

## NOTE

### American Idol: The Domestic and International Implications of Preferencing the Highly Educated and Highly Skilled in U.S. Immigration Law

*Kayleigh Scalzo\**

#### INTRODUCTION

Anna and Peter both live in Poland. Anna is a waitress, and none of her family members has ever been to the United States. Peter is a highly acclaimed ballet dancer, having performed with the best companies worldwide. Like Anna, none of his family members has ever been to the United States. Both Anna and Peter would like to immigrate to the United States. Because neither has any family there, both must apply as employment-based (“EB”) immigrants, as opposed to family-based immigrants.

Peter has a good case for qualifying as an alien of “extraordinary ability” (“EB-1”) under the Immigration and Nationality Act (“INA”)<sup>1</sup> because of his accomplished dance career, putting him in an elite visa category with streamlined application procedures.<sup>2</sup> Anna, on the other hand, would be considered an unskilled worker—labeled by the INA as “other workers” (“EB-3”)—meaning that she would have to fight for one of only ten thousand visas each year, obtain a job

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\* J.D., expected May 2011, The George Washington University Law School; B.A., 2008, Brown University.

<sup>1</sup> Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537 (2006).

<sup>2</sup> See *id.* § 1153(b)(1)(A).

offer prior to entry, and prove that there is not a single American worker ready, willing, and able to waitress at her intended destination in the United States.<sup>3</sup>

It would seem nearly impossible for Anna to comply with these requirements, and even if she somehow managed to do so, it may take several years for her file to wade through the backlog of EB-3 applications. Therefore, she essentially has three options: (1) attempt to immigrate without authorization and join the undocumented population, (2) take her chances in the “visa lottery,”<sup>4</sup> or (3) contact someone in the United States willing to falsify elements on her application (which still would not alleviate the backlog).

Although this imagined vignette is undeniably reductionist, the underlying theme is salient: in the category of EB immigration, the INA gives significant preference to highly skilled and highly educated aliens at the expense of unskilled and skilled aliens. The statute uses language such as “extraordinary ability,” “sustained national or international acclaim,” and “exceptional ability” in describing the type of applicants that the United States permits and encourages.<sup>5</sup> Because immigrants of this caliber are the exception rather than the norm,<sup>6</sup> the statute creates a disconnect between the immigration supply and demand curves and evidences a refusal to acknowledge the continuous stream of unskilled foreign nationals crossing U.S. borders.<sup>7</sup>

This disconnect also reveals a profound irony in the allocation of EB visas. EB-1 status, the most-favored category, is reserved for “that small percentage who have risen to the very top of [their] field of endeavor.”<sup>8</sup> This is an elite group by design, but it is given the same numerical proportion of visas as those whose abilities are not worthy

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<sup>3</sup> See *id.* § 1153(b)(3)(A)(iii), (B).

<sup>4</sup> See *id.* §§ 1151(e), 1153(c) (providing 55,000 immigrant visas on a random basis to applicants with either a high school education or two years of work experience in a position that requires at least two years of experience or training, and excluding applicants from certain countries that send large numbers of migrants to the United States under different provisions of the INA).

<sup>5</sup> See *id.* § 1153(b)(1)–(2).

<sup>6</sup> See *infra* notes 34–35 and accompanying text.

<sup>7</sup> See The Honorable Jorge Castañeda, Professor, N.Y. Univ., Remarks at the Nat’l Museum of Am. History & the Woodrow Wilson Int’l Ctr. for Scholars Symposium on The Legacy of the Bracero Program (Sept. 30, 2009) (explaining that the overall number of migrants coming across the border from Mexico is stable and that the only aspect of the flow that changes is the ratio of legal to illegal entries); see also Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 557 (2007) (“[T]he alternative to authorized migration is not an absence of immigration, but rather unauthorized migration.”).

<sup>8</sup> 8 C.F.R. § 204.5(h)(2) (2009).

of such accolades.<sup>9</sup> Assuming a greater number of potential unskilled (and even skilled) immigrants than potential EB-1 immigrants in any given country, the United States has adopted an immigration policy distillable to a cliché: separating the wheat from the chaff.<sup>10</sup>

Currently, there is significant discontent with the U.S. immigration system, as is demonstrated by the ongoing debate around immigration reform and the political and popular furies that it inspires.<sup>11</sup> An examination of EB immigration is especially relevant to any attempt at addressing this discontent and reforming the law. Many complaints about immigration focus on the intersection of immigration and employment, including factory raids and lost job opportunities.<sup>12</sup> Furthermore, immigration as a phenomenon is largely motivated by employment or economic issues.<sup>13</sup>

This Note identifies two main flaws with EB visa allocations: insufficient immigration opportunities for skilled and unskilled EB immigrants (“EB-3s”)<sup>14</sup> and a labor certification process so stringent and

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<sup>9</sup> See 8 U.S.C. § 1153(b)(1).

<sup>10</sup> See Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 719 (1997) (referring to this phenomenon as “designer immigration”); see also Brian Adler & Beth Jarrett, Comment, *Capital v. Labor: Who Wins and Who Loses Under the Immigration Act of 1990?*, 23 U. MIAMI INTER-AM. L. REV. 789, 820 (1992) (describing U.S. policy as “tak[ing] the ‘best’ of all societies and exclud[ing] most workers who do not meet the selective criteria”).

<sup>11</sup> See, e.g., Janet Napolitano, U.S. Sec’y of Homeland Sec., Prepared Remarks on Immigration Reform at the Center for American Progress (Nov. 13, 2009) (stating that “[e]verybody recognizes that our current system isn’t working and that our immigration laws need to change”).

<sup>12</sup> See, e.g., Julia Preston, *Immigrant Crackdown Leads to 1,800 Pink Slips*, N.Y. TIMES, Sept. 30, 2009, at A1 (discussing local and state politicians’ reactions to Immigration and Custom Enforcement’s investigation of hiring practices at American Apparel); see also Lee Cary, *The Elephant in the Immigration Room*, AM. THINKER (Feb. 3, 2008), [http://www.americanthinker.com/2008/02/the\\_elephant\\_in\\_the\\_immigratio.html](http://www.americanthinker.com/2008/02/the_elephant_in_the_immigratio.html) (arguing that undocumented immigrants deprive “unskilled, uneducated, native-born U.S. workers” of job opportunities).

<sup>13</sup> Devon Roepcke, Comment, “*Should I Stay or Should I Go?*”: Preventing Illegal Immigration by Creating Opportunity in Mexico Through Microcredit Lending, 38 CAL. W. INT’L L.J. 455, 459, 461–63 (2008) (suggesting that aliens do not need to emigrate if they have economic and employment opportunities in their native lands, and emphasizing the need to consider the “push” factors of immigration, including poverty and underground economies). The economic impetus underlying immigration is discussed in further detail below. See *infra* notes 141–45 and accompanying text.

<sup>14</sup> See Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1599, 1612–13 (2009) (observing that “the nation’s immigration laws are dramatically out of line with the nation’s demand for labor[, and c]urrently, many employers demand a relatively inexpensive, and flexible, labor pool”); see also Cristina M. Rodriguez, *Immigration: The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1126 (2008) (reviewing HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006)) (explaining that the native-born population

unrealistic that it invites fraud.<sup>15</sup> This situation is problematic for a number of reasons: it occasions “brain drain”<sup>16</sup> and undermines U.S. foreign policy; it runs contrary to the economic interests of both aspiring immigrants and the U.S. workforce; and its valorization of—and preference for—the highly educated, wealthy, and well-situated is at odds with the fundamentals of American law.

This Note argues that, as a first step toward immigration reform, the percentage of EB visas allocated to skilled and unskilled workers should be increased relative to other EB categories, and the labor certification requirement should be waived for unskilled workers. It does not, however, advocate a higher overall number of EB immigrants.

Part I provides an overview of the state of EB immigration law, including numerical allocations and caselaw illustrating the category-based standards as applied. Part II examines the domestic and international ramifications of a strongly meritocratic system. Part III proposes a less stratified and more pragmatic arrangement of visa allocations and explains why this reform is appropriate, even in a period of economic uncertainty. Finally, Part IV demonstrates why this reapportionment of visa numbers is the optimal solution in comparison to two alternatives.

#### I. THE INA AND EB VISA CATEGORIES: THE REAL AMERICAN IDOL

The INA comprehensively governs U.S. immigration, migration, citizenship, and border policy.<sup>17</sup> The 1990 amendments to the INA profoundly changed the EB immigration regime and instituted the visa allocations that are in place today.<sup>18</sup> Congress considered a vari-

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has “shifted toward high-skilled, high-wage jobs” and, as a result, there would still be insufficient U.S. workers available for the positions currently filled by undocumented aliens, even if those positions were more highly remunerated).

<sup>15</sup> See 8 U.S.C. § 1182(a)(5)(A)(i)(I)–(II) (2006) (requiring EB-immigrants (except EB-1) to have a pending job offer in the United States, where the potential employer has established and documented that “there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . . the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed”).

<sup>16</sup> Brain drain is defined as an exodus of the highly skilled and highly educated population from a country, accompanied by detrimental domestic economic consequences. See B. Lindsay Lowell, *Skilled Migration Abroad or Human Capital Flight?*, MIGRATION INFO. SOURCE (June 1, 2003), <http://www.migrationinformation.org/feature/display.cfm?ID=135>. This issue is discussed in more detail in Part II.A, *infra*.

<sup>17</sup> See 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 2.03, at 2–12 to –14 (rev. ed. 2010).

<sup>18</sup> See Immigration Act of 1990, Pub. L. No. 101-649, §§ 121–122, 104 Stat. 4978, 4987–94.

ety of visa apportionment formulations with varying treatment of elite immigrants before settling on the current system.<sup>19</sup> Under the law as adopted, discrimination based on educational, vocational, and professional qualifications—a meritocratic system—is a politically and constitutionally acceptable method of choosing amongst aspiring EB immigrants.<sup>20</sup>

A selective immigration policy is nothing new in U.S. law. Historically, admissions decisions were made (and, in some regards, continue to be made) based on, *inter alia*, ethnicity, race, mental health, physical health, morality, and criminal history.<sup>21</sup> Filtering based on education and skill level within the EB category dates back to 1952 and the first version of the INA, known as the McCarran-Walter Act.<sup>22</sup> Phrases such as “extraordinary ability” and “national or international acclaim” have appeared in the statute since that time.<sup>23</sup> In the past, however, “extraordinary ability” was considered equivalent to “exceptional ability”—the term used in the McCarran-Walter Act.<sup>24</sup>

As of the 1990 amendments, EB immigrants are divided into five “preference categories,” each receiving a fixed allocation of visas and requiring different qualifications.<sup>25</sup> EB-1, EB-2, and EB-3 immigrants, the three main categories, each receive 28.6% of the overall allocation of 140,000 EB visas per annum.<sup>26</sup> Legislative reports from the surrounding 1990 debates emphasize a rhetoric of national com-

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<sup>19</sup> See, e.g., *Immigration Act of 1989: Hearing on S. 358, H.R. 672, and H.R. 2646 Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 122 (1989) (discussing H.R. 672) (allocating fifty percent of all EB visas to skilled and unskilled workers and omitting the priority worker category).

<sup>20</sup> See Parker, *supra* note 10, at 709 (positing that the INA “discriminates” based on skill).

