Business, Immigration Groups Push White House On Skilled Worker Visa Reform

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The White House has been dragging its feet on implementing basic administrative reforms that would ameliorate the country's broken immigration system, according to a coalition of organizations, including the U.S. Chamber of Commerce, the American Council on International Personnel, Immigration Works and the U.S. Conference of Catholic Bishops.

On Wednesday, the group released a report [PDF] via the National Foundation for American Policy, urging the Obama White House to take greater action to reform regulations affecting skilled foreign-born workers and students with advanced degrees.

According to the report:

Over the past several months, despite discussion of reviewing regulatory policies, employers have been met with the reality of agency actions that delay vital projects, force companies to go without valuable employees and push work outside the United States.

While in speeches the President has justifiably criticized policies that lead to educating international students in America only to send them back to their home countries, his own agencies make it difficult for skilled foreigners to work in America.

As comprehensive immigration reform remains unlikely in the current political climate, the report highlights steps that the administration could take immediately -- ones that the group contends would have a tangible effect on the immigration system and specifically serve to attract foreign-born talent to U.S. shores.

"This is low-hanging fruit," the Chamber's senior vice president for Labor, Immigration and Employee Benefits, Randel K. Johnson, said on a conference call. "That doesn't take legislative change on Capitol Hill."

Among the areas of concern, the report highlights outmoded labor certification regulations that call on would-be employers of foreign nationals to first take out costly print ads in newspapers to solicit American applicants, "even though in many of the fields in which this process is likely to take place, print advertisements have completely disappeared," according to the report.

Said Johnson, "There are print advertisements even for nuclear physicists -- those should be stricken from the regulations."

"It's one of those 'duh' moments -- but it still continues to be on the books," he added.

Other groups suggested the administration implement a "Trusted Employer Program" for companies that have "proven their commitment to compliance with U.S. immigration laws."

By streamlining the process in this way, they argue, the government could then focus on the eligibility of foreign national prospective hires and direct resources towards enforcement and fraud prevention.

As an example of the burden placed on employers looking to hire skilled foreign workers applying for H1-B visas, the report notes:

In the past year U.S. Citizenship and Immigration Services (USCIS) has conducted 15,000 on-site audits of employers that hire skilled foreign-born professionals. To put the enormity of 15,000 audits a year in perspective, in Fiscal Year 2009, there were only about 27,000 employers of new H-1B visa holders and 26,200 of them hired 10 or fewer foreign-born professionals.

Other suggestions included fast-tracking the visa applications for students with science, technology, engineering or math degrees (STEM) -- a sector that the White House has prioritized as a critical part of the 21st Century "innovation economy." At present, employers looking to hire foreign-born STEM specialists are required to demonstrate that there are a shortage of U.S. workers with such expertise through lengthy certification processes.

A reformed visa re-validation process, another suggestion in the report, would allow foreign nationals to renew visas for travel prior to their departure from the United States -- rather than requiring them to return to their home countries to reapply.

Whether the administration will take up these suggestions remains to be seen. Austin Fragomen, Chairman of the American Council on International Personnel, told HuffPost, "Obviously we welcome anything the administration is willing to do to facilitate some of these ideas. But in the scheme of all the different ideas that have been floated, the suggestions we've been making are far more significant than the few concepts that the administration has put on the table."

Alejandro Mayorkas, the director of the USCIS, pushed back on assertions that the administration was not doing enough. "There are criticisms that we deserve, but the criticism that we're not doing enough is not deserved," he said.

"We're doing a tremendous amount across the spectrum," he explained, saying the White House immigration reform efforts were not limited to business and employment concerns but also extended to "family unity and humanitarian relief" issues.

"When we announce new initiatives, we have to implement them operationally -- and that is not something that is done overnight," he added.

"We are being incredibly forward leaning," he said, and as evidence, pointed to a recent Aug. 2 Department of Homeland Security and USCIS announcement to increase transparency and efficiency around visas for skilled workers.

Mayorkas said that he thought some of the group's recommendations were "well taken" but explained that he would have to further examine them to determine whether they might amount to regulatory and statutory changes -- ones that would ultimately require Congressional approval. "The devil is in the details," he said.

NATIONAL FOUNDATION FOR AMERICAN POLICY

NFAP POLICY BRIEF» AUGUST 2011

REFORMING AMERICA'S REGULATIONS AND POLICIES ON EMPLOYMENT-BASED IMMIGRATION

EXECUTIVE SUMMARY

A review of current regulations and administrative procedures finds U.S. companies face counterproductive and often punitive policies directed against employers that utilize the global talent pool. Over the past several months, despite discussion of reviewing regulatory policies, employers have been met with the reality of agency actions that delay vital projects, force companies to go without valuable employees and push work outside the United States. While in speeches the President has justifiably criticized policies that lead to educating international students in America only to send them back to their home countries, his own agencies make it difficult for skilled foreigners to work in America.

Today, applications for skilled foreign nationals are routinely greeted by U.S. Citizenship and Immigration Services adjudicators with costly and time-consuming "requests for evidence." Immigration attorneys say they have never seen the process for approving applications this arduous and adversarial. In addition to problems with green cards and H-1B temporary visas, both the State Department and the immigration service routinely deny or delay applications for companies simply to transfer into the U.S. existing employees with specialized knowledge, another signal to keep more work abroad in the first place.

The oversight process has become more burdensome. Seeking to appease Congressional critics likely to remain dissatisfied, in the past year U.S. Citizenship and Immigration Services has conducted 15,000 on-site audits of employers that hire skilled foreign-born professionals. To put the enormity of 15,000 audits a year in perspective, in FY 2009, there were only about 27,000 employers of new H-1B visa holders and 26,200 of them hired 10 or fewer foreign-born professionals.[1]

Large employers with recognizable household names have received 6 or more visits within the past year, which does not add to the integrity of the H-1B visa category but tells companies our government would rather have them answer the same questions over and over than devote their energies to competing in global markets. A 2008 audit report assumed improbably that many employers who hire only 1 or 2 skilled foreign nationals on a H-1B visa were committing fraud, rather than the more likely scenario of such employers not understanding a complex legal procedure that often involves three separate government agencies and dozens of individual regulations. It's not surprising that the site visits have showed a rate of fraud or technical violations far lower than the original report. Since 2005, employers have paid over $700 million in government-mandated fees to fund enforcement activities against themselves.[2]

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[1] U.S. Citizenship and Immigration Services; *H-1B By the Numbers: 2010 and Beyond*, National Foundation for American Policy, March 2010.

[2] *Employers Have Paid Over $3 Billion in Mandatory Fees to Hire Skilled Foreign Nationals in Past Decade*, National Foundation for American Policy, March 2011.

At ports of entry, companies have reported cases of foreign-born engineers, computer specialists and executives being placed in 24-hour detention and sent back on planes because an immigration inspector at a port of entry did not think that professional's entry served America's economic needs. Recently a Customs and Border Patrol representative assured a business audience that foreign nationals subjected to these interrogations should welcome these "opportunities" to explain why they are coming to the United States.

