Equivalencies, Experience with Same Employer, and Timelines," *Immigration & Nationality Law Handbook* (Washington: American Immigration Lawyers Association, 2007).

344. Gary Endelman, "**The Lawyer's Guide to 212(a)(5)(A): Labor Certification from 1952 to PERM**," *Immigration Daily* (blog), ILW.com; and *Matter of Goldman Sachs & Co.*, 2011-PER-01064 (June 8, 2012).

345. 20 C.F.R. § 656.17(g)(2) (2021).

346. ***Matter of Los Angeles Unified School District, 2012-PER-03153*** (January 23, 2017).

347. ***Matter of Los Angeles Unified School District, 2012-PER-03153*** (January 23, 2017).

348. Joel Stewart, ed., *The PERM Book*, 3rd ed. (New York: ILW.com, 2021).

349. Robert H. Cohen et al., "**Practice Pointers in Resolving PERM Conundrums: Job Requirements, Degree Equivalencies, Experience with Same Employer, and Timelines**," *Immigration & Nationality Law Handbook* (Washington: American Immigration Lawyers Association, 2007), p. 202, footnote 10.

350. Cora-Ann Pestaina, "**Listing the Foreign National's Qualifications on the PERM Form**," *The Insightful Immigration Blog* (blog), July 8, 2014. It later slipped the change into the form instruction without giving notice to the public or opportunity for public comment, and the issue is still not clearly resolved. See Joel Stewart, "**Board Disregards Form 9089 Section K License Instruction**," *Immigration Daily* (blog), ILW.com, March 15, 2019.

351. "**PERM Labor Certification Overview**," Boundless Immigration Inc., 2021.

352. "**Prevailing Wage Determination**," U.S. Department of Labor, 2022.

353. Krystal Alanis, "**PERM Labor Certification Frequently Asked Questions**," Reddy & Neumann, P.C., August 4, 2021.

354. "**Green Card through PERM Roadmap**," Curran, Berger & Kludt Immigration Law.

355. "**Performance Data**," U.S. Department of Labor, 2023.

356. Technically, recruitment can be done while waiting for the prevailing wage determination, but the 160 days refers to the time between the prevailing wage determination and the labor certification being filed, not solely to the formal recruitment period, so it accounts for applications where, for instance, the prevailing wage was received the same day as the labor certification was filed.

357. "**Check Case Processing Times**," U.S. Citizenship and Immigration Services, 2023.

358. "**Talent Access Report**," SHRM Benchmarking, 2022.

359. Discounted for time.

360. *Matter of Marcoux*, 12 I&N Dec. 827 (BIA 1968). Some employers require foreign workers to sign a contract to commit to stay for a minimum period to reduce the risk, but the government will sometimes deny these contract jobs, asserting that they are not "permanent" jobs. See Michael Grabell, "**Who Would Pay $26,000 to Work in a Chicken Plant?**," ProPublica, December 28, 2017; and Kate Kalmykov, "**Permanent Residency through EB-3 Program: What's Lawful and What's Not**," *National Law Review* 6, no. 103 (April 2016).

361. 14 percent versus 3 percent overall. See "**Performance Data**," U.S. Department of Labor, 2021.

362. Matthew Castillon, "**70% of Workers Are Likely to Quit at Current $7.25 Federal Minimum Wage in 'Brutal' Turnover Cycle**," CNBC, September 25, 2019.

363. 20 C.F.R. § 656.11 (2020); and 20 C.F.R. 656.30(c)(2) (2021). See 72 Fed. Reg. 27903 (2007).

364. 20 C.F.R. § 656.12(a) (2020).

365. 20 C.F.R. § 656.11 (2020); and 20 C.F.R. 656.30(c)(2) (2020).

366. 8 U.S.C. §1182(a)(5)(A)(iv) (2020).

367. Half of U.S. jobs had wages lower than $41,950, but fewer than 10 percent of labor certifications had wages that low, meaning jobs with wages below the median were about 80 percent less likely to receive a labor certification. See "May 2020 National Occupational Employment and Wage Estimates," U.S. Bureau of Labor Statistics, March 31, 2021.

368. "**May 2021 National Occupational Employment and Wage Estimates**," U.S. Bureau of Labor Statistics, March 31, 2022.

