

# Journal of Law & Commerce

Vol. 41, No. 2 (2023) • ISSN: 2164-7984 (online)  
DOI 10.5195/jlc.2023.259 • <http://jlc.law.pitt.edu>

## NOTE

THE RIGHT VISA AT THE RIGHT TIME: PROPOSING A TARGETED  
SPECIAL IMMIGRANT VISA AS A FLEXIBLE TOOL FOR  
PRACTICAL IMMIGRATION REFORM

*Fred J. Porter*



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# NOTE

## THE RIGHT VISA AT THE RIGHT TIME: PROPOSING A TARGETED SPECIAL IMMIGRANT VISA AS A FLEXIBLE TOOL FOR PRACTICAL IMMIGRATION REFORM

*Fred J. Porter\**

### I. INTRODUCTION

As the Islamic Republic of Afghanistan collapsed in the summer of 2021 and the Taliban moved into Kabul to displace the American-backed government, thousands of Afghans who had worked with the U.S. government were airlifted to the United States to receive emergency residency.<sup>1</sup> These individuals' work put them under direct threat from the Taliban, and with their lives now at risk, continuing to live in Afghanistan was no longer an option.<sup>2</sup> As part of Operation Allies Welcome, the U.S. government resettled thousands of Afghans and streamlined residency processing to provide them with immigrant status in the United States.<sup>3</sup>

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<sup>1</sup> *Statement by President Joe Biden on the Evacuation Mission in Kabul*, THE WHITE HOUSE BRIEFING ROOM (Aug. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/28/statement-by-president-joe-biden-on-the-evacuation-mission-in-kabul/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Secretary Mayorkas Delivers Remarks on Operation Allies Welcome*, DEP'T OF HOMELAND SEC.: SPEECHES (Sept. 3, 2021), <https://www.dhs.gov/news/2021/09/03/secretary-mayorkas-delivers-remarks-operation-allies-welcome>; *see also* Jake Sullivan, Memorandum on the Designation of the Department of Homeland Security as Lead Federal Department for Facilitating the Entry of Vulnerable Afghans into the United States, THE WHITE HOUSE BRIEFING ROOM (Aug. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/29/memorandum-on-the-designation-of-the-department-of-homeland-security-as-lead-federal-department-for-facilitating-the-entry-of-vulnerable-afghans-into-the-united-states/>.

Commentators have noted that the Afghan withdrawal was clumsy, dangerous, largely chaotic, and tragically resulted in the deaths of many individuals, including both U.S. soldiers and Afghan civilians.<sup>4</sup> It also left many thousands of Afghans eager for U.S. residence behind in Kabul, often with visas stuck in years of consular processing.<sup>5</sup> The shortcomings, failures, and humanitarian consequences of this operation, while certainly worthy of reflection and further attention, are not within the scope of this Note. Of interest here are the legal mechanisms by which these individuals were brought to the United States, the statutes authorizing the visas that they were issued, and the curious departure from the usual immigration gridlock that was presented under these circumstances. Through certain legislative actions, many tens of thousands of Afghans have been given residency in the United States.<sup>6</sup> How can this be, in a country where a visa may take some noncitizens decades to receive?<sup>7</sup>

This Note will demonstrate the ease by which new visas can be created when the need is deemed great enough and the value that such visa creation offers to a system that desperately needs immigration reform in the face of political deadlock. Special visa creation offers benefits by allowing the issuance of a finite number of visas to targeted populations through bite-sized pieces of legislation enacted more easily than larger reform. This Note aims to persuade the reader that such reform offers a feasible solution to reducing the immigration backlog, that such reform would be politically palatable, and that such reform offers a myriad of economic benefits to the United States.

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<sup>4</sup> See generally J. Sayre Payne, *A Duty Owed: The Failure of the Special Immigrant Visa Program and its Message to Allies and Enemies*, 44 DAYTON L. REV. 631 (2019) (providing several perspectives on Afghans left after the U.S. withdrawal).

<sup>5</sup> See *id.* at 634.

<sup>6</sup> Secretary Mayorkas Delivers Remarks on Operation Allies Welcome, *supra* note 3.

<sup>7</sup> See generally *Visa Bulletin for February 2022*, U.S. DEP'T OF STATE BUREAU OF CONS. AFFS. (Jan. 7, 2022), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-february-2022.html> (describing the wait times for filing dates for visa eligibility, ranging from immediately to the late 1990s).

## II. THE AMERICAN IMMIGRATION LEGISLATIVE LANDSCAPE

All American immigration law flows from the Immigration Act of 1990,<sup>8</sup> a major legislative upgrade to the earlier Immigration and Nationality Act of 1952 (INA),<sup>9</sup> and the last significant immigration reform in the past thirty years. The executive system created by this legislative framework is immense. Tens of thousands of individuals work for the Department of Homeland Security (DHS) in Customs and Border Patrol (CBP),<sup>10</sup> Immigration Control and Enforcement (ICE),<sup>11</sup> and the United States Citizenship and Immigration Services (USCIS),<sup>12</sup> all enforcing different branches of the law in concert. Adjudication on thousands of issues happens every day,<sup>13</sup> and an attempt to analyze the intricate workings of this system here would be futile.