<sup>21</sup> See Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (current version at 8 U.S.C. § 1101 (2006)) (excluding, *inter alia*, “idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [and] polygamists”); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION & CIVIL RIGHTS* 6, 8–9 (2004) (discussing immigrant filtering based on race, ethnicity, criminal history, and perceived morality); Mark Gibney, *United States Immigration Policy and the “Huddled Masses” Myth*, 3 *GEO. IMMIGR. L.J.* 361, 362, 374 (1989) (discussing the hypocrisy and disconnect between the “golden door” image and the reality of immigrant admissions, dating back to the beginning of immigration control).

<sup>22</sup> See, e.g., H.R. REP. NO. 101-723, pt. 1, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6712 (explaining that, in the 1952 Act, “50 percent of each national quota was allocated for first preference distribution to aliens with high education or exceptional abilities”); see also Parker, *supra* note 10, at 709.

<sup>23</sup> See 3 GORDON, MAILMAN & YALE-LOEHR, *supra* note 17, § 39.03, at 39-24 to -25.

<sup>24</sup> *Id.* at 39-26 to -28.

<sup>25</sup> 8 U.S.C. § 1153(b)(1)–(5) (2006).

<sup>26</sup> *Id.* §§ 1151(d), 1153(b)(1), (2)(A), (3)(A).

petitiveness in praising the immigration of “highly skilled workers.”<sup>27</sup> However, as is clear from two decades of applying the EB regime, it does anything but facilitate the immigration of mere doctors and lawyers. Rather, it sets the standard for receiving EB-1 and EB-2 visas—over half of total EB admissions—extraordinarily high.

#### A. *EB-1 Immigrants*

EB-1 immigrants, or “priority workers,” include aliens of extraordinary ability, “[o]utstanding professors and researchers,” and “[c]ertain multinational executives and managers.”<sup>28</sup> There is a high bar for qualification in this group. Professors, researchers, and multinational executives are de facto an elite class of aliens. The statute defines those of extraordinary ability more explicitly, requiring the alien to have “extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and [which] have been recognized in the field through extensive documentation,” and to show proof that she “seeks to enter the United States to continue work in the area of extraordinary ability.”<sup>29</sup> In addition, she must demonstrate that her immigration “will substantially benefit prospectively the United States.”<sup>30</sup>

Federal regulations offer some guidance to an aspiring EB-1 immigrant wondering how to demonstrate her extraordinary ability. In evidencing her “sustained national or international acclaim,” she may choose between showcasing a significant “one-time achievement” or at least three items from a list of lesser accomplishments.<sup>31</sup> These latter items include, for example, coverage of the alien in the mass media or a trade publication, high salary or compensation, or evidence of high ticket sales, record sales, or the like.<sup>32</sup>

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<sup>27</sup> See, e.g., 136 CONG. REC. 36,838 (1990) (statement of Rep. Fish) (noting that new legislative efforts would “allow[ ] business to obtain the necessary skills to help it remain competitive in the international economy”).

<sup>28</sup> 8 U.S.C. § 1153(b)(1).

<sup>29</sup> *Id.* § 1153(b)(1)(A). All EB immigrants must establish their qualification within a certain visa category preliminarily through paperwork. See *Employment-Based Immigrant Visas*, TRAVEL.STATE.GOV., [http://travel.state.gov/visa/immigrants/types/types\\_1323.html](http://travel.state.gov/visa/immigrants/types/types_1323.html) (last visited Oct. 22, 2010) [hereinafter *Employment-Based Immigrant Visas*] (requiring all EB-1s, EB-2s, and EB-3s to obtain approval of their I-140 forms from U.S. Citizenship and Immigration Services). Thus, as an initial matter, evidence of qualification must be presented in the form of a written record. *Id.*

<sup>30</sup> 8 U.S.C. § 1153(b)(1)(A)(iii).

<sup>31</sup> 8 C.F.R. § 204.5(h)(3) (2009).

<sup>32</sup> *Id.* § 204.5(h)(3)(iii), (ix)–(x) (listing “[p]ublished material about the alien in profes-

Caselaw evidences the intense selectivity of the EB-1 category.<sup>33</sup> An Illinois district court described the federal regulations for EB-1 visas as “extremely restrictive,”<sup>34</sup> reflecting the regulatory definition of 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 [their] field of endeavor.”<sup>35</sup> In the realm of sports, for example, athletes cannot establish their extraordinary ability solely by demonstrating membership on a professional sports team; rather, professional status is but one factor to be considered in the calculation.<sup>36</sup>

There are also a number of cases reflecting inexplicable denials of EB-1 visas at the agency level (later overturned on judicial review), which suggest that “extraordinary” may actually signify superhuman in many administrative decisions.<sup>37</sup> In an oft-cited case, the United States District Court for the Eastern District of Michigan overturned the Immigration and Naturalization Service’s (“INS”) denial of an EB-1 visa for an alien physician who had won a number of national awards in Albania, published books of international medical importance, been the subject of favorable national newspaper coverage in Albania, presented many high-level scholarly papers, had expert

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sional or major trade publications or other major media,” “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field,” and “[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales”).

<sup>33</sup> Recent scholarship has also noted the government’s intense restriction of the EB-1 category. See Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 FORDHAM URB. L.J. 183 (2010). Gafner and Yale-Loehr observe that immigrants have “rarely approached” filling the annual quota allotted to the EB-1 category. *Id.* at 202 (attributing the failure to reach the quota to U.S. Citizenship and Immigration Service’s “interpretation of its [EB-1] . . . regulations”); see also *id.* at 194. They posit that this restrictive interpretation is contrary to Congress’s intent in the 1990 INA, which was to substantially increase the number of “highly skilled immigrants.” *Id.* at 201.

<sup>34</sup> *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002).

<sup>35</sup> 8 C.F.R. § 204.5(h)(2).

<sup>36</sup> *Muni v. INS*, 891 F. Supp. 440, 443 (N.D. Ill. 1995); see also *Grimson v. INS*, 934 F. Supp. 965, 967, 969 (N.D. Ill. 1996) (overturning INS’s denial of an EB-1 visa for a National Hockey League (“NHL”) player who was the “third rated and third highest paid enforcer in the NHL”).

<sup>37</sup> Although these administrative decisions were indeed overturned on judicial review, they are still salient because of the infrequency with which immigration decisions receive judicial review at all. For example, visas denied by consular officers are immune from judicial review pursuant to the doctrine of consular nonreviewability. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (“[A] consular official’s decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise.” (footnote omitted)); cf. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 625 (2006) (observing in the context of deportation that, “[s]ince 1996, Congress has acted to exclude many discretionary determinations from the ambit of judicial review”).

knowledge in a number of medical specialties, and maintained a medical practice.<sup>38</sup> Chinese-American writer Yiyun Li also experienced an obstacle-ridden attempt to obtain an EB-1 visa, which was denied despite her two-book contract with Random House, participation in the Iowa Writers' Workshop, and letters of support from Salman Rushdie and David Remnick, editor of *The New Yorker*.<sup>39</sup>

### B. EB-2 Immigrants

The next category, EB-2, includes “[a]liens who are members of the professions holding advanced degrees or aliens of exceptional ability.”<sup>40</sup> The expertise of aliens of exceptional ability must be in science, art, or business, and they must demonstrate that their immigration “will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and [that their] services . . . are sought by an employer in the United States.”<sup>41</sup> A college degree alone is insufficient to demonstrate exceptional ability.<sup>42</sup>

EB-2 immigrants need not show expertise or ability to the same level as EB-1 immigrants.<sup>43</sup> In contrast to EB-1 immigrants, however, they must obtain a labor certification prior to applying for a visa.<sup>44</sup> This requires that the alien have a pending job offer in the United States, where the potential employer has established and documented that

there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and

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<sup>38</sup> *Buletini v. INS*, 860 F. Supp. 1222, 1225, 1230–33 (E.D. Mich. 1994).

<sup>39</sup> Bob Thompson, *Writer Yiyun Li's Petition for Residency Denied on Appeal*, WASH. POST, Feb. 3, 2006, at C8. For a very recent example of an administrative denial of an EB-1 visa—here, to singer Celine Dion's bodyguard and driver, Nikolaos Skokos—see Marc Lacey, *Fending Off Paparazzi May Earn Glory, but Not Necessarily a Visa*, N.Y. TIMES, Mar. 2, 2011, at A12 (reporting Skokos's appeal of his denial to the U.S. Court of Appeals for the Ninth Circuit). For a detailed discussion of the application of the EB-1 category, an analysis of who qualifies for EB-1 status, and the extreme confusion in this area, see Gafner & Yale-Loehr, *supra* note 33, at 194–98.

<sup>40</sup> 8 U.S.C. § 1153(b)(2) (2006).

<sup>41</sup> *Id.* § 1153(b)(2)(A).

<sup>42</sup> *Id.* § 1153(b)(2)(C).

<sup>43</sup> Compare 8 C.F.R. § 204.5 (2009) (listing the evidence required to demonstrate professional status with an advanced degree or exceptional ability), with *id.* § 204.5(h)(3) (listing the evidence required to demonstrate extraordinary ability).

<sup>44</sup> See 8 U.S.C. § 1153(b)(2)(A) (requiring that the alien's “services in the sciences, arts, professions, or business [be] sought by an employer in the United States”); *Employment-Based Immigrant Visas*, *supra* note 29 (“A[n] [EB-2] applicant must generally have a labor certification approved by the Department of Labor.”).

admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . . the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.<sup>45</sup>

The only way for an aspiring EB-2 immigrant to avoid this process is to obtain a national-interest waiver to the labor certification by demonstrating that her work will be in “an area of substantial intrinsic merit,” that the benefit of her receipt of a waiver “will be national in scope,” and that “the national interest would be adversely affected if a labor certification were required.”<sup>46</sup>

### C. EB-3 Immigrants

The EB-3 category comprises a catchall for workers who do not qualify for EB-1 or EB-2—including “[s]killed workers, professionals, and other workers”—all of whom must obtain labor certifications prior to their visa applications.<sup>47</sup> Skilled work is defined as neither seasonal nor temporary and requires two or more years of experience or training.<sup>48</sup> Skilled immigrants are eligible for a visa only if there are no qualified workers for their position already in the United States.<sup>49</sup> Professionals are defined as having both a baccalaureate degree and being “members of the professions.”<sup>50</sup> A sampling of qualifying professions includes “architects, engineers, lawyers, physicians, surgeons and teachers in elementary or secondary schools, colleges, academies, or seminaries.”<sup>51</sup> The statute treats professionals and skilled workers

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<sup>45</sup> 8 U.S.C. § 1182(a)(5)(A)(i)(I)–(II); *Foreign Labor Certification: Permanent Labor Certification*, U.S. DEP’T LABOR, <http://www.foreignlaborcert.doleta.gov/perm.cfm> (last updated Oct. 14, 2010).

<sup>46</sup> N.Y. State Dep’t of Transp., 22 I. & N. Dec. 215, 217 (1998). For a detailed discussion of the national-interest waiver and the confusion in that area, see Gafner & Yale-Loehr, *supra* note 33, at 203–07.

<sup>47</sup> 8 U.S.C. § 1153(b)(3). EB-4 and EB-5 categories are designated for “special immigrants” and employment-creating, entrepreneurial investors, respectively, and, based on their narrowness and small numerical allocation, are beyond the scope of this Note. *See id.* § 1153(b)(4), (5). Demetrios G. Papademetriou and Professor Stephen Yale-Loehr also use the phrase “catch-all” to describe the EB-3 category. *See* DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS* 46 (1996).

<sup>48</sup> 8 U.S.C. § 1153(b)(3)(A)(i).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* § 1153(b)(3)(A)(ii).

