

**FROM OBSOLETE TO ESSENTIAL: HOW  
REFORMING OUR IMMIGRATION LAWS  
CAN STIMULATE AND STRENGTHEN THE  
UNITED STATES ECONOMY**

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We can and should be able to fix our broken immigration system and do so in a way that is reflective of American values and ideals and the tradition we have of accepting immigrants to our shores.

. . . .

. . . [W]e need stronger enforcement on the border and at the workplace. . . .

But for reform to work, we also must respond to what pulls people to America . . . . Where we can bring in more foreign-born workers with the skills our economy needs, we should.

. . . .

. . . [T]he time to fix our broken immigration system is now.

153 CONG. REC. S6511–12 (daily ed. May 23, 2007) (statement of Sen. Obama).

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## INTRODUCTION

The immigration process in the United States is broken. Poorly designed and ineffectively implemented, the current scheme has created a quagmire of backlogs and oversubscription. Those seeking admission to the United States face a daunting and sometimes impossible journey. Employers cannot hire the foreign labor they need to complement the native workforce, boost overall production, and compete in the global marketplace. Over the years, many companies have resorted to outsourcing portions of their business to countries with more amicable immigration schemes, just to meet their labor needs.<sup>1</sup>

Against the backdrop of a broken immigration system, the United States has suffered through one of the worst economic crises in nearly a century.<sup>2</sup> The credit markets are frozen and the fundamentals of the economy are weak. Comprehensive immigration reform can provide the United States with a tremendous catalyst for recovery. Congress must revise immigration laws to admit highly qualified foreign workers to the country and keep them here. These immigrants will stimulate innovation and create jobs for Americans, providing a pathway to economic restoration.

It is in the national interest to have a properly regulated system of legal immigration. A good immigration scheme “enhances the benefits of immigration while protecting against potential harms.”<sup>3</sup> By removing the backlogs, quotas, and oversubscriptions that plague our current scheme, Congress can strengthen the economy. This article demonstrates that immigration is beneficial and explains how reform of the current scheme can revitalize the U.S. economy.

## SCOPE OF THE ARTICLE

While many aspects of the current immigration scheme must be fixed, this article’s focus is on employment-based immigration

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<sup>1</sup> See, e.g., Peter Elstrom, *Gates to Senate: More Visas*, BUS.WK. ONLINE, Mar. 8, 2007, available at 2007 WLNR 4381984.

<sup>2</sup> See Press Release, President-Elect Barack Obama, President-Elect Speaks on the Need for Urgent Action on an American Recovery and Reinvestment Plan (Jan. 8, 2009), [http://change.gov/newsroom/entry/presidentelect\\_obama\\_speaks\\_on\\_the\\_need\\_for\\_urgent\\_action\\_on\\_an\\_american\\_r](http://change.gov/newsroom/entry/presidentelect_obama_speaks_on_the_need_for_urgent_action_on_an_american_r).

<sup>3</sup> U.S. COMM’N ON IMMIGRATION REFORM, EXECUTIVE SUMMARY i (1995), <http://www.utexas.edu/lbj/uscir/exesum95.pdf>.

and the role that immigrants can play in restoring the fundamentals of the U.S. economy. The current process for family-based immigration also calls for reform. However, this article concerns itself with the positive impact that highly skilled immigrant labor has on the economy and the innovation and entrepreneurship that immigrants contribute to society. Therefore, this article focuses on fixing problems with employment-based immigration as a way of stimulating the economy.

In advocating for immigration reform, the article will examine the current problems with immigration and discuss solutions for dealing with backlogs, quotas, and oversubscription for both immigrant and nonimmigrant visas. Because many immigrants initially come to the United States through nonimmigrant work visas and adjust their status toward attaining permanent residency over time, it is important to focus on both immigrant and nonimmigrant visa reform. When discussing nonimmigrant visas, the article focuses particularly on H-1B visas, which are primarily awarded to foreign workers with professional backgrounds, particularly in areas of high demand such as science, engineering, technology, and business.

## I. THE CURRENT IMMIGRATION SCHEME

Substantive reform of our immigration laws can be achieved only by first understanding the historical development of U.S. immigration laws, how the current scheme works, and its many problems. During the early years of the United States, there were few restrictions on immigration and people were generally able to come to the United States at will. In the late nineteenth century, the federal government's plenary powers over immigration were established by the Supreme Court<sup>4</sup> and Congress began to regulate immigration with the Chinese Exclusion Act of 1882.<sup>5</sup>

### A. *Historical Development of Immigration Law in the United*

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<sup>4</sup> Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346 (2008).

<sup>5</sup> Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943); *see* Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889) (holding that the federal government retains the power to exclude foreigners from the country in its judgment).

*States*

Any executive summary of the current immigration scheme in the United States must begin with the Quota Act of 1921, which marked the beginning of the quota system as a means of regulating immigration.<sup>6</sup> Fueled by fear that the United States would be overwhelmed by a flood of immigrants from Europe following World War I, Congress imposed an annual ceiling of new immigrants, which totaled approximately 350,000 per year.<sup>7</sup> The Immigration Act of 1924 reduced the annual quota from 350,000 to 150,000 immigrants and adopted a national origins formula that created a quota of allowable immigrants from each country based “on the number of persons of their national origin in the United States in 1920. . . . However, natives of Western Hemisphere countries could enter without numerical restriction.”<sup>8</sup>

In enacting the Immigration & Nationality Act (INA) of 1952, Congress retained the quota formula without much substantive change.<sup>9</sup> The Act retained annual national origin quotas for immigrants arriving from non-Western Hemisphere countries, including special racial quotas for Asians.<sup>10</sup> The INA gave immigrants with specialized skills and certain relatives of U.S. citizens or resident aliens preference under the new scheme.<sup>11</sup> Eventually, the 1965 amendments to the INA abolished these special national origin quotas and immigration restrictions relating to Asians.<sup>12</sup> The amendments also established quota preference based on familial relationship and national needs and created a separate annual quota of 120,000 immigrants for natives of Western Hemisphere countries.<sup>13</sup> Congress eventually merged the two hemispheric quotas into a single, worldwide annual quota of 290,000 immigrants.<sup>14</sup>

Over the next forty years, Congress made various changes to the INA by adjusting quotas, creating new preference categories,

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<sup>6</sup> Act of May 19, 1921, ch. 8, § 2(d), 42 Stat. 5, 5–6 (repealed 1952).

<sup>7</sup> CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[3], at 2-9 to 2-10 (rev. ed. 2009).

<sup>8</sup> *Id.* at 2-10; Immigration Act of 1924, ch. 190, § 11(a)–(b), 43 Stat. 153, 159.

<sup>9</sup> See Immigration & Nationality Act (INA) of 1952, Pub. L. No. 82-414, §§ 201(a)–(b), 202(b), 66 Stat. 163, 175–76, 177.

<sup>10</sup> § 202(b).

<sup>11</sup> § 203(a), 66 Stat. at 178-79.

<sup>12</sup> Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 2, § 202(a), 79 Stat. 911, 911–12.

<sup>13</sup> *Id.* sec. 4, § 204(a), 79 Stat. at 915; *id.* sec. 21(e), 79 Stat. at 921.

<sup>14</sup> Act of Oct. 5, 1978, Pub. L. No. 95-412, sec. 1, § 201(a), 92 Stat. 907, 907.

and admitting a certain number of refugees each year.<sup>15</sup> The Immigration Act of 1990 established an annual worldwide limit for immigration to 700,000 immigrants admitted, which decreased to 675,000 after three years.<sup>16</sup>

### B. Nonimmigrant (H-1B) Visas

When amended by the Immigration Act of 1990, the H-1B program was “generally comprised [of] persons of ‘distinguished merit and ability’ coming to the United States to ‘perform services of an exceptional nature.’”<sup>17</sup> These temporary workers were often times treaty investors, exchange visitors, and intra-company transferees.<sup>18</sup> There were no caps on H-1B visas and candidates only had to show that they were coming to the United States temporarily and had no intention of abandoning their residence in a foreign country.<sup>19</sup>

The 1990 Act made several important amendments to the H-1B program and established today’s current scheme. Under the current H-1B scheme, applicants must be coming to the United States to work in “specialty occupations.”<sup>20</sup> They must show specific professional training or a showing of prominence in their respective fields.<sup>21</sup> The current scheme does not include nonimmigrants under the O (extraordinary ability) and P (athlete and entertainers) visa categories.<sup>22</sup>

Currently, the United States only awards 65,000 H-1B visas per year.<sup>23</sup> Although Congress has occasionally raised the H-1B visa cap to meet demand,<sup>24</sup> none of these escalators have been

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<sup>15</sup> See generally Immigration Act of 1990, Pub. L. No. 101-649, §§ 101, 102, 302, 104 Stat. 4978, 4980–85, 5030–36 (codified as amended at INA §§ 101–102, 244, 8 U.S.C. §§ 1151–52, 1254a (2006)).

<sup>16</sup> § 101, 104 Stat. at 4980–82; see Henry M. Burwell, *The Immigration Act of 1990*, 2 S.C. LAW. 37, 37 (1991).

<sup>17</sup> GORDON ET AL., *supra* note 7, at § 20.08[1], at 20-49.

<sup>18</sup> *Id.* § 20.01, at 20-5.

<sup>19</sup> *Id.* § 20.08[1], at 20-49.