Most relevant to this Note is the work conducted by the USCIS, which processes timely filed immigration petitions to disburse benefits, which may include nonimmigrant visas, immigrant visas (known colloquially as “green cards”), and naturalization.<sup>14</sup> The benefits in question are often visas, which are issued and numbered annually based on formulas created by the INA.<sup>15</sup> Critical to current immigration backlogs is the “cap,” a hard limit on visas that can be issued in any given year.<sup>16</sup> Congress’ current annual cap is

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<sup>8</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (amending 8 U.S.C. §§ 1101–1778).

<sup>9</sup> Immigration and Nationality Act, 8 U.S.C. §§ 1101–1778 (1952).

<sup>10</sup> See *About CBP*, U.S. CUSTOMS & BORDER PROT. (Jan. 4, 2022), <https://www.cbp.gov/about>.

<sup>11</sup> See *About Us: Who We Are*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/about-ice#> (Jan. 18, 2023).

<sup>12</sup> *Chapter 1—Purpose and Background*, USCIS POL’Y MANUAL (Feb. 10, 2022), <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-1>.

<sup>13</sup> See *Yearbook of Immigration Statistics: Table 6. Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2018 to 2020*, DEP’T OF HOMELAND SEC. (Feb. 2, 2022), <https://www.dhs.gov/immigration-statistics/yearbook/2020/table6>; see also *A Day in the Life of USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 16, 2022), <https://www.uscis.gov/about-us/a-day-in-the-life-of-uscis>.

<sup>14</sup> STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 3 (7th ed. 2019).

<sup>15</sup> *Id.* at 329.

<sup>16</sup> *Id.* at 8.

480,000 visas for family-sponsored immigrants,<sup>17</sup> 140,000 visas for employment-sponsored immigrants,<sup>18</sup> and 55,000 visas for diversity immigrants.<sup>19</sup> A fourth pathway to residency comes through the asylum program, which the president is authorized to set—as he or she deems appropriate—by the INA,<sup>20</sup> and which currently sits at 125,000 visas.<sup>21</sup> Asylum legislation recognizes that changing geopolitical circumstances justify empowering the president to be flexible and alter visa numbers as necessary.<sup>22</sup>

The employment-sponsored immigrant category includes an interesting category of visas: Special Immigrant Visas (SIVs), a subcategory of visas that were each created by legislation when a unique need was recognized but not applicable under other family or employment-based categories.<sup>23</sup> A review of the SIV statutory language gives the reader insight into Congress' intentions for this visa to encompass a miscellany of needs as they arose.<sup>24</sup> Among visas reserved under the SIV subcategory are, *inter alia*, visas for Panama Canal employees, Special Juvenile Immigrants, U.S. Armed Forces recruited abroad, international broadcasting employees, and certain victims of terrorism.<sup>25</sup> Created from more recent legislation is an SIV category for Special Immigrant Translators, as well as Afghan and Iraqi allies from the

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<sup>17</sup> *Id.* at 329. While actual immigration numbers change year-to-year depending on prior years' family-sponsored visas or unused employment-based visas, as well as demand, the overall cap is referenced here for simplicity.

<sup>18</sup> *Id.* at 330.

<sup>19</sup> *Id.*; see also Immigration and Nationality Act, 8 U.S.C. § 1151(c)–(e).

<sup>20</sup> LEGOMSKY & THRONSON, *supra* note 14, at 1149. For clarification on the definition of asylee versus refugee see *Refugees and Asylees*, DEP'T OF HOMELAND SEC.: PUBLICATION LIBRARY (Mar. 14, 2023), <https://www.dhs.gov/immigration-statistics/refugees-asylees#:~:text=An%20asylee%20is%20a%20person,at%20a%20port%20of%20entry> (explaining that “a refugee is a person outside his or her country of nationality who is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. An asylee is a person who meets the definition of refugee and is already present in the United States or is seeking admission at a port of entry.”).

<sup>21</sup> *Memorandum for the Secretary of State on Presidential Determination on Refugee Admissions for Fiscal Year 2022*, THE WHITE HOUSE BRIEFING ROOM (Oct. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/08/memorandum-for-the-secretary-of-state-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2022/>.

<sup>22</sup> LEGOMSKY & THRONSON, *supra* note 14, at 1149.

<sup>23</sup> *Id.* at 425.

<sup>24</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27).

<sup>25</sup> *Id.*

War on Terror.<sup>26</sup> This category was created due to a predicted need for residency for individuals who aided the U.S. military during the War on Terror, and who had earned that residency due to their service to the United States that might result in retribution in Iraq or Afghanistan.<sup>27</sup>

These SIVs have a valuable role to play in future reform that is not solely limited to the benefit of wartime allies. Through the creation of additional SIVs, Congress can define new immigration pathways for distinct classes of individuals who might otherwise risk years in processing and waiting lines before receiving their visas. Additionally, language in the INA indicates that some SIV holders are automatically exempt from the cap totals,<sup>28</sup> meaning that Congress has the power to issue visas to holders that neither detract from the existing visa numbers, nor participate in the waiting lines. Were Congress to enact legislation that tacked an additional category of visa onto the SIV list, it could create a release valve for the current pressure on waiting lines without risking confusion or requiring the need for new interpretive frameworks. The addition of SIVs is natural to the current immigration legislative framework, although the actual executive adjudication of SIVs through the USCIS and courts has been plagued by miscommunication, confusion, and opposition from administrations unwilling to process SIVs in a timely manner.<sup>29</sup>

