National Visa Policy of the United States

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The United States grants millions of visas a year to noncitizens who want to come to this country. Parts I and II of this chapter explore, respectively, the two main categories of U.S. visas: immigrant and nonimmigrant. Part III discusses how U.S. visas are issued and obtained. Finally, Part IV explores how many noncitizens can legally enter the United States without a visa, including those individuals from countries participating in the Visa Waiver Program and those individuals granted parole. Each Part of this chapter describes current law, offers brief historical analysis, and identifies contemporary policy disagreements.[1]

I. IMMIGRANTS

In the United States, the term *immigrant* is a legal one. It refers to individuals being admitted to the United States as lawful permanent residents (LPRs). These immigrants are commonly called "green card" holders, a nod to the original color of the wallet-sized visa documents issued to LPRs.

Immigrant visas are the most coveted of U.S. visas. That is because immigrant visa holders are unrestricted in how long they can stay in the United States and what activities they can undertake while here. Most notably, immigrant visa holders have a structured and authorized path to become U.S. citizens, should they desire to pursue it, after five years of immigrant status.[2]

The United States issues around one million immigrant visas each year. Those visas are made available to just four categories of noncitizens: (i) those with family connections in the United States, (ii) those with jobs awaiting them in the U.S., and (iii) those who win a diversity lottery, and (iv) those admitted as refugees.

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[1] This chapter paints a broad-brush picture of the national visa policy of the United States. U.S. immigration law is complex, even labyrinthian. This chapter does not aim to address every nook and cranny of the field. Rather, it aims to provide a wholistic look at the noncitizens who the United States admits into the country, the process of their admission, and the debates that surround these issues.

[2] INA § 316. Some immigrants can become U.S. citizens in a shorter timeframe, such as spouses of U.S. citizens and those serving in the U.S. military.

For a noncitizen to receive an immigrant visa, three stars must align. First, the United States must have a visa available for the noncitizen, not an easy feat when many immigrant visas are numerically restricted. Second, the noncitizen cannot have too many countrymen applying for immigrant visas in the same year because no single country can receive more than 7% of the total family- and employment-based visas issued annually. Third, and finally, the noncitizen must fit within one of the aforementioned immigrant visa categories: family, employment, diversity or refugee.

A. Immigrant Visas Are Numerically Restricted

Most, but not all, immigrant visas categories are numerically limited, including certain family-based visas as well as all employment and diversity visas. The United States introduced numerical limitations on immigration in 1921, and they became a permanent feature of U.S. immigration law in 1924. The low number of immigrant visas issued corresponds to the limited number of immigrant visas that are made available annually.

Contemporary debate among lawmakers about immigrant visa numbers typically concerns just the question of the best allocation between family- and employment-based immigrant visas. Occasionally, U.S. lawmakers debate about increasing the overall number of visas. One approach championed for increasing immigrant visa numbers focuses on "recapturing." Recapturing is essentially an accounting concept: The idea is that, in prior years, certain visas went unused, and thus those visas should be available for use now. Others argue for increasing the total number of visas available annually on a going-forward basis. While there are different perspectives on what to do with numerical caps, there seems to be no appetite among lawmakers for ending numerical caps altogether.

B. Race Matters—And Has Always Mattered—To U.S. Visa Allocation

While numerical caps have been a feature of U.S. immigrant visas for more than 100 years, race has been a factor in U.S. immigration policy for even longer. Race has mattered to naturalization—the changing of one's citizenship to that of U.S. citizenship. Race has also mattered to the allocation of immigrant visas—a decision equivalent to choosing who the United States is willing to grant a path toward eventual citizenship.

The First Congress of the United States passed the Naturalization Act of 1790, which granted only "free white person[s]" the right to

change one's citizenship of origin to that of U.S. citizenship. Congress accepted that nonwhite noncitizens existed in the United States—particularly enslaved persons and Native Americans—but nonwhite noncitizens could not become U.S. citizens.

In ensuing years, Congress applied race-based gatekeeping to naturalization to later-arriving groups of nonwhite noncitizens. Chinese migrants, who began coming to the country in significant numbers in the middle of the Nineteenth Century, were excluded from U.S. citizenship until 1943. Their exclusion notably persisted long after the granting of U.S. citizenship to former slaves in 1868 with the Fourteenth Amendment to the U.S. Constitution and to Native Americans with the Indian Citizenship Act of 1924.

Restrictions on the naturalization of persons present in the United States were not the only means by which Congress sought to affect the racial makeup of its citizenry. Congress has also had race in mind when limiting the type of immigrants allowed to enter the country.

One of the earliest race-based limitations on immigration came in 1882 when Congress passed the Chinese Exclusion Act. That act eliminated most migration from China.

In 1921, Congress combined its desire to numerically restrict immigration with its longstanding concerns about the racial makeup of the country. Congress invented "national origins quotas." That is, Congress set up an admissions formula whereby immigrants could be admitted in numbers no greater than 3% of the foreign-born individuals of their nationality that had been living in the United States in the year 1910. This date was not chosen at random. Congress believed that the immigrant stream of 1910 was better than the immigrant stream of 1921. In fact, 1910's immigrants were substantially whiter—made up more prominently of northern and western Europeans.

In 1924, Congress leaned harder into national origins quotas, making them even more restrictive. Congress restricted immigrant admissions to no greater than 2% of the foreign-born individuals of their nationality had been living in the United States in the year 1890. In fact, the U.S. immigrant stream was even more predominantly made up of persons from northern and western Europe in 1890 than it was in 1910.

