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RE: Docket No. USCIS-2021-0004, Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

Most of the following comments were previously organized and published by the Cato Institute, a nonprofit, nonpartisan public policy research organization in Washington, D.C.[1] They contain the views and proposals of leading immigration scholars. The commenters include previous presidents of the American Immigration Lawyers Association, authors of the most widely used immigration law reference texts in the United States, a former Department of Homeland Security official, and other well-known immigration law experts.

While some of these proposals are addressed partially or wholly to agencies other than USCIS, the Department of Homeland Security and USCIS often have the authority to determine the immigration rules of the Department of State or Department of Labor. The Secretary of Homeland Security has the responsibility of "establishing and administering rules . . . governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States," which grants them authority over most aspects of State Department visa issuance procedures.[2] USCIS also has joint regulatory authority with the Department of Labor over the H-2B nonagricultural visa program.[3]

The unifying principle behind these reforms is that the agency has far more power to streamline the immigration process and prevent problems for U.S. citizens and immigrants than it is currently using. It should exercise its full authorities to ease legal immigration to the United States. The United States is currently experiencing one of the lowest rates of legal immigration in decades, and USCIS can do a lot to facilitate faster and more equitable processing. During the COVID-19 pandemic, the rate of immigrant visa issuance plummeted, causing the United States to lose out on hundreds of thousands of contributors to its economy and society. USCIS should work with Department of State and Department of Labor to reverse this trend.

Contents

[1] Edited by David J. Bier, "Deregulating Legal Immigration: A Blueprint for Agency Action," Cato Institute, December 18, 2020.
[2] 6 U.S. Code § 202 (2018).
[3] 80 Fed. Reg. 24041 (April 29, 2015).

Permanent Residents

1. Stop Counting Dependents against Immigrant Visa Limits

— Ira Kurzban
Founding partner in the law firm of Kurzban, Kurzban, Tetzeli, and Pratt P.A.[4]

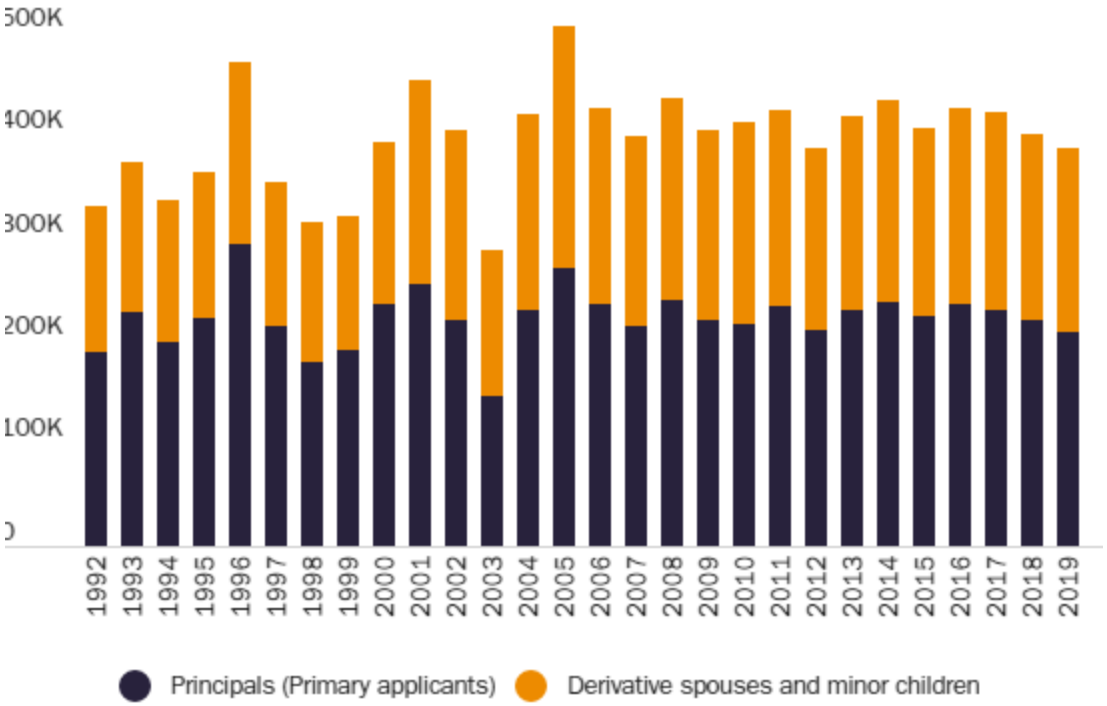
The Department of State (DOS) should stop counting derivative spouses and minor children of immigrant visa applicants against the immigrant visa limits.

In the Immigration Act of 1990, Congress limited the number of family-based (FB), employment-based (EB), and diversity immigrant visas or green cards that may be issued in a year.[5] It allotted at least 226,000 to certain family members of U.S. citizens and legal permanent residents, 140,000 to employees of U.S. businesses, investors, and other beneficiaries of EB petitions, and 55,000 to diversity lottery winners.[6] It *separately* authorized the "same status and order of consideration" for derivative spouses and minor children of these principal immigrants.[7] While the caps explicitly apply to the principal applicant (e.g., the employee)—and no mention is made of the caps applying to derivatives[8] —DOS still adopted an interpretation that derivatives do count against the caps.[9] About 40 percent of the permanent residents admitted under these caps were derivatives in 2019 (Figure 1).[10]

[4] Ira J. Kurzban, Esq., is a founding partner in the law firm of Kurzban, Kurzban, Tetzeli, and Pratt P. A. of Florida, and is the chair of the firm's immigration department. Kurzban is a past national president and former general counsel of the American Immigration Lawyers Association. Kurzban is an adjunct faculty member in Immigration and Nationality Law at the University of Miami School of Law and has lectured and published extensively in the field of immigration law, including articles in the *Harvard Law Review*, *San Diego Law Review*, and other publications. He is the author of *Kurzban's Immigration Law Sourcebook*, the most widely used one-volume immigration source in the United States.
[5] The Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4983, § 101 (November 29, 1990).
[6] 8 USC § 1151(c)-(e) (2018).
[7] 8 USC § 1153(d) (2018).
[8] The only textual argument for counting derivatives is a vestigial reference to how spouses and children *could* be counted against the per-country caps under the old pre-1990 system (8 USC § 1152(b)). Even if it is necessary to interpret this vestigial reference as somehow a *requirement* to continue to count spouses and children against the caps today, the language only refers to derivatives who receive status under 8 USC § 1153(a) or (b), not 8 USC § 1153(d). Since 1990, the only derivatives who receive status under 8 USC § 1153(a) or (b) are spouses and children of special immigrants under 8 USC § 1153(b)(4) who are explicitly subject to the cap because they are part of the definition of a principal applicant under 8 USC § 1101(a)(27).
[9] DOS never explicitly states that derivatives count against the caps in regulation, but this change could be accomplished by amending 22 CFR § 42.31(b), 22 CFR § 42.32, and 22 CFR § 42.33.
[10] Department of Homeland Security, *Yearbook of Immigration Statistics 2019*, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019, 2020.

Figure 1

Permanent residents admitted under family, employment, and diversity visa caps by type, FY 1992–2019



Sources: Department of Homeland Security, "Yearbook of Immigration Statistics," Table 7, 1996–2019; 1992–1995.

Prior to 1990, the provision providing the "same status" to derivatives was explicitly subject to the cap,[11] but in 1990, Congress moved that provision to its own subsection separate from the caps.[12] DOS has insisted that because derivatives receive the "same *status*" (legal permanent residence) as the principal applicant, they are nonetheless subject to the same *cap*. But normally, whether immigrants are subject to a cap is based on the provision under which they receive status, not the type of status that they receive.[13] Congress has repeatedly stated in laws passed since 1990 that derivatives receive status pursuant to or "under" their own separate provision, not the provisions subject to the caps.[14]

Indeed, in every other case where Congress has wanted spouses and minor children to count against a cap, it has explicitly indicated that outcome. For instance, the refugee statute has the exact structure whereby refugees are authorized for admission under a cap set by the president,

[11] Immigration and Nationality Act of 1965, Pub. L. 89–236, 79 Stat. 911, (October 3, 1965).
[12] The Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4983, § 101 (November 29, 1990).
[13] For instance, children of U.S. citizens under the age of 21 have no cap, while older children have caps, despite both receiving the "same status" (legal permanent residence), because minor children receive that status under a provision without a cap under 8 USC § 1151(b)(2)(A)(i) (2018) and older children status under 8 USC § 1153(a) (2018) with caps. The reason that the State Department adopted this completely anomalous interpretation after 1990 is because of its prior practice before 1990 when the provision providing derivatives the "same status" was explicitly subject to the worldwide cap. Not only was there no reason to do this, since the 1990 act moved the provision outside the caps, but Congress has repeatedly stated in laws passed since 1990 that derivatives receive status pursuant to or "under" their own separate provision, not the provisions subject to the caps. The USA PATRIOT Act of 2001, Pub. L. 107–56, 115 Stat. 272, (October 26, 2001); 8 USC § 1101(a)(15)(V); 8 USC § 1255(i)(1)(B); 8 USC § 1154(l)(2)(C); and 8 USC § 1186b(f).
[14] The USA PATRIOT Act of 2001, Pub. L. 107–56, 115 Stat. 272, (October 26, 2001); 8 USC § 1101(a)(15)(V); 8 USC § 1255(i)(1)(B); 8 USC § 1154(l)(2)(C); and 8 USC § 1186b(f).

and a separate provision states that spouses and minor children of refugees are authorized for admission. In this case, however, Congress expressly stated, "Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation."[15] Because this language is absent for derivatives of FB and EB immigrants and diversity lottery winners, no provision of law counts them against the caps.

Congress even amended several other provisions of the 1990 act authorizing immigrant visas with the same structure to clarify that it wanted derivatives to count in those cases, but it did not do so for beneficiaries of FB and EB petitions and diversity lottery winners.[16] In other contexts, Congress does explicitly exempt derivatives from certain caps but only where they would otherwise be subject to that cap.[17] Since no provision of law subjects beneficiaries of FB and EB petitions and diversity lottery winners to the caps, there was no reason for Congress to have explicitly exempted them.

The administration also has a strong affirmative reason in the text to stop counting derivatives. The law also requires DOS to grant derivatives the "same order of consideration" as the primary applicant if "accompanying or following to join," entitling them to receive status at the same time as the principal applicant or any time thereafter.[18] But when derivatives count against the cap, DOS cannot guarantee that it will fulfill this legal requirement because the principal may receive status, then the cap is filled, and the derivatives miss the opportunity to receive the "same order of consideration." Therefore, DOS cannot even fulfill the requirements of the statute itself without ending its illegal practice of counting derivatives.

It is not unprecedented for Congress to create a separate authorization for permanent residence apart from its primary "worldwide" immigration limits and for successive administrations to misinterpret its action. In 1966, Congress enacted the Cuban Adjustment Act (CAA), which granted permanent residence to Cuban refugees.[19] The CAA was entirely silent about whether Cubans would count against the "worldwide" immigration limits that Congress updated in 1965, yet the Johnson administration decided to count them against the quotas in 1968 anyway, and the Nixon and Ford administrations continued the practice until 1977, when litigation forced the government to end the illegal counting policy.[20]

The Biden administration should similarly stop counting derivative spouses and minor children against the immigrant visa caps. Not counting derivatives would reduce the wait times for permanent residence, helping hundreds of thousands of immigrants and their families.

2. Recapture Unused Green Cards

— Amy M. Nice
Independent immigration policy advisor and former attorney advisor in the Office of the General Counsel at DHS.[21]

[15] 8 USC § 1157(c)(2) (2018).
[16] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102–232, 105 Stat. 1733, (December 12, 1991).
[17] See 8 USC § 1101(a)(15)(H) (2018), where H nonimmigrants include spouse and minor children, necessitating an explicit exemption for spouses and children in 8 USC § 1184(g)(2) (2018).
[18] 8 USC § 1153(d) (2018); and 9 Foreign Affairs Manual 503.2–4(A)(c)(1) (2020).
[19] The Cuban Adjustment Act of 1966, Pub. L. 89–732, 80 Stat. 1161, (November 2, 1966).
[20] *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979).
[21] Amy Marmer Nice is an independent immigration policy advisor. Nice was an attorney advisor in the Office of the General Counsel at DHS headquarters from September 2015 to December 2016, working on employment-based immigration regulations. Before that, she was the executive director of immigration policy at the U.S. Chamber of Commerce from December 2010 to September 2015, where she primarily worked on pushing legislative reforms to business immigration. From October 1989 to

DOS should issue a memo announcing a one-time recapture of certain immigrant visa cap numbers to redress prior agency failures to issue visas.

The Immigration Act of 1990 evidences Congress's intent to avoid having family-based (FB) and employment-based (EB) immigrant visa cap numbers left unused.[22] Specifically, Congress provided a variety of steps to ensure full cap usage: if DOS predicts that numbers will go unused in a category during a fiscal year, DOS must reallocate them to another category during the fiscal year,[23] and in some cases numbers are allocated without regard to per country limits to avoid wasting them[24] or can be counted against the per country limit of a spouse or parent.[25] The law also requires DOS to recycle visas that are issued but that immigrants fail to use to enter.[26] Numbers that are still unused at the end of the fiscal year are supposed to spill over to the other system in the next year (from FB to EB and vice versa).[27]

Despite this comprehensive scheme to avoid unused visas, over 220,000 EB and FB immigrant visa numbers under the Immigration Act of 1990 have never been utilized—primarily because of agency inaction and delays in the EB categories. These visa numbers are now lost forever because of a quirk in the formula to calculate the cap for the FB preference categories. The FB cap is equal to the base cap of 480,000 visas plus unused EB visas in the prior year, but the formula *subtracts* the number of immediate relatives (spouses, minor children, and parents of adult U.S. citizens who are not subject to any cap) in the prior year down to a floor of not less than 226,000 visas.

Unforeseeable to Congress when it developed the 1990 Act, there has been a vast increase in the number of immediate relatives. This has caused the formula to hit the 226,000 floor in all but one fiscal year since 1997, meaning that any unused EB green cards failed to raise the number of FB green cards at all the next year. Thus, whenever the agency failed to appropriately issue EB green cards within the fiscal year, the unused EB green cards have been incinerated rather than used in the next fiscal year by FB, contrary to the expectation of Congress. For example, in 2007, the formula was the base cap of 480,000 minus 591,938 immediate relatives.[28] Since this equaled a negative number, the formula reverted to the floor of 226,000, and the 10,326 EB green cards that went unused in 2006 due to agency delays in issuing them were not added to the FB cap but rather were lost forever (Figure 2).

December 2010, she practiced immigration law at the Washington, DC, firm of Dickstein Shapiro LLP, where she managed the immigration practice beginning in 1997.

[22] The Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4983, § 101 (November 29, 1990).

[23] 8 USC § 1153(a) and (b) (2018).

[24] 8 USC § 1152(a)(4)(A) (2018).

[25] 8 USC § 1152(b) (2018).