### III. SIVS AS A LEGISLATIVE SOLUTION TO PRESSING IMMIGRATION NEEDS

The SIV program was enacted with mixed results in Afghanistan and Iraq. Introduced by the optimistically-named Afghan Allies Protection Act of 2009 (AAPA), the SIV program was inserted into the INA and provided visa eligibility for those with the following criteria: (1) status as a citizen or national of Afghanistan; (2) past or present employment by or on behalf of the U.S. government beginning on or after October 7, 2001; (3) “faithful and valuable” service to the U.S. government, documented in a positive recommendation or evaluation from a supervisor; and (4) an ongoing serious

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<sup>26</sup> See U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL VOLUME 7, PART F, CHAPTER 10—CERTAIN AFGHANISTAN AND IRAQI NATIONALS (2022).

<sup>27</sup> *Id.*

<sup>28</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101, *amended by* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 602(b)(3)(b), 123 Stat. 524, 808 (2009).

<sup>29</sup> Payne, *supra* note 4, at 633–35.

threat as a consequence of employment by the U.S. government.<sup>30</sup> The application process for Afghan SIVs is extensive and requires numerous recommendations, approvals, and interviews before applicants can receive visas into the United States,<sup>31</sup> while similar pathways are in place for Iraqi SIV applicants.<sup>32</sup> To date, thousands of individuals have received visas, yet thousands more have been stuck in extensive processing delays,<sup>33</sup> or had their SIVs unexpectedly revoked at the last second.<sup>34</sup> While *Afghan and Iraqi Allies v. Pompeo* was adjudicated during the Trump administration, adjudications in the Obama administration were not free of processing difficulties.<sup>35</sup> Furthermore, federal courts have demonstrated a consistent unwillingness to entertain requests from would-be SIV beneficiaries seeking to overturn unfavorable Department of State or USCIS determinations about their SIV eligibility.<sup>36</sup> A notable example, *Airaj v. United States Department of State*, involved an unsuccessful FOIA request by an Afghan translator with the U.S. military who refused to participate in a Khost mission due to an unacceptably high risk to his safety from the Taliban.<sup>37</sup> After this refusal, the translator received three denials on three separate SIV petitions, citing “derogatory information” about his performance that was “incompatible with the regulations of the Special Immigrant Visa program” necessary for him to get Chief of Mission status from the U.S. Embassy in Kabul.<sup>38</sup> Finally, *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry* was a suit seeking adjudication of SIVs following years of administrative backlogs, largely in violation of statutory language

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<sup>30</sup> Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, § 602(b)(2)(A), 123 Stat. 807 (2009).

<sup>31</sup> *Special Immigrant Visas for Afghans—Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP’T OF STATE BUREAU OF CONS. AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html> (last visited Apr. 19, 2023) (detailing the numerous steps necessary to receive an SIV approval).

<sup>32</sup> *Special Immigrant Visas for Iraqis—Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visas-iraqis-employed-us-gov.html> (last visited Apr. 19, 2023) (detailing the numerous steps necessary to receive an SIV approval).

<sup>33</sup> *See, e.g., Afghan and Iraqi Allies v. Pompeo*, 334 F.R.D. 449 (D.D.C. 2020).

<sup>34</sup> *See, e.g., Doe v. Rodriguez*, No. 17-1709, 2018 U.S. Dist. LEXIS 14560 (D.N.J. Jan. 29, 2018).

<sup>35</sup> *See Airaj v. U.S. Dep’t of State*, No. 15-983, 2016 U.S. Dist. LEXIS 55750 (D.D.C. Apr. 27, 2016).

<sup>36</sup> *See, e.g., id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 4–5.

mandating processing of nine months or less for qualified individuals, and immediate processing for individuals in imminent danger.<sup>39</sup>

These challenges present ironies, given the overtly humanitarian language included in the AAPA,<sup>40</sup> as well as the Crisis in Iraq Act of 2007,<sup>41</sup> which authorized these SIVs. The Crisis in Iraq Act authorized the creation of a batch of SIVs for Iraqis who, among other conditions, “provided faithful and valuable service to the U.S. government,” and “ha[ve] experienced an ongoing serious threat as a consequence” of that service.<sup>42</sup> The AAPA § 602(b) provides a similar discussion of the rationale behind granting SIVs to these Afghans.<sup>43</sup> Both statutes require that the petitioner in question receive a positive recommendation from a senior supervisor to proceed with the SIV program among other legislative hurdles, a complex step among several which provided fertile ground for the litigation discussed above.<sup>44</sup>

Despite these hurdles, nearly 18,000 Afghan SIVs were issued by the fourth quarter of 2021, marking a tangible execution with real benefits of a novel special immigrant visa pathway that did not exist roughly a decade ago.<sup>45</sup> The Iraqi SIV was in less demand and offered fewer visas than the Afghan program, but still thousands of Iraqis have received residency in the United States.<sup>46</sup> No doubt many would have appreciated a far more expeditious processing pathway, and it is indisputable that despite some qualified Afghans’ expectations, many were not able to obtain visas.<sup>47</sup> Due to the mechanics of how the federal government processes visas, the

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<sup>39</sup> *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 276–80.

