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IMMIGRANT VISA DISTRIBUTION: THE CASE OF MEXICO

BERNARD TRUJILLO*

On every immigration lawyer's desk there is a chart. A constant source of reference for attorneys, this chart gives a sense of how long the "waiting line" is for an applicant to receive a visa and enter the United States as a permanent resident. The chart is a simple, one-page affair compiled by the Department of State and published monthly on its website¹ as well as in the various periodicals of the immigration bar.

This short Article will explore the legal origin and social impact of this chart, focusing on the question of how the chart regulates Mexican migration to the United States. This Article argues that what appears to be just another dull chart on a lawyer's desk actually finds its roots in a sorry act of international pillage—an act of which the United States should be ashamed and for which it should make remedy.

I. THE CHART OBSERVED

Reproduced as Figure 1 is the chart (called variously the "Visa Availability" chart or the "Visa Numbers" chart) for February 2000, which is the most recent monthly chart available prior to this Article's press date.

A few words of explanation are appropriate. The vertical axis of the chart represents the various statutory categories through which an applicant may qualify for an immigrant visa.² The horizontal axis shows how access

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1. See United States Department of State, Bureau of Consumer Affairs, *Visa Bulletin* (visited Apr. 14, 2000) <http://travel.state.gov/visa_bulletin.html>.

2. The three main ways of qualifying for an immigrant visa are (1) being petitioned in as a close family member of a U.S. citizen or permanent resident; (2) entering as a skilled worker or employee of a U.S. employer; and (3) winning a lottery designed to enhance the "diversity" of the immigrant stream. The "diversity lottery" is closed to applicants from most Asian and Latin American countries. See Stephen H. Legomsky, *Immigration Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 327-30 (1993). For other works that criticize the racial upshot of U.S. immigration law, see generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2108-09 (1997); Jan C. Ting, *"Other than a Chinaman": How the U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 308, 314-15 (1995).

to visas varies country by country. The "C's" on the chart stand for "current," and the dates indicate the backlogs for the various categories.

Figure 1: Visa Availability for February 2000

<u>Family</u>	<u>All Other Countries</u>	<u>India</u>	<u>Mexico</u>	<u>Philippines</u>
1st: Unmarried sons and daughters of citizens	15OCT98	15OCT98	22OCT93	22MAR88
2A: Spouses and children of permanent residents	15OCT95	15OCT95	01JUL94	15OCT95
2B: Unmarried sons and daughters of permanent residents	08DEC92	08DEC92	22AUG91	08DEC92
3rd: Married sons and daughters of citizens	22OCT95	22OCT95	01SEP91	15NOV87
4th: Brothers and sisters of adult citizens	22OCT88	15APR87	22OCT88	15JUL79
<u>Employment</u>				
1st: Priority workers	C	C	C	C
2nd: Professionals with advanced degrees or persons of exceptional ability	C	C	C	C
3rd: Skilled workers	C	C	C	C
Other workers	01JAN94	01JAN94	01JAN94	01JAN94
4th: Certain special immigrants	C	C	C	C
5th: Employment creation	C	C	C	C

The chart works like the "NOW SERVING" device at your local delicatessen. Suppose you enter the deli and take a number, say number 39. The "NOW SERVING" display reads 25. You figure that there are 14 customers who will be served before your turn comes up. Depending on how quickly the line is moving, that could mean a wait of a few short minutes or quite a while.

Now suppose that the client is from Bulgaria and she seeks to enter as a married daughter of a U.S. citizen (i.e., the 3rd Family Preference category). The attorney locates the 3rd Family Preference row and the "All Other Countries" column and sees "22OCT95." This means that those applicants who began seeking admission on October 22, 1995, are now being served. The Bulgarian client, beginning the process in February 2000, could have four years and four months worth of applicants ahead of her.³ The attorney, who has been watching how quickly the numbers have been moving, will then be able to give the client a general sense of how long she has to wait.