<sup>51</sup> IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 883 (11th ed. 2008).

identically, and thus the same worker availability restrictions apply to each.<sup>52</sup>

“Other workers” within the EB-3 category are defined as aliens “capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”<sup>53</sup> They are subject to a cap of 10,000 per annum and consequently are in a less favorable position than the other EB-3 sub-categories.<sup>54</sup> Processing of “other worker” applications is subject to notorious backlogs because of the vast number of applicants within this category.<sup>55</sup>

The judiciary has recognized that Congress’s goal in allocating EB visas was to “increase the influx into the United States of highly skilled professionals to fill jobs for which American personnel are scarce.”<sup>56</sup> However, the standard for qualifying as a highly skilled EB-1 immigrant—as well as for qualifying as a mere “exceptional” EB-2 immigrant—is staggeringly high in light of the fact that these two categories consume over half of all EB visas. Although the difference between “extraordinary,” “exceptional,” and “skilled” may seem trivial in any other context, these labels have a profound effect on aspiring immigrants.<sup>57</sup> The highly meritocratic system of visa allocations must be reexamined in light of this situation.

## II. NEGATIVE EFFECTS OF A HYPER-MERITOCRATIC EB IMMIGRATION REGIME

The hyper-meritocracy of the current EB immigration regime is problematic for three main reasons: its furtherance of global brain drain, its failure to optimize U.S. economic interests, and the undemocratic and “un-American” value judgment that underlies it.

### A. *Global Brain Drain*

The phenomenon of international brain drain is based on two premises: there are few highly educated people in developing nations,

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<sup>52</sup> 8 U.S.C. § 1153(b)(3)(A).

<sup>53</sup> *Id.* § 1153(b)(3)(A)(iii).

<sup>54</sup> *Id.* § 1153(b)(3)(B).

<sup>55</sup> KURZBAN, *supra* note 51, at 883–84.

<sup>56</sup> *Buletini v. INS*, 860 F. Supp. 1222, 1228 (E.D. Mich. 1994).

<sup>57</sup> See Vernon M. Briggs Jr., *The State of U.S. Immigration Policy: The Quandary of Economic Methodology and the Relevance of Economic Research to Know*, 5 J.L. ECON. & POL’Y 177, 187 (2009) (pointing out that, to the average English speaker, “extraordinary,” “exceptional,” and “skilled” workers probably sound more or less the same).

and those highly educated people are extremely likely to emigrate.<sup>58</sup> It is defined as a “significant loss of the highly educated population” resulting in negative economic effects in the sending country.<sup>59</sup> These negative effects are often twofold, including a loss of human capital as well as a loss of the government’s return on its investment in its citizenry.<sup>60</sup> For example, a developing country may invest significant amounts of money in educating and providing healthcare to its youths on the understanding that they will mature into informed, healthy, and productive members of the national society.<sup>61</sup> That understanding collateralizes the investment.<sup>62</sup> Whenever a highly skilled, highly educated citizen emigrates, the country enters a loss on its ledger.

Although it is understandable that the best and brightest of a developing nation emigrate for a better life and additional opportunities, this strips the sending nation (perhaps more aptly described as the *deprived* nation) of valuable resources necessary for continuing development. In this regard, African countries have been acutely affected, and widespread emigration from the continent “threatens Africa with yet another net loss of quality human resources” similar to the effect of the slave trade.<sup>63</sup> One scholar estimates that twenty to fifty percent of the “top African brains and skilled personnel” have left the continent and fail to retain significant professional ties with their homelands.<sup>64</sup> The 2005 World Migration Report, compiled by the International Organization for Migration, called attention to the loss of human resources from the continent, a trend which one scholar predicts will culminate in Africa’s transformation into an “intellectually barren ghetto.”<sup>65</sup>

By contrast, developed countries benefit greatly from this continual injection of brains and talent, and they even compete with each other over immigrant candidates.<sup>66</sup> As Professor Ayelet Shachar, of

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<sup>58</sup> Lowell, *supra* note 16.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (explaining that adverse effects may extend beyond the economic and include social, political, artistic, and scientific losses).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Rotimi Sankore, *Africa Killing Us Softly*, 445 NEW AFR. 8, 10 (2005).

<sup>64</sup> *Id.* at 9.

<sup>65</sup> *Id.* at 12.

<sup>66</sup> Jean-Christophe Dumont & Georges Lemaître, *Beyond the Headlines: New Evidence on the Brain Drain*, 56 REVUE ÉCONOMIQUE 1275, 1285, 1295 (2005) (citing the general benefit from brain drain to member countries of the Organisation for Economic Co-Operation and Development); Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 154 (2006).

the law faculty at the University of Toronto, explains, “industrial countries are trying to outbid one another . . . to attract highly skilled migrants to their domestic industries in order to gain (or retain) a relative advantage over their international competitors in the knowledge-based global economy.”<sup>67</sup> From this perspective, encouraging highly skilled immigration becomes yet another strategy in the broad reach of a developed country’s economy.<sup>68</sup> Reflecting upon this conceptualization of the immigrant as human capital, Professor Kunal M. Parker, of Cleveland-Marshall College of Law, aptly concludes that receiving countries measure the value of an aspiring immigrant based on her profile as “*homo oeconomicus*.”<sup>69</sup> Thus, brain drain is the inevitable symptom of a widespread “reimagination of legal immigration in terms of productivity, skill, resources, and self-sufficiency.”<sup>70</sup>

The United States is the most popular destination country for skilled immigrants,<sup>71</sup> and it is easy to imagine why. The nation boasts expansive opportunities for the well-educated and highly skilled, and its immigration policies reward such a showing of talent. Admittedly, arguments appealing to international concerns often do not fare well in shaping U.S. laws.<sup>72</sup> U.S. immigration law is, without illusion, designed with the goal of furthering U.S. interests.<sup>73</sup> Critics of U.S. immigration policy have often urged an even stronger preferencing of

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<sup>67</sup> Shachar, *supra* note 66, at 154–55 (analyzing immigration policy as a “multiplayer and multilevel game” where developed nations formulate their policies relative to other countries, all competing for the same highly skilled labor); *see also* Gafner & Yale-Loehr, *supra* note 33, at 185 (noting that countries around the world are now taking an aggressive approach to attracting highly skilled immigrants and arguing that this competition should motivate a retailoring of the U.S. system “to compete against the growing international competition”); *id.* at 186–92.

<sup>68</sup> *See* Dumont & Lemaître, *supra* note 66, at 1276 (“[A]ny migration represents a transfer of human capital from the sending to the receiving country, the ‘value’ of which depends on its productive potential.”).

<sup>69</sup> Parker, *supra* note 10, at 716 (“The . . . reimagination of legal immigration in terms of productivity, skill, resources, and self-sufficiency conjures up an image of the desirable immigrant as *homo oeconomicus*,” “a supremely rational actor poised to exploit to the fullest the opportunities opened up by the global economy, unencumbered by the weight of social disadvantage.”).

<sup>70</sup> *Id.* at 719; *see also id.* at 729–30 (urging “our discussions [to] take account of the economic politics of immigration [so] that we will acquire a deeper awareness of new modalities of power, oppression, and inequality”).

<sup>71</sup> Lowell, *supra* note 16.

<sup>72</sup> *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (asserting that the legal landscape in other countries should not guide the interpretation of U.S. laws).

<sup>73</sup> *See, e.g.,* H.R. REP. No. 101-723, pt. 1, at 39, 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6718–19, 6738 (listing Congress’s goals for reform in 1990 as meeting shortages in the domestic labor force and better serving U.S. business).

elite immigrants rather than tempering the meritocracy.<sup>74</sup> This position is understandable and in no sense irrational from either a legal or policy perspective; after all, the United States was arguably founded on the ideas that social mobility was possible and that hard work and high achievement would be rewarded.<sup>75</sup>

Brain drain is detrimental, however, even with purely domestic goals in mind: it directly undercuts U.S. foreign policy regarding global development and democracy promotion and also subverts border control policy aimed at reducing unauthorized entries. The United States Agency for International Development (“USAID”) states its “twofold purpose” as “furthering America’s foreign policy interests in expanding democracy and free markets while improving the lives of the citizens of the developing world.”<sup>76</sup> It is the main U.S. governmental agency charged with promoting economic and democracy development around the globe.<sup>77</sup> USAID is not unaware of the benefits and detriments of brain drain. In a presentation to USAID on the relationship between migration and development, the Migration Policy Institute emphasized the “potential [domestic] benefits of a ‘brain export’ industry,” while at the same time acknowledging that efforts to repatriate such highly skilled immigrants—and thus mitigate the negative effects in sending countries—have generally failed.<sup>78</sup>

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<sup>74</sup> See, e.g., Michele R. Pistone & John J. Hoeffner, *Rethinking Immigration of the Highly-Skilled and Educated in the Post-9/11 World*, 5 GEO. J.L. & PUB. POL’Y 495, 498, 505 (2007) (asserting that the United States “undervalues . . . highly skilled immigration” and that increasing immigration of highly skilled workers benefits both sending and receiving countries); Peter H. Schuck & John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 328–29 (2010) (proposing a number of initiatives to increase and facilitate the immigration of “[h]ighly skilled immigrants,” especially those within the areas of “science, technology, engineering, and math”); Alan Tafapolsky, Brandon Meyer & Terry Kelly, *All Trees and No Forest: U.S. Immigration Policy Towards EB-1 Researcher/Professor Petitions—Thwarting the National Interest*, 5 IMMIGR. BRIEFINGS 1, 1 (2005) (advocating a more liberal application of EB-1 visas so that more foreign researchers and professors may come to the United States); Darrell M. West, *Creating a “Brain Gain” for U.S. Employers: The Role of Immigration*, POL’Y BRIEF (Brookings Inst., Wash., D.C.), Jan. 2011, at 3–4 (encouraging an increase in visas for highly skilled workers in order to stimulate U.S. “brain gain”); Farnoush Nassi, Comment, *Into the Labyrinth: Artists, Athletes, Entertainers and the INS*, 19 LOY. L.A. ENT. L.J. 107, 108 (1998) (arguing that immigration reform should facilitate the immigration of elites such as artists, athletes, and entertainers).

<sup>75</sup> Cf. ABRAHAM CAHAN, *THE RISE OF DAVID LEVINSKY* (Harper & Roe 1960) (1917) (tracing the travails and triumphs of a fictional Russian immigrant in his journey to become a tycoon of the garment industry).

<sup>76</sup> *About USAID*, U.S. AGENCY FOR INT’L DEV., [http://www.usaid.gov/about\\_usaid/](http://www.usaid.gov/about_usaid/) (last updated Dec. 8, 2010).

<sup>77</sup> *Id.*

<sup>78</sup> See Kevin O’Neil, *International Migration and Development: Linked, but How?*, MIGRATION POL’Y INST., 16 (Feb. 3, 2005), [http://www.usaid.gov/our\\_work/agriculture/landmanage-](http://www.usaid.gov/our_work/agriculture/landmanage-)

Although remittances by highly skilled and highly educated migrants may contribute to economic development in sending countries, it is harder to assert that these remittances similarly contribute to democracy promotion, which has become a prominent focus of USAID policy since 2002.<sup>79</sup> Democracy, especially in contrast to other forms of governance, requires a certain financial stability and economic security in governmental entities; the populace relies on the state to provide healthcare, educate the nation's youth, and, at least to some extent, redistribute wealth.<sup>80</sup> Democratic governments must also exercise self-determination over their economic policies, a significant feat in the current international political economy.<sup>81</sup> The infrastructure and bureaucratic capabilities necessary to accomplish these stepping stones to democracy rely on an educated, informed citizenry, which must fill the roles of leaders and constituencies. Promoting "brain export" hardly seems consistent with promoting democracy, and, therefore, the United States impairs its own global policy goals with its domestic immigration law.<sup>82</sup>

Border control policy is also underserved by an EB immigration system that engenders brain drain. Immigration is often motivated by a lack of employment and economic opportunity in the home country,<sup>83</sup> and the current allocation of EB-3 visas serves only a fraction of aspiring EB-3 immigrants.<sup>84</sup> Although the intent behind these statutory restrictions is likely to recalibrate the nature of the immigrant

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ment/poverty/presentations/oneil.pdf. Interestingly, at least one scholar has proposed reforms to U.S. immigration policy in order to minimize what she identifies as "reverse brain drain," whereby "[h]ighly skilled professionals . . . who entered the country legally to study or work, are returning to their countries of origin in unprecedented numbers and driving research and development there." Janice D. Villiers, *Closing the Borders: Reverse Brain Drain and the Need for Immigration Reform*, 55 WAYNE L. REV. 1877, 1882 (2009).