In a *Wall Street Journal* article (January 18, 2011), President Obama announced a "government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive."[3] To be meaningful, such a process needs to be accompanied by concrete changes.

To help this process, the National Foundation for American Policy gathered together recommendations from several immigration attorneys and business organizations, submitted comments to the Department of Homeland Security notice, and compiled this report. The research was made possible by a grant from the Carnegie Corporation of New York. The statements made and views expressed are solely the responsibility of the authors.

Among the recommendations in this report:

- Sharply curtail requests for evidence by U.S. Citizenship and Immigration Services adjudicators and adjudicate cases in a timely manner.
- Stop wasting public and private resources by subjecting employers to redundant audits rather than engaging in focused enforcement.
- To keep skilled foreign-born professionals in America, return labor certification, a process required for an employment-based green card that costs up to $25,000, back to its original intention. At the time of the 1965 Immigration Act, the late Senator Edward Kennedy stated: "It was not our intention, or that of the AFL-CIO, that all intending immigrants must undergo an employment analysis of great detail that could be time consuming and disruptive to the normal flow of immigration." He said the Labor Department could simply use available statistical data on employment.
- To help ensure we have an accurate count of workers and their families who have been waiting 6 to 10 years for green cards due to low immigration quotas, allow skilled professionals to file early for adjustment of status prior to when a visa number is available. While this would not award green card status any faster, this could help our country retain skilled foreign nationals by giving them greater labor mobility,

[3] A copy of the executive order can be found here: http://www.theatlantic.com/politics/archive/2011/01/obamas-executive-order-and-memo-on-regulations/69711/

including the ability of the sponsoring employer to promote, and award interim benefits of travel and work authorization for the workers and their families while waiting for final green card issuance.

- To discourage illegal immigration, make visa rules less bureaucratic, not only for skilled professionals but also for H-2A visas for agricultural workers and H-2B visas for non-agricultural workers.
- Relieve long-time employer sponsors with good track records of certain burdensome application procedures.
- Adjudicate consistent standards for the highest-skilled immigrants in the employment-based 1st and 2nd preferences, since these categories are underutilized at a time when companies and countries are competing for the world's best talent.
- To foster startups, U.S. Citizenship and Immigration Services should rescind its January 2010 immigration memo that prohibited a company from petitioning for its founder, especially since, unfortunately, the agency's recently announced modification to the memo will benefit few potential foreign-born entrepreneurs.

This October marks the 125th Anniversary of the Statue of Liberty coming to America's shores. In that spirit, the Obama Administration should make changes to our immigration system that welcome talented individuals from around the world to contribute to America's competitiveness and prosperity.

U.S. CHAMBER OF COMMERCE

As the Obama Administration moves forward with its regulatory review in an attempt to weed out federal regulations "that are just plain dumb," it would do well to start with a top to bottom review of immigration-related regulations that are on the books today only as an accident of history.

There are multiple federal agencies, with competing institutional histories and expertise, assigned interlocking responsibilities concerning our nation's immigration laws. This cross jurisdiction itself is grounded in the past and how we have always addressed immigration as a nation. Perhaps this patchwork approach at the federal level should, ultimately, also be reexamined. A review of immigration regulations requires analysis at five separate agencies of the federal government, which are the State Department (visa issuance and exchange visitor programs), the Labor Department (certification as to wages and labor market impact), and three constituent agencies of the Department of Homeland Security: Customs and Border Protection (inspection and admission), Immigration and Customs Enforcement (interior enforcement), and Citizenship and Immigration Services (benefits adjudication).

There are many immigration regulations on the books which were appropriate at the time initially promulgated, but which the controlling federal agency has failed to review despite the evolution of new facts and circumstances. For example, the State Department's Bureau of Consular Affairs has failed to promulgate regulations creating a process for internal agency review of visa decisions. Under the governing 1952 immigration statute, the State Department is not required to create any internal process for review. This system made sense when official communications with consulates were via papers in diplomatic pouches and consular officers receiving visa applications were the only government representatives with access to the facts. Not only is this not a sensible view of the world today, continuing this approach has a serious negative impact on our immigration system.

Unlike almost any other administrative responsibility fulfilled by executive agencies of the U.S. government, consular officers are not subject to any formalized review process in visa decision-making. In the pre 9/11 environment when the U.S. remained perhaps the leading destination for corporate training, professional conferences, product demonstrations, and tourism, this approach, while perhaps lacking in transparency, may not have presented any particular downside to American interests. However, American companies are increasingly finding it necessary to change where they train international customers and foreign staff concerning their products and services, moving training centers and staff conferences outside of the U.S. because customers and staff from abroad cannot reliably obtain the necessary U.S. visas. Similarly, increasing numbers of business and tourism visitors from emerging markets like India, China and Brazil do not gain visas to the U.S. Last year, about 57

million Chinese citizens traveled outside of China for holidays, of which about 1 million (about 2%) chose the U.S. as their destination, at least in part because of the vagaries of the U.S. visa application process.

When the controlling statute was signed into law nearly 60 years ago, the decisions of a consular officer could not effectively or efficiently be controlled or reviewed beyond the walls of the consular section in far away locations. Now, though, the State Department's 216 visa-issuing posts around the world are linked by a real-time Consular Consolidated Database (CCD) that allows appropriate State Department officials access to one of the world's largest relational databases of information, and email, not diplomatic pouch, allows the Visa Office in Washington, D.C. to communicate regularly with consular staff. The CCD includes access to updates by program sponsors and other government agencies for many visa categories (via CCD access to SEVIS, the Student and Exchange Visitor Information System), documents from petitioning employers concerning visa petitions for employer sponsored status (via CCD access to PIMS, the Petition Information Management Service), and copies of prior passports and visas of each visa applicant.

While it is understandable that the State Department wants to ensure that its visa decisions remain discretionary and unreviewable in the courts, for important foreign policy reasons, the State Department could promulgate regulations or strong administrative guidelines establishing a prompt, informal internal agency review process for visa decisions, and a means to correct its own errors, without any change in statute, without diluting the discretionary nature of visa issuance decisions, without increased staffing, and while maintaining the bar to judicial review for visa issuance decisions. Absent such changes, problems in visa processing are compounded by the applicants' inability to obtain explanations for decisions and the lack of clear channels for pursuing redress, other than filing a new visa application. This lack of accountability has serious consequences in how the United States is perceived abroad in the 21st century, and in the Department's ability to timely and cost effectively rectify errors. It simply makes sense that there should be some, at least informal, internal review of a discretionary decision of such importance.

Presently, supervisory review is required by State Department policy for only a small fraction of nonimmigrant visa application cases.[4] Such review should be expanded, and the State Department should monitor and compile results of supervisory reviews, by visa category, post, country, consular officer, and globally. In particular, attention needs to be given to the fact that 93 percent of all nonimmigrant visa denials are in effect under one catch-all category that allows a consular officer to deny a nonimmigrant visa without ever having to identify the deficiency in the applicant's case.[5]

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[4] A non-citizen who is not seeking to enter the U.S. as a green card holder (also known as a permanent resident) is a "nonimmigrant."