National origins quotas remained in in place until 1965, when they were abolished. In a notable shift, Congress opted in that year not to allocate visas based upon past migration patterns. Instead, Congress

allocated 20,000 immigrant visas to each country, regardless of size, outside of the Western Hemisphere. The Western Hemisphere received a total of 120,000 immigrant visas. The 1965 change in immigration law changed the racial makeup of incoming immigrants, producing a significant increase in migration from Latin America, South America, and Asia.

The United States has never returned to a national origins approach to immigration. Instead, it has made tweaks to the per-country approach that was established in 1965. The most important change happened in 1990, when Congress established a new allocation program. Under this program, which continues to today, no single country can receive more than 7% of the total number of family- and employment-based visas issued annually.[3] Visas are issued on a first-come, first-served basis, but always subject to the 7% per-country cap. Whenever the cap is reached in a given fiscal year, nationals of that country who are otherwise eligible for visas must wait until the next year for new visas to become available. In that next year, the country may well reach the 7% cap again. This system has had the effect of leaving nationals of many countries waiting in line, year after year. Applicants from countries where demand for U.S. visas is high—China, India, Mexico and the Philippines—have faced waits of many years, even decades, before they can receive the U.S. visa for which they are statutorily eligible.

The 7% per-country cap has been subject to substantial debate. Some have argued for the total elimination of the per-country cap. Others have argued for raising the per-country cap, for example, by making it 15% instead of 7%. The debate over per-country caps boils down to concern for those who have been stuck in an immigrant visa backlog for decades and concern that any change to the per-country cap would both adversely affect other immigrants and result in a system where the stream of migration to the United States would be limited to just a handful of nations.

Focus on the racial makeup of the U.S. immigrant stream continues to the present era. In January 2017, shortly after taking office, President Donald Trump signed an executive order banning foreign nationals from seven predominantly Muslim nations from entering the

[3] INA § 202(a)(2).

United States.[4] Opponents sued to challenge the travel ban, even as it was re-worked through several iterations. Ultimately, the U.S. Supreme Court upheld the administration's ban. In 2021, after President Joseph Biden was inaugurated, one of his first executive actions was to rescind Trump's travel ban.

As this brief recounting of history shows, race has been an important factor in U.S. immigration law since the founding of the country. Indeed, U.S. lawmakers today continue to fret in various ways about the perceived otherness of incoming immigrants—whether with regard to race, religion, or nationality.

C. The Four Categories of Immigrant Visas

Having provided a big picture look at the U.S. immigrant visa system, I now turn in the following sections to offering a closer look at family-based, employment-based, diversity, and refugee visas. These sections begin with an explanation of the current law regarding each visa category. They conclude with a discussion of the policy debates that dominate these visas.

1. Family-Based Immigrants

There are two broad groups of family members who can receive U.S. immigrant visas. There are family members who are not subject to numerical limitations or per-country caps, and there are family members who are subject to these limitations and caps.

a. Unrestricted Family Migration

Unrestricted family-based migration is limited to "immediate relatives." Immediate relatives are the children, spouses, and parents of U.S. citizens.[5] "Child" is a term of art that means an individual who is under the age of 21 and unmarried.[6] Spouses include opposite-sex as well as same-sex marriage partners. Finally, in order to sponsor a parent's visas, the U.S. citizen must be at least 21 years old.

Immediate relatives are not subject to numerical limitations on immigrant visas. Thus, U.S. citizens can petition for immigrant visas for their immediate relatives, and those immigrant visas will be issued as

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[4] Executive Order 13769.
[5] INA § 201(b)(2)(A)(i).
[6] INA § 101(b)(1).

approved, following the processes discussed in Part III. There is no numerical cap that, if reached, will halt approvals for the year for this category of visa applicants.

It is also the case that immediate relative visas do not count towards the 7% per-country cap on immigrant visas—meaning that the number of immigrant visas available for a given country in a given year is not reduced by the issuance of immigrant visas to immediate family.

b. Restricted Family Migration

Congress has allocated all other family-based immigrants a minimum of 226,000 visas annually. These other family members are divided into four categories, each with their own annual limitation on the number of available visas. Those categories correspond to the F1, F2, F3, and F4 visas. The F1 visa is available to persons over the age of 21 who are unmarried sons and daughters of U.S. citizens. There are 23,400 slots available for F1 visas. The F2 visa is available for the spouses and unmarried sons and daughters of lawful permanent residents. There are 114,200 slots available for F2 visas. The F3 visa is available to the married sons and daughters of U.S. citizens. There are 23,400 slots available for F3 visas. Finally, the F4 visa is for the brothers and sisters of U.S. citizens. There are 65,000 slots available for F4 visas.[7]

An important feature of the immigrant visa system is that every qualifying immigrant has the right to migrate with their spouse and their unmarried and under-21 children.[8] The qualifying immigrant—say, the brother of a U.S. citizen—is called the principal beneficiary. His spouse and children are called derivative beneficiaries. All receive the same visa, in this case, the F4 visa. And the visas given to derivative beneficiaries count against the total number of visas available. So, in the year that this brother of the U.S. citizen receives an F4 visa, his husband also receives an F4 visa, their three children also receive F4 visas, and the F4 annual allocation of 65,000 will diminish by five. Put another way, it is not the case that 65,000 siblings receive F4 visas annually. Some number of siblings plus their spouses and their children split those 65,000 F4 visas.

[7] INA § 203(a).
[8] INA § 203(d).

Visa allocation is additionally complicated by several cross-referencing schemes. For example, if any particular family-based category does not use the maximum number of annual visas allowed, another family-based category may appropriate those unused visas. In addition, the total number of family-based visas available can exceed 226,000 if the total number of immediate relatives admitted in the prior year was low.[9] Furthermore, if the total number of employment-based visas issued in the prior year was low, additional family-based visas made be made available.

