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American Employment-based Immigration Program in a Competitive Global Marketplace: Need for Reform

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**AMERICAN EMPLOYMENT-BASED IMMIGRATION
PROGRAM IN A COMPETITIVE GLOBAL
MARKETPLACE: NEED FOR REFORM**

Paschal O. Nwokocha[†]

| | |
|--------------------------------------------------------------------------------------------|----|
| I. INTRODUCTION..... | 38 |
| II. EMPLOYMENT-BASED IMMIGRATION: A BRIEF HISTORICAL ANALYSIS | 39 |
| A. <i>Legislation Prior to 1952</i> | 39 |
| B. <i>Immigration and Nationality Act of 1952</i> | 41 |
| C. <i>The Immigration Reform Control Act of 1986 and Related Legislation</i> | 42 |
| III. SURVEY OF EMPLOYMENT-BASED IMMIGRATION IN OTHER COUNTRIES | 50 |
| IV. CONTEMPORARY GLOBAL ECONOMY | 59 |
| V. SPECIFIC EFFECT OF IMMIGRATION ON AMERICAN COMPETITIVENESS..... | 63 |
| VI. CONCLUSION | 66 |

I. INTRODUCTION

American immigration laws for skilled and unskilled workers were created in an era defined by closed borders, limited flow of capital and labor, and limited competition for highly skilled professionals. Those circumstances have since changed, and American immigration laws should adjust if the United States is to remain competitive in the global economy. Part two of this article offers a historical summary of American employment-based immigration laws. Part three contains a survey of the immigration laws of three other countries—showing how these countries have

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changed their laws to adapt to the evolving global economy. Part four discusses the evolving global free market for labor, and part five discusses the specific impact of immigration on the United States and the need for the United States to respond the way other countries have. Finally, part six concludes that an American immigration regime that places arbitrary numerical limits on the number of employment-based visas has no place in today's world, and, therefore, it should be eliminated to maintain the country's competitive edge in the global economy.

II. EMPLOYMENT-BASED IMMIGRATION: A BRIEF HISTORICAL ANALYSIS

A. *Legislation Prior to 1952*

During the United States' first century, the entry of foreign nationals into the country was practically unrestricted.¹ Those entering included foreign nationals seeking religious freedom or fortune, merchants and landowners, and slaves forced to enter primarily for labor.² An open door policy towards foreigners was promoted except for limited legislative restrictions like the Alien Act of June 25, 1798,³ which allowed the President to deport aliens who were found to be "dangerous."⁴

In the 1850s, the first anti-immigrant movements formed in opposition to Irish and German Catholic immigration.⁵ Prior to the official end of the slave trade, many foreign nationals emigrated because of increasing job availability despite the likely exploitation of these workers for "low wages, long hours, and poor working conditions."⁶ The prospect of opportunity outweighed the gloomy reality of untenable working conditions.⁷ The Treasury Department had control over immigration enforcement duties and had the authority to exclude "undesirables" such as "idiots, lunatics, convicts and persons likely to become public charges."⁸

1. 1 AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LAW & BUSINESS § 1:2 (2008) [hereinafter FRAGOMEN, IMMIGRATION].

2. *Id.*

3. Act of June 25, 1798, ch. 58, 1 Stat. 570.

4. *Id.*

5. See FRAGOMEN, IMMIGRATION, *supra* note 1, § 1:2.

6. *Id.*

7. *Id.*

8. *Id.*

The Immigration Act of February 19, 1862,⁹ prohibited the importation of slave laborers from China and, specifically, the transportation of Chinese “coolies” on American vessels.¹⁰ Immigration laws of the late nineteenth century primarily legislated against contract labor; however, the Act of July 4, 1864, was passed to encourage immigration.¹¹ It created a Commissioner of Immigration appointed by the President to serve under the Secretary of State and authorized immigrant labor contracts whereby would-be immigrants would pledge their wages to repay the expense of their transportation.¹²

Codification of immigration law came with the Act of March 3, 1891, which enacted penalties relating to immigration, established the office of Superintendent of Immigration, provided for inspection of immigrants on arrival in the United States, and specified for the return of “unlawful immigrants.”¹³ One of the first immigration laws to touch on skilled labor was the Act of March 3, 1903.¹⁴ Among other things, this Act provided that skilled labor may be imported “if labor of like kind unemployed can not [sic] be found in this country.”¹⁵ In 1903, the Department of Commerce and Labor also began overseeing immigration.¹⁶ The Act of May 19, 1921, created the first quantitative restrictions, allocating an annual quota per nationality of three percent of its foreign-born nationals residing in the United States in 1910.¹⁷ For example, it resulted in an annual limit of 350,000 immigrants from the Eastern Hemisphere.¹⁸ Between 1860 and 1920, over 28.5 million immigrants entered the United States.¹⁹

Between 1942 and 1947, in response to the domestic labor shortage during World War II, the United States negotiated several formal agreements to regulate the flow of labor from Mexico, Canada, the Bahamas, Jamaica, and the British West Indies.²⁰

9. Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (repealed 1974).

10. *Id.*

11. Act of July 4, 1864, ch. 246, 13 Stat. 385, *repealed by* Act of March 30, 1868, ch. 38, § 4, 15 Stat. 58.

12. *Id.* §§ 1–2.

13. Act of Mar. 3, 1891, ch. 551, §§ 6–8, 10, 26 Stat. 1084, 1085–86.

14. Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214.

15. *Id.*

16. *See* FRAGOMEN, IMMIGRATION, *supra* note 1, § 1:2.

17. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5, 5 (repealed 1952).

18. FRAGOMEN, IMMIGRATION, *supra* note 1, § 1:2.

19. *Id.*

20. *See, e.g.*, Act of April 29, 1943, Pub. L. No. 45, ch. 82, 57 Stat. 70. The Act

These were later absorbed into the H2 temporary worker program under the 1952 Immigration and Nationality Act.²¹

B. Immigration and Nationality Act of 1952

The Immigration and Nationality Act of 1952 drastically overhauled U.S. immigration policy.²² It increased the number of quotas, made immigration easier for those immigrants with certain skills or family, and expanded the grounds for deportation.²³ Prior to 1965, unions and labor organizations, attempting to support the interests of their members, often exerted pressure to protect the U.S. labor market.²⁴ The 1965 amendments, however, eliminated the quota system codified in the Immigration and Nationality Act but maintained the numerical restrictions with entry limits based on region.²⁵ These amendments also added a requirement that the Secretary of Labor certify that an alien, upon the issuance of a visa, will not displace a U.S. worker.²⁶ Subsequently, foreign nationals with professional qualifications who sought jobs for which U.S. citizens were unavailable to perform, were required to obtain a “labor certification” from the Secretary of Labor.²⁷ Congress also enacted more legislation affecting employers’ ability to hire or to

appropriated money to provide “an adequate supply of workers for the production and harvesting of agricultural commodities essential to the prosecution of war. . . .” *Id.* § 1, 57 Stat. at 70. It would “facilitate the employment by agricultural employers in the United States of native-born residents of North America, South America, and Central America, and the islands adjacent thereto, desiring to perform agricultural labor in the United States.” *Id.* § 5(g), 57 Stat. at 73.

21. See Immigration and Nationality Act § 101, 8 U.S.C. §§ 1101–1537 (2006).

22. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

23. *Id.*; see also RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:2 (2d ed. 1992).

24. See, e.g., Kiera LoBreglio, *The Border Security And Immigration Improvement Act: A Modern Solution To A Historic Problem?*, 78 ST. JOHN’S L. REV. 933, 937 (2004) (“The Bracero Program came to an end in 1964, due in part to widespread abuses by employers and increased opposition to the program by labor unions.”). The Bracero Program originated during World War II as a source of temporary Mexican migrant labor in the United States. See *supra* note 20; LoBreglio, at 936–37. “A bracero is a seasonal Mexican laborer who worked in the United States on farms and railroads to ease labor shortages in the World War II era.” *Id.* at 936 n.20.

25. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

26. *Id.*

27. 8 U.S.C. § 1182(a)(5) (2006); see also *Pesikoft v. Sec’y of Labor*, 501 F.2d 757 (D.C. Cir. 1974) (providing detailed history of § 1182).

continue to employ authorized or unauthorized foreign nationals.²⁸

C. The Immigration Reform Control Act of 1986 and Related Legislation

In 1986, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).²⁹ Part of its provisions made it illegal for any employer to knowingly hire, recruit, or refer for a fee a foreign national who is not authorized to work in the United States, and the IRCA also outlawed continuing to employ workers after discovering they are unauthorized.³⁰ The IRCA further provided for both temporary agricultural workers and for legalization of certain agricultural workers.³¹ In 1989, Congress enacted the Immigration Nursing Relief Act of 1989, which eased the ability of some registered nurses to obtain permanent resident status and added additional requirements for temporary worker H-1 nurse petitions.³²

Immigration Act of 1990

The Immigration Act of 1990 (the 1990 Act)³³ was the most comprehensive revision of U.S. immigration laws after the Immigration and Nationality Act of 1952.³⁴ Among other things, the 1990 Act more than doubled the number of immigrant visas available yearly for employment-based immigration.³⁵ Additionally, “the categories of immigrants who can immigrate to the United States based on employment skills were dramatically revised, with emphasis placed on [foreign nationals] in *professional* fields and fields requiring advanced education or skills.”³⁶ The 1990 Act also created diversity immigration in which immigrant visas are awarded annually to foreign nationals “selected at random from all eligible

28. See FRAGOMEN, IMMIGRATION, *supra* note 1, § 1:5.

29. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

30. *Id.* § 324 (codified as amended at 8 U.S.C. § 1324(a) (2006)).

31. See FRAGOMEN, IMMIGRATION, *supra* note 1, § 1:7.

32. Immigration Nursing Relief Act of 1989, Pub. L. No. 101-238, §§ 2–3, 103 Stat. 2099, 2099–2100. Alien nurses can apply for H-1C visas to enter the United States. See 8 C.F.R. § 214.2(h)(1)(ii)(A). They must meet the requirements of 8 U.S.C. § 1182(m) to be eligible.

33. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

34. FRAGOMEN, IMMIGRATION, *supra* note 1, § 1:8.

35. *Id.*

36. *Id.* (emphasis added).

applicants, who are natives of countries statistically underrepresented in the recent waves of immigration.”³⁷

The Immigration Act of 1990 “divided the preference categories into two groups (family-based and employment-based) and expanded the number of employment-based categories from two to three classifications. Those three classifications were further divided into subcategories dealing with specific groups of immigrant workers.”³⁸ The 1990 Act created five categories of employment-based immigrant visas.³⁹ Visa preferences one through five classified employment-based visas on types of skill the alien had.⁴⁰ The table below describes the five employment-based immigration categories with details about what each category represents and the available visas as of October 2008.⁴¹

Employment-Based Immigration Categories

| | Category | Minimum Annual Visas Available | Priority Date |
|------------|---------------------|--------------------------------|---------------|
| EB1 | Priority Workers | 40,040 | Current |
| EB2 | Advanced Degree | 40,040 | Current |
| EB3 | Skilled Workers | 30,040 | 1/1/2005* |
| EB3 | Other Workers | 10,000 | 1/1/2003* |
| EB4 | Special Immigrants | 9,940 | Current |
| EB5 | Employment Creation | 9,940 | Current |

* As of October 2008, the immigration service is issuing visas for those whose applications were filed by these dates for applicants from all countries except Mexico, China, India, and the Philippines.

37. *Id.*

38. Interoffice Memorandum from Michael Aytes, Acting Assoc. Dir., Domestic Operations, U.S. Dep’t of Citizenship & Immigration Serv., Dep’t of Homeland Sec. 4 (Sept. 12, 2006), *available at* http://www.uscis.gov/files/pressrelease/afm_ch22_0912_06R.pdf.

39. FRAGOMEN GLOBAL, GLOBAL BUSINESS IMMIGRATION HANDBOOK § 18:50 (Nancy H. Morowitz ed., 2007).

40. *Id.*

41. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, PUBL’N NO. 9514, VISA BULLETIN FOR OCTOBER 2008 (2008), *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_4357.html. The total annual minimum for employment-based visas is 140,000. 8 U.S.C. § 1151(d)(1)(A) (2006).

Any “unused visas within the employment-based preference categories may “spill down” to successive categories with unused visas saved for use in future fiscal years when the demand for employment-based visas exceeds the overall cap for that year.”⁴² Although rare, any unused visas not used in the family-sponsored categories in a particular year are made available to foreign nationals in the employment-based categories the next year.⁴³ The low limits depicted on the above table illustrate just how challenging it is to qualify under the strict numerical maximums for foreign nationals seeking to work in the United States.

The H-1B Visa

The 1990 Act amended the immigration laws to increase the admission of foreign skilled workers to the United States.⁴⁴ It restructured the existing “H” visa category to provide for a number of categories under which needed workers could be admitted to the United States on a temporary basis.⁴⁵ It further created the H-1B provision primarily to admit foreign workers to the United States to work in a “specialty occupation”⁴⁶ on a temporary basis.⁴⁷

The 1990 Act capped the number of H-1B visas at 65,000 annually and “limited the validity of the . . . visas to three years . . . renewable for an additional three-year period.”⁴⁸ In 1997, H-1B

42. FRAGOMEN GLOBAL, *supra* note 39, § 18:50.

43. *Id.*

44. Immigration Act of 1990, Pub. L. No. 101-649, §§ 121–24, 201–09, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

45. *Id.* § 205, 104 Stat. at 5019–22.

46. According to 8 C.F.R. § 214.2(h)(4)(ii)(4) (1995), a specialty occupation is defined under the statute as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

47. 8 C.F.R. § 214.2(h)(1)(ii)(B) (1995).

48. Jung S. Hahm, Note, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1679 (2000).

admissions reached this annual cap before the end of the fiscal year for the first time.⁴⁹ “The oversubscription . . . forced the INS to announce . . . ‘the formation of a waiting list because approved workers would be ineligible to enter until the . . . following fiscal year.’”⁵⁰ In 1998, the H-1B admissions reached the cap in May, one month after the first application date.⁵¹ This resulted in shortages of skilled information technology professionals forcing the high-tech industry to lobby Congress for a raise in the annual cap of H-1Bs.⁵²

In October 1998, Congress passed the American Competitive and Workforce Improvement Act of 1998 (ACWIA). The ACWIA increased the annual cap of H-1Bs from 65,000 to 115,000 in both 1999 and 2000 and to 107,500 in 2001, before reverting back to 65,000 in 2002.⁵³ For fiscal year 2001, the visas were again exhausted early in the fiscal year. On October 17, 2000, President Clinton signed into law the American Competitiveness in the Twenty-First Century Act of 2000 (AC-21), which increased the number of H-1B visas to 195,000 for each of the next three years, beginning in the fiscal year of October 1, 2000.⁵⁴ The cap returned to 65,000 in October 2003 for fiscal year 2004.⁵⁵

Other key provisions of the AC-21 include: exemption of certain aliens from the H-1B numerical limit, *i.e.* those employed at institutions of higher learning, governmental and nonprofit research entities; allowing one-year extensions of an H-1B stay if a permanent resident adjudication lasts longer than 365 days; and providing employment-based visas without regard to per-country limitation if unused visas are available; increasing the low income scholarship amounts for mathematics, engineering, or computer studies while reducing the National Science Foundation’s costs for job training, engineering, mathematics, or science courses.⁵⁶

49. *Id.* at 1683.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1676.

54. *Clinton Signs Special Visas Bill*, WASHINGTONPOST.COM, Oct. 17, 2000, http://www.washingtonpost.com/wp-srv/aponline/20001017/aponline215507_000.htm.

55. DEBORAH WALLAH MEYERS, MIGRATION POLICY INST., TEMPORARY WORKER PROGRAMS: A PATCHWORK POLICY RESPONSE 5 (2006), http://www.migrationpolicy.org/ITFIAF/TFI_12_Meyers.pdf.

56. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. 106–313, §§ 103, 104, 106, 110, 114 Stat. 1251, 1252–55.