[5] Nonimmigrant visa denials are most often based solely on refusal under Section 214(b) of the immigration law, meaning that the consular officer concluded the applicant did not generally meet his burden to prove he was complying with the terms of a

A review of immigration regulations targeting just those rules whose historical justification is now outdated would certainly be fruitful as a means to drive regulatory reform. To name just two more examples of such rules from other agencies with immigration responsibilities, one can look to the labor certification process and the premium processing system.

The Labor Department's Employment and Training Administration regulations continue to mandate print ads to test the labor market before certain immigration benefits can be granted, and restrict online advertisements. Even though print ads in the major newspaper of daily circulation are exceedingly expensive and are not always used by employers in real world advertising, the Labor Department's rules have never been updated. In recruitment for university professors, the rule goes farther because the focus is solely on journal advertisements yet there is no recognition of electronic publication. If the Labor Department's goal is broad exposure of the available position to assess whether qualified U.S. workers are interested and available for jobs being offered to those being sponsored for permanent resident status, online recruitment would be substantially more effective than print advertisements in today's labor market.

The Department of Homeland Security's Citizenship and Immigration Services regulations allow premium processing within 15 calendar days for certain petitions upon payment of an additional filing fee, but do not permit such processing for all similarly situated beneficiaries. The premium processing rules should be updated to allow such expedited processing for "E-3" visas, a classification based on a recent bilateral investment treaty with Australia that, among other things, permits certain Australian professionals to obtain work authorization in the U.S. when they are working temporarily in the country in a field related to their university degree. When premium processing was created, the E-3 visa category did not exist. While E-3 visas can be issued to Australians who are not present in the U.S., sometimes a U.S. employer selects an Australian who is already lawfully present in the country, such as those completing U.S. graduate degrees. When an Australian citizen is graduating from a U.S. university and qualifies for E-3 status to remain in the U.S. temporarily to work in a professional job, regular processing on an E-3 visa petition can take up to six months at Citizenship and Immigration Services, and usually takes at least two months at best. With payment of a premium processing fee, the sponsored worker can

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nonimmigrant classification and, therefore, could not document his intent to return home. While initially many nonimmigrant visa applicants are denied under Section 221(g) of the immigration law, meaning they lacked some of the required proper documents, 89% of these soft denials are overcome each year. Specifically, for FY10, the State Department's data shows there were 1,863,994 nonimmigrant visa applications denied in FY10, but of these, 694,620 were initially denied under 221(g) for having insufficient documents, of which 89% later provided the necessary documents and were issued visas. Removing the 221(g) ineligibilities that were overcome leaves 1,246,839 denied nonimmigrant visa applicants of which 93% were denied under 214(b). In effect, the State Department allows 214(b) denials to operate as a catch-all category that allows denial without providing any justification or standards.

maintain lawful status during the brief adjudication period and remain in the U.S. until receiving authorization to work for the sponsoring E-3 employer. Since premium processing is not available for E-3 petitions, and U.S. employers can't wait 2-6 months for a new hire, U.S. entities sponsoring workers for E-3 status typically must pay to send the sponsored worker halfway around the world to Australia to utilize an alternative procedure at American consulates in Australia, which can be completed more quickly than regular Citizenship and Immigration Services processing.

We believe that the Labor, Homeland Security and State Departments can and should study ways in which they can strike a better balance between security, efficiency, and fairness in our immigration system. They can do this without a congressional mandate for comprehensive immigration reform, and they can start with an analysis of regulations that are anachronistic, remaining on the books now only because they've always been there.

Randel K. Johnson and Amy M. Nice both work at the U.S. Chamber of Commerce, where Mr. Johnson serves as the Chamber's senior vice president for labor, immigration and employee benefits and Ms. Nice is the organization's executive director for immigration policy.

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Labor Department

A one-sentence provision of the immigration statute requires, prior to an immigrant being admitted for employment purposes, that the Department of Labor (DOL) certify that there are insufficient workers willing, able, qualified and available for the job, and that the employment will not adversely affect wages and working conditions in the United States.

Long ago, DOL concluded that the best way to reach a certification decision was to require employers to conduct recruitment under Department guidance and report to DOL about the results and the process followed. Over the years, these requirements became increasingly rigid and detailed as to where an employer could or could not recruit and what must be put in the advertisements. The process shifted somewhat in the late 1990s-early 2000s, to allow employers to use their actual recruitment processes rather than the formalized process dictated by DOL.

However, when DOL automated its system in 2005, it returned to the highly structured and specifically dictated recruitment process of the past. Since then, employers have been required to recruit using specific forms of recruitment and only during specific and narrow timeframes. Thus, real-world recruiting went back out the door in favor of stilted methods bearing no resemblance to the modern world.

The result is that, on top of the realistic recruiting that took place when the company found and hired the foreign national for whom a green card is sought, an expensive and futile new recruitment must be held. As a base, the employer *must* run a print advertisement, even though in many of the fields in which this process is likely to take place, print advertisements have completely disappeared. Some newspapers' and magazines' help wanted ads are completely labor certification advertisements.

This labor certification process is outmoded, burdensome and expensive. Employers who could be using those resources on expansion, marketing, or some other productive manner are instead "investing" them in a meaningless, non-productive compliance process that exists solely for its own sake. A better alternative is to return to the process of the late 1990s, when employers could show DOL what they did to conduct a "real" recruitment.

Department of Homeland Security

The Department of Homeland Security seems to have considerable difficulty in issuing regulations. Instead, its practice, particularly within the USCIS component agency, is to issue guidance memoranda. One such memorandum stands out above all others as a stifler of jobs and competitiveness: a January 8, 2010 memo titled "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements."[6]

Buried within this memo is the assertion that business owners cannot be employees, even of a corporation, and thus cannot be eligible for an H-1B working visa. While the memo is specific to the H-1B category, the reasoning has been applied to other categories as well, including intra-company transferees. The net result is that business owners who want to start up operations in the U.S. cannot obtain the visa needed to do so, and thus do not bring their job-creating businesses here. A clarifying Q&A issued Aug. 2, 2011, indicates that if there is a Board or other entity that has the right to control the business owner, an employment relationship can be shown.[7] However, it remains to be seen if USCIS adjudicators will find such right to control in any typical entrepreneurial situation. In California alone, according to a 2008 study by the California Immigrant Policy Center, "Immigrants are among California's most productive entrepreneurs and have created jobs for tens of thousands of Californians. By 2000, immigrant owners of Silicon Valley companies had created 72,829 jobs and generated more than $19.5 billion in sales."[8] The 2010 memo has put the brakes on this kind of development countrywide.

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[6] See Sherry Neal and Michael Hammond, *Take a Memo*, National Foundation for American Policy, March 2010.
[7] See http://www.dhs.gov/ynews/releases/20110802-napolitano-startup-job-creation-initiatives.shtm.
[8] *Looking Forward: Immigrant Contributions to the Golden State*, California Immigrant Policy Center, January 2008.

Fixing the Problem?