369. "**Employee Tenure in 2020**," U.S. Bureau of Labor Statistics, September 22, 2020.

370. This total includes compound interest on each year's return. The average annual rate of return from the stock market is about 10 percent. See Glenn Ruffenach, "**How to Estimate a Future Rate of Return on Your Retirement Savings**," *Wall Street Journal*, September 6, 2021.

371. "**PERM Labor Certification** 2023," VisaNation.

372. "**H-1B Electronic Registration Process**," U.S. Citizenship and Immigration Services, April 25, 2022.

373. The Department of Labor data list the classification of admission as a visa category, entry without inspection, "not in the USA," or blank. For blanks with no current state address, the assumption is that they are normally outside the United States, but because applicants with no current state address sometimes (8 percent of the time) also list a class of admission, this estimate assumes that 8 percent of the blanks for classification of admission with no current state address are in the United States in some status and the rest (92 percent) outside the United States. See "**Performance Data**," U.S. Department of Labor, 2023.

374. There were 6,422 approved labor certifications for applicants outside of the United States, and 1,091 were for immigrants from India and China. Because both countries' EB-2 and EB-3 caps are full, these applicants will need a temporary work visa to begin work. Another 761 were from immigrants from other countries who had bachelor's, master's, or doctorate degrees and job offers requiring a bachelor's or higher who would likely qualify for an H-1B visa.

375. For instance, in 2019, consulates issued 6,578 EB-2 or EB-3 immigrant visas to primary applicants abroad. They denied 10,214 under the labor certification ground, implying a 61 percent denial rate. See "**Annual Report of the Visa Office**," U.S. Department of State, 2000–2020, Tables VI and XX; and "**Monthly Immigrant Visa Issuance Statistics**," U.S. Department of State, 2017–2022. A former consular officer with 15 years of experience responded to this issue by stating in an email received by the author that consular staff have "little confidence that the DOL does a thorough job of reviewing these cases" and that they are "applying a much more narrow interpretation of whether or not the applicant reasonably intends to work for the employer."

376. Four occupational categories account for about half the roughly 3,000 labor certifications filed on behalf of workers not in the United States (and not from India or China, who would need a work visa regardless): tractor-trailer drivers (864); meat, poultry, and fish cutters and trimmers (302); janitors (190); and manufacturing workers (124), mainly metalworking.

377. The exceptional cases fall into three categories. First, although it is common not to disclose a relationship to an owner or key employee for fear of a denial, about 3 percent of labor certifications offered to immigrants abroad who are ineligible for a temporary work visa are for immigrants who disclosed a familial relationship to the owner, and another 9 percent were for employers with five or fewer employees where it is likely the person knew the owner. This includes many where the employer was an individual with just one employee. Second, shortage jobs are dominated by tractor-trailer truck drivers, accounting for 21 percent of these jobs in 2019. Another 11 percent were for meat cutters, trimmers, slaughterers, and packers. Landscapers and their supervisors took another 9 percent (who likely had previous experience in the United States on a temporary H-2B visa). Janitors, maids, and household cleaners in specific areas took another 8 percent. Home health aides, nursing assistants, and personal care aides were another 7 percent. Third, the other jobs are dominated by very unique circumstances. Cooks, chefs, and bakers are 5 percent and are often sponsored because of their expertise in specific ethnic cuisines. Other jobs are much less common but usually have other unique issues, personal connections, or unusual skill sets.

378. "**Occupations That Need More Education for Entry Are Projected to Grow Faster than Average**," U.S. Bureau of Labor Statistics, September 8, 2022.

379. "**Educational Attainment, at Least Bachelor's or Equivalent, Population 25+, Total (%) (Cumulative)**," World Bank, September 2021.

380. "**Labor Certification for Permanent Immigrant Admissions**," Congressional Research Service, May 15, 2003.

381. 8 U.S.C. § 1153(b)(3)(C) (2019).

382. "**Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019**," DHS, December 13, 2022.

383. 8 U.S.C. § 1101(a)(15)(H), (L), and (O); and 8 U.S.C. § 1184(b) (2020).