The horizontal axis of the chart virtually screams out from the page. A few countries have been isolated for special treatment. Depending on the client's national origin, the length of her wait could vary dramatically. This national origin discrimination is the fruit of the "per country limits" Congress has placed on the distribution of visas. Every country is entitled to a flat seven percent of all immigrant visas available for that year.⁴ The annual per-country ceilings are generally in the neighborhood of 15,820 family visas per country, and 9,800 employment visas per country. There is no adjustment in the per-country ceiling for countries with large populations, or for countries that are geographically adjacent to the U.S., or for countries that historically send immigrants to the U.S. in large numbers. Luxembourg has the same visa ceiling as China and Mexico.

Looking at the February 2000 numbers, the discrimination is tangible. For the first family preference (unmarried sons and daughters of citizens) applicants from the Philippines have to wait ten years, and applicants from Mexico five years, longer than applicants from the rest of the world. In both of the second preferences (spouses and children of permanent residents, and unmarried sons and daughters of permanent residents) Mexicans have to wait one year longer than all other countries. With the third category (married sons and daughters of citizens) Filipinos wait eight years, and Mexicans four years, more than the rest of the world. And for the fourth preference category (brothers and sisters of adult citizens), Filipinos must wait nine years, and

3. I say "could have" because the chart only tells us about the past (i.e., someone who began the process in October 1995 is being served in February 2000); it cannot predict the future. Since the number of people who enter the queue and the INS formulae that determine visa availability both vary year to year, the chart can only provide a "guesstimate" of future waiting time.

4. Some applicants for admission into the United States are exempt from the per-country limit, most notably people who are "immediate relatives" (i.e., children, spouses, and parents) of a citizen. Large numbers of immediate relatives gain admission every year.

Indians one year, longer than applicants from all other countries. While the per-country limits do affect the waiting time for employment visa, the effect on the distribution of family visas is much more dramatic.

Along with India, China is also frequently featured on the chart's horizontal axis, and I have seen Vietnam, the Dominican Republic, and El Salvador pass through in years past. Mexico and the Philippines are fixtures of the horizontal axis.

II. THE CHART APPRAISED

A. U.S. Interests in Culture and Economy

Can this practice of national origin discrimination be justified? It is beyond question that such discrimination, if levied by the U.S. government against its citizens, would be unconstitutional. But the hard lesson of immigration law is that Congress may make rules in the immigration context "that would be unacceptable if applied to citizens."⁵ Obviously, inflicting burdens on Filipinos and Mexicans for no other reason than their national origin offends some basic notion of "immigrants' rights." But the prevailing argument in Congress, the courts, and Main Street is that immigrants have no "right" to come to the United States—entry into the U.S. and participation in its market and polity are privileges that the U.S. may extend or withdraw at its pleasure and for its own interests.

What are the U.S. interests that are offered to justify the discrimination worked by the per-country ceilings? The main justification for the ceilings usually takes this form: The U.S. has a legitimate interest in a "diverse stream" of immigrants, so that people from a few nations do not dominate the flow, taking scarce visas away from immigrants of less represented lands. If the per-country ceilings were removed (while still limiting the total number of immigrants allowed in annually) it is possible that the immigrant stream would be mainly Mexican and Filipino, and the U.S. would be a poorer nation because of it.

Suppose we accept *arguendo* the (somewhat Herculean) assumption that dropping or altering the per-country ceilings would achieve a dynamic in which the immigrant flow comes to be consistently dominated by a few high-demand countries. We must then scrutinize the notion that more immigrants from Asia and Latin America, and fewer immigrants from, say, Europe, would somehow impoverish the United States. There are at least two ways in which one might say that the U.S. would be "poorer" if its immigrant stream was less diverse. One involves a cultural claim and the other involves an economic claim.

5. *Matthews v. Diaz*, 426 U.S. 67, 80 (1976).

A first stab at enunciating the cultural claim might go like this: The immigrant stream should be diverse because diversity is a good in itself, and the U.S. benefits from diversity. This claim runs aground, however, when we notice that the people who dominate the immigrant flow are actually under-represented in the general population of the United States. Nobody can make a straight-faced claim that having more Latinos and Asians around would make the U.S. a *less* diverse place.

Nor can there be one sort of diversity that is good for the immigrant stream and another sort of diversity that is good for the U.S. general population. The immigrant stream is a stream of people seeking to be permanent residents of the United States. The qualities of this stream must be appraised by how they correspond to the population as a whole. Considering the immigrant stream as separate from the thing it is streaming into, and holding different standards for each, is an error. Thus, diversifying the immigrant stream must intend some goal other than achieving diversity for its own sake. This other goal must be revealed and defended in order to argue successfully that the U.S. has a bona fide interest in controlling the ethnic content of the immigrant stream.

