

THE NEW EMPLOYMENT-BASED IMMIGRATION SELECTION SYSTEM

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October 1, 1991, ushered in a new phase in the history of American immigration policies. On that date, the new immigration selection system established by the Immigration Act of 1990 became effective.² Its principal message is clear: America wants the best and the brightest. While Emma Lazarus' famous lines at the base of the Statue of Liberty "Give me your tired, your poor, your huddled masses" may still ring true, the changes brought by the Immigration Act of 1990 presage that America's immigration policy has taken a new turn.

The shift in U.S. immigration policies is an acknowledgment that in the global market, competition is no longer limited to selling goods. Industrialized countries are also competing to lure immigrants who have capital or skills. Simply stated, skilled people have become a commodity.³ As noted by *Time* magazine, "[t]he new policy brings the U.S. in line with other nations, like Canada and Australia, that have been luring the best and the brightest."⁴ As Congress assessed the situation "it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and . . . that immigration can and should be incorporated into an overall strategy that promotes the creation of the type of work force needed in an increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers."⁵

The Immigration and Naturalization Service (INS), in its introduction to the proposed rules implementing these new employment-based provisions, found that they were based "on American businesses' need for highly

skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found, and an increasing skills gap in current and projected United States labor pool."⁶

THE EMPLOYMENT-BASED PREFERENCES

The Immigration Act of 1990 allocates 140,000 visas to employment-based immigrants.⁷ Under prior law, the annual numerical limit was 54,000 visas. The visas are available to aliens who can qualify under one of the five following preferences: 1) priority workers, 2) advanced degree professionals, 3) skilled workers, professionals, 4) special immigrants, and 5) employment creation immigrants.

Priority Workers⁸

Under prior law, namely the third preference, up to 27,000 visas were allocated to aliens who were members of the professions, or persons of exceptional ability in the sciences or arts.

The new law allocates 40,000 visas to priority workers.⁹ This preference is reserved for three categories of applicants: 1) persons of extraordinary ability in the sciences, arts, education, business, or athletics; 2) outstanding professors and researchers; and, 3) certain multinational executives and managers.

Persons of Extraordinary Abilities. The objective of this category is to attract that "small percentage of individuals who have risen to the very top of their field of endeavor."¹⁰ In other words, we want to attract those who have ex-

traordinary abilities in the sciences, arts, education, business, or athletics. Congress defined "extraordinary ability" as being one that "has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation."¹¹ The INS has defined "extraordinary ability" to mean "a level of expertise indicating that the individual is one of those few who have risen to the top of the field of endeavor."¹² In addition, the applicant must prove that he is seeking to enter the United States to continue to work in his area of extraordinary ability and that his entry will substantially benefit the United States.¹³

An applicant who can establish that he or she is a person of extraordinary ability does not need a sponsor to enter the United States. Moreover, he does not need even an offer of employment. Because such an applicant is so extraordinary, he essentially can sponsor himself. All that the law requires is that the applicant file the petition (Form I-140) with the INS.¹⁴ The proposed regulations explain at length the types of documentation that such an applicant must submit.¹⁵ Specifically, INS requires that the evidence "shall include evidence of a one-time achievement (that is, a major, internationally recognized award), or at least three other achievements as listed by the INS."¹⁶

What neither the statute nor the regulations define is what is meant by "sciences, arts, education, business, or athletics." Although reasonable persons can agree as to whether an ability falls within one of these five fields of endeavors, there are bound to be cases where it will not be as clear.

Outstanding Professors and Researchers. The second category within the priority workers preference is reserved for outstanding professors and researchers.¹⁷ This provision was probably intended to facilitate the recruitment of outstanding academicians by American universities and research institutions.