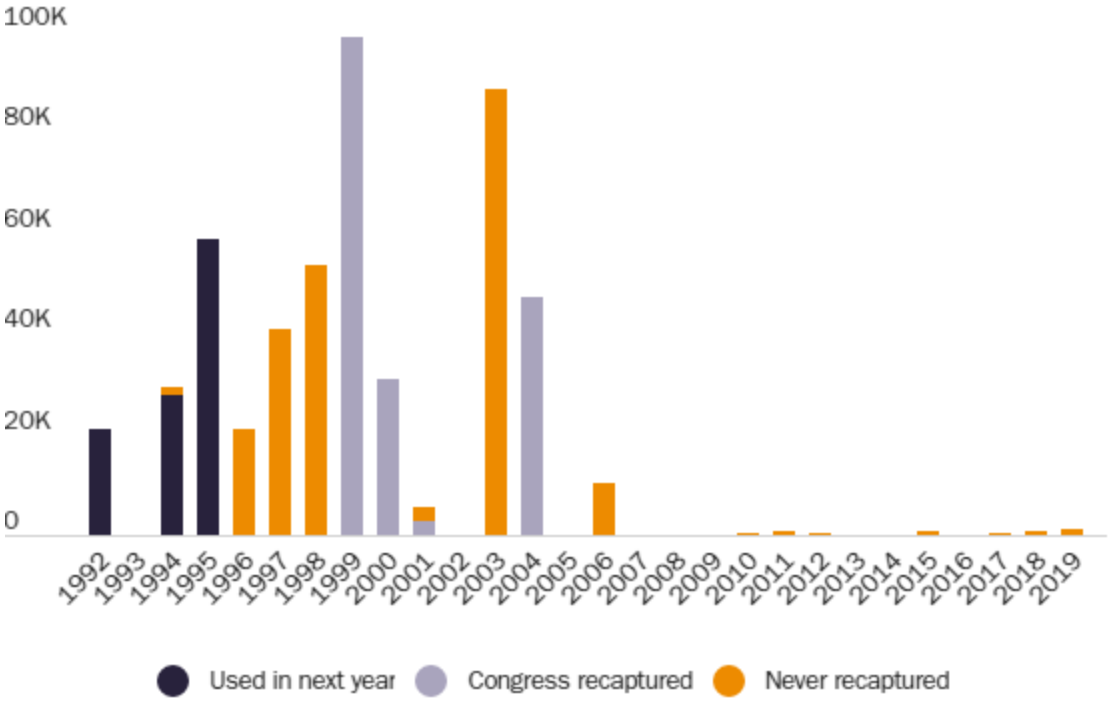
[26] 8 USC § 1156 (2018).

[27] 8 USC § 1151(c)(3)(C) and (d)(2)(C) (2018).

[28] Kelly Jefferys and Randall Monger, "U.S. Legal Permanent Residents: 2007," (Annual Flow Report, Department of Homeland Security, March 2008).

Figure 2

Final dispensation of employment-based immigrant visa cap numbers unused in the fiscal year, FY 1992–2019



Download data

Sources: U.S. Citizenship and Immigration Services Ombudsman, "Annual Report 2010," June 30, 2010; Department of Homeland Security, "Lawful Permanent Residents," 2010–2019; Department of State, "Report of the Visa Office," Table V, 2017–2019; PL 106-313, October 17, 2000; PL 109-13, May 11, 2005.
Notes: In the REAL ID Act of 2005 (PL 109-13), Congress recaptured 50,000 green cards that went unused from 2001 to 2004. This figure allocates them to 2001 and 2004.

As Figure 2 shows, Congress has recaptured some lost green cards through legislation.[29] But the State Department has independent authority to recapture any unused green cards in cases where agency inaction caused them to be permanently lost, violating Congress's intent that all numbers be used.

Between 1968 and 1976, immigrants from Western Hemisphere countries faced longer wait times because the government incorrectly charged Cuban refugees to the Western Hemisphere limitation. In response to a lawsuit, the government conceded that it had committed an error and entered into a stipulated agreement to recapture the visa numbers for two plaintiffs.[30] The government then openly acknowledged its error, recaptured over 140,000 visas from prior fiscal years on its own authority, and issued them to other immigrants who were caught in the Western Hemisphere backlog. In a subsequent class action to determine the proper recapture method, the

[29] The American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. 106–313, 114 Stat. 1251, (October 17, 2000); and Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109–13, 119 Stat. 231, (May 11, 2005).
[30] *Zambrano v. Levi*, 76 C 1456 (N.D. Ill. 1977).

court, the plaintiffs, and the government all "agree[d] that relief, in the form of a program to recapture and reissue the wrongfully issued visa numbers, is appropriate."[31]

In other words, some federal courts[32] and the government have already acknowledged and exercised the authority to rectify a government failure to issue green cards in a timely manner in accordance with the laws and intent of Congress. The State Department should use this legal authority to recapture green cards in cases where its actions failed to make them available in accordance with the law.

3. Don't Limit Green Card Filings When the Cap Is Unfilled

— Cyrus D. Mehta
Founder and managing partner of Cyrus D. Mehta & Partners, PLLC.[33]
DOS should determine that visas are available for purposes of filing adjustment of status applications so long as the green card cap has not been fully exhausted.[34]

Low caps mean that beneficiaries of family-based (FB) and employment-based (EB) petitions often wait in backlogs for many years before they can receive immigrant visas or green cards.[35] Table 1 shows how the waits have grown for immigrants who became eligible to receive green cards in prior years for the two types of immigrants with the longest waits in the EB and FB systems. Immigrants who are still waiting for green cards in these categories will have to wait even longer because such a large backlog has developed.

[31] *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979); Citing *Silva*, the court in *Contreras de Avila v. Bell*, Civil Case No. 78 C 1166 (N.D. Ill 1980), likewise determined the appropriate allocation for recaptured immigrant visas after an improper government allocation, stating that "[o]ur goal in affording relief is to place the class members in the position they would have been in absent" the failure to allocate the visa numbers as Congress had intended.
[32] There is a circuit split on the issue. In *Li v. Kerry*, 710 F.3d 995 (9th Cir. 2013), a case involving the allocation of employment-based immigrant visa numbers, the Ninth Circuit found no authority to recapture, specifically acknowledged Silva, and "respectfully disagree[d]" with the decision. There are strong reasons, however, to distinguish Li from the present context. First, the plaintiffs in *Li* did not challenge the overall process the agencies use to allocate immigrant visa numbers and did not "allege that Defendants failed to take discrete actions they were legally required to take." 710 F.3d at 997. Instead, the plaintiffs alleged that in 2008 and 2009—fiscal years in which no employment-based visa numbers were left unused—visas that should have been issued to Chinese nationals in the EB-3 category were instead issued to beneficiaries of other nationalities, even though there was both demand and room within the China EB-3 per country limit for visas to be issued. Here, by contrast, the problem to be remedied is the agencies' failure to issue, at all, hundreds of thousands of immigrant visa numbers, a responsibility that the agencies acknowledge and that the *Galvez* court described as a "statutory duty." That issue was not before the *Li* court. In addition, in *Li*, the visa numbers in dispute had already been issued to other beneficiaries. In this situation, there is no need to do what the Ninth Circuit was loath to do in Li and require "DOS to go back in time and not do something it already did, let alone determine which individuals awarded visa numbers in the past should have their numbers taken away." 710 F.3d at 1002.
[33] Cyrus D. Mehta is the founder and managing partner of Cyrus D. Mehta & Partners, PLLC. He has over 25 years of experience in immigration law. He is also an adjunct professor of law at Brooklyn Law School. He is the 2018 recipient of the American Immigration Lawyers Association's Edith Lowenstein award for advancing the practice of immigration law.
[34] For a complete explanation of this proposal, see Cyrus Mehta, "Proposal for the Biden Administration: Using the Dual Date Visa Bulletin to Allow the Maximum Number of Adjustment of Status Filings," *The Insightful Immigration Blog*, November 8, 2020.
[35] State Department, "Visa Bulletin for October 2020," 2020.

Table 1

Years waited for green cards for the longest-delayed family and employment applicants, 2001–2020

Date	EB2 Indian employee w/master's		F3 Mexican married adult child of citizen	
Visa Bulletin	Final Action Date (Priority Date)*	Years waited	Final Action Date (Priority Date)*	Years waited
2001 May	May 1, 2001	0	July 15, 1995	5.8
2002 May	May 1, 2002	0	July 15, 1992	9.8
2003 May	May 1, 2003	0	July 1, 1993	9.8
2004 May	May 1, 2004	0	March 15, 1995	9.1
2005 May	May 1, 2005	0	April 22, 1995	10
2006 May	January 1, 2003	3.3	January 1, 1993	13.3
2007 May	January 8, 2003	4.3	February 8, 1988	19.2
2008 May	January 1, 2004	4.3	July 22, 1992	15.8
2009 May	February 15, 2004	5.2	October 22, 1992	16.5
2010 May	February 1, 2005	5.2	October 22, 1992	17.5
2011 May	July 1, 2006	4.8	November 15, 1992	18.5
2012 May	August 15, 2007	4.7	January 15, 1993	19.3
2013 May	September 1, 2004	8.7	April 1, 1993	20.1
2014 May	November 15, 2004	9.5	July 1, 1993	20.8
2015 May	April 15, 2008	7	April 15, 1994	21.1
2016 May	November 22, 2008	7.4	October 8, 1994	21.6
2017 May	June 22, 2008	8.9	January 22, 1995	22.3
2018 May	December 22, 2008	9.4	September 1, 1995	22.7
2019 May	April 16, 2009	10	February 15, 1996	23.2
2020 May	June 2, 2009	10.9	June 8, 1996	23.9

Source: U.S. Department of State, "Immigrant Visa Statistics," 2020; and "Visa Bulletin For May 2020," April 6, 2020.

*Note: Prior to 2015, the Visa Bulletin listed only Priority Dates, not Final Action Dates.

While the caps only limit green card *approvals*, DOS and U.S. Citizenship and Immigration Services (USCIS) also limit the *filing* of applications by these backlogged immigrants.[36] This is harmful because simply filing an adjustment of status application provides significant benefits to those waiting in the United States, such as allowing them to travel internationally without losing their place in line, to obtain an employment authorization document that allows them to work, and—if they are already working—to more easily change jobs.[37] If the applicants have a temporary status that will soon expire, filing also places them in a period of authorized stay until they receive their green cards.[38]

[36] It regulates filings with the dates for filing (DFF) in the monthly Visa Bulletin. Only applicants who were beneficiaries of a petition before the DFF may file an application.

[37] 8 USC § 1154(j) (2018).

[38] Note that although a pending I-485 application will preclude the triggering of unlawful presence, it does not provide any protection against the placement of the foreign national in removal proceedings until the application is approved. U.S.

USCIS's and DOS's stated reason for limiting filings is that the law allows the filing of an adjustment of status application only when a cap number is "immediately available" to the applicant.[39] USCIS relies on DOS to decide when cap numbers are available. DOS has always interpreted the law to require only an estimate of potential availability, allowing applications that may or may not actually receive green cards that year, depending on how many applicants file, how many derivatives they have, how many denials are issued, and other factors.[40] In one case in 2007, DOS's decision on availability allowed filings that took more than a decade for USCIS to be able to approve under the caps.[41]

This outcome and DOS's other policies demonstrate that what matters to DOS in its interpretation of the law is only the possibility that applicants could receive a green card, not certainty that they will.[42] The problem is that DOS interprets "possibility" narrowly to mean what it believes is *likely* at the time. But the law does not require DOS to predict the future and guess whether all immigrants filing applications ahead of the applicant will be approved and receive green cards that year. Instead, the law only requires that cap space be "immediately available" if it could *potentially* go to the applicant, regardless of whether that outcome is probable in some statistical sense.

Workers and families should be able to file adjustment of status applications so long as there is at least some cap space available, which would occur, at a minimum, at the start of every fiscal year. DOS could even preserve one visa in each preference category to keep filings open throughout the year.[43] Because USCIS relies on DOS's determination on availability, DOS could accomplish this unilaterally without formally amending its regulation—which does not specifically prevent this interpretation—but it would be prudent to adopt a regulation to codify the change regardless.[44]

4. Parole for the Immigrant Visa Backlog

— Cyrus D. Mehta
Founder and managing partner of Cyrus D. Mehta & Partners, PLLC.[45]

USCIS should create a parole program for beneficiaries of family-based (FB) and employment-based (EB) petitions when the visa caps prevent the immediate issuance of an immigrant visa.[46]

The low caps on immigration have created an FB backlog of 3.5 million family-sponsored immigrants and an EB backlog of 125,000 employees, investors, and their families who are waiting for a visa abroad.[47] USCIS should grant parole to these backlogged applicants to allow them to enter the United States. Congress has explicitly granted authority to the Secretary of Homeland Security to issue parole documents based on "urgent humanitarian reasons or significant public

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Citizenship and Immigration Services, *Policy Manual*, Volume 7, Chapter 3, "Unlawful Immigration Status at Time of Filing (INA 245(c)(2))," November 18, 2020.
[39] 8 USC § 1255(a)(3) (2018).
[40] U.S. Citizenship and Immigration Services, "Visa Availability and Priority Dates," April 29, 2020.
[41] The State Department announced that the July 2007 Visa Bulletin for EB-2 and EB-3 would become current for India. Hundreds of thousands filed during that period (which actually was the extended period from July 17, 2007, to August 17, 2007). It was obvious that these applicants would not receive their green cards during that time frame. The State Department then retrogressed the EB dates substantially the following month, and those who filed under the India EB-3 in July–August 2007 waited for over a decade before they became eligible for green cards.
[42] See U.S. Citizenship and Immigration Services, "Visa Availability and Priority Dates," April 29, 2020.
[43] Cap numbers are typically being used right up until the end of the year anyway.
[44] 8 CFR § 245.1(g)(1) (2019).
[45] Cyrus D. Mehta is the founder and managing partner of Cyrus D. Mehta & Partners, PLLC. He has over 25 years of experience in immigration law. He is also an adjunct professor of law at Brooklyn Law School. He is the 2018 recipient of the American Immigration Lawyers Association's Edith Lowenstein award for advancing the practice of immigration law.
[46] For a complete explanation of this proposal, see Cyrus Mehta, "Proposal for the Biden Administration: Using the Dual Date Visa Bulletin to Allow the Maximum Number of Adjustment of Status Filings," *The Insightful Immigration Blog*, November 8, 2020.
[47] State Department, "Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2019," 2020.

benefit."[48] The Secretary can expand the interpretation of "urgent humanitarian need" to include the reunion of families who have an approved immigrant visa petition but who are waiting for visas to become available. Simultaneously, USCIS can define "significant public benefit" to include beneficiaries of EB immigrant petitions.

Once family-sponsored petition beneficiaries receive parole, they can also apply for an employment authorization document that would allow them to work legally in the United States.[49] Beneficiaries of family-sponsored immigrant visa petitions can adjust status to legal permanent residence in the United States after receiving parole, so they may wait in the United States until visa numbers become available.[50] Due to a quirk in the law, parolees cannot adjust on EB grounds, but EB beneficiaries could depart the United States for consular processing of their immigrant visas once visas become available for them.[51]

USCIS has already created similar programs to parole backlogged family-sponsored immigrants from Haiti and Cuba as well as for backlogged family of World War II veterans from the Philippines.[52] USCIS also issued a rule that—though never implemented—deemed parole a "significant public benefit" for entrepreneurs, many of whom would have come from the EB backlog.[53] A parole program could alleviate the hardship of many families and generate economic growth through new investment and productivity of U.S. companies.

When the visa caps prevent the immediate issuance of an immigrant visa, USCIS should grant parole to beneficiaries of FB and EB petitions.

