



STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

SUBMITTED TO THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP

HEARING ON

“HOW OUTDATED U.S. IMMIGRATION POLICIES PUSH TOP TALENT TO OTHER COUNTRIES”

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The American Immigration Council (Council) is a non-profit organization that has worked to increase public understanding of immigration law and policy—and the role of immigration in American society—for over 30 years. We write to share with the Committee our analysis of the archaic U.S. immigration policies which are making the United States a less attractive destination for highly skilled workers from other countries.

The marketplace for highly skilled workers is global in scope. Nations compete with one another to attract qualified professionals from around the world to fill available jobs in key economic sectors. Unfortunately, the competitiveness of the United States in this global marketplace is being undermined by outdated rules and arbitrary numerical caps which have not been updated in decades. These self-imposed limitations have caused the backlog of applications for employment-based visas to grow rapidly, which forces applicants to wait longer and longer for visas to actually become available. As a result, the United States is becoming a less desirable destination for a growing number of skilled foreign workers looking for either temporary or permanent employment opportunities. Other nations, such as Canada, are taking advantage of this fact by crafting immigration policies that are more welcoming than those of the United States. Until the U.S. government revamps its outdated employment-based immigration system, the U.S. economy will continue to fall behind in the global competition for skilled workers.

Arbitrary limits in the temporary employment-based immigration system

Currently there are 22 different types of temporary employment visas defined by U.S. immigration law.¹ Employers may petition for and hire foreign nationals for specific jobs for limited periods of time only within these visa categories. Most temporary workers must work for the employer who petitioned for them and have limited ability to change jobs.² In most cases, they must leave the United States if their status expires or if their employment is terminated for any reason, including layoffs.

One of the most widely utilized of the temporary visa categories for high-skilled workers is the H-1B, which allows employers to petition for foreign professionals to work in “specialty occupations” that require at least a bachelor’s degree in a specific specialty or the equivalent.³ Jobs in fields such as mathematics, engineering, technology, and medical sciences often qualify. Typically, the initial duration of an H-1B visa classification is three years, which may be extended for another three years at most.⁴ The largest number of H-1B recipients come from India, followed by China.⁵

Since the category was created in 1990, Congress has limited the number of H-1Bs made available each year. The current annual cap is 65,000 visas, plus 20,000 additional visas for foreign professionals who graduate with a master’s degree or doctorate from a U.S. institution of higher learning.⁶ In recent years, demand for H-1B visas has far exceeded the supply. For instance, from Fiscal Year (FY) 2015 through FY 2020, the number of H-1B petitions submitted was more than double the 85,000 visas available.⁷ Due to this unmet demand, the annual limit on H-1Bs is regularly reached well before the end of each fiscal year. In FY 2021, the cap was reached on February 16, 2021.⁸

Arbitrary limits in the permanent employment-based immigration system

The numerical limits for permanent employment-based immigration are exceedingly complex. The overall numerical limit is capped at 140,000 per year. But this number includes not only the immigrants themselves, but their eligible spouses and minor children as well, meaning that the actual number of employment-based immigrants is far less than 140,000 each fiscal year. Moreover, the 140,000 visas are divided among five preference categories, each of which is subject to its own numerical cap.⁹

Preference Category	Eligibility	Yearly Numerical Limit
1 Priority Workers	“Persons of extraordinary ability” in the arts, science, education, business, or athletics; outstanding professors and researchers; multinational managers and executives.	40,040* or 28.6%
2 Professionals with Advanced Degrees or Exceptional Ability	Members of the professions holding advanced degrees, or persons of exceptional abilities in the arts, science, or business.	40,040** or 28.6%
3 Skilled Workers, Professionals, and Unskilled Workers	Skilled workers with at least two years of training or experience, professionals with college degrees, or “other” workers for unskilled labor that is not temporary or seasonal.	40,040*** or 28.6% “Other” unskilled laborers restricted to 5,000
4 Certain Special Immigrants	Certain “special immigrants” including religious workers, employees of U.S. foreign service posts, translators, former U.S. government employees, and other classes of noncitizens.	9,940 or 7.1%

5 Immigrant Investors	Persons who will invest \$500,000 to \$1 million in a job-creating enterprise that employs at least 10 full-time U.S. workers.	9,940 or 7.1%
Total Employment-Based Immigrants		140,000 for principals and their dependents
*Plus any unused visas from the 4th and 5th preferences **Plus any unused visas from the 1st preference ***Plus any unused visas the 1st and 2nd preference		
Source: William A. Kandel, <i>Permanent Legal Immigration to the United States: Policy Overview</i> (Washington, DC: Congressional Research Service, May 11, 2018), 5, https://fas.org/sgp/crs/homesecc/R42866.pdf .		

