

U.S. Immigration Reform Should Focus on Improving the Employment-Based Visa System

BY **STUART ANDERSON**, *an adjunct scholar at the Cato Institute and executive director, National Foundation for American Policy.*

Efforts to reform immigration are, at a minimum, delayed because of lack of support in the U.S. Congress. Attempts to impose more restrictive measures are expected in the coming year. Whether new legislation is pro-immigration or anti-immigration, it is important to understand the rules, quotas, and reality of the current employment-based immigration system if we are to avoid reforms that do more harm than good.

TEMPORARY VS. PERMANENT

The first important distinction to understand in our immigration system is the difference between (1) receiving temporary status (see Table 1) and (2) gaining lawful permanent residence, sometimes known as receiving one's "green card" (see Table 2). An employee in temporary status or on a temporary visa (also known as a "nonimmigrant" visa) can stay in the United States for a period of time but is not entitled to remain permanently or become a U.S. citizen. In contrast, a worker who receives permanent residence (a green card) can remain in the United States for the rest of his or her life (barring long absences or certain criminal convictions) and can become eligible for U.S. citizenship.¹

WORKING IN AMERICA: THERE IS NO LINE FOR LOWER-SKILLED WORKERS

One of the most common accusations hurled against illegal immigrants is the rhetorical question, "Why can't they just wait in line?" The problem for lower-skilled workers is that no such line exists. For example, if an employer were to ask, "How does

one obtain a legal visa for an employee to work as a maid full time at a hotel or as a waiter at a restaurant?" the short answer would be, "There is no such visa for those jobs."

The closest available categories for low-skilled workers are H-2A and H-2B visas. Both are used for short-term seasonal jobs. H-2A visas are used for such jobs in agriculture. While

there is no numerical limit on H-2A visas—approximately 60,000 were issued in FY 2009²—employers consider the process bureaucratic, not timely for their employment needs, and prone to litigation. This is a major reason the majority of agricultural seasonal workers are believed to be in the country illegally.³ Farm worker advocates would like to make the H-2A rules even tighter, however. Both growers and farm worker advocates have favored compromise legislation called AgJobs, which would streamline certain rules for growers

and provide legal status for illegal immigrants now working in agriculture.

H-2B visas can be used for temporary jobs, such as picking crabs over a 3- to 6-month period, not for permanent positions. The annual quota is 66,000 a year, which has regularly been exhausted by employers, although with the economic slowdown only 44,847 H-2B visas were issued in FY 2009.⁴ Immigration attorneys say recent regulatory changes have made the H-2B process more cumbersome and less predictable for employers. Overall, the core problem is that the visas cover too few of the types of jobs most employers need filled, which creates a mismatch between the law and the labor market.

“The significant wait time for green cards is one reason H-1B temporary visas are so important.”

TABLE 1
KEY TEMPORARY VISA CATEGORIES FOR EMPLOYMENT

Visa Category	Description	Annual Quota
H-1B	For professionals in jobs requiring the equivalent of a B.A. or higher; separate requirements for fashion models. Typical visa for international students who work long-term in the U.S. after graduation.	65,000 plus exemption of 20,000 for advanced degree holders from U.S. universities; there is also an exemption for those hired by universities and nonprofit and government research institutes.
L-1	Intracompany transferee visa for managers, executives, and those with specialized knowledge who have worked abroad for an employer for at least one year.	no quota
H-2A	For seasonal agricultural workers.	no quota
H-2B	For seasonal nonagricultural workers.	66,000
O-1	For persons of extraordinary ability.	no quota
P-1	Primarily for professional athletes and those in the entertainment industry.	no quota
R	For religious workers.	no quota
TN	For professionals from Mexico and Canada qualified under NAFTA.	no quota

Source: U.S. Citizenship and Immigration Services, U.S. Department of State.

Individuals on H-2A and H-2B visas cannot be sponsored for green cards. Even if they could, the annual quota for employer-sponsored green cards is limited to only 10,000 so-called “other workers” (5,000, in practice, due to a congressional offset in green cards).⁵ In short, neither temporary visas nor green-card sponsorship present realistic paths to work legally in the United States in jobs at the lower end of the skill spectrum.

WORKING IN AMERICA: OUR IMPERFECT SYSTEM FOR HIGHLY SKILLED PROFESSIONALS

Foreign nationals seeking to work in areas such as computer science, finance, and engineering have it better than those in lower-skilled jobs. Still, even the visas in these categories tend to be oversubscribed and burdened by long delays and frequent demands for additional documentation from govern-

STUART ANDERSON, *Editor*

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ment examiners.

To remain in the United States on a permanent basis, a skilled professional generally must receive lawful permanent residence. Temporary visas such as H-1B or L-1 entitle an individual to stay for only limited periods of time. Under U.S. law, no more than 140,000 employment-based green cards are issued in a

fiscal year. Wait times for skilled immigrants range from 6 to 12 years (or more) in most categories.⁶ It is the low quota of 140,000, rather than bureaucratic delays, that lead to long waits for skilled immigrants.⁷ That quota includes not just the professional being sponsored but also dependent family members (spouses and minor children). Another factor

TABLE 2
EMPLOYER-SPONSORED IMMIGRANT VISA (GREEN CARD) CATEGORIES

Category	Description	Persons Obtaining Permanent Resident Status in FY 2009
First Preference (EB-1 priority workers)	Aliens with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers.	40,924
Second Preference (EB-2 workers with advanced degrees or exceptional ability)	Aliens who are members of the professions holding advanced degrees or their equivalent and aliens who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States.	45,552
Third Preference (EB-3 professionals, skilled workers, and other workers)	Aliens with at least two years of experience as skilled workers; professionals with a baccalaureate degree; and others with less than two years of experience, such as an unskilled worker who can perform labor for which qualified workers are not available in the United States.	40,398
Fourth Preference (EB-4 special immigrants)	Workers such as those in a religious occupation or vocation.	13,472
Fifth Preference (EB-5 employment creation)	Immigrant investors who create a certain minimum number of jobs.	3,688