5. Stop Aging Out of Older Children by Using the Filing Date

— Cyrus D. Mehta
Founder and managing partner of Cyrus D. Mehta & Partners, PLLC.[54]
USCIS should prevent older children of family-based (FB) or employment-based (EB) immigrants from aging out of green card eligibility by using the dates for filing (DFFs) to determine their age.[55]

Green card applicants in the capped FB and EB categories wait for a visa number to become available under the caps after USCIS approves a petition on their behalf (usually submitted by a family member or employer). USCIS informs these applicants when they can *file* green card applications with the DFFs in the monthly Visa Bulletin. USCIS separately informs immigrants of the earliest times that it will *approve* those applications with a set of later dates known as the final action dates (FADs). Children of these immigrants under the age of 21 can file along with their parents under the DFFs.[56] But USCIS will only approve a child's application if the child was still under the age of 21 when the child first could have received a green card under the FAD. USCIS credits children for the time that USCIS took to process the initial petition for their parent,[57] but

[48] 8 USC § 1182(d)(5)(A) (2018).
[49] 8 CFR § 274a.12(c)(11) (2019).
[50] 8 CFR § 245.1(d)(1)(v) (2019).
[51] 8 USC § 1255(c)(7) (2018).
[52] U.S. Citizenship and Immigration Services, "Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States," December 16, 2019.
[53] For another such program, see 82 Federal Register 5238, (January 17, 2017).
[54] Cyrus D. Mehta is the founder and managing partner of Cyrus D. Mehta & Partners, PLLC. He has over 25 years of experience in immigration law. He is also an adjunct professor of law at Brooklyn Law School. He is the 2018 recipient of the American Immigration Lawyers Association's Edith Lowenstein award for advancing the practice of immigration law.
[55] For a complete explanation of this proposal, see Cyrus Mehta, "Proposal for the Biden Administration: Using the Dual Date Visa Bulletin to Allow the Maximum Number of Adjustment of Status Filings," *The Insightful Immigration Blog*, November 8, 2020.
[56] 8 USC § 1153(h)(1) (2018).
[57] The age is calculated by subtracting the number of days that the petition was pending.

even still, many children age out of eligibility between filing under the DFFs and being able to receive approvals under the FADs.

The law permits the filing of a green card application only when "an immigrant visa is immediately available" under the caps.[58] USCIS is already interpreting the word "available" to include dates (the DFFs) ahead of when a green card is actually to be issued (the FADs). Meanwhile, the Child Status Protection Act (CSPA) requires that when determining whether the child is "under 21," USCIS must use the age of a child applicant on "the date on which *an immigrant visa number becomes available*"—nearly identical wording.[59]

Therefore, when filing, USCIS interprets "available" to mean the earlier date (the DFF), but when deciding the child's age, USCIS interprets "available" to mean the later date (the FAD). This reasoning is inconsistent and causes many children to lose eligibility for a green card when they turn 21 between the DFF and the FAD, which can be nearly five years apart.[60] USCIS should end this policy by allowing CSPA protection based on the DFF.[61] Similarly, when a person is applying for an immigrant visa at a U.S. consulate abroad, the State Department should use the same interpretation by allowing CSPA protection based on the DFF.[62]

6. Parole the Children of H-1B Workers Who Age Out

— William A. Stock
Founding member of Klasko Immigration Law Partners, LLP.[63]
USCIS should issue a policy memorandum creating a parole-in-place program for children of H-1B skilled workers who lose their derivative status when they turn 21.

Skilled immigrants typically first work in the United States under the H-1B program, which entitles their spouses and children under the age of 21 to H-4 status.[64] After the workers start the job, employers sponsor them for green cards, and the entire family waits for permanent residence together. Between waiting for employer sponsorship and waiting for green cards to become available under the low numerical caps, many immigrants—nearly all from India—spend between 10 and 20 years in H-1B, H-4, or other temporary statuses.

During this process, children often spend their most formative years in the United States in H-4 status. Yet when they reach age 21—and the parent still has not been able to apply for a green card because of the scarcity of green cards under the caps—they lose eligibility for both H-4 status and the ability to receive green cards as dependents of their parents.[65] This leaves young adults without a legal status even though they followed the law, were educated in U.S. schools, and consider themselves culturally American. They must try to find another temporary status, leave the country altogether, or live in the country illegally. About 155,000 children of Indian employer-

[58] 8 USC § 1255(a)(3) (2018).
[59] 8 USC § 1153(h)(1) (2018)
[60] See, for example: State Department, "Visa Bulletin for November 2020," October 12, 2020.
[61] If a child files an adjustment of status using the FAD more than one year after the DFF, that should not violate the "sought to acquire within one year of availability" requirement in 8 USC § 1153(h)(1) because an applicant should be allowed to use either the DFF or the FAD for CSPA protection, just as USCIS allows filing an adjustment of status under either the DFF or FAD.
[62] 9 FAM 502.1–1(D)(4) (2019).
[63] William A. Stock is a founding member of Klasko Immigration Law Partners, LLP, and has practiced immigration law exclusively for over 20 years. Stock served as president of the American Immigration Lawyers Association (AILA), the 16,000-member national organization of immigration lawyers in 2017. Stock is a senior editor of AILA's annual *Immigration & Nationality Law Handbook* and is the coauthor of the "J Visa Guidebook" from Lexis Publishing.
[64] Department of Homeland Security, *Yearbook of Immigration Statistics 2019*, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019, 2020.
[65] 8 USC § 1101(a)(15)(H) (2018); and 8 USC § 1101(b) (2018).

sponsored immigrants were in the green card backlog in 2020—a majority are likely to age out without receiving green cards.[66]

USCIS should create a parole-in-place program for children of temporary visa holders who "age out" of H-4 status through a policy memorandum. Congress has granted USCIS clear authority to "parole into the United States" noncitizens "for urgent humanitarian reasons or for significant public benefit."[67] This authority effectively allows USCIS discretion to waive the normal limits on entry. USCIS has repeatedly used this authority to create parole-in-place programs for other groups already in the United States,[68] and Congress has explicitly recognized parole-in-place as a valid use of the parole power in 2020.[69]

A Significant Public Benefit Parole program for aging-out H-4s would keep talented young people in the United States.[70] These talented young people would be able to finish college and continue the lives they have established here with their families. Parolees may also receive employment authorization,[71] allowing them to start careers and reach their full economic potential, which would substantially benefit the United States. For these reasons, USCIS should issue a policy memorandum to create a parole-in-place program for children of H-1B skilled workers who lose their derivative status when they turn 21.

7. Expand USCIS Interview Waivers

— David Kubat
Associate attorney at Zimmer Law Group.[72]
USCIS should issue a policy memorandum allowing adjudicators to waive a field office interview for all applicants for any visa type or category of adjustment of status.

The interview requirement is costly for both the applicants and the agency, so it should be used only when the documentary evidence is inconclusive. The interview can increase the processing time from less than a year to more than two years in some areas of the country.[73] As a result, a backlog of nearly 600,000 applications for adjustment of status to permanent residence has developed—a nearly fourfold increase since 2010 (Figure 3).[74] Interview delays hurt U.S. sponsors, prolong the immigrant's path to citizenship, and disrupt family reunification.[75]

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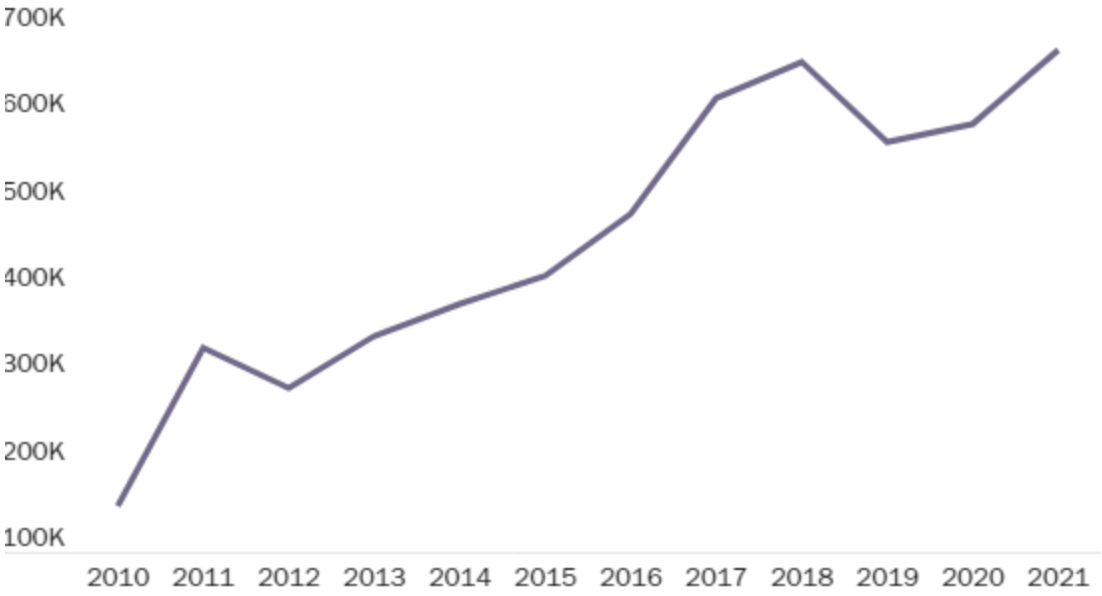
[66] David J. Bier, "100,000 Children in the Employment-Based Green Card Backlog at Risk of Family Separation," *Cato at Liberty* blog, November 20, 2020.
[67] 8 USC § 1182(d)(5)(A) (2018).
[68] U.S. Citizenship and Immigration Services, "Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States," December 16, 2019.
[69] National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92, 133 Stat. 1198, (December 20, 2019).
[70] For another such program, see 82 Federal Register 5238, (January 17, 2017).
[71] 8 CFR § 274a.12(c)(11) (2019).
[72] David Kubat is an associate attorney at Zimmer Law Group. Kubat graduated from Hamline University School of Law in 2013. Kubat also served in the Army National Guard from 2008 to 2020. Kubat serves as the Military Assistance Program Liaison for the Minnesota-Dakota's chapter of the American Immigration Lawyers Association.
[73] U.S. Citizenship and Immigration Services, "Check Case Processing Times," accessed November 22, 2020.
[74] U.S. Citizenship and Immigration Services, "All USCIS Application and Petition Form Types," November 16, 2020.
[75] Reforming the USCIS adjudication process will only increase in importance particularly if Congress passes a large-scale immigration reform bill that would increase the demands on a system.

Figure 3

I-485 adjustment of status pending applications for green cards, FY 2010–2020



Source: U.S. Citizenship and Immigration Services, "I-485 Performance Data," 2012; USCIS, "All USCIS Application and Petition Form Types," 2013–2021. 2020 as of Quarter 3. 2021 as of Quarter 1.

USCIS generally empowers its adjudicators to waive interviews for unmarried minor children of U.S. citizens, parents of U.S. citizens, and legal permanent residents' unmarried children under the age of 14.[76] The waiver authority enables career staff with expertise to allocate their limited resources only to those cases they believe merit closer scrutiny. But USCIS extends only extremely limited discretion to waive interviews for spouses, fiancé(e)s, older or adult children, employees of U.S. businesses, investors, asylees and refugees (including those petitioning for their family abroad), and others.[77] USCIS maintains this policy and has expanded it in recent years even though various agencies including USCIS itself commonly interview these individuals in person at other times, such as when they initially applied for temporary visas abroad or other statuses in the United States.

Because the existing regulation allows interviews to be waived "when it is determined by the Service that an interview is unnecessary,"[78] this change to expand the list of categories not requiring an interview would only require a policy memorandum without the lengthy process of

[76] U.S. Citizenship and Immigration Services, *Policy Manual*, Volume 7, Chapter 5, "Interview Guidelines," November 18, 2020. In May 2018, USCIS removed from this list the previously authorized categories of employment-based petitions and fiancé(e)-based adjustments. Roughly 25 percent of all adjustment applications came from these categories alone in quarter two of FY2020 (last available data); U.S. Citizenship and Immigration Services, "Adjustment of Status Interview Guidelines and Waiver Criteria," Policy Alert, PA-2018–04, May 15, 2018. In November 2020, USCIS began a phased process to eventually require interviews for all asylees and refugees petitioning for derivative family members. U.S. Citizenship and Immigration Services, "Expanding Interviews to Refugee/Asylee Relative Petitions," PM-602-0180, November 18, 2020. In December 2020, USCIS restricted interview waivers for most asylees and refugees. USCIS noted that "approximately less than 5% of cases" in these categories currently received an interview. U.S. Citizenship and Immigration Services, "Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines," Policy Alert, PA-2020–26, December 15, 2020. In FY 2019 (the most recent available full year data), USCIS received 68,081 adjustment applications in this category (11 percent of all adjustments). U.S. Citizenship and Immigration Services, "All USCIS Application and Petition Form Types (Fiscal Year 2019, 4th Quarter, Jul.1-Sep. 30, 2019)," January 14, 2020.

[77] The consulate already interviews I-730 beneficiaries abroad (or they are interviewed by USCIS if they are inside the United States). This will require USCIS to conduct an interview with the petitioner prior to approving the I-730 *and* to then have the beneficiary engage in an entirely duplicative interview abroad. There is literally no justifiable purpose for it other than to burden an already overburdened system.

[78] 8 CFR § 245.6 (2019).

amending a regulation. Thus, USCIS should issue a policy memorandum that allows adjudicators to waive an adjustment of status interview for applicants in any green card category.

8. Deem a Grant of Temporary Protected Status an Admission

— Ally Bolour
Founding and managing partner of Bolour/Carl Immigration Group[79]
— Scott Emerick
Senior associate at Bolour/Carl Immigration Group.[80]
USCIS should recognize a grant of temporary protected status (TPS) as an "admission" to allow TPS recipients who are otherwise eligible for green cards to adjust to legal permanent residence.

Congress created TPS to allow USCIS to grant a temporary, renewable status and employment authorization in circumstances in which forcing temporary residents, foreign visitors, or immigrants with no status to leave is inhumane due to temporary problems in their home countries.[81] Protracted crises and multiple extensions have resulted in hundreds of thousands of immigrants living in the United States with TPS for many years (Table 4).[82] Many have married U.S. citizen spouses or have adult U.S.-born children who have sponsored or could sponsor them for green cards.

The law only allows someone who was "inspected and admitted or paroled into the United States" to adjust his or her status to legal permanent residence.[83] For immigrants who entered without inspection, this can pose a problem. But TPS should cure this defect because the statute clearly states that "for purposes of adjustment of status … the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant"—clearly indicating that Congress wanted TPS recipients to be able to adjust.[84] Moreover, since the law also repeatedly characterizes all nonimmigrants as being "admitted," the Ninth, Sixth, and Eighth Circuit Courts of Appeals have concluded that USCIS's policy of denying green cards to TPS recipients based on the lack of an "admission" is unlawful.[85]

Yet USCIS continues to maintain this policy outside of those courts' jurisdictions.[86] The Third, Fifth, and Eleventh Circuits have ruled that USCIS's current interpretation is more consistent with the law mainly because the statute never explicitly describes a grant of TPS as an

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[80] Scott A. Emerick is a senior associate at Bolour/Carl Immigration Group, a full service immigration law firm based in Los Angeles with satellite offices in Salinas, California, and Palm Springs, California. Emerick is a graduate of Southwestern University School of Law. He is the immediate past chair of the Southern California Chapter of AILA and serves on AILA's law student outreach committee. Emerick speaks regularly on immigration law topics, including family immigration, asylum law, and removal defense.
[81] 8 USC § 1254a.
[82] D'Vera Cohn, Jeffrey S. Passel, and Kristen Bialik, "Many Immigrants with Temporary Protected Status Face Uncertain Future in U.S.," Pew Research Center, November 27, 2019.
[83] 8 USC § 1255(a) (2018).
[84] 8 USC § 1254a(f)(4) (2018).
[85] *Ramirez v. Brown*, 852 F.3d 954 (2017); *Flores v. USCIS*, 718 F.3d 548 (2013); and *Velasquez v. Barr*, No. 19–1148 (2020). Other appeals courts disagree, but their decisions only indicate that the government's position is compatible with the law, not that it is required.
[86] U.S. Citizenship and Immigration Services, *Matter of H-G-G-Adopted Decision 2019-01 (AAO July 31, 2019)*, Policy Memorandum, PM-602-0172, July 31, 2019.

admission,[87] but because the Supreme Court and the other circuits have not decided the issue, USCIS still has leeway to adopt a new policy at least outside those courts' jurisdictions. The policy harms legal immigrants and contradicts the intent of the law. USCIS should rescind it via policy memorandum and later regulation. The Department of Justice should adopt the same view and begin recognizing a grant of TPS as an admission wherever it can.[88]

Nonimmigrant Visas

9. Recapture Unused H-1B Visas

— Amy M. Nice
Independent immigration policy advisor and former attorney advisor in the Office of the General Counsel at DHS[89]

The Department of Homeland Security (DHS) should issue a policy memorandum to implement its existing regulation to recapture unused H-1B visas.