All agencies involved with immigration have issued notices inviting comment on how to make regulations more effective by modifying, streamlining, expanding, or repealing them. However, all of these agencies provided a comment period of only 30 days. 8 CFR, the regulations of the Department of Homeland Security alone related to immigration, is 1,010 pages long. That does not count Department of Labor, Department of State and Department of Justice regulations. It is hard to see this as a serious effort with so short a comment period.

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FRAGOMEN, DEL REY, BERNSEN AND LOEWY, LLC

Consistent with the Obama Administration's directive to the Executive Branch, we recommend regulations that could be changed or eliminated because they "stifle job creation and make our economy less competitive."

Department of Labor

a. One-for-One Recruitment via Certification Application for Multiple Openings

Labor Certification is based on demonstration by the sponsoring U.S. employer that there is a shortage of U.S. workers. Currently one minimally qualified U.S. applicant prevents filing multiple Labor Certifications. Instead, one qualified applicant should prevent only one Labor Certification from being filed. If an employer has ten Labor Certification positions and only two qualified U.S. workers respond to recruitment, the employer has demonstrated a shortage of eight U.S. workers and should be able to get eight Labor Certifications.

Allowing applications for certification of multiple openings would be an easy way to administer this. For example, an application for certification of five openings could be based on a demonstration that there was recruitment for seven positions but only two qualified U.S. workers.

b. Expand Schedule A Pre-Certification Beyond Physical Therapists

DOL has authority to pre-certify occupations and not require employers to demonstrate shortage of U.S. workers through recruitment. 20 C.F.R. §656.5 ("Schedule A"). DOL has made sparing use of Schedule A. However, in keeping with the privileged position of STEM [science, technology, engineering and math] and scientific research positions within public policy in general and recent

Obama administration pronouncements in particular, and given the accepted shortage of certain types of U.S. workers, the following are alternatives for Schedule A precertification:

Ph.D. research positions in STEM
Any research position in STEM
Any STEM position

Employers get thousands of STEM Labor Certifications every year. It is burdensome on DOL and employers to require repetitive recruitment for STEM when the shortage is clear and the positions are especially important.

c. Have an Easier Real World Standard for Labor Certification for Certain Positions

The current standard is that availability of a minimally qualified U.S. worker prevents Labor Certification, even if the U.S. worker's minimum qualifications are far below the employer's normal hiring standards. For example, the employer might normally require top grades from select schools, rather than a "minimally qualified" person with very low grades in a weak program.

The standard should instead always be the same as the one that DOL already applies to college and university teachers through "special handling." Under special handling, if the foreign national is more qualified than available U.S. workers and all other regulatory requirements are met, then Labor Certification is granted. 8 U.S.C. §212(a)(5)(A)(i)(1); 20 C.F.R. §656.18(b). The standard matches real world hiring and is better public policy because it promotes excellence.

While "special handling" for college teachers is statutory, DOL has authority to implement the standard more broadly. DOL has the Schedule A authority *supra* to pre-certify occupations and *a fortiori* has authority to relax the standard for certain occupations. At minimum special handling should be expanded to STEM positions or STEM research positions, which are as favored under public policy as college positions.

Department of Homeland Security

a. Apply 240-Day Rule to Employment Authorization Document ("EAD") Extensions.

This would allow work authorization for 240 days after filing for an EAD extension, even if the extension is not approved before the expiration of the original EAD. This 240-day rule already applies

to extension of nonimmigrant statuses. The proposal would ease adjudication burdens on USCIS and prevent disruptive gaps in employment authorization.

USCIS must adjudicate EAD renewal applications within 90 days, but if that does not occur the regulations provide for an interim EAD valid for 240 days. 8 C.F.R. §274a.13(d). In reality, however, getting the interim EAD has been either impossible or unreliable. Unfortunately, the process for obtaining an interim EAD is unreliable. The result is that employees sometimes have gaps in work authorization, and frequently the fear of such a gap exists until the eleventh hour and disrupts business planning.

The Ombudsman recommended this automatic 240-day extension by allowing I-797 receipt notices for EAD renewals to be the 240-day work authorization document. This would be an easy solution to the problem.

b. Expand the Ability of Work Visa Holders to Travel without Advance Parole Documents when Adjustment of Status (AOS) Applications are Pending

USCIS does not require H and L visa holders with Adjustment of Status applications pending to obtain advance parole documents for international travel. 64 Fed. Reg. 29208 (1999). The 1999 regulation stated,

> [i]n addition, the Service is considering expanding the dual intent concept to cover other long term nonimmigrants who are visiting this country as traders (E-1), investors (E-2), students (F-1, J-1 or M-1), or scholars (J-1), etc. These nonimmigrants, who are typically authorized to stay in this country for considerable lengths of time, often need to make short overseas travels during their authorized stay. Under the ``dual intent'' doctrine, these nonimmigrants would be able to maintain valid nonimmigrant status and travel overseas without advance parole while applying for adjustment of status.

The Service, however, *has not expanded the regulation and still requires people with other work statuses such as* TN, E, and O to get an advance parole document or else they are deemed to have abandoned their adjustment applications if they leave the U.S. The rationale for this abandonment is archaic and long forgotten.

Department of State

a. Resume Visa Revalidation in the United States

The U.S. Department of State should resume visa revalidation in the United States, a practice that was discontinued in 2004. The visa revalidation system was a great convenience to the business community, allowing foreign nationals to renew visas for travel prior to their departure from the United States. The system allowed foreign nationals to keep their visas current, thus avoiding costly and time consuming travel simply for the purpose of obtaining a visa. Currently, U.S. employers use significant resources to send foreign nationals abroad to obtain visa renewals and are often faced with a loss of productivity during the renewal process. In other circumstances, employers are unable to send foreign nationals on business related work overseas because of insufficient time to obtain visas abroad prior to their return to the United States.

The visa revalidation system should be reinstated for E, H, I, L, O and P nonimmigrant visa categories. Although the U.S. Department of State has interview requirements and mandates to obtain biometric information for visa issuance, these requirements could be modified or adapted to allow for visa issuance within the United States. There would be a significant financial and operational benefit to U.S. employers. At the same time, U.S. consulates abroad would be relieved of some routine renewal visa processing and could divert resources to a more efficient centralized visa processing. Resuming the visa revalidation process would preserve government resources, reduce visa related costs for employers and eliminate unnecessary travel by foreign national employees.

Allowing visa revalidation could only increase the opportunities to do security background checks. Everybody who currently goes to consulates for visa revalidation would continue to do so from within the U.S. and some people who currently do not leave the U.S. because of potential delays in visa issuance would apply for revalidation.

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AMERICAN COUNCIL ON INTERNATIONAL PERSONNEL

Trusted Employer - Flexible and Efficient Regulation

Section 4 of Executive Order 13563 states that "[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that *reduce burdens and maintain flexibility* and freedom of choice for the public." An idea with strong support in the employer community is creation of a *Trusted Employer* registration program that would reduce the paperwork burden and render more efficient and consistent decisions for employers that have proven their commitment to compliance with U.S. immigration laws. Such streamlined processing was recently recommended to US Citizenship and Immigration Services (USCIS) by the Government Accountability Office[9] but could easily be extended to other parts of the immigration system, including the Department of State, Department of Labor, and Immigration and Customs Enforcement.