<sup>79</sup> See Jennifer Windsor, *Democracy and Development: The Evolution of U.S. Foreign Assistance Policy*, 27 FLETCHER F. WORLD AFF. 141, 145 (2003) (noting that the "promotion of democracy" is one of USAID's strategic goals).

<sup>80</sup> See Thomas A. Koelble & Edward Lipuma, *Democratizing Democracy: A Postcolonial Critique of Conventional Approaches to the 'Measurement of Democracy,'* 15 DEMOCRATIZATION 1, 5 (2008).

<sup>81</sup> See *id.* at 5–6 (explaining that "the international financial system imposes a myriad of hidden constraints on their economic policy, which, in turn, constrains the possibility for creating the foundation for the realization of these critical [democratic] values").

<sup>82</sup> This disconnect between immigration and foreign affairs policies reinforces Professor Juliet Stumpf's theory that "the locus of immigration law" has moved from the realm of foreign policy to that of domestic policy. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1557 (2008).

<sup>83</sup> Roepcke, *supra* note 13, at 458.

<sup>84</sup> See KURZBAN, *supra* note 51, at 883–84 (describing the omnipresent backlogs in the EB-3 category).

flow,<sup>85</sup> the result is a near trainwreck of supply and demand curves. Rather than abandoning all intention of emigrating and remaining in their home countries, immigrants who would otherwise be EB-3s are more likely to violate border policies and pursue U.S. employment opportunities outside of the law.<sup>86</sup>

EB immigration law largely attempts to restrict entry to all but the most elite, but the policy carries significant negative externalities. By extracting the highly educated and highly skilled from nations around the globe, it stifles international development. Thus, populations remain relatively unskilled and opportunities in sending countries remain limited. These unskilled, aspiring immigrants develop the logical desire to immigrate to the United States and, undaunted by tight restrictions on their visa category, arrive without authorization. Border control policy is compromised, and U.S. immigration law erodes its own domestic and international goals.<sup>87</sup>

#### B. *Pure Economic Impact*

There is strong reason to believe that current EB visa policy does not optimally serve U.S. economic interests. First, the system is based on the largely erroneous premise that immigrant and native-born workers compete for jobs. Second, it operates on the false assumption that high levels of immigration are inherently damaging to the native-born labor force.

Even in the immediate aftermath of the 1990 amendments to the INA, scholars identified the risk that unskilled immigrant labor would be undersupplied by the new policy.<sup>88</sup> In 1990, while the INA amendments were being formulated and discussed in Congress, there was

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<sup>85</sup> See *supra* note 56 and accompanying text; *infra* note 116 and accompanying text.

<sup>86</sup> See Johnson, *supra* note 14, at 1609 (noting that “the refusal to provide adequate legal avenues for migration of workers creates huge incentives for undocumented migration”); Castañeda, *supra* note 7 (hypothesizing that as long as job opportunities exist in the United States, the overall number of immigrants from Mexico will remain stable, regardless whether visas are available for their legal entry).

<sup>87</sup> See Roepcke, *supra* note 13, at 477–79 (discussing the relationship between brain drain, lack of economic opportunity in Mexico, and illegal immigration to the United States).

<sup>88</sup> See, e.g., Marianne Grin & Miguel Lawson, Recent Development, *The Immigration Act of 1990*, *Pub. L. No. 101-649*, 104 *Stat.* 4978, 33 *HARV. INT’L L.J.* 255, 275 (1992) (exploring the then-recent Immigration Act of 1990 and acknowledging the possibility that unskilled labor might be undersupplied); Alice E. M. Aragones, Note, *The Immigration Act of 1990: Changes in Employment-Based Immigration*, 5 *GEO. IMMIGR. L.J.* 109, 126 (1991) (“Because American workers’ need for home care, elder care, and day care providers will continue to increase rapidly in the 1990s, and assuming ‘unskilled workers’ provide this care, the 10,000 visas now allocated under the new law are inadequate to meet the United States’ future demands. In fact, these numbers are insufficient to meet even today’s demand.”).

concern that the new EB immigration regime would detrimentally favor elite immigrants. Representative Connie Morella of Maryland was one of the most vocal critics within Congress, expressing concern that a lack of visas for unskilled labor would negatively affect working women in the United States.<sup>89</sup> Without an adequate number of visas for home-care and childcare providers, Representative Morella predicted that career-oriented women would forego their professional goals to perform these tasks themselves.<sup>90</sup> A diverse group of expert commentators also participated in congressional hearings on the amendments, a number of whom testified about the dangers of minimizing visas for nonelite immigrants.<sup>91</sup> Two decades later, these predictions prove accurate.<sup>92</sup>

In testimony before the Senate during the 2006 immigration debates, Dean Dan Siciliano, of Stanford Law School, explained that the U.S. economy depends on immigrant laborers to perform a “growing number of less-skilled jobs for which a shrinking number of native-born workers are available.”<sup>93</sup> Rather than taking jobs away from U.S. workers or lowering their wages, Siciliano argued that the benefit of immigrant labor is to fill in “gaps in our labor force.”<sup>94</sup> These gaps occur because U.S. workers are becoming older and more educated and, as a result, tend to seek high-paying, high-skilled jobs—a phe-

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<sup>89</sup> See 136 CONG. REC. 36,797, 36,843 (1990) (statement of Rep. Morella).

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., *Immigration Act of 1989: Hearing on S. 358, H.R. 672, H.R. 2448, and H.R. 2646 Before the Subcomm. on Immigration, Refugees & Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 277, 291, 308–11, 313, 318, 447–51 (1989) (statements of Daryl R. Buffenstein, U.S. Chamber of Commerce; Msgr. Nicholas DiMarzio, Executive Director, Migration and Refugee Services, U.S. Catholic Conference; Gary E. Rubin, Director of National Affairs, American Jewish Committee; and David N. Williams, Federal Rep., Christian Science Committee on Publication).

<sup>92</sup> See Johnson, *supra* note 14, at 1613 (observing that “low and moderately skilled workers” have minimal legal immigration opportunities to the United States, and the emphasis on highly skilled workers does not correspond to the need for labor in the U.S. market). It is important to note that extreme controversy exists about the data and theories addressing the economic effects of immigration, as well as about the conclusions drawn from them. Reasonable thinkers on both sides of the issue offer cogent arguments. See, e.g., Pistone & Hoeffner, *supra* note 74, at 501–03 (arguing that the economic benefits of highly skilled immigration are underestimated and undermeasured). This Note neither suggests that highly skilled immigration threatens the U.S. economy nor advocates increased numbers of EB immigrants in the aggregate, and it recognizes the validity of scholarly, political, and economic apprehensions about immigration liberalization initiatives.

<sup>93</sup> *Immigration: Economic Impacts: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 63 (2006) (written testimony of Dan Siciliano, Executive Director of the Program in Law, Economics, and Business, Stanford Law School) (citing the chief economic problem with immigration policy as the limited legal options for immigrants to come and take these jobs).

<sup>94</sup> *Id.* at 64.

nomenon that Siciliano describes as “the economic reality of a changing native-born U.S. population.”<sup>95</sup> In the aggregate, job opportunities and wages of “nonprofessional U.S. workers” have not suffered due to immigration.<sup>96</sup> In fact, the United States has a need for this type of auxiliary labor.<sup>97</sup>

Furthermore, EB policy is premised on the theory that, because high immigration levels are harmful to the U.S. economy, entry flows in certain sectors must be tightly controlled and monitored.<sup>98</sup> In actuality, even with a starting assumption that “give[s] zero weight to the welfare of aliens in our measure of social welfare,” U.S. economic interests are better served by higher levels of both EB and family-based immigration than those currently allowed under the INA.<sup>99</sup> Concededly, unskilled labor has the potential to be an initial net cost, but unskilled immigrants’ children are a significant net gain and asset to society, which would likely offset this possible initial burden.<sup>100</sup> More tellingly, this conclusion was reached analyzing only skilled and unskilled immigrants, both of whom fall into the disfavored EB-3 category.<sup>101</sup> It did not separately consider—at least explicitly—superstar EB-1 immigrants (i.e., those with “extraordinary” ability, high-level researchers, and multinational executives) nor the more modest talents of EB-2 immigrants (those with “exceptional” ability or advanced degrees).<sup>102</sup>

Despite these findings, the recession of 2007–2010 poses an unavoidable obstacle to future application of this research. This is especially true given a recent study that suggests that blue collar workers—the demographic that a large portion of EB-3 immigrants would likely join—are among the hardest hit.<sup>103</sup> As discussed in Part

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<sup>95</sup> *Id.*

<sup>96</sup> See Elmore, *supra* note 7, at 530–31.

<sup>97</sup> *Id.* at 530.

<sup>98</sup> See *infra* text accompanying note 114.

<sup>99</sup> Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 377 (1999). For a discussion of why this Note does not advocate higher levels of immigration as an immediate remedy to the problems identified, see *infra* Part IV.A.

<sup>100</sup> See Chang, *supra* note 99, at 383, 389–90 (explaining that both child-immigrants and U.S.-born children of immigrants “increase the economic benefits associated with that immigrant household”); cf. PAPADEMETRIOU & YALE-LOEHR, *supra* note 47, at 37 (“[O]n balance, [EB] immigrants represent a strong net plus to our society.”).

<sup>101</sup> See Chang, *supra* note 99, at 384–86 (comparing proposed regulation of skilled and unskilled immigrants).

<sup>102</sup> 8 U.S.C. § 1153(b)(1)(A)–(C), (2)(A) (2006).

<sup>103</sup> See CTR. FOR LABOR MKT. STUDIES, NE. UNIV., *THE DEPRESSION IN BLUE COLLAR LABOR MARKETS IN MASSACHUSETTS AND THE U.S.: THEIR IMPLICATIONS FOR FUTURE ECO-*

III.C, however, even given the recent economic downturn, there is no reason to believe that the relationship between U.S. labor market need and immigrant labor supply has been fundamentally altered.