Finally, do not forget the 7% per-country cap. A U.S. citizen may submit a visa application on behalf of their married daughter. But that application may not be finalized for many years because of the per-country cap. According to data from the U.S. Department of State—or State Department, as it is more commonly called—most petitions filed for married sons and daughters of U.S. citizens will take more than 13 years to process—with some taking as long as 24 years. Those estimates are based on the State Department's visa bulletins, which provide information about current immigrant visa processing.[10] For example, in July 2022, the State Department was ready to issue F3 visas to Mexican nationals whose applications were filed before October 15, 1997. That same month, the State Department was ready to issue F3 visas to immigrants from other nations, excepting the Philippines, that had been filed before November 22, 2008. Immigration practitioners use these current processing dates to estimate the wait times for visa petitions filed today, meaning that F3 visas are taking between 13 and 24 years to process.

c. Policy Debates Surrounding Family-based Immigrant Visas

Family connections have long been an important focus of U.S. immigration law. In 1921, when Congress first took aim at restricting immigration by creating its nationality quota system, the law explicitly privileged certain family members over other potential immigrants. In 1965, when Congress eliminated the national origins quotas, it also created the distinction between the unrestricted admission of immediate family members and the restricted admission of other relatives.

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[9] INA § 201(c).

[10] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.

Another way in which family connections have been prioritized is that the spouse and children of qualifying immigrants get the same immigrant visa as their spouse or parent.[11] Adding the derivative beneficiaries of employment-based, diversity, and refugee visas to the strictly family-based visa numbers, more than 80% of U.S. immigrant visas are issued to family members annually.

This is not to say that family-based immigrant visas are without controversy. In recent years, U.S. lawmakers have proposed eliminating certain family-based categories, including: the parents of U.S. citizens (currently categorized as immediate family members); the adult children of U.S. citizens, both unmarried (the F1 visa category) and married (the F3 visa category); and the siblings of U.S. citizens (the F4 visa category).[12] Lawmakers who are interested in eliminating these family-based visas typically seek to reallocate those immigrant visa numbers to employment-based categories, arguing that skills-based migration benefits the U.S. economy more than immigration based on family ties, derisively referred to as "chain migration."

Lawmakers seeing family- and employment-based migration as completely different spheres are too constrained in their view. The fact is, many immigrants with a family-based visa make economic contributions of the type that are the aim of employment-based visa provisions, and many immigrants with employment-based visas have, or bring with them, a network of family relations.

Consider the Canadian-born actor Ryan Reynolds, who is now a naturalized U.S. citizen. He could have obtained an immigrant visa because of his stature as an actor, or he could have obtained an immigrant visa because of his marriage to U.S.-citizen actress Blake Lively. Consider too Alec Gores, now a U.S. citizen, who is a billionaire that made his fortune in private equity. Gores came to the United States from Israel as a young teen, the derivative beneficiary of his father's immigrant visa. Gores' father, in turn, was sponsored by Gores' uncle. Gores arrived in the United States unable to speak English and virtually penniless; today he is a member of the Forbes 400—a list of the world's wealthiest people.

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[11] INA § 203(d).

[12] https://lawprofessors.typepad.com/immigration/2018/01/wrapping-up-immigrant-priorities.html.

Like the United States, other countries also prioritize the migration of close relatives, though who qualifies as a close relative differs. In Canada, for example, citizens and permanent residents can seek permanent resident status—a corollary of U.S. green cards—for their children, spouses, parents, and grandparents, as well as orphaned brothers, sisters, nephews, nieces, or grandchildren.[13] Lacking any relative in these categories, a Canadian citizen or permanent resident could sponsor another blood relative. All of these family members fall outside of Canada's numerical caps on immigration, but, in total, family sponsorship accounts for only 27% of Canada's immigrant stream. In contrast to the United States, Canada's immigration system heavily favors economic classes of permanent residents.

2. Employment-Based Immigrants

The United States maintains five categories of employment-based visas, each with their own annual limitation on the number of available visas.[14] While family-based visa categories are allocated specific numbers of visas, employment-based visa categories are allocated a percentage of the total number of employment-based visas. Those percentages can change: If an employment-based category is undersubscribed in a year, the unused visas for that category will be reallocated to a different employment-based category. Overall, there are at least 140,000 visas available annually for employment-based immigrants.[15] More can be made available if the number of family-based immigrant visas issued in the prior year was low.

The first category of employment-based visas (EB-1) covers "priority workers." These are noncitizens with "extraordinary ability in the sciences, arts, education, business or athletics" as established by "sustained national or international acclaim." John Lennon and Yoko Ono received these immigrant visas, but recipients do not necessarily need their stratospheric level of fame. Tony award winning actor Alan Cumming also received an EB-1 visa as did Orlando Hernandez, the Cuban-born Yankees pitcher known as El Duque. These "extraordinary" individuals do not need a job offer in the United States so long as they are coming to work in their field of excellence. In addition, priority

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[13] Immigration and Refugee Protection Act § 12(1); Immigration and Refugee Protection Regulations § 117.

[14] INA § 203(b)

[15] INA § 201(d).

workers include "outstanding" professors and researchers as well as certain multinational executives and managers, though these individuals do need a job offer in the United States. This group is allocated 28.6% of the employment visas.

The second category of employment-based visas (EB-2) applies to "members of the professions holding advanced degrees" and immigrants of "exceptional" (but not extraordinary) ability in the sciences, arts, or business. Keith Otter received an EB-2 visa. His name may not be familiar, but his story is illustrative. Otter came to the United States from England to serve as the executive creative director of an advertising agency. His prior experience working for top advertising agencies overseas and his Cannes Lions advertising awards (the equivalent of Oscars for ad agencies), led him to receive an EB-2 visa as an individual with "exceptional" business ability. This second category of employment-based immigrant visas receives 28.6% of the annual employment visas.