384. This is the standard for the E-1 and E-2 visa. "Intent to Depart Upon Termination of Status," Foreign Affairs Manual, U.S. Department of State, 9 FAM 402.9–4(C), October 18, 2022.

385. See 8 U.S.C. § 1101(a)(15)(B), (F), (H)(ii), (J), (M), (P), and (Q) (2020). On the partial exception, see 8 U.S.C. § 1101(a)(15)(E)(i) and (ii) (2020). Like the other categories listed, E-1 and E-2 applicants can receive a visa while intending to immigrate permanently, but they cannot intend to stay beyond their temporary period of authorized stay for that purpose. In other words, they have to intend to leave the United States. Beyond this confusing standard, primary recipients of the E-1 and E-2 visas generally are owners of business entities in the United States, and the labor certification process effectively bars self-sponsorship to receive permanent residence. Although some "essential employees" of E visa holders can obtain visas and then adjust, E-1 and E-2 visa holders constitute a very small number of the beneficiaries of permanent labor certifications, 1 percent.

386. "**Worldwide NIV Workload by Visa Category FY 2019**," U.S. Department of State, 2020; "**Worldwide NIV Workload by Visa Category FY 2021**," U.S. Department of State, 2022; and "**Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal under the Immigration and Nationality Act) Fiscal Year 2019**," U.S. Department of State, 2020.

387. 8 U.S.C. § 1101(a)(15)(O) (2019).

388. 8 U.S.C. § 1101(a)(15)(O) (2019).

389. Less than half a percent of labor certifications in 2021 (463) were for O-1 visa holders. See "**Performance Data**," U.S. Department of Labor, 2022.

390. 8 U.S.C. § 1101(a)(15)(L) (2019).

391. 8 U.S.C. § 1184(b) (2020).

392. "**Activities of U.S. Multinational Enterprises**, 2018," Bureau of Economic Analysis, November 5, 2021.

393. Office of the Director, U.S. Citizenship and Immigration Services, "**L-1B Adjudications Policy**," August 17, 2015.

394. "**Form I-129 Petition for a Nonimmigrant Worker Intracompany Transferee Specialized Knowledge (L1B) Receipts, Approvals, Denials, and Pending by Fiscal Year, Quarter, and Case Status 2016–2021**," U.S. Citizenship and Immigration Services, July 2021.

395. Some 97 percent of all L-1s who received labor certification in FY 2021 either had a college degree or were in a job requiring a college degree; see Employment and Training Administration, "**Performance Data**," U.S. Department of Labor, 2022.

396. This amount includes a $460 regular petition fee plus an optional $2,500 15-day processing petition fee, a $500 fraud fee, and, in cases of employers with 50 or more workers, a $4,500 L-1 dependency fee. See "**H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker**," U.S. Citizenship and Immigration Services, February 20, 2018.

397. 88 Fed. Reg. 402 (January 4, 2023).

398. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2019).

399. These rules also apply to willful violators of H-1B rules. 20 C.F.R. 655.737(a) (2023).

400. "**Performance Data**," Employment and Training Administration, U.S. Department of Labor, 2022.

401. "**H-1B Fees 2023–2024: Extension, Amendment and Transfer Cost**," VisaNation, January 3, 2023.

402. 88 Fed. Reg. 402 (January 4, 2023).

403. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (2020).

404. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (2020).

405. 8 U.S.C. § 1184(i)(1) (2019); and Desiree Goldfinger and Drilona Breçani, "**Redefining Specialty Occupation: How the Trump Administration Is Limiting the Use of the H-1B Visa Program**," *Federal Lawyer* (March/April 2019).

406. *Caremax Inc. v. Holder*, 40 F. Supp. 3d 1182 (U.S.D.C. N.D. California 2014); *Xiaotong Liu v. Baran*, SACV 18–00376 JVS (U.S.D.C. C.D. California, 2019); and "How to Become a Meeting, Convention, or Event Planner," U.S. Bureau of Labor Statistics, July 9, 2022.

407. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

408. "**H-1B Visa Attorney Fee**," USAVisaNow.com, 2021; 20 § C.F.R. 655.731(c)(9)(iii)(C); and 20 C.F.R. § 655.731(c)(10)(ii) (2020).