<sup>20</sup> See INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> INA § 214(g), 8 U.S.C. § 1184(g).

<sup>24</sup> See American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, sec. 411(a), § 214(g), 112 Stat. 2681, 2681-641 to -642 (increasing the number of visas to 115,000 in fiscal years 1999 and 2000 and to 107,500 in 2001); see also American Competitiveness for the Twenty-first Century Act of 2000, Pub. L. No. 106-313, sec. 102(a), § 214(g)(1)(A), 114 Stat. 1251, 1251 (increasing the number of visas to 195,000 for fiscal years 2001 through 2003).

permanent and the current H-1B cap remains at 65,000.<sup>25</sup> As part of the H-1B Reform Act of 2004, Congress exempted employees of institutions of higher education, nonprofit research organizations, and government research organizations from the cap.<sup>26</sup> Those nonimmigrants who have earned a master's degree or higher from a U.S. institution of higher education are also exempt.<sup>27</sup> This exemption is limited to 20,000 beneficiaries annually.<sup>28</sup>

Another important feature of the H-1B visa scheme is the requirement that employers undergo a labor condition application (LCA) process before hiring foreign workers under the program:<sup>29</sup>

In the labor condition application, the petitioner must identify the occupation by job title and DOL occupation code (listed on the instructions to Form ETA 9035), the number of H-1B workers sought, the rate of pay, the prevailing wage and its source, the period of employment and, as a general rule, all locations (by city or county, and state) where the H-1B nonimmigrant will work.<sup>30</sup>

The purpose of the LCA is to protect U.S. workers from wage suppression and substandard working conditions due to competition from imported foreign labor.<sup>31</sup>

Employers that depend on H-1B workers must also fall within one of the following three categories. An employer is classified as H-1B dependent if it employs at least fifty-one full-time employees, of whom at least 15% are H-1B visa holders.<sup>32</sup> Employers with twenty-six to fifty full-time employees are H-1B dependent if they employ more than twelve H-1B visa holders.<sup>33</sup> Employers with fewer than twenty-five full-time employees are considered H-1B dependent if eight or more of their employees are H-1B visa holders.<sup>34</sup> H-1B dependent employers must make two attestations to satisfy the LCA process: (1) during the ninety days before and ninety days after filing the H-1B petition, the employer did not displace U.S. workers at any of its locations; and (2) that no H-1B worker will be placed with another employer without verifying that the employer has not also displaced any worker or intends to do so, and that the employer has made good-

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<sup>25</sup> INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A).

<sup>26</sup> INA § 214(g)(5)(A)–(B), 8 U.S.C. § 1184(g)(5)(A)–(B).

<sup>27</sup> INA § 214(g)(5)(C), 8 U.S.C. § 1184(g)(5)(C).

<sup>28</sup> *Id.*

<sup>29</sup> INA § 212(n), 8 U.S.C. § 1182(n).

<sup>30</sup> GORDON ET AL., *supra* note 7, at § 20.08[3][e].

<sup>31</sup> *Id.*

<sup>32</sup> 20 C.F.R. § 655.736(a)(iii) (2009).

<sup>33</sup> § 655.736(a)(ii).

<sup>34</sup> § 655.736(a)(i).

faith efforts to recruit for the position and that it has offered the job to any U.S. worker as qualified as the H-1B worker.<sup>35</sup> In submitting the LCA application, an H-1B dependent employer must also pledge that it will not pay H-1B employees below market, it will not subject H-1B employees to substandard working conditions, and it will keep detailed records of compliance.<sup>36</sup>

The primary problem with the H-1B nonimmigrant visa program is heavy oversubscription.<sup>37</sup> The Department of Labor received nearly 163,000 H-1B petitions during the fiscal year 2009 filing period—more than two and a half times the cap.<sup>38</sup> Oversubscription of this arbitrarily low cap number inhibits companies from meeting their labor demands and from competing on a global scale with companies based in countries with more affable immigration laws.<sup>39</sup> The cap also prevents the United States from retaining the best and the brightest workers from around the world to complement the native workforce and stimulate innovation. Companies that are unable to hire foreign nationals because of a lack of H-1B visas are more likely to outsource more work to other countries in order to meet their labor demands.<sup>40</sup>

The arbitrary cap that Congress has placed on available H-1B visas is inefficient. In the years preceding the current recession, employers outsourced work or scaled back their growth models because they could not meet their labor demands.<sup>41</sup> This prevented the U.S. economy from growing at an optimal pace and hindered progress. In times of recession, the cap also proves ineffective because employers are less likely to hire foreign labor. Those visas will go unused and there are no recapture programs in place to use those visas in subsequent years where demand may rise again.

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<sup>35</sup> § 655.736; see U.S. DEP'T. OF LABOR, FORM ETA 9035, <http://www.foreignlaborcert.doleta.gov/pdf/eta9035v50.pdf>.

<sup>36</sup> GORDON ET AL., *supra* note 7, at § 20.08[1], at 20-50.

<sup>37</sup> See Stephen Yale-Loehr & Ted J. Chiappari, *H-1B Visas Used Up Overnight*, N.Y. L.J., Apr. 23, 2007, at 3.

<sup>38</sup> Brandon E. Davis, *America's Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, 54 LOY. L. REV. 353, 366 (2008).

<sup>39</sup> *Id.* at 355.

<sup>40</sup> NAT'L FOUND. FOR AM. POLICY, H-1B VISAS AND JOB CREATION 8 (2008), <http://www.nfap.com/pdf/080311h1b.pdf> (noting in a survey that 65% of companies outsourced work overseas because of the inability to hire foreign labor and 46% of companies delayed or scaled back growth).

<sup>41</sup> *Id.*

*C. Employment-Based Immigrant Visas*

The employment-based immigrant visa scheme divides immigrant labor into five preference categories based on experience and qualifications.<sup>42</sup> The first preference category covers designated priority workers, including those with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers.<sup>43</sup> The second preference category covers alien members of professions holding advanced degrees and aliens of exceptional ability in the areas of science, art, or business.<sup>44</sup> The third preference category covers professionals with baccalaureate degrees, skilled workers with at least one to two years of experience, and other unskilled workers.<sup>45</sup> The fourth preference category awards immigrant visas to special immigrants who tend to be mostly religious ministers and workers.<sup>46</sup> And the fifth preference category awards immigrant visas to entrepreneurs that invest a certain amount of capital to set up a new business that provides jobs for at least ten U.S. workers.<sup>47</sup>

Immigrants seeking admission under the second or third employment-based preference category must undergo a labor certification process, which differs from the LCA process used for nonimmigrant H-1B visas.<sup>48</sup> The main difference between the EB and H-1B categories is that most H-1B employers do not have to advertise and demonstrate that they have attempted to hire domestic workers before they can hire H-1B workers. Employers sponsoring foreign labor for immigrant visas must do so.<sup>49</sup>

There are over 140,000 immigrant visas available on the basis of skills and jobs.<sup>50</sup> However, the INA allocates only 7% of the

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<sup>42</sup> INA § 202(b), 8 U.S.C. § 1153(b) (2006).

<sup>43</sup> INA § 202(b)(1), 8 U.S.C. § 1153(b)(1).

<sup>44</sup> INA § 202(b)(2), 8 U.S.C. § 1153(b)(2).

<sup>45</sup> INA § 202(b)(3), 8 U.S.C. § 1153(b)(3).

<sup>46</sup> INA § 202(b)(4), 8 U.S.C. § 1153(b)(4).

<sup>47</sup> INA § 202(b)(5), 8 U.S.C. § 1153(b)(5).

<sup>48</sup> See GORDON ET AL., *supra* note 7, § 42.02[3][c], at 44-32 to -34 (describing the labor certification process).

<sup>49</sup> An exception applies to H-1B employers who “depend” on H-1B workers. H-1B dependent employers must advertise, etc., which makes the process for them more like the labor certification process in the immigrant visa context. See 20 C.F.R. § 655.736 (2009).

<sup>50</sup> INA § 201(d)(1)(A), 8 U.S.C. § 1151(d)(1)(A). “Plus” is “the difference (if any) between the maximum number of visas which may be issued under section 203(a) (relating to family-sponsored immigrants) during the previous fiscal year and the number of visas issued under that section during that year.” INA § 201(d)(1)(C), 8 U.S.C. § 1151(d)(1)(C).

total number of available visas to immigrants from any single foreign state in a given fiscal year.<sup>51</sup> This means that only about 9,800 employment-based immigrants from the same country may become permanent residents in a given year, even though the majority of individuals that seek immigrant visa admission to the United States come from only a handful of countries. Therefore, although the largest number of people seeking admission to the United States hail from Mexico,<sup>52</sup> the quota system only allows 9,800 Mexican economic migrants per year. Consequently, many would-be immigrants from Mexico enter the country illegally because of oversubscription.<sup>53</sup>

One reason the H-1B visa program is so important to immigration is because many recipients use the H-1B visa as a stepping stone toward becoming permanent residents. Foreign workers with H-1B visas may apply for permanent residency through their employers.<sup>54</sup> But because of backlogs in the process of obtaining permanent residency, many H-1B holders cannot obtain green cards during the six-year period in which they are allowed to work in the United States.<sup>55</sup> An important feature of the immigrant visa scheme is the State Department's monthly Visa Bulletin.<sup>56</sup> Due to heavy demand for a limited number of immigrant visas, there are large backlogs for several immigrant visa categories, resulting in years of waiting before the immigrant visa is fully processed.<sup>57</sup> The Visa Bulletin updates immigrants on the State Department's progress in processing immigrant visa applications.<sup>58</sup> The preference of an immigrant's placement on the waiting list is determined by his or her priority date, typically the date the immigrant files his or her visa petition or labor certification application.<sup>59</sup> Every month, the State Department

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<sup>51</sup> INA § 202(a)(2), 8 U.S.C. § 1152(a)(2).