The *Trusted Employer* concept is actually quite simple.[10] Employers who comply with U.S. immigration laws and who routinely hire foreign nationals as part of their U.S. or global operations would demonstrate to the government that they continue to have the resources and processes to maintain compliance. Because fundamentals such as financial stability, organizational structure and the nature of an employer's business do not change frequently, the agency should not be required to review them more than once every few years. This would allow the government to instead focus more attention and resources on the credentials and eligibility of the foreign national employee, while also allowing any saved resources to go toward other priorities like enforcement and fraud prevention and detection. An annual report submitted by the employer would document visa use and any compliance challenges.

Trusted Employer can serve as a modest but important solution to several important issues confronting our nation:

- **Jobs Recovery**. *Trusted Employer* could serve as a core asset of a thriving economy by ensuring "predictability" through efficiency, transparency and consistency. CEOs are looking 10 and 20 years ahead to the coming global demographic and economic shifts and are trying to determine where to build their workforces.[11] These CEOs are in agreement that there will continue to be a need, and intense competition for, talent. As the economy recovers, smart immigration policy will be integral to winning the

[9] "H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program," GAO-11-26 January 14, 2011.
[10] See www.acip.com/advocacy for more detailed information on Trusted Employer.
[11] See "Stimulating Economies Through Fostering Talent Mobility," World Economic Forum, January 2011. See also,

war for talent, which will create even more jobs in those countries that get the best and brightest. *Trusted Employer* will reduce redundant paperwork for the employers with demonstrated track records of compliance and allow them to devote more time and resources to U.S. job creation, economic growth and innovation.

- **Immigration Enforcement**. *Trusted Employer* would aid the proverbial search for the needle (fraud and abuse) in the haystack. A 2008 USCIS report has shown that to the extent that there is fraud and abuse in the immigration system, it is perpetrated by less well-known employers.[12] Therefore, it is important to separate the employers who can demonstrate their experience with and commitment to immigration compliance from those who may be new to the field or have previously violated the laws. Freeing government resources to focus on these entities makes enforcement easier.

- **Budget Savings**. *Trusted Employer* could put a small dent in the looming government deficit. Although USCIS is primarily funded by user fees, Customs and Border Protection, Immigration and Customs Enforcement and the Departments of Labor and State receive significant appropriations that facilitate visa processing and enforcement. *Trusted Employer* can save government resources by eliminating duplicative paperwork reviews and can generate revenue as most employers would gladly pay a fee to enroll in a more efficient, predictable, streamlined and reliable system.

Models for Trusted Employer already exist. In the first annual State of DHS address, Secretary Janet Napolitano announced that the Department would expand Trusted Traveler and Trusted Shipper programs in 2011.[13] The United Kingdom distinguishes between "trusted" and "highly trusted" sponsors and Australia employs an employer registration system. As President Obama said in his State of the Union address, America must 'win the future.' *Trusted Employer* is a part of that future.

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[12] "H-1B Benefit Fraud & Compliance Assessment," U.S. Citizenship and Immigration Services, September 2008.
[13] State of America's Homeland Security Address, January 27, 2011.
http://www.dhs.gov/ynews/speeches/sp_1296152572413.shtm

IMMIGRATION VOICE

Allow filing of Adjustment of Status (Form I-485) when a visa number is not available

Allowing adjustment of status when visa numbers are not available would provide desperately needed job flexibility to high skilled professionals who are here for many years working in the United States. This minor fix will not result in a single green card being expedited. Rather, by allowing applicants to obtain an Employment Authorization Document (EAD) through the adjustment of status process, this minor fix would allow high-skilled immigrants to accept job offers and promotions, either with their current employer or other perspective employers, without having to start the entire green card application process all over again.

This simple administrative change would have other benefits as well. It would allow immediate background security and medical checks on workers who otherwise are not subject to such screening until an immigrant visa number becomes available. Additionally, facilitating increased job flexibility would benefit America's economy by allowing the labor market to work more efficiently, with high-skilled talent migrating to areas where they are most needed.

Allow visa revalidation in the United States

While the authorization to remain in the U.S. to work can be renewed without leaving the country, hundreds of thousands of legal high skilled immigrants find themselves unable to travel outside the country either for business or personal reasons without encountering tremendous bureaucratic hurdles. In the past, new entrance visas were available without leaving the country. In recent years, however, legal immigrants must return to their country of origin to have these visas renewed by US diplomats abroad. This new system has overwhelmed embassies and consulates abroad, resulting in delays as legal U.S. immigrants authorized to work in the U.S. wait weeks or months for appointments so they can reenter the U.S. to return to their jobs.

For example, a medical doctor from India legally working and living in the U.S. for seven years may have an expired entrance visa in his passport, though he is still legally allowed to work in the U.S. If that doctor were to attend a medical conference in Toronto, he would then have to travel from Toronto to India to get a new stamp in his passport. In India, he would have to wait weeks for an appointment at the U.S. embassy before he could return to the U.S. As a result, a three-day medical conference in Toronto would require a trip around the globe and a month-long absence from the doctor's medical practice in the United States.

Employer and federal agencies (USDOL and USCIS) obligation to provide the immigration case related paperwork upon request from the beneficiary

At present, employers and lawyers are custodians of all the original immigration paperwork/documents of the immigration casework for the employee. However, the employee may need originals for important reasons such as applying for driver's license, rent an apartment, mortgage application, car loan, child's admission to school, visa stamp for self or his/her spouse, and for changing employers. Due to administrative hurdles or plain negligence from the employer, often times the employee does not always have easy access to the non-immigration and immigration application paperwork, which he/she may need, for travel or in pursuit of alternative employment opportunities. In the worst cases, some employers withhold such documents from employees to prevent employees from applying for job opportunities at other companies.

For the sake of fairness, Immigration Voice requests for an administrative fix be enacted to make it mandatory and compulsory for employers and lawyers to give the original or copies of immigration paper work and documentation when requested by the employee on visa or pending green card status. The fix could also make it illegal to intentionally withhold originals or copies of immigration documents and applications, making it illegal not to issue the requested immigration documents to the beneficiary if such a request is made in writing. The employer and the federal agencies would be required to produce originals or certified/notarized copies of all documents pertaining to immigration and non-immigrant visa including but not limited to L-1/H1B petitions, L-1/H1B notices for RFE, L-1/H1B notices of approval or denial, green card labor petitions, I-140 (immigrant) petitions, and all notices and petitions pertaining to an I-485 (adjustment of status) filing. This fix will go a long way in curbing a loophole with far reaching consequences in the lives of skilled immigrants.

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IMMIGRATIONWORKS USA

RECOMMENDATION: Give employers a legal option – make existing temporary worker programs work for U.S. businesses

The problem. Most employers who rely on immigrant workers want to be on the right side of the law – it's their obligation as citizens and it makes good business sense. But existing temporary worker programs are so burdensome, bureaucratic and restrictive about who is eligible to participate that only a fraction of employers who need additional workers to keep their businesses running and contributing to the economy take advantage of them.

