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## Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System

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# ATTRACTING THE BEST AND THE BRIGHTEST: A CRITIQUE OF THE CURRENT U.S. IMMIGRATION SYSTEM

*Chris Gafner\* & Stephen Yale-Loehr\*\**

*[Immigrants] contribute greatly to the vitality of the economy. They are highly motivated, willing to work and venture, and bring in fresh insights. Immigrants have made a disproportionate contribution to dynamism of the economy because of these characteristics ever since our forefathers first landed in the New World.<sup>1</sup>*

## ABSTRACT

The United States has long benefited as a leader in attracting the “best and brightest” immigrants. However, the world has changed since the U.S. immigration system’s last major modification in 1990. The United States is no longer the primary destination for many talented immigrants. Many other nations have enacted immigration systems meant to attract the best and brightest immigrants. These immigration systems are often point-based and allow potential immigrants to quickly determine eligibility. By comparison, the U.S. immigration system is slow and complicated. Many now question the United States’ ability to attract talented immigrants.

This Article first examines how other national immigration systems entice the best and brightest immigrants. It then examines the current U.S.

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1. H.R. REP. NO. 101-723, at 37 (1990) (Milton Friedman, 1976 Nobel laureate, comments to Congress).

immigration system and its evolution since the Immigration Act of 1990. Finally, the Article suggests how the United States can improve its immigration system to continue to attract talented immigrants.

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### INTRODUCTION

The United States has long sought to attract the "best and brightest" immigrants.<sup>2</sup> These highly talented immigrants have contributed to the eco-

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2. This Article generally defines the "best and brightest" immigrants as those foreign nationals who have excelled in any field of endeavor and who will contribute to the U.S.

conomic, scientific, and cultural growth of the United States.<sup>3</sup> Increasingly, however, many other countries are taking action to attract the best and brightest to their own country. This increased international competition is challenging our nation's continued ability to attract these talented immigrants.

The most recent significant modification to the U.S. employment-based immigration system was the Immigration Act of 1990 ("IMMACT90").<sup>4</sup> IMMACT90 created a five-tiered employment-based immigration system that includes three distinct categories to ensure that the best and brightest have a meaningful opportunity to gain permanent residency in the United States.<sup>5</sup> The first category is for individuals with extraordinary ability in the sciences, arts, education, business, or athletics (colloquially referred to as "EB-1-1" status). The second category is for outstanding professors and researchers ("EB-1-2" status). The third category is the national interest waiver ("NIW"), which is for those individuals whose employment is in the United States' national interest.

Since IMMACT90's enactment, the international competition for talent has increased. The world has entered an era in which more countries are gaining economic and cultural clout. Many countries are launching ambitious immigration programs meant to attract the best and brightest. Additionally, countries long seen as sources for talented immigrants are now seeking to keep talented nationals home. Many question whether the U.S. immigration system is correctly positioned to compete against the growing international competition.<sup>6</sup>

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national interest. This Article focuses specifically on immigrants who have excelled in the STEM (science, technology, engineering, and math) professions.

3. In 2009, five Nobel Prize winners were immigrants who now live in the United States: Medicine—Elizabeth H. Blackburn (Australia) and Jack W. Szostak (United Kingdom), *Nobel Prize in Medicine*, NOBEL PRIZE, [http://nobelprize.org/nobel\\_prizes/medicine/](http://nobelprize.org/nobel_prizes/medicine/) (last visited Oct. 24, 2010); Physics—Charles K. Kao (China) and Willard S. Boyle (Canada), *Nobel Prize in Physics*, NOBEL PRIZE, [http://nobelprize.org/nobel\\_prizes/physics/](http://nobelprize.org/nobel_prizes/physics/) (last visited Oct. 24, 2010); and, Chemistry—Venkatraman Ramakrishnan (India), *Nobel Prize in Chemistry*, NOBEL PRIZE, [http://nobelprize.org/nobel\\_prizes/chemistry/](http://nobelprize.org/nobel_prizes/chemistry/) (last visited Oct. 24, 2010).

4. Pub. L. No. 101-649, 104 Stat. 4978.

5. 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.

6. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHLIGHTS OF A GAO FORUM: GLOBAL COMPETITIVENESS—IMPLICATIONS FOR THE NATION'S HIGHER EDUCATION SYSTEM 11 (2007) (noting that "[i]n particular, participants said the permanent immigration system does not facilitate high-skill workers coming to the United States"); U.S. GOV'T ACCOUNTABILITY

This Article first examines the current global competition for talent and how other key global players are attracting the best and brightest. Second, the Article examines the current U.S. immigration system and the congressional intent behind IMMACT90.<sup>7</sup> Third, the Article recommends how to improve the U.S. immigration system to help the nation attract foreign nationals who are most likely to contribute to the national interest.<sup>8</sup>

### I. THE GROWING INTERNATIONAL COMPETITION FOR TALENT

The world was a different place when IMMACT90 was enacted. In 1990, the United States was the sole military, cultural, and economic super power. The Soviet Union was about to splinter, China had just put down the Tiananmen Square protests, India had a stagnant economy, and Europe was over a decade away from the Euro's first circulation.

The international economic tide has risen since that time. The United States does not hold the same hegemonic position today that it held twenty years ago. As Fareed Zakaria recently highlighted, the United States no longer has the world's tallest building, richest individual, largest publicly traded corporation, or largest movie industry.<sup>9</sup>

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OFFICE, HIGHLIGHTS OF A GAO FORUM: WORKFORCE CHALLENGES AND OPPORTUNITIES FOR THE 21ST CENTURY—CHANGING LABOR FORCE DYNAMICS AND THE ROLE OF GOVERNMENT POLICIES 14 (2004) (noting that “most participants agreed that current immigration policies were developed decades ago and do not address current workforce needs”).

7. America's immigration system is a complex network of agency and departmental responsibility. The Immigration and Naturalization Service (INS), an agency of the Department of Justice that had administrated U.S. immigration law, was formally dissolved on March 1, 2003. Its functions and authority were allocated primarily to the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; *see also* Stanley Mailman & Stephen Yale-Loehr, *Immigration in a Homeland Security Regime*, N.Y. L.J., Dec. 23, 2002, at 3, *reprinted in* 8 BENDER'S IMMIGR. BULL. 1 (2003). Within DHS, the former INS functions relating to such immigration benefits and services as the processing of visa petitions and applications for adjustment of status and naturalization were allocated to U.S. Citizenship and Immigration Services (USCIS). Enforcement at the border was allocated to U.S. Customs and Border Protection (CBP). Interior enforcement was allocated to U.S. Immigration and Customs Enforcement (ICE). *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824 (Feb. 28, 2003) (amending various parts of 8 C.F.R., triggering the transfer of functions and allocating them within DHS agencies). In addition to DHS, the Departments of Labor, State, and Justice also have immigration responsibilities.

8. The United States must address many pressing immigration concerns, including legalization, employment authorization compliance and enforcement, and multi-year backlogs in family-based and employment-based immigrant categories. Many of these concerns are important to the long-term viability of the nation and need to be thoughtfully addressed. This Article, however, focuses solely on improving the immigration of highly skilled workers into the United States.

9. FAREED ZAKARIA, *THE POST-AMERICAN WORLD* 2-3 (2008).

In this era characterized by the “rise of the rest,”<sup>10</sup> many other countries are competing to attract the best and brightest immigrants. Only a few countries methodically sought international migration for economic enhancement before 2000,<sup>11</sup> whereas nearly two dozen do today.<sup>12</sup> Canada was the first country to implement an immigration point system and remains an aggressive attractor of international talent.<sup>13</sup> The European Union has proposed a “Blue Card” to attract highly skilled noncitizens.<sup>14</sup> The United Kingdom recently created an objective, systematic point system.<sup>15</sup> Even smaller countries like Singapore and South Korea are competing for immigrant talent.<sup>16</sup> Additionally, China and India are seeking to retain and attract talent, rather than have their most talented citizens immigrate to other countries.<sup>17</sup>

### A. Canada’s Point System

In 1967, Canada created the first immigration “point system” to provide a systematic means of attracting immigrants.<sup>18</sup> Since then, Canada has been an “aggressive player” in attracting talent to its shores.<sup>19</sup> A majority of Canadian immigrants are economic immigrants,<sup>20</sup> and Canada admitted

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10. *Id.* at 2.

11. DEMETRIOS G. PAPADEMETRIOU ET AL., *MIGRATION POL’Y INST., TALENT IN THE 21ST-CENTURY ECONOMY 5* (2008) [hereinafter *TALENT IN THE 21ST-CENTURY*] (citing DEMETRIOS G. PAPADEMETRIOU ET AL., *MIGRATION POL’Y INST., HYBRID IMMIGRANT-SELECTION SYSTEMS: THE NEXT GENERATION OF ECONOMIC MIGRATION SCHEMES* (2008) [hereinafter *HYBRID IMMIGRANT-SELECTION SYSTEMS*]).

12. *Id.*

13. *HYBRID IMMIGRANT-SELECTION SYSTEMS*, *supra* note 11, at 7.

14. *See* ECON. POL’Y COMM., *FACTOR MOBILITY IN THE GLOBAL ECONOMY: POLICIES FOR GROWTH IN AN INTERCONNECTED WORLD 16* (2006) [hereinafter *POLICIES FOR GROWTH*].