<sup>52</sup> Max J. Pfeffer, *The Underpinnings of Immigration and the Limits of Immigration Policy*, 41 CORNELL INT'L L.J. 83, 87 (2008).

<sup>53</sup> See Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445, 462 (2005).

<sup>54</sup> Joseph Tiger, Note, *Re-Bending the Paperclip: An Examination of America's Policy Regarding Skilled Workers and Student Visas*, 22 GEO. IMMIGR. L.J. 507, 511–12 (2008).

<sup>55</sup> See David C. Yang, Note, *Globalization and the Transnational Asian "Knowledge Class"*, 12 ASIAN L.J. 137, 147 (2005).

<sup>56</sup> See U.S. Department of State, Visa Bulletin, [http://www.travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html) (last visited Nov. 1, 2009).

<sup>57</sup> See, e.g., *New H-1B Proposal Would Raise Cap, Boost Portability, Address Lengthy LPR Adjudications*, 77 INTERPRETER RELEASES 200, 200 (2000).

<sup>58</sup> See U.S. Department of State, Visa Bulletin, *supra* note 56.

<sup>59</sup> 8 C.F.R. § 245.1(g)(2) (2009); 22 C.F.R. § 42.53 (2009).

announces the priority dates reached that month for each preference category worldwide, and for particular countries or areas with heavy subscription, such as Mexico, China, and India.<sup>60</sup>

One major problem with this system of awarding immigrant visas is that it creates backlogs for many immigrant visa categories. The system is also highly speculative. The State Department must sometimes revise its allotment to account for heavy demand, resulting in retrogressions in priority dates. Just that happened in April 2009, when priority dates for several employment-based categories regressed.<sup>61</sup> For example, the priority date for third-preference immigrants from the Philippines was May 1, 2005 as posted in the March 2009 bulletin.<sup>62</sup> One month later, however, the preference date had moved back two full years to March 1, 2003.<sup>63</sup> As of July 2009, the preference date for third-preference immigrants from the Philippines is unavailable for the rest of the fiscal year.<sup>64</sup>

These retrogressions in priority dates occur because the current scheme limits how many immigrant visas the government may issue in a given year.<sup>65</sup> The State Department must then determine how to allocate the allotted visas over twelve months among the various categories.<sup>66</sup> Sometimes due to heavy demand, the State Department reaches the point at which it cannot issue visas in a given month without risking using up the monthly allotment for certain categories of individuals. In such a case, the Department often postpones priority dates to avoid issuing immigrant visas to members of a certain preference category and to maintain the allocation numbers. The country-by-country limits often play a large role in causing these retrogressions because only approximately 9,800 visas may be issued to immigrants of a certain country, even though demand for visas

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<sup>60</sup> See U.S. Department of State, Visa Bulletin, *supra* note 56.

<sup>61</sup> U.S. Department of State, Visa Bulletin for April 2009, [http://www.travel.state.gov/visa/frvi/bulletin/bulletin\\_4438.html](http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4438.html) (last visited Nov. 1, 2009).

<sup>62</sup> U.S. Department of State, Visa Bulletin for March 2009, [http://www.travel.state.gov/visa/frvi/bulletin/bulletin\\_4428.html](http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4428.html) (last visited Nov. 1, 2009).

<sup>63</sup> U.S. Department of State, Visa Bulletin for April 2009, *supra* note 61.

<sup>64</sup> U.S. Department of State, Visa Bulletin for July 2009, [http://www.travel.state.gov/visa/frvi/bulletin/bulletin\\_4512.html](http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4512.html) (last visited Nov. 1, 2009).

<sup>65</sup> Seton Stapleton, *The Immigrant Numerical Control System: How It Works*, 65 INTERPRETER RELEASES 929, 929 (1988).

<sup>66</sup> *Id.* at 931.

may be much higher in one country than another.

## II. IMMIGRATION AND THE UNITED STATES ECONOMY

Immigration reform is vital because of the important role immigrants can play in stimulating and developing the U.S. economy, especially during times of economic crisis. Many anti-immigration activists argue, however, that immigrants strain domestic natural resources and hinder economic progress. These claims lack merit and ultimately hinder substantive progress on immigration reform. To properly understand how immigration reform can strengthen and stimulate the economy, it is important to debunk some of the myths that anti-immigrant groups perpetuate.

### Myth 1: Immigrants Take Jobs Away From Americans

The Federation for American Immigration Reform (FAIR) claims that immigrants displace as many as 1.88 million American workers from their jobs every year.<sup>67</sup> FAIR argues that even though there were nearly 7.5 million unemployed American workers in 1997, the United States admitted 798,000 immigrants.<sup>68</sup> Additionally, FAIR claims that half of high school dropouts in the United States suffer wage depression because of job competition from immigrants who will work for lower wages.<sup>69</sup>

These arguments are misleading for several reasons. First, studies have shown that overall, immigrants do not take jobs away from the native labor force. Research from the National Foundation for American Policy (NFAP) shows that hiring H-1B visa holders actually increases employment of U.S. workers at U.S. technology companies.<sup>70</sup> For every H-1B position that an employer requests, total employment at the company increased by two more workers than it otherwise would have been.<sup>71</sup> Using regression analysis, NFAP has “found that requests for H-1B certifications by U.S. technology companies are associated with an increase in total employment more than five times the size of

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<sup>67</sup> FED’N FOR AM. IMMIGRATION REFORM, IMMIGRATION 101: A PRIMER ON IMMIGRATION AND THE NEED FOR REFORM 7 (2000), <http://www.fairus.org/site/DocServer/immigration101.pdf>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> NAT’L FOUND. FOR AM. POLICY, *supra* note 40, at 1.

<sup>71</sup> *Id.* at 7.

[an] H-1B request.”<sup>72</sup> The report further explains that for technology companies with fewer than 5,000 employees, each H-1B position requested in an LCA application corresponds with an increase in employment of 7.5 workers.<sup>73</sup> Furthermore, when a company is able to increase its workforce by hiring immigrant labor, it can boost production and stimulate capital investment, which boosts the gross domestic product (GDP).<sup>74</sup>

Second, there is little evidence to support FAIR’s claims that immigrants contribute to the wage depression of native workers.<sup>75</sup> In fact, the White House Council of Economic Advisers concluded in a 2007 report that immigrants do not take jobs away from Americans, but rather complement the native born workforce.<sup>76</sup> The facts show that roughly 90% of native-born workers actually experience wage gains due to immigration.<sup>77</sup> The total gain in wages due to immigration reaches between \$30 billion and \$80 billion per year.<sup>78</sup>

Economist Giovanni Peri has found that immigrant workers complement native workers in terms of education and skills, and therefore, immigration tends to increase the productivity and wages of natives.<sup>79</sup> Peri estimates that between 1990 and 2004, 90% of native born workers with at least a high school diploma experienced wage gains from immigration ranging from 0.7% to 3.4%, depending on education.<sup>80</sup> Furthermore, native-born workers without a high school diploma suffered a decline of only 1.1% in their yearly wages due to immigration.<sup>81</sup> Noted immigration skeptic and economist George Borjas has even acknowledged that there is not “a single shred of evidence that

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<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.*

<sup>74</sup> See COUNCIL OF ECON. ADVISERS, IMMIGRATION’S ECONOMIC IMPACT 3 (2007), [http://georgewbush-whitehouse.archives.gov/cea/cea\\_immigration\\_062007.pdf](http://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.pdf) (finding that immigration increases the U.S. GDP by roughly \$37 billion per year through increased capital investment).

<sup>75</sup> *But cf.* FED’N FOR AM. IMMIGRATION REFORM, *supra* note 67, at 7.

<sup>76</sup> COUNCIL OF ECON. ADVISERS, *supra* note 74, at 1.