In fiscal year 2004, the H-1B visa numbers reverted to the 1990 level of 65,000.⁵⁷ In the meantime, the demand for H-1B visas had not diminished.⁵⁸ The continued growth of jobs in the technology and high skill industries has necessitated a demand for more H-1B visas. Very minor changes have been made to deal with this obvious shortage. For example, the government allocated an extra 20,000 H-1B visas to foreign nationals who graduated with a masters degree or higher from a U.S. university.⁵⁹

Each year, applications are accepted from April 1 for the employment start date of October 1.⁶⁰ Thus, for the fiscal year 2009, applications were received beginning April 2008. On April 10, 2008, ten days into the application window, the Citizenship and Immigration Service announced that it had received about 163,000 applications for the 85,000 available visas for the 2009 fiscal year.⁶¹ In what has turned into a lottery system, those whose applications are received on those days are randomly selected to receive approvable visas.⁶² This does not include the numerous other employers that would rather not submit applications because of the obvious unpredictability of the system.⁶³ The following chart shows the date that the Citizenship and Immigration Service reached the cap for each year. For the fiscal years 2005–07, the government stopped accepting further applications once the numerical cap was reached.⁶⁴

57. WALLAH MEYERS, *supra* note 55, at 5.

58. *See, e.g., id.* at 6 (stating that the H-1B visa cap for fiscal 2006 was reached in August 2005).

59. 8 U.S.C. § 1184(g)(5)(c) (2006).

60. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15389, 15390 (Mar. 24, 2008) (codified at 8 C.F.R. pt. 214).

61. Press Release, U.S. Citizenship & Immigration Services, UCSIS Releases Preliminary Number of FY 2009 H-1B Filings, Apr. 10, 2008, *available at* http://www.uscis.gov/files/article/USCIS%20Update_H1B_Preliminary%20Count1_10Apr08.pdf.

62. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15389, 15390–91 (Mar. 24, 2008) (to be codified at 8 C.F.R. pt. 214).

63. *Id.*

64. *Id.*

H-1B Application History

| Fiscal Year | Visa Cap | Date Cap Reached | Applications Received |
|-------------|----------|------------------|-----------------------|
| 2005 | 65,000 | 10/1/2004* | 65,000 |
| 2006 | 85,000 | 8/10/2005* | 85,000 |
| 2007 | 85,000 | 5/26/2006* | 85,000 |
| 2008 | 85,000 | 4/3/2007 | 150,000 |
| 2009 | 85,000 | 4/10/2008 | 163,000 |

*The immigration service stopped accepting H-1B petitions on these dates because it had received enough application for the available visas.⁶⁵

In 2007, the United States granted a significant plurality of the 461,730 total of temporary worker H-1B “specialty occupation” visas to people from India (34.1 percent or 157,613).⁶⁶ After India, the next five countries in terms of H-1B visas were Canada (5.7 percent or 26,209), the United Kingdom (5.5 percent or 25,507), Mexico (3.9 percent or 18,165), China (3.6 percent or 16,628), and Japan (3.1 percent or 14,435).⁶⁷ Together, these six countries accounted for 56.0 percent (or 258,557) of all H-1B admissions in 2007.⁶⁸

All together, Asian countries made up 52.5 percent of all 2007 H-1B admissions, followed by the Americas (22.7 percent), Europe (21.4 percent), Africa (1.8 percent), and Oceania (1.3 percent).⁶⁹ In 2004, two-thirds of H-1B admissions were from Europe and Asia, particularly the United Kingdom and India.⁷⁰

To file an H-1B application, the petitioner must obtain a certification from the Department of Labor (DOL) that he has filed a labor condition application in the occupational specialty for which the foreign worker will be employed.⁷¹ The petitioner and

65. *Id.* at 15391 n.4.

66. U.S. Dep’t of Homeland Sec., Yearbook of Immigration Statistics: 2007, Temporary Admissions (Nonimmigrants), Supplemental Tbl. 1 (2008), <http://www.dhs.gov/ximgtn/statistics/publications/YrBk07NI.shtm>.

67. *Id.*

68. *Id.*

69. *Id.* at Temporary Admissions (Nonimmigrants), Tbl. 32 (2008).

70. WALLAH MEYERS, *supra* note 55, at 5.

71. 8 C.F.R. § 214.2(h)(4)(i)(B)(1)–(2) (2008); *see also* 8 U.S.C. §§ 1184, 1188

beneficiary must meet certain requirements and comply with specific provisions of the immigration regulations for the petition to be approved.⁷² The requirements also give only the director of the DOL the power to determine if the application involves a specialty occupation and to determine whether the specific foreign worker for whom the H-1B visa is sought is eligible to work in that specialty occupation.⁷³ The petitioner must pay between \$820 and \$3,320 in government fees depending on the size and type of employer involved.⁷⁴

Multiple other types of temporary employment-based visas exist. These visa categories include E,⁷⁵ H-2A,⁷⁶ H-2B,⁷⁷ H-3,⁷⁸ L,⁷⁹ O,⁸⁰ P,⁸¹ Q,⁸² R,⁸³ and TN/NAFTA visas.⁸⁴ They represent a

(2006).

72. 8 C.F.R. § 214.2(h)(4)(i)(B)(1)–(2) (2008).

73. *Id.* A specialty occupation is defined at 8 U.S.C. § 1184(i) (2006). *See also supra* note 46.

74. *See* U.S. Citizenship & Immigration Serv., U.S. Dep't of Homeland Sec., Helpful Information for Completing and Submitting a FY 2009 H-1B Cap Case 2 (2008), http://www.uscis.gov/files/pressrelease/Q_and_A_H1B.pdf. The standard H-1B fee is \$320, and a \$500 fraud fee is also required. *Id.* Additionally, certain petitioners may have to pay either \$750 or \$1,500 required by the American Competitiveness and Workforce Improvement Act of 1998, and faster processing is available for \$1,000. *Id.*

75. E visas are for traders and investors entering temporarily under provisions of international treaties. *See* 8 C.F.R. § 214.2(e) (2008).

76. The 1986 Immigration Reform and Control Act subdivided the H2 programs under H-2A and H-2B. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301, 100 Stat. 3359, 3411–17. H-2A visas allow employers to bring into the U.S. temporary workers for agricultural jobs seasonally or for up to one-year period. *See* 8 C.F.R. § 214.2(h)(1)(ii)(C) (2008).

77. H-2B visas allow employers to bring foreign nationals to fill temporary non-agricultural jobs for less than one year. The occupations covered include landscaping and work in hotels, restaurants, resorts, and construction. *See* 8 C.F.R. § 214.2(h)(1)(ii)(D) (2008).

78. H-3 visas allow foreign nationals to come to the United States to participate in a training program. *See* 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) (2008).

79. Created in 1970, L visas allow multinational companies with US operations to temporarily transfer top personnel from abroad to the U.S. *See* 8 C.F.R. § 214.2(l) (2008).

80. Created by the 1990 Act, the O visa is for foreign nationals of extraordinary ability in science, art, business, or athletics. Immigration Act of 1990, Pub. L. No. 101-649, § 207, 104 Stat. 4978, 5023-24; *see also* 8 C.F.R. § 214.2(o) (2008).

81. Created by the 1990 Act, P is a class of visa for athletes and entertainers. § 207, 104 Stat. at 5024–25; *see also* 8 C.F.R. § 214.2(p) (2008).

82. Also created by the 1990 Act, the Q visa is a class of visa for cultural exchange. § 208, 104 Stat. at 5027; *see also* 8 C.F.R. § 214.2(q) (2008).

83. Created by the 1990 Act, an R visa is for religious workers. § 209, 104 Stat. at 5027; *see also* 8 C.F.R. § 214.2(r) (2008).

patchwork response to economic and business needs. The H-1B remains the most used visa category for highly skilled workers.