<sup>40</sup> *See* Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, 123 Stat. 807.

<sup>41</sup> *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

<sup>42</sup> *See id.* § 1244(b)(1)(C)–(D).

<sup>43</sup> Afghan Allies Protection Act § 602(b).

<sup>44</sup> Payne, *supra* note 4, at 634.

<sup>45</sup> *Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/dam/visas/SIVs/Afghan-Public-Quarterly-Report-Q4-October-2021.pdf> (last visited Apr. 19, 2023).

<sup>46</sup> *See Joint Department of State/Department of Homeland Security Report: Status of the Iraq Special Immigrant Visa Program*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/dam/visas/SIVs/Iraqi-Public-Quarterly-Report-Q4-October-2021.pdf> (last visited Apr. 20, 2023).

<sup>47</sup> *See generally* Nadia Abramson, *Wasting My Time in the Waiting Line: Solutions for Improving the Afghanistan and Iraq Special Immigrant Visa Programs*, 55 VA. J. INT’L L. 483 (2015); *see also* J. Sayre Payne, *A Duty Owed: The Failure of the Special Immigrant Visa Program and its Message to Allies and Enemies*, 44 DAYTON L. REV. 631 (2019) (providing overview of the frustrations in the SIV adjudication process).



executive implementation of the law and bureaucratic SIV obstacles resulted in backlogs, processing delays, and unfairly rigorous enforcement of regulations.<sup>48</sup>

But even with these problems considered, the fact remains that the SIV demonstrated a surprisingly rapid congressional solution that enabled many thousands of Afghans and Iraqis to escape dangerous conditions and seek a new life in the United States.<sup>49</sup> Interestingly, both the AAPA and Crisis in Iraq Act were passed by large majorities: the Crisis in Iraq Act passed the Senate 91-3 and House 369-46,<sup>50</sup> while the AAPA passed the Senate by Voice Vote and House by 245-178.<sup>51</sup> These votes imply that Congress can move quickly when issues are popular to safeguard legislative paths for entry for immigrants and refugees. Even more remarkable was that both bills passed at a point when apprehensions at the U.S. border were fairly high;<sup>52</sup> Afghan and Iraqi allies were seen as a necessary carveout to make even in the midst of high levels of undocumented immigration. Visas can be created if the need is perceived great enough, and Congress can cut the INA's Gordian Knot.<sup>53</sup> This type of legislative action represents a feasible opportunity for marginal immigration reforms that can tangibly improve the lives of thousands of individuals seeking residency in the United States. How would such a reformist movement take shape?

In some sense, immigration legislation is straightforward when compared to other areas of law that might require extensive litigation or cooperation between state and federal governments. Immigration

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<sup>48</sup> Abramson, *supra* note 47, at 494–96.

<sup>49</sup> *Id.* at 490.

<sup>50</sup> See *H.R. 4986—National Defense Authorization Act for Fiscal Year 2008, Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/4986/actions> (last visited Apr. 20, 2023).

<sup>51</sup> See *H.R. 1105—Omnibus Appropriations Act, 2009: Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/house-bill/1105/actions> (last visited Apr. 20, 2023).

<sup>52</sup> See *Annual Report: Immigration Enforcement Actions: 2007*, U.S. DEP'T OF HOMELAND SEC., [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2007.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2007.pdf) (last visited Apr. 20, 2023); see also *Annual Report: Immigration Enforcement Actions: 2009*, U.S. DEP'T OF HOMELAND SEC., [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2009.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2009.pdf) (last visited Apr. 20, 2023).

<sup>53</sup> LEGOMSKY & THRONSON, *supra* note 14, at 326 (“To qualify for lawful immigration status, an immigrant must affirmatively fit within one of the various categories established by Congress. . .”).

enforcement is solely within the authority of the federal government.<sup>54</sup> As illustrated in the cases of Afghan and Iraqi SIVs, Congress can create new visa categories by introducing new legislation language. The number of visas currently in “circulation” does not relate to any exterior market force, state law, foreign country’s policy, or constitutional restriction.<sup>55</sup> Rather, the number of visas is purely a product of language in the INA and is ostensibly adjusted according to: the labor demands of the American workforce,<sup>56</sup> the carrying capacity of asylum numbers across the United States,<sup>57</sup> and a rough estimate of the number of family members who may be petitioning for relatives to obtain residency.<sup>58</sup>

However, the most straightforward explanation is that the visa numbers are plainly the number of visas Congress wishes to make available.<sup>59</sup> The number of available visas and the number of individuals who receive them may be raised, lowered, manipulated, or dramatically reformed if Congress passes legislation doing so,<sup>60</sup> and the USCIS and immigration courts would be obligated to process the new or reformed visas in the same manner as they currently process visas. The legislative history for the Crisis in Iraq Act demonstrates the ease by which Congress can generate visas.<sup>61</sup> During debate on the bill, a single line of questioning in the Committee Report discussing “Items of Special Interest,” including the Iraqi refugee crisis, resulted in the creation of thousands of additional visas and a safe passage to new life in the United States for many of those at risk in Iraq.<sup>62</sup>

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<sup>54</sup> See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (holding that a presidential proclamation placing entry restrictions on foreign nationals whose entry was deemed detrimental to U.S. interests was legal); see also *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 145 (1892) (holding that Congress was authorized to immediately naturalize residents of U.S. territories when they became U.S. states).