Exhibit A. The H-2A temporary farm worker program is uncapped – there is no annual quota. But the regulations are so cumbersome, the process so out of sync with the real-time needs of agricultural employers, that only a small fraction of farmers use the program – and an estimated 60 percent of the workers employed in American agriculture are illegal immigrants. If there was a better option, American farmers would make use of it. But if anything, in recent years the Department of Labor has been piling on additional rules and regulations that make H-2A – and its sister program, H-2B, for non-farm workers at resorts and other seasonal businesses – even less practical for employers to use as a last resort when they are unable to fill jobs with U.S. workers.

FOUR EASY FIXES

- **Expand the circle of employers who can use existing programs.** One of the nation's biggest and most significant agricultural sectors – dairy – is barred from participating in the H-2A program. Dairy farmers' reliance on foreign workers has skyrocketed in recent years as young Americans move away from rural areas and even the children of dairy families seek less arduous and less demanding work. But dairy farmers are largely excluded from the only program that offers farmers a legal way to hire foreign workers. This must change – or the dairy industry will eventually move offshore. Dairy farmers should have access to the H-2A program – as should an array of food packers and processors who are also excluded.

- **Eliminate the 50 percent rule.** Of course, employers should try to hire Americans first – and visas should be issued only when businesses have exhausted all other options. The current H-2A rules require employers to spend thousands of dollars trying to recruit U.S. workers. Then if the recruitment is unsuccessful, they spend thousands more to hire temporary foreign workers – paying a lawyer to file paperwork, hiring a recruiter to find the worker, arranging for his travel to the U.S. and providing housing for him. But even after complying with all of the government's recruiting requirements, the employer can't be certain how things will play out. If an American shows up looking for work at any point during the first half of the foreign worker's stay in the U.S., the employer must hire the American – and either fire the foreigner (and pay for his travel home) or keep both workers on the payroll, paying two employees to do the same job. Only the federal government could come up with a scheme that requires employers to hire workers for positions that have already been filled. The 50 percent rule should be scrapped.

- **Let employers set meaningful performance standards.** The Department of Labor regulates virtually every aspect of H-2A jobs and worksites – from the number of hours for which workers must be paid (whether or not they actually work that long) to the screen doors on their housing and the quality of their cooking utensils. It also approves the production and performance standards that H-2A employers set for employees, foreign and native-born. And in some cases, if a farmer relied on foreign workers before 1977, the government generally

prohibits him from requiring current employees to be more productive than his workers were 30 years ago – despite significant advances during this period in farming techniques and technology. This is absurd. Not only does it make it all but impossible for the farmer to compete with rivals who hire U.S. workers or illegal immigrants; it's also a drain on productivity – for this farmer and for U.S. agriculture. This rule should be eliminated.

- **Modernize the bureaucratic application process and create a window of last resort.** Despite these burdensome rules and regulations, thousands of small and medium-sized business owners across the U.S. rely on existing temporary worker programs to keep their companies running, especially during peak seasons and other busy times of the year. Business owners apply months in advance, spend thousands of dollars to recruit workers, jump through hoops to meet federal requirements – and then find themselves at the mercy of an unpredictable and indifferent government bureaucracy. Applications get lost in the processing pipeline, envelopes sit unopened on desks, no one notifies employers that there is a problem until it's too late to fix it – until the application deadline has passed or the quota has been filled. And for many of the businesses that rely on the H-2 programs, these seemingly small slips are fatal: without the foreign workers they need, fruit rots in the fields, machinery sits idle, orders go unfilled – and eventually businesses downsize or close, laying off Americans as they go under. This is not only bad for business – it's a waste for the U.S. economy and makes us less competitive in the global marketplace. The government should modernize the application process, adding features such as electronic filing, online tracking of applications and responsive customer service departments, now standard in the business world. The government should also create a separate application track that employers can resort to when normal processing fails them – someone they can call and get an answer, with expedited procedures and reliable service. The two steps go together – creating a new track cannot be an excuse for routine applications to take even longer. But employers trying to play by the rules should not be left at the mercy of a bureaucracy where no one is answering the phone.

Tamar Jacoby is President and CEO of ImmigrationWorks USA.

ATTORNEYS CHRIS GAFNER AND STEPHEN YALE-LOEHR

How USCIS Can Help the United States Win the Global Competition for the Best and Brightest

Introduction

The United States needs the world's best and brightest immigrants. They disproportionately benefit the United States by creating jobs, advancing science and technology, and improving the nation's economic position. Congress acknowledged their benefit to the country by making them a top priority in the 1990 statutory overhaul of the immigration system.

Since 1991, however, the regulatory framework for attracting the best and brightest has unnecessarily limited their immigration into the United States. The regulations and the immigration agency's interpretation of them have been continuously debated, modified, and challenged. Today, twenty years later, the debate continues. Statistics demonstrate the inconsistent regulatory standard for the best and brightest immigrants. Statistics also show that the regulations have unnecessarily limited the number of highly talented immigrants admitted to the United States.

Absent agency action, the current regulations will continue to stifle the immigration of talented individuals to the United States.

Congressional Intent

Congress enacted the current U.S. immigration system as part of the Immigration Act of 1990 ("IMMACT90").[14] The 1990 Act prioritized highly talented immigrants by giving them the first priority in a five tiered employment immigration system.[15] Further, Congress gave these priority workers certain advantages, including the ability to bypass the normal labor certification requirement[16] and to self-petition in some cases.[17]

As a whole, IMMACT90 was an expansive enactment. The act increased the annual limit of employment-based immigrants from 56,000 to 140,000.[18] Many members of Congress noted the importance of increasing the number of highly qualified immigrants to the United States. One representative even stated that "we may even question

[14] Pub. L. No. 101-649, 104 Stat. 4978.
[15] 8 U.S.C. § 1153(b) (2006). The first level is reserved for priority workers, including immigrants with extraordinary ability, outstanding professors and researchers, and multinational executives and managers. The second level is for professionals holding advanced degrees and persons with exceptional ability. The third level is for skilled workers, professionals, and other workers. The fourth level is for "special immigrants," including religious workers. The fifth level is for immigrant investors.
[16] 8 U.S.C. § 1182(a)(5)(A). A labor certification is a process through which a petitioner demonstrates that no sufficient U.S. workers are able, willing, and qualified to take the position the foreign national seeks.
[17] 8 U.S.C. § 1153(b)(1)(A). Self-petitioning immigrants do not need to be sponsored by a U.S. employer and do not need to have an offer of employment to immigrate to the United States. Only certain priority workers are allowed to self-petition.
[18] 8 U.S.C. § 1151(d) (2006).

why [IMMACT90] does not go further in admitting additional skilled workers and immigrants with the knowledge and know-how that America will need to the 20th century."[19]

IMMACT90 divided first priority workers into three distinct subcategories. The first sub-type, commonly called EB 1-1, allows for individuals with extraordinary abilities to enter the United States through self-petitioning or employer sponsorship. The second sub-type, EB 1-2, allows outstanding professors and researchers to immigrate to the United States without completing a labor certification. The third type, EB 1-3, allows managers and executives of multinational companies to enter the United States.[20]