If USCIS approves an employer's petition to hire an H-1B skilled specialty worker, USCIS counts the worker against the annual H-1B visa cap set by Congress. After an approval, some workers fail to receive H-1B status (because employers decide not to hire them, workers take different jobs, or other reasons). In those cases, USCIS regulations require that employers notify USCIS if a petition goes unused and that the agency revoke the petition and "take into account the unused number during the appropriate fiscal year."[90]

While USCIS does account for "historical data related to approvals, denials, revocations, and other relevant factors" to estimate how many petitions are needed above the cap in order to ultimately fill it,[91] these data do not include unused approved visa petitions, because they are never revoked. This is because USCIS's use-it-or-lose-it regulation has no deadline by which employers must report an unused cap number, includes no enforcement mechanism if they fail to, and has not been implemented with clarifying policy guidance. As a result, H-1B visas regularly go unused, employers fail to report that they never used them, and USCIS never reallocates them to other employers.

DHS should issue a policy memorandum clarifying that (1) notification must occur if the H-1B nonimmigrant fails to be admitted within 180 days; (2) the "appropriate fiscal year" is the year that the petition is revoked; (3) U.S. Customs and Border Protection must share information with USCIS to allow it to identify and confirm which H-1B petitions were not used to secure initial H-1B

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[87] *Serrano v. U.S. Attorney General*, 655 F.3d 1260 (2011); *Sanchez v. Secretary of the U.S. Department of Homeland Security*, 967 F.3d 242 (2020); and *Nolasco v. Crockett*, 978 F.3d 955 (2020).
[88] This would require overturning *Matter of Roberto Carlos Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020). The Attorney General has authority to overturn Board of Immigration Appeals decisions under 8 CFR § 1003.1(h).
[89] Amy Marmer Nice is an independent immigration policy advisor. Nice was an attorney advisor in the Office of the General Counsel at DHS headquarters from September 2015 to December 2016, working on employment-based immigration regulations, and before that was the executive director of immigration policy at the U.S. Chamber of Commerce from December 2010 to September 2015, where she primarily worked on pushing legislative reforms to business immigration. From October 1989 to December 2010, she practiced immigration law at the Washington, DC, firm of Dickstein Shapiro LLP, where she managed the immigration practice beginning in 1997.
[90] 8 CFR § 214.2(h)(8)(ii)(B) (2019) reads in full: "When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petition that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year."
[91] 83 Federal Register 62406, 62412 (December 3, 2018), citing 8 CFR § 214.2(h)(8)(ii)(B) (2019).

status; and (4) USCIS must revoke those unused petitions (after notifying and letting the employer challenge the determination that they were unused).[92]

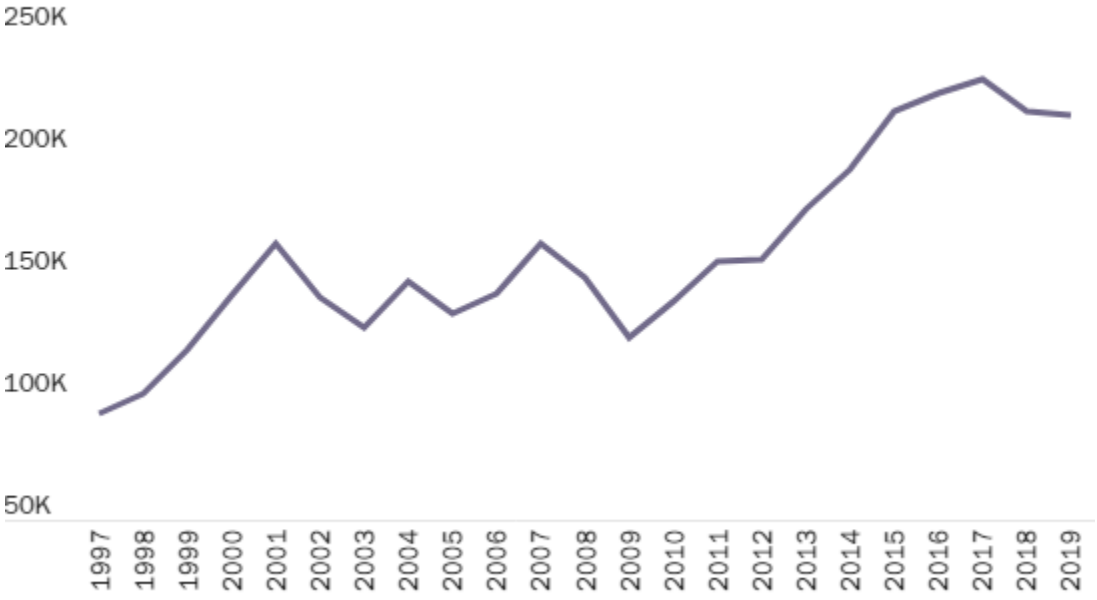
10. Let the Family Members of All Guest Workers Work

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[93]
USCIS should allow all derivatives of temporary workers to work.

Hundreds of thousands of temporary workers' spouses and children under the age of 21 enter to live in the United States in derivative statuses—that is, statuses that depend on their spouse's or parent's temporary worker status.[94] In recent years, the number of derivatives has greatly increased (Figure 4). In some categories, the law explicitly requires USCIS to authorize spouses of these workers to find jobs,[95] but USCIS has generally declined to authorize employment for other derivatives in those categories without this explicit requirement, despite clear statutory authority to do so.[96]

Figure 4

Visas for derivative spouses and minor children of nonimmigrant workers, FY 1997–2019



Source: U.S. Department of State, "Nonimmigrant Visa Statistics," 2020.
Notes: Image excludes E and TD derivatives who are not separately enumerated from the principal applicant.

[92] In accordance with 8 CFR § 214.2(h)(11)(iii) (2019).
[93] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[94] See 8 USC § 1101(a)(15) (2018).
[95] 8 USC § 1184(c)(2)(E); and 8 USC § 1184(e)(2) (2018).
[96] The law specifically defines "unauthorized alien" to exclude anyone "authorized to be so employed by this chapter [i.e., the immigration law] *or by the Attorney General*." 8 USC § 1324a(h)(3) (2018). Since 2003, this authority of the Attorney General has passed to USCIS 8 USC § 1103(a) (2018).

USCIS has frequently used its power to authorize employment for many groups of noncitizens,[97] but the only derivatives who have benefited from its use so far are H-4 spouses of H-1B workers who are going through the green card process.[98] USCIS has denied jobs to all other spouses and children of temporary workers not specifically authorized by Congress. It makes little sense to have foreigners residing in the United States under programs designed to enhance economic growth but who are banned from working. For that reason, USCIS should authorize all spouses and children of foreign workers to work.

While USCIS has the authority to authorize employment without restrictions, it has adopted a heavy-handed, protectionist approach for H-2A agricultural and H-2B nonagricultural workers. If USCIS decided it could not issue unfettered employment authorization to spouses and children of H-2 visa holders consistent with its existing policies, it should at least allow them to work at H-2 jobs certified by DOL as jobs for which U.S. workers are not available. Since the H-2B cap for seasonal nonagricultural jobs is so quickly filled, it is likely that employers would hire spouses to fill these otherwise open jobs because the law exempts spouses and children from the cap.[99] Most H-2 workers do not bring their families, because it is too expensive to do so when they cannot work, so authorizing employment would reduce family separation and incentivize immigrants to wait for H-2 sponsorship rather than cross the border illegally to find jobs immediately.

By allowing all spouses and children of temporary workers to fill open jobs in the United States, USCIS would greatly increase the economic benefits of all temporary worker programs.

11. Allow Visa Reissuance in the United States

— Stephen Yale-Loehr
Immigration professor at Cornell Law School.[100]
DOS should reinstate its prior practice of visa reissuance at its office in Washington, DC, rather than requiring nonimmigrants to travel to consulates abroad to renew their visas.

Until 2004, nonimmigrants admitted with C, E, H, I, L, O, and P visas could get their temporary visas reissued when they expired by mailing their passports to the DOS main office in Washington, DC.[101] DOS discontinued this policy in 2004 because Congress required U.S. visas to contain biometric identifiers, and DOS stated that it was "not feasible for the Department to collect the biometric identifiers in the United States" at that time.[102] Nonetheless, DOS continued to provide visa reissuance for A, G, and NATO nonimmigrants.

This decision forced many nonimmigrants already approved to work in the United States to travel to U.S. consulates abroad to receive a visa enabling them to travel internationally and created a surge of demand for consular services across the border in Canada.[103] Having to travel overseas to renew a visa involves significant costs related to work disruption and travel expenses

[97] Most prominently, it authorizes international students and foreign graduates of U.S. universities in F-1 status to work under the Optional Practical Training program. 8 CFR § 274a.12(c)(3) (2019).
[98] 80 Federal Register 10283, (February 25, 2015).
[99] 8 USC § 1184(g)(2) (2018).
[100] Steve Yale-Loehr is professor of immigration practice at Cornell Law School. He is also of counsel at Miller Mayer in Ithaca, New York. He is coauthor of *Immigration Law and Procedure*, the leading 21-volume treatise on U.S. immigration law. Mr. Yale-Loehr is a member of the New York bar and the U.S. Supreme Court. He is a member of the asylum committee and the administrative litigation taskforce of the American Immigration Lawyers Association (AILA). He is also a founding member of the Alliance of Business Immigration Lawyers, www.abil.com, a global consortium of top business immigration attorneys.
[101] Stephen Yale-Loehr, Demetrios G. Papademetriou, and Betsy Cooper, "Secure Borders, Open Doors: Visa Procedures in the Post-September 11 Era," Migration Policy Institute, August 2005.
[102] 69 Federal Register 35121, (June 23, 2004).
[103] Stephen Yale-Loehr, Demetrios G. Papademetriou, and Betsy Cooper, "Secure Borders, Open Doors: Visa Procedures in the Post-September 11 Era," Migration Policy Institute, August 2005.

and introduces more uncertainty in the outcome. Domestic visa reissuance would avoid those costs and lessen the uncertainties. It would also reduce the workload at U.S. consular posts overseas.

In 2008, a DHS advisory committee recommended restarting the visa reissuance policy for the E, H, I, L, O, and P nonimmigrant visa categories and expanding it to include F and J nonimmigrants, noting that "numerous options exist for taking fingerprints domestically" if necessary and arguing that a "convincing business and security case has not been made for the continued suspension."[104] Security is not a real concern for most visa reissuance cases since DOS vetted the applicants when they received their original visa.

DOS should resume visa reissuance in the United States for, at a minimum, the same categories it had previously allowed. This could be accomplished without amending its regulations, which already allow for reissuance in the United States for E, H, I, L, O, and P nonimmigrants.[105]

12. Grant Duration of Status to Nonimmigrant Derivatives

— Adam Greenberg
Founder of Greenberg Visa Law.[106]

DHS should amend its regulations to admit the derivative spouses and minor children of principal nonimmigrants for the duration of status (D/S) of the principal nonimmigrant rather than requiring separate renewals.

Derivative spouses and children in E,[107] H-4, L-2, O-3, P-4, R-2, and TD dependent nonimmigrant statuses are often long-term residents of the United States whose status periodically expires with that of their principal nonimmigrant spouse or parent. Extensions require separate applications with separate fees—$455 plus an $85 biometric screening fee—adding administrative complexity for no benefit.[108] USCIS routinely extends their derivative status, provided it approves the underlying principal nonimmigrant's application and the family relationship continues to exist. They are effectively being admitted indefinitely, except for the mandate to repeatedly file extensions of status. These extensions add tens of thousands of applications to USCIS's workload.[109]

DHS should not require extensions and should admit these derivatives for the duration of the principal's status and the qualifying family relationship.[110] For decades, DHS has admitted students and exchange visitors,[111] foreign media,[112] diplomats, and their derivatives for D/S

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[104] Secure Borders and Open Doors Advisory Committee, "Secure Borders and Open Doors: Preserving our Welcome to the World in an Age of Terrorism," Department of Homeland Security, January 2008.
[105] Specifically, 22 CFR § 41.111(b) (2019).
[106] Adam S. Greenberg is a practicing immigration attorney in the Pittsburg area and founder of Greenberg Visa Law. Greenberg is a member of the bars of the Commonwealth of Pennsylvania and the United States District Court for the Western District of Pennsylvania. He is also a member of the American Immigration Lawyers Association (AILA) and is the 2020–2021 chair of the Pittsburg Chapter of AILA.
[107] E dependents are classified as E-1, E-2, or E-3D to match their principal nonimmigrant.
[108] Currently $455 plus a $85 biometrics fee per additional derivative per extension. U.S. Citizenship and Immigration Services, "I-539, Application to Extend/Change Nonimmigrant Status," September 22, 2020. A small adjustment was proposed as part of the currently enjoined fee changes. See 85 Federal Register 46788 (August 3, 2020).
[109] In 2019, there were 221,566 I-539 forms filed to change or extend nonimmigrant status. USCIS does not independently record the number of derivative extensions specifically, but the number of arrivals (see Figure 4) indicates it is likely a majority of them. U.S. Citizenship and Immigration Services, "All USCIS Application and Petition Form Types (Fiscal Year 2019, 4th Quarter, Jul. 1–Sep. 30, 2019)," January 14, 2020.
[110] The divorce of a derivative spouse or the marriage of a derivative child would terminate his or her status immediately, but that is no less true with admissions until dates certain. A derivative child reaching the age of majority also terminates his or her status in either system but is a date known in advance to DHS, at which time it could terminate the child's status immediately.
[111] 8 CFR § 214.2(f)(5)(i); and 8 CFR § 214.2(j)(1)(ii) (2019).
[112] 8 CFR § 214.2(i)(1)(i) (2019).

without a specified end date.[113] Students, for example, are admitted for however long it takes to complete one or more courses of study. In late 2020, DHS proposed withdrawing D/S admissions from the first two of these classes on the basis of a phantom need for continual verification of the eligibility of students and journalists.[114] But in this case, DHS could verify derivative relationships as part of the principal nonimmigrant's application, saving time and money for DHS and the applicants.[115]

13. Let L-2 and E Spouses Work without an Employment Authorization Document

— Angelo Paparelli
Partner in Seyfarth Shaw LLP.[116]
USCIS should expressly authorize employment for L-2 and E spouses without requiring the spouse to apply for an employment authorization document.