The rest of the “cultural” argument might go like this: The United States has an interest in preserving its culture. As it stands, the U.S. culture to-be-preserved is primarily European. Any transformation of the extant culture is to be resisted, or at least stalled, so that U.S. citizens and institutions will have more time to adjust.

Beyond certain quarters of U.S. society, this claim cannot be voiced without a twinge of embarrassment, and in any case the claim is difficult to defend. First, it is certainly controversial that U.S. culture is predominantly European. The United States is a country blessed with a rich and diverse heritage. It is home to both New England and New Mexico, and it has legacy from the namesakes of both. Second, if it can be said that the culture and institutions of the U.S. are dominated by a given ethnic group, that domination can only be temporary and accidental. One hundred fifty years ago, this was a nation as hostile to the Irish and most other Europeans as it is to the Latinos and Asians of today. The cultural constitution of the United States is an open set, and constantly subject to fundamental change. This is the price (if one can call it so) of living in a free society. Finally, there is the sheer futility of attempts at cultural engineering. Trying to control the direction of culture in an open society is like trying to drive the clouds. Such attempts would be amusing if they were not so costly and hurtful.

One might also claim that an immigrant stream dominated by a few countries would impoverish the U.S. in an economic sense—that the U.S. has a legitimate interest in reaching out to other immigrants in order to enhance the labor pool and bring economic value to the United States. But where the cultural argument for the per-country limits survives only within the crabbed confines of tendentious assumptions, the economic argument perishes even

on its own terms. It is an axiom of price theory that the allocation of goods is properly a function of demand. In this case, it would be most economically efficient for all involved (i.e., the individual immigrant and the U.S. economy as a whole) to allocate visas to the immigrants who *want* them the most. If they are lining up around the block to buy your product in Sheboygan, Wisconsin, and they are leaving your product on the shelves in Waunakee, the rational businessperson would move some merchandise from Waunakee to Sheboygan. Doing so would redound to the value of the business (i.e., sales, and perhaps the price-per-item, would increase).

In the same way, keying allocation of visas to demand can only redound to the value of the U.S. economy. Really wanting a visa, and being willing to uproot oneself from home to labor in a foreign land, evinces qualities (e.g., industriousness, creativity, doggedness, flexibility) that make the U.S. economy smile.

If the U.S. denies visas to applicants who want them the most, it can only be because the U.S. is betting that the applicants' intense demand will not translate into productivity and value for the U.S. economy. But why would national origins be a useful indicator for predicting which applicants will be most productive? It is as though the U.S. were saying, "We know that you fervently desire to uproot yourself from your home to come and make a living here. But because you are from Mexico or the Philippines we think that you will not work as well or as hard as someone from Europe." Here, the economic argument in favor of national origins discrimination tails off into the cultural argument, and carries the scent of the same irrationality.

B. Discerning Demand

Let us return to the chart. At first glance, one could conclude that the chart tells us something about the demand for U.S. visas by indicating which countries have the longest waiting lines. On that analysis Filipinos and Mexicans (and to a lesser extent, Indians and also Chinese) have consistently had the greatest demand for U.S. visas.

But that conclusion needs qualification. For the family preference categories, the immigrant applying for a visa needs to be petitioned in by a family member who is already a U.S. citizen or permanent resident. In the parlance of the immigration bar, the immigrant needs a family "anchor" in the United States. Thus, the chart does not register pure demand for visas. In order for an aspiring immigrant's demand to be measurable by the Department of State, that immigrant must be "pre-qualified" by having a family anchor. It is possible that Bulgarians demand visas at the same level as Mexicans, but the Bulgarians have fewer anchors and so their "waiting line" appears shorter.

Note that having a family anchor is a necessary, but not sufficient condition for seeking a visa (and thus having one's "demand" registered on

the chart). Witness the distribution of family preference visas in the years immediately following 1965. Prior to 1965, the U.S. employed a “national origins formula” for determining per-country visa allocation: Visas were distributed to maintain the status quo ethnic distribution of the United States. This formula had the effect of awarding the broad majority of visas to applicants from European nations. In 1965 the U.S. switched from the “national origins formula” to the system of family and employment preferences now in place.