The statute requires EB 1-1 seekers to have "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation."[21] The statute requires EB 1-2 seekers to be a professor or researcher "recognized internationally as outstanding in a specific academic area,"[22] having at least three years of experience in teaching or research,[23] and be entering the United States to work in a tenure-track position (or comparable position) at a university, institution of higher education, or a private employer.[24]

Regulatory Confusion

Regulations supplementing IMMACT90 were issued in 1991. In the twenty years since, the regulations for the best and brightest immigrants have caused confusion and debate. The confusion continues to this day.[25]

A source of constant debate has been the regulatory constraints for EB 1-1 and EB 1-2 status. The immigration agency has changed its interpretation of the regulations numerous times. In 1992, the agency's Acting Associate Commissioner for Examination interpreted the regulations in a way completely different from how the immigration agency now adjudicates these petitions.[26] Further, the shifting standard for EB 1-1 and EB 1-2 status has led to numerous federal court cases, many of which have interrupted the regulations differently.[27]

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[19] 101 Cong. Rec. E3099 (1990) (statement of Rep. Glenn Anderson) (noting that thirty-one leading economists had been surveyed and all of them believed immigration had a favorable impact on the national economy).
[20] The EB 1-3 category is often used by business-types and is not often used by the best and brightest immigrants outside of the business environment. As such, the EB 1-3 regulations are not discussed in this article.
[21] 8 U.S.C. § 1153(b)(1)(A)(i).
[22] 8 U.S.C. § 1153(b)(1)(B)(i).
[23] 8 U.S.C. § 1153(b)(1)(B)(ii).
[24] 8 U.S.C. § 1153(b)(1)(B)(iii).
[25] For a more complete discussion of the regulatory confusion since 1991, see Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and Brightest: A Critique of Current U.S. Immigration System,* 38 Fordham Urban Law Journal 183 (2010).
[26] Memorandum from Lawrence Weinig, INS Acting Assoc. Comm'r for Examinations, to James Bailey, INS Northern Serv. Ctr. Dir. (July 22, 1992), *reprinted in* 69 Interpreter Releases 1051-52 (Aug. 24, 1992).
[27] *See, e.g.*, Buletini v. INS, 860 F. Supp. 1222, 1234 (E.D. Mich. 1994) ("It is an abuse of discretion for an agency to deviate from the criteria of its own regulation. Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R.§ 204.5(h)(3), the alien must be deemed to have extraordinary ability . . .");

Currently, U.S. Citizenship and Immigration Services (USCIS) is attempting to modify its current adjudication process after a Ninth Circuit decision chastised the agency for misconstruing the EB 1-1 regulations.[28] Whether the Ninth Circuit intended its decision to be the basis for the agency's understanding of the regulations purpose is questionable, however, as the court dismissed the petitioner's claim on a preliminary question.

Statistical Evidence Demonstrates Agency Inconsistency

Statistics highlight the inconsistent adjudication of the agency's regulations. Statistics also show the negative consequences of the restrictive nature of the regulations and inconsistent adjudicatory standards.

The diagram on the next page shows the number of principal EB 1-1 and EB 1-2 immigrants who have obtained permanent residency each year since IMMACT90's implementation:[29] The chart shows a clear correlation between the number of EB 1-1 and EB 1-2 petitions. In all but the last year, the two immigration types both increased or both decreased. The chart also shows an ebb and flow that does not correlate with economic conditions. The number of visas issued did not necessarily rise during economic booms or fall during economic recessions.[30] If the ebb and flow of the visas were not caused by the economy, then the likely reason for the drastic changes would be a change in the way USCIS interpreted the regulations.

The chart also demonstrates the relatively low number of visas issued to the best and brightest immigrants. The first priority employment immigrant visa category, which includes EB 1-1, EB 1-2, and EB 1-3, has about 40,000 slots annually. The first priority's 40,000 annual visa level has almost never been reached.

Moreover, the 40,000 limit includes principal immigrants, their spouses and minor unmarried children. The combined annual total of only principal EB 1-1 and EB 1-2 immigrants has only once exceeded 10,000, and has an annual average of less than 5,000.

To put this into perspective, the U.S. Census Bureau estimates that the U.S. population exceeded 310 million at the beginning of 2011.[31] Yet in 19 years the United States has admitted less than 90,000 EB 1-1 and EB 1-2 principal immigrants into the United States. That represents less than .029% of the total U.S. population.

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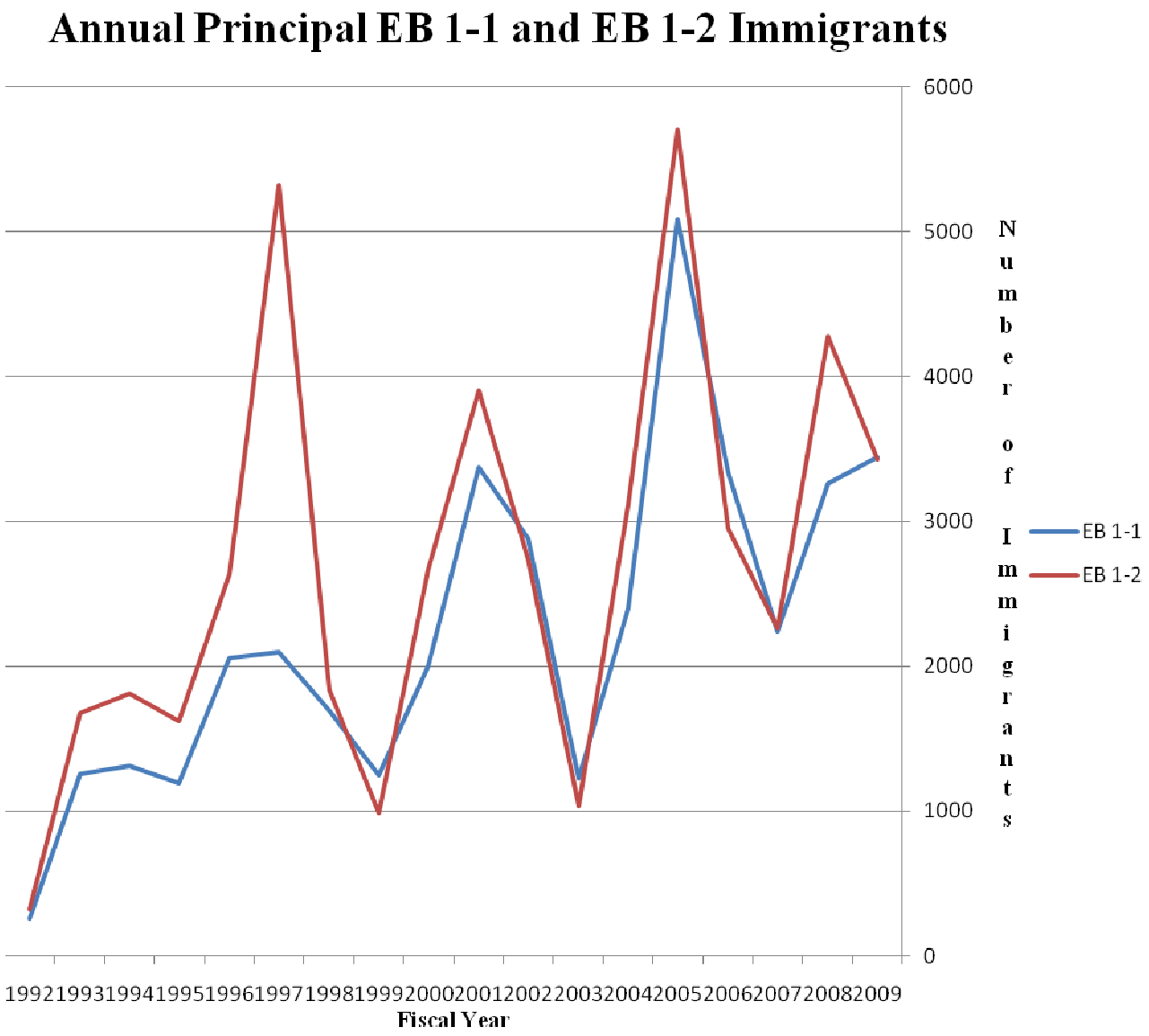
[28] Kazarian v. U.S. Citizenship and Immigration Services, 596 F.3d 1115 (9th Cir. 2010).