C. *Undemocratic, “Un-American” Value Judgment*

Restricting EB-3 immigration while favoring EB-1 immigration is not only a devaluation of the working- and middle-class immigrant populations, but it is also at odds with the fundamentals of U.S. law—at least as it pertains to U.S. citizens. By packaging the visa groups this way, Congress has relegated nonelite immigrants to a visa category fraught with obstacles. By contrast, an elite multinational executive or internationally acclaimed movie star is bestowed with a golden ticket as an EB-1.<sup>104</sup> It is difficult to imagine other areas of U.S. law that explicitly differentiate the treatment of persons on the basis of celebrity status, skill level, and education in any way comparable to the INA.<sup>105</sup>

Historically, immigration laws have been uniquely situated vis-à-vis domestic constitutional and antidiscrimination protections. The federal government regulates immigration based on a number of enumerated and implied constitutional powers,<sup>106</sup> and Congress’s authority to regulate immigrant admissions is subject to extremely minimal judicial intervention.<sup>107</sup> Antidiscrimination laws do not apply equally to U.S. citizens and aliens; instead, the government may invoke authority inherent in sovereignty to prevent certain groups from entering the country.<sup>108</sup> This contrasts distinctly with domestic civil rights

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NOMIC STIMULUS AND WORKFORCE DEVELOPMENT POLICIES 8 (2009) [hereinafter *CTR. FOR LABOR MKT. STUDIES*], available at [http://www.clms.neu.edu/publication/documents/The\\_Depression\\_in\\_Blue\\_Collar\\_Labor\\_Markets\\_in\\_MA\\_and\\_the\\_U.S..pdf](http://www.clms.neu.edu/publication/documents/The_Depression_in_Blue_Collar_Labor_Markets_in_MA_and_the_U.S..pdf) (concluding that a “true Great Depression has fallen upon America’s blue collar workers”).

<sup>104</sup> A legal specialty has developed to cater to the immigration needs of celebrities. See, for example, the website of Kate L. Raynor, who boasts that her clients have starred in “huge Hollywood Blockbusters [such] as *Derailed*, *Ocean’s Twelve*, *Ocean’s Thirteen*, *Around the World in 80 Days*, *Letters From Iwo Jima*, *The Last Samurai*, *Memoirs of a Geisha*, *Pink Panther 2*, [and] *Eastern Promises*,” in addition to a laundry list of musicians and television actors. *About Us*, L. OFFICES KATE L. RAYNOR, <http://www.kateraynor.com/about-us.html> (last visited Jan. 22, 2010).

<sup>105</sup> For more information about the disconnect between U.S. criminal law and U.S. immigration law, for example, see Juliet Stumpf, *Fitting Punishment*, 66 *WASH. & LEE L. REV.* 1683, 1688–89 (2009) (arguing that “proportionality,” while a cornerstone of U.S. criminal and tort law, is totally lacking in statutorily imposed consequences for immigration violations).

<sup>106</sup> See KURZBAN, *supra* note 51, at 29–30.

<sup>107</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

<sup>108</sup> See JOHNSON, *supra* note 21, at 3 (“As long as noncitizens are afforded minimal procedural safeguards, the courts have afforded Congress free reign with respect to exclusion and

regimes and the special protections of U.S. citizen minority groups within the country.<sup>109</sup>

U.S. immigration policy also has a tradition of excluding the poor and working classes, largely by means of laws providing for the inadmissibility and deportability of aliens likely to become public charges.<sup>110</sup> In other words, the reputation of the United States as a haven for poor, underprivileged immigrants is a false, yet well-maintained, historical image.<sup>111</sup> The increasing skill and education levels of legal immigrants contrasts with the unskilled, poor profile of undocumented immigrants to suggest that immigration policy is actually about controlling U.S. demography rather than securing the nation's borders.<sup>112</sup> Because affluence and professional achievements facilitate immigration under current U.S. policy, "class biases are endemic to the modern immigration laws."<sup>113</sup> At the time the 1990 INA amendments were made, policy was driven by a concern that "because most of the world was poor, we must limit immigration or risk being overrun."<sup>114</sup>

Despite these constitutional and historical hurdles, in 1994, a group of aspiring EB-3 immigrants attempted to challenge the reallocation of EB visas under the 1990 INA, including the restrictive an-

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deportation of noncitizens."); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 *LAW & CONTEMP. PROBS.* 1, 7 (2009) (observing that "[t]hrough invocation of [the plenary power] doctrine, the courts routinely permit 'aliens' to be expressly disfavored under the immigration laws in ways that U.S. citizens—including the poor and racial minorities—could never be").

<sup>109</sup> See JOHNSON, *supra* note 21, at 3, 6 (explaining that the failure to protect aliens arises, at least in part, out of the fact that the "alien" label is a legal fiction: an alien is something that the law creates; the status does not exist in nature).

<sup>110</sup> *Id.* at 91. The Department of Justice defines "public charge" as an alien who has become (for purposes of deportation) or is likely to become (for purposes of admissibility or adjustment of immigration status) primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.

See Program Assistance Letter 1999-25: *Guidance on Definition of "Public Charge" in Immigration Laws and Policies*, U.S. DEP'T HEALTH & HUM. SERVICES, HEALTH RESOURCES & SERVICES ADMIN. (July 19, 1999), <http://bphc.hrsa.gov/policy/pal9925.htm>.

<sup>111</sup> Gibney, *supra* note 21, at 364–65, 374.

<sup>112</sup> *Id.* at 375.

<sup>113</sup> JOHNSON, *supra* note 21, at 92 (citing EB-immigration and especially employment-creation visas). For a theory of the nexus between poverty- and economic-based immigration exclusions and the racial makeup of the normative immigrant class, see *id.* at 34 ("In operation, and to a certain extent in design, the U.S. immigration laws aim to keep poor and working people of color out of the United States.").

<sup>114</sup> *Id.* at 98.

nual quota of 10,000 unskilled immigrants.<sup>115</sup> The United States District Court for the Southern District of New York found no violation of plaintiffs' Fifth Amendment substantive due process rights because of the rational relationship of the reallocations to Congress's "goal of reducing the waiting period for *skilled* workers."<sup>116</sup> The court's choice of language only reinforces the confusion amongst policy, public understanding, and law in this area: skilled workers, part of the EB-3 category, are disfavored by statute. Admittedly, they have a slight leg-up over unskilled workers (namely, evading the 10,000 per annum cap), but the functional effect of the INA in no way accelerates or facilitates their immigration. Rather, Congress's goal in EB immigration policy was to ease provisions for those with extraordinary abilities, high-level professors and researchers, and multinational managers and executives—not skilled workers.<sup>117</sup>

### III. PROPOSAL: TRANSFORMING EB IMMIGRATION FROM AN AUDITION TO AN APPLICATION

The current system of EB visa allocations contributes to brain drain, underserves U.S. economic interests, and prolongs a historical exemption of immigration law from antidiscrimination regimes. In light of this situation, a larger proportion of permanent immigrant visas should be allocated for skilled and unskilled workers, and the labor certification requirement should be waived for unskilled workers. This Note does not, however, advocate a higher overall number of EB visas.

#### A. *Proposed Visa Allocations by Percentage*

As a first step toward reform, it is appropriate to focus on the proportional allotment of visas instead of the overall number, because concerns regarding immigration generally stem from the "composition" of incoming immigrant groups rather than their quantity.<sup>118</sup> The allocation of EB visas should more closely resemble the natural spectrum of human abilities: only a small number (logically) comprises "that small percentage who have risen to the very top of [their] field of endeavor," in contrast to the 28.6% of visas that EB-1s now re-

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<sup>115</sup> See *Aliens for Better Immigr. Laws v. United States*, 871 F. Supp. 182, 184 (S.D.N.Y. 1994).

<sup>116</sup> *Id.* at 185 (emphasis added).

<sup>117</sup> See Gafner & Yale-Loehr, *supra* note 33, at 201 (identifying congressional intent as addressing "the need for more highly skilled immigrants").

<sup>118</sup> Susan F. Martin, B. Lindsay Lowell & Philip Martin, *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 622 (2002).

ceive.<sup>119</sup> Thus, the bulk of EB visas should be reserved for skilled and unskilled labor, the group into which most immigrants likely fall.

Admittedly, any quantification of or numerical limitation on immigrant categories is, to some degree, arbitrary, but the following numbers provide an example of a more appropriate distribution. Amongst the 140,000 EB visas per annum currently available, EB-1 immigrants—those with extraordinary abilities, high-level researchers and professors, and multinational executives and managers—should receive 5.2%, or 7280, of the visas. EB-2s, those with exceptional abilities and members of professions with advanced degrees, should receive 10.2%, or 14,280, of the visas. Skilled workers, a subset of the current EB-3 category, should receive 35.2%, or 49,280, of the visas; and unskilled workers, another subset of the current EB-3 category, should receive 35.2%, or 49,280, of the visas.<sup>120</sup> These percentages and numbers add up to the same proportion of worldwide immigrant visas currently allocated to EB-1, EB-2, and EB-3 categories. Consequently, the change would be limited to an internal rearrangement and would preserve the current taxonomy and nomenclature.<sup>121</sup>

This redesigned allocation retains statutory privileges for the highly skilled and highly educated who seek to immigrate. However, reducing the number of visas reserved for EB-1 and EB-2 immigrants would reduce brain drain,<sup>122</sup> would better match the overall immigra-

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<sup>119</sup> 8 U.S.C. § 1153(b)(1) (2006); 8 C.F.R. § 204.5(h)(2) (2009).

<sup>120</sup> It is worth reiterating that any numerical apportionment in visa-allocating statutes is unavoidably arbitrary. This Note selects numbers that would result in EB-1s receiving roughly 5% of visas, EB-2s receiving roughly 10% of visas, and EB-3s receiving roughly 70% of visas, split evenly between unskilled and skilled workers. The rationale was to approximate a more natural spectrum of immigrant abilities while preserving the overall number of visas provided to EB-1s, EB-2s, and EB-3s under the current statute, which accounts for the two-tenths at the end of each percentage.

<sup>121</sup> Although the current taxonomy of EB immigrants is not optimal, gradual change is more beneficial than a sweeping, dramatic overhaul in such an inflammatory area of the law. At least as an initial matter of reform, a relatively minor structural change is more likely to win political consensus and be effectively implemented. For an example of the political peril—and ultimate failure—of comprehensive reform, see *infra* notes 162–63.

<sup>122</sup> The critical reader may observe—and one has done so!—that the internal reapportionment that this Note proposes may simply engender the drain of *skilled* workers from immigrant-sending countries, thus replacing one negative externality of U.S. immigration policy with another. In other words, brain drain of a slightly different style would continue. This risk is arguably less serious than brain drain under current legislation. The reason that current brain drain is detrimental in immigrant-sending countries is because their highly educated populations are so small. See *supra* notes 58–59 and accompanying text. A U.S. policy that allows for the immigration of populations within the sending country that are proportionally larger than this small and elite group of highly skilled workers would almost certainly not have the same detrimental effect as classic brain drain.

tion flow with the domestic economic needs outlined above, and would create an EB-immigrant spectrum more closely resembling a natural bell curve than a combination of the Academy Awards and the Nobel Prize ceremonies. Furthermore, under these revised allocations, the same total number of EB immigrants would be legally admitted as under the current regime; the only difference would be the internal makeup of the group. In other words, there would be no net change to the number of arrivals per year. Thus, this rearrangement would present minimal risk even if one believes that immigrants deprive U.S. workers of employment opportunities—a position that may be validly defended.

### B. *Waiver of Labor Certifications for Unskilled Workers*

To accomplish effective reform, it is crucial to address the current labor certification requirements, which render legal immigration practically impossible for unskilled immigrants. An aspiring EB immigrant must obtain a labor certification even before initiating a visa application,<sup>123</sup> and the process of doing so is “notoriously slow, cumbersome, inflexible, politicized, manipulable, and ill-suited to a heterogeneous, rapidly changing labor market.”<sup>124</sup> Under this requirement, an applicant must convince an employer that she is so perfect for a given job that the employer agrees to expend a considerable amount of time and resources constructing a legal guarantee that there exists not a single qualified, willing, able, and available U.S. worker in the area who could fill the applicant’s intended position.<sup>125</sup> In short, for an unskilled worker whose desired position may be generic and impersonal, these requirements are so academic as to practically counsel fraud.