Employment-Based Temporary Visas

| Visa Name | Length of Stay & Extensions | Numerical Limit |
|------------------------------------------------|----------------------------------------------------------------|------------------------------|
| E Treaty Trader | 2 years initially & unlimited 2-year extensions | None (E-1/2) 10,500 (E-3) |
| H-1B Specialty Occupation | 3 years initially & one 3-year extension* | 65,000** |
| H-2A Temporary Agricultural Workers | 1 year only*** | None |
| H-2B Non-agricultural Temporary Workers | 1 year only | 66,000 |
| L Intracompany Transferees | 3 years initially & one (L-1B) or two (L-1A) 2-year extensions | None |
| O Extraordinary Ability | 3 years initially & unlimited 1 year extensions | None |
| P Athletes & Entertainers | 1 year (groups & teams) or 5 years (individuals) | None |
| Q Cultural Exchange | 15 months (Q-1) or 3 years (Q-2/3) | None |
| R Religious Worker | 3 years initially & one 2-year extension | None |
| TN Professionals from Canada & Mexico | 1 year initially & unlimited extensions**** | None |

*Also extendable in 1 yr. increments while application for permanent resident is pending.

**20,000 additional H-1B visas available applicants with advanced degrees from US colleges and universities.

***Workers may return an unlimited number of times on a new H-2A visa in subsequent years.

****Effective Oct. 15, 2008, TN visas are good for 3 years at a time, with unlimited extensions.

<http://www.aila.org/content/default.aspx?docid=26886>.

84. Created in 1994 as part of the North American Free Trade Agreement, it allows professionals in one of sixty-three occupational categories from Canada and Mexico to work in the United States for one year at a time with unlimited extensions. See 8 C.F.R. § 214.2(b)(4)(i) (2008).

III. SURVEY OF EMPLOYMENT-BASED IMMIGRATION IN OTHER COUNTRIES

Three other countries that have high immigration rates and widely emulated immigration systems are Canada, Australia, and the United Kingdom.⁸⁵ When assessing American employment-based immigration laws, it is constructive to examine these nations' regulations on employment-based immigration. By evaluating these systems, not only does one learn what the United States is competing against in the global labor market, but one can also draw lessons from their strong points and shortcomings to help the United States enact forward-looking employment-based immigration policies.

United Kingdom

The United Kingdom Border Agency⁸⁶ states that “[its] Immigration Act 1971 is the foundation of the current legal framework, although that Act was passed in a very different world. Subsequent Acts have provided vital additions and strengthening measures to respond to changes over the last thirty years.”⁸⁷ The last of these acts was the UK Borders Act 2007, which introduced a new points-based immigration system.⁸⁸ “The points-based system is the biggest shake-up of the immigration system for 45 years,” and it “allows British businesses to recruit the skills they need from abroad”⁸⁹ This transition to a points-based system is occurring in stages, as old employment-based categories are phased out and replaced with five point-based tiers between June 2008 and November 2008.⁹⁰ Applicants score points based on their attributes, including age, education, qualifications, previous earnings, and experience in the United Kingdom; their English

85. *Help Not Wanted*, ECONOMIST, Apr. 12, 2008, at 38, 38, available at http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=11016270.

86. UK Home Office Border Agency, <http://www.bia.homeoffice.gov.uk/managingborders/simplifying> (last visited Dec. 13, 2008).

87. *Id.*

88. *Id.*; see also UK Borders Act, 2007, c.30.

89. UK Border Agency, What is the Points-Based System?, <http://www.ukba.homeoffice.gov.uk/employers/points/whatisthepointsbasedsystem/> (last visited Dec. 13, 2008).

90. UK Border Agency, Timetable for Launch, <http://www.ukba.homeoffice.gov.uk/employers/points/timetable/> (last visited Dec. 13, 2008).

language abilities; and their funds available for fiscal self-maintenance.⁹¹ Further revision and guidance of these attributes are ongoing and have not yet been finalized.⁹² Thus, evaluations of this new system's effectiveness, efficiency, and overall success in meeting the United Kingdom's contemporary immigration needs can only be made in the future.

Tier one areas of employment are for individuals who contribute to economic growth and productivity.⁹³ Specifically, this includes highly skilled workers, investors, entrepreneurs, and post-study graduates.⁹⁴ This category does not require an individual to be sponsored by a petitioning employer nor have a pre-existing job offer.⁹⁵ Post-study graduates may look for work and be employed without a sponsor for two years following their graduation from a British university.⁹⁶ This program retains able, educated graduates of British universities in the United Kingdom and contributes to attracting international students to the United Kingdom as well.⁹⁷ Tier two, the category for skilled workers, is intended to fill gaps in the British labor force.⁹⁸ Generally, there are three main qualifications: a job offer, a certificate of sponsorship from a licensed sponsor, and a passing number of points.⁹⁹ There are two subcategories of tier two reserved for religious leaders and athletes who are internationally established at the highest level.¹⁰⁰

Tier three was established for a limited number of low-skilled workers needed to fill specific and temporary labor shortages.¹⁰¹ The United Kingdom publishes a list of the specific occupations that qualify.¹⁰² Tier four is designed for students.¹⁰³ Students who

91. What is the Points-Based System?, *supra* note 89.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See, e.g.*, University of Oxford, Student Funding and International Office: Before You Leave Home, <http://www.admin.ox.ac.uk/io/guide/before.shtml> (last visited Nov. 10, 2008).

97. UK Border Agency, Home Page, <http://www.ukba.homeoffice.gov.uk/> (last visited Nov. 17, 2008).

98. Timetable for Launch, *supra* note 90.

99. What is the Points-Based System?, *supra* note 89.

100. UK Border Agency, Sponsoring Workers Under the Points-Based System, <http://www.ukba.homeoffice.gov.uk/employers/points/whatisthepointsbasedsystem/employingmigrants/> (last visited Dec. 13, 2008).

101. Timetable for Launch, *supra* note 90.

102. *See* What is the Points-Based System?, *supra* note 89.

103. *Id.*

have permission to enter the United Kingdom and will be studying there for a minimum of six months may also work there.¹⁰⁴ Tier five is composed of other temporary workers allowed into the United Kingdom for primarily noneconomic objectives.¹⁰⁵ This includes the youth mobility scheme, which allows young British Commonwealth Citizens to temporarily live and work in the United Kingdom.¹⁰⁶ Tier five is also divided into five subcategories: creative and sporting, charity workers, religious workers, government authorized exchange, and international agreements.¹⁰⁷

Tier three and tier five are temporary routes, and migrants in those tiers will not be able to switch out once they are in the United Kingdom.¹⁰⁸ These applicants are expected to comply with the terms of their stay and to leave the United Kingdom when their authorized stay expires.¹⁰⁹ “Those in tiers [one], [two] and [four] will be eligible to switch between these tiers subject to meeting the requirements of the tier they want to switch to.”¹¹⁰ Tier one and tier two will potentially lead to permanent residency provided that the requirements are satisfied at the time of the application.¹¹¹

The points based system, however, is designed for migrants from outside the European Union (EU).¹¹² As a member of the European Economic Area (EEA), the United Kingdom allows all EEA and Swiss nationals to enter, stay, and work in the country without applying for permission; however, it does not extend this privilege to nationals of Bulgaria and Romania, who are recent EU members.¹¹³

104. British Council, Advice on Immigration and Working in the UK, <http://www.britishcouncil.org/usa-educationuk-immigration-and-work.htm> (last visited Dec. 13, 2008).

105. Timetable for Launch, *supra* note 90.

106. *Id.*

107. Laura Devine, *Is the Newly Skilled Migrant Programme “Fit for Purpose”? If No, the Government’s Proposed Points Based Immigration System is Fundamentally Flawed*, 21 J. IMMIGR. ASYLUM & NATIONALITY L. 90, 103 (2007).

108. UK Border Agency, How It Works, <http://www.ukba.homeoffice.gov.uk/managingborders/managingmigration/apointsbasedsystem/howitworks> (last visited Nov. 6, 2008).

109. *Id.*

110. *Id.*

111. *Id.*

112. See What is the Points-Based System?, *supra* note 89.

113. See UK Border Agency, Bulgarian and Romanian Nationals, <http://www.ukba.homeoffice.gov.uk/eucitizens/bulgarianandromaniannationals/> (last visited Nov. 6, 2008).