15. *HYBRID IMMIGRANT-SELECTION SYSTEMS*, *supra* note 11, at 8.

16. Singapore considers itself a “talent capital,” and South Korea’s Presidential Council on National Competitiveness has the goal of attracting “global talent.” *TALENT IN THE 21ST-CENTURY*, *supra* note 11, at 6.

17. *Id.* at 6-7.

18. *See* *HYBRID IMMIGRANT-SELECTION SYSTEMS*, *supra* note 11, at 17.

19. *Id.* at 7.

20. In 2009, Canada had 153,498 economic immigrants (out of 252,179 total immigrants). In 2005, Canada had 156,312 economic immigrants (out of 262,241 total immigrants). *Facts and Figures 2009—Immigration Overview: Permanent and Temporary Residents*, CITIZENSHIP & IMMIGR. CAN., <http://www.cic.gc.ca/english/resources/statistics/facts/2009/permanent/01.asp> [hereinafter *CITIZENSHIP & IMMIGR. CAN.*] (last modified Sept. 9, 2010). The term “economic immigrant” is defined as “someone who goes to a new country because living conditions or opportunities for jobs are not good in their [sic] own country. This word is used by governments to show that a person is not considered a refugee.” *MACMILLAN DICTIONARY*, <http://www.macmillandictionary.com/dictionary/british/economic-migrant> (last visited Oct. 17, 2010).

more employment-based immigrants than the United States in 2009—153,458 employment-based Canadian immigrants compared to 144,034 U.S. immigrants.<sup>21</sup> Highly skilled noncitizens represent seven percent of the Canadian workforce.<sup>22</sup>

An immigration point system is “first and foremost a human-capital-accumulation program that allows countries to emphasize the applicant characteristics they deem the most valuable for economic growth.”<sup>23</sup> Points are awarded based on criteria indicative of a foreign national’s potential contribution to the country. It is considered the best means for determining whether a prospective immigrant will contribute to a country over the immigrant’s entire life.<sup>24</sup>

The Canadian point system looks at (in decreasing level of importance) an applicant’s education, proficiency in French and English, experience, age, arranged employment in Canada, and adaptability.<sup>25</sup> The point system allows potential immigrants to easily compute whether they qualify for Canadian immigrant status. Canada even offers a calculator to help potential immigrants determine eligibility.<sup>26</sup>

Other countries have emulated Canada’s success in attracting talented immigrants. The point system is a “growth area” in global immigration policy.<sup>27</sup> As point systems become more widely adopted, more countries will offer highly skilled immigrants easily understood and objective standards for determining immigration eligibility.

## B. The European Union’s Blue Card

In 2007, the European Union (“E.U.”) proposed the “Blue Card.”<sup>28</sup> Its purpose is to create a more systematic and appealing environment for talented foreign nationals.<sup>29</sup> The E.U. knew the restrictions and inequities

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21. DEP’T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6 (2010); CITIZENSHIP & IMMIGR. CAN., *supra* note 20.

22. Elizabeth Collett, *The Proposed European Blue Card System: Arming for the Global War for Talent?*, MIGRATION POL’Y INST. (Jan. 7, 2008), <http://www.migrationinformation.org/Feature/print.cfm?id=667>.

23. HYBRID IMMIGRANT-SELECTION SYSTEMS, *supra* note 11, at 7.

24. See Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 101-02 (2001).

25. Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.).

26. *Immigrating as a Worker: Am I Eligible?*, CITIZENSHIP & IMMIGR. CAN., <http://www.cic.gc.ca/english/immigrate/skilled/tool/index.asp> (last visited Oct. 23, 2010).

27. HYBRID IMMIGRANT-SELECTION SYSTEMS, *supra* note 11, at 7.

28. The “Blue Card” was meant to be comparable to the U.S. “Green Card.” See POLICIES FOR GROWTH, *supra* note 14.

29. See Collett, *supra* note 22.

between its member nations made it less appealing than other world powers. In announcing the Blue Card, the European Commission emphasized that highly skilled foreign nationals make up only 1.7 percent of the European workforce (compared to seven percent in Canada and three percent in the United States).<sup>30</sup>

The E.U. has yet to finalize the Blue Card's specifics. This lack of agreement is not due to a lack of desire to attract highly skilled workers. Rather, individual E.U. countries feel more capable of attracting highly skilled workers as individual countries than as a unified block of countries. Put differently, individual European countries feel they are competing against both European and non-European countries in attracting talented immigrants.<sup>31</sup>

It is clear that European countries are keen on competing for the best and brightest immigrants. Even if the Blue Card remains stalled, individual European countries will create national immigration systems meant to attract the best and brightest to individual European countries. Many European countries have already taken action.<sup>32</sup>

### C. The United Kingdom's New Point Scheme

The United Kingdom is not waiting for the Blue Card. In 2008, the United Kingdom revamped its employment-based immigration system by adopting a five-tiered immigration point system.<sup>33</sup> Under the new system, highly skilled and talented workers may obtain immigration through the

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30. *Id.*

31. ROBERT PARKES & STEFFEN ANGENENDT, HEINRICH BÖLL STIFTUNG, AFTER THE BLUE CARD: EU POLICY ON HIGHLY QUALIFIED MIGRATION: THREE WAYS OUT OF THE IMPASSE (2010); see also Brandon Meyer, *Convergence or Divergence*, 13 BENDER'S IMMIGR. BULL. 2 (2008).

32. Many E.U. countries have recently revised their immigration policies, including Finland (Aliens Act, 301/2004 (2004), [www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf](http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf)); France (Loi pour la sécurité intérieure du 18 Mars 2003 [Law for French Interior Security of March 18, 2003], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.Q.], [www.legislationline.org/documents/id/5617](http://www.legislationline.org/documents/id/5617)); Ireland (Immigration, Residence and Protection Bill 2010 (Act No. 38/2010) (Ir.), available at <http://www.oireachtas.ie/viewdoc.asp?DocID=15565&&catID=59>); and, the United Kingdom (The Immigration (Form and Manner of Passenger Information) Direction (2008), <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/immigrationdirection2008/>). See POLICIES FOR GROWTH, *supra* note 14, at 20.

33. Tier 1 is for highly skilled workers, Tier 2 covers skilled workers with an employment offer, Tier 3 covers low skilled workers, Tier 4 covers students, and Tier 5 covers temporary workers and youth mobility. See generally *Working in the U.K.*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/workingintheuk/> (last visited Aug. 28, 2010).



Tier I–General category.<sup>34</sup> The Tier 1–General category allows foreign nationals to self-petition to work in the United Kingdom without an employment offer.<sup>35</sup>

Twenty percent of the required points are earned by understanding English and having adequate financial means.<sup>36</sup> The remaining points are granted based on age, qualifications, previous earnings, and experience in the United Kingdom.<sup>37</sup> Like Canada, the United Kingdom’s immigration agency provides a calculator to help applicants determine eligibility.<sup>38</sup>

As originally enacted, the Tier 1–General immigrant category had no limitation or cap.<sup>39</sup> Thus, the best and brightest immigrants could immediately determine their eligibility for the program and begin employment without much delay. However, on July 19, 2010, the new United Kingdom government placed a cap on the Tier 1–General category applicants until March 31, 2011.<sup>40</sup> Whether the recent cap will create a backlog is yet to be seen. Further, if a backlog is created, it is unknown how (or if) the United Kingdom will differentiate between highly skilled workers and the truly best and brightest.

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34. Tier 1 is divided into four subcategories, including an Investor category (for those willing to invest £1,000,000 in the United Kingdom), an Entrepreneur category (for those willing to start or take over a United Kingdom business and have £200,000 in funds), and a “Post-study Work” category that allows recent degree or post-graduate degree recipients to apply for permission to work in the United Kingdom for two years. The “Post-study Work” category is viewed as “a bridge to highly skilled or skilled work.” People with Post-study Work leave will be expected to switch into another part of the points system as soon as they are able to do so. See *Highly Skilled Workers, Investors and Entrepreneurs*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/workingintheuk/tier1/> (last visited Oct. 23, 2010).

35. *Id.*

36. See *Immigration Rules: App. B*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appendixb/> (last visited Oct. 18, 2010); *Immigration Rules: App. C*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appendixc/> (last visited Oct. 18, 2010).

37. See *Immigration Rules: App. A*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appendixa/> (last visited Oct. 20, 2010).

38. See *Points-based Calculator*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/pointscalculator> (last visited Oct. 20, 2010).

39. See *Britain Explains New Visa Rules for Interim Immigration Cap*, ECON. TIMES, July 1, 2010, <http://economictimes.indiatimes.com/news/news-by-industry/services/travel/visa-power/Britain-explains-new-visa-rules-for-interim-immigration-cap/articleshow/6114190.cms>.

40. *Immigration Limit for Tier 1 (General) of the Points-based System*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/27-intro-limit-for-t1-pbs> (last visited Oct. 24, 2010).