To qualify under this provision, the applicant must be internationally recognized as outstanding in a specific academic area, must have a minimum of three years teaching experience or researching in the area, and must be entering the United States to occupy one of three types of positions. These positions are: 1) a tenured or tenured-track position within a university or institution of higher education, 2) a comparable position with a university or institution of higher education to conduct research, and, 3) a comparable position to conduct research with a private employer. The employer must have at least three additional persons involved in full-time research activities and who have achieved accomplishments in an academic field.¹⁸

The INS has stated that "[o]utstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition."¹⁹

Unlike persons of extraordinary ability who can sponsor themselves, outstanding professors or researchers must be sponsored by an American university, an institution of higher education, or a private employer. A private employer who petitions the INS to obtain the services of a researcher, must show, among other matters, that the research position "would be one in which the job description and duties are comparable to those of a researcher at a university or institution of higher education."²⁰

Certain Multinational Executives and Managers. The final category is reserved for certain multinational executives and managers. Under this provision, multinational companies, which are based in the United States or have a subsidiary or affiliate, now have easier access to their foreign executives and managers. Under this category companies can petition the INS to transfer these business executives to the United States.²¹

To qualify under this provision, the sponsoring employer must have employed the executive for at least one year within three years prior to the filing of the petition. Moreover, the employee must be coming to the United States to work in managerial or executive capacity.

The statute provides an extensive definition of "managerial capacity."

and policies, exercises discretion in decision-making, and receives only general supervision by higher level executives.²³

Advanced Degree Professionals and Aliens of Exceptional Ability

The second employment-based preference is reserved for aliens who are members of the professions holding advanced degrees, or their equivalent, or aliens of exceptional ability in the sciences, arts, or business.²⁴ A total of 40,000 visas are allocated to this preference plus any visas that are not required by priority workers (first preference).

Members of the Profession. The statute defines the term "profession" as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."²⁵ The INS in the proposed rule implementing this provision noted, that "based on past immigration case law, the definition of profession . . . indicates that a profession is an occupation which requires at least a baccalaureate degree for job entry. However, this provision is available only to members of the pro-

fession holding advanced degrees or equivalent. The regulations define advanced degree as any degree above that of the baccalaureate.²⁶ The term baccalaureate means a bachelor degree received from a college or university, or an equivalent degree."²⁷

Aliens who do not possess an advanced degree may nonetheless qualify if they can establish the equivalent of an advanced degree. The proposed rule by the INS states that "a United States baccalaureate degree (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty shall be consid-

FIRST PREFERENCE	PRIORITY WORKERS	40,000
SECOND PREFERENCE	ADVANCED DEGREE EXCEPTIONAL ABILITY	40,000
THIRD PREFERENCE	SKILLED WORKERS PROFESSIONALS OTHERS (10,000 MAXIMUM)	40,000
FOURTH PREFERENCE	SPECIAL IMMIGRANTS	10,000
FIFTH PREFERENCE	INVESTORS	10,000

Generally, the term means an assignment within an organization in which the employee manages the organization or a component of it, supervises and controls other employees, and has the authority to hire and fire people, and exercise discretion over the day to day operations of the activity for which the employee has the authority.²² If the employee has no authority over personnel, the employee must function at a senior level within the organization. The term "executive capacity" is defined as an assignment within an organization where the employee primarily directs management of the organization, establishes its goal

ered the equivalent of a master's degree."²⁸

Aliens of Exceptional Ability. The INS has defined "exceptional ability" as "a degree of expertise above that ordinarily encountered in the sciences, arts, or business."²⁹ The INS has set forth a list of accomplishments and the alien must satisfy three of them. For example, the alien may show membership in a professional organization, a license or diploma to practice the profession, or commanded a salary which demonstrates exceptional ability.³⁰

Generally, an alien who seeks admission under this preference will need to be petitioned by an employer. An exception exists for aliens of exceptional ability where the alien can petition the INS to waive a job offer requirement. The employer must also file a labor certification unless the alien is coming to the United States to occupy a shortage occupation.

The Department of Labor will establish a Labor Market Information Pilot Program that will designate occupations where there is a shortage of American workers.

Skilled Workers, Professionals and Other Workers

The third employment-based preference is available to skilled workers, professionals, and other workers.³¹ The statute makes available 40,000 visas plus any visas that are not used for the first and second preference. However, not more than 10,000 visas may be allocated to the "other workers" category.

To obtain a visa under this preference the alien will have to be sponsored or petitioned by the prospective employer in the United States. All petitions filed under this preference will also require a labor certification unless the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

Skilled Workers. To obtain a visa as a skilled worker, the intended job must require a minimum of two years of training or experience. The job cannot be temporary or seasonal in nature.

Professionals. To qualify as a professional, an applicant must hold a baccalaureate degree or a foreign equivalent degree, and be a member of the profession.