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.*

<sup>79</sup> Giovanni Peri, *Rethinking the Effects of Immigration on Wages: New Data and Analysis from 1990–2004*, IMMIGRATION POLICY IN FOCUS, Oct. 2006, at 1, 2.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; see David Card, *Is the New Immigration Really So Bad?* 25 (Centre for Research & Analysis of Migration, University College London, Working Paper No. 11547, 2005) (finding that despite the large influx of immigrants without a high school diploma from 1980 to 2000, the wages of U.S. born workers without a diploma relative to the wages of U.S. born workers with a diploma remained nearly constant).

immigrants have a sizable adverse impact on the earnings and employment opportunities of natives in the United States.”<sup>82</sup>

### Myth 2: Immigrants Strain Our Resources

Another myth anti-immigrant groups frequently perpetuate is that immigrants strain our natural resources and over-burden government assistance programs. FAIR argues that providing welfare and other benefits to Americans displaced from their jobs by immigrants costs taxpayers \$15 billion per year.<sup>83</sup> FAIR also argues that poor English speaking skills among immigrants have cost the United States almost \$175 billion in “lost productivity, wages, tax revenues, and unemployment compensation.”<sup>84</sup>

These arguments are not persuasive. A fatal flaw in many of these studies is that they rely upon single-year “snapshots” of the immigrant population.<sup>85</sup> They neglect to account for the fact that the income levels and tax contributions of immigrants increase over time and from generation to generation.<sup>86</sup> These studies also count the education and care of American-born children of immigrants as costs incurred by immigrant households, yet classify those same children as natives when they are working, taxpaying adults.<sup>87</sup> Finally, many studies also fail to consider immigrant economic contributions such as “consumer purchasing power” or entrepreneurial activities.<sup>88</sup> Immigrant entrepreneurs “create jobs and provide federal, state, and local governments with additional revenue through sales, income, business, and property taxes.”<sup>89</sup> Immigrants do not strain our fiscal resources. “[T]he average immigrant pays [nearly] \$1,800 more in taxes [per year] than he or she imposes on the costs of benefits . . . .”<sup>90</sup> “The average fiscal impact of immigrants . . . is positive in part because they tend to arrive at young working ages, . . . their descendants are expected to have higher skills and incomes, . . . [and] they pay

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<sup>82</sup> GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 81 (1990).

<sup>83</sup> FED’N FOR AM. IMMIGRATION REFORM, *supra* note 67.

<sup>84</sup> *Id.*

<sup>85</sup> *The Economic Impact of Immigration*, AFR. NEWS J., Dec. 25, 2007, <http://www.anjnews.com/node/389>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 319 (James P. Smith & Barry Edmonston eds., 1997) [hereinafter THE NEW AMERICANS].

taxes . . . [for] national defense and interest on federal debt, for which they do not impose costs . . . .”<sup>91</sup> Furthermore, even if immigrants are initially a slight economic burden when they arrive, over time they become net economic contributors and overcome the small burdens they once posed.<sup>92</sup>

While undocumented immigrants are more likely to consume public resources than those arriving legally, any negative impact they might have on the economy is minimal.<sup>93</sup> They continue to pay taxes even at the risk of being detected and facing deportation.<sup>94</sup> The 2005 Presidential Economic Report noted that undocumented immigrants contribute to tax rolls even though they “are ineligible for almost all Federal public assistance programs and most major joint Federal-state programs.”<sup>95</sup> Individual state studies also report that undocumented immigrants tend to have a positive impact on a state’s gross product because of their contributions to tax revenue, despite being ineligible for state assistance programs.<sup>96</sup>

Finally, immigrants in the United States tend to climb the socioeconomic ladder over time. According to a 2003 RAND Corporation study, second- and third-generation “Hispanic men have made great strides in closing their economic gaps with native whites.”<sup>97</sup> For instance, Latino men born during 1895 and 1899 who immigrated to the United States earned 60.5 cents for every dollar earned by white men with whom they competed, despite having four less years of education on average.<sup>98</sup> Their adult sons went on to earn 76.3 cents for every dollar earned by

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<sup>91</sup> *Id.* at 353.

<sup>92</sup> STEPHEN MOORE, A FISCAL PORTRAIT OF THE NEWEST AMERICANS 5 (Maurice Belanger & Alicia Barletta eds., 1998).

<sup>93</sup> See Gordon H. Hanson, *The Economic Logic of Illegal Immigration* 24 (Council on Foreign Relations, Working Paper No. 26, 2007).

<sup>94</sup> See, e.g., Dan Frosch, *Paying Taxes, and Fearing Deportation*, N.Y. TIMES, Feb. 2, 2009, at A9.

<sup>95</sup> COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 2005, at 107 (2005), [http://www.gpoaccess.gov/eop/2005/2005\\_erp.pdf](http://www.gpoaccess.gov/eop/2005/2005_erp.pdf).

<sup>96</sup> See, e.g., CAROLE K. STRAYHORN, TEX. COMPTROLLER, OFFICE OF THE COMPTROLLER, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY 20 (2006), <http://www.cpa.state.tx.us/specialrpt/undocumented/undocumented.pdf>; see also OR. CTR. FOR PUBLIC POLICY, ISSUE BRIEF: UNDOCUMENTED WORKERS ARE TAXPAYERS, TOO 4 (2007), <http://www.ocpp.org/2007/issue070410immigranttaxeseng.pdf>.

<sup>97</sup> James P. Smith, *Assimilation Across the Latino Generations*, 93 AM. ECON. REV. 317, 319 (2003).

<sup>98</sup> *Id.* at 317.

their white counterparts, while their grandsons earned 81.9 cents on the dollar and had closed the education gap to 1.6 years.<sup>99</sup> Each successive generation has been able to close the educational and wage gap with native white Americans, which leads to generational progress and increasing contributions to the economy and its resources.<sup>100</sup>

*A. The Economic Impact of Immigrants in the United States*

The central thesis of this article is that immigration is beneficial to the U.S. economy. By reforming the outdated and inefficient immigration scheme, Congress can usher in the highly skilled workers that will stimulate innovation and create jobs for Americans. Immigration reform will strengthen the economy and allow the United States to emerge from the current recession stronger and less vulnerable. It is vital that employers have access to immigrant labor to continue to grow and compete globally.<sup>101</sup> The U.S. economy needs highly skilled workers in a wide range of occupations, not just in the science and engineering fields.<sup>102</sup>

As the American population ages and shrinks, highly skilled foreign professionals will become increasingly important to the U.S. economy. America no longer boasts the most highly skilled workforce in the world. Because Americans are not as highly skilled today as their baby boomer parents, America could face a broad and substantial skill shortage in the coming decade.<sup>103</sup> While the skill of American workers can be improved in the long term through education reform, in the intermediate term, Congress must reform the immigration scheme to welcome the best and brightest to American shores now.<sup>104</sup>

Congress must devise an immigration system that allows

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 317, 319.

<sup>101</sup> IMMIGRATION POLICY CTR., AM. IMMIGRATION LAW FOUND., ECONOMIC GROWTH & IMMIGRATION: BRIDGING THE DEMOGRAPHIC DIVIDE 3 (2005), <http://www.immigrationpolicy.org/sites/default/files/docs/Econ%20Grwth%20Imm.pdf>.

<sup>102</sup> MICHELE WASLIN, IMMIGRATION POLICY CTR., THE U.S. ECONOMY STILL NEEDS HIGHLY SKILLED FOREIGN WORKERS: AND ARBITRARY CAPS ON H-1B VISAS STILL DON'T MEET THAT NEED 3 (2008), <http://www.immigrationpolicy.org/sites/default/files/docs/H1Bs06-08.pdf>.

<sup>103</sup> See JACOB FUNK KIRKEGAARD, PETERSON INST. FOR INTERNATIONAL ECON., THE ACCELERATING DECLINE IN AMERICA'S HIGH-SKILLED WORKFORCE: IMPLICATIONS FOR IMMIGRATION POLICY 2 (2007).

<sup>104</sup> *Id.* at 2–3.

employers to bring in foreign, highly skilled workers, even in an economic downturn. Workers who arrive in the United States on H-1B visas—who may eventually become permanent residents—bring with them the expertise and innovative skills necessary to complement the native workforce. With an adequate labor force, businesses in the United States can optimize production and compete globally.

H-1B workers tend to be overrepresented in the fields of science, engineering, and technology.<sup>105</sup> Due to a combination of immigration policies and self-selection, these immigrants may also be highly educated and possess higher levels of inventive ability.<sup>106</sup> For example, “immigrants account for 24% of patents, twice their share in the population.”<sup>107</sup> In fact, data indicates that a “one percentage point increase in college-graduate immigrants’ share of the [U.S.] population increases patents per capita by 6%.”<sup>108</sup> Even immigrants who do not file patents themselves may increase patenting by “providing complementary skills” to native workers and helping them to become more inventive.<sup>109</sup>

Microsoft Chairman Bill Gates has testified that he fears America’s status as “a technology and innovation leader” is slipping, largely because of immigration restrictions.<sup>110</sup> Gates noted that the United States will find it “more difficult to maintain its technological leadership if it [continues] to shut[] out the very people who are most able to help [it] compete.”<sup>111</sup> He also warned that “[o]ther nations are recognizing and benefiting from” the situation by “crafting their immigration policies to attract highly talented students and professionals” to compete with American businesses.<sup>112</sup>

Lazlo Bock, Vice President of Google, Inc., has also emphasized that Google’s success, like all other technological companies across the nation, absolutely depends on attracting “the best and

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<sup>105</sup> Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?* 2 (Institute for the Study of Labor, Working Paper No. 3921, 2009).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2.

<sup>110</sup> *Strengthening American Competitiveness in the 21st Century: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 11–12, 16–17 (2007) (statement of William H. Gates, Chairman, Microsoft Corporation).

<sup>111</sup> *Id.* at 17.