#### D. Indian and Chinese Incentive Programs

The United States has long benefited from many talented Indian and Chinese immigrants.<sup>41</sup> India was the leading place of birth for those gaining U.S. employment-based permanent residency in fiscal year 2009.<sup>42</sup> China was the third leading place of birth.<sup>43</sup> Combined, these countries represented 21.9 percent of the 144,034 foreign nationals who gained employment-based permanent residency status in 2009.<sup>44</sup> However, as India and China grow economically, both are seeking to maintain and attract the best and brightest individuals.

In 1994, the Chinese Academy of Sciences launched the Hundred-Talents Program to attract outstanding researchers in the sciences and technology.<sup>45</sup> During the last fifteen years, it and the like-minded Yangtze River Scholar Scheme have lured over 4000 researchers (mostly postdoctoral or assistant-professor level) back to China.<sup>46</sup>

China recently launched the more ambitious One-Thousand-Talents Program. Announced in January 2009, the program is targeted at individuals with “full professorships or the equivalent in developed countries” and offers a relocation payment of one million renminbi.<sup>47</sup> The program is open to non-Chinese nationals, in addition to Chinese nationals.<sup>48</sup> The individuals sought are “high calibre” researchers who are meant to “lead key laboratories, projects and disciplines in China.”<sup>49</sup> Although China is still working to determine what criteria should be used in its selection process,

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41. At least three U.S. citizens who have won Nobel Prizes were born in India—Har Gobind Khorana (Medicine, 1968), Subramanyan Chandrasekhar (Physics, 1983), and Venkatraman Ramakrishnan (Chemistry, 2009). At least three U.S. citizens who have won the Nobel Prize were born in China—Chen Ning Yang (Physics, 1957), Daniel Chee Tsui (Physics, 1998), and Tsung-Dao Lee (Physics, 1957). NOBELPRIZE.ORG, [http://nobelprize.org/nobel\\_prizes/](http://nobelprize.org/nobel_prizes/) (last visited Nov. 22, 2010).

42. 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 21, at 27-28 tbl.10.

43. *Id.*

44. *Id.*

45. See *Hundred Talents Programme, European Inventory on Research and Innovation Policy Measures*, ERAWATCH, <http://cordis.europa.eu/erawatch/index.cfm?fuseaction=prog.documentAjax&uuid=35B3A430-BA29-C5CD-F0BF31EAA29FC05B> (last visited Oct. 20, 2010).

46. Jane Qiu, *China Targets Top Talent From Overseas: Package Aims to Entice High-Flyers Back Home*, NATURE NEWS, Jan. 29, 2009, <http://www.nature.com/news/2009/090128/full/457522a.html>.

47. *Id.* On October 20, 2010, one million renminbi was valued at \$150,295.

48. *Id.*

49. Gina Lin, *Chinese Repatriation Scheme 'Needs Tighter Rules'*, SCIDEV NET (June 10, 2009), <http://www.scidev.net/en/news/chinese-repatriation-scheme-needs-tighter-rules.html>.

China attracted ninety-six scientists and twenty-six entrepreneurs in the first four months of the program's existence.<sup>50</sup>

India has also developed programs to persuade its talented scientists and researchers to return to India. The Indian Council of Scientific and Industrial Research, a publicly funded scientific and industrial research organization, recently announced a program to recruit seventy-five "Distinguished" and "Outstanding" scientists of Indian descent to return to India.<sup>51</sup> The program is meant to attract the "best minds,"<sup>52</sup> who will "be young dynamic leaders of science who would lead and build centres of excellence in national laboratories."<sup>53</sup> It is also hoped that the recipients will entice more young Indian researchers and scientists to remain in India.<sup>54</sup> The program offers recipients housing, a chauffeured car, the "apex" in pay, and other benefits.<sup>55</sup>

The continued economic development of these two countries, coupled with their attempts to persuade highly skilled immigrants to return, will have long-term ramifications on the United States. Currently, U.S. doctoral degree recipients who are Indian and Chinese nationals are more likely to stay in the United States than any other country's nationals.<sup>56</sup> Whether that trend continues depends greatly on how open and welcoming the U.S. immigration system is now and in the future.

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50. *Id.*

51. *India Beckons Leaders to Push the Frontiers of Science and Technology*, COUNCIL OF SCI. & INDUS. RES., [hereinafter SCIENTIFIC & INDUS. RES.], [http://www.csir.res.in/External/Heads/aboutcsir/announcements/75\\_pos.pdf](http://www.csir.res.in/External/Heads/aboutcsir/announcements/75_pos.pdf) (describing a "distinguished" scientist as a "visionary leader," who has "international eminence with [a] proven track record in cutting edge areas," and an "outstanding" scientist as a "young dynamic leader" who has a "high degree of peer recognition and ten years of experience as a faculty/scientist of an internationally renowned university/institute/corporate research and development laboratory").

52. *Id.*

53. *CSIR Scheme Ready To Woo NRI Scientists*, ECON. TIMES, June 20, 2010, <http://economictimes.indiatimes.com/news/news-by-industry/et-cetera/CSIR-scheme-ready-to-woo-NRI-scientists/articleshow/6070105.cms>.

54. *Cf. id.*

55. *See* SCIENTIFIC & INDUS. RES., *supra* note 51.

56. Between 1995 and 2005, over ninety percent of Chinese nationals who received doctoral degrees in the United States and over eighty percent of Indian nationals who received doctoral degrees in the United States remained in the United States after five years. *See* MICHAEL G. FINN, *STAY RATES OF FOREIGN DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES* 9 tbl.8 (2007).

## II. CURRENT U.S. IMMIGRATION POLICY

IMMACT90 created the current U.S. employment-based immigration system.<sup>57</sup> IMMACT90 raised the annual ceiling on employment-based immigrants to 140,000 from 56,000.<sup>58</sup>

The U.S. immigration law contains five employment-based immigrant preference categories. For purposes of this Article, we focus on the first preference category (“EB-1”) and a small portion of the second preference category (“EB-2”). The EB-1 category is for priority workers, including immigrants with extraordinary ability in the sciences, arts, education, business, or athletics (“EB-1-1”);<sup>59</sup> immigrants who are outstanding professors and researchers (“EB-1-2”);<sup>60</sup> and multinational executives or managers (“EB-1-3”).<sup>61</sup> The EB-2 category is for professionals holding advanced degrees and those immigrants with exceptional ability in the arts, sciences, or business.<sup>62</sup> Normally, the EB-2 category requires first obtaining a labor certification.<sup>63</sup> The national interest waiver (“NIW”) allows qualifying immigrants to gain EB-2 status without a labor certification.<sup>64</sup>

The EB-1, EB-2, and third preference (“EB-3”) categories are each allotted 28.6 percent (about 40,000) of the total (140,000) employment-based immigrant visas available annually.<sup>65</sup> In addition, the EB-1 category is allotted any unused numbers from the fourth and fifth employment-based preference categories.<sup>66</sup> Any unused EB-1 visas are made available to the EB-2 visa category.<sup>67</sup> In turn, any unused EB-2 visas are made available to the EB-3 visa category.<sup>68</sup>

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57. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

58. 8 U.S.C. § 1151(d) (2006).

59. *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=cdfd2f8b69583210VgnVCM100000082ca60aRCRD&vgnnextchannel=cdfd2f8b69583210VgnVCM100000082ca60aRCRD> (last updated Aug. 10, 2010).

60. *Id.*

61. *Id.*

62. The third preference category is reserved for skilled workers, professionals, and other workers. 8 U.S.C. § 1153(b)(3) (2006). The fourth preference category is reserved for “special immigrant[s],” including religious workers, Panama Canal Treaty employees, and certain employees of U.S. foreign-service posts abroad. *Id.* § 1153(b)(4). The fifth preference category is reserved for certain immigrant investors. *Id.* § 1153(b)(5).

63. 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. *See id.* § 1182(a)(5)(A).

64. *Id.* § 1153(b)(2)(B); 8 C.F.R. § 204.5(k)(4)(ii) (2010).

65. 8 U.S.C. § 1153(b)(1), (b)(2)(A), (b)(3)(A).

66. *Id.* § 1153(b)(1).

67. *Id.* § 1153(b)(2)(A).

68. *Id.* § 1153(b)(3)(A).

The actual number of EB-1 immigrants entering the United States each year is often lower than the potential number of EB-1 immigrants. In fiscal year 2009, 40,924 individuals were granted EB-1 status.<sup>69</sup> This is the third highest number since fiscal year 2000.<sup>70</sup> Between 2000 and 2009, the average number of EB-1 immigrants each year was 35,514.<sup>71</sup>

The number of actual EB-1 priority workers entering the United States each year is significantly less than the 35,514 average. The number of EB-1 visas issued each year includes principal EB-1 priority workers, their spouses, and their children. In fiscal year 2009, only 16,806 of the 40,924 EB-1 immigrants were principal EB-1 priority workers.<sup>72</sup> Of those 16,806 principal EB-1 workers, only 3442 were EB-1-1 workers and only 3432 were EB-1-2 workers.<sup>73</sup> The remainder (9932) were EB-1-3 multinational executives or managers.<sup>74</sup>

#### A. The EB-1-1 and EB-1-2 Immigrant Status

The EB-1-1 and EB-1-2 are reserved for the highest quality individuals whom the United States is able to attract.<sup>75</sup> Both visas offer its recipients many advantages. Most notably, both offer the ability to avoid a labor certification.<sup>76</sup> In addition, EB-1-1 status allows an applicant to self-petition without an employment offer.<sup>77</sup>

To qualify for EB-1-1 status, an immigrant must demonstrate that he or she possesses “extraordinary ability.”<sup>78</sup> What is extraordinary ability? The statute does not define the term. The statute only states that a qualifying foreign national will 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.”<sup>79</sup>

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69. 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 21.