<sup>55</sup> See LEGOMSKY & THRONSON, *supra* note 14, at 107 (“The Congressional powers to exclude and to deport aliens have been upheld to be ‘plenary.’ When Congress exercises those powers, its decisions are final.”).

<sup>56</sup> *Id.* at 386–87.

<sup>57</sup> *Id.* at 1149.

<sup>58</sup> See *id.* at 339.

<sup>59</sup> See *id.* at 326.

<sup>60</sup> See *id.* at 328 (“Congress from time to time admits special groups ad hoc on a nonquota basis . . .”).

<sup>61</sup> See S. REP. NO. 110-77.

<sup>62</sup> *Id.* at 417 (2007) (Asking “how [Department of Defense] is working with the Department of State to promote safe passage and resettlement to protect those [Iraqi] refugees in the region who remain vulnerable, as well as to promote family reunification for those refugees with parents, sons, daughters, grandparents, grandchildren, and siblings who are lawfully residing in the United States.”).

Such legislation following military action is not new. The Indochina Migration and Refugee Assistance Act of 1975 allowed for more than 140,000 refugees from South Vietnam to seek extraordinary permanent residency in the United States following the Vietnam War.<sup>63</sup> In 1991, similar generosity in peacetime was extended to Chinese students in the United States with the passage of the Chinese Student Protection Act,<sup>64</sup> which provided green cards for thousands of Chinese students in the United States fearing persecution from the Chinese government following the Tiananmen Square protests.<sup>65</sup> Interestingly, those green cards were given even to those with expired passports or incomplete documentation, as the normal petitioning procedure in § 204(a) requiring documentation was waived.<sup>66</sup> Such measures were taken due to the perceived need for immediate administrative action to safeguard humanitarian goals in the public interest.<sup>67</sup> It is apparent that the strict immigration rules on visa quotas can be bent if Congress deems it necessary.

The fact that the immigration adjudication landscape in the United States can be radically altered through congressional action has meant that calls for reform are plentiful, bipartisan, and varied in nature, with proposals on reform being a perennially favorite topic for immigration advocates and scholars.<sup>68</sup> However, many of these proposals involve radical overhauls of the U.S. immigration system that would result in an entirely different framework. Admittedly, the U.S. immigration system can be fairly

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<sup>63</sup> See U.S. GOV'T ACCT. OFF., GAO-76-63, EVACUATION AND TEMPORARY CARE AFFORDED INDOCHINESE REFUGEES: OPERATION NEW LIFE (1976).

<sup>64</sup> Chinese Student Protection Act, 8 U.S.C. § 1255 (1992).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* § 1255(a)(1).

<sup>67</sup> See *id.* § 1255(a)(3)(b).

<sup>68</sup> See Kevin R. Johnson, *Symposium, Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions: Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1598 (2009); see also Kevin R. Johnson, *Symposium, Immigration Law & Resistance: Ensuring a Nation of Immigrants: Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343 (2018); see also Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out: Assessing Dystopian Dreams and Usable Futures of Immigration Reform, and Considering Whether Immigration Regionalism is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1 (2010); see also María Pabón López & Natasha Ann Lacoste, *Immigration Reform in 2013–2014: An Essay on the Senate's Bipartisan Plan, the House's Standards for Immigration Reform, Interest Convergence and Political Realities*, 17 HARV. LATINO L. REV. 121 (2014) (all providing a variety of discussions on topics of immigration reform).

characterized as byzantine, overly litigious, intentionally opaque, and unfriendly to foreign nationals caught unaware by the unforgiving nature of its rules and regulations.<sup>69</sup> Wholesale reform may certainly be desirable in the long-term, but such calls for reform are unlikely to pass the heated political discourse currently surrounding immigration policy.<sup>70</sup> Furthermore, the federal immigration apparatus as it currently stands constitutes an immense ecosystem of agencies and courts that employ tens of thousands of individuals, manage offices in many states, and generate a tremendous amount of material every day in the form of visas, precedential decisions and rulings, and advisory opinions.<sup>71</sup> To suddenly erase this apparatus and begin anew ignores the reality that the system offers benefits to both practitioners and petitioners in its predictability and reliability. In the short-term, the answer is not to radically alter the immigration system, but rather to make the existing system work better, and maximize the number of immigrants granted residency wherever possible.

#### IV. SIVS IN THE FUTURE: TARGETED ECONOMIC BENEFITS

While family-related immigration receives the largest number of visas per the INA,<sup>72</sup> employment-based immigration is the next-largest category, with 140,000 visas set aside annually.<sup>73</sup> It has become common parlance that immigration is a major economic driver for the United States, and both increases in the size of the labor force and increases in productivity can be directly attributed to greater levels of immigration.<sup>74</sup> A great deal of USCIS

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<sup>69</sup> See LEGOMSKY & THRONSON, *supra* note 14, at 1 (“The Immigration and Nationality Act . . . is a hideous creature.”).