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

brightest” employees, regardless of their national origin.<sup>113</sup> Bock noted “countless examples of immigrants and non-immigrant foreign workers” that play a vital role at Google and spearhead the development of many of its services.<sup>114</sup> He also emphasized that improving immigration policies was vital to the continued innovation and growth of companies like Google.<sup>115</sup>

A prominent example of the vital role immigrants can play in developing our economy is Krishna Bharat. A native of India, Bharat received his Ph.D. from the Georgia Institute of Technology in human computer interaction.<sup>116</sup> Hired by Google as an H-1B worker, Bharat spearheaded several research projects and obtained several patents in the process.<sup>117</sup> His most notable achievement was the creation of Google News, a “service that aggregates more than 4,500 English-language news websites around the world.”<sup>118</sup> Bharat’s invention allows Google to produce better search results and, according to Google executives, “helped the [company’s] bottom line because Google News readers were among the most active users of Google’s search [functions] and other services.”<sup>119</sup>

In a survey conducted by the National Foundation for American Policy, “[s]eventy-four percent of company respondents said [their] inability to fill positions because of the lack of [available] H-1B visas has potentially affected their ‘company’s competitiveness against foreign competitors or in international markets.’”<sup>120</sup> “Forty-six percent of companies said they ‘delayed or changed plans for projects’ in response to the lack of H-1B visas.”<sup>121</sup> “Thirty-eight percent responded that they ‘needed to alter the plans, location or growth of a product or service . . . .’”<sup>122</sup> Combined with the large percentage of companies that have indicated the need to outsource work to other countries with more

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<sup>113</sup> *Comprehensive Immigration Reform: Business Community Perspectives, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 11–12 (2007) (statement of Laszlo Bock, Vice President of People Operations, Google, Inc.).

<sup>114</sup> *Id.* at 8.

<sup>115</sup> *Id.* at 13–14.

<sup>116</sup> *Id.* at 12.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 12.

<sup>119</sup> Miguel Helft, *At Google, Slow Growth in News Site*, N.Y. TIMES, June 24, 2008, at C1.

<sup>120</sup> NAT’L FOUND. FOR AM. POLICY, *supra* note 40, at 2.

<sup>121</sup> *Id.* at 8.

<sup>122</sup> *Id.*

liberal immigration schemes, the inability to hire highly skilled foreign labor is preventing U.S. businesses from reaching their potential.<sup>123</sup>

Another reason why immigration reform is so vital to the economy is that immigrants have substantially higher rates of entrepreneurship than native workers.<sup>124</sup> Although foreign-born individuals only comprise 12% of the U.S. population, 25% of “public venture-backed U.S. companies” started between 1990 and 2005 were founded by foreign-born individuals.<sup>125</sup> Immigrants have also started 25% of the “new high-tech companies with more than one million dollars in sales in 2006.”<sup>126</sup>

The proliferation of entrepreneurship among immigrants has been extremely beneficial to the U.S. economy, especially in generating capital and jobs for Americans. According to the U.S. Census Bureau, in 2002 approximately “1.6 million Hispanic-owned firms provided jobs to 1.5 million employees” and approximately “1.1 million Asian-owned firms provided jobs to 2.2 million employees.”<sup>127</sup> These businesses generated payrolls of over \$56 billion and over \$36.7 billion, respectively.<sup>128</sup> Research suggests that immigrants significantly contribute to “the founding of high technology firms in the U.S.”<sup>129</sup> “A study commissioned by Duke University and the University of California at Berkeley found that 25.3 percent of U.S. science and engineering firms founded between 1995–2005 had at least one

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<sup>123</sup> *Id.*

<sup>124</sup> ROBERT W. FAIRLIE, EWING MARION KAUFFMAN FOUND., KAUFFMAN INDEX OF ENTREPRENEURIAL ACTIVITY 1996-2006, at 1, 4 (2007), <http://people.ucsc.edu/~rfairlie/kea/kauffmanreport19962006.pdf> (finding that in 2006, 0.37% of immigrants created new businesses compared to 0.27% of natives).

<sup>125</sup> Hunt & Gauthier-Loiselle, *supra* note 105, at 1.

<sup>126</sup> *Id.*

<sup>127</sup> IMMIGRATION POLICY CTR., THE ECONOMICS OF IMMIGRATION REFORM: WHAT LEGALIZING UNDOCUMENTED IMMIGRANTS WOULD MEAN FOR THE U.S. ECONOMY 5 (2009), <http://immigration.server263.com/images/File/factcheck/EconomicsofImmRe-link2-12-08.pdf>; *see* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2002 ECONOMIC CENSUS SURVEY OF BUSINESS OWNERS: ASIAN OWNED FIRMS: 2002, at 1 tbl.1 (2006), <http://www.census.gov/prod/ec02/sb0200casian.pdf> [hereinafter ASIAN OWNED FIRMS]; U.S. CENSUS BUREAU, 2002 ECONOMIC CENSUS SURVEY OF BUSINESS OWNERS: HISPANIC OWNED FIRMS: 2002, at 1 tbl.1 (2006), <http://www.census.gov/prod/ec02/sb0200cshisp.pdf> [hereinafter HISPANIC OWNED FIRMS].

<sup>128</sup> IMMIGRATION POLICY CTR., *supra* note 127, at 5; *see* ASIAN OWNED FIRMS, *supra* note 127, at 1 tbl.1; HISPANIC OWNED FIRMS, *supra* note 127, at 1 tbl.1.

<sup>129</sup> DANIEL J. MONTI ET AL., IMMIGRANT LEARNING CTR., IMMIGRANT ENTREPRENEURS IN THE MASSACHUSETTS BIOTECHNOLOGY INDUSTRY 1 (2007), [http://www.massworkforce.com/documents/immigrants\\_in\\_biotechnology\\_MONTI.pdf](http://www.massworkforce.com/documents/immigrants_in_biotechnology_MONTI.pdf).

foreign-born founder.”<sup>130</sup> Even more importantly, “publicly traded venture-backed firms founded by immigrants have current market capitalization exceeding \$500 billion.”<sup>131</sup>

“Immigrants have co-founded firms such as Google, Intel, eBay, and Yahoo” that have created jobs for thousands of Americans over the years.<sup>132</sup> Immigrants have also served as the CEOs or lead technologists in one of every four technology or engineering start-ups “in the United States from 1995 to 2005 and in 52 percent of Silicon Valley startups.”<sup>133</sup> “These . . . companies [have] employed 450,000 workers and generated \$52 billion in revenue in 2006” alone.<sup>134</sup> Furthermore, “immigrant inventors [have] contributed to more than a quarter of U.S. global patent applications.”<sup>135</sup> The positive impact of these immigrant entrepreneurs is undeniable and vital to our economic strength.

Entrepreneurialism is deeply rooted in the history of the United States. The country was “founded and . . . settled by innovators and risk-takers who were willing to sacrifice old certainties for new opportunities.”<sup>136</sup> “Economists have realised [sic] that, in a knowledge-based economy, entrepreneurs play a central role in creating new companies [and] commercializing new ideas . . . .”<sup>137</sup> What has given the United States an advantage over other countries is the innovation that immigrant entrepreneurs bring to the country and the way they can stimulate the economy through job creation.<sup>138</sup>

### *B. How Reforming Immigration Can Help End the Recession*

Several people feel the United States should restrict

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<sup>130</sup> *Id.* (citing Vivek Wadhwa et al., *America’s New Immigrant Entrepreneurs* 4 (Duke Science, Technology & Innovation, Working Paper No. 23, 2007)).

<sup>131</sup> MONTI ET AL., *supra* note 129 (citing STUART ANDERSON & MICHAELA PLATZER, CONTENT FIRST LLC, AMERICAN MADE: THE IMPACT OF IMMIGRANT ENTREPRENEURS AND PROFESSIONALS ON U.S. COMPETITIVENESS 6 (2007), [http://www.nvca.org/index.php?option=com\\_docman&task=doc\\_download&gid=331&ItemId=93](http://www.nvca.org/index.php?option=com_docman&task=doc_download&gid=331&ItemId=93)).

<sup>132</sup> VIVEK WADHWA ET AL., EWING MARION KAUFFMAN FOUND., AMERICA’S LOSS IS THE WORLD’S GAIN: AMERICA’S NEW IMMIGRANT ENTREPRENEURS, PART IV, at 1 (2009), [http://www.kauffman.org/uploadedFiles/americas\\_loss.pdf](http://www.kauffman.org/uploadedFiles/americas_loss.pdf).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *The United States of Entrepreneurs: America Still Leads the World*, ECONOMIST, Mar. 14, 2009, at 9 [hereinafter *The United States of Entrepreneurs*].

<sup>137</sup> *An Idea Whose Time Has Come*, ECONOMIST, Mar. 14, 2009, at 8.

<sup>138</sup> *The United States of Entrepreneurs*, *supra* note 136, at 12.

immigration in a time of economic recession. This philosophy, however, is short-sighted—it overlooks the positive role that bringing in more highly skilled workers can have in strengthening the fundamentals of the economy and spearheading innovation and growth. In an op-ed piece in the *New York Times*, Thomas Friedman recalled that the United States became the wealthiest country in history with an open economy that “tolerate[d] creative destruction[,] so [that] dead capital [could be] quickly redeployed to better ideas and companies.”<sup>139</sup> By restricting immigration, the United States is only hurting itself by scaring away the best and brightest in the world from coming here to work.<sup>140</sup>

We live in a technological age where virtually every study shows that the more knowledgeable workers that are employed in a country and working in its economy, the faster incomes will rise.<sup>141</sup> United States policymakers must refrain from preventing foreign workers from coming here to work, especially since “holders of H-1B visas add substantially to U.S. innovation.”<sup>142</sup> The native labor force benefits from “intellectual cross-pollination and interaction with foreign workers plying the same trade,” thereby stimulating creativity and increasing technological advancement.<sup>143</sup>

The core driving principle and centerpiece of any economic stimulus plan should be to provoke growth of everything that improves knowledge and attracts the best and brightest to U.S. shores.<sup>144</sup> Diana Furchtgott-Roth, the former chief economist at the U.S. Department of Labor, argues that had Congress not imposed such a tight lid on immigrant visas, the United States “might have had up to 300,000 more highly educated engineers and graduate students performing path breaking research” in the

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<sup>139</sup> Thomas L. Friedman, Op-Ed, *The Open-Door Bailout*, N.Y. TIMES, Feb. 11, 2009, at A31.