The third category of employment-based visas (EB-3) covers skilled workers with two years of experience, professionals with baccalaureate degrees, and unskilled workers where U.S. workers are not available. Valentina Pérez, a Venezuelan national and social media influencer, obtained her EB-3 visa based on skilled work in the field of public relations and her employment by a U.S. company focused on influencer marketing. EB-3 visa holders are allotted 28.6% of the employment visas.

The fourth category of employment-based immigrants (EB-4) is a broad one. It covers "special immigrants," a term of art that applies to, among other groups, certain religious workers, international organization employees, recommended current and former U.S. Government employees, and children abandoned by a parent.[16] The most visible cohort that falls within the EB-4 visa category are wartime interpreters. For example, Hamid Khalid Darweesh, an Iraqi national who served as an interpreter for the U.S. military, received an EB-4 visa. He was one of the first immigrants to be denied entry into the United States because of President Trump's 2017 travel ban, though Darweesh was ultimately allowed entry after 24 hours in detention at New York's JFK airport following urgent lawyering in his defense. Today, the United States

[16] INA § 101(a)(27).

continues to process applications filed by Afghani and Iraqi nationals who aided U.S. servicemembers overseas. This category receives a smaller percentage of the total visas: 7.1%.

Finally, the fifth category of employment-based immigrants (EB-5) applies to investors, meaning migrants who create employment for at least ten unrelated persons by investing between $900,000 and $1,800,000 in a new commercial enterprise in the United States. Investment is not limited to a singular enterprise; multiple investors can join together in a larger commercial endeavor. For example, Gary Lai, a Taiwanese citizen, received his EB-5 visa after investing in One Fulton Square, a mixed-use real estate venture in New York City. This group gets 7.1% of the total employment-based immigrant visas.

As noted in the discussion of family-based visas, recipients of employment-based immigrant visas are not expected to travel to the United States by themselves. Spouses and children of the principal beneficiary are also entitled to receive immigrant visas.[17] The visas allocated to these dependents are subtracted from the total number of employment-based visas available.

The limited number of employment-based immigrant visas, coupled with the 7% per-country cap on immigrant visas, means that some eligible employment-based immigrants must wait years for a visa to become available. However, the wait times facing employment-based migrants are significantly shorter than those facing family-based migrants.

Looking at data provided by the U.S. Department of State, in July 2022, the agency was ready to issue E-3 visas to Indian nationals whose applications were filed before January 15, 2012. Migrants in the same category from all other nations, excepting China, were being processed as they came in without a wait. We can extrapolate from this data that petitions filed for Indian nationals in the third employment category must wait more than 10 years for a visa. Note that this does not mean that their employer is waiting 10 years to fill an open position. Rather, it is likely that the Indian national is present in the United States and working for their employer in a nonimmigrant capacity—see Part II—while waiting for their immigrant visa.

[17] INA § 203(d)

a. Policy Debates Surrounding Employment-based Immigrant Visas

In recent years, many U.S. lawmakers have advocated for an increased focus on employment-based immigrant visas. Some, as previously discussed, want to redirect immigrant visas from family members to foreign-born workers. Others focus on those employment-based immigrants who have been waiting years for a visa due to per-country limits; they look to address this backlog by recapturing unused visas from prior years and eliminating or changing the per-country limits.

U.S. lawmakers frequently support their focus on employment-based immigration by emphasizing the immigration approaches of countries that have prioritized economic-based immigration over family connections. In particular, U.S. lawmakers have eyed the various "points-based" immigration systems employed by the United Kingdom, Canada, Australia, and New Zealand. These countries employ scoring systems to determine eligibility for immigrant visas, looking at factors such as language ability, education, offer of employment, and salary. U.S. lawmakers who favor moving to a points-based system argue that a "merit-based" approach to immigration is economically desirable.

3. Diversity Immigrants

Every year, the United States makes 50,000 visas available to diversity immigrants.[18] These visas are allocated by way of a complex lottery to individuals who come from countries and regions of the world from which the United States has historically had few immigrants. In addition to the geographic qualifications of the visa, applicants must have at least a high school education and two years of work experience in an occupation that requires such work experience. Millions apply to the lottery each year. Few, of course, secure a visa in this way.

The diversity visa is a relative newcomer to the U.S. immigrant visa space. It was created in 1990. By all accounts, its purpose was to create new pathways for Europeans to immigrate to the United States that had been cut off by the 1965 changes to the U.S. immigration system. Recall that the national origins quotas that had been in place from 1921 to 1965 explicitly favored European migration. When that system ended, principal migration streams to the U.S. flowed from Latin

[18] INA §§ 201(e), 203(c).

America, South America, and Asia. That is because European migrants have been largely ineligible for family-based migration post 1965: Few Europeans are recent-enough immigrants to have spouses, children, parents, and siblings in Europe to sponsor. This demographic shift in U.S. immigration is borne out by the State Department's visa bulletins, which reveal that the countries sending the largest number of migrants to the United States pursuant to family-based visas are Mexico, China, India, and the Philippines. While European migration is an important part of the diversity visa system, the principal beneficiaries of diversity visas in recent years have been African nations.

a. Policy Debates Surrounding Diversity Visas

The U.S. diversity visa program is unique. There are no comparable programs around the world. Perhaps because of that uniqueness, it has been the subject of controversy for years. Some argue that its origins—promoting European migration—are problematic and even racist. Others argue that the ongoing preference of individuals based on their national origins is discriminatory. Other arguments about the program center on its benefits to the United States. Some applaud the program as a bastion of equality, one that breaks down the inequalities created by favoring family and workers. Others argue that the country would be better served by eliminating the category and reallocating these visas to higher-skilled employment-based categories.