Waiving labor certifications for unskilled immigrants would have the practical effect of allowing them to use the visa numbers that are

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<sup>123</sup> 8 U.S.C. § 1153(b)(3)(C).

<sup>124</sup> Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 69; cf. JOHNSON, *supra* note 21, at 14 (noting that skilled workers struggle to obtain visas because of the “complexities and delays” in the labor certification process).

<sup>125</sup> See 8 U.S.C. § 1182(a)(5)(A)(i)(I). It is prohibited for a potential immigrant-employee to finance the employer’s expense in filing a labor certification. 20 C.F.R. §§ 656.12(b)–(c), 656.15(a)–(c) (2009); *Foreign Labor Certification: OFLC Frequently Asked Questions and Answers*, U.S. DEP’T LABOR, [http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm\\_Program](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm_Program) (last updated Oct. 20, 2010) (explaining, in the “Prohibition on Improper Payments and Transactions (Fraud Rule)” section, that “[t]he regulation prohibits payment by the foreign worker or others of employer-incurred costs related to labor certification, including attorneys’ fees”); cf. *ETA Form 9089, Application for Permanent Employment Certification*, U.S. DEP’T LABOR, 5, <http://www.foreignlaborcert.doleta.gov/pdf/9089form.pdf> (last visited Feb. 22, 2011).

available to them without the need to resort to less-than-legal methods of establishing their unparalleled and unique qualifications. Such a change recognizes the reality that unskilled workers will enter the country regardless of legal red tape if potential employment opportunities await them.<sup>126</sup> This acknowledgment is certainly not revolutionary; there is a strong understanding, both scholarly and political, that aliens may either work on the “black labor market” without documentation and undercut the wages of U.S. workers, or they may work with documentation for market wages.<sup>127</sup> As long as the demand for immigrant labor continues and the borders remain anything less than hermetically sealed, EB immigration law must cater to these supply-and-demand forces rather than impose formalistic and impractical restraints.

C. *The Great Recession: No Reason to Think Differently Now*

The global financial upheaval of the past several years cannot be isolated from EB immigration policy. Department of Homeland Security Secretary Janet Napolitano has stated that the recent recession, in conjunction with ramped-up security along the Southwest border, has effected a fundamental change on U.S. immigration by reducing the number of aspiring immigrants.<sup>128</sup> She estimated that “[t]he flow has reduced significantly[,] by more than half from the busiest years, proving we are in a much different environment than we were before.”<sup>129</sup>

Despite this assertion that immigrant entries may have slowed, it is unlikely that immigrant supply-and-demand forces have been fundamentally and permanently altered to the point of prompting a radical reappraisal of U.S. migration patterns and policy. Although the financial sector has been transformed,<sup>130</sup> professional areas such as “biglaw” have taken a massive hit,<sup>131</sup> and blue collar industries such as construction have witnessed enormous cutbacks,<sup>132</sup> the bases of the American economy and the global political economy have not

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<sup>126</sup> Cf. Castañeda, *supra* note 7 (asserting that the number of Mexicans crossing the Southwest border remains constant regardless of their legal status).

<sup>127</sup> See Elmore, *supra* note 7, at 521–22; see also Napolitano, *supra* note 11.

<sup>128</sup> Napolitano, *supra* note 11.

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., Graham Bowley, *Morgan Stanley Tries on a New Psyche*, N.Y. TIMES, Jan. 17, 2010, at BU1 (describing James Gorman’s challenge as chief executive in attempting to reverse Morgan Stanley’s downward trajectory).

<sup>131</sup> See, e.g., Alex Williams, *No Longer Their Golden Ticket*, N.Y. TIMES, Jan. 17, 2010, at ST1 (recounting diminished prospects for law school graduates in the post-crash economy).

<sup>132</sup> See CTR. FOR LABOR MKT. STUDIES, *supra* note 103, at 3–4.

changed in such a way as to suggest a permanent, radical restructuring of the workforce. In fact, a January 2010 study by Dr. Raúl Hinojosa-Ojeda, on behalf of the Center for American Progress and the Immigration Policy Center, asserts that immigrants are the key to economic recovery.<sup>133</sup>

Hinojosa-Ojeda bases his argument on an analysis of the effects of the legalization provision in the 1986 Immigration Reform and Control Act (“IRCA”),<sup>134</sup> which was enacted during a recession featuring high unemployment.<sup>135</sup> He found that IRCA “helped raise wages and spurred increases in educational, home, and small-business investments by newly legalized immigrants” and predicts that a legalization provision or a temporary-worker program would accomplish similar results in the current recession.<sup>136</sup> Hinojosa-Ojeda’s theory is simple: by providing a legal opportunity for immigrants to pursue employment, they gain the ability to earn more money and upward mobility in employment positions, which then allows greater investment in education and further socioeconomic mobility.<sup>137</sup> He estimates that a comprehensive immigration reform initiative would result in a \$1.5 trillion increase in gross domestic product within ten years.<sup>138</sup> He further calculates that the additional earning power generated by immigrants would create millions of dollars in increased tax revenue within the first three years of a legalization initiative, in addition to the benefits produced by increased spending power.<sup>139</sup>

A higher proportion of skilled and unskilled visas, as proposed in this Note, may have similar economic effects to those that Hinojosa-Ojeda attributes to legalization provisions. Instead of pursuing illegal modes of immigration, aliens would instead have practical access to EB-3 visas, providing them with employment authorization and the upward mobility that Hinojosa-Ojeda identifies as associated with a legalization program. Furthermore, an internal visa reallocation of-

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<sup>133</sup> See Raúl Hinojosa-Ojeda, *Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform*, CENTER FOR AM. PROGRESS & IMMIGR. POL’Y CENTER, 13 (2010), available at <http://www.americanprogress.org/issues/2010/01/pdf/immigrationeconreport.pdf>.

<sup>134</sup> Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>135</sup> Hinojosa-Ojeda, *supra* note 133, at 1.

<sup>136</sup> *Id.* at 1–2 (identifying a higher predicted increase in gross domestic product with legalization measures than with temporary-worker programs).

<sup>137</sup> *Id.* at 7.

<sup>138</sup> *Id.* at 11 (basing calculation on a program to legalize unauthorized immigrants, which would require the payment of a fine, application fee, and back taxes; a background check; and English-language education).

<sup>139</sup> *Id.* at 13 (predicting between \$4.5 and \$5.4 million in increased tax revenue).

fers the additional benefit of avoiding the political polarization of amnesty-type legalization programs.<sup>140</sup> Although it would not remedy the issue of undocumented immigrants already in the country (and in no way purports to do so), it would provide expanded legal immigration opportunities to some aliens who may otherwise consider unauthorized entry while simultaneously serving as an economic stimulus under Hinojosa-Ojeda's theory.

Moreover, the supply forces of EB immigration have a built-in stopgap: if immigrants cannot find better employment opportunities in the United States than in their homeland (i.e., if there are no available jobs in the United States), they will either repatriate or not immigrate in the first place.<sup>141</sup> A market analysis of EB immigration found that "the properly understood economics of immigration create a presumption in favor of opening the United States' borders much more widely" because, if an immigrant is unable to find work suited to his skill set, he will simply return home.<sup>142</sup> The study additionally concluded that "[p]eople so destitute of skills are unlikely to leave home in search of work in a foreign and highly competitive economy" in the first place.<sup>143</sup> Data compiled by the Brookings Institution validates this finding, showing a decrease in immigration during the recession: the fewer the available jobs, the fewer the immigrants who undertake the imposing task of immigrating to seek them.<sup>144</sup> For example, H1-B visas, reserved for temporary workers entering to perform specialty

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<sup>140</sup> IRCA contained such an amnesty-type legalization program: it provided legal status to approximately three million unauthorized immigrants. *Id.* at 7. Legalization measures have been part of recent efforts at immigration reform as well, and some Republican politicians have labeled them "political folly" given current unemployment rates. See Julia Preston, *To Overhaul Immigration, Advocates Alter Tactics*, N.Y. TIMES, Jan. 2, 2010, at A12 (quoting Representative Lamar Smith of Texas as stating that, "[a]llowing millions of illegal immigrants to stay and take jobs away from citizens and legal immigrants is like giving a burglar a key to the house").

<sup>141</sup> See Roepcke, *supra* note 13, at 460–68. For discussion of the general relationship between employment, labor, and immigration, see Johnson, *supra* note 14, at 1609 ("We must recognize that migration is largely driven by jobs and the labor market . . .").

<sup>142</sup> Donald J. Boudreaux, *Some Basic Economics of Immigration*, 5 J.L. ECON. & POL'Y 199, 208 (2009).

<sup>143</sup> *Id.* at 201.

<sup>144</sup> See Jill H. Wilson & Audrey Singer, *How the Recession's Affecting Immigration*, UP FRONT BLOG—BROOKINGS INST. (Nov. 19, 2009), [http://www.brookings.edu/opinions/2009/1118\\_immigration\\_singer\\_wilson.aspx](http://www.brookings.edu/opinions/2009/1118_immigration_singer_wilson.aspx). The Department of Homeland Security also measured a nearly one-million-person drop in the population of unauthorized immigrants in the United States between January 2008 and January 2009. Michael Hoefer, Nancy Rytina & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, POPULATION ESTIMATES—U.S. DEP'T HOMELAND SECURITY, OFFICE OF IMMIGR. STAT., 1 (Jan. 2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf).

occupations, were still available in late August of fiscal year 2010, whereas their annual quota is normally filled almost immediately after their April start date.<sup>145</sup> Thus, there is reason to believe that the flow of immigrants is self-correcting in response to economic opportunities in the destination country.<sup>146</sup>

For the skeptics, however, there is an additional backup plan written into the INA—the public charge provisions. If an aspiring immigrant is found “likely at any time to become a public charge” if admitted, or if she has become a public charge within five years subsequent to admission, she is excludable or deportable, respectively.<sup>147</sup>

The risks of amending EB visa allocations are, therefore, low. The existing system is problematic on both domestic and international levels, and even given the current climate of economic tumult, there are both socioeconomic and statutory release valves in place to prevent foreign workers from displacing U.S. citizens in the labor market.

#### IV. THE NONVIABILITY OF ALTERNATIVE SOLUTIONS

This Note has identified several problems with the current system of EB visa allocations, including its contribution to foreign brain drain, its arguable disservice to U.S. economic interests, and its uniquely discriminatory nature. In response to these problems, it proposes a simple internal rearrangement of preexisting visa numbers, leaving the aggregate number of annual EB visas undisturbed. There are, however, other possible amendments to the EB system that may address these problems.<sup>148</sup> For example, Congress may increase the

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<sup>145</sup> Wilson & Singer, *supra* note 144.

<sup>146</sup> Commentators have also observed that the formulation of the EB categories themselves (along with labor certifications) serves as an inherent stopgap in the immigrant flow such that numerical quotas are unnecessary. See Seth R. Leech & Emma Greenwood, *Keeping America Competitive: A Proposal to Eliminate the Employment-Based Immigrant Visa Quota*, 3 ALB. GOV'T L. REV. 322, 341 (2010) (“The proper filters of EB immigration to the United States are the current EB immigration categories which are structured so as to allow only intending immigrants who fill an unmet need in the U.S. economy or whose skills are somehow distinguished.”); see also *id.* at 342–46.

<sup>147</sup> 8 U.S.C. §§ 1182(a)(4)(A), 1227(a)(5) (2006); see also Chang, *supra* note 99, at 393.