The foremost criticism of the United Kingdom's new points-based system asserts that this system allows entrance only for the highest skilled and best paid individuals and fails to provide for the possibility of low-skilled migration from outside of the EEA.¹¹⁴ Furthermore, the system demands proof of qualifications, thereby excluding some professions that require rare but largely undocumented skills.¹¹⁵ According to a recent study, fewer than forty percent of current migrant workers will be part of it.¹¹⁶

Of those that are covered, highly-qualified young people on big salaries will have the easiest passage, being allowed in even without a job offer; medium-skilled workers will have to hunt around more carefully for points, unless their profession is deemed particularly in demand by a new council of economists. Low-skilled workers assigned to a third tier . . . will be shut out, for the time being at least.¹¹⁷

Still, low-skilled workers in the third tier may be allowed in later if there is a sudden need for such workers.¹¹⁸

Yet, as painfully restrictive as the British system may be, it brings precisely those migrants from whom the United Kingdom can receive the greatest economic benefits. The points-based system currently does not have any annual quotas for the number of visas given to foreign nationals, though this provision is currently under debate.¹¹⁹ This means that the number of skilled workers allowed to join the British workforce is not limited. Finally, the points-based system is a simplification replacing eighty previous work-permit-and-entry schemes that "developed in a piecemeal fashion over decades, sometimes reflecting economic need . . . and

114. RSA MIGRATION COMM'N, *MIGRATION: A WELCOME OPPORTUNITY* 6 (2005), http://www.migrationcommission.org/pdf/RSA_migration_report_awo.pdf.

115. *Of Stable Lads and Ballet Dancers*, *ECONOMIST.COM*, May 8, 2008, http://www.economist.com/world/britain/displaystory.cfm?story_id=11332497.

116. *Guarding British Soil*, *ECONOMIST*, Jan. 5, 2008, at 47, 47, available at http://www.economist.com/world/britain/displaystory.cfm?story_id=10442987.

117. *Id.* at 48.

118. *Id.* ("Ministers will be able to move points thresholds up and down according to what they, advised by assorted wise men, think is in the national interest.")

119. See UK Border Agency, *Strict New Jobs List for Migrant Workers*, <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/macshortagelists> (last visited Nov. 6, 2008) ("Crucially, the points system means only the migrants with the skills Britain needs can come - and no more. Unlike made-up quotas, this stops Government cutting business off from the skills it needs when they need them.") (quoting Border & Immigration Minister Liam Byrne).

sometimes reflecting the political mood.”¹²⁰

Canada

Canada is considered to have one of the most forward-looking immigration policies for skilled workers in the world.¹²¹ Canada operates a points-based immigration system, rewarding education and advanced skills to import foreign workers.¹²² Points are assessed on six selection factors: education, ability in English or French, experience, age, arranged employment, and adaptability.¹²³ The primary statute for Canadian immigration law is the 2002 Immigration and Refugee Protection Act (IRPA), which largely replaced the former Immigration Act of 1976.¹²⁴ In 2007, 236,800 immigrants entered Canada, mostly classified as economic immigrants, which accounted for approximately two-thirds of the country’s annual population growth.¹²⁵

Seven primary categories of temporary, employment-based immigration in Canada exist.¹²⁶ Those seven programs are intercompany transfer, software worker, NAFTA professional, reciprocal employment exchange, labor market opinion (or labor certification), postgraduate employment, and spouse of skilled worker.¹²⁷ Temporary work permits for applicants in these categories are issued at a port of entry.¹²⁸ For certain categories and nationalities, an applicant initially may have to acquire a letter of authorization or a pre-approval letter at a visa office before appearing at a Canadian port of entry.¹²⁹ Employees on temporary work permits are limited to the specifications that are on their work permits.¹³⁰ If their position or title changes, or if they are required

120. Dominic Casciani, *Migration: How Points Will Work*, BBC NEWS, Feb. 29, 2008, http://news.bbc.co.uk/1/hi/uk_politics/4244707.stm.

121. See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U.L. REV. 1277, 1347 (2008).

122. See Citizenship and Immigration Canada, <http://cic.gc.ca/english/resources/publications/busimm.asp> (last visited Nov. 6, 2008).

123. *Id.*

124. See Immigration and Refugee Protection Act, 2001 S.C., ch. 27 (Can.).

125. See Statistics Canada, http://www.statcan.ca/english/freepub/91-209-XIE/2004_000/high-en.htm (last visited Nov. 6, 2008).

126. AM. IMMIGRATION LAWYERS ASS’N, AILA’S GLOBAL IMMIGRATION GUIDE: A COUNTRY-BY-COUNTRY SURVEY 24 (Scott M. Borene et al. eds., 2005).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 24–25.

to switch to a different location, the petition must be amended prior to the change.¹³¹ If they take a job with a different employer, they must apply for a new work permit.¹³² Depending on the category, temporary work permits may be issued for a period of three years, but most are limited to one year increments with the potential for renewal.¹³³ The processing time for a temporary work permit where the applicant has pre-approval is usually as short as three weeks.¹³⁴ Approximately three additional weeks are needed if a medical evaluation is required, and three more weeks of processing are required for a labor certification.¹³⁵

The most common method for work permit holders to obtain permanent residence in Canada is through the independent skilled worker category.¹³⁶ Provided the applicant is in Canada, has a valid work permit, possesses at least a post-secondary education, and does not have a serious medical condition or a criminal record, then a permanent residency application should be approved.¹³⁷ American, Mexican, and Chilean citizens particularly benefit under Canadian immigration law through sections of the North American Free Trade Agreement and the Canada-Chile Free Trade Agreement.¹³⁸

The Canadian employment-based immigration system shares the same costs and benefits as the British structure. It is a simplified system without annual quotas that helps to provide the country with highly skilled workers, yet it limits the immigration options of lower-skilled workers.¹³⁹ It also offers unlimited renewals of most temporary employment-based visas.¹⁴⁰

131. *Id.*

132. *Id.* at 25.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See generally* Citizenship and Immigration Canada, *Immigrating to Canada: Skilled Workers and Professionals*, <http://cic.gc.ca/english/immigrate/skilled/index.asp> (last visited Dec. 13, 2008) (describing how the Canadian immigration system prefers skilled workers and professionals).

140. *See* AM. IMMIGRATION LAWYERS ASS'N, *supra* note 126, at 25.

Australia

Australia's points-based immigration system has served as a model for many nations.¹⁴¹ Following World War II, Australia created its Department of Immigration and Citizenship, launched a massive immigration program, and passed what is still the basis for its immigration laws—the Migration Act 1958.¹⁴² Some 6.8 million people have migrated to Australia since 1945.¹⁴³ This represents a significant proportion of the overall population increase experienced by Australia within that time, having gone from nearly seven million in 1945 to over twenty-one million today.¹⁴⁴ The present Australian immigration model is largely found in the Migration Regulations 1994.¹⁴⁵

The majority of immigrants entering Australia (133,500 or 70 percent) are skilled workers.¹⁴⁶ Yet, Australia still faces a skills shortage.¹⁴⁷ As of 2008, its booming economy is in its seventeenth year of uninterrupted growth with unemployment at a thirty year low, and Australia is working to invest in skills and intellectual infrastructure to meet this demand.¹⁴⁸ The Immigration Minister has stated that Australia's old approach to immigration "was designed for a world in which people did not move much."¹⁴⁹ He has argued that Australia now needs a program suited to a global age in which people migrate frequently for work.¹⁵⁰ Further, he has also expressed his belief that Australia's economy cannot continue

141. See Workpermit.com, Points Based Immigration Systems Around the World, <http://www.workpermit.com/news/2008-03-06/world/points-based-immigration-systems-around-globe.htm> (last visited Dec. 13, 2008) ("Australia's skilled migration program has worked so well, it has influenced a new system currently being implemented by Britain.").

142. Migration Act, 1958 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/.

143. Australian Immigration Fact Sheet 2, Key Facts in Immigration, <http://www.immi.gov.au/media/fact-sheets/02key.htm#a> (last visited Dec. 13, 2008).

144. *Id.*

145. See Migration Regulations, 1994 (Austl.), available at <http://www.comlaw.gov.au/comlaw/comlaw.nsf/sh/homepage> (search for Migration Regulations 1994).