4. Refugees

Refugees can also be said to fall under U.S. immigrant visa policy, though their treatment is quite different from family-based, employment-based, and diversity immigrants.

As discussed by other authors,[19] and so only briefly addressed here, refugees are individuals who are currently living outside of the United States as well as outside of their country of origin. Refugees are unable or unwilling to return to their country of origin due to persecution, or fear of persecution, based on race, religion, nationality, membership in a particular social group, or political opinion.[20]

The president of the United States is charged with identifying the appropriate number of refugees to be admitted each year. The largest

[19] See, e.g., Maryellen Fullerton.
[20] INA § 101(a)(42).

number of refugee admissions ever authorized was 231,700 in FY 1980. The trend has been downward since then. The nadir was 18,000 in FY 2020.

Refugees are admitted into the United States with refugee status. This is different from family-based, employment-based, and diversity immigrants who arrive in the United States with immigrant status. Refugees, in contrast, are required to adjust their status to that of immigrants one year after their admission as refugees.[21] Four years after receiving their immigrant visas, refugees are eligible for naturalization.

a. Policy Debates Surrounding Refugee Visas

U.S. refugee policy, as discussed by other contributors to this volume,[22] has been the subject of vociferous and wide-ranging debate. Arguments surround the limited categorization of refugees and the desperate migrants that refugee law currently leaves behind (including those forcibly displaced by climate change and war). In addition, lawmakers debate whether the U.S. should accept more refugees and the adequacy of screening refugees for terrorist ties.

Beyond these challenges, there are specific debates about the treatment of refugees in the context of U.S. immigrant visa policy. For example, some have criticized the fact that refugees are admitted in a refugee status and then tasked with applying for immigrant status. Refugees, they contend, ought to enter the United States as immigrants given that refugees are a uniquely vulnerable population, migrants of need, not intention, and it is unclear why the United States requires them to jump through hoops from which other immigrants are exempt.

Others challenge that admission of refugees as immigrants does not go far enough. Refugees ought to be admitted as naturalized U.S. citizens, they argue, given that, by definition, refugees are unable to return to their country of origin due to persecution. Advocates of this approach note that unnaturalized refugees are "deportable," which means they can be kicked out of the United States for bad behavior and even returned to the country where they were previously persecuted. For example, the United States has deported to Cambodia adults, who were

[21] 8 C.F.R. § 209.1
[22] See, e.g., Maryellen Fullerton.

admitted to the United States as child refugees, when they received a criminal conviction as an adult in the United States.

II. NONIMMIGRANTS

Unlike immigrant visa holders, nonimmigrant visa holders are admitted to the United States for a limited time and a limited purpose. For example, a person with a tourist visa may be admitted to the United States for six months, during which time they may freely travel around the country but cannot work or attend school. At the end of those six months, the tourist visa holder is expected to return to their country of origin.

Many more nonimmigrant visas are awarded each year than immigrant visas, though numbers vary. For instance, compared to the approximately one million immigrant visas issued each year, in FY 2020, just over four million nonimmigrant visas were issued. As recently as FY 2016, over 10 million nonimmigrant visas were issued.

The numerical differential makes sense—the United States restricts the numbers of immigrant visas because those individuals have the option of living in the United States permanently and even becoming U.S. citizens. The vast majority of nonimmigrant visa holders do not have similar options. Thus, the largely unrestricted number of nonimmigrant visas corresponds to a general welcomeness towards temporary visitors who will benefit the United States in varying ways without being entitled to any long-term commitment from the country in return.

Nonimmigrants include such diverse categories as temporary workers, international students, victims of crime in the United States, and tourists.[23] While immigrant visa categories have been stable over a long timeframe, Congress has frequently adjusted nonimmigrant visa categories, with the types of available visas generally expanding over time.

A. Temporary Workers

The United States issues nonimmigrant visas for workers of many kinds including, among others: diplomats, business visitors, crewmembers on ships in port, fashion models, journalists, athletes,

[23] INA § 101(a)(15).

entertainers, and religious workers. Debates about U.S. nonimmigrant visa policy frequently focus on temporary workers.

Consider the H-1B nonimmigrant visa for professional workers.[24] This visa is limited to individuals with bachelors or advanced degrees working in "specialty occupations" that require the "theoretical and practical application of a body of highly specialized knowledge."[25] It is closely associated with the information technology industry as top H-1B sponsors include well-known tech giants Amazon, Google, Microsoft, IBM, and Facebook.

In contrast to some nonimmigrant programs, the H-1B visa is numerically limited. There are just 65,000 H-1B visas available annually, though more are available to certain exempt categories such as employees of nonprofit institutions of higher education. The demand for H-1B visas is high enough that the category is routinely oversubscribed, leading the USCIS to conduct an annual lottery to award these visas.

Policy debates surrounding H-1B visas frequently center on whether the United States truly needs skilled labor from overseas and whether lower-paid H-1B workers push out similarly situated but higher-paid U.S. workers. For example, technology companies frequently argue that there is an insufficient number of skilled American workers and that, to remain competitive and to innovate, foreign workers are needed. In contrast, American tech workers tend to argue that companies use the H-1B program to save money on labor rather than fill gaps in the U.S. labor market. Meanwhile, advocacy organizations raise concerns about whether H-1B workers are being unfairly exploited by their employer-sponsors and the entire temporary work regime.