[29] Principal EB 1-1 and EB 1-2 visas means visas issued to the petitioning individual, and do not include spouses and children who also receive the same immigration status as the sponsored or self-petitioned immigrant. The statistics for the chart, along with the other statistics cited in this section, are gathered from the Department of Homeland Security and the legacy Immigration & Nationality Services Statistical Yearbooks.

[30] For example, the United States had a robust economy between 2005 and 2007. Yet during that time the number of EB 1-1 and EB 1-2 immigrant visas dropped by over fifty percent.

[31] Statistical Abstract of the United States: 2011, Population 9, Table 3 (2011), *available at* http://www.census.gov/prod/2011pubs/11statab/pop.pdf.


Annual Principal EB 1-1 and EB 1-2 Immigrants
6000
5000
4000
3000
2000
1000
0
Number of Immigrants
EB 1-1
EB 1-2
1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009
Fiscal Year

Fixing the Regulations

Congressional intent was clear in IMMACT90. The regulations must offer equal clarity. In addition to clarity, the regulations must be flexible to accommodate technological change, fully use the first priority immigrant visa slots, and recognize the growing international competition for talent. If USCIS fails to improve its regulations to encompass these changes, the United States will fall behind in the international competition for the best and brightest.

Create a Clear, Consistent, and Transparent Standard: The immigration agency has interpreted its EB 1-1 and EB 1-2 regulations inconsistently for the last twenty years. To eliminate the current confusion, the immigration agency should set out an objective and transparent standard. The standard set out in *Buletini v. INS* is a good place to start.[32] *Buletini* suggests that an applicant must normally meet a set number of criteria laid out in the current regulations. This standard, with a little modification to reflect the points below, would provide a clear standard to applicants. Additionally, to alleviate concerns of potential misuse, *Buletini* suggests that in unique situations, where an applicant technically qualifies for the position but the adjudicator does not believe the applicant should receive it, the immigration agency should provide detailed, specific, and original reasons for the concern and give the recipient time to respond to those concerns.

Flexibility to Change: The current regulations were written when much of current technology was unknown. Technological advances have changed the way that scientists and academics perform their duties and present their findings. The regulations fail to encompass these technological advances. The regulations must be made more flexible to technological change. For example, the regulations appear to emphasis printed media over online media.[33] Yet a substantial amount of academic interaction and media recognition is through the Internet. The regulations also appear to emphasis outdated indicators of commercial success, including "box office receipts or record, cassette, compact disk, or video sales."[34]

Fully Use EB 1-1 and EB 1-2 Immigrant Visa Slots: The current regulations have unnecessarily limited the number of highly skilled workers allowed into the United States. Although the priority worker tier should not be available to everyone, the tier should and needs to be implemented in a way that ensures that it is not underused. Since unused first priority numbers are passed to the second and third priority visa groups, more stringent regulations or interpretations do not mean that fewer immigrants enter the United States. Instead, it means that more less-talented immigrants are allowed into the United States.

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[32] 860 F. Supp. 1222, 1234 (E.D. Mich. 1994).
[33] *See* 8 C.F.R. § 204.5(h)(3)(iii), (vi), (x); 8 C.F.R. § 204.5(i)(3)(i)(C), (F).
[34] *See* 8 C.F.R. § 204.5(h)(3)(x).

International Competition: In fixing the regulations, the agency must be conscious of the growing international competition for the world's most talented individuals. The United States is not the sole destination for talented immigrants. Since 1990, many countries have developed immigration systems to attract the world's top talent.[35] In general, these systems are quicker than the U.S. process and are significantly more transparent. Additionally, countries long seen as the source of immigration are starting to develop national programs to keep talented individuals from wanting to leave their country.[36]

Any modification to the regulations should recognize the changing international situation. The United States cannot solely rely on its historical position as a leader in attracting the best and brightest immigrants. Instead, USCIS must perfect a process that offers quick and transparent decisions similar to those offered in other countries. Currently, USCIS can take many months to reach a decision and often provides vague and template justifications for denials. USCIS must adapt a system that balances the need for quick adjudications and the need for case specific justifications for its decisions. In today's fast-paced economy, a slow adjudication is just as destructive as no adjudication. Employers and employees cannot wait months for USCIS to act.

Conclusion

Highly talented immigrants have made extensive contributions to the United States. These contributions have been extensively documented, including evidence that twenty-five percent of U.S. startups have at least one noncitizen founder[37] and that five 2009 Nobel Prize winners were immigrants living in the United States.[38] Implementing clear, succinct regulations would ensure the United States fully benefits from the contributions of these talented immigrants. Failing to act will hinder U.S. efforts at economic and scientific betterment.

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[35] For an examination of some countries' systems, see Gafner & Yale-Loehr, *supra* note 12.
[36] *Id.*
[37] Vivek Wadhwa et al., America's New Immigrant Entrepreneurs 4 (2007), *available at* http://people.ischool.berkeley.edu/~anno/Papers/Americas_new_immigrant_entrepreneurs_I.pdf.
[38] Medicine—Elizabeth H. Blackburn (Australia) and Jack W. Szostak (United Kingdom), *Nobel Prize in Medicine*, NOBEL PRIZE, http://nobelprize.org/nobel_prizes/medicine/ (last visited Mar. 24, 2011); Physics—Charles K. Kao (China) and Willard S. Boyle (Canada), *Nobel Prize in Physics*, NOBEL PRIZE, http://nobelprize.org/nobel_prizes/physics/ (last visited Mar. 24, 2011); and Chemistry—Venkatraman Ramakrishnan (India), *Nobel Prize in Chemistry*, NOBEL PRIZE, http://nobelprize.org/nobel_prizes/chemistry (last visited Mar. 24, 2011).

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