146. *Give Us Your Huddled Masses, Mate*, ECONOMIST, May 31, 2008, at 47, 48, available at 2008 WLNR 10143684.

147. *Id.*

148. *Id.* at 47–48.

149. *Id.* at 48.

150. *Id.*

growing without many more skilled migrant workers.¹⁵¹ In 2008, Australia addressed that need, announcing revisions to the immigration program that are predicted to bring the largest yearly increase since the immigration program was launched.¹⁵²

Numerous categories of visas exist for foreign nationals entering Australia for temporary business or employment reasons.¹⁵³ The three most common visa categories include subclass 456, subclass 457, and Business Electronic Travel Authorization (Business ETA).¹⁵⁴ These three categories allow an individual to enter Australia for business or employment purposes, but they differ in the amount of authorized time the individual may stay in Australia and the type of employment undertaken.¹⁵⁵

Both the subclass 456 and the Business ETA enable the applicant to perform highly skilled labor that is related to their employment outside Australia and that cannot be carried out by an Australian citizen or permanent resident.¹⁵⁶ For example, this could be an employee coming to support a short-term project for an affiliate company in Australia, but not an appointment to a permanent position in Australia. The subclass 456 and the Business ETA are both valid for up to three months permitting multiple entries during the life of an individual's passport.¹⁵⁷ The procedure for securing a Business ETA is simple; if the applicant holds an eligible passport (there is a list of thirty-two eligible countries¹⁵⁸) he may apply when he makes his flight reservation, or

151. *300,000 Skilled Workers Needed – Evans*, NEWS.COM.AU, May 17, 2008, <http://www.news.com.au/story/0,,23714642-421,00.html>.

152. *Id.* Under the new program, more than 300,000 migrants will enter Australia. *Id.*

153. *See generally* Australia Visa and Migration Agent Information, <http://www.australiavisa.com.au/> (last visited Nov. 6, 2008) (displaying over 100 subclasses of Australian visas); Austl. Dep't of Immigration and Citizenship, Business Visit Visa Options, <http://www.immi.gov.au/skilled/business/business-visit-visa-options.htm> [hereinafter Business Visit Visa Options] (last visited Nov. 6, 2008) (displaying business visa options).

154. *See generally*, Mary E. Crock, *Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology*, 16 GEO. IMMIGR. L.J. 133 (2001) (providing information on various visa categories available to qualified foreign nationals).

155. *Id.*

156. *See* Business Visit Visa Options, *supra* note 153; *see also* Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, 13 GEO. IMMIGR. L.J. 273, 306 (1999).

157. Crock, *supra* note 154, at 141.

158. Zierer Visa Service, Australian Electronic Travel Authorization (ETA) Application 1 (2007), http://www.zvs.com/zvs_eta.pdf (listing the thirty-two countries where ETAs are valid).

later online.¹⁵⁹ If the applicant is not a national of one of the thirty-two eligible countries, the person will apply for a subclass 456 visa by filing a petition with an Australian embassy or consulate.¹⁶⁰ Provided the applicant meets the criteria, both visas are approved and processed within one month of filing.¹⁶¹

Conversely, the subclass 457 visa allows an employee to be appointed to a formal position in Australia and is valid for stays between three months and four years.¹⁶² This visa allows Australian employers to recruit highly skilled employees that will be essential to the overall operation of the company.¹⁶³ The procedure for obtaining a subclass 457 is threefold: first, approval as a business sponsor; second, nomination of the position; and third, individual visa application.¹⁶⁴ This process may be undertaken both within Australia and at an Australian consulate or embassy abroad.¹⁶⁵ The position the subclass 457 applicant will engage in must be an occupation requiring professional, paraprofessional, or trade qualifications or experience; and there are minimum salary regulations for the position being offered.¹⁶⁶ An established company in Australia can apply to be a standard business sponsor—which is valid for two years—and receive a number of pre-approved

159. See Austl. Dep't of Immigration and Citizenship, Visas & Immigration, http://www.immi.gov.au/e_visa/eta.htm (last visited Dec. 13, 2008) (providing general ETA information regarding online applications); Australian Electronic Travel Authority, <http://www.eta.immi.gov.au/> (last visited Dec. 13, 2008) (providing access to apply for an ETA online).

160. See AM. IMMIGRATION LAWYERS ASS'N, *supra* note 126, at 142; see also Austl. Dep't of Immigration and Citizenship, Business (Short Stay) Visa (Subclass 456), <http://www.immi.gov.au/skilled/business/456/how-to-apply.htm> (last visited Nov. 10, 2008) (detailing 456 visa application procedures).

161. See Austl. Dep't of Immigration & Citizenship, Business (Short Stay) Visa (Subclass 456), After You Lodge Your Application, <http://www.immi.gov.au/skilled/business/456/after-you-lodge.htm#a> (last visited Nov. 10, 2008).

162. See Crock, *supra* note 154, at 141–42.

163. *Id.*

164. Austl. Dep't of Immigration & Citizenship, Visas & Immigration, <http://www.immi.gov.au/skilled/skilled-workers/sbs/how-to-apply.htm> (last visited Oct. 16, 2008) (describing the three step procedure to apply for a subclass 457 visa).

165. See AM. IMMIGRATION LAWYERS ASS'N, *supra* note 126, at 142. See generally, Austl. Dep't of Immigration & Citizenship, Visas & Immigration, <http://www.immi.gov.au/skilled/skilled-workers/sbs/index.htm> (last visited Oct. 16, 2008) (describing subclass 457 visas generally).

166. See Austl. Dep't of Immigration & Citizenship, Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2008 (2008), <http://www.immi.gov.au/skilled/skilled-workers/sbs/occupations.pdf>.

sponsor positions.¹⁶⁷ It takes between four weeks and three months for most subclass 457 visas to be approved.¹⁶⁸

The Employer Nominated Scheme (ENS) is the most widely used means for skilled international workers in Australia to gain permanent residency.¹⁶⁹ This category has several requirements: there must be an employer sponsor, the employee being sponsored has to be highly skilled, and the sponsor must demonstrate that there are no Australian citizens suitable for the job being offered to an international skilled worker.¹⁷⁰ Independent executives who can demonstrate that they have started their own successful business in Australia may also be eligible to apply for permanent residency.¹⁷¹

Among the strengths of Australia's immigration system are its rapid visa processing, employee flexibility through multiple entry visas, and malleability to Australia's current economic needs.

IV. CONTEMPORARY GLOBAL ECONOMY

Today, individuals, corporations, and states operate in a distinctly unique economy compared to that experienced in past decades. Goods, capital, labor, and ideas circulate through increasingly permeable national boundaries at increasing volume and speed. Their scope, as well as their nature, is truly global. The contemporary global economy can be defined as the rapid and extensive transnational movement of capital, money, goods, services, people, ideas, and technology to achieve productivity in the integrated worldwide market.¹⁷²

The transfusion of ideas and the movements of people and goods around the globe have been around for centuries and are certainly not new phenomena.¹⁷³ What characterizes our current

167. See generally Austl. Dep't of Immigration & Citizenship, Visas & Immigration: Employer Eligibility Subclass 457, <http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-employer.htm> (last visited Oct. 16, 2008) (describing employer eligibility requirements).

168. Austl. Dep't of Immigration & Citizenship, Subclass 457 Application Processing Times, <http://www.immi.gov.au/skilled/skilled-workers/sbs/application-processing-times.htm> (last visited Nov. 11, 2008).

169. AM. IMMIGRATION LAWYERS ASS'N, *supra* note 126, at 143.

170. *Id.*

171. *Id.*

172. See generally Beth A. Simmons & Zachary Elkins, *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization*, GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 275 (Miles Kahler & David A. Lake eds., 2003).

173. See generally Law, *supra* note 121, at 1294-96 (discussing the extensive

era of the global economy, however, is distinctly novel.