The L-1 visa category allows multinational companies to transfer certain skilled foreign employees to the United States, such as managers, executives, and skilled workers with specialized knowledge. The E visa allows similar categories of foreign nationals from countries where the United States has "a treaty of commerce and navigation" to carry out substantial trade (E-1), develop and direct the operations of a business (E-2), or perform services in a specialty occupation if from Australia (E-3). The law entitles the spouses of these workers to derivative status,[117] and it requires that USCIS "authorize the alien spouse to engage in employment in the United States and provide the spouse with an 'employment authorized' endorsement or other appropriate work permit."[118]

This statute clearly requires that, while USCIS must *separately* issue a "work permit," the agency must authorize E and L-2 spouses to work whenever they are in the United States without such a permit. The Social Security Administration (SSA) recognizes their eligibility for employment incident status—that is, based on their admission as an L-2 or E spouse. SSA issues a Social Security card "valid for work only with specific DHS authorization."[119] An admission stamp entered into the passport of an E or L-2 spouse with a handwritten notation showing a period of authorized stay by a DHS border inspector should suffice as a DHS authorization.[120]

USCIS seems also to adopt the view that E or L-2 employment is authorized as an inherent attribute of spousal derivative status. Its approval notices for L-2 and E spouses refer to USCIS's regulation that lists noncitizens authorized to accept employment "incident to status."[121] Yet the regulation itself does not actually include L-2 or E spouses.[122] Moreover, USCIS's *Handbook for Employers* (M-274) implies that L-2 and E spousal status does not suffice to prove employment

[113] 8 CFR § 214.2(a)(1); and 8 CFR § 214.2(g)(1) (2019).
[114] 85 Federal Register 60526, (September 25, 2020).
[115] This is similar to how M-2 nonimmigrant extensions are handled when derivatives are included in the primary's extension of status application (Form I-539).
[116] Angelo Paparelli is a partner in Seyfarth Shaw LLP, a member of the firm's Business Immigration Group and its Government Relations and Policy Group, a Certified Immigration Law Specialist (California), and a Fellow in the College of Labor and Employment Lawyers with experience in a wide array of subspecialties of immigration law.
[117] 8 USC § 1101(a)(15)(E), (L) (2018).
[118] 8 USC § 1184(c)(2)(E); and 8 USC § 1184(e)(2) (2018).
[119] Social Security Administration, "Program Operations Manual System (POMS)—Policy For Non-Immigrant Employment Authorization," RM 10211.420, August 17, 2018.
[120] Border inspectors are part of U.S. Customs and Border Protection (CBP), which is a component of DHS.
[121] When USCIS issues work permits to L-2 and E spouses, it annotates the approval with a code, "A17" (for E nonimmigrant spouses) or "A18" (for L-2 spouses)—two reserved sections of 8 CFR § 274a.12(a) (2019) applicable to classes of noncitizens authorized to accept "employment incident to status."
[122] 8 CFR § 274a.12(a) (2019).

authorization.[123] USCIS should modify its regulations so that individuals are authorized for employment based on their spousal relationship and thus do not appear to violate their status or lose eligibility to change or adjust their status by working as the statute allows.

Agency action is also necessary because as long as the USCIS's M-274 *Handbook for Employers* is left unchanged, the Justice Department's Immigrant and Employee Rights (IER) unit could penalize employers who follow it.[124] Employers that decline to accept an unexpired foreign passport containing an L-2 or E dependent's entry stamp issued by DHS would be engaging in "unfair documentary practices" related to verifying the employment eligibility of employees. The IER states that "when verifying a workers' employment authorization, employers … are not allowed to demand more or different documents than necessary" to verify identity and employment eligibility.[125] With the backing of SSA's interpretation, L-2 or E derivative spouses would have a claim of unfair documentary practices if an employer rejected them for failing to produce a USCIS employment authorization document. Thus, by policy memorandum and later by regulation, USCIS should conform its interpretation to that of the SSA and explicitly provide L-2 and E spouses employment authorization incident to their status.

14. Automatically Approve H-2 Unnamed Petitions

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[126]
USCIS should defer to DOL's determination of whether an H-2A or H-2B job is "temporary" and automatically approve all H-2 petitions without substantive review if the employer plans to name the specific worker only at the consulate abroad.

H-2A agricultural or H-2B nonagricultural employers must receive a temporary labor certification from DOL showing that no qualified U.S. workers are available for the job. As part of its review, DOL first determines whether the job is "temporary" based on employer-provided evidence like payroll and tax documents.[127] If DOL certifies the job, employers file a petition requesting USCIS grant status to the workers. USCIS has chosen to again conduct a second review to determine whether the job is temporary, sometimes requiring different evidence from DOL.[128]

USCIS's second review is burdensome and unnecessary. Even though USCIS approved 99 percent of petitions, it issued requests for evidence (RFEs) to 17 percent of H-2B employers and 10 percent of H-2A employers in 2020.[129] The USCIS Ombudsman has found numerous cases of USCIS adjudicators issuing RFEs for already-submitted evidence or evidence for issues that are legally irrelevant.[130] The Ombudsman has said that "delays at any point in the process can have

[123] U.S. Citizenship and Immigration Services, "12.0 Acceptable Documents for Verifying Employment Authorization and Identity," last reviewed April 27, 2020. The M-274 does not explain what an employer should do if the prospective employee presents a List B driver's license and a Social Security number card stating that it is valid for work only with DHS authorization, and the employee also presents DHS authorization in the form of a CBP-issued L-2 admission stamp in his or her passport.
[124] 8 USC § 1324b(a)(6) (2018).
[125] Immigrant and Employee Rights Section, "Types of Discrimination," Department of Justice, April 30, 2019.
[126] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[127] H-2B: 20 CFR § 655.6(b) (2019); and H-2A: 20 CFR § 655.103(d) (2019).
[128] H-2B: 20 C.F.R § 655.6 (2019); and H-2A: 8 CFR § 214.2(h)(5)(iv)(B) (2019).
[129] U.S. Citizenship and Immigration Services, "I-129—Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014–June 30, 2020," June 30, 2020.
[130] U.S. Citizenship and Immigration Services Ombudsman, "Annual Report 2015," June 29, 2015; and U.S. Citizenship and Immigration Services Ombudsman, "Annual Report 2016," June 29, 2016.

severe economic consequences for U.S. employers" exactly because the work is short-term and time-sensitive.[131] USCIS should amend its regulations to defer to DOL to determine whether an H-2 job is temporary.

Employers must also attest to USCIS that they did not receive any fees that H-2 workers paid to get the job in prior years (or documenting that it has repaid any such fees).[132] USCIS should also allow DOL to enforce this requirement at the labor certification stage for unnamed petitions because its regulations also contain the same prohibition on job placement fees.[133] Employers do not need to list the specific names of the workers they plan to hire on "unnamed" USCIS petitions, so after deferring to DOL on these issues, USCIS has no further need to substantively review the petition.

Thus, once DOL approves an H-2 labor certification, USCIS should automatically approve all unnamed H-2 petitions without any review. USCIS already automatically revokes H-2 petitions when a labor certification is revoked, but a comparable provision in the opposite direction would be a better reform.[134] DOL should have employers state on the labor certification whether they plan to file an unnamed petition on its labor certification, collect any information necessary for USCIS, and forward any such approved labor certification directly to USCIS. USCIS then can immediately and automatically approve the petition and forward the approval to the consular affairs and the employer.[135]

Automatically approving unnamed H-2 petitions would save employers time and money, preserve agency resources, and reduce the usual H-2 filing fees.

15. Approve H-2 Jobs for up to Three Years

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[136]
USCIS should allow DOL to certify H-2A and H-2B recurring jobs for up to three years.

H-2A agricultural and H-2B nonagricultural employers almost always need workers to return annually to perform the same job.[137] Employers hire for a season, and they bring back the same H-2 workers seasonally year after year. To employers, these "returning workers" are just existing employees who have taken a seasonal hiatus.[138] Yet USCIS and DOL refuse to recognize this basic business reality, so USCIS only permits DOL to certify H-2 recurring jobs for a single season,[139] and DOL requires re-advertising the position every year[140] and has a nonpublic practice

[131] U.S. Citizenship and Immigration Services Ombudsman, "Annual Report 2014," June 27, 2014.
[132] U.S. Citizenship and Immigration Services, "Form I-129, Petition for Nonimmigrant Worker," 2020, 18; H-2A: 8 CFR § 214.2(h)(5)(xi)(A) (2019); and H-2B: 8 CFR § 214.2(h)(6)(i)(B) (2019).
[133] H-2A: 20 CFR § 655.135(j) (2019); and H-2B: 20 CFR § 655.20(o) (2019).
[134] 8 C.F.R. 214.2(h)(11)(ii) (2019).
[135] At that point, the employer could pay the $150 H-2B fraud fee required by 8 USC § 1184(c)(13). Failure to pay the fee by the job start date would be grounds for revocation of the petition.
[136] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[137] Office of Foreign Labor Certification, "Performance Data," Department of Labor, 2020.
[138] As a legal matter, this is not the case, but as a practical matter, it is how many employers understand it. USCIS should be clear that by certifying a job across multiple years, it is not actually deeming workers a current employee when they are laid off during the down season.
[139] 8 CFR § 214.2(h)(6)(iv)(B): "The Secretary of Labor may issue a temporary labor certification for a period of up to one year"; and 20 CFR § 655.103(d) (2019).
[140] 20 CFR § 655.15(f); and 20 CFR § 655.6(b) (2019).

of prohibiting advertising the job only to those who commit to return for additional years.[141] This means repeatedly following a process that costs thousands of dollars, often delays H-2 workers' entries until after the date of need, and rarely ever turns up any U.S. workers.[142] Such pointless costs incentivize other employers to hire illegally.

USCIS and DOL should amend their regulations to allow employers to advertise only to those workers who commit to return each season and certify the recurring job for up to three years. Nothing in the law requires H-2 labor certifications every year. While the employer's "need" must be "temporary," the H-2B regulations already recognize that for most employers, "the underlying job is permanent,"[143] and this is acceptable so long as the employer's "need" is still temporary, implicitly within a given year.[144] Moreover, for both H-2A and H-2B programs, DOL requires employers to prove that the employer's needs recur annually (i.e., are permanent) unless the temporary job is based on a one-time or intermittent need, acknowledging the same fact.[145]

With three-year certifications, Americans would still have a chance to take the job every three years,[146] and the knowledge that the job is more than just for the one season could even induce a few more U.S. workers to apply. Three years would match USCIS's existing three-year limit on continuous H-2B and H-2A status in the United States[147] as well as USCIS and DOL's (rarely used) limit on H-2B approvals based on a temporary, one-time need of three continuous years.[148] Both limits are not found in the law and are arbitrary, but it is logical to at least harmonize these existing periods with the regularity of DOL's labor certification requirement.

Beyond the regulatory relief, this action would provide more visas under the H-2B annual cap of 66,000 visas.[149] Because DOL's labor certification indirectly determines the validity period of the visa under DOS's existing regulations,[150] workers with H-2B recurring positions certified for three years would receive three-year visas, so they would not need a new one each year, freeing up visas for other workers.[151] With more cap space, almost all H-2B jobs would be filled, increasing economic growth. Moreover, few policies have reduced illegal immigration from Mexico more than expanding visas for seasonal Mexican workers (Figure 5). DOL should certify H-2 recurring jobs for up to three years, effectively exempting those returning to the same job from DOL's labor certification process and the H-2B cap for two years.

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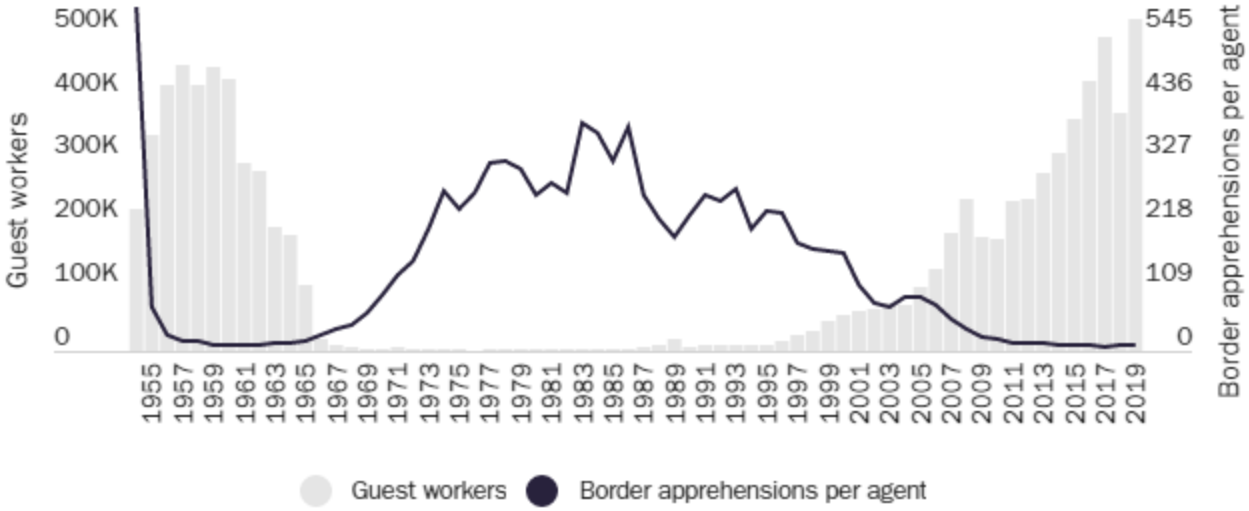
[141] Based on interviews with attorneys.
[142] David J. Bier, "H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers," Cato Institute, Immigration Research and Policy Brief no. 17, March 10, 2020.
David J. Bier, "H-2B Visas: The Complex Process for Nonagricultural Employers to Hire Guest Workers," Cato Institute, Policy Analysis No. 910, February 16, 2021.
[143] 20 CFR § 655.6(a); and 8 CFR § 214.2(h)(6)(ii)(A) (2019).
[144] 20 CFR § 655.6(b) (2019).
[145] H-2B: 20 CFR § 655.6(b) (2019); and H-2A: 20 CFR § 655.103(d) (2019).
[146] H-2A regulations should simultaneously eliminate the "50 percent rule" requiring that farmers accept U.S. applicants even after H-2A workers start through half the work period, which is unfair in its own right but also incompatible with this reform. 20 CFR § 655.135(d) (2019).
[147] H-2B: 8 CFR § 214.2(h)(13)(iv) (2019); and H-2A: 8 CFR § 214.2(h)(5)(viii)(C) (2019).
[148] 8 CFR § 214.2(h)(6)(ii)(B) (2019).
[149] 8 USC § 1184(g)(1)(B); and 8 USC § 1184(g)(10) (2018).
[150] DOL's labor certification determines the validity period of USCIS's petition for nonimmigrant workers under 8 CFR § 214.2(h)(9)(iii)(B), and the petition determines the validity period of the visa under DOS's regulations (22 CFR § 41.53(c)).
[151] For workers who do not need visas, USCIS only counts the first entry pursuant to a new approved petition toward the H-2B visa cap. U.S. Citizenship and Immigration Services, "Characteristics of H-2B Nonagricultural Temporary Workers: Fiscal Year 2019 Report to Congress," April 29, 2020.

Figure 5

Mexican guest worker entries and apprehensions of Mexicans per border patrol agent, FY 1954–2019



Sources: Immigration and Naturalization Service, "Yearbook of Immigration Statistics" (Washington: DOJ, 1992); Department of Homeland Security, "Yearbook of Immigration Statistics" (Washington, DHS, 2019); Department of Homeland Security, "Legal Immigration and Status Report Quarterly Data" (Washington: DHS, 2018); "Nonimmigrant Visa Statistics," Department of State; "Total CBP Enforcement Actions," Customs and Border Protection, 2019; Border Patrol, "Nationwide Illegal Alien Apprehensions Fiscal Years 1925–2018" (Washington: DHS, 2019); Border Patrol, "Border Patrol Agent Nationwide Staffing by Fiscal Year" (Washington: DHS, 2018); and "Border Patrol Agents: Southern Versus Northern Border," Transactional Records Access Clearinghouse, 2006.

Notes: Includes Bracero admissions from 1954 to 1965, and H-2A and H-2B admissions thereafter. 1980 interpolated, 1981–1983 based on total H visa admissions.

16. Extend OPT for Health Science Professionals

— Greg Siskind

Founding partner of Siskind Susser, PC—Immigration Lawyers.[152]

USCIS should add nurses, physicians, and other health science professionals to the list of occupations eligible for a 24-month employment authorization extension under Optional Practical Training (OPT).

OPT has existed in some form since 1947 to provide employment authorization to international students, allowing them to obtain on-the-job training and experience at U.S. companies after graduation.[153] DHS relies on its congressionally recognized authority to authorize employment to any noncitizen.[154] DHS authorizes 12 months of initial OPT to all foreign graduates and 24 months

[152] Greg Siskind is a founding partner of Siskind Susser, PC—Immigration Lawyers and has been practicing law since 1990. Siskind is the author of several books, including the annually published *J-1 Visa Guidebook*, the *American Bar Association's Lawyers Guide to Marketing on the Internet*, and *SHRM's Employer's Immigration Compliance Desk Reference*. He is also the author of several immigration-related pieces of legislation and has testified as an expert in front of the U.S. House of Representatives Immigration Subcommittee.