409. "**H-1B Visa Attorney Fee**," USAVisaNow.com, 2021; 20 § C.F.R. 655.731(c)(9)(iii)(C); 20 C.F.R. § 655.731(c)(10)(ii) (2020); and David J. Bier, "**H-1B Wages Surge to the Top 10% of All Wages in the US**," *Cato at Liberty* (blog), Cato Institute, April 7, 2022.

410. "**Approved H-1B Petitions (Number, Salary, and Degree/Diploma) by Employer, Top 100 Fiscal Year 2019**," U.S. Citizenship and Immigration Services, October 15, 2019.

411. 8 U.S.C. § 1184(g)(1)(A)(vii), (5)(C) (2020).

412. 8 U.S.C. § 1184(g)(5)(A) and (B) (2020).

413. "**H-1B Electronic Registration Process**," U.S. Citizenship and Immigration Services, April 25, 2022.

414. "**USCIS Immigrant Fee**," U.S. Citizenship and Immigration Services; "**Family Immigration: Fees**," U.S. Embassy and Consulate in Poland; and "**I-485, Application to Register Permanent Residence or Adjust Status**," U.S. Citizenship and Immigration Services.

415. 88 Fed. Reg. 402 (January 4, 2023).

416. "**H-1B Electronic Registration Process**," U.S. Citizenship and Immigration Services, July 29, 2021.

417. "**Performance Data**," U.S. Department of Labor, 2022.

418. "Worldwide NIV Workload by Visa Category FY 2021," U.S. State Department, 2022.

419. David J. Bier, "**1.4 Million Skilled Immigrants in Employment-Based Green Card Backlogs in 2021**," *Cato at Liberty* (blog), Cato Institute, March 8, 2022.

420. "**Performance Data**," U.S. Department of Labor, 2022.

421. "**Performance Data**," U.S. Department of Labor, 2022.

422. "**Form I 140, Current Status for All Countries**," U.S. Citizenship and Immigration Services, May 2021.

423. "**Number of Service-wide Forms by Quarter**," U.S. Citizenship and Immigration Services, 2022.

424. "**Number of Service-wide Forms by Quarter**," U.S. Citizenship and Immigration Services, 2022.

425. David J. Bier, "**1.4 Million Skilled Immigrants in Employment-Based Green Card Backlogs in 2021**," *Cato at Liberty* (blog), Cato Institute, March 8, 2022.

426. 8 U.S.C. § 1153(b)(1)–(5) (2020).

427. 8 U.S.C. § 1153(a)(2) (2020).

428. "**Form I-140, I-360, I-526 Approved Employment Based Petitions Awaiting Visa Availability by Preference Category and Country of Birth as of September 2021**," U.S. Citizenship and Immigration Services, December 15, 2021.

429. "Visa Bulletin for November 2021," U.S. Department of Labor, November 2021.

430. "Form I-140, I-360, I-526 Approved Employment-Based Petitions Awaiting Visa Availability by Preference Category and Country of Birth as of April 21, 2021," U.S. Citizenship and Immigration Services, November 2021.

431. "Table V (Part 1) Immigrant Visas Issued and Adjustments of Status Subject to Numerical Limitations Fiscal Year 2019," U.S. Department of State, 2020.

432. U.S. Bureau of Labor Statistics, "Civilian Labor Force Level [CLF16OV]," retrieved from Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, March 21, 2023.

433. 20 C.F.R. § 655.130(b) (2019); and "Prevailing Wage Determination Processing Times," U.S. Department of Labor, October 31, 2021.

434. 8 C.F.R. § 214.2(h)(5)(ix) (2019).

435. 20 C.F.R. § 655.731(a) (2019).

436. "Prevailing Wages," U.S. Department of Labor, 2022.

437. "Fact Sheet #62O: Must an H-1B Employer Recruit U.S. Workers before Seeking H-1B Workers?," U.S. Department of Labor, July 2009.

438. "Annual Reports, 1960–1965," U.S. Citizenship and Immigration Services, 2022.

439. *Yearbook of Immigration Statistics 2020*, Office of Immigration Statistics (Washington: DHS, 2020).

440. 20 C.F.R. § 656.12 (2019).

441. "FAQs about the L-1 by Employers," Peng & Weber U.S. Immigration Lawyers, 2011.