It is not merely the speed and volume of transnational activity that have changed profoundly, but also the nature of such activity. International trade in natural resources has been eclipsed by movements of intangible assets, intellectual capital, and manufactured goods that owe their existence to tightly integrated multinational supply and production chains. The advent of globally integrated production, triggered by the lowering of trade and investment barriers, is said to mark the evolution of the ‘multinational corporation’ . . . into the ‘globally integrated enterprise. . . .’¹⁷⁴

Markedly, “[i]nternational capital flows now exceed one trillion dollars a day.”¹⁷⁵ And the amount traded on modern currency markets each day equals approximately four trillion dollars, which is greater than the annual gross domestic product of the United States.¹⁷⁶ The propagation of ideas and technology circulate nearly as rapidly.¹⁷⁷ “The membrane of the nation-state is becoming increasingly permeable: not only are governments lowering the barriers to transnational exchange, but their capacity to enforce those barriers is continually undermined by advances in transportation, communication, miniaturization, and digitization technology.”¹⁷⁸

In the contemporary global economy, human capital is also increasingly mobile so both states and companies must now compete for talent in a worldwide market. The number of people who are currently living outside their country of birth has doubled in less than forty years and now totals up to 150 million people, or 2.5 percent of the world’s population.¹⁷⁹ Breaking this number down, there exists a polarity such that most emigrants tend to be either skilled workers with the financial means to emigrate, or are facing desperate economic or social conditions which necessitate

international flow of goods and people experienced before World War I).

174. *Id.* at 1296.

175. *Id.* (citing Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1585–86 (2000)).

176. *Id.* at 1297 (citing PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 221 (2003)).

177. *See id.* at 1286–88 (describing how globalization has helped the spread of constitutional ideas).

178. *Id.* at 1286.

179. *Id.* at 1324.

them to emigrate.¹⁸⁰ Yet for all migrants, the vast majority move for economic incentives. Where economic growth is strong, migrant workers are drawn. This does not, however, only mean Western Europe and the United States, but holds true for most emerging markets such as India and China. The top six countries receiving immigrants are the United States, the United Kingdom, Spain, Canada, Australia, and the United Arab Emirates.¹⁸¹ The top six countries sending emigrants to the United States are Mexico, India, China, the Philippines, Colombia, and Haiti.¹⁸²

Though most migrant flows are between nearby countries, a recent survey by Manpower, a global employment services firm, shows that 36.9 percent of employees would consider moving anywhere in the world for work.¹⁸³ Based on examples from previous migration movements, “countries stop sending large numbers of migrants once they get to a certain level of wealth.”¹⁸⁴ “Based on the experience of countries like Spain, Portugal, Greece and South Korea, emigration usually slows when income per person approaches a threshold level in relation to income in the richer countries where the migrants are heading.”¹⁸⁵ That change occurs when the ratio of incomes reaches about 1:4 or 1:5.¹⁸⁶

“[E]asier movement of capital and goods has helped to make the world a much richer place in the past decade or two, and more human mobility has both created wealth and helped to share it out more equally.”¹⁸⁷ One of the reasons much of the world has seen a sustained economic boom with low rates of inflation over the past

180. *Id.* (citing PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE 267 (2d ed. 1999)).

181. *Beyond Brain Drain*, ECONOMIST.COM, June 24, 2008, http://www.economist.com/research/articlesbysubject/displaystory.cfm?subjectid=7933600&story_id=11611190.

182. KELLY JEFFERYS & RANDALL MONGER, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2007 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf.

183. MANPOWER INC., RELOCATING FOR WORK SURVEY: GLOBAL RESULTS 2008 (2008), http://files.shareholder.com/downloads/MAN/441121196x0x208360/24508db9-9e07-430b-b7ef-913f47b5ed63/RelocatingForWorkSurvey_Global_FINAL.pdf.

184. *Migration: A Turning Tide?*, ECONOMIST, June 28, 2008, at 30, 32, available at http://www.economist.com/displaystory.cfm?story_id=11614062.

185. *Id.*

186. *Id.*

187. *Open Up*, ECONOMIST (SPECIAL REPORT), Jan. 5, 2008, at 3, 5, available at http://www.economist.com/specialreports/displayStory.cfm?story_id=10286197.

decade is because the global labor market has expanded so quickly.¹⁸⁸ The IMF reported that the labor market quadrupled since 1980 due in large part to China and India's large, young populations more fully entering the global work force.¹⁸⁹ It is likely to keep growing given the projection of a 40 percent increase in the world's working-age population by 2050.¹⁹⁰ Studies attempting to estimate possible world economic gains resulting from liberalizing immigration policies find that world real income would increase from 5.6–12.3 percent, or from \$1.97–\$4.33 trillion per year.¹⁹¹ The most conservative estimate still exceeds current amounts of international aid and foreign direct investment combined in less developed countries.¹⁹²

Moreover, these benefits are realized by all involved parties: the individual migrating, the sending country, and the receiving country.¹⁹³ The advantages to the individual are most obvious: higher wages, career advancement, and perhaps better access to high-quality education and personal freedoms.¹⁹⁴ The country they left also stands to benefit. Remittances to low income countries in 2006 totaled at least \$240 billion, more than aid and foreign investment combined for some countries.¹⁹⁵ It has been argued that shrinking work forces in sending countries inflate wages for the remaining laborers.¹⁹⁶ The IMF states that “emigration from Belize, El Salvador, Guyana and Jamaica, for example, may have led to higher wages and less poverty.”¹⁹⁷ Migrants who go abroad for employment often return to their home countries with greater

188. *Id.* at 4.

189. *Id.*

190. *Id.*

191. Howard Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L.J. 1, 4 (2008).

192. *Id.*

193. *Id.* at 5–6.

194. *See id.*

195. *See Send Me a Number*, ECONOMIST (SPECIAL REPORT), Jan. 3, 2008, at 10, 11, available at http://www.economist.com/specialreports/displaystory.cfm?story_id=10286141.

196. *See, e.g.*, WORLD BANK, WORLD BANK EU 8 QUARTERLY ECONOMIC REPORT, LABOR MIGRATION FROM THE NEW EU MEMBER STATES 28–29 (2006), http://siteresources.worldbank.org/INTECA/Resources/EU8QERSeptember2006_SpecialTopicFINAL.pdf (arguing that outflows of labor can create skill shortages and bottlenecks in the sending country which can lead to increased wage pressures).

197. *Open Up*, *supra* note 187, at 4.

knowledge, skills, and experience.¹⁹⁸ Returning employees transfer technology and are a greater asset to their native country's workforce and economy.

V. SPECIFIC EFFECT OF IMMIGRATION ON AMERICAN COMPETITIVENESS

Many indicators suggest that receiving countries, and in this case the United States, benefit currently from employment-based immigration and will continue to do so in the future.¹⁹⁹ In 2006, immigrants made up 12.5 percent of the population, or 37.4 million people in the United States.²⁰⁰ In economic terms alone, the United States has measurably profited from employment-based immigration; a recent report produced by Goldman Sachs states that overall economic output slows as the American labor force grows more slowly, and that new migrants have added approximately 0.5 percent to American gross domestic product every year in the past decade.²⁰¹ Skilled immigrants supplement an aging and shrinking American workforce; they are entrepreneurs who create jobs and wealth, consumers of goods and services, and skilled workers whose large numbers encourage capital business investment.²⁰² Employment-based immigrants also pay taxes in the United States.²⁰³ A study by the National Research Council points out that migrants with more than a high school education generate a net fiscal benefit of \$198,000 over their lifetime.²⁰⁴ Immigrant labor also helps keep the American economy stable because,

198. *Id.* at 5 (“Indeed, some argue that emigration can help to add to the stock of brainpower. Migrants who go abroad may spend more time studying, pick up more skills and experience and then bring them all home again.”).

199. See e.g., *Of Bedsheets and Bison Grass Vodka*, ECONOMIST (SPECIAL REPORT), Jan. 5, 2008 at 5, 5–6.

200. JACK MARTIN, FED’N FOR AMER. IMMIGRATION REFORM, THE IMMIGRANT POPULATION OF THE UNITED STATES IN 2006 3 (2007), available at <http://www.fairus.org/site/DocServer/06USFBPOP.pdf?docID=1561>.

201. Andrew Tilton et al., *Global Economics Paper No. 168, Immigration and the North American Economy*, 168 Goldman Sachs Econ. Research 1 (2008), available at <http://www.gdsnet.org/classes/GSEconomicsPaper168ImmigrationandUS.pdf>.