70. *Id.*

71. *Id.*

72. *Id.* at tbl.7.

73. *Id.*

74. *Id.*

75. 8 C.F.R. § 204.5(h)(2) (2010) (defining “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor”).

76. 8 U.S.C. § 1153(b)(2)(B) (2006). For an explanation of “labor certification,” see *supra* note 63.

77. *Id.* § 1153(b)(1)(A); 8 C.F.R. § 204.5(h)(5).

78. 8 U.S.C. § 1153(b)(1)(A).

79. *Id.* § 1153(b)(1)(A)(i).

The regulations provide a little more detail.<sup>80</sup> First, the regulations define extraordinary ability as a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”<sup>81</sup> Next, the regulations provide directions on demonstrating extraordinary ability. The regulations state:

A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, internationally recognized award), or at least three [of ten listed documentary criteria] . . . .<sup>82</sup>

The EB-1-2 statute requires a foreign national professor or researcher to be “recognized internationally as outstanding in a specific academic area,”<sup>83</sup> have at least three years of experience in teaching or research,<sup>84</sup> 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.<sup>85</sup>

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80. 8 C.F.R. § 204.5(h).

81. *Id.* § 204.5(h)(2).

82. *Id.* § 204.5(h)(3). The ten documentary criteria listed in the regulations are:

(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.

*Id.* The regulations allow “comparable evidence” to be submitted if the listed “standards do not readily apply to the beneficiary’s occupation.” *Id.* § 204.5(h)(4).

83. 8 U.S.C. § 1153(b)(1)(B)(i).

84. *Id.* § 1153(b)(1)(B)(ii).

85. *Id.* § 1153(b)(1)(B)(iii).

The EB-1-2 regulations require a foreign national to demonstrate that he or she is "recognized internationally as outstanding" by presenting evidence of at least two of six criteria.<sup>86</sup> EB-1-2 immigrant status has very similar evidentiary requirements and has faced many of the same difficulties as the EB-1-1.

### 1. *What Do the Regulations Mean?*

Although the regulations were meant to provide guidance to adjudicators and applicants, their meaning has proven elusive. Debate about the regulations began almost immediately after their publication in 1991. Some thought an EB-1-1 applicant qualified for the visa by receiving a major, internationally recognized award or by meeting three of the ten criteria. Others thought that an adjudicator needed to make an additional determination once an applicant demonstrated receipt of a major, internationally recognized award or fulfillment of three of the criteria. Likewise, with respect to qualifying for the EB-1-2 visa, questions were raised about whether an additional determination of the applicant's outstandingness was required after an applicant had met two of the six listed criteria.

### 2. *The Weinig Approach*

The confusion surrounding these regulations is evident in a June 18, 1992 letter from James Bailey, Director of the Northern Service Center of the INS, to Lawrence Weinig, Acting Associate Commissioner for Examinations at the INS.<sup>87</sup> Director Bailey wrote that "[i]t has become clear that there are two schools of thought [about the regulations]."<sup>88</sup> For the first school of thought, the phrase "such evidence shall consist of" meant that once the criteria were satisfied, the foreign national qualified for the classification without further inquiry. The second school of thought believed

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86. 8 C.F.R. § 204.5(i)(3)(i). The six criteria are: (1) documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field; (2) documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members; (3) published material in professional publications written by others about the alien's work in the academic field; (4) evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field; (5) evidence of the alien's original scientific or scholarly research contributions to the academic field; or, (6) evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field. *Id.*

87. Memorandum from James Bailey, INS N. Serv. Ctr. Dir., to Lawrence Weinig, INS Acting Assoc. Comm'r for Examinations (June 18, 1992), *reprinted in* 69 INTERPRETER RELEASES 1049-51 (Aug. 24, 1992).

88. *Id.* at 1049.

that meeting the minimum number of criteria was merely a prerequisite; once the criteria were met, the adjudicator still needed to determine if the foreign national “stands out.”<sup>89</sup>

Lawrence Weinig responded to Director Bailey’s letter by stating:

The evidentiary lists were designed to provide for easier compliance by the petitioner and easier adjudication by the examiner. The documentation presented must establish that the alien is either an alien of extraordinary ability or an outstanding professor or researcher. If this is established by meeting three of the criteria for extraordinary aliens or two of the criteria for outstanding professors or researchers, this is sufficient to establish the caliber of the alien. There is no need for further documentation on the question of the caliber of the alien. However, please note that the examiner must evaluate the evidence presented. This is not simply a case of counting pieces of paper.<sup>90</sup>

The Weinig Memorandum clearly endorsed the first school of thought: If an applicant meets three of the ten criteria, the applicant qualifies for EB-1-1 status. Likewise, if an applicant meets two of the six criteria, the applicant qualifies for EB-1-2 status. Nevertheless, the second school of thought has persisted.

### 3. *The Circular Reasoning Approach*

At its most basic level, the second school of thought requires: (a) an applicant to meet three of the ten criteria for EB-1-1 status (or two of the six criteria for EB-1-2 status); and (b) the adjudicator to then decide whether the applicant qualifies for EB-1-1 or EB-1-2 status by being extraordinary or outstanding. Some critics have branded this approach as “circular reasoning”<sup>91</sup> because it often leads adjudicators to decide whether a criterion is met by deciding whether an applicant is extraordinary or outstanding. Put differently, an applicant needs to meet the minimum number of criteria to be found extraordinary or outstanding, but the applicant needs to be extraordinary or outstanding to meet each criterion.

For example, many recent EB-1-1 decisions have found that scientists who published articles in scientific journals had not met the criterion that requires “[e]vidence of the alien’s authorship of scholarly articles in the

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89. *Id.*

90. Memorandum from Lawrence Weinig, INS Acting Assoc. Comm’r for Examinations, to James Bailey, INS N. Serv. Ctr. Dir. (July 22, 1992), reprinted in 69 INTERPRETER RELEASES 1051-52 (Aug. 24, 1992) [hereinafter Weinig Memorandum].

91. Rita Sostrin & Alexander Dgebuadze, *State of the Union in the Universe of EB-1 Petitions*, in AILA’S IMMIGRATION PRACTICE POINTERS 2010-11 EDITION 230 (Rizwan Hassan et al. eds., 2010).



field, in professional or major trade publications or other major media.”<sup>92</sup> In denying their applications, the immigration agency stated that the applicants did not meet the criterion for published scientific articles because the applicants failed to demonstrate that their articles attracted the attention of others in the field to the extent that an extraordinary or outstanding applicant would.<sup>93</sup>

Likewise, the immigration agency has interpreted the regulation concerning participation of a judge of others to require that a person be of extraordinary ability to be a judge. As one recent decision stated:

The regulatory criteria are established to assist the petitioner in demonstrating national or international acclaim, and must be interpreted as a whole with the statute. Not all who sit as a judge of the work of others will have extraordinary ability or will qualify under this criterion. The AAO [Administrative Appeals Office] interprets this regulation to require that the selection and participation process for serving as the judge of the work of others in the field be indicative of national or international acclaim in the field.<sup>94</sup>

The “circular reasoning” approach has persisted despite the Weinig Memorandum, as the immigration agency consistently discounts the memorandum as not being official agency policy.<sup>95</sup> Given the ambiguity in the regulations, it is impossible to determine whether the Weinig or “circular reasoning” approach is the correct interpretation.

#### 4. *The Proposed 1995 Regulations*

In 1995, the Immigration and Naturalization Service issued proposed regulations that were meant to clarify and revise a number of issues that

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92. 8 C.F.R. § 204.5(h)(3)(vi) (2010).

93. See, e.g., *In re* [name redacted], File No. SRC 07 102 52476, at 10 (AAO 2009) (“[C]itations demonstrate a small degree of interest in her published work, they are not sufficient to demonstrate that her articles have attracted a level of interest in her field consistent with sustained national or international acclaim. In light of the above, the petitioner has not established that she meets [the publishing] criterion.”); *In re* [name redacted], File No. LIN 07 062 52772 (AAO 2009); *In re* [name redacted], File No. SRC 07 800 22964, at 9 (AAO 2009) (“[T]here is no citation evidence showing that articles published by the beneficiary have attracted a level of interest in his field consistent with sustained national or international acclaim. Accordingly, the petitioner has not established that the beneficiary meets this criterion.”).

94. *In re* [name redacted], File No. SRC 07 800 17067, at 5 (AAO 2009).