Other Workers. Only 10,000 visas are reserved for unskilled workers. These are nannies, maids, restaurant workers—the kind of workers who are paid low wages. Historically there has been a backlog of unskilled applicants waiting to enter the United States under the former sixth preference. According to the Department of State, last year there was a waiting list of 126,442 applicants for a sixth preference visa.³² However, since the new law imposes a limit of 10,000 visas per year, it is likely that aliens who seek to enter under this

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provision will have to wait even longer than in the past. Representative Constance E. Morella (R-MD) warned that the new law will exacerbate[] an already existing shortage of child care, home care, elder care, and other basic skilled workers."³³

Special Immigrants

The fourth employment-based preference is reserved for certain special immigrants. Under the prior law, special immigrants were not subject to numerical limitations. The new law imposes a limit of 10,000 visas, of which no more than 5,000 may be allocated to religious worker classes.³⁴

In addition to ministers of religion and religious workers, these visas are made available to certain employees of U.S. government who have served abroad, certain employees of the Panama Canal, certain officers of international organizations, and certain aliens declared dependent on a juvenile court in the United States.

Prior to 1990, there was only one category for religious workers. Visas were made available only to those who had served a religious ministry for two years and who were coming to the United States to continue to carry on their vocation. The new law now permits up to 5,000 other religious workers to obtain immigrant visas. Like the ministers, the religious workers must have worked for two years with a bonafide nonprofit religious organization in a professional or nonprofessional capacity prior to entering the United States. The "religious workers" visas are available only until 1994.

Employment Creation Immigrants

The last preference category is reserved for alien entrepreneurs, better known as foreign investors.³⁵ This provision seeks to attract aliens who will contribute to the economic growth of the United States by investing in United States businesses and creating needed business opportunities.³⁶

The statute requires the investors to invest a minimum of \$1 million in a new commercial enterprise that will create full-time employment for not fewer than ten persons other than the investor's spouse, sons, and daughters. The law also provides that not less than 3,000 visas be allocated for investors who invest in a rural or high unemployment area. For these targeted areas the initial investment may be \$500,000.

Alien entrepreneurs are admitted conditionally for two years. They must petition the INS to remove the conditions on their status.³⁷ In case of fraud, alien entrepreneurs can be subject to criminal penalties.³⁸

CONCLUSION

The fundamental question guiding the debates preceding the passage of the Immigration Act of 1990 was: What immigration policies are in the best inter-

est of the United States? Family reunification has been the cornerstone of our immigration policies for many decades. The Immigration Act of 1990 generally left family-sponsored immigration unchanged. Congress, however, reached a consensus that we need to attract skilled immigrant workers and that the importation of skilled manpower, especially in areas where we may have shortages, is in the best interest of the United States.

Other industrialized countries have also made a determination to lure the best and the brightest. But what happens when extraordinary and skilled workers leave their developing countries to accept attractive offers in the United States or in other industrialized countries? Can developing countries afford to lose their most skilled citizens? Perhaps the movement of skilled workers from South to North will not be a massive one. However, the possibility of it happening should raise some concerns regarding the fundamental dynamics of the relationship between industrialized and developing countries. At a minimum the United States, perhaps in concert with other industrialized countries, should monitor the global movement of professionals to determine whether it is causing an adverse economic impact on the sending countries. A recent article about Uruguay, known for most of this century as "the Switzerland of Latin America," is revealing. Apparently, Uruguay is "losing the highest percentage of residents of any nation in the Americas to the 'brain drain.'"³⁹ According to the article, nearly one million live outside their country, which has a population of about 3 million. Is the Uruguayan example an aberration or a trend of the future?

The interests of the United States and those of other industrialized countries are best served, ultimately, by the contributions industrialized countries make to promoting economic self-sufficiency of developing countries. Is that likely to happen if the most educated persons leave their native countries because of attractive offers abroad?

The Immigration Act of 1990 provides for the establishment of a Commission of Legal Immigration Reform

to review and evaluate the impact of the new legislation. The Commission must submit a final report to Congress in 1997. If immigration policies are at the core of our nation's interest, then the Commission's agenda ought to include a study of how the new employment-based immigration policies are effecting developing countries.