<sup>70</sup> See *Polls In-Depth: Topics A to Z: Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> (last visited Feb. 11, 2022) (provides a helpful analysis of the polarized nature of popular immigration perception in the United States).

<sup>71</sup> *About CBP*, *supra* note 10.

<sup>72</sup> See LEGOMSKY & THRONSON, *supra* note 14, at 329–30.

<sup>73</sup> Immigration and Nationality Act, 8 U.S.C. § 1151(d) (1952).

<sup>74</sup> See Cecilia Rouse et al., *The Economic Benefits of Extending Permanent Legal Status to Unauthorized Immigrants*, THE WHITE HOUSE: WRITTEN MATERIALS, <https://www.whitehouse.gov/cea/written-materials/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants/> (Sept. 17, 2021); see also Arloc Sherman et al., *Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s “Public Charge” Rule Rationale*, CENTER ON BUDGET AND POLICY PRIORITIES, <https://www.cbpp.org/research/poverty-and-inequality/immigrants-contribute-greatly-to-us-economy-despite-administrations> (Aug. 15, 2019).

adjudication is directly related to the adjudication of employment-based petitions,<sup>75</sup> and such cases have resulted in federal court litigation to clarify these adjudication standards related to the INA.<sup>76</sup> In *Berardo v. United States Citizenship & Immigration Services*, the U.S. District Court for the District of Oregon clarified the adjudication standards for the elite EB-1A Alien of Extraordinary Employment visa when the USCIS wished to deny an EB-1A petition to a stop motion animator from pursuing employment with LAIKA animation studios.<sup>77</sup>

Understandably, then, many calls for reform highlight the need for additional focus on employment-based adjudication.<sup>78</sup> However, both the complicated nature of employment-based immigration adjudication, which involves input from the Department of Labor and lengthy analyses of local employment conditions for many visas,<sup>79</sup> as well as the strong demand for employment-based visas, has calcified the adjudication process to the point where waiting lines for these visas can take years.<sup>80</sup> Commentators frequently point at these waiting lines as being the most needed area for immigration reform.<sup>81</sup>

Proposed here is the introduction of a new class of flexible economic SIV that would ameliorate these backlogs with the urgency of an Afghan or Iraqi SIV, while giving the executive branch the authority necessary to tailor the visa to any future need and use it to assist both with humanitarian assistance and economic stimulus. Through a malleable process designed to respond to economic conditions “on the ground,” Congress should provide either a fixed number of annual visas or empower the president to set an annual total number in a manner similar to the current refugee allocation,<sup>82</sup> and so would be exempt from current visa allocations. The path to achieving this is straightforward: a piece of legislation should be introduced that would

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<sup>75</sup> See LEGOMSKY & THRONSON, *supra* note 14, at 386–88.

<sup>76</sup> See *Berardo v. U.S. Citizenship & Immigr. Servs.*, No. 3:19-cv-01796-SB, 2020 U.S. Dist. LEXIS 195449 (D. Or. Oct. 20, 2020).

<sup>77</sup> See *id.* at 25–32.

<sup>78</sup> *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Kerry*, 168 F. Supp. 3d 268, 276–80.

<sup>79</sup> LEGOMSKY & THRONSON, *supra* note 14, at 391–93.

<sup>80</sup> *Id.* at 328 (“In modern times the demand for . . . visas has vastly exceeded the statutory supply.”).

<sup>81</sup> See *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States*, 168 F. Supp. at 276–80.

<sup>82</sup> See Immigration and Nationality Act, 8 U.S.C. § 1157(a)(2) (1952).

amend the SIV section of the INA to insert language for the (Targeted Economic) Special Immigration Visa, alongside the statutory language authorizing the issuance of other SIVs.<sup>83</sup> This language would create some number of TESIVs that are not taken from either the family-based or employment-based immigrant visa pools, in a manner identical to the creation of the Iraqi SIVs,<sup>84</sup> as well as Afghan SIVs.<sup>85</sup>

The push for this style of visa creation can accommodate the existing bipartisan appetite for immigration reform by ushering new visas through amendments to existing legislation laws rather than a new bill that remakes the immigration apparatus from the ground up. Happily, for more conservative voices, the creation of TESIVs would be a dramatic improvement to legal immigration without requiring radical alteration of existing law or lowering current adjudication standards, or without abandoning the bureaucratic process that is foundational to the modern immigration apparatus.<sup>86</sup> Furthermore, for the progressive reader, TESIVs would humanely solve some of the most pertinent issues in American demographic and economic policy, while also offering a grand stimulus to the American economy.

Such a visa could be created through legislation that would amend the INA and insert the following (or similar) language into INA §1101(a)(27):

***Targeted Economic Special Immigrant:** an immigrant for whom a visa shall be issued following an analysis of the projected economic benefit to the United States. Such visas are exempt from the allocated visa totals described in §§ 203(a), 203(c), or 207(a). At the discretion of the president, such visas shall temporarily be authorized for a class of individuals, considering:*

- 1. the class economic benefit to a specific region of the United States, not to exceed the size of a metropolitan area; or*
- 2. the humanitarian benefit to the targeted recipients.*

*Visas issued under this section will not exceed 50,000 for a fiscal year.*

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<sup>83</sup> See *id.* at 8 U.S.C. § 1101(a)(27).