95. *In re* [name redacted], File No. LIN 07 027 53883 (AAO 2007); *In re* [name redacted], File No. SRC 04 118 51732 (AAO 2006). *But see* *Buletini v. INS*, 860 F. Supp. 1222, 1234 (E.D. Mich. 1994) (citing Weinig Memorandum, *supra* note 90) (“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 . . .”).

had arisen with IMMACT90 and its regulations.<sup>96</sup> The proposed regulations acknowledged that “there has arisen some confusion over the role of various types of evidence listed [in the regulations].”<sup>97</sup> The proposed regulations stated:

The evidence listed is intended to be a guideline for the petitioner and the Service to determine extraordinary ability in order to make the adjudicative process easier for both the petitioner and the Service. The fact that an alien may meet three of the listed criteria does not necessarily mean that he or she meets the standard of extraordinary ability. The Service adjudicator must still determine whether the alien is one of that small percentage who have risen to the very top of his or her field of endeavor. Accordingly, the Service proposes to amend the regulations to state that meeting three of the evidentiary standards is not dispositive of whether the beneficiary is an alien of extraordinary ability.<sup>98</sup>

The proposed regulations failed to provide guidance on how an adjudicator would determine that a foreign national had “risen to the very top of his or her field of endeavor.”

Generally, the 1995 proposed regulations were more restrictive than the regulations already in place. Nevertheless, the proposed regulations were never made final and are not dispositive. At best, the proposed regulations demonstrate that some INS officials wanted the regulations to have a more restrictive reading.

##### 5. *Kazarian v. U.S. Citizenship and Immigration Services*

Most recently, *Kazarian v. U.S. Citizenship and Immigration Services*,<sup>99</sup> a Ninth Circuit Court of Appeals decision, has entered the debate about adjudicating EB-1-1 and EB-1-2 petitions. At issue in *Kazarian* was the common “circular reasoning” practice of applying additional requirements to each regulatory criterion.

*Kazarian* stemmed from the denial of an EB-1-1 visa for theoretical physicist Poghos Kazarian, Ph.D.<sup>100</sup> In affirming the adjudicator’s denial, the AAO<sup>101</sup> indicated that the scholarly publications criterion required not only publication, but also evidence of the “research community’s reaction

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96. Employment-Based Immigrants, 60 Fed. Reg. 29,771, 29,772 (June 6, 1995) (to be codified at 8 C.F.R. pt. 204) (supplementary information to proposed rule).

97. *Id.* at 29,775.

98. *Id.*

99. 596 F.3d 1115 (9th Cir. 2010).

100. *Id.* at 1132-33.

101. AAO is the acronym for the Administrative Appeals Office. The AAO adjudicates cases that are appealed following a denial by a USCIS adjudicator. 8 C.F.R. § 103.3(a)(1)(iv) (2010).

to [the published] articles.”<sup>102</sup> *Kazarian* recognized the disparity between the agency’s requirements for the criterion and the actual regulatory criterion’s language. This opinion stated that “neither USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [by the regulations].”<sup>103</sup>

Although *Kazarian* rebuked the USCIS policy of creating “novel” approaches to determine EB-1 cases, the decision did not eliminate EB-1 adjudication confusion.

The decision created a new term in EB-1 adjudication: the “final merits determination.”<sup>104</sup> The *Kazarian* court used the term twice in its opinion.<sup>105</sup> Both instances were in sentences rebuking the immigration agency’s “novel” requirements.<sup>106</sup> It is difficult to determine what the *Kazarian* opinion meant by the “final merits determination” because the decision itself made no “final merits determination.” Instead, the court held that Dr. Kazarian did not meet three of the required criteria for EB-1-1 classification.<sup>107</sup>

If the “final merits determination” is based on regulatory language, it appears to be based on the definition of extraordinary ability put forth at 8 C.F.R. § 204.5(h)(2) and 8 C.F.R. § 204.5(h)(3). Put differently, the “final merits determination” appears to be the same requirement as required in the “circular reasoning” school of thought mentioned above. But the *Kazarian* court failed to explain how a “final merits determination” is made.

It is unclear how much reliance should be placed on the *Kazarian* court’s analysis of EB-1 adjudication standards. The court made no “final merits determination,” and it is unknown how deeply the court thought through the process for making such a determination or its implications on U.S. immigration policy.<sup>108</sup>

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102. *Kazarian*, 596 F.3d at 1121.

103. *Id.* The applicable criterion states: “Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publication or other major media.” 8 C.F.R. § 204.5(h)(3)(vi).

104. *Kazarian*, 596 F.3d at 1121.

105. *Id.* at 1121-22.

106. *Id.*

107. *Id.* at 1122.

108. For example, it is troubling that *Kazarian*’s attempt to provide “context” to the employment-based immigration statutes involved comparing the “extraordinary ability” criteria to the “exceptional ability” criteria for the EB-2 category. *Id.* at 1120. If Dr. Kazarian was seeking EB-2 status, he would have qualified without needing to meet the “exceptional ability” criteria.

Despite *Kazarian's* limitations, the AAO has already started to cite the *Kazarian* "final merits determination" in its decisions.<sup>109</sup> Additionally, the USCIS has recently issued a proposed memorandum that seeks to incorporate the *Kazarian* "final merits determination" into its Adjudicator's Field Manual.<sup>110</sup>

#### 6. *Do the Regulations Reflect IMMACT90's Congressional Intent?*

As a whole, IMMACT90 was an expansive enactment by Congress.<sup>111</sup> The 1990 law increased the number of employment-based immigrant visas from 56,000 to 140,000, included the concept of "self-petitioning,"<sup>112</sup> and allowed priority workers to seek permanent residency without first having to seek labor certification.<sup>113</sup>

Legislative history reflects IMMACT90's expansive nature. Time after time, Congress highlighted the need for more highly skilled immigrants. The House Judiciary Committee report for IMMACT90 listed one of the bill's purposes as "eas[ing] certain current U.S. immigration law restrictions that . . . severely limit the number of highly skilled or otherwise needed foreign-born workers who may become lawful permanent residents of the United States."<sup>114</sup>

In the U.S. congressional debates, many speakers mentioned the economic benefits of obtaining more high-skilled immigrants. Senator Alfonse D'Amato stated that "[o]pening the gateway of opportunity to more of these deserving individuals could only enhance our productivity and vitality as a culture."<sup>115</sup> Representative Glenn Anderson commented that "we may even question why [IMMACT90] does not go further in admitting additional skilled workers and immigrants with the knowledge and know-how that America will need in the 20th century."<sup>116</sup>

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109. See, e.g., *In re* [name redacted], File No. [redacted], AILA InfoNet Doc. No. 10061065 (AAO 2010).

110. Memorandum from the U.S. Citizenship and Immigration Servs. on Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (AFM Update AD 10-41) (Aug. 18, 2010) [hereinafter USCIS Memo], available at <http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf>.

111. Naomi Schorr, *It Makes You Want to Scream: Do Not Make a Fortress out of the Dictionary: The USCIS is not an Outstanding Researcher*, 15 BENDER'S IMMIGR. BULL. 2 (2010).

112. 8 U.S.C. § 1151(f)(4) (2006).

113. See *id.* § 1151(d).

114. H.R. REP. NO. 101-723, at 43 (1990), reprinted in 1990 U.S.C.C.A.N. 6779, 6780.

115. 101 CONG. REC. S1,843 (1989) (statement of Sen. Alfonse D'Amato).

116. 101 CONG. REC. E3,099 (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).

Congress wanted IMMACT90 to provide the United States with the talented immigrants it needs to thrive. In contrast, the restrictive interpretations the USCIS has placed on its EB-1-1 and EB-1-2 regulations have limited the number of talented immigrants entering the United States. In the eighteen years that EB-1-1 and EB-1-2 visas have been issued, an annual combined average of only 4925 principal visas have been issued.<sup>117</sup> In 2005, a record number of principal visas were issued in each category: 5089 EB-1-1 visas and 5706 EB-1-2 visas.<sup>118</sup> Yet, just two years later, only 2243 EB-1-1 and 2261 EB-1-2 principal visas were issued.<sup>119</sup> This relatively low and inconsistent number of approved visas demonstrates the agency's restrictive and inconsistent adjudication of the EB-1-1 and EB-1-2 categories.

The United States has experienced extensive economic growth in the last twenty years.<sup>120</sup> Yet, the EB-1 category has rarely approached its annual cap. The failure to reach the cap is not due to a limiting section of the statute, nor is it due to economic factors. Instead, the limiting factor has been the USCIS's interpretation of its EB-1-1 and EB-1-2 regulations.

The immigration agency's restrictive interpretation of IMMACT90 has caused fewer talented immigrants to come to the United States than Congress intended.

### 7. *The Persistent Confusion*

Reading the statutes and IMMACT90's congressional intent, it is obvious Congress wanted an expansive immigration act that would provide highly skilled workers with a quick and meaningful way to obtain permanent residency.<sup>121</sup> Of the approaches available, the Weinig approach most comports with congressional intent for EB-1-1 and EB-1-2 status. However, the other approaches have their supporters,<sup>122</sup> and the regulations simply do not offer the clarity needed to settle the matter.

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117. Data gathered from the Yearbook of Immigration Statistics issued by the Department of Homeland Security and the former Immigration and Naturalization Service from 1992 to 2009.

118. DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 21 tbl.7 (2006).

119. DEP'T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS 21 tbl.7 (2008).

120. NICHOLAS CRAFTS, STAN. INST. FOR ECON. POL'Y RES., FIFTY YEARS OF ECONOMIC GROWTH IN WESTERN EUROPE: NO LONGER CATCHING UP BUT FALLING BEHIND? (2003).