202. See *id.* at 9–11 (noting that immigrants add to labor supply by their sheer presence and increase labor demand by increasing consumption levels and by spurring increased business investment).

203. *Of Bedsheets and Bison Grass Vodka*, *supra* note 199, at 7; see also Tilton et al., *supra* note 201, at 13–14.

204. PANEL ON THE DEMOGRAPHIC AND ECON. IMPACTS OF IMMIGRATION, NAT’L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 350 (James P. Smith & Barry Edmonston eds., 1997).

during strong growth periods, immigrants lower “the risk of wage pressures and rising inflation.”²⁰⁵ If growth slows, migrants often choose to move home, to migrate to another country, or not to migrate initially.²⁰⁶

Skeptics of the benefits of employment-based immigration argue that immigrants fill jobs that otherwise could have been occupied by native workers.²⁰⁷ This assertion may hold true for the least well off Americans, as income inequality has increased in the United States, while the real wages of the least skilled workers have decreased.²⁰⁸ Where immigrants do directly compete with native workers in low skill jobs, wages have been kept 3–8 percent lower.²⁰⁹ Yet overall low unemployment rates suggest that immigrants have not displaced native workers.²¹⁰ Moreover, labor demand does not remain fixed when immigrants enter the economy,²¹¹ and the economic net gain should not be undervalued.

Immigrants to the United States have assisted the drive for innovation and entrepreneurship and have helped keep the United States at the forefront of industry.²¹² Greater numbers of skilled workers provide greater intellectual wealth, an immeasurably valuable resource for companies, universities, and research institutions to incite future developments in their fields.²¹³ As a recent article in *The Economist* points out:

America has always thrived by attracting talent from the world. Some 70 or so of the 300 Americans who have won Nobel prizes since 1901 were immigrants. Great American companies such as Sun Microsystems, Intel and Google had immigrants among their founders. Immigrants continue to make an outsized contribution to the American economy. About a quarter of information technology (IT) firms in Silicon Valley were founded by Chinese and Indian immigrants. Some 40 % of American PhDs in science and engineering go to immigrants. A similar proportion of all the patents filed in America are

205. *Of Bedsheets and Bison Grass Vodka*, *supra* note 199, at 6.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *The New Face of the Low Wage Workforce*, NPC POLICY BRIEF No. 8 (Nat'l Poverty Ctr., Gerald R. Ford Sch. of Pub. Policy, Univ. of Mich.), Jan. 2007, at 3.

211. *See Chang*, *supra* note 191, at 1.

212. *See Help Not Wanted*, *supra* note 85, at 38.

213. *See id.*

filed by foreigners.²¹⁴

Employment-based immigrants to the United States can also alleviate specific labor shortages.²¹⁵ The U.S. Labor Department projects that by 2014 there will be more than two million job openings in science, technology, and engineering, while the number of Americans graduating with degrees in those areas are plummeting.²¹⁶ Supplementing this deficiency with skilled, educated, foreign-born employees will maintain American industry leadership in these fields.

All these benefits, however, are at risk because the United States is simply ill-equipped for today's global labor market.²¹⁷ The current employment-based immigration system fails to vigorously compete for human capital. Immigration policies that may have worked well in a world of relatively impermeable borders and immobile factors of production, particularly labor, are not only unsuitable for today's world of porous borders and relentless mobility, but are a handicap.²¹⁸ Evolving patterns of commerce, communication, and migration necessitate change in domestic immigration conceptions.²¹⁹

"None of these competitive advantages can be realized, however, if countries do not reform their immigration policies to facilitate the entry of skilled workers. No country can compete effectively for human capital in the global labor market until it first chooses to compete."²²⁰ American policy "lacks focus and fails to exploit this country's many advantages in the global competition for human talent."²²¹

American businesses seek better avenues to compete in the global labor market. According to Sam Palmisano, the Chief Executive Officer of IBM, the "single most important challenge" facing today's 'globally integrated enterprises' and 'the

214. *Id.*

215. *See id.*

216. *See generally* Daniel E. Hecker, *Occupational Employment Projections to 2014*, 128 MONTHLY LAB. REV. 70, Nov. 2005, available at <http://www.bls.gov/opub/mlr/2005/11/art5full.pdf> (describing labor market projections for the United States from 2004–2014).

217. *See* Hahm, *supra* note 48, at 1694 (arguing that in order to remain competitive and able to adapt to rapid changes in the global market American businesses need a more efficient worker visa program).

218. *Law, supra* note 121, at 1287.

219. *See id.* at 1297.

220. *Id.* at 1347.

221. *Id.*

consideration driving most business decisions today' is the need to secure 'a supply of high-value skills.'²²² In 2007, Microsoft chairman Bill Gates testified before a Senate committee "that the only way to solve the 'critical shortage of scientific talent' was to open up the country's doors."²²³ The United States has already seen some consequences of its failure to adjust to the new global market as businesses have moved offshore to attract skills and talent.²²⁴ One example is Washington-based Microsoft, which opened a software development center in Canada partly because Canada's liberal immigration laws made it easier for them to recruit qualified workers from around the globe.²²⁵

VI. CONCLUSION

In the past, skilled migrants had few options but to tolerate restrictive U.S. immigration policies.²²⁶ Many European countries had similarly rigid immigration restrictions and countries such as China and India were underdeveloped and had restrictive policies as well.²²⁷ Today, these countries are reforming their immigration policies and *opening* their borders while the United States appears to be *closing* its borders.²²⁸ Emerging markets with growing economies are now competing for skilled migrants, and as the surveys above demonstrate, traditional competitors such as Europe and Canada are re-working their immigration systems to attract global talent.²²⁹

The United States is fortunate in that it already possesses most of the elements that attract both skilled migrants and the multinational companies that seek to hire them, namely, a dynamic economy, a world-class higher education system, a record of upholding human rights, and a transparent and stable political and social system. All of the elements but one, the immigration system, is in place to make the United States a top competitor for global talent. The immigration system has to be made resoundingly receptive to immigrants and their contributions.

222. *Id.* at 1322 (quoting Samuel J. Palmisano, *The Globally Integrated Enterprise*, 85 FOREIGN AFF. 127, 133–34 (May-June 2006)).

223. *Beauty and the Geek*, ECONOMIST, June 21, 2008, at 85.

224. *Help Not Wanted*, *supra* note 85, at 38.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

This survey and analysis has shown that a more progressive policy that attracts and retains skilled immigrants is imperative for the United States to remain competitive. This policy must meet three basic requirements: 1) it must incorporate and respect effective labor standards; 2) it cannot have arbitrary numerical limits on the number of employment-based visa applicants; and 3) there should be no limit on the number of years a worker can renew their visas and remain in the United States. These three factors represent the paradigm of immigration laws for the future.

The arbitrary numerical limits to employment-based visas have no place in contemporary immigration laws. For instance, between 2004 and 2008, several thousand H-1B petitions were rejected because of the numerical cap.²³⁰ These applications were not reviewed, and the applicants apparently had to go elsewhere for employment.²³¹ Those whose applications were accepted were subjected to a random selection system.²³² This is not the way to remain competitive. The affected employers are forced to move those jobs to countries where immigration is not an impediment to productivity or lose workers to other competing countries.

The employment-based immigration system should be seen as one of the most important elements in U.S. economic development. The employment-based immigration system, particularly the H-1B program, should be viewed “not merely as an immigration policy, but rather as a new paradigm of economic and labor policy.”²³³ Just as other countries are moving away from immigration systems with artificial restrictions on the movement of labor, so must the United States. If adequate labor protections are in place, employers should be free to seek out, hire, and retain skilled foreign workers in the United States to continue the country’s competitive edge in the global economy.

230. See Jonathan G. Goodrich, Comment, *Help Wanted: Looking for a Visa System that Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975, 996 (2008). In 2005, applicants filled the H-1B visa cap on the first day of availability, in 2006 they filled the cap two months before visas were available, and in 2007 they filled the cap five months before. *Id.*

231. See *Help Not Wanted*, *supra* note 85, at 38.

232. *Id.*

233. Hahm, *supra* note 48, at 1677.