<sup>148</sup> There are a number of other proposals beyond the scope of discussion in this Note. See, e.g., PAPADEMETRIOU & YALE-LOEHR, *supra* note 47, at 144–46, 183 (proposing a three-tiered system including EB-1 equivalents, points-based immigrants, and immigrant investors; and essentially eliminating entry of unskilled workers); F.H. Buckley, *The Political Economy of Immigration Policies*, 16 INT'L REV. L. & ECON. 81, 81–82 (1996) (supporting a Canadian-style “points” system in order to admit more immigrants on economic rather than family grounds, but in such a way that encourages “valuable” rather than value-decreasing immigrants); Leech & Greenwood, *supra* note 146, at 324–25, 334 (observing that “the hardships suffered by EB immigrants resulting from long delays caused by the annual quota . . . are the chief reason that the

aggregate number of EB visas per year. Alternatively (or in conjunction), Congress may expand temporary-worker programs and increase the number of nonimmigrant visas available to aliens who would otherwise fall within the EB-3 category. In light of the need for practicality and efficacy, however, neither of these alternatives is sufficient.

#### A. *Increasing Overall EB Visa Numbers*

Increasing the number of EB immigrant visas overall would expand the limited opportunities for skilled and unskilled immigration. It is a relatively popular proposal among academics.<sup>149</sup> By nudging up the number of EB visas from 140,000 to 200,000 annually, for example, EB-1, EB-2, and EB-3 categories would each receive an additional 17,160 visas, with unskilled workers limited to an additional 4286 visas.<sup>150</sup> In effect, skilled and unskilled workers would benefit from greater visa availability, albeit with identically proportioned allocations among the categories as under the current statute.<sup>151</sup>

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United States is not the attractive destination it once was for talented foreign workers” and instead proposing “the elimination of immigrant visa caps” for “professional and skilled immigrants”). Paschal O. Nwokocho, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 63–65, 67 (2008) (encouraging increased admission of skilled immigrants and advocating the elimination of quotas on EB visas); Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL’Y REV. 349, 350–51 (2007) (advocating decentralization of EB immigration, whereby states would have an increased amount of authority and control over admissions).

<sup>149</sup> See, e.g., Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 288 (“Our long-term interest in assimilation would be far better served by substantially expanding opportunities for permanent membership, perhaps by expanding the number of [legal permanent resident] visas available to unskilled immigrants.”); Jonathan G. Goodrich, Comment, *Help Wanted: Looking for a Visa System that Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975, 985, 986–1000 (2008) (arguing that not enough low-skilled or high-skilled workers are admitted under the INA and positing that the inefficacy of U.S. policy stems from the “all-or-nothing dichotomy between economic and security decisions”); Trent R. Hightower, Comment, *Give Me Your Tired, Your Poor, Your Huddled Masses Yearning to Breathe Free . . . as Long as They Have the Proper Visas: An Analysis of the Current State of United States Immigration Law, and Possible Changes on the Horizon*, 39 TEX. TECH L. REV. 133, 163 (2006) (encouraging higher immigration levels for unskilled laborers); Herbert A. Weiss, *Employment-Based (EB) Immigration at the Millennium: EB Recommendations for the Future*, 1 IMMIGR. BRIEFINGS 1, 9–10 (2001) (advocating increased number of unskilled worker visas in EB-3 category, but specifically for home health workers due to shortage of U.S. workers in that area).

<sup>150</sup> This increase in unskilled worker visas is calculated by raising the current 10,000-visa limit by 42.857%, which is the same proportionate increase between 140,000 and 200,000 EB visas overall, as is the premise of this hypothetical.

<sup>151</sup> One may argue in favor of this approach on the grounds that, under the reapportionment proposed by this Note, aspiring immigrants would merely reclassify themselves—i.e., highly skilled workers would apply for skilled-worker visas. This is an unlikely outcome, how-

The weakness in this approach, however, is its exacerbation of global brain drain and continuation of discriminatorily meritocratic filtering. Because the EB-1 and EB-2 categories would be correspondingly increased along with EB-3, developing countries would lose even more of their highly skilled and highly educated workers—34,320 more annually, using the example above. Furthermore, because the ratio of EB-1, EB-2, and EB-3 visas would remain unchanged, and because unskilled workers would still face the near-impossibility of legally procuring a labor certification,<sup>152</sup> fundamental flaws would remain written into the statute.

To alleviate these drawbacks, it would be possible to combine the internal reallocation of visas proposed in this Note with an aggregate increase in EB visas. Under this model, assuming that the annual allocation were increased to 200,000, EB-1 immigrants would receive 10,400 visas (5.2%), EB-2s would receive 20,400 visas (10.2%), and EB-3s would receive 140,800 visas, split evenly between skilled and unskilled workers (35.2% each). This approach would eliminate the residual discriminatory problems found in a purely pro rata increase, as discussed above. Additionally, relying on studies that identify a domestic economic advantage to high levels of immigration,<sup>153</sup> the U.S. economy would arguably derive even more benefit out of this model than out of a simple internal reallocation.

Nonetheless, an aggregate increase in EB visas would likely burden government processing and enforcement infrastructure to the detriment of both citizens and aspiring immigrants. U.S. Citizenship and Immigration Services (“USCIS”) works in tandem with the State Department in processing visa applications of all categories, both permanent and temporary.<sup>154</sup> The backlogs for high-volume sending

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ever. As observed in *Muni v. INS*, highly skilled workers include “that small percentage who have risen to the very top of [their] field of endeavor.” *Muni v. INS*, 891 F. Supp. 440, 443 (N.D. Ill. 1995) (quoting *Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60899 (Nov. 29, 1991) (internal quotation marks omitted)). Five percent of overall visas, as this Note proposes, would seem to be a reasonable “small percentage,” whereas 28.6%—under current law—does not. The October 2010 *Visa Bulletin*, for example, provides further evidence that 28.6% provides more visas than necessary for this category: EB-1 visas are marked “current,” meaning that “numbers are [currently] available for all qualified applicants.” By contrast, EB-3 visas have been oversubscribed to the extent that the backlog is five to ten years. *Visa Bulletin for October 2010*, U.S. DEP’T ST., BUREAU CONSULAR AFF. (Sept. 9, 2010), [http://travel.state.gov/visa/bulletin/bulletin\\_5145.html](http://travel.state.gov/visa/bulletin/bulletin_5145.html). For more on visa processing and backlogs, see *infra* notes 155–60 and accompanying text.

<sup>152</sup> See *supra* Part III.B.

<sup>153</sup> See, e.g., Chang, *supra* note 99, at 377.

<sup>154</sup> See *About Us*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/aboutus>

countries are staggering under the current system and would become only more severe if visa availability were increased without a corresponding increase in processing resources.

A striking illustration of the ongoing backlog is found in the *Visa Bulletin*, a monthly document compiled by the State Department.<sup>155</sup> The *Bulletin* lists “priority dates,” which are the filing dates for the visa applications that are being processed at any given time, and thus serve as an indication of visa availability.<sup>156</sup> For EB immigration, the *Bulletin* separates out India, mainland China, Mexico, and the Philippines, and agglomerates all other countries in a fifth catchall group.<sup>157</sup> It provides priority dates by EB category, distinguishing “other workers” from the larger EB-3 group.<sup>158</sup>

In December 2009, for example, EB-1 visa applications were current for all sending countries, indicating no backlog or delay.<sup>159</sup> EB-2 visa applications were current for all sending countries except mainland China and India, with delays of approximately 4.5 and 5 years, respectively.<sup>160</sup> In the EB-3 category, the backlog for unskilled workers, designated in the *Bulletin* as “other workers,” regardless of the sending country, was 8.5 years, while the backlog for skilled workers and professionals in the EB-3 group ranged from approximately 7.5 years to 8.5 years.<sup>161</sup>

Any increase in overall numbers is likely to further aggravate the already significant delay in EB-3 processing. With backlogs approaching (and potentially exceeding) a decade, any benefit to EB-3 immigrants from extra visa numbers would probably be eliminated. Although an internal reallocation of visa numbers would not mitigate preexisting delays, there is no reason to expect any elongation as a result.

The ideal, of course, is to develop an infrastructure that works so efficiently that processing time would be a minimal policy consideration. However, such innovation, testing, and implementation would

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(last updated Sept. 12, 2009); *About the Visa Office*, U.S. DEP'T ST., BUREAU CONSULAR AFF., [http://travel.state.gov/visa/about/about\\_1464.html](http://travel.state.gov/visa/about/about_1464.html) (last visited Dec. 30, 2009).

<sup>155</sup> See, e.g., *Visa Bulletin for December 2009*, U.S. DEP'T ST., BUREAU CONSULAR AFF. (Nov. 9, 2009), [http://travel.state.gov/visa/bulletin/bulletin\\_4587.html](http://travel.state.gov/visa/bulletin/bulletin_4587.html).

<sup>156</sup> *Id.* For example, the December 2009 *Bulletin* lists the EB-2 priority date for mainland China as “01APR05.” *Id.* This signifies that EB-2 applications filed on or before April 1, 2005, were being processed in the month of December 2009—a 4.5-year backlog.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

take a significant amount of time and resources—far in excess of the desired timeframe for tangible immigration reform. Therefore, with an eye toward practical, easily implemented improvements, an internal reallocation of EB visa numbers is a well-tailored solution.

Beyond the pragmatics of processing capabilities, increasing the overall number of EB visas is likely politically unfeasible in the context of a prolonged recession. In 2007, when the last surge of immigration reform fervor passed through Congress, “comprehensive” was the buzzword.<sup>162</sup> Comprehensive reform, although attractive because of its high-risk, high-return potential, tends to incite political panic and inflammatory rhetoric.<sup>163</sup> The political climate, at least for the near future, would not seem conducive to the type of large-scale reform that an overall increase in EB numbers would probably entail.<sup>164</sup> The economy’s slow and delicate recovery is likely to leave both politicians and voters sensitive to employment-related issues, especially as unemployment rates continue to remain elevated.<sup>165</sup> Rather than either attempting a major immigration overhaul or pushing back immigration reform for yet another few years, a simple but effective change is apt. An internal reallocation of EB visa numbers would address the

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<sup>162</sup> See, e.g., Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007) (proposing reforms encompassing border enforcement, interior enforcement, document and immigration fraud, unauthorized immigrant employment, immigrant and nonimmigrant visas (including guest-worker programs), backlog reduction, and a host of other specialized provisions).

<sup>163</sup> See, e.g., Bill Carter & Jacques Steinberg, *Anchor-Advocate on Immigration Wins Viewers*, N.Y. TIMES, Mar. 29, 2006, at A17 (discussing Lou Dobbs’s central and fervent role in the 2006–2007 immigration reform movement).

<sup>164</sup> But see Robert Creamer, *Immigration Reform Is Necessary for America’s Economic Recovery*, HUFFINGTON POST (Feb. 2, 2010, 9:20 AM), [http://www.huffingtonpost.com/robert-creamier/immigration-reform-is-nec\\_b\\_445688.html](http://www.huffingtonpost.com/robert-creamier/immigration-reform-is-nec_b_445688.html) (maintaining that the political climate is ripe for comprehensive immigration reform due to solidarity between employers and laborers as well as efforts by politicians to curry favor amongst Latino voters). Gafner and Yale-Loehr express a similar skepticism about the practicability of comprehensive immigration reform at this stage and also urge an EB-specific reform to immigration law as a feasible and effective alternative. See Gafner & Yale-Loehr, *supra* note 33, at 207–09 (proposing immigration reform by way of a “point system” in order to further facilitate the immigration of highly skilled workers); see also PAPADEMETRIOU & YALE-LOEHR, *supra* note 47, at 13–14 (describing the extreme challenges to comprehensive immigration reform, but arguing that changes to the EB system are necessary for any immigration reform).