Notes:

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² The Immigration Act of 1990 was enacted on November 29, 1990. President Bush in signing into law the most comprehensive immigration revision in 66 years called the Immigration Act of 1990 "good for families, good for business, good for crime fighting, and good for America." *26 Weekly Comp. Pres. Doc.* 1946 (December 3, 1990). The Senate version of this legislation (S. 358) had been approved in July 1989. *135 Cong. Rec.* 57907 (daily ed. July 13, 1989). The House passed its own immigration bill on October 3, 1990. *136 Cong. Rec.* H8712 (daily ed. October 3, 1990). After considerable debate, the two versions of the legislation were reconciled and the conference report was approved by the House on October 27, 1990. *136 Cong. Rec.* H12358 (daily ed. October 27, 1990).

³ "[Immigration] policy must be refocused to benefit our nation economically. A much higher number, as many as half of the available visas, should be set for applicants who can fill shortages in fields such as engineering, medicine, computers and other sciences." Zuckerman, "Give Us Your Brainpower," *U.S. News & World Report*, October 29, 1990 at 108.

⁴ Lacayo, "Give Me Your Rich, Your Lucky . . ." *Time*, October 14, 1991, p. 26.

⁵ H.R. Rep. 723 Pt. 1, 101 Cong., 2d Sess. 41 (1990).

⁶ *56 Fed. Reg.* 30703 (July 5, 1991). To date the INS has not published the final regulations implementing the employment-based immigration system.

⁷ INA § 203(b).

⁸ The statutory provision governing priority workers is set forth at INA § 203(b)(1).

⁹ However, the priority workers category also receives the visa numbers that are not used by the fourth and fifth category.

¹⁰ H.R. Rep. No. 723, Pt. 1, 101st Cong., 2d Sess. 59 (Sept. 19, 1990).

¹¹ INA § 203(B)(1).

¹² *56 Fed. Reg.* 30709 (July 5, 1991).

¹³ INA § 203(B)(1).

¹⁴ INA § 204(a)(1)(C).

¹⁵ Congress suggested that "[d]ocumentation may include publications in respected journals, medial accounts of the alien's contributions to his profession, and statements of recognition of exceptional expertise by qualified organizations. Recognition can be through a one-time achievement such as receipt of the Nobel Prize. An alien can also qualify on the basis of a career of acclaimed work in the field." H.R. Rep. No. 723, Pt. 1, 101st Cong., 2d Sess. 59 (Sept. 19, 1990).

¹⁶ Among the other "lesser" achievements that the applicant can show in lieu of the "one-time achievement," the INS lists the recognized prizes, membership in an association which requires outstanding achievements by its members, published materials in trade publications, or evidence of the alien's original scientific, scholarly, or artistic contributions of major significance in the field. *56 Fed. Reg.* 30709 (July 5, 1991).

¹⁷ INA § 203(b)(1)(B).

¹⁸ INA § 203(b)(1)(B)(iii).

¹⁹ *56 Fed. Reg.* 30705 (July 5, 1991).

²⁰ *Id.*

²¹ INA § 203(b)(1)(C).

²² INS § 101(a)(44).

²³ INS § 101(a)(44)(B).

²⁴ INA § 203(b)(2).

²⁵ INA § 101(a)(32).

²⁶ The Senate Judiciary Committee intended that the term "advanced degree be a degree received which requires initial completion of a 4-year course of undergraduate study, followed by at least one academic year of graduate study, and which is normally referred to as a master's degree." S. Rep. No. 55, 101st Cong., 1st Sess. 20 (June 19, 1990).

²⁷ *56 Fed. Reg.* 30706 (July 5, 1991).

²⁸ *Id.* at 30711.

²⁹ *Id.* at 30711.

³⁰ *Id.* at 30711.

³¹ INA § 203(b)(3).

³² Kamen, "INS Law Spurs Willful Illegal Hiring of Home Help," *Washington Post*, November 10, 1991, p. A5.

³³ *136 Cong. Rec.* H12364 (daily ed. Oct. 27, 1990).

³⁴ INA § 203(b)(4).

³⁵ INA § 203(b)(5).

³⁶ *56 Fed. Reg.* 30707 (July 5, 1991).

³⁷ INA § 216A.

³⁸ See INA § 216A.

³⁹ Marcus, "Uruguay Faces Crisis as Citizens Move Abroad," *The Dallas Morning News*, September 11, 1991, p. 14A.