One would expect that if the presence of a family anchor was a significant determining factor in the application of close relatives seeking admission (an alleged phenomenon called “chain migration” or the “multiplier effect”), we would have seen waves of European immigration continue at a very high rate after 1965. In fact, we saw immigrants from Europe decrease sharply, and immigrants from Asia and Latin America increase sharply, in the post-1965 years.

Thus there appear to be two equally important components for having measurable demand for a U.S. visa: having a family anchor and having the desire to apply. As to the second of these components, the economic logic of demand-based allocation seems compelling—giving visas to applicants with the highest demand best serves U.S. interests. Proponents of attempts to engineer the ethnic content of the immigration stream through per-country limits (as well as other measures such as the “diversity lottery”) resist the clear economic logic of demand-based allocation by pointing to the first, “pre-qualification” component of demand. They argue that because there are so many Mexicans (or Filipinos, or Indians) already present in the U.S., a legal regime that allowed for family members freely to petition in family members would give applicants from Mexico (or the Philippines, or India) an unfair “advantage” meriting legal correction. Thus, the argument goes, measures that allegedly discriminate in favor of European immigrants and against Asian and Latino immigrants actually just “level the playing field.”

C. The “Mexican Advantage”

In what sense is the “playing field” lopsided? Answering that question requires a closer exploration of particular institutions and relevant social history. Accordingly, the balance of this Article shall focus exclusively on the case of Mexico. I contend that the peculiar relationship between Mexico and the U.S. has created conditions that tend to enhance migration patterns, but that these conditions are far from a Mexican “advantage” requiring that additional corrective burdens be placed upon Mexican migration. I believe that similar arguments could be marshaled in the cases of the Philippines, China, India, and perhaps other nations, but I am not attempting to make those arguments here.

There are a great number of Mexican "anchors" in the United States. There are also a great number of other Mexican nationals, who might be called "magnets" in that they are present in the U.S. and serve to attract the migration of other Mexicans, but they do not have the legal capacity to "petition in" others (typically because they are here on temporary visas or because they are undocumented). A short list of institutional factors explaining the presence of these anchors and magnets might include: (1) the Immigration Reform and Control Act of 1986, which granted amnesty to several thousands of erstwhile undocumented foreign nationals, many of them from Mexico (those granted amnesty were allowed to become permanent residents and citizens, thus attaining the capacity to petition in close relatives via the family preference categories); (2) enhanced ease of entry as temporary low-skilled laborers under the "Seasonal Agricultural Worker" program; (3) a history of U.S. programs designed to tap Mexican labor, most notoriously the "Bracero" programs; and (4) no ceilings on immigration from the Western Hemisphere countries, including Mexico, until 1965.

But is it a discrimination in favor of Mexico, properly remediable by legal measures, that there are large numbers of Mexicans with vibrant ties to Mexico already present in the United States? Stephen Legomsky, in an excellent piece criticizing the "diversity lottery," rejects the proposition that the family preferences regime constitutes remediable *de facto* discrimination in favor of Asian and Latino immigrants.⁶ By way of analogy, Legomsky observes that very few Canadians seek asylum in the United States. In order to obtain asylum, an applicant has to show that she suffers or has a reasonable fear of suffering from persecution in her home country. It just so happens that few citizens of Canada could meet that definition. But the low number of Canadian asylees is not evidence of *de facto* discrimination against Canada. It is just a natural fact, not remediable by law, that Canadians are typically ineligible to apply for asylum. Legomsky concludes that the large number of Asian and Latino residents who are present in the U.S. and able to petition in their family members is just a natural fact and not evidence of remediable discrimination.

Taking Legomsky one step further, I suggest that the alleged "Mexican advantage" is not merely a "natural fact" that fails to justify placing additional burdens on Mexican migration. I suggest that the enhanced migration patterns that we observe from Mexico to the U.S. are the result of past unjust acts by the United States that themselves call for remedy. Rather than placing burdens upon Mexican migration, justice requires that the U.S. facilitate that migration.