<sup>165</sup> In November 2010, the unemployment rate was 10.0%. Press Release, U.S. Dep’t of Labor, Bureau of Labor Stats., The Employment Situation—November 2010 (Dec. 3, 2010), available at [http://www.bls.gov/news.release/archives/empstat\\_12032010.pdf](http://www.bls.gov/news.release/archives/empstat_12032010.pdf). That rate has remained relatively unchanged, and in February 2010, the Bureau of Labor Statistics measured unemployment at 9.7%. Press Release, U.S. Dep’t of Labor, Bureau of Labor Stats., The Employment Situation—February 2010 (Mar. 5, 2010), available at [www.bls.gov/news.release/archives/empstat\\_03052010.pdf](http://www.bls.gov/news.release/archives/empstat_03052010.pdf).

current system's problems while avoiding the pitfalls of increased visa numbers overall.

*B. Increasing the Number of Temporary Visas or Expanding Guest-Worker Programs*

An expansion of nonimmigrant visas, possibly taking the form of a guest-worker program, could be used to provide additional migration opportunities for skilled and unskilled workers. Nonimmigrant visas are issued to aliens seeking to come to the United States for temporary stays and are generally categorized by the purpose of the alien's visit or her unique, specially protected situation.<sup>166</sup> Under this approach, skilled and unskilled workers would be admitted for a narrow purpose and short duration but would avoid the constraints and obstacles associated with applying for EB-3 status.<sup>167</sup> During the immigration debates of 2006 and 2007, guest-worker programs were a hotly contested component of proposed reforms.<sup>168</sup>

In its relatively narrow temporal scope, an expansion of nonimmigrant visas would have the benefit of providing additional migration opportunities to skilled and unskilled workers without permanently siphoning off human capital from developing countries. It would also provide the type of immigrant labor that arguably nourishes the U.S. economy, although it would not alleviate the discriminatory nature of the EB system. If qualifying criteria were formulated to avoid the unrealistically lofty expectations of EB labor certifications, adherence to legal methods of migration and employment might also be higher than under the current EB system.

Nevertheless, employers generally prefer hiring immigrant labor possessing permanent rather than temporary visas.<sup>169</sup> Although the use of nonimmigrant visas for labor-based migration is extremely

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<sup>166</sup> Examples include "an alien . . . visiting the United States temporarily for business or . . . pleasure," 8 U.S.C. § 1101(a)(15)(B) (2006), and "an alien . . . who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill . . . who is coming temporarily . . . for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training," *id.* § 1101(a)(15)(J).

<sup>167</sup> Many nonimmigrant visa categories also require tricky bureaucratic maneuvering. For example, H-1B workers must obtain a "labor attestation" that is very similar to the labor certification necessary for EB-3 immigrants. *See id.* § 1182(t).

<sup>168</sup> *See* Robert Pear & Jim Rutenberg, *Senators in Bipartisan Deal on Broad Immigration Bill*, N.Y. TIMES, May 18, 2007, at A1 (quoting Representative Xavier Becerra as accusing the proposed temporary-worker program of creating "a permanent underclass of imported workers to fill American jobs").

<sup>169</sup> Martin, Lowell & Martin, *supra* note 118, at 635–36.

common, it is out of necessity rather than preference; EB visas are simply too difficult to procure.<sup>170</sup> As a result, the nonimmigrant system has become somewhat of a sham, as temporary visas are used to buy time while applications for legal permanent residency (usually in the EB category) are pending.<sup>171</sup> This circuitous approach has transformed nonimmigrant visas into step one of an extended process to procure legal permanent resident status through EB classification.<sup>172</sup>

Beyond logistics, temporary visas and guest-worker programs often engender harmful consequences for both the domestic and migrant populations. From the standpoint of the receiving society, guest-worker programs hinder the integration of the migrant population by segregating aliens in an isolated laborer class.<sup>173</sup> The integration of the migrant population is a critical, if not explicit, social component of U.S. immigration policy, and any obstruction of integration is likely to be perceived by lawmakers and their constituencies as a failed or threatening endeavor.<sup>174</sup> In addition, the relegation of nonelite migrants to segregated, temporary status would do nothing to discourage unauthorized entries and residency.<sup>175</sup> The expense and logistical challenges of legal migration would probably not be sufficiently offset by the reward of second-class treatment to induce compliance with the law. Not only would reliance on temporary visas undercut integration, but it would also work to the detriment of ever-expanding enforcement efforts.<sup>176</sup>

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<sup>170</sup> See *id.* at 625–26, 635–36.

<sup>171</sup> See *id.* at 625–26.

<sup>172</sup> See *id.* A recent article in *The Huffington Post* also reveals the politicized character of guest-worker programs. Mark H. Ayers, President of the Building and Construction Trades Department of the AFL-CIO, voiced vehement opposition to what he identified as a “ratcheting up of pressure on American lawmakers to expand the guest worker programs under the federal H-1B and H-2B visa programs, as well as further expand the L1 Intra-Company transfer visas.” Mark H. Ayers, *It’s the Height of Audacity to Claim a Skilled Worker “Shortage” When 20% of American Skilled Craft Workers Are Unemployed*, HUFFINGTON POST (Aug. 27, 2010, 03:02 PM), [http://www.huffingtonpost.com/mark-h-ayers/its-the-height-of-audacit\\_b\\_697347.html](http://www.huffingtonpost.com/mark-h-ayers/its-the-height-of-audacit_b_697347.html) (describing a host of temporary visa abuses by a variety of U.S. employers).

<sup>173</sup> Rodriguez, *supra* note 149, at 221.

<sup>174</sup> See PAPADEMETRIOU & YALE-LOEHR, *supra* note 47, at 12 n.10 (referring to integration as “the ‘ground zero’ of all immigration policy and the ultimate test of success or failure in any immigration system”); Rodriguez, *supra* note 149, at 221 (identifying integration as the “long-term goal of our immigration policy”).

<sup>175</sup> See Rodriguez, *supra* note 149, at 221 (predicting that a guest-worker program “will fail to prevent the emergence of a new undocumented population”).

<sup>176</sup> See, e.g., ICE: *A Federal Leader in Combating Terrorism*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 29, 2009), <http://www.ice.gov/news/releases/0912/091229detroit.htm> (identifying ICE as the “second largest federal contributor to the nationwide network of Joint Terrorism Task Forces”).

From the perspective of the migrant population, the segregated, class-based aspect of temporary-worker programs certainly does not mitigate the discriminatory nature of EB visa allocations. If anything, an emphasis on these programs only contributes to such stratification. In discussing existing nonimmigrant programs as a continuing legacy of the infamous Bracero Program, Professor Matt Garcia of Brown University describes guest workers' lives as "close to slavery."<sup>177</sup> The asymmetry built into guest-worker status allows for the maintenance of such degrading conditions; the programs are "driven by the demands of individual employers, who recruit, certify, and have the sole power to hire and fire guest workers . . . ."<sup>178</sup> By contrast, permanent immigration removes this structural asymmetry because the migrant is no longer reliant solely on her employer's goodwill in extending a job offer and retaining the migrant in the position.<sup>179</sup> Rather, with an EB-procured green card in hand, an immigrant is comparable to a free agent and incurs no risk to her legal status by leaving her employment in search of better conditions, pay, or opportunities.<sup>180</sup>

In short, an expanded guest-worker program would do nothing to reform the discriminatory and hyper-meritocratic nature of the EB system. Its sole virtues are an expansion of temporary migration opportunities for skilled and unskilled foreign laborers and an increase in foreign labor in the domestic market, which arguably benefits the U.S. economy.<sup>181</sup> It is not preferable to an internal reallocation of EB visas, however, because of its significant negative consequences, including retarded integration, contribution to unauthorized immigration, and enabling of deplorable living conditions for migrants. Reliance on and development of the permanent immigration system, therefore, is a better alternative.

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<sup>177</sup> Matthew Garcia, Assoc. Professor, Brown Univ., Introduction at the Nat'l Museum of Am. History & the Woodrow Wilson Ctr. for Scholars Symposium on The Legacy of the Bracero Program (Sept. 30, 2009). The Bracero Program was an agreement between the Mexican and U.S. governments by which Mexican laborers were "actively recruited" to temporarily work in the United States. See FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s*, at 287 (rev. ed. 2006). The program began in 1942 as an effort to counteract the shrinking U.S. labor force during World War II, and it endured far longer than anticipated—until 1964. *Id.*

<sup>178</sup> Elmore, *supra* note 7, at 535.

<sup>179</sup> See Martin, Lowell & Martin, *supra* note 118, at 635–36.

<sup>180</sup> See *id.* at 636.

<sup>181</sup> See *supra* Part II.B.

## CONCLUSION

Undocumented immigration and proposed amnesty programs are the fodder of political and media frenzy.<sup>182</sup> The legal implications and issues arising out of immigration reform are myriad and profound, and the proposed reforms themselves are often enormous in length, scope, and aspiration.<sup>183</sup> A more nuanced, gradual change is better suited to address such an incendiary topic.<sup>184</sup>

Reforming EB immigration will not only resolve the problems inherent in and caused by the current system, but also serve as a significant measure toward minimizing undocumented entries. Unauthorized migration is fueled by economic exigencies and lack of employment in the sending country, and, therefore, EB and unauthorized immigration are inextricably linked.<sup>185</sup> By reallocating EB visas and waiving labor certification requirements such that skilled and unskilled workers have an expanded opportunity to enter the United States and pursue employment within the auspices of the law, unauthorized entries and employment will correspondingly diminish.

Naturally, the tendency toward comprehensive, broad-reaching reform in this area is understandable: the perceived defects in the system are sizeable and widespread, and immediate change is desired. Admittedly, an internal reapportionment of EB visas will not accomplish this Herculean task, and it should not be the one and only measure toward improving the INA. Nevertheless, as a first step that is politically palatable, legally viable, and pragmatically executable, it is the best legislative option.

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<sup>182</sup> See, e.g., Antonio Olivo, *Democrats Push New Immigration Reforms: Bill Provides Path to Legalization for Roughly 12 Million*, CHI. TRIB., Dec. 16, 2009, at C10 (discussing a bill proposed by Representative Luis Gutierrez, which includes a legalization provision, and citing its detractors as labeling the bill a “tactical error” in the context of a recession).

<sup>183</sup> Representative Gutierrez’s bill is 700 pages in length and includes provisions for, inter alia, legalization, reform of family-based immigration, expansion of visas for sending countries with high rates of undocumented immigration, the elimination of local enforcement of federal immigration regulations, and enhanced border security. See *id.* More recently, Senators Robert Menendez and Patrick Leahy’s comprehensive immigration reform bill runs 874 pages and includes titles on border enforcement, interior enforcement, worksite enforcement, a legalization provision, immigrant integration, and a substantial revamping of the legal immigration system. See Comprehensive Immigration Reform Act of 2010, S. 3932, 110th Cong. (2d Sess. 2010).

<sup>184</sup> Gafner and Yale-Loehr recognize that their proposed EB reform, discussed *supra* note 164, “would be a radical step for the United States.” Gafner & Yale-Loehr, *supra* note 33, at 209. To temper their proposal, they suggest implementing it by first just replacing the “visa lottery,” discussed *supra* note 4, with their points-based system, rather than transforming the entire EB regime into such a system. *Id.* at 210. In other words, Gafner and Yale-Loehr fully appreciate the need for such nuanced, gradual change.

<sup>185</sup> See Roepcke, *supra* note 13.