121. Palma R. Yanni, *R-Railing the Train: The True Meaning of "National Interest,"* 2 NATIONALITY L. HANDBOOK 183, 183-93 (1993).

122. See, e.g., *Extraordinary Ability: Who's Got It and Who Doesn't?*, 71 INTERPRETER RELEASES 782, 783-89 (1994) (discussing a number of cases where, contrary to the Weinig

The persistent confusion has left the nation's most enticing means of attracting the best and brightest in limbo for the last twenty years. Further, the limbo will continue until Congress or the USCIS takes action.

### B. National Interest Waiver

Another way the United States attracts the best and brightest is through the NIW. The NIW allows qualifying immigrants to gain EB-2 status without completing a labor certification.<sup>123</sup> EB-2 status is available to immigrants with an advanced professional degree or exceptional ability.<sup>124</sup>

Determining which immigrants qualify for the NIW has proven difficult. The statute only provides that the NIW will be granted if the Attorney General (now the Secretary of Homeland Security) "deems it to be in the national interest."<sup>125</sup> The regulations provide little more guidance, stating simply that "[t]he [USCIS] may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest."<sup>126</sup>

The immigration agency purposefully left the regulations vague because it believed "it appropriate to leave the application of [the national interest] test as flexible as possible."<sup>127</sup>

This flexibility led to confusion among both applicants and adjudicators during the first years of the NIW. In *In re Mississippi Phosphate*, a 1992 non-precedent decision, the AAO listed many examples of what might be deemed to be "in the national interest."<sup>128</sup> The list included: improving the U.S. economy; improving wages and working conditions of U.S. workers; improving education and training programs for U.S. children and underqualified workers; improving healthcare; providing more affordable housing for young and/or older, poorer U.S. residents; improving the U.S. environment; making more productive use of natural resources; or a request from an interested U.S. government agency.<sup>129</sup>

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approach, applicants were denied EB-1 status, despite having satisfied three of the ten requirements, because the evidence failed to demonstrate their extraordinary ability); Farnoush Nassi, *Into the Labyrinth: Artists, Athletes, Entertainers, and the INS*, 19 LOY. L.A. ENT. L. REV. 107, 117-20 (1998).

123. 8 U.S.C. § 1153(b)(2)(B) (2006).

124. *Id.* § 1153(b)(2)(B).

125. *Id.* § 1153(b)(2)(B)(i).

126. 8 C.F.R. § 204.5(k)(4)(ii) (2010).

127. Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,900 (Nov. 29, 1991) (supplementary information).

128. File No. EAC 92 091 50126 (AAO 1992).

129. *Id.*; see also Cletus Weber & Ron Wada, *National Interest Waivers 2002—A Practice Update*, 7 BENDER'S IMMIGR. BULL. 361 (2002).

Although the list provided a good indication of what the immigration agency sought, it remained difficult to determine whether an individual qualified for a NIW. For example, would an attorney practicing in the public interest be doing work that qualifies? Would it matter if the attorney was providing services that had a national impact? Would an otherwise eligible attorney be disqualified based on the type of public interest clients he or she represented? Without much guidance, the NIW cases varied widely.<sup>130</sup> Even an international ivory trader attempted to obtain an NIW, albeit unsuccessfully.<sup>131</sup>

1. *The INS Attempts to Define "National Interest"*

The INS attempted to clarify the NIW category in its 1995 proposed regulations. The agency lamented that "absent published general guidelines, it is very difficult to adjudicate consistently national interest waivers."<sup>132</sup> The proposed regulations would have required each NIW applicant to meet four elements that would "allow for greater consistency in [NIW] adjudication," but "not limit, or attempt to define, which types of activities are in the national interest."<sup>133</sup>

The first element would have required a NIW applicant to have at least two years of experience in the area of national interest.<sup>134</sup> This element addressed agency concerns about whether newly minted graduates would be "truly committed to performing the activity which promotes the national interest."<sup>135</sup> The second element would have required that the NIW not be solely based on the applicant's "ability to ameliorate a local labor shortage."<sup>136</sup> The third element would have required the applicant's work to "substantially benefit prospectively the United States."<sup>137</sup> The fourth element would have required the applicant to play a "significant role in that activity which will prospectively benefit the United States."<sup>138</sup>

The four elements in the 1995 proposed regulations would have brought a clearer standard to the NIW, but would also have restricted the NIW. The immigration bar criticized the proposed restrictions because they would

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130. Weber & Wada, *supra* note 129.

131. Naomi Schorr, *They Don't Shoot Elephants, Do They?: The National Interest Waiver for EB-2*, 70 INTERPRETER RELEASES 773 (1993).

132. Employment-Based Immigrants, 60 Fed. Reg. 29,771, 29,777 (June 6, 1995) (supplementary information).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

have barred many deserving immigrants from seeking a NIW.<sup>139</sup> In the face of this criticism, the agency never finalized the proposed regulations.

## 2. In re New York State Department of Transportation

A few years after the proposed regulations were announced, the AAO published its only precedent NIW decision: *In re New York State Department of Transportation (NYSDOT)*.<sup>140</sup> The case involved a civil engineer who sought work maintaining New York State's bridge and road infrastructure. In discussing the application, the AAO laid out three "factors [that] must be considered when evaluating a request for a national interest waiver."<sup>141</sup> These three factors have become the cornerstone of any NIW application.

The first factor is whether an applicant "seeks employment in an area of substantial intrinsic merit."<sup>142</sup> The *NYSDOT* court quickly determined that maintaining bridge infrastructure has intrinsic merit.<sup>143</sup> The decision offered no additional input on what does or does not have intrinsic merit. It is difficult to think of a profession or occupation that does not have intrinsic merit. As a practical matter, this factor has not limited many NIW cases.

The second factor is whether an applicant's "proposed benefit will be national in scope."<sup>144</sup> The *NYSDOT* court determined that the applicant met this factor because his work on New York State bridges and roadways was part of the national roadway system.<sup>145</sup> By contrast, the *NYSDOT* decision included a footnote stating that a public interest attorney or a local teacher would not meet this factor.<sup>146</sup> The distinction between a civil engineer working solely in New York State and a public interest attorney or schoolteacher working solely in New York State is not readily apparent.

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139. AM. IMMIGR. LAWYERS ASS'N, RESPONSE TO THE PROPOSED RULE AMENDING THE IMMIGRATION AND NATURALIZATION SERVICE REGULATIONS ON EMPLOYMENT-BASED IMMIGRANT PETITIONS, in 60 FED. REG. 29771 (June 6, 1995) (Aug. 7, 1995); Nathan Waxman, *A Distinction Without a Difference?: Misapplication of Exceptional and Extraordinary Ability Evidentiary Standards to Adjudication of National Interest Waiver Petitions of Advanced-Degree Professionals*, in AM. IMMIGR. LAWYERS ASS'N, 1998-99 IMMIGRATION & NATIONALITY LAW HANDBOOK 194, 204-06 (R. Patrick Murphy et al. eds., 1998).

140. 22 I. & N. Dec. 215 (BIA 1998).

141. *Id.* at 217.

142. *Id.*

143. *Id.* at 222.

144. *Id.* at 217.

145. *Id.*

146. *Id.*



The third factor is “specific to the [applicant]”<sup>147</sup> and requires a showing that the applicant “will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.”<sup>148</sup> This factor requires an applicant to “persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the [applicant].”<sup>149</sup> In addition, the third factor effectively disqualifies any applicant with “no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.”<sup>150</sup>

The third factor proved to be the *NYSDOT* applicant’s downfall and the deciding factor in many subsequent NIW applications.<sup>151</sup> In practice, the factor turns the question of “national interest” on its head. Instead of proving that a waiver’s approval will serve the national interest, an applicant must “persuasively demonstrate” that the waiver’s approval will not hurt the national interest of protecting the theoretical employment of a minimally qualified U.S. worker.

### 3. *Does NYSDOT Reflect Congressional Intent?*

The NIW was meant to provide a flexible, efficient method for the United States to attract international workers who would serve the national interest. For that reason, Congress did not define “national interest.” The Senate Judiciary Committee report highlighted that it “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise.”<sup>152</sup>

*NYSDOT*’s second and third factors have effectively changed the dynamics of the NIW. No longer is there a flexible means of ensuring that each applicant will serve the “national interest.” The second factor limits the NIW to immigrants whose work is national in scope. The third factor creates a subjective, de facto labor certification test administered by an individual immigration adjudicator. Each applicant must prove that he or she will not hurt a theoretical U.S. worker, rather than prove that the applicant will benefit the “national interest.”

Providing objective statistics as to the effect of *NYSDOT* is difficult. The authors have been unable to find DHS or INS statistics quantifying the number of NIWs issued each year. However, practicing attorneys report

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147. *Id.*

148. *Id.* at 218.

149. *Id.* at 217.

150. *Id.* at 219.

151. *Id.* at 223.

152. S. REP. NO. 101-55, at 11 (1989).

that the restrictive requirements placed on NIW cases by *NYSDOT* limit the number of workers whose employment in the United States would qualify as being in the national interest.<sup>153</sup>

### III. RECOMMENDATIONS

Comprehensive immigration reform (“CIR”) has been a political talking point for many years. For all the talk, little progress has been made toward reaching a consensus. It is unlikely that CIR will become law soon. Attracting the best and brightest has been entangled in the overall CIR debate.