[153] *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security* 249 F. Supp. 3d 524 (D.D.C. 2017), April 19, 2017.

[154] 8 USC § 1324a(h)(3) (2018).

of additional OPT employment authorization for graduates with STEM degrees.[155] However, it defines "science" narrowly to include only biological or physical sciences.[156]

In proposing the 24-month extension, DHS noted that "more than one in eight STEM graduates were working in healthcare (including 594,000 who were working as physicians),"[157] yet despite this acknowledgment, it chose not to include these health science professionals within its definition of STEM.[158] This causes foreign doctors, nurses, and other health science professionals to lose out on two additional years of employment authorization after graduation, forcing many of them home.

In light of that fact, USCIS should define "science" to include health science professionals, including physicians, nurses, surgeons, and anyone else who is applying scientific knowledge to improve the health of Americans.[159] Taking this action makes even more sense in light of the COVID-19 pandemic. Congress has also proposed a number of bills over the years designed to provide paths to temporary and permanent residency for STEM professionals, and the bills often refer to the same STEM occupation list used for OPT.[160] Rectifying this issue for F-1 students will hopefully also ensure that should STEM immigration legislation pass, health care workers are not ignored there either.

17. Extend OPT for Foreign Graduates Sponsored for Green Cards

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[161]
DHS should issue OPT extensions to every international student sponsored for a green card.

Nearly all foreign graduates of U.S. universities attempt to work in the United States after graduation. DHS grants one-year employment authorization documents to graduates of U.S. universities in F-1 status under OPT.[162] Currently, extensions are available for two years to those with STEM degrees or when the graduate is eligible to change status to an H-1B nonimmigrant status (for skilled workers in specialty occupations) on the first day of the next fiscal year.[163] This H-1B–related extension is known as the "H-1B cap-gap extension" because it is only necessary because the H-1B cap prevents an immediate change of status.[164]

But DHS's regulations do not address another similar and common situation in which the graduate is sponsored for a green card but the lengthy process or the caps prevent immediate adjustment to permanent residence. If graduates cannot receive an OPT extension, their employers try to apply for an H-1B visa, which—if successful—takes cap space away from employers trying to hire from abroad and—if unsuccessful—forces a talented foreign graduate of a U.S. university to leave the

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[155] 81 Federal Register 13039, (March 11, 2016).
[156] Department of Homeland Security, "Eligible CIP Codes for the STEM OPT Extension," 2020.
[157] 81 Federal Register 13039, 13053, (March 11, 2016).
[158] Department of Homeland Security, "Eligible CIP Codes for the STEM OPT Extension," 2020.
[159] 8 CFR § 214.2(f)(10)(ii)(C)(2)(i).
[160] See, for example, Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013).
[161] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the New York Times, Washington Post, USA Today, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[162] 8 CFR § 214.2(f)(10)(ii) (2019).
[163] 8 CFR § 214.2(f)(5)(vi) (2019).
[164] U.S. Citizenship and Immigration Services, "Extension of Post Completion Optional Practical Training (OPT) and F-1 Status for Eligible Students under the H-1B Cap-Gap Regulations," May 26, 2020.

country. About 6,500 international students are sponsored for green cards in this way,[165] and if DHS grants OPT to every international student sponsored for a green card, more employers would try to sponsor foreign students, retaining international talent here.[166]

18. Allow Q Visa Holders to Interact with the Public Virtually

— Ally Bolour *Founding and managing partner of Bolour/Carl Immigration Group.*[167]
— Scott Emerick
Senior associate at Bolour/Carl Immigration Group.[168]

USCIS should amend its regulations to allow Q visa holders to meet the requirement to interact with the public with virtual interaction or development of material for the public.

The Q visa allows nonimmigrants to enter the United States "as a participant in an international cultural exchange program … for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality."[169] USCIS regulations interpret this to allow Q visa holders to "engage in employment or training of which the essential element is the sharing with the American public" the Q visa holder's culture.[170]

But USCIS's nonpublic guidance requires that Q visa holders fulfill the "sharing" requirement only through in-person interaction, such as at a museum or cultural center.[171] Expanding this definition to include virtual interaction or development of material to be absorbed by the public over media would recognize modern technology and trends, especially in a world where social distancing is essential, and would allow more nonimmigrants to participate in the program.

19. Grant H-1B Petitions and LCAs for 6 Years

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[172]

USCIS should amend its regulations to grant H-1B status for up to 6 years, and DOL should restart granting labor condition applications (LCAs) for up to 6 years.

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[165] Office of Foreign Labor Certification, "Performance Data—Disclosure Data," Department of Labor, 2020.
[166] DHS should work with universities to implement this rule in a way that minimizes costs to them since universities have a role in monitoring their OPT graduates even though they are not currently enrolled.
[167] Ally Bolour is founding and managing partner of Bolour/Carl Immigration Group, a full service immigration law firm based in Los Angeles with satellite offices in Salinas, California, and Palm Springs, California. Bolour has practiced immigration law since 1996 and is an elected director at the American Immigration Lawyers Association (AILA). Previously, he served on the board of trustees at the American Immigration Council. He is a member of the Los Angeles County Bar Association and the LGBT Bar Association. Bolour is a frequent speaker on immigration issues for AILA and other local, national, and international organizations.
[168] Scott A. Emerick is a senior associate at Bolour/Carl Immigration Group, a full service immigration law firm based in Los Angeles with satellite offices in Salinas, California, and Palm Springs, California. Emerick is a graduate of Southwestern University School of Law. He is the immediate past chair of the Southern California Chapter of AILA and serves on AILA's law student outreach committee. Emerick speaks regularly on immigration law topics, including family immigration, asylum law, and removal defense.
[169] 8 USC § 1101(a)(15)(Q) (2018).
[170] 8 CFR § 214.2(q)(3) (2019).
[171] Based on the authors' experiences
[172] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.

The H-1B program grants status to foreign workers who are "coming temporarily to the United States to perform services . . . in a specialty occupation" or as a fashion model.[173] While the workers may be "coming temporarily," Congress has recognized that an employer's need for an H-1B worker may last several years. The Immigration Act of 1990 has authorized H-1B workers to receive status up to 6 years,[174] and the American Competitiveness in the 21st Century Act has permitted extensions beyond that period if the worker is following the process to obtain permanent status.[175]

Even though the law envisions employment of at least 6 years, DOL and USCIS regulations limit LCA and petition approvals to no more than 3 years.[176] Filing for an extension after 3 years is an unnecessary and expensive burden. Employers and workers suffer unjust costs and potential delays, and USCIS and DOL are burdened with additional reviews of materials that they have already reviewed and approved. In 2020, H-1B workers and employers had to file more than 320,000 extension requests.[177]

The 3-year limit can impose other logistical problems. Doctors who change status from J-1 to H-1B status must receive a waiver of the requirement to return to their home country and must commit to work for a full 3 years in a medically underserved area.[178] If the LCA, petition, and actual employment periods do not perfectly align down to the day, the doctor must seek an H-1B extension to finish the 3-year J-1 waiver requirement. Because the doctors commonly want to leave their current employer as soon as the waiver requirement is complete, some employers simply refuse to file an H-1B extension on their behalf, while others extract further commitments from the workers in exchange for sponsorship. This is unfair to workers who just want to fulfill the legal requirements.

DOL and DHS have never affirmatively justified the three-year limit on LCAs and petitions, and DOL previously permitted longer approvals. In 1991, DOL issued regulations implementing the Immigration Act of 1990 that authorized a labor condition application for the period of employment up to 6 years.[179] But in 1994, DOL reduced the validity period to no longer than 3 years.[180] DOL's only justification was that INS regulations granted petitions for no more 3 years. DOL stated in its final rule, "While the Department is mindful of the concerns expressed by commenters opposed to the proposal, the need for uniformity in the DOL and INS administration of the program and avoidance of confusion among H-1B employers and nonimmigrants outweigh any potential burdens."

Yet INS regulations implementing the Immigration Act of 1990 provided no justification for the 3-year limit at all.[181] It just carried over the same language from the pre-1990 H-1 category regulations. Those regulations had established the 3-year limit because INS felt that it needed to define the meaning of the phrase "coming temporarily" in the definition of an H-1 worker in the absence of any congressional guidance on the issue. From 1952 to 1984, the INS had imposed 1-year limit, but it expanded authorizations to 2 years in 1983 and 3 years in 1987.[182] In its proposed rule in 1983, INS stated:

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[173] 8 U.S.C. 1101(a)(15)(H)(i)(b) (2018).
[174] Sec. 205 of Title II of Pub.L. 101–649, November 29, 1990; 8 U.S.C. 1184(g)(4) (2018).
[175] Sec. 106 of Title I of Pub. L. 106–313, October 17, 2000.
[176] DOL: 20 CFR § 655.750(a)(1) (2019).
USCIS: 8 C.F.R. 214.2(h)(9)(iii)(A)(1) (2019).
[177] U.S. Citizenship and Immigration Services, "Characteristics of H-1B Specialty Occupation Workers - Fiscal Year 2020 Annual Report to Congress," February 17, 2021.
[178] U.S. Citizenship and Immigration Services, "Conrad 30 Waiver Program," 2020.
[179] 57 Fed. Reg. 1316, January 13, 1992.
[180] 59 Fed. Reg. 65646, December 20, 1994.
[181] Proposed: 56 Fed. Reg. 31553, July 11, 1991.
Final: 56 Fed. Reg. 61111, December 2, 1991.
[182] 48 Fed. Reg. 4114, Sept. 14, 1983.
52 Fed. Reg. 5738, February 26, 1987.

> *Experience with [H-1] administration . . . has shown that extending the initial approval period will greatly benefit the public without causing adverse impact on compliance [because] . . . extension requests filed by the vast majority of aliens of distinguished merit and ability are routinely granted.*[183]

H-1B extension requests are still "routinely granted" for "the vast majority" of applicants (94 percent in 2020),[184] and extension approval rates will increase even more after USCIS's April 2021 policy manual update that instructs officers to give deference to prior determinations when adjudicating extension requests involving the same parties and facts.[185] In other words, the same facts as those in 1983 would justify increasing petition validity to 6 years, except today 6 years would have an underlying statutory basis.

Indeed, there is no longer any basis for defining "coming temporarily" to mean less than six years now that Congress has *explicitly* stated otherwise. Thus, Congress has overturned the original basis of USCIS's 3-year petition limit, and DOL has already stated that the 3-year limit was only necessary because of INS's regulation, while acknowledging it could impose burdens on applicants and the agency. For these reasons, USCIS should replace the 3-year limit on initial H-1B petition approvals with a 6-year limit, and DOL should revert to its earlier regulation allowing a 6-year approval of LCAs.

20. Increase the H-2 Status Limit to 6 Years

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[186]

USCIS should increase the three-year limit on H-2B and H-2A extensions of status to six years.

The H-2A and H-2B programs admit foreign workers who are "coming temporarily" to perform temporary agricultural or nonagricultural labor or services in the United States.[187] By statute, all H-2 jobs must be "temporary" defined through regulation as generally lasting less than a year or, in the case of a one-time need, less than 3 years. Independent of this restriction on the length of the job, USCIS regulations also limit H-2A and H-2B workers to a maximum period of 3 continuous years in the United States without a continuous period of 90 days abroad.[188]

This regulation imposes unnecessary burdens on the agencies, employers, and workers. Agencies must vet and process a new group of workers to replace those who are subject to the 3-year limit, creating new burdens and exposing the country to avoidable security risks. Workers who are nearing the end of their stay cannot change employers, giving those employers' excessive leverage in wages

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[183] 48 Fed. Reg. 4114, Sept. 14, 1983.
[184] U.S. Citizenship and Immigration Services, "Characteristics of H-1B Specialty Occupation Workers - Fiscal Year 2020 Annual Report to Congress," February 17, 2021.
[185] "unless there was a material error, material change, or new material facts": U.S. Citizenship and Immigration Services, "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity," PA-2021-05, Department of Homeland Security, April 27, 2021.
[186] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[187] 8 U.S.C. 1101(a)(15)(H)(ii) (2018).
[188] 8 C.F.R. 214.2(h)(5)(viii) (2019).

and working conditions and undermining the most efficient allocation of labor. Since every H-2 job must first be certified by DOL as unfilled by U.S. workers, the domestic workforce sees no benefit.

Meanwhile, employers face the prospect of pointless turnover if their employees are required to leave in the middle of a job. They may also be blocked from rehiring trusted returning workers who are already trained on their operations, creating preventable inefficiencies. The requirement also exacerbates the shortage of H-2B workers because H-2B hires who are already in the United States are exempt from the H-2B cap, which employers have reached every year since 2014.

In 2008, USCIS finalized rules that reduced the required time abroad from 6 months to 3 months.[189] In those rules, USCIS directly recognized the burden that 3-year limit causes and agreed that the shorter period "would allow a worker to engage in a longer employment period, which would benefit both employers and employees." DHS stated that "this streamlining measure will encourage employers who are unable to secure their workforce among U.S. workers to use the H-2A program instead of hiring individuals who have no legal immigration status and are unauthorized to work."

But in 2008, USCIS did not address the 3-year limit. The 3-year limit originally appears to date to a 1964 INS rulemaking governing H-2A's and H-2B's predecessor, the H-2 program, but that rule provided no justification.[190] INS's 1987 H-2A rulemaking states that the 3-year limit is based on the grounds that allowing an H-2 worker to "remain indefinitely" would cause the worker to "at some point . . . no longer qualify as a nonimmigrant."[191]

Yet this opinion was based on the law as it existed prior to the Immigration Act of 1990 in which Congress created new nonimmigrant classifications, such as the O and P categories which still have no limit on extensions of status.[192] Additionally, Congress defined what it considered "coming temporarily" for the purpose of the other major H visa program—the H-1B program—as up to 6 years.[193] Thus, there is a statutory ground for saying that "coming temporarily" under the H-2 programs also means up to 6 years. Moreover, during the COVID-19 emergency, USCIS granted H-2 workers in industries critical to the food supply extensions beyond the 3-year limit.[194] This indicates the agency does not believe that the 3-year limit is binding under the statute.

As a practical matter, most H-2 workers cannot continue to extend indefinitely. In 2015, DHS assumed that 50 percent of H-2B workers received extensions for at least a year and 25 percent for three years.[195] But one in four workers is still a very substantial portion of the H-2 workforce. After 6 years, however, the share of affected workers would be much less. Assuming a similar annual decline in extensions, just 3 percent would hit the full 6-year limit. Nonetheless, easing the limit would have a substantive cumulative effect on the availability of H-2B workers, reduce burdens for the agency and employers, and improve the bargaining power of workers. For these reasons, USCIS should replace the 3-year limit on H-2 status with a 6-year limit.

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[189] 73 Fed. Reg. 76891, December 18, 2008.
[190] 29 Fed. Reg. 11956, 11958, August 21, 1964.
[191] 52 Fed. Reg. 20554, 20555, June 1, 1987.
[192] Pub. L. 101-649, 104 Stat. 4978, November 29, 1990
[193] Sec. 205 of Title II of Pub.L. 101–649, November 29, 1990; 8 U.S.C. 1184(g)(4) (2018).
[194] 85 Fed. Reg. 28843, May 14, 2020; 85 Fed. Reg. 21739, April 20, 2020; 85 Fed. Reg. 51304, August 19, 2020; 85 Fed. Reg. 82291, December 18, 2020.
[195] 80 Fed. Reg. 24042, 24091 (April 29, 2015), https://www.govinfo.gov/content/pkg/FR-2015–04-29/pdf/2015–09694.pdf.

21. Create H-2 Grace Periods and Extend Status Based on a New Petition

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[196]

USCIS should create a 60-day "grace period" of authorized status for H-2A and H-2B workers to find subsequent jobs, and it should allow the job to start as soon as a petition is filed on their behalf.