In fields outside of information technology, debates about the H-1B visa can have a very different tone. For example, the United States is experiencing a significant shortage of medical professionals in rural America. H-1B visas have played an important role in remedying that shortage, being utilized in programs designed to specifically entice

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[24] A word about terminology: nonimmigrant visas have names that correspond to their location in U.S. code. That is, each nonimmigrant visa is referred to by the letter of the subsection of the code on nonimmigrants that corresponds to its criteria. So, when one speaks about the H-1B visa, perhaps the most well-known nonimmigrant visa in the United States, they are referring to the visa category found at INA § 101(a)(15)(H)(i)(b).

[25] INA § 214(i).

foreign medical graduates to practice in rural communities. In this context, the debate about H-1B visa holders is not so much about whether these professionals are needed (they are) or whether they push out American physicians (they do not), the question is how to permanently retain these needed physicians. That is, debates center on the difficulties in transitioning these H-1B nonimmigrants to employment-based immigrants with a path towards U.S. citizenship.

The 7% per-country cap on immigrant visas looms large in this space. Indian nationals make up the largest percentage of noncitizen physicians in the United States. And because of the demand for visas from India, the wait times for processing employment-based immigrant visas for Indian nationals can exceed 10 years. This is especially problematic for Indian H-1B holders with children: If their immigrant visas are not processed before their children turn 21, their children will not be eligible for immigrant status as derivative beneficiaries, and those children may not have options for remaining in the United States with their parents.

Debates about temporary workers are not limited to the realm of professional occupations. Agricultural enterprises insist that more nonimmigrant visas are needed for farm laborers. These businesses argue there are insufficient Americans willing to work in agriculture. They also debate about the inflexibility of the current visa process, where processing times do not always ensure that visas arrive in the time needed to harvest crops. Other lawmakers argue that Americans would be willing to do agricultural labor if the jobs paid more and if the working conditions were more favorable.

The United States is hardly alone in struggling with issues surrounding temporary workers. Canada, too, has struggled with questions over the need for temporary foreign workers, the lengthy wait times for temporary workers to become permanent residents, and concerns about whether temporary foreign workers are exploited by Canadian employers.

III. OBTAINING A U.S. VISA

Noncitizens seeking to come to the United States, whether pursuant to an immigrant or nonimmigrant visa, must receive authorization from different federal agencies. The following sections discuss the roles played by the U.S. Department of Labor, U.S.

Citizenship and Immigration Services, U.S. Department of State, and the Department of Homeland Security.[26]

A. Department of Labor

The U.S. Department of Labor (DOL) does not review every application for admission to the United States. It reviews only certain applications for individuals who would like to work in the United States.

Migrants who fall within the second and third categories of employment-based immigrant visas (EB-2 and EB-3) must undergo a labor certification as the first step of their visa application process. This entails having their prospective employers submit information to the DOL so that the DOL can confirm that there are no "able, willing, and qualified" U.S. workers who would otherwise fill the would-be immigrant's job and that employment of the would-be immigrant will not adversely affect the wages and working conditions of similarly employed U.S. workers. If the DOL denies certification, the employer can appeal that determination to the Board of Alien Labor Certification Appeals, an administrative agency that is also under the DOL.

Some employment-based immigrants are categorially exempted from the labor certification process, including nurses. Other employment-based immigrants are exempted from the labor certification process based on a determination that employment of the specific immigrant is in the national interest of the United States. For example, the United States routinely waives labor certification for EB-2 physicians who commit to working in medically underserved communities for five years.

Employers looking to hire temporary workers on nonimmigrant visas to engage in specialty occupations (H1-B visas) must also start by receiving authorization from the DOL. These employers file a labor condition application with the DOL, attesting that the would-be nonimmigrant: (1) will be paid the greater of either actual wages at the place of employment or prevailing wages in the area for the position; and (2) will not adversely affect the working conditions of workers similarly employed. In addition, the employer must attest that it (3) is not experiencing a strike or lock-out; (4) provided notice to employees and unions about the labor certification; and (5) displayed publicly the

[26] Refugee admissions follow a different path, one not covered in this chapter.

specific number of the foreign hires, their wages, and working conditions. Unlike the process for hiring workers with immigrant visas, employers looking to obtain workers with nonimmigrant visas do not need to establish that there are no "able, willing, and qualified" U.S. workers who would otherwise fill the position. Denials of labor condition applications are not appealable. Employers must refile, looking to address the reasons the DOL stated for denial.

This description of the U.S. visa process for foreign workers reveals an emphasis on protecting U.S. workers. Other countries take a similar approach. Canada, for example, has a process that enables employers to hire skilled foreign workers and tradespeople on a permanent basis when there are no Canadian citizens, or even Canadian permanent residents, to fill the position.[27] That same inquiry is relevant to the hiring of temporary foreign workers in Canada.[28]

B. U.S. Citizenship and Immigration Services

Once the DOL has approved the request for labor certification or the labor condition application, or if no authorization from the DOL is needed, the next agency involved with visa processing is U.S. Citizenship and Immigration Services (USCIS). All immigrant visa petitions, and some nonimmigrant visa petitions, are filed with USCIS. The individual who files the visa petition is called the petitioner. The ultimate recipient of the visa is known as the beneficiary.

The petitioner for family-based immigrant and nonimmigrant visas is the migrant's relative—their family member who is a U.S. citizen or LPR. The petitioner for an employment-based immigrant or nonimmigrant visa is most commonly that migrant's prospective employer. Noncitizens can sometimes file a visa petition on their own behalf: This is the case for diversity immigrants and touring nonimmigrant entertainers, for example.

The USCIS reviews visa petitions to determine whether the beneficiary is entitled to the visa sought. This includes examining whether the beneficiary meets the visa criteria—for example, whether

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[27] https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/hire-permanent-foreign/skilled.html.