Attracting the best and brightest is of immediate national importance and should not be put on the back burner while the nation debates divisive immigration issues. Absent CIR, Congress should pass an employment-based immigration bill that strengthens our ability to attract the best and brightest. The bill should include a point system and ensure that the best and brightest have an objective, fast track mechanism for gaining permanent residency in the United States.

Even absent congressional action, the USCIS should act to clarify its standards and ensure that the best and brightest have a clear path for immigrating to the United States under the current law.

#### A. The U.S. Point System

The United States should adopt an employment-based immigration point system. A point system could provide an objective, less complicated means for attracting the best and brightest. Further, a properly structured point system will ensure that qualifying immigrants have the tangible qualities and knowledge that will truly enhance U.S. interests.<sup>154</sup> It will also create more public confidence in the immigration system.<sup>155</sup>

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153. Many immigration practitioners believe that it was more difficult to obtain a NIW immediately following *NYSDOT* than it is today. Practitioners attribute this to the belief that both adjudicators and advocates were unfamiliar with the new standard at first. As more NIW cases have been adjudicated, a standard has emerged over time. Attorneys, however, continue to believe that many deserving immigrants working in the national interest are unable to meet the *NYSDOT* factors. E-mail from Dan Berger, Immigration Lawyer, Curran & Berger, to Chris Gafner & Stephen Yale-Loehr (Sept. 14, 2010, 04:40 EST) (on file with authors); Interview with Nathan Waxman, Immigration Lawyer, Law Office of Nathan Waxman (Sept. 16, 2010); Interview with Suzanne Seltzer, Immigration Lawyer, Klasko, Rulon, Stock & Seltzer, LLP (Sept. 16, 2010).

154. GEORGE J. BORJAS, *HEAVEN’S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 193 (1999). Admittedly, many intangible and immeasurable factors determine a person’s contribution to national interest. A point system is best suited for determining tangible factors.

155. *Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the H. Comm. on the Judiciary*, 110 Cong. (May 1, 2007) (statement of

The factors included in any point system will be hotly debated. The selected factors will help shape the future demographics of the United States. As such, it is paramount that the main purpose of the point system be to ensure that the national interest is benefited by the inclusion of highly skilled noncitizens in the U.S. workforce.<sup>156</sup>

A U.S. point system has been proposed before, most notably during the debate leading up to IMMACT90 and during recent immigration debates.<sup>157</sup> The factors proposed in the IMMACT90 debate included age, education, occupational demand, occupational training or work experience, and pre-arranged employment.<sup>158</sup> The point system proposed in the Immigration Act of 2007 included four categories, including employment experience in the United States, educational attainment, English language and civic proficiencies, and extended family residing in the United States.<sup>159</sup>

The point system must ensure the inclusion of immigrant workers who are capable of contributing to the U.S. national interest. The following factors would enable the point system to meet that purpose:

*Education:* An immigrant's education should be a key factor. Education is "the clearest and most basic pointer to an individual's human capital."<sup>160</sup> Points should be available for obtaining a bachelor's degree and graduate degrees. Moreover, the number of points should vary based upon the subject matter of the degree awarded. For example, more points should be granted to graduate degrees in the STEM professions. Further, skilled immigrants who are fresh out of graduate school must be eligible to immigrate to the United States. This variation would ensure that the United States attracts immigrants that are most beneficial to the nation.

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Demetrios G. Papademetriou, President, Migration Pol'y Inst.); DEMETRIOS PAPADEMETRIOU & STEPHEN YALE-LOEHR, PUTTING THE NATIONAL INTEREST FIRST: RETHINKING THE SELECTION OF SKILLED IMMIGRANTS ch. 5 (1996); DEMETRIOS PAPADEMETRIOU, MIGRATION POL'Y INST., SELECTING ECONOMIC STREAM IMMIGRANTS THROUGH POINTS SYSTEMS (2007); Yale-Loehr & Hoashi-Erhardt, *supra* note 24, at 108.

156. In maintaining its purpose, the point system should only address employment-based immigration and should not be hindered by family-based or humanitarian-based immigration concerns. Family-based and humanitarian-based immigration are important parts of U.S. immigration policy, but they serve a separate purpose from employment-based immigration and should not play a primary role in the point system.

157. RUTH WASEM & CHAD HADDAL, CONG. RESEARCH SERV., RL 34030, POINT SYSTEMS FOR IMMIGRATION SELECTION: OPTIONS AND ISSUES (2007).

158. *Id.* at 13.

159. *Id.* at 15-16.

160. Yale-Loehr & Hoashi-Erhardt, *supra* note 24, at 115 (citing CITIZENSHIP AND IMMIGR. CAN., SKILLED WORKER IMMIGRANTS: TOWARDS A NEW MODEL OF SELECTION 9 (1998) (discussing a Canadian study finding that education is "the clearest and most basic pointer to an individual's human capital"))).

*Age:* The United States has an interest in attracting immigrants who will have greater longevity in the workforce. Although older immigrants should not be barred from immigrating, younger immigrants should be afforded more points on a sliding scale that is determined by one's age.

*English Proficiency:* An immigrant's ability to communicate in English is an important indicator of how beneficial that immigrant can be to the nation's development.<sup>161</sup> As the point system is an employment-based system, an immigrant capable of understanding written and spoken English should be granted additional points. From a societal standpoint, this factor will also lend itself to an immigrant's greater ability to integrate more readily into American society.<sup>162</sup>

*Work Experience:* An immigrant's work experience should also be a factor. It would allow more experienced immigrants to enter the United States if the immigrant has employment skills beneficial to the nation's interest. Work experience, however, should not trump youth or education. Nor should work experience be a required factor.

*Employment Arrangement:* Immigrants with prearranged employment opportunities should be granted additional points. U.S. employers are in the best position to determine which workers are immediately needed in the U.S. workforce, and employers' selection of a foreign national should be given weight. In addition, to ensure that the nation meets its long term workforce requirements, the system should grant additional points to immigrants with prearranged employment opportunities in industries and fields that are most beneficial to the United States in the long run.

Political wrangling will likely require the United States to place an upper limit on the annual number of highly skilled immigrants allowed into the United States. If such a limit is imposed, the United States must ensure that the best and brightest immigrants are provided a fast track for immigrating to the United States. If a limitation is imposed, the EB-1-1, EB-1-2, and NIW caliber immigrants must not be impeded in their ability to enter the United States.

### 1. *A Lottery for Highly Skilled Immigrants?*

A point system would be a radical step for the United States. To avoid the fate of previously proposed point systems, we offer a compromise—a pilot program. Currently, the “diversity lottery” enables 50,000 immigrants

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161. *Id.* at 116 (citing CITIZENSHIP AND IMMIGR. CAN., SKILLED WORKER IMMIGRANTS: TOWARDS A NEW MODEL OF SELECTION 33-35 (1998)).

162. See SAMUEL P. HUNTINGTON, WHO ARE WE? 201, 298 (2004).

to enter the United States each year.<sup>163</sup> The program is open to all who have a minimal education and a qualifying relationship. Some have criticized the diversity lottery program as failing to provide significant value to the United States.<sup>164</sup> Further, although diversity lottery immigrants may have ambition, they often do not have the education or experience necessary to succeed in the United States.

Congress should substitute the diversity lottery visa program with a pilot point system lottery. The pilot program would ensure that 50,000 selected immigrants have the ambition and know-how to make a significant positive impact on the United States. It would be an American lottery for highly skilled immigrants.

To qualify for the lottery, each applicant would need to meet a predetermined point level. The factors in the point system would stress the characteristics that are most appealing to the national interest. The factors should include age, education, English proficiency, and work experience. Further, education and work experience should be divided into sections that provide varying points based on the usefulness of the education and experience of the immigrant (for example, more points should be awarded to individuals with STEM education and experience).

Certain factors should not be included in the pilot point system. To ensure U.S. companies do not use the point lottery to end run the permanent immigration structure, an applicant's prearranged employment should not result in additional points (nor should it be a negative factor). Additionally, a person's current or past salary (or wealth) is not necessarily indicative of his or her ability to contribute to the national interest and should not be a positive or negative factor.<sup>165</sup> Likewise, family ties to the United States should not be a factor, as it is not indicative of a person's ability to contribute to the national interest. Unlike the diversity lottery, a person's nationality should also bear no impact on a person's eligibility.

In short, the point lottery should be a meritocracy based upon each applicant's ability to contribute to the national interest.

The pilot program legislation should require empirical studies on the impact that the selected immigrants would have on the national interest. The report should focus on the impact that the selected immigrants would have

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163. 8 U.S.C. § 1153 (2006).

164. See, e.g., Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319 (1993).

165. For example, a low level financial trader's salary is almost certainly higher than that of most world class scientists, yet in our view the scientist is likely to contribute more to the national interest. In addition, the inclusion of income or wealth as a factor would make the lottery biased towards individuals residing in countries with strong global currencies.

on all parts of the national interest, including scientific, economic, environmental, and educational impact. The empirical information would provide Congress with the data needed to decide whether to keep, expand, or modify the program.

Given the success that other countries have had with the point system, we are confident that the data will show the point system's effectiveness. If for some reason the point system is not effective, then the pilot program would allow Congress the flexibility to modify or eliminate the point system lottery.