H-2A and H-2B workers can only receive an H-2 visa or status to perform temporary agricultural or nonagricultural jobs if USCIS approves a petition filed on their behalf from a U.S. employer.[197] The petition is the basis for the worker's status, meaning that if an employer no longer wants to employ them, they lose their status and right to remain in the country.[198] If they do violate their status, they can be banned from the H-2 program for 5 years.[199] This puts H-2 workers at a disadvantage bargaining with their employers, knowing that they cannot walk away from their position without another H-2 employer already lined up to hire them. USCIS could help reduce this imbalance by guaranteeing that H-2 workers will not lose their H-2 status for at least 60 days if they quit their H-2 job.

A grace period would allow workers to quit and find legal jobs with better pay or working conditions. This could improve working conditions for both H-2 and U.S. workers in similar positions by encouraging market competition for workers. USCIS currently provides H-2A workers 30 days to find subsequent legal employment at the conclusion of the H-2A job and provides H-2B workers 10 days,[200] but as applied now, these periods only kick in at the end of the petition validity period. If an H-2 worker left their job early because they felt mistreated, USCIS regulations require employers to report the worker as an "absconder,"[201] and the agency to revoke the petition if the worker is no longer employed by the employer.[202] USCIS could immediately change the interpretation of the existing post-petition periods by policy memo, but a rule creating a longer grace period would produce a better policy with a stronger legal foundation.

In 2008, USCIS did create a 30-day grace period for H-2A workers but only when USCIS terminates the petition because the worker paid a fee or because DOL revoked the employer's labor certification.[203] In 2016, USCIS created a more useful and better reasoned 60-day grace period for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN workers, saying that the period would "afford eligible high-skilled workers sufficient time following a cessation of employment to pursue other employment opportunities, seek a change or extension of status, or make the preparations necessary to depart the country."[204] The 60-day grace period applies to any cessation of employment, empowering H-1B workers to negotiate more fairly with their employers.

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[196] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[197] 8 U.S.C. 1184(c) (2019).
[198] 8 C.F.R. § 214.2(h)(1)(i) (2019). The State Department's handbook on the rights of temporary workers states, "your visa status will no longer be valid if you leave your employer." U.S. Department of State, "Know Your Rights," 2020, p. 5.
[199] 8 U.S.C. 1188(f) (2018); 8 C.F.R. § 214.2(h)(5)(viii)(B) (2019).
[200] 8 C.F.R. § 214.2(h)(5)(viii)(B) (2019); 8 C.F.R. § 214.2(h)(13)(i)(A) (2019).
[201] 8 C.F.R. § 214.2(h)(5)(vi)(B) (2019).
[202] 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) (2019).
[203] 73 Fed. Reg. 76891, December 18, 2008.
[204] 81 Fed. Reg. 82398, November 18, 2016.

USCIS should not provide fewer protections to H-2 workers who generally have far fewer resources—financially or otherwise—in the United States than to highly paid H-1B workers. USCIS should treat both groups equally and create a grace period for H-2 workers. At the same time, the only way to make a grace period workable given the bureaucratic reality is to allow H-2 workers changing jobs to start working as soon as their new employer files a petition on their behalf, which is also the case for H-1B workers. Without this provision, the grace period would almost always run out before the H-2 petition is approved.

During the COVID-19 emergency, USCIS introduced temporary rules to permit H-2 employment on the date that USCIS acknowledges receipt of an H-2 petition for workers in industries critical to the food supply. USCIS states that the temporary rules were intended "to provide agricultural employers with an orderly and timely flow of legal foreign workers, thereby protecting the integrity of the nation's food supply chain and decreasing possible reliance on unauthorized aliens." But the emergency only highlights the preexisting need to make these rules permanent for all H-2 workers. Nothing in the goals of the temporary rules is limited to an emergency setting. Creating greater H-2 portability would benefit both employers and employees alike.

Simultaneously, USCIS—which has joint rulemaking authority over the H-2B labor certification program—and DOL should also fast-track labor certifications for H-2 workers already in the United States to facilitate easier transitions between H-2 jobs. All H-2 certification applications for workers in the United States should be treated as emergency requests not subject to the normal filing deadline.[205] Taken together, the grace period, faster labor certification processing, and immediate work authorization based on an approved petition would create a more competitive environment for H-2 workers, allowing them to assert their rights and find the most economically productive employment in the United States.

Refugees

22. Grant Refugee Status to Family-Sponsored Immigrants Who Are Refugees

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[206]
USCIS should allow backlogged beneficiaries of family-sponsored petitions from certain countries to apply directly for refugee status at consulates abroad.

U.S. citizens and legal permanent residents have sponsored about 3.5 million immediate family members for immigrant visas[207] but cannot reunite solely because of the low visa cap.[208] These family members are the siblings and adult children of U.S. citizens and the spouses and children of legal permanent residents. Many of these family members could qualify for refugee resettlement as people fearing persecution in their home countries. For example, in 2016, nearly 6,400 Syrians

[205] 20 CFR § 655.17 (2019); 20 CFR § 655.134 (2019).
[206] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[207] State Department, "Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2019," 2020.
[208] 8 USC § 1151(c)(2).

were waiting in the family-sponsored backlog.[209] The top nationalities for asylum seekers at the border—Guatemalans, Hondurans, and Salvadorans—have about 144,000 applicants waiting in the family-sponsored backlog.[210] Because most will have to wait more than a decade for immigrant visas, many family members of U.S. citizens and legal permanent residents could die or suffer persecution unnecessarily.[211]

Congress has given the president the explicit authority to establish the number of refugees admitted outside the family-sponsored caps[212] if the president determines them to be of "special humanitarian concern to the United States."[213] The president should classify all beneficiaries of approved family-sponsored immigrant visa petitions as those of "special humanitarian concern" and allot refugee numbers equal to the number of qualifying applicants. The State Department should establish a fee to accept refugee applications directly at consulates from beneficiaries of approved family-sponsored immigrant visa petitions. Backlogged applicants would submit evidence that they would face persecution in their home countries to consulates with a modified immigrant visa application, and consular officers would interview them as they would normally for an immigrant visa.

If they are approved, the refugees would be "resettled" by their relative, not through the U.S. Refugee Admissions Program, without government funds just as they would have been had they received immigrant visas. While this would be outside the usual refugee procedures, this policy would speed refugee processing for American families far more than requiring the usual involvement of the State Department's Bureau of Population, Migration and Refugees, and USCIS's International and Refugee Affairs Division. Granting refugee status to family-sponsored immigrants would save tens of thousands of lives at minimal government expense.

23. Create a Private Refugee Sponsorship Program

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[214]
— Matthew La Corte
Government affairs manager for immigration policy at the Niskanen Center.[215]
USCIS and the State Department should create a private refugee sponsorship program with a numerical limitation apart from the U.S. Refugee Admissions Program equal to the number of requested sponsorships.

Under the U.S. Refugee Assistance Program (USRAP), the United Nations High Commissioner for Refugees refers refugees for resettlement and the State Department funds a public-private partnership in which several nonprofit organizations find housing and help integrate the refugees.

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[209] Adam Schiff, "Rep. Schiff: Administration Must Act Now to Extend Humanitarian Parole for Syrian Refugees," September 25, 2013.
[210] David J. Bier, "Legal Immigration Will Resolve America's Real Border Problems," Cato Institute, Policy Analysis No. 879, August 20, 2019.
[211] David J. Bier, "How to Save Refugees with U.S. Ties," *Cato at Liberty* (blog), July 20, 2016.
[212] 8 USC § 1157(a)(2) (2018).
[213] 8 USC § 1157(a)(3) (2018).
[214] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
[215] Matthew La Corte is the government affairs manager for immigration policy at the Niskanen Center, a nonpartisan 501(c)(3) think tank. He leads the immigration department's legislative outreach efforts, focusing on DACA, work visas, and refugee resettlement. His writing has been published in a wide range of outlets, including: the *Wall Street Journal*, *USA Today*, the *Financial Times*.

While this model has effectively resettled more than three million refugees since 1980, the United States could resettle more refugees if it also allowed private individuals and organizations to sponsor refugees.[216]

The law grants the president the authority to determine the refugee admissions cap for each fiscal year[217] as well as select refugees who are of "special humanitarian concern to the United States."[218] Presidents Ronald Reagan and George H. W. Bush used this authority to create the Private Sector Initiative that set aside 10,000 refugee slots for privately sponsored refugees.[219] By leveraging private resources, Americans could resettle far more refugees, and private parties could get ahead of emerging refugee crises faster than the U.S. government.

USCIS and the State Department should establish a refugee allotment for privately sponsored refugees, and DOS should model a program based on the successful refugee sponsorship program in Canada.[220] President Biden's Executive Order 14013 already urges "capitalizing on community and private sponsorship of refugees."[221] U.S. sponsors—organizations as well as individuals—should be allowed to submit sponsorship applications directly to the State Department. They would be required to present evidence of the refugee's status, provide a resettlement plan showing where the refugees will live for the first year after arrival, and pay a fee to cover the costs of resettlement for the first year. The process should follow the procedures for family-sponsorship for immigrant visas, not refugee resettlement under the USRAP. The entire process should be handled by the State Department to fast-track resettlement and assure that there is not a long period between an offer of sponsorship and resettlement.

Broadly Applicable Reforms

24. Permit Legal Counsel during Inspections and Visa Interviews

— Kate Voigt
Senior associate director of government relations for the American Immigration Lawyers Association.[222]

DHS should permit access to legal counsel for visa applicants and anyone placed in secondary or deferred inspection at ports of entry.[223]

Federal courts have recognized that "immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' … A lawyer is often the only person who could thread the labyrinth."[224] A 1999 State Department cable has also affirmed this view.[225] Nonetheless, a lack of

[216] State Department, "Refugee Admissions by Region," 2020.
[217] 8 USC § 1157(a)(2) (2018).
[218] 8 USC § 1157(a)(3) (2018).
[219] David Bier and Matthew La Corte, "Private Refugee Resettlement in U.S. History," Niskanen Center, April 26, 2016.
[220] Immigration, Refugees, and Citizenship Canada, "Guide to the Private Sponsorship of Refugees Program," Government of Canada, 2020.
[221] Executive Order 14013, February 4, 2021.
[222] Kate Voigt, Esq. is the senior associate director of government relations for the American Immigration Lawyers Association, the national association of immigration lawyers.
[223] This would not mandate government-appointed or government-funded counsel, though the government could still be, in some or all situations, required to appoint counsel. For a full explanation of this proposal, see American Immigration Lawyers Association and American Immigration Counsel, "Petition for Rulemaking to Promulgate Regulations Governing Access to Counsel Submitted to the United States Department of Homeland Security and the United States Department of State," AILA Doc. No. 17052500, May 24, 2017.
[224] *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988), partially quoting Elizabeth Hull, *Without Justice For All*, (Greenwood Press 1985), 107.
[225] IV Processing and Procedure, 99 STATE 21138—Working with Attorneys, at ¶¶ 1, 4, 12, AILA Doc. No. 03010241 (posted Jan. 2, 2003).

access to counsel in visa interviews, as well as during the secondary and deferred inspection processes at ports of entry, is the norm. Even close relatives of U.S. citizens and lawful permanent residents, and employees of U.S. corporations and nonprofit entities, are often denied access to their attorneys at these critical stages of the immigration and inspection process.

When a complicated legal issue arises and counsel is barred from participating meaningfully in proceedings, both citizens and noncitizens may be subject to prolonged and unnecessary administrative processing of a benefit or extended detention. Moreover, the lack of meaningful access to counsel can result in an unjust refusal of a visa, denial of admission, or expedited removal from the United States. Either way, significant government resources are expended in many situations where the presence of counsel could have helped resolve the problem more quickly.

DHS regulations from 1980 do not guarantee a right to counsel at primary or secondary inspection.[226] The 1980 rulemaking justified the limitation because, if the inspecting officer believed that an individual seeking admission was not entitled to enter, the individual was entitled to a hearing at which point the right to an attorney would apply.[227] But since 1996, Congress has allowed DHS to remove applicants for admission without a hearing.[228] While officers may allow a "representative access to the inspectional area to provide assistance,"[229] they are not required to allow such access, and the same policy applies to deferred inspections in which applicants are released and required to return.[230] In many or most cases, access to an attorney is denied. DOS regulations now require that all immigrants and most nonimmigrants personally appear before a consular officer for an interview,[231] but each consular section decides whether attorneys can be present,[232] and many refuse to allow them.[233]

The Administrative Procedure Act (APA)[234] provides for a right to counsel for individuals who are "compelled" to appear before an agency or agency representative.[235] Since virtually all interactions

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[226] 8 CFR § 292.5(b) (2019).
[227] 45 Federal Register 81732 (Dec. 12, 1980).
[228] 8 USC § 1225(b), 1226(a), 1362.
[229] U.S. Customs and Border Protection Inspector's Field Manual, 17.1(e) (citing 8 CFR § 292.5)).
[230] U.S. Customs and Border Protection Inspector's Field Manual, 17.1(e).
[231] 22 CFR § 42.62 (2019); and 22 CFR § 41.102 (2019).
[232] There is a limited exception to this general rule for applicants under the Iraqi and Afghan special immigrant visa programs. Sections 1218 and 1219, respectively, of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113–66, 127 Stat. 672 (December 26, 2013), authorize representation throughout the special immigrant visa process for applicants under the Refugee Crisis in Iraq Act of 2007, Special Immigrant Status for Certain Iraqis, 1244 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181, 122 Stat. 3 (January 28, 2008), as amended, and Afghan Allies Protection Act of 2009, 602 of the Omnibus Appropriations Act of 2009, Pub. L. 111–8, 123 Stat. 524 (March 11, 2009), as amended. DOS guidance to consular officers for attorney representation of these applicants is provided in 9 FAM 502.05–12(B)(b)(8).
[233] See American Immigration Lawyers Association and American Immigration Counsel, "Petition for Rulemaking to Promulgate Regulations Governing Access to Counsel Submitted to the United States Department of Homeland Security and the United States Department of State," AILA Doc. No. 17052500, May 24, 2017, p.13.
[234] 8 USC § 1362 (2018) provides a limited privilege of counsel of the individual's choice in removal proceedings, at no expense to the U.S. government. Immigration law is silent on the issue of counsel in all other proceedings. Accordingly, the APA requirements would apply. Thus, to the extent that an individual's response to an inquiry is compelled during an interview involving a visa application or citizenship/nationality-related claim, or when seeking admission, the APA requires that the individual be permitted access to counsel.
[235] 5 USC § 555(b) (2018) states, "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding."

with DHS and DOS officers involve compulsion, the right to counsel is clear.[236] Regardless, the authority to grant this right is undisputed. While DOS could independently grant access to counsel at visa interviews under its own authority, USCIS has statutory authority to establish rules for both the visa issuance and entry processes.[237]

Applicants and petitioners should be provided with a reasonable opportunity to seek the advice and counsel of their attorneys, and attorneys should have the opportunity to accompany their clients. In cases where the agency has decided to refuse admission to the United States or to allow an applicant to withdraw his or her application for admission, and where an attorney-client relationship has been established, the officer must communicate that decision to counsel under long-standing requirements regarding communications with a represented party.

25. Digitize USCIS Immigration Forms

— Greg Siskind
Founding partner of Siskind Susser, PC — Immigration Lawyers.[238]
The president should require USCIS to complete within two years an electronic filing system that allows submissions of all application forms via lawyers' approved case-management systems.

Of 102 USCIS forms available on its website, only 11 can be filed electronically.[239] Lawyers barely use the system that does exist because it is not an open Application Programming Interface system, so the case management systems on which immigration lawyers store their client data cannot "talk" to the USCIS online filing system. Lawyers must manually retype up to 100 form pages, wasting effort and necessitating higher fees for clients. The IRS figured out decades ago how to allow software companies to electronically push tax returns to the IRS e-filing system.[240] Yet immigration attorneys cannot even file virtually all the major forms online.