<sup>84</sup> See *id.*

<sup>85</sup> See USCIS POLICY MANUAL VOLUME 7, PART F, CHAPTER 10—CERTAIN AFGHANISTAN AND IRAQI NATIONALS, *supra* note 26.

<sup>86</sup> See *About CBP*, *supra* note 10; see also *About Us: Who We Are*, *supra* note 11.

This would result in the creation of TESIVs without detracting from visas reserved for family-based or employment-based immigration petitioners. By creating an entirely separate adjudication pathway for TESIVs and removing them from the existing visa pool, the needs of these specific petitioners could be met without taking up visas from individuals who have been waiting years for a visa.<sup>87</sup>

The TESIV would share characteristics with existing benefits like Temporary Protected Status (TPS) and the asylum program. However, TESIV would differ in crucial ways and would not be intended to replace or reform either program.

TPS is similar to TESIV in that it is awarded to a general class: individuals who hold a certain nationality which has been designated as deserving of TPS by the Secretary of Homeland Security.<sup>88</sup> This designation arises when the Secretary determines that “conditions in the country . . . temporarily prevent the country’s nationals from returning safely, or in certain circumstances . . . the country is unable to handle the return of its nationals adequately.”<sup>89</sup> TPS is meant to allow individuals from countries experiencing temporary strife to enjoy safety in the United States. This shares some similarity with the hypothetical executive designation that would create TESIVs based on certain conditions. However, TPS differs from TESIV as TPS is inherently temporary, and does not automatically lead to a green card.<sup>90</sup> Furthermore, TPS can only be granted to individuals currently in the United States and cannot be given to individuals who have not been inspected or admitted into the United States.<sup>91</sup>

To contrast, refugee status is meant as a permanent solution to an individual’s personal persecution in their country of origin.<sup>92</sup> A refugee is defined at INA § 101(a)(42) as:

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<sup>87</sup> *Visa Bulletin for February 2022*, *supra* note 7.

<sup>88</sup> LEGOMSKY & THRONSON, *supra* note 14, at 1393–95.

<sup>89</sup> See *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last visited Apr. 20, 2023) (providing an overview of the steps and requirements for securing Temporary Protected Status).

<sup>90</sup> See *generally* *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021) (unanimous court holding that a grant of TPS alone does not offer petitioner a pathway to a green card when they entered without admission or inspection).

<sup>91</sup> See *generally* *Solorzano v. Mayorkas*, 987 F.3d 392, 396 (5th Cir. 2021) (“[T]he text of the relevant statutory provisions confirms that TPS does not cure the bar to status adjustment in § 1255.”).

<sup>92</sup> LEGOMSKY & THRONSON, *supra* note 14, at 1133.

A person who is outside his or her country of residence, or without nationality, and is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>93</sup>

This status is inherently individualistic, as each individual must prove that they meet the criteria, and the burden of proof is on the applicant to demonstrate why they need refugee status or asylum once they reach the United States and are seeking residency.<sup>94</sup> The TESIV carries this evidentiary burden on the governmental end. If each applicant can prove that they are part of the designated class, they are *prima facie* eligible for TESIV status, which relieves the applicant of a great deal of the evidentiary burden as to why they need residency. However, like asylum, TESIV visa totals would lead to a green card, and like asylum, the number of visas offered could be adjustable based on the President's designation.<sup>95</sup>

Finally, TESIV remains distinct from traditional employment-based visas in that each employment-based visa is generally issued to correspond to a single position or type of job,<sup>96</sup> to the effect that each employment-based visa only exists because there is a job that requires a worker.<sup>97</sup> This is a useful means of ensuring that immigration is linked to the needs of the American labor market. However, TESIV would allow the executive to tailor an immigration plan that can meet or create economic needs, while providing responsiveness to changes on the world stage or in the economy that may not correlate with individual job openings.

## V. TESIV HYPOTHETICAL CASE STUDY

Helpful for illustrating these concepts is a hypothetical case study. Following passage of legislation that authorizes TESIV, a major geopolitical

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<sup>93</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1952). It should be noted that both refugees (applicants outside of the United States) and asylees/asylum-seekers (applicants within the United States) must satisfy these statutory elements.

<sup>94</sup> See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020) (detailing the procedure and evidentiary burdens imposed on applicants for asylum).

<sup>95</sup> See Immigration and Nationality Act, 8 U.S.C. § 1157(a)(1)–(4) (1952).

<sup>96</sup> LEGOMSKY & THRONSON, *supra* note 14, at 333.