<sup>140</sup> *Id.*

<sup>141</sup> It has been shown that a cross-pollination of knowledgeable workers, both immigrant and nonimmigrant, does no harm to those non-immigrant populations, and a correlation can be seen between H-1B visas increasing along with patent applications. See Vivek Wadhwa, *Don't Blame H-1B Workers for Woes: Cutting Visas for High-Skilled Immigrations Won't Lessen U.S. Economic Pain and Could Stifle Domestic Innovation, New Research Suggests*, BUS. WK. ONLINE, Feb. 10, 2009, [http://www.businessweek.com/technology/content/feb2009/tc2009029\\_333899.htm](http://www.businessweek.com/technology/content/feb2009/tc2009029_333899.htm).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; see Hunt & Gauthier-Loiselle, *supra* note 105, at 4 (noting that every 1% increase in foreign labor yields a 6% increase in patenting).

<sup>144</sup> See Friedman, *supra* note 139.

country today.<sup>145</sup> These immigrants “would have added about \$23 billion to GDP, and the federal government would have gained [an additional] \$5 billion in tax revenues.”<sup>146</sup> Furthermore, because these foreign workers tend to be “young, self-selected, highly educated, and have excellent employment opportunities, the likelihood that they would receive federal benefits such as Medicare, Social Security, Medicaid, [etc.] is extremely low in the near term.”<sup>147</sup>

Despite the clearly positive impact that immigrants can have in reviving the U.S. economy, the government has already begun instituting protectionist policies, most notably with the Grassley-Sanders amendment to the American Recovery and Reinvestment Act of 2009.<sup>148</sup> Section 1611 of the new law restricts the ability of companies receiving Troubled Asset Relief Program (TARP) funding from hiring H-1B workers except under certain conditions.<sup>149</sup> Most notably, banks and other financial institutions are now barred from hiring H-1B workers unless they have offered those positions first to equally qualified U.S. workers.<sup>150</sup> Therefore, employers receiving TARP assistance must now comply with LCA attestations previously imposed only on H-1B dependent employers.<sup>151</sup>

The *Economist* has also argued that “[r]estricting the immigration of highly skilled workers” in the stimulus plan “will hurt America’s ability to innovate” and revive the economy.<sup>152</sup> TARP restrictions will only hinder the country’s ability to more efficiently dig out of this crisis. Furthermore, President Obama has stated that part of the solution to the economic crisis will come from our investment in science, research, and technology.<sup>153</sup>

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<sup>145</sup> Diana Furchtgott-Roth, *Jump-Start U.S. Growth Through Immigration*, HUDSON INST., Mar. 12, 2009, [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=6089](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=6089).

<sup>146</sup> *Id.*

<sup>147</sup> ARLENE HOLEN, TECH. POLICY INST., *THE BUDGETARY EFFECTS OF HIGH-SKILLED IMMIGRATION REFORM 11* (2009), <http://www.techpolicyinstitute.org/files/the%20budgetary%20effects%20of%20highskilled%20immigration%20reform.pdf>; see THE NEW AMERICANS, *supra* note 90, at 349 (finding that the average immigrant pays far more in taxes than he or she consumes in benefits).

<sup>148</sup> Employ American Workers Act, Pub. L. No. 111-5, tit. XV, § 1611, 123 Stat. 305 (2009).

<sup>149</sup> *Id.*

<sup>150</sup> § 1611(b)(1).

<sup>151</sup> *See id.*

<sup>152</sup> *Economic Focus: Give Me Your Scientists*, *ECONOMIST*, Mar. 7, 2009, at 84.

<sup>153</sup> President-Elect Barack Obama, Remarks on the American Recovery and Reinvestment Act (Jan. 8, 2009), [http://change.gov/newsroom/entry/dramatic\\_action](http://change.gov/newsroom/entry/dramatic_action).

This will “lead to new medical breakthroughs, new discoveries, and entire new industries.”<sup>154</sup> Immigrants are disproportionately represented in the field of research and their innovative ideas can potentially create jobs and jumpstart the economy.<sup>155</sup>

However, because the government only issues 65,000 H-1B temporary visas each year, the United States cannot properly spend the billions of dollars allocated to scientific research in the stimulus plan because there are not enough highly skilled workers to take advantage of the allotted funds.<sup>156</sup> While education reform may eventually provide the United States with a native labor force capable of meeting the demand for highly skilled workers in the science, technology, engineering, or mathematics (STEM) fields, such changes will not take place for some time. The United States must continue to usher in highly skilled foreign labor to use the stimulus funding effectively and help renew its commitment to groundbreaking research.

Reforming the immigration scheme to remove backlogs and quotas in immigrant visas while allowing more highly skilled foreign professionals to contribute their innovative ideas and unique backgrounds will allow the United States to spearhead the kind of research and development needed to strengthen the fundamentals of the economy and bring it out of recession. Most importantly, however, the United States must avoid the urge to hide behind protectionist policies and prevent immigrants from being able to make a valuable contribution. In doing so, the United States will rise out of this economic crisis and secure the long-term economic future of this country.

### III. ENACTING COMPREHENSIVE IMMIGRATION REFORM

At this point, the article has established that the U.S. immigration scheme is broken and in dire need of reform. It has also stressed how removing backlogs and quotas to allow more highly skilled workers to enter the country will revitalize and strengthen the U.S. economy, especially during times of economic crisis. An important question remains: what can be done to fix the system? Past efforts to enact comprehensive immigration reform have failed.<sup>157</sup> A similar fate must be avoided in this time

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<sup>154</sup> *Id.*

<sup>155</sup> See *Economic Focus: Give Me Your Scientists'*, *supra* note 152; see also Furchtgott-Roth, *supra* note 145.

<sup>156</sup> Furchtgott-Roth, *supra* note 145.

<sup>157</sup> See, e.g., Robert Pear & Carl Hulse, *Immigration Bill Dies in Senate*;

of economic crisis.

This final section suggests the most practical remedies for fixing the H-1B and employment-based immigrant visas schemes. Comprehensive immigration reform can be a politically divisive issue, therefore this section offers practical recommendations that will fix the current problems and stimulate the economy. The key goal of any “economic migrant selection system should be” to admit those immigrants into the country that have the “proper mix of skills and other attributes that maximize the probability of long-term success.”<sup>158</sup> At the same time, it is important to craft a new immigration scheme that prevents abuse of foreign workers by U.S. employers. This means providing the Department of Labor with the appropriate tools to properly monitor employers and protect immigrants’ rights.

To fix the broken immigration system, the United States must reform both the H-1B visa category and the employment-based immigrant visa program. Congress should raise the H-1B cap from 65,000 to at least 135,000 to meet the high demand for H-1B visas by employers. Congress should also exempt priority workers from the H-1B cap, initiate a recapture program to pool unused H-1B visas from years when demand is low, and streamline the labor condition attestation process for H-1B employers that file multiple petitions. Congress must also overhaul the employment-based immigrant visa program by exempting highly skilled workers in the STEM fields from the employment-based quotas. In addition, the federal legislature should adjust the per-country quota system with a staggered quota system where the country quotas for nations with a high volume of individuals seeking immigrant visas would be higher than in countries where demand is relatively low. Finally, Congress should recapture unused immigrant visa numbers and allocate them to oversubscribed categories.

#### A. *Fixing the H-1B Visa Problem*

The cap on H-1B visas hurts the U.S. economy. The demand by employers for highly skilled foreign workers far exceeds the supply of visas. In fiscal year 2009, employers filed nearly

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*Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1.

<sup>158</sup> Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 101–02 (2001).

163,000 H-1B petitions for only 65,000 available visas.<sup>159</sup> Employers have long complained that their inability to hire foreign workers hinders their ability to compete on a global scale.<sup>160</sup> Many companies have resorted to outsourcing portions of their businesses to countries with more liberal immigration policies so that they can meet their labor demands.<sup>161</sup>

Ideally, Congress should remove the H-1B cap entirely. Employers should be able to hire all the foreign labor they need to maximize their businesses' potential. When highly skilled foreign workers are unable to come to the United States, they either stay at home or, worse yet, obtain visas to work in countries with more open immigration policies. The benefitting countries can use immigrant labor to obtain a competitive advantage over companies based in the United States. Arbitrary numerical limits on H-1B hiring are incapable of responding to the fluid demand for highly skilled foreign workers. Furthermore, "the U.S. economy will continue to depend heavily on the contributions of H-1B professionals . . . for many decades to come" to compete on a global scale.<sup>162</sup> Logically, market conditions should dictate how many H-1B visas are needed each year.