USCIS spends huge sums on outside contractors who manually type form data into USCIS's own case management system, often making mistakes that can even cause immigrants to fall out of status. USCIS has also started denying applications where not every field is filled in, even if those fields are completely inapplicable.[241] One asylum applicant was actually rejected because the applicant failed to fill in the requested current addresses—for dead relatives.[242] E-filing could easily be configured to not provide an address field if the deceased box is checked or to prevent an applicant from advancing unless the person affirmed that the question was not applicable. E-

[236] For example, U.S. Customs and Border Protection Inspector's Field Manual 17.8 states that referral of a noncitizen to secondary inspection commences that individual's "detention." At that point, the noncitizen may not unilaterally withdraw an application for admission and depart from the United States (8 CFR § 235.4 (2011)). Given that the person is not free to leave or withdraw the application without permission, the person's appearance is "compelled" under the APA.
[237] 6 USC § 112(a)(3), 202(4), 236(b)(1) (2018).
[238] Greg Siskind is a founding partner of Siskind Susser, PC—Immigration Lawyers and has been practicing law since 1990. Siskind is the author of several books, including the annually published *J-1 Visa Guidebook*, the *American Bar Association's Lawyers Guide to Marketing on the Internet*, and *SHRM's Employer's Immigration Compliance Desk Reference*. He is also the author of several immigration-related pieces of legislation and has testified as an expert in front of the U.S. House of Representatives Immigration Subcommittee.
[239] U.S. Citizenship and Immigration Services, "All Forms," 2020.
[240] Internal Revenue Service, "How Tax Preparation Software Is Approved for Electronic Filing," April 7, 2020.
[241] American Immigration Lawyers Association, "Featured Issue: USCIS's Blank Space Policy," AILA Doc. No. 20102030, October 22, 2020.
[242] Greg Siskind, "The Biden Administration Needs to Add Digital Modernization into Its Immigration Plans," *Think Immigration* (blog), November 17, 2020.

filing would also guarantee that applications ended up where they needed to go[243] and that the proper fees were accepted electronically, avoiding common confusions in those areas.[244]

USCIS should not lead this effort, as it has previously wasted more than $2.3 billion on failed digitization efforts that refused to involve lawyers in alpha and beta testing.[245] Instead, the administration should require the U.S. Digital Service (USDS) to manage USCIS modernization efforts because it was created specifically to handle these types of technological upgrades, and USDS should involve actual customers in its testing.

26. Enforce USCIS Policy against Broad Brush RFEs

— Angelo Paparelli
Partner in Seyfarth Shaw LLP.[246]

USCIS policy should reinforce its current policy memorandum banning broad-brush requests for evidence (RFEs) and notices of intent to deny (NOIDs) and track RFEs and NOIDs by individual adjudicators.

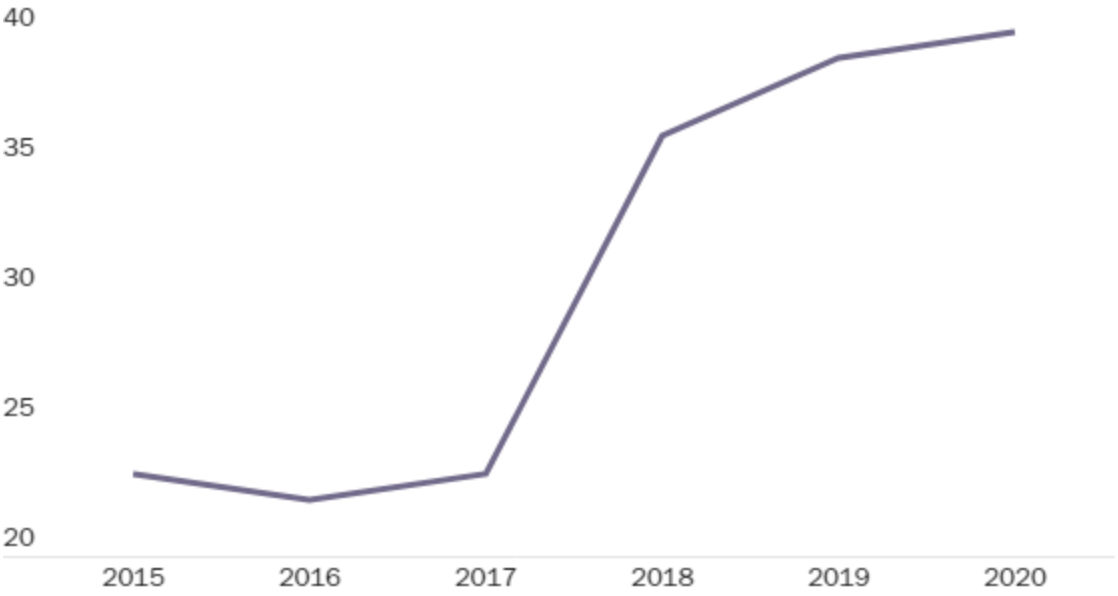
During immigration adjudications, USCIS issues RFEs or NOIDs to give applicants an opportunity to correct deficiencies in their applications. RFEs are commonly issued for family-based applications and for employer-sponsored work visas like the H-2B for nonagricultural workers and the H-1B for skilled workers at U.S. companies. The share of work visa petitions with an RFE nearly doubled from 2015 to 2020 (Figure 6). Unnecessary RFEs or NOIDs can add additional work and costs for employers or lead to denials, which would thus prevent eligible individuals from obtaining or keeping the immigration benefits the law allows.

A 2005 USCIS policy memorandum prohibits issuing RFEs "for a broad range of evidence when, after review of the record so far, only a small number of types of evidence is required" because it concludes broad-brush RFEs "overburden our customers, over-document the file, and waste examination resources through the review of unnecessary, duplicative, or irrelevant documents."[247] USCIS will often create "template" RFEs that generally describe issues that can come up, but the memorandum tells adjudicators not to "'dump' the entire template in [an] RFE; instead, the record must be examined for what is missing, and a limited, specific RFE should be sent."

[243] USCIS requires applicants to manually calculate the correct fee, and that is not always such an easy task. An application for adjustment of status for a family of two parents and three kids has five sets of fees for each of the fee-requiring forms as well as separate biometric fees for each. And fees frequently change. Someone who prints out the fee list and sends the check with the forms may be surprised to find out the fee changed in the day or so after they printed out that list. With e-filing, these problems are avoided because the software will calculate the fee amount and the person would then pay via credit card or online bank draft.
[244] The instructions for where to file an H-1B petition, for example, are 12 pages long. Even experienced law firms sometimes have packages rejected because they are sent to the wrong place, and that's a very common problem for people filing relatively simple applications on their own. An e-filing system would obviously end that problem and save people a lot of aggravation.
[245] Marcelo Rochabrun, "U.S. Immigration Agency Will Lose Millions Because It Can't Process Visas Fast Enough," ProPublica, April 7, 2017.
[246] Angelo Paparelli is a partner in Seyfarth Shaw LLP, a member of the firm's Business Immigration Group and its Government Relations and Policy Group, a Certified Immigration Law Specialist (California), and a Fellow in the College of Labor and Employment Lawyers with experience in a wide array of subspecialties of U.S. immigration law.
[247] William R. Yates, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)," U.S. Citizenship and Immigration Services, HQOPRD 70/2, February 16, 2005.

Figure 6

Share of work visa employer petitions completed with a request for evidence, FY 2015–2020



Source: U.S. Citizenship and Immigration Services, "Nonimmigrant Worker Petitions by Case Status and Request for Evidence (RFE)," August 18, 2020. 2020 as of Quarter 1.

Despite clear headquarters instructions, these requirements are uniformly ignored by USCIS adjudicators, and boilerplate RFEs are now routine. The USCIS Ombudsman has described how USCIS will issue RFEs for information already provided by the applicants,[248] and one court noted that USCIS had "issued an RFE requesting nearly identical information as it did when it last reviewed the petition.… Although not mirror images, the information requested is the same. [The employer and the H-1B beneficiary] have already provided this information in response to the defendants prior RFE."[249]

To remedy this problem, USCIS should adopt a new policy memorandum reaffirming the binding nature of the 2005 policy memorandum and requiring supervisory review when adjudicators issue all-encompassing, broad-brush, or template RFEs and NOIDs. It should also extend the memorandum to Notices of Intent to Revoke previously approved petitions. Moreover, it should expressly note all interim adjudications as to specific legal issues of eligibility for the immigration benefit sought to avoid wasting the time of the applicant or petitioner addressing already resolved issues. USCIS should also be required, by executive order or otherwise, to collect statistics on the ID code (but not the name) of adjudicators and begin to report the frequency of RFEs and NOIDs and the resulting outcome of the adjudication. In this way, renegade adjudicators who fail to comply with the requirement of the Administrative Procedure Act that agency decisions be reasonably explained can be identified.

27. Prohibit Regulatory Actions on USCIS Forms

[248] U.S. Citizenship and Immigration Services Ombudsman, "Annual Report 2015," June 29, 2015; and U.S. Citizenship and Immigration Services Ombudsman, "Annual Report 2016," June 29, 2016.
[249] *Relx, Inc. v. Baran, et al.*, 2019 U.S. Dist. LEXIS 130286 (August 5, 2019).

— Angelo Paparelli
Partner in Seyfarth Shaw LLP.[250]
USCIS should amend its regulations to stop automatically incorporating all form instruction changes into its regulations, bypassing notice and public comment procedures.[251]

USCIS requires employers and applicants for immigration benefits to use forms that it creates to collect information.[252] Along with these forms, USCIS publishes detailed instructions that explain to applicants how they must fill out the form and the types of information or evidence that must be provided. USCIS's regulations currently assert that all form instruction changes are incorporated into the regulations themselves.[253] The clause allows the agency to evade a slew of federal statutes and presidential directives including the Administrative Procedure Act (APA), the Regulatory Flexibility Act, Executive Orders 12866 and 13563, and OMB Circular A-4.[254] It allows the agency to effectively change its regulations with only minimal notice under the Paperwork Reduction Act.

USCIS uses this vague regulation to bypass the APA and impose expensive costs on applicants without any notice or review. For example, the government updated its form instructions in 2019 to state that any application failing to answer every question—including those for which the answer is none, not applicable, or unknown—would be rejected.[255] Contradictory and inconsistent legal requirements can result even when USCIS issues multiple sets of instruction, as it did with the guidance for the I-9 Form.[256] The agency should rescind the regulation and clearly require notice and public comment for all substantive changes. Instructions on agency forms should not be allowed to take effect unless there is a meaningful, substantive opportunity for comment, as the APA requires.[257]

28. Require Agencies to Apply the Rule of Lenity to All Actions

— David J. Bier
Research fellow at the Cato Institute's Center for Global Liberty and Prosperity.[258]
— Angelo Paparelli
A partner in Seyfarth Shaw LLP.[259]
The president should issue an executive order requiring all federal immigration agencies to interpret ambiguous statutes and regulations with leniency in favor of the applicant or

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[251] For more, see Angelo A. Paparelli, "Instruct Us Again on the Immigration Rules," *Nation of Immigrators* (blog), May 5, 2012.
[252] U.S. Citizenship and Immigration Services, "All Forms," 2020.
[253] U.S. Citizenship and Immigration Services, "All Forms," 2020.
[254] 8 CFR § 103.2(a)(1) (2019).
[255] U.S. Citizenship and Immigration Services, "Ombudsman Alert: Recent Updates to USCIS Form Instructions," January 23, 2020.
[256] American Immigration Lawyers Association, "Letter to Yvette LaGonterie—Re: Comments Concerning I-9 Central," March 12, 2012.
[257] 5 USC § 553(a)-(c) (2018).
[258] David J. Bier is research fellow at the Cato Institute's Center for Global Liberty and Prosperity. He is an expert on legal immigration, border security, and interior enforcement, and his work has appeared in the *New York Times*, *Washington Post*, *USA Today*, and many other print and online publications. The United States Supreme Court and multiple federal appeals courts have cited his research and writing. From 2013 to 2015, Bier drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, then a member and later chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security.
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petitioner, and USCIS and the State Department should also require adjudicators to use the rule of lenity in adjudications by regulation.

Immigration law is commonly referred to as "second only to the Internal Revenue Code in complexity."[260] It is a convoluted morass of vague and poorly defined terms, making life-altering decisions hang on the meaning of unfamiliar and ambiguous terms like "moral turpitude" or subjective analyses about an applicant's "credibility."[261] In the removal context, courts have dealt with this phenomenon by "construing any lingering ambiguities in deportation statutes in favor of the alien."[262] The Supreme Court has stated, "since the stakes are considerable for the individual, we will not assume that Congress means to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[263] This interpretative method is referred to as "strict construction" or "the rule of lenity."[264]

While courts have only applied this rule to statutes governing removal and immigration crimes, the stakes are just as considerable in the adjudication of various immigration benefits—denials of which can themselves trigger removals or prevent travel to and residence in the United States, causing permanent separation of Americans from their spouses, children, and parents and career-ending decisions requiring departure from the United States. Since adverse adjudications of petitions and applications requesting immigration benefits routinely render a denied beneficiary "out of status" and thus removable, the rule of lenity should be interpreted by executive order and extended to other immigration statutes and regulations, which, if enforced against particular noncitizens, would similarly lead to their deportation or "exile."

The president should require all agencies involved in the interpretation or application of immigration statutes and regulations to adopt the rule of lenity for all rulemakings, decisions, and adjudications. The president has the inherent authority under the Constitution to require agencies to follow certain procedures before acting in order to preserve and protect the rule of law. Prior presidents have used this authority on numerous occasions.[265] In ordering the application of lenity, the president should recognize past, largely unsuccessful efforts to encourage evenhanded and fair adjudications.[266] Thus, there can be no substitute for executive branch oversight and internal agency supervisory review if lenity is to be applied consistently.[267] USCIS and the State Department should also require adjudicators to use the rule of lenity in adjudications by regulation.

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[260] *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988).
[261] *Sessions v. Dimaya* 584 U.S. ___ (2018).
[262] *INS v. St. Cyr*, 533 U.S. 289 (2001).
[263] *Fong Haw Tan v. Phelan* 333 U.S. 6 (1948); and *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).
[264] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) refers to the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." Similarly, see *INS v. Errico*, 385 U.S. 214 (1966); *Costello v. INS*, 376 U.S. 120 (1964); and *Fong Haw Tan v. Phelan* 333 U.S. 6 (1948). See also, William T. Gillis, *An Unstable Equilibrium: Evaluating the "Third Way" Between Chevron Deference and the Rule of Lenity*, 12 N.Y.U. J.L. & Liberty 352 (2019); and Brian Slocum, "The Immigration Rule of Lenity and Chevron Deference," *Georgetown Immigration Law Review* 17 (2003): 515.
[265] For examples, see Executive Order 13892, October 9, 2019; Executive Order 13891, October 9, 2019; and Executive Order 12866, September 30, 1993.
[266] Legacy Immigration and Naturalization Service asserted a "zero tolerance policy" on failure to abide by INS policy and field instructions in 2002 but never backed violations with real consequences and backed away from it in 2003. James W. Ziglar, "Memorandum for All Regional Directors and All District Directors—Subject: Zero Tolerance Policy," Immigration and Naturalization Service, March 22, 2002; and Remarks of Director Aguirre, "CIS Town Hall Prepared Remarks," September 8, 2003.
[267] The current skeptical or adversarial attitude toward immigration applicants has not always prevailed. In 1980, one senior immigration official offered the view that agency "clientele are honest, hard-working people, not interested in fraud or obtaining any benefit for which they cannot qualify." Durward Powell, "Memorandum to District Director and Officers in Charge Southern Region—Subject: Dispensing Information and Adjudications Decision Making," SR 79/3-C, April 21, 1980, https://www.ilw.com/articles/2004,0224-memor.pdf.

Ordering that leniency of interpretation and application be applied by federal immigration authorities to their adjudications in favor of petitioners and applicants requesting immigration benefits would promote the rule of law and protect the rights of immigrants and Americans.