<sup>97</sup> See *generally* Immigration and Nationality Act, 8 U.S.C. § 1153 (1952) (describing the various classes of employment-based visas that require a job offer or specified U.S. employer).



crisis occurs in the nation of Utopia, and tens of thousands of Utopian nationals seek to permanently leave Utopia. The United States indicates an intention to extend aid to those individuals. To facilitate this decision, TPS is authorized for Utopian nationals currently in the United States, and asylum officers are instructed to favorably consider Utopian nationals petitioning and adjusting for asylum within their case-by-case authority.<sup>98</sup>

The president also decides to order the issuance of TESIV visas to Utopian nationals to increase the number of options available for maximizing aid. Fifty thousand new Utopian-only visas are authorized at the President's discretion, per this proposed statute. Additionally, because the statutory language allows for TESIV visas to be finely tuned and directed unlike typical employment-based visas or asylum visas, the order states that TESIV visas will allow individuals to select from a dozen metropolitan areas that have experienced demographic or economic downturns and are seeking new arrivals to stimulate demographic revitalization.<sup>99</sup> The TESIV will be granted with the condition that the individual will initially settle in one of those twelve regions, which might include cities within the Rust Belt such as Pittsburgh,<sup>100</sup> that have experienced population losses in recent decades.<sup>101</sup> This entire process would be independent of asylum and TPS efforts, and would be offered to interested Utopians as one option for residency in the United States.

This process achieves several desirable outcomes. It allows for Utopian nationals to escape dangerous conditions in their home country, and ensures they have a designated location in the United States to call home. It also ensures that no additional pressure is put on the existing employment or family-based immigration system and does not result in longer wait times for individuals currently moving through these processes.<sup>102</sup> Finally, it

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<sup>98</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL VOLUME 7, PART M, CHAPTER 5—ADJUDICATION PROCEDURES (2022) (providing that asylum officers are authorized to adjust asylum status on a case-by-case status).

<sup>99</sup> See generally CITY OF PITTSBURGH, THE WELCOMING PITTSBURGH PLAN: A ROADMAP FOR CHANGE (2014), [https://apps.pittsburghpa.gov/mayorpeduto/WelcomingPittsburgh\\_RoadMap\\_FullReport\\_FINAL2.pdf](https://apps.pittsburghpa.gov/mayorpeduto/WelcomingPittsburgh_RoadMap_FullReport_FINAL2.pdf) (providing an example of Pittsburgh as one of the metropolitan areas that has experienced demographic and economic downturns).

<sup>100</sup> See *id.*

<sup>101</sup> Channa Yoon, *The Decline of the Rust Belt: A Dynamic Spatial Equilibrium Analysis*, 1–7 (2013).

<sup>102</sup> *Visa Bulletin for February 2022*, *supra* note 7.

strengthens communities that have experienced years or decades of demographic decline, which would greatly benefit from a demographic “shot in the arm” from thousands of new arrivals.<sup>103</sup> In this scenario, many Utopians opt to take advantage of TESIV, and they establish new communities in cities the President has identified as needing new population and economic growth.

Putting aside the hypothetical, it should be noted that under this statutory framework, no foreign crisis would even need to exist for the President to authorize TESIV issuance for the twelve regions listed above. Should those cities’ demographic or economic needs become great enough, it would be within the President’s authority to assign a number of visas per year for a class of foreign nationals seeking to specifically relocate to those dozen cities, solely with the intention of increasing their populations and jumpstarting their economic growth.<sup>104</sup> President Joe Biden campaigned on such a policy in 2020, though reform efforts slowed in Congress,<sup>105</sup> and no such hyper-local “Heartland Visa” has been instituted as of June 2023.<sup>106</sup> While the above is a simple scenario, it illustrates that TEVIS could be a powerful tool for focusing immigration on areas that could benefit from it the most, and providing the government with an additional tool to provide useful immigration relief.

## VI. CONCLUSION

Immigration is frequently portrayed as one of the great partisan debates of our time, one without easy solutions or clear pathways to reform. However, the law as it currently stands allows for extremely meaningful

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<sup>103</sup> Muhammad Maisum Murtaza, *The Economic Contributions of Pennsylvania’s Immigrants*, PA. BUDGET AND POL’Y CENTER 7–11 (2021), [https://krc-pbpc.org/wp-content/uploads/20210516\\_ImmigrantContributionsReport.pdf](https://krc-pbpc.org/wp-content/uploads/20210516_ImmigrantContributionsReport.pdf).

<sup>104</sup> See generally Don Beyer, CONG. JOINT ECON. COMM. JEC, IMMIGRANTS ARE VITAL TO THE U.S. ECONOMY 5–6 (2021) (explaining that immigrants can jumpstart economic growth).

<sup>105</sup> Carrie Kahn & Joel Rose, *President Biden Promised to Reform Immigration Policy. How Has That Been Going?*, NATIONAL PUBLIC RADIO (Dec. 29, 2021), <https://www.npr.org/2021/12/29/1068895454/president-biden-promised-to-reform-immigration-policy-how-has-that-been-going> (last visited Mar. 24, 2022).

<sup>106</sup> *The Biden Plan for Securing our Values as a Nation of Immigrants*, BIDEN-HARRIS 2020 PRESIDENTIAL CAMPAIGN, <https://joebiden.com/immigration/> (last visited Mar. 23, 2022) (scroll down or use Ctrl-F to search for “Creates a new visa category to allow cities and counties to petition for higher levels of immigrants to support their growth”).

reforms to be put into place which, if enacted, could greatly improve the speed and flexibility in which the immigration apparatus responds to new international challenges, and jumpstart areas of the U.S. economy that need revival. Such reform need not be a grand overhaul of current institutional frameworks to provide benefits to foreign nationals and Americans alike. By inserting language into the existing INA, new visas can be created, and flexible new pathways to residency can be laid out, for thousands of people around the world seeking safe and productive lives in the United States.