In addition to these caps on employment-based preference categories, the total number of visas (both employment-based and family-based) that any country can receive is capped at no more than seven percent of the worldwide limit on U.S. immigrant admissions (which is set at 675,000). In other words, no country can receive more than 47,250 employment-based and family-based visas combined (not counting uncapped categories like the immediate relatives of U.S. citizens). This is often referred to as the “per-country cap.”¹⁰

Given these overlapping sets of numerical limits, it is not surprising that for certain countries there are more petitions each year in some preference categories than there are visas available. Some individuals therefore must wait a long time to apply for adjustment of status or to have their pending applications processed (if they are already in the United States) or to apply for an immigrant visa (if they will apply at a U.S. embassy or consulate abroad), even after their employer’s petition is approved by the U.S. government. There are particularly large backlogs—and, hence, lengthy wait times—for individuals born in India and China.¹¹

For example, in the case of India, as of June 2021 visa or adjustment of status applications could be submitted or processing completed for individuals in the second preference category whose immigrant visa petitions had been approved and for whom the relevant labor certification or petition was filed before December 1, 2010—meaning that these individuals have been waiting more than 11 years for a visa to become available.¹² However, because the backlog is continuing to grow very rapidly, the wait time will be far greater for those individuals whose immigrant visa petitions have been approved and for whom the relevant labor certification or petition is filed in 2021. One study estimates that Indian nationals in the second and third preference categories who enter the backlog now will have to wait somewhere between 39 and 89 years if visas continue to become available at the current rate.¹³

Given wait times of this magnitude, many Indians in the United States are considering moving elsewhere. One recent survey of Indian nationals waiting for an immigrant visa to become available found that 70% “are seriously thinking at the present time about emigrating to a more visa-friendly country.” Moreover, 30% “have already applied for permanent residency in a visa-friendly country” and 9% “have already obtained a permanent residency in a more visa-friendly country.”¹⁴

Moving beyond rigid numerical caps

An employment-based immigration system dominated by static numerical caps is far too rigid to respond to the changing demands of either the U.S. economy or the global labor market. For instance, there will be times when a limit of 40,040 visas in the second preference category is sufficient and times when it is inadequate to meet the labor needs of U.S. industries. Moreover, imposing the same per-country caps on, say, India and Switzerland makes little sense given that so many more of the high-tech workers needed by the U.S. economy are coming out of India. The governments of many other advanced industrialized nations, like Canada, understand that an employment-based immigration system artificially constrained by rigid numerical caps is inefficient and economically self-destructive. Hopefully, U.S. lawmakers will come to this realization as well.

Beyond lifting rigid numerical caps, Congress could take other steps to address problems with the current system, such as directing the Department of State not to count derivative beneficiaries such as spouses and children against numerical caps. This alone would nearly double the number of employment-based visas available and make the United States more competitive with other nations. Congress can and should consider common-sense changes like this to restore the United States' competitiveness for talent from around the world.

Endnotes

¹ See U.S. Citizenship and Immigration Services, "Temporary (Nonimmigrant) Workers," last accessed June 22, 2021, <https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers>.

² Some nonimmigrant visa classifications permit foreign workers to work in the United States without an employer having first filed a petition on the foreign worker's behalf. These include such nonimmigrant classifications as the E-1, E-2, E-3, and TN classifications. See U.S. Citizenship and Immigration Services, "Temporary (Nonimmigrant) Workers," last accessed June 22, 2021, <https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers>.

³ U.S. Citizenship and Immigration Services, "H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers and Fashion Models," updated March 2016, <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models>.

⁴ See 8 U.S.C. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(9)(iii)(A)(1), (h)(13)(iii)(A). Certain H-1B workers who face delays in the green card process are eligible for extensions beyond the six-year maximum. See 8 C.F.R. § 214.2(h)(13)(iii)(D).

⁵ U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress*, March 5, 2020, 7, https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.

⁶ 8 U.S.C. §§ 1184(g)(1)(A)(vii) & (g)(5)(C). The advanced degree must be earned from a U.S. "institution of higher education," as defined in 20 U.S.C. § 1001(a).

⁷ FWD.us and the Orrin G. Hatch Foundation, *Barriers to recruiting and retaining global talent in the U.S.*, 2019, 8, <https://www.fwd.us/wp-content/uploads/2019/03/19-03-29-high-skilled-report.pdf>.

⁸ U.S. Citizenship and Immigration Services, "USCIS Reaches Fiscal Year 2021 H-1B Cap," February 16, 2021, <https://www.uscis.gov/news/alerts/uscis-reaches-fiscal-year-2021-h-1b-cap>.

⁹ William A. Kandel, *Permanent Legal Immigration to the United States: Policy Overview* (Washington, DC: Congressional Research Service, May 11, 2018), 2-5, <https://fas.org/sgp/crs/homsec/R42866.pdf>.

¹⁰ Ibid.

¹¹ U.S. Department of State, "Visa Bulletin For June 2021," <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-june-2021.html>.

¹² Ibid.

¹³ David J. Bier, *Backlog for Skilled Immigrants Tops 1 Million: Over 200,000 Indians Could Die of Old Age While Awaiting Green Cards* (Washington, DC: Cato Institute, March 30, 2020), 5, <https://www.cato.org/sites/cato.org/files/2020-03/irpb-18-updated.pdf>.

¹⁴ Pooja B. Vijayakumar and Christopher J. L. Cunningham, “An indentured servant: The impact of green card waiting time on the life of highly skilled Indian immigrants in the United States of America,” *Industrial and Organizational Psychology Translational Research and Working Papers* (Chattanooga, TN: University of Tennessee, 2019), <https://scholar.utc.edu/iopsy/2/>.