[28] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers.html.

the beneficiary is, in fact, the unmarried and under-21 child of a U.S. citizen. USCIS review also involves examining whether the beneficiary is "inadmissible" because they are subject to "exclusion" from the United States.[29]

The United States has a long history of flagging certain noncitizens for exclusion. In 1875, the country issued its first exclusion grounds, prohibiting the entry of prostitutes and persons convicted of crimes involving moral turpitude. The list of exclusion grounds has grown over time. Persons can now be excluded for prior violations of U.S. immigration law, criminal history, poverty, and drug addiction.

Sometimes, the USCIS will issue a Request for Evidence (RFE) to the petitioner, indicating that the USCIS officer reviewing the petition needs more information before they can make a decision about the pending application. Other times, the USCIS will issue a decision based on the initial documentation submitted. If a visa petition is denied by USCIS, the petitioner can appeal to the USCIS Administrative Appeals Office or, in certain cases, to the Board of Immigration Appeals. If a visa petition is granted, it is frequently forwarded to the State Department for additional processing.

Certain noncitizens seeking immigrant visas—whether nonimmigrant visa holders or noncitizens without legal status—can take the USCIS grant and apply for "adjustment of status."[30] Adjustment of status allows these applicants to finish their immigrant visa process with the USCIS inside of the United States. There are many prerequisites to adjustment of status. The applicant must have been "inspected and admitted or paroled" into the United States. Inspection and admission is the role that the Department of Homeland Security plays in screening noncitizens for entry into the United States across an international border, discussed in Part III.D; parole is discussed in Part IV.B and is the physical admission of a noncitizen into the United States without any lawful immigration status. In addition, the adjustment of status applicant must be "admissible," which means there must not be a statutorily defined ground for their exclusion from the United States.[31] Finally, the visa the applicant seeks must be presently available, a low bar for immediate relatives of U.S. citizens who are not bound by numerical

[29] INA § 212.
[30] INA § 245.
[31] INA § 212.

limitations on their visa numbers, but a significantly higher bar for noncitizens in other immigrant visa categories.

C. Department of State

Those seeking immigrant visas who are not or cannot pursue adjustment of status will have their materials sent from USCIS to the Department of State's National Visa Center (NVC) in New Hampshire. The NVC serves a clerical function for the State Department. The NVC communicates with visa petitioners to gather fees, forms, and supporting documentation. When the desired visa becomes available, the NVC forwards the visa application to the U.S. embassy or consulate that will process the application, frequently in the beneficiary's place of last residence abroad. For some, like immediate relatives seeking family-based immigrant visas, the NVC will pass their paperwork along in a matter of weeks. For others, like those seeking employment-based visas from countries with significant backlogs, their paperwork may remain with the NVC for years.

Nonimmigrant visas do not go to the NVC. If the nonimmigrant visa required processing by USCIS (for example, H-1B visas), the next step will be for USCIS to forward all materials to the relevant U.S. consulate overseas. Some nonimmigrant visas, however, do not require initial approval by USCIS (for example, B-2 tourists). Those nonimmigrant visas begin their journey with an electronic application submitted directly to the consulate.

Once visa paperwork is sent overseas, whether for an immigrant or nonimmigrant visa, "consular processing" begins. This entails the collection of new materials. Nearly all applicants submit recent photographs and fingerprints. Persons seeking an immigrant visa must undergo a medical examination abroad and present a police certificate confirming the applicant's clean record. All applicants—immigrant and nonimmigrant alike—are subject to security checks that verify the person's identity and screen for criminality, terrorist ties, and fraud. Typically, after these procedures, applicants have an in-person interview at the consulate. For immigrants, the consular official starts with the presumption that the individual is entitled to the visa. For nonimmigrants, the consular official starts with the presumption that the noncitizen intends to remain in the United States indefinitely—meaning it is up to the visa applicant to establish nonimmigrant intent, that they

intend to return to their country of origin after their nonimmigrant stay in the United States.[32]

If the visa application is granted, the consular official will issue a visa. If the visa application is denied, the applicant will receive a written notice of denial. There is little to nothing that a beneficiary can do to seek redress after a denial. The beneficiary can ask the consular official to reconsider their determination, but there is no right to appeal the officer's decision. Pursuant to the U.S. policy of "consular nonreviewability" or "consular absolutism," denials of visas by consular officials are not subject to judicial review. There is one limited exception: judicial review may be available if the visa denial implicates the constitutional rights of a U.S. citizen. This exception has been construed narrowly. The overwhelming majority of consular denials are not reviewable. For example, U.S. citizen Fauzia Din sought review of the consular denial of the visa petition she filed for her husband, an Afghan national, that was denied on unspecified terrorism grounds.[33] In a plurality decision, the Supreme Court said Din's case did not implicate her constitutional rights and the notice of denial she received from the U.S. consulate was sufficient.

D. Department of Homeland Security

After the noncitizen receives their visa from the consulate, they face additional scrutiny when using that visa at a port of entry into the United States. There, the noncitizen will be inspected by an officer from the Department of Homeland Security. More specifically, they will be inspected by an officer from an agency within DHS: the Office of Field Operations (OFO) division of the U.S. Customs and Border Patrol. The OFO officer conducts their own screening of the noncitizen for eligibility to enter the United States. This typically entails verifying identity, examining the validity of travel documents, and evaluating the noncitizen's compliance with rules regarding their individual visa. This inquiry by an OFO officer will occur every time that a noncitizen crosses a U.S. border whether for the very first time or on any subsequent occasion.