Source: U.S. Citizenship and Immigration Services; *2009 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security, Table 6.

influencing the availability of green cards is the per country limit on employment-based immigrants, which affects individuals from India and China the most.⁸

The significant wait time for green cards is one reason H-1B temporary visas are so important, since without such visas the vast majority of highly skilled foreign nationals, including international students, could never work or start a career in the United States. From FY 1997 to FY 2010, employers exhausted the supply of H-1B visas every year except when the ceiling was temporarily increased for the years 2001 to 2003. When Congress revised the H-1 category in 1990 and designated it H-1B, lawmakers established an annual limit of 65,000. Since then, Congress has approved exemptions from the annual cap for those hired by universities and nonprofit research institutes and 20,000 individuals who received a master's degree or higher from a U.S. university. When the economy is sluggish, such as in FY 2010 and FY 2011, the visa supply is used up more slowly, demonstrating that hiring is based on market conditions.

Efforts to cripple the use of H-1B visas through additional bureaucratic requirements will succeed mostly in preventing foreign nationals from working in America, which is the general goal of those proposing such measures. Yet like most government regulatory actions, such new restrictions will carry unintended consequences—as more highly skilled foreign nationals are pushed abroad, more innovation and work in important fields will take place in other countries, limiting new opportunities for U.S. workers and lessening growth in the United States for both large and small companies in technology, finance, and other sectors.

Employers must pay H-1B visa holders the higher of the prevailing or actual wage paid to other similarly employed Americans. Jobs generally must require a B.A. or its equivalent through work experience.⁹ Contrary to popular belief, H-1B visa holders are free to change jobs, needing only a new employer to petition for them. Changing jobs is actually common among H-1B visa holders. A balanced use of whistleblower protections already in the law can help protect H-1B visa holders who feel

unable to change employers. Liberalizing green card quotas would help prevent a situation where an H-1B professional feels that he or she must stay at a current job while waiting for approval of a green card.

Today, in a connected global economy, L-1 visas have become essential to companies as a means of moving—and integrating—employees from around the world. L-1 visas allow U.S. companies to transfer executives, managers, and personnel with specialized knowledge from their overseas operations into the United States. To qualify, L-1 beneficiaries must have worked abroad for the employer for at least one continuous year (within a three-year period) prior to a petition being filed. This would prevent, for example, someone hired overseas from being sent to work immediately in the United States. Also, based on U.S. Citizenship and Immigration Services (USCIS) regulations, an executive or manager is limited to seven years, while an individual with specialized knowledge can stay for five years.

OTHER CATEGORIES

An O-1 visa is for persons of extraordinary ability who can demonstrate national or international acclaim. Generally, such individuals would be older and more accomplished. USCIS adopts a strict standard—in FY 2009 only 9,368 O-1 visas were issued, including those for individuals in fields as diverse as film, the culinary arts, and science.

A P-1 visa is used for professional athletes and people in the entertainment industry (23,920 visas in FY 2009). An R is used for religious workers who come to work on a temporary visa (23,920 visas in FY 2009). TN visas are for professional workers from Mexico and Canada who qualify under the North American Free Trade Agreement (2,771 visas in FY 2009). Foreign journalists use an I visa (15,219 in FY 2009).¹⁰

CONCLUSION

Efforts to reform employment-based immigration should be measured against three criteria. First, has Congress increased the opportunity for lower-skilled foreign workers to enter the country on legal visas, which would reduce illegal immigration? Second, have lawmakers

made it more likely that foreign nationals, who now make up a majority of graduate students in key fields at U.S. universities, will remain in the United States on temporary visas to pursue long-term careers? Third, has Congress reduced significantly the time skilled immigrants must wait to receive green cards?

An enforcement-only approach to illegal immigration and the establishment of new

protectionist measures against highly skilled foreign nationals will harm our economy and the U.S. immigration system. The more thoughtful approach would be to welcome through legal means those who would fill employment needs at both the low and high end of our labor market. In the long run, that would give us laws that conform to the realities of the global economy.

¹ See December 2010 Cato *Immigration Reform Bulletin* for a discussion of the rules pertaining to citizenship. For a more detailed discussion of the legal immigration system, see Stuart Anderson, *Immigration* (Denver, Colorado: Greenwood, 2010).

² U.S. Department of State, *NIV Workload by Category FY 2009*, <http://www.travel.state.gov/pdf/FY2009NIVWorkloadbyVisaCategory.pdf>.

³ Linda Levine, "Farm Labor Shortages and Immigration Policy," Congressional Research Service, November 9, 2009.

⁴ U.S. Department of State.

⁵ Section 203(e) of the Nicaraguan Adjustment and Central American Relief Act, as amended by Section 1(e) of Pub. L. 105-139.

⁶ National Foundation for American Policy, "Employment-Based Green Card Projections Point to Decade-Long Waits," November 2009, www.nfap.com

⁷ There were earlier years when inadequate processing prevented the full employment-based green card quota from being utilized, which has an impact on the current backlog.

⁸ *Immigration Benefits*, GAO-06-20 (Washington: Government Accountability Office, November 2005), p. 43. According to the GAO,

"There are also annual numerical limitations on the number of visas that can be allocated per country under each of the preference categories. Thus, even if the annual limit for a preference category has not been exceeded, visas may not be available to immigrants from countries with high rates of immigration to the United States, such as China and India, because of the per country limits."

⁹ Section 214(i)(1) of the Immigration and Nationality Act.

¹⁰ U.S. Department of State.