Politically, however, a cap on H-1B visas is inevitable. Otherwise there would be no chance at substantive immigration reform. Therefore, the real challenge is to find an H-1B scheme that will retain some kind of cap structure while allowing employers to fill their employment needs and not compromise their business models. This article proposes four major reforms to overhaul the H-1B visa program: (1) substantially increase the number of H-1B visas that can be issued in a fiscal year; (2) exempt certain highly skilled workers in priority fields of employment from the cap; (3) establish a recapture program so that unused H-1B visas are pooled to meet demand in years of heavy subscription; and (4) streamline the H-1B application process for employers that hire multiple H-1B employees.

First, the United States would benefit from raising the cap on the annual number of H-1B visas. An annual cap of 65,000 visas is not nearly enough to meet the demand. Taking into account the high demand for H-1B eligible workers, Congress should immediately raise the H-1B cap to a minimum of 135,000 visas. There are two reasons the cap should stand at 135,000 H-1B

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<sup>159</sup> Davis, *supra* note 38.

<sup>160</sup> Elstrom, *supra* note 1.

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

<sup>162</sup> WASLIN, *supra* note 102, at 1.

visas. First, it would substantially raise the number of available H-1B visas and provides a cap number similar to what Congress has advocated in prior attempts at immigration reform. Raising the cap any higher may prove politically unpalatable for legislators. Second, the cap exemptions and recapture programs proposed below would eliminate the need for raising the H-1B cap any higher and would also alleviate the burden of oversubscription during years of heavy demand.

A 135,000 visa cap is on par with cap numbers in previous congressional bills aimed at relieving the H-1B visa problem. For example, the Comprehensive Immigration Reform (CIR) Act of 2006 proposed an immediate increase of available visas to 115,000.<sup>163</sup> The bill also included a market escalator provision. Under a market escalator clause, in each subsequent fiscal year the number of available H-1B visas would be 120% of the previous year's cap.<sup>164</sup> This would deal with any continued problems with oversubscription and would provide businesses with the flexibility to hire H-1B employees as they see fit. If the H-1B cap is not reached in a given fiscal year, the cap for the subsequent year should remain the same.<sup>165</sup> This way, the cap will not arbitrarily continue to increase regardless of current market conditions. It must be noted that in the past fiscal year, employers filed more than 163,000 H-1B visa petitions and the cap proposed by this article stands at only 135,000 visas. Thus, the cap proposed here may not go far enough on its own to remedy the problem. Several measures can be taken by Congress, however, to deal with the current demand for H-1B employees without resorting to raising the H-1B cap beyond what may seem politically palatable. One way is to enact H-1B cap exceptions for individuals of special significance to our economy.

Under the second reform, the proposed Innovation Employment Act, foreign nationals with master's degrees or higher from accredited U.S. universities in the STEM fields would be H-1B cap exempt where the petitioning employer requires such education as a condition for employment.<sup>166</sup> This

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<sup>163</sup> S. 2611, 109th Cong. § 523 (2006); *see* Global Competitiveness Act of 2008, S. 2839, 110th Cong. § 4 (2008) (stating that H-1B cap would be raised to 115,000 for fiscal years 2009 through 2011); Strengthening U.S. Technology & Innovation Now (SUSTAIN) Act, H.R. 5642, 110th Cong. § 2 (2008) (stating that the H-1B cap would have been temporarily increased in 2008 and 2009 to 195,000).

<sup>164</sup> S. 2611 § 523.

<sup>165</sup> *Id.*

<sup>166</sup> H.R. 5630, 110th Cong. § 3 (2008).

exemption would alleviate problems of oversubscription in the H-1B visa category. By exempting STEM workers from the H-1B cap, Congress can both alleviate pressure on the 135,000 cap and also place special emphasis on ushering in the foreign talent that is crucial to revitalizing the economy. President Obama has made it clear that a renewed commitment to research, technology, and innovation will help the United States rebound from this economic recession.<sup>167</sup> Allowing employers to bring in the best and brightest talent in the world without restrictions will help achieve that goal.

Third, Congress must establish a recapture program for unused H-1B visas. Market conditions will dictate how many H-1B visas an employer will need. The demand for highly skilled foreign labor may be low in some years. In the current economic crisis, many anticipate a reduction in H-1B applications.<sup>168</sup> A recapture program will allow Congress to pool unused visas from years in which demand is low to supplement the H-1B cap in economic boom times when the demand for H-1B employees will naturally increase.<sup>169</sup> Recapturing visas would allow the government to maintain cap limits while avoiding waste in the H-1B visa program.

Fourth, the H-1B application process should be streamlined to prevent undue delays in hiring and verification. Employers that hire multiple H-1B employees must file LCAs with the government for every H-1B employee they intend to hire.<sup>170</sup> For H-1B dependent employers, the LCA process is even more rigorous. They must establish that they have attempted to locate qualified U.S. workers to fill the positions and that these efforts have failed.<sup>171</sup> Pending approval from the Department of Labor, the employer may also file forms, including a description of the company, location, financial information, and wage attestations.<sup>172</sup> This must be done for every H-1B application, a rigorous and time consuming process that can take several weeks

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<sup>167</sup> President-Elect Barack Obama, *supra* note 153.

<sup>168</sup> See, e.g., Alice Lipowicz, *Demand May Fall for Visas*, FED. COMPUTER WK., Mar. 26, 2009, available at <http://fcw.com/articles/2009/03/26/demand-may-fall-for-h1b-visas-this-year.aspx>.

<sup>169</sup> See, e.g., Global Competitiveness Act of 2008, S. 2839, 110th Cong. § 3 (2008).

<sup>170</sup> 20 C.F.R. § 655.700(b)(1) (2009).

<sup>171</sup> § 655.739.

<sup>172</sup> See § 655.700(b)(2); U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T. OF HOMELAND SEC., I-129, PETITION FOR A NON-IMMIGRANT WORKER (2009), <http://www.uscis.gov/files/form/i-129.pdf>.

and cause needless delays for employers that rely on H-1B employees to operate.<sup>173</sup>

Needless waste of resources can be avoided by establishing a pre-certification procedure for H-1B employers. The CIR Bill of 2007 recognized this problem and proposed a pre-certification procedure for H-1B employers that file multiple petitions.<sup>174</sup> H-1B employers should be able to submit in one application documents that are common to all of their petitions. Through this procedure, they could establish the credentials necessary to qualify as an H-1B employer and would not have to submit the paperwork with each successive petition. The new system should of course require regular updates from the employers so that the United States Citizenship and Immigration Services can be certain that the employers still qualify for pre-certification.

Because the proposed reforms will likely increase the number of H-1B professionals that begin to work in this country every year, some will argue that the new scheme has potential for abuse. Some critics complain that employers favor hiring H-1B workers because they can pay them lower wages.<sup>175</sup> These fears are unfounded. As discussed above, evidence shows “foreign-born professionals actually earn more than their native counterparts when controlled for age and the year” they earned their degree.<sup>176</sup>

Furthermore, H-1B visa holders are not “indentured servants” to their sponsoring employers; they enjoy “mobility in the U.S. labor market.”<sup>177</sup> A number of large companies have noted that a “majority of their H-1B hires first worked for other employers.”<sup>178</sup> Enhanced enforcement by the Department of Labor should prevent widespread abuse of the scheme, even if more H-1B workers are allowed into the country. This can be achieved with increased funding for Department of Labor audits of employers that hire H-1B workers and close scrutiny of H-1B dependent

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<sup>173</sup> *INS Reform and Border Security Act of 1999: Hearing on S. 1563 Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 106th Cong. 35 (2001) (statement of Warren R. Leiden, Partner, Berry, Appleman & Leiden LLP).

<sup>174</sup> S. 1348, 110th Cong. § 528 (2007).

<sup>175</sup> *Should Congress Raise the H-1B Cap?: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 35 (2006) (statement of John Miano, Center for Immigration Studies).

<sup>176</sup> NAT'L FOUND. FOR AM. POLICY, H-1B PROFESSIONALS AND WAGES: SETTING THE RECORD STRAIGHT 5 (2006), <http://www.nfap.com/researchactivities/articles/NFAPPolicyBriefH1BProfessionalsAndWages0306.pdf>.

<sup>177</sup> *Id.* at 1.

<sup>178</sup> *Id.* at 8.

employers.

*B. Removing Backlogs in the Employment-Based Visa Program*

Comprehensive reform of the immigration scheme must also tackle the problems of the employment-based immigrant visa system. Backlogs and quotas are a huge burden on the United States' ability to attract highly qualified foreign workers and keep them here. This article proposes three substantive changes to the employment-based scheme: (1) exempt certain highly skilled workers from employment-based visa limits; (2) reform the per-country quota system for immigrant visas; and (3) recapture unused immigrant visas to ease the burden on oversubscribed categories.

To revitalize and strengthen the U.S. economy, it is necessary to recruit the best and brightest foreign workers. These are the immigrants who will complement the native labor force, stimulate innovation and production, and create jobs for Americans. While these workers typically arrive in the United States through the H-1B visa program, the majority of them will attempt to obtain permanent residency while they are here. To end the current recession and strengthen the U.S. economy, Congress must begin by simplifying the process for immigrant workers. This is why Congress should exempt certain high-priority workers in fields of great importance from the employment-visa quota and preference category system.