### **B. Should a U.S. Ph.D. Diploma Lead to Permanent Residency?**

Another clear and objective standard for granting permanent residency to highly skilled immigrants would be to provide U.S.-educated noncitizens the opportunity to gain permanent residency upon the completion of their education here in the United States. It makes no sense to educate the world's best and brightest in U.S. universities, often subsidized by U.S. taxpayers, and then force them to leave and compete against the United States in the global economy.

Congress is considering this concept. The Stopping Trained in America Ph.D.s From Leaving the Economy Act of 2009 ("STAPLE Act") would grant permanent resident status to certain Ph.D. graduates if they have an offer of employment in a field related to their Ph.D. coursework.<sup>166</sup> Only Ph.D. graduates in the STEM fields would benefit if the bill became law.<sup>167</sup>

Others have proposed that the United States could benefit greatly by attaching permanent residency to the receipt of an American bachelor's degree. The Kauffman Foundation's Robert Litan has been paraphrased as stating that a green card should be stapled to the diploma of every foreign student who graduates from a U.S. university.<sup>168</sup>

Absent CIR, attaching permanent residency to educational achievement is a good initial step in strengthening America's global position. Enactment of the STAPLE Act or similar legislation would enhance U.S. global competitiveness. Additionally, by restricting the program to only STEM degree recipients with offers of employment, the act would alleviate concerns that this change would cause the mass entrance of less qualified and desirable immigrants.

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166. H.R. 1791, 111th Cong. § 2 (2009).

167. *Id.*

168. Thomas L. Friedman, *A Gift for Grads: Start-Ups*, N.Y. TIMES, June 9, 2010, at A25.

### C. Bring Consistency and Clarity to the EB-1-1 and EB-1-2

While the nation waits for Congress to enact CIR, the USCIS should reform its EB-1-1 and EB-1-2 regulations.

These regulations have been unclear since their inception. For the last twenty years, this lack of clarity has cast a shadow on the most enticing means the United States has for attracting the best and brightest.<sup>169</sup> The United States risks losing great scientists, researchers, academics, and industrialists simply because of the country's confusing immigration laws. Twenty years of ambiguity is enough.

The USCIS has recently taken the initiative by releasing a memorandum concerning proposed changes to the EB-1-1 and EB-1-2 adjudicative process following *Kazarian*.<sup>170</sup> This is a positive step. Nevertheless, the USCIS's proposed changes do not adequately address the congressional intent behind the categories and the subsequent case law since IMMACT90.

*Kazarian* has not settled EB-1-1 and EB-1-2 standards. *Kazarian* is just one of many cases that have weighed in on the Weinig-circular reasoning debate that has persisted for the last twenty years.<sup>171</sup>

In crafting its policies, the USCIS should strive to create an objective, transparent scheme for adjudicating EB-1-1 and EB-1-2 petitions. The most objective approach would be to follow *Buletini v. INS*.<sup>172</sup> The *Buletini* opinion stated that once an applicant meets the prerequisite number of criteria, the immigration agency must grant EB-1-1 or EB-1-2 classification unless "[the immigration agency] sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard."<sup>173</sup>

Adjudicators should first review each application to determine if it meets the required number of criteria set forth in the regulations. If so, immigrant status should normally be granted. If the USCIS decides to issue a Request for Evidence ("RFE"), the RFE should specifically state which criterion has not been met and why.

In rare circumstances, an adjudicator may believe that an applicant who meets the required number of criteria should nevertheless be denied immigrant status. In such cases the adjudicator should bear the burden to dem-

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169. See *supra* Part II.A.

170. USCIS Memo, *supra* note 110.

171. Letter from Am. Immigration Lawyers Ass'n to USCIS (Sept. 3, 2010) (AILA InfoNet Doc. No. 10090733) [hereinafter AILA Letter to USCIS] (responding to USCIS Interim Memorandum for Comment "Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions").

172. 860 F. Supp. 1222, 1234 (E.D. Mich. 1994).

173. *Id.*

onstrate why. An adjudicator should provide specific and substantive reasons for the RFE, and provide an applicant meaningful opportunity to respond to the objection.<sup>174</sup> The adjudicator's reasoning should be original and not include template language. Each case is different and template language simply does not explain an applicant's unique situation.

The USCIS must also work to better train its adjudicators and give them more time to adjudicate petitions. EB-1-1 and EB-1-2 cases are often complicated and require an in-depth understanding of an applicant's field of endeavor, the applicant's qualifications, and the complicated legal standards. Adjudicators must make difficult decisions, and USCIS must equip the adjudicators with the knowledge necessary to correctly make those decisions. Adjudicators should also be given the opportunity to visit research institutions and national laboratories on a regular basis. Learning more about academia will enable adjudicators to make more informed decisions. Finally, adjudicators should be given the opportunity to learn more about other fields and industries that employ many EB-1-1 and EB-1-2 applicants.

Moreover, the USCIS must not rush adjudicators in making their decisions. An immigration attorney was recently told that adjudicators are given an average of just twenty-three minutes to decide EB-1-1 and EB-1-2 cases.<sup>175</sup> That is simply not enough time for an adjudicator to read a petition, gain an understanding of the field and the applicant's credentials, and make an informed decision.<sup>176</sup>

Empowering USCIS adjudicators is as important as any other modification to the EB-1-1 and EB-1-2 system. They determine who will benefit the United States and who will not.

In revising its standards, the USCIS should not set its standards so rigidly as to cause the underutilization of the EB-1 category. Not everyone is extraordinary or outstanding, and obtaining EB-1 status should not be a simple task. Yet, the United States benefits greatly from attracting as many qualifying EB-1 immigrants as possible. Thus, in revising its regulations, the USCIS should aim to ensure that the EB-1 visa cap is reached (or nearly reached) each year.

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174. AILA Letter to USCIS, *supra* note 171.

175. E-mail from Dan Berger, *supra* note 153.

176. Abundant evidence exists of the hasty adjudication of EB-1-1 and EB-1-2 cases. AILA Letter to USCIS, *supra* note 171; *In re* [redacted], File No. [redacted] (Tex. Serv. Ctr. Feb. 4, 2010) (showing the wrong name of EB-1-1 self petitioner) (copy on file with authors).



#### D. Return Flexibility to the National Interest Waiver

The NIW was created to offer the United States a flexible means of attracting immigrants who will serve the national interest. The working NIW mechanism must be as open ended as the statute. The current controlling case, *NYSDOT*, has limited the NIW's availability for many immigrants who would serve the national interest. This limitation runs counter to the congressional intent behind IMMACT90.

Creating a flexible mechanism is easier said than done. New regulations are not the answer. Regulations are inherently rigid and limiting. Any attempt to regulate the NIW would restrict the immigration opportunities of deserving individuals who do not nicely fit into the regulatory framework. The proposed 1995 regulations demonstrate this problem.<sup>177</sup> According to one attorney, the proposed regulations would have "straight jacket[ed]" the NIW.<sup>178</sup>

Precedent case law is one way to create a paradigm as elastic as the NIW statute. Many advocates believe that *NYSDOT*'s three factors are "inherently opaque," but workable with some changes.<sup>179</sup> At the time of the decision, it may have been the "best of a bad situation."<sup>180</sup> However, in the twelve years following *NYSDOT*, it has become apparent that the decision unnecessarily restricts many deserving and otherwise eligible immigrants.

A new precedent decision could build upon the *NYSDOT* framework and create a more encompassing mechanism. It could ensure the NIW's inclusion of immigrants, who are advancing national priorities, but whose work is not national in scope. If *NYSDOT*'s second factor is not met, a new precedent decision should require adjudicators to consider whether the applicant's work is advancing a national priority. This modification would allow the admission of immigrants, such as highly innovative school principals, who are revolutionizing the nation's education system, and local medical physicians, who are serving (but not living in) medically underserved areas. Not every principal or local physician should be granted a NIW, but the truly exceptional ones should be. Focusing on national priorities would also allow for the inclusion of immigrants working on international projects consistent with national priorities. For example, many environmental scientists who are improving the global environment could use the NIW. *NYSDOT*'s second factor should be expanded to include

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177. See *supra* Part II.A.4.

178. Interview with Nathan Waxman, *supra* note 153.

179. *Id.*

180. *Id.*

those immigrants who are making significant contributions to advance national priorities.

The USCIS should also modify *NYSDOT*'s third factor. Although the NIW should not be used solely to ameliorate a local labor shortage, the key factor should not be whether a labor shortage exists. The key factor should be whether the applicant's work will significantly contribute to the national interest.

*NYSDOT* was perhaps the best solution available in 1998. But, now that the case has been applied for twelve years, it is time for it to be modified to correct the limitations that *NYSDOT* imposed on the NIW, which contradict the NIW's congressional intent.

The USCIS must also start collecting and publishing data on the number of NIW petitions granted each year. How else will Congress know the effectiveness of the NIW?

### CONCLUSION

The United States has long benefited from the contributions of its best and brightest immigrants. However, the United States cannot bask in its past glory. Other nations have positioned themselves to attract individuals who are likely to make significant contributions to their own countries. The United States must act now if it wishes to continue being a formidable competitor.