OFO officers pay particular attention to questions of fraud and misrepresentation. For example, if a foreign national presents a B-2

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[32] INA § 214(b).
[33] Kerry v. Din, 576 U.S. 86 (2015).

tourist visa, the OFO officer may seek to verify that they are not entering the United States to work, something noncitizens are forbidden from doing on a B-2 visa. If the officer examines the noncitizen's bag and finds a letter of employment from a business in the United States, or paystubs from a U.S. employer, the OFO officer will detain the person for violating the terms of their visa. The noncitizen will then be subject to a process called "expedited removal," which means they will be removed from the United States based on the official's determination regarding their visa violation, without appearing before a judge or having any opportunity for judicial review.[34] The noncitizen will then not be allowed back into the United States for a minimum of five years.

IV. LEGAL ENTRY WITHOUT VISAS

Key to understanding U.S. visa policy is the context of non-visa admissions—which looms large both in terms of quantity and economic significance. Many noncitizens are allowed entry into the United States without a visa, including travelers under the United States' Visa Waiver Program and parolees.

A. The Visa Waiver Program

The United States allows citizens of certain countries to enter the United States without a visa and stay for 90 days, whether for business or pleasure, pursuant to its Visa Waiver Program (VWP).[35] The VWP applies to citizens of more than three dozen nations. That is, roughly 20% of the world's countries are VWP participants. The countries who are part of the program tend to be wealthy democracies with whom the United States has close ties, including the United Kingdom, Japan, France, Germany, and Australia. Countries are only eligible to be included in the program if they offer reciprocal non-visa travel benefits to U.S. citizens traveling abroad. The physical passports themselves matter as well—participating countries must use features that make the documents highly secure.

Before traveling to the United States, VWP travelers apply for admission through an online system. Through the system, travelers receive verification that they are eligible for the VWP program.

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[34] INA § 235(b).
[35] INA § 217.

The Visa Waiver Program was launched as a trial program in 1986 and made a permanent feature of U.S. law in 2000. It was last updated in 2015. The 2015 update introduced new anti-terrorism measures into the program. It removed two groups of individuals from VWP eligibility. The first group excluded from VWP eligibility are those with recent travel to North Korea, Iran, Iraq, Libya, Somalia, Sudan, Syria, or Yemen. The second group is persons who, in addition to being a citizen of a VWP country, also have dual citizenship with North Korea, Iran, Iraq, Sudan, or Syria.

B. Parole

Another important group of noncitizens allowed entry into the United States without a visa are those granted parole.[36] This is a status in which the United States allows the noncitizen to physically enter the country under the supervision of the Department of Homeland Security (DHS) without achieving the legal definition of "admission."[37] Put another way, parole is a legal fiction that allows an individual to be physically present in the United States without lawful status.

Parole is frequently associated with asylum seekers who present themselves at the U.S. border, are detained, are then are subsequently released from DHS custody, after which they may pursue their asylum case from within the United States. There are many other noncitizens who are granted parole aside from asylum seekers, however. DHS might grant parole, for instance, to a person with a drug addiction—who would otherwise not be allowed to enter the United States—to receive medical treatment in this country. DHS might also grant humanitarian parole to allow an inadmissible parent—say one who has been removed from the United States for violating U.S. immigration law—to visit a dying child.

C. Other Non-Visa Entry

Beyond the Visa Waiver Program and parole, there are other categories of noncitizens who are routinely permitted to enter the United States without a visa.

One very important category of non-visa admission is the admission of Canadian citizens into the United States without a visa so

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[36] INA § 212(d)(5).
[37] INA § 101(a)(13).

long as their stay in the country is temporary.[38] Their Canadian passport alone guarantees entry, and there is no requirement of applying for admission online, as there is for nationals of VWP countries. Canadians can further smooth their travel across the U.S.-Canada border by joining a program called NEXUS, which expedites border processing for low-risk, preapproved users.

Notably, the United States does not have similar provisions for Mexico, its other land-border neighbor. The United States makes "border crossing cards" available to certain Mexican nationals to facilitate their speedy and routine travel into the country, though only to areas very close to the U.S./Mexico border. The Mexican border crossing card, unlike the Canadian NEXUS program, is in fact a kind of visa. It is a particular form of a B1/B2 visitor's visa. The motivation for treating Canadian and Mexican visitors differently stems from lawmakers' worry that, given the opportunity, Mexican nationals are more likely to stay permanently in the United States without authorization than their Canadian counterparts.

There is one way in which the United States exempts Canadian and Mexican visitors alike from the country's visa requirements. Citizens of either nation may enter the United States as business visitors so long as they receive no salary from an entity in the United States.[39] This travel is limited to certain professions.

V. CONCLUSION

The United States is a country distinguished by its vast size. Movies, novels, and songs laud the nation's wide-open spaces and the freedom of travel those spaces invite. And yet the United States is also, as its visa policy reveals, a nation distinguished by the restrictions imposed on noncitizens who would like to enter the country.

The United States grants limited and tightly circumscribed opportunities for foreign nationals to join the country permanently, and the process for taking advantage of those opportunities can be slow and arduous. The United States offers many more opportunities for foreign nationals to enter the country on a temporary basis—but even those opportunities can be engirdled with obstacles. The process for obtaining

[38] 22 C.F.R. § 41.2(m).
[39] 8 C.F.R. § 214.2(b)(4).

a U.S. visa involves at least two and frequently four different federal agencies—each agency imposing its own burdens and delays. Finally, some noncitizens can legally enter the United States without a visa—yet even then, it is not a given that their travel is unrestrained.

Debates surrounding U.S. visa policy reveal ever renewing focus on admitting the right number and the right type of foreign nationals. The race, nationality, religion, and skills of arriving noncitizens are concerns that have long steered the visa policy of the United States, and they continue to do so today. After two centuries, the United States still wrestles with questions of its self-interest, fears about otherness, and the inertia of its bureaucracy, even as it upholds its identity as a nation of immigrants.