The employment-visa exemption would apply primarily to immigrants with advanced degrees in STEM fields that are crucial to this country's attempt at economic recovery. The CIR Bill of 2006 also suggested this mechanism, exempting from the immigrant visa scheme aliens with certain advanced degrees in the STEM fields that had been working the previous three years in the United States as nonimmigrants.<sup>179</sup> When necessary, the Department of Labor can also exempt immigrants that work in fields of critical shortage.<sup>180</sup> The Department of Labor should have little difficulty identifying fields of critical shortage through employment surveys and monitoring fields that traditionally suffer from shortages of native labor. However, critical shortages vary from time to time and should not be part of the permanent cap-exempt structure.<sup>181</sup>

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<sup>179</sup> S. 2611, 109th Cong. § 508(a)(1)(G) (2006).

<sup>180</sup> *Id.* § 505(a)(F)(i)(II).

<sup>181</sup> See, e.g., Ashley Halsey III, *Jobs Scarce, Even for Nurses; Economic Crisis*

Other bills have suggested creating a new category of immigrant visas for STEM professionals rather than an exemption.<sup>182</sup> An exemption, however, is preferable. A new visa category would not go far enough to revitalize the economy—it would still be subject to the quota system, resulting in oversubscription. Highly skilled workers who are already working in the United States should be encouraged to make a commitment to the United States by becoming permanent residents and eventually citizens. Immigration policy must prioritize long-term interests, which means attracting and retaining highly skilled workers so that they can continue to contribute to the economy.

The per-country quota system that prevents the government from effectively issuing immigrant visas to those who want them must be reformed. The quota system has always been the subject of much contention, even dating back to the enactment of the original Immigration & Nationality Act in 1952.<sup>183</sup> The current law allows only approximately 9,800 individuals from any country to obtain an employment-based immigrant visa each year.<sup>184</sup> This creates a remarkably inefficient immigration scheme that profoundly inhibits the nation's ability to retain the immigrants it needs to compete in the global economy.

The simplest solution would be to eliminate the quota requirement and allow the government to issue immigrant visas to individuals regardless of their country of origin. This would be a more efficient method for awarding immigrant visas and would allow employers to retain their highly skilled employees without the fear of losing them to immigration backlogs. In fact, such a proposal was made in the High Skilled Per Country Level Elimination Act of 2008, which sought to eliminate immigrant visa quotas.<sup>185</sup> However, the quota system has been a part of our immigration scheme for some time now and Congress may be reluctant to eliminate it.

As an alternative to eliminating the per-country quota, a

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*Freezes Field Once Short of Workers*, WASH. POST, Apr. 5, 2009, at C01 (finding that demand for nurses has significantly decreased in the current recession).

<sup>182</sup> See, e.g., H.R. 6039, 110th Cong. § 1(a)(F) (2008).

<sup>183</sup> See 98 CONG. REC. S5109, S5111, S5158–59 (1952) (statements of Sens. Lehman and Benton).

<sup>184</sup> Compare INA § 201(d), 8 U.S.C. § 1151(d) (2006) (setting the worldwide level of employment-based immigration at 140,000), with INA § 202(a)(2), 8 U.S.C. § 1152(a)(2) (explaining that employment-based immigrants may not exceed 7% of the total number of visas available in that fiscal year).

<sup>185</sup> H.R. 5921, 110th Cong. § 2 (2008).

staggered quota system could be used where quotas for immigrants from countries that possess a larger number of individuals seeking admission are higher than those for immigrants from countries where demand for immigrant visas is relatively low. Based on the State Department's monthly Visa Bulletin, it is apparent that the demand for immigrant visas is higher for individuals from China, India, Mexico, and the Philippines than from other countries.<sup>186</sup>

Congress should enact a higher quota for immigrants from these oversubscribed countries to eliminate backlogs and retrogressions. For countries with a low volume of individuals seeking immigrant visas to the United States, the quota can be lowered. Quotas can be adjusted on a yearly basis by the State Department, based on its projections of how many visas are being sought from each country. This approach is preferable to that taken in the CIR Bill of 2006, which sought to simply increase the quota across the board.<sup>187</sup> A staggered system will be more attuned with U.S. economic needs and will maximize the efficiency of the immigrant visa scheme.

While a staggered system alone will not put an end to backlogs, it will help alleviate the burden, especially for immigrant visa seekers from heavily oversubscribed countries. Immigrants from Mexico, China, India, and the Philippines suffer the most from the quota system because demand for immigrant visas is higher in these countries than anywhere else in the world. By increasing the quota for these nations, many of the problems those applicants face with backlogs will decrease. Furthermore, by exempting certain highly skilled workers from the quota system and establishing a visa recapture program, the Legislature should be able to significantly alleviate the problem of backlogs in the employment-based immigrant system.

One criticism of a staggered quota system is that many immigrants from Mexico are lower skilled and do not seek admission to the United States to work in the STEM fields or occupations that will stimulate the economy. While this is generally true, raising the quota for Mexican immigrants is a desirable and necessary compromise. The United States would betray its principles of equality under the law if it were to keep Mexico's quota lower than India's or China's simply because many Indian or Chinese immigrants may be more educated.

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<sup>186</sup> See U.S. Department of State, Visa Bulletin for April 2009, *supra* note 61.

<sup>187</sup> S. 2611, 109th Cong. § 502(1)(B) (2006).

Furthermore, increasing the quota for Mexican immigrants also benefits the economy. Many undocumented immigrants from Mexico are eligible for admission to the United States but cannot obtain admission due to the numerical per-country quota system.<sup>188</sup> These otherwise eligible immigrants should be allowed to enter legally, pay taxes, and contribute to society and economic vitality.

Finally, Congress should institute an immigrant visa recapture program, similar to the program suggested for H-1B visas. The quota system and preference categories have created a wasteful immigration scheme where many available immigrant visas go unused, while individuals in certain preference categories must wait years before finally obtaining their immigrant visas. In 2008, Congresswoman Zoe Lofgren introduced a bill that sought “[t]o recapture employment-based immigrant visas lost to bureaucratic delays and to prevent losses of family- and employment-based immigrant visas in the future.”<sup>189</sup> The bill would have created a pool for all unused visas from fiscal years 1992 through 2007 which could then be used by Congress to provide relief to immigrants in heavily oversubscribed categories.<sup>190</sup> By pooling these unused visas, which some estimate at over 200,000,<sup>191</sup> Congress can significantly reduce backlogs for many immigrants facing long waiting periods for their visas.

#### CONCLUSION

The U.S. immigration scheme is broken. Arbitrary caps on H-1B employment prevent employers from hiring the foreign labor they need to complement the United States’ native workforce, stimulate innovation, and compete in the global economy. Backlogs and quotas in the immigrant visa system prevent immigrants from obtaining green cards in a timely fashion. This prevents the United States from retaining highly skilled foreign workers and leads to undocumented immigration in the United

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<sup>188</sup> See M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word “Citizen,”* 11 HARV. LATINO L. REV. 189, 190 (2008); Aimee Deverall, Comment, *Make the Dream a Reality: Why Passing the Dream Act is the Logical First Step in Achieving Comprehensive Immigration Reform,* 41 J. MARSHALL L. REV. 1251, 1262 (2008).

<sup>189</sup> H.R. 5882, 110th Cong. (2008).

<sup>190</sup> See *id.* § 1(d)(2)–(3).

<sup>191</sup> See, e.g., PAT KERRIGAN, ALLEVIATING THE U.S. NURSING SHORTAGE: IMPROVING OUR IMMIGRATION AND HEALTHCARE SYSTEMS AT THE SAME TIME 2 (2009), [http://www.hccaintl.com/NEWS/RN\\_Shortage\\_White\\_Paper.pdf](http://www.hccaintl.com/NEWS/RN_Shortage_White_Paper.pdf).

States.

Immigration is vital to the long-term success of the U.S. economy. Contrary to myths perpetuated by anti-immigrant activists, immigrants do not take away jobs from U.S. workers. Rather, they complement U.S. workers and increase their earning potential. H-1B workers have a significant positive effect on our economy by stimulating innovation and providing businesses with the talent and expertise to grow and compete in the global marketplace. Immigrants also create jobs for many Americans, particularly in high-tech fields such as science, engineering, technology, and medicine. Highly skilled foreign workers will prove crucial to the United States' ability to emerge from its current economic recession stronger than ever.

To fix these problems, Congress must reform both the H-1B visa category and the employment-based immigrant visa program. Congress should raise the H-1B cap from 65,000 to at least 135,000 to meet the high demand for H-1B visas by employers. The government should also exempt priority workers from the H-1B cap, initiate a recapture program to pool unused H-1B visas from years when demand is low, and streamline the labor condition attestation process for H-1B employers that file multiple petitions.

Overhaul of the employment-based immigrant visa program is also necessary. Highly skilled workers in the STEM fields should be exempt from the employment-based quotas. In addition, the per-country quota system should be adjusted with a staggered quota system. In such a staggered system, the country quotas for nations with a high volume of individuals seeking immigrant visas would be higher than those for countries where demand is relatively low. The quota numbers could be adjusted annually to reflect the current demand for immigrant visas and would make the system far more efficient. Finally, unused immigrant visa numbers should be recaptured and allocated to oversubscribed categories.

These reforms are crucial if the United States is to fix the many problems of its current immigration system. There must be a mechanism for bringing the best and brightest foreign workers to U.S. shores and integrating them into society—their remarkable skills can be used to help end the recession and strengthen the economy. The time to act is now.