The United States has a history of alienating the land and labor resources of Mexico. Regarding labor, much has been written about the horrors of the Bracero program and Operation Wetback, the summary deportation of

6. See Legomsky, *supra* note 2, at 331-34.

Mexican workers in the 1950s. There have also been other mass deportation programs, including a period in the 1930s when thousands of U.S. citizens of Mexican descent were expatriated during a time when the "domestic" labor pool had swelled, causing the need for Mexican labor to evaporate.⁷ Despite much symbolic speech condemning undocumented Mexican labor, the U.S. economy and legal authorities are actually quite ambivalent, allowing Mexicans to build up reasonable expectations that their labor will be welcomed in the United States.⁸

Regarding U.S. alienation of Mexican land, the major events are the annexation of Texas in 1845 and, perhaps most significantly, the war between the U.S. and Mexico culminating in the 1848 Treaty of Guadalupe Hidalgo. The Treaty, signed at gunpoint as U.S. forces occupied Mexico City, ceded between one-third and one-half of Mexico's territory to the U.S., including all of what is now California, Nevada, and Utah, most of New Mexico and Arizona, and parts of Colorado and Wyoming. The U.S. had offered to buy the land, Mexico declined, and the war followed soon thereafter. A dispassionate reading of this history supports the conclusion that the War and the Treaty were little more than a "land-grab." Indeed, the entire history of Mexican-U.S. relations suggests the image of a strong country serially mugging, at will and without remorse, its weaker neighbor to the south.

How might these events enhance Mexican migration? The patterns of Mexican migration we observe are partially attributable to the vibrant and ongoing relationships between Mexicans in Mexico and Mexicans (along with persons of Mexican descent) in the United States. A Mexican national fixes her eyes on the U.S. with a mixture of hope and resentment: hope because she knows her labor will be welcomed by the economy and she will be welcomed by networks of Mexicans who have come weeks and generations before; resentment because she believes the border is fundamentally false. In going North, there is still a sense in which she is going home.

Also contributing to the obsession that might lead to immigration is the sick fascination one might call "Loser's History." One is much more likely to catch a self-described Alabaman than a self-described New Yorker fantasizing about Pickett's Charge. In fact, the average New Yorker is unlikely even to have heard of Pickett's Charge.⁹ In historic confrontations,

7. See generally FRANCISCO E. BALDERRAMA ET AL., *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (1995); JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980); KITTY CALAVITA, *INSIDE THE STATE* (1992); Michael Olivas, *The Chronicle, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicles as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990).

8. See, e.g., Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 618 (1981).

9. Pickett's Charge was the decisive moment of the Battle of Gettysburg (which, in its turn, is taken to be the turning point of the U.S. Civil War) in which a gambit by the

where land or honor changes hands, the losers are apt to feel the sting far longer than the winners. To this day, U.S. exchange students at the Mexican National War College are not allowed to observe the war games, perhaps because the Mexicans are fighting again, but with different results, the Battle of Cerro Gordo. And to this day, the average U.S. native has never even heard of the Treaty of Guadalupe Hidalgo.

III. TOWARD REMEDY

This Article began with a very modest inquiry: whether we can justify the national origins discrimination underlying the distribution of immigrant visas. I have argued that we cannot. U.S. interests in culture or economy do not justify attempts to engineer the ethnic composition of the immigrant stream. In the case of Mexico, moreover, I have argued that any perceived "advantage" held by Mexicans seeking admission to the U.S. is not a wrong to be remedied, but rather the upshot of wrongs that require remedy.

If this modest inquiry were to end modestly, I could conclude simply that the per-country limits should be abandoned and the visas distributed to the applicants who want them, or at least that the limits should be relaxed for countries that are substantially affected. But what began as a quarrel with a lawyer's chart has brought us to a question much more vast: Does a history of injustice make a legal difference? Do past acts of oppression contain current legal relevance? One can readily call to mind other aggrieved populations within the U.S. polity, and their arguments, sometimes prevailing and sometimes not, that past injustice merits present legal rights. Foremost among these arguments is the claim that "past" wrongs are not purely past. They live on in unjust structures that perpetuate yesterday's wrongs, paying their passage into tomorrow.

The United States is a nation that must come to live with its history. Our nation's road to empire is marked with unjust acts. Roads to empire always are. The test of greatness under law is whether we will bend to remedy those injustices.