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A COMPARATIVE LOOK AT IMMIGRATION AND HUMAN CAPITAL ASSESSMENT*

STEPHEN YALE-LOEHR AND CHRISTOPH HOASHI-ERHARDT**

This article examines the formation of an immigration policy designed to build up the skill and human capital of a country. We discuss how the process of selecting economic-stream migrants¹ could be designed to yield economic benefits to the host country. Part I examines the theoretical considerations involved in framing a policy that governs economic-stream immigration. In this section, we outline the goals that a host country seeks to achieve in selecting these migrants and propose important elements of a selection scheme. Part II takes a comparative look at existing points-based schemes for selecting economic migrants, focusing on Canada and Australia. Part III briefly discusses practical barriers to implementing such a system in the United States. The article concludes that the United States should enact a points-based system for selecting economic-stream migrants.

It is impossible to cover this subject exhaustively in one article. For that reason, this article only discusses the immigration of high-skilled workers,

* This article was presented at an international symposium entitled *NationSkilling: Immigration, Labour and the Law*. The Symposium was co-hosted by the Law Council of Australia and the Faculty of Law at the University of Sydney, Australia on November 23-24, 2000 and was made possible through the generous support of Australia's Department of Immigration and Multicultural Affairs, the National Australia Bank, and Parish Patience Solicitors. Its goal was to provide a public forum for the consideration of policy and theory relating to the admission of skilled and business migrants within the framework of nation-building and optimizing the public interest. Although much of the policy discussion was focused on Australian law and practice, the principles considered have universal significance in a world where the international movement of labor and capital are an increasingly important part of life in a global economy. Additional papers from the *NationSkilling* Symposium will be published in the forthcoming spring issue of the *Georgetown Immigration Law Journal*.

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1. We use the terms "economic-stream" and "skills-based" interchangeably to refer to migrants who enter a country primarily to fill labor market demand for skilled workers.

not low-skilled or agricultural workers. We also only discuss permanent immigration, not temporary workers. Finally, as others studying this area know, we are all handicapped by a lack of good statistical or economic data. We discuss several studies that have sought to evaluate the economic “success” of economic-stream migrants over time, but these studies are limited in scope, the time period covered, and their ability to establish a clear link between selection criteria and the economic results that were measured. Thus, our recommendations should be considered skeptically. As discussed below, we are not sure what has worked best in other countries, let alone how policy changes would work in the U.S. context.

I. A THEORETICAL FRAMEWORK FOR SELECTING ECONOMIC-STREAM MIGRANTS

The Purpose of a Policy Governing Economic-Stream Migration

A national immigration policy seeks to achieve diverse and often competing national goals. As a result, the purposes of the constituent parts of that policy differ from one another. At least in the United States, the goal of family-based immigration is to reunite families.² We admit refugees for humanitarian reasons. In this discussion, we assume that the purpose of selecting economic-stream migrants is to increase the host country’s wealth and to achieve a net economic gain for the entire population. This purpose contrasts with that of immigration policies that govern humanitarian or family-based migration, where net economic benefit may not be the primary criterion upon which the success of the policy is judged. To conflate the objectives of distinct policy areas and to evaluate an entire immigration program on its ability to produce economic gain may do harm to the nation’s other immigration goals. All areas of immigration may yield some economic benefits to the host country. Certain immigrants, however, are particularly well-equipped to benefit the host economy. This section focuses on the means by which these migrants can be selected and attracted to a country.

Which Migrants Should We Seek to Attract?

The assertion that increasing the number of skilled migrants who enter a country will result in economic gain for that country seems immediately sensible and conceptually palatable. The nature of the economies of industrialized nations places a premium on the education and training of the

2. Mary Deibel, *Cold Treatment for Many Children Who Arrive on American Shores*, SCRIPPS HOWARD NEWS SERVICE, Apr. 28, 2000, at 2 (quoting former U.S. Immigration and Naturalization Service Commissioner Doris Meissner as saying that “family reunification has long been a cornerstone of both American immigration law and practice”).

workforce. A firm's productivity and competitiveness depend increasingly on its products' *knowledge content* (as distinct from its content of capital and other physical resources), on the innovativeness of its production processes, on "first-to-market" corporate strategies, and on the ability to develop and exploit global connections.³ Given that economic benefits are greatest for a country whose workforce is well educated and trained, the degree to which a nation's immigration policy can maximize economic benefits to the country depends largely on that nation's ability to encourage the immigration of highly skilled workers.⁴ George Borjas, an economist at Harvard University who has spent much of his career trying to assess the economic impact of immigration, states that:

skilled immigrants earn more, pay higher taxes, and require fewer social services than less-skilled immigrants. Put differently, skilled immigration increases the after-tax income of natives, while the tax burden imposed by the immigration of less-skilled workers probably reduces the net wealth of native taxpayers. From a fiscal perspective, therefore, there is little doubt that skilled immigration is a good investment, particularly when compared to the immigration of less-skilled workers.⁵

Any policy that seeks to encourage the migration of highly skilled workers must first determine which migrants will contribute to the economy of the host country and then persuade those migrants to choose to move to the host country.

Selecting Migrants Who Will Succeed in the Economy

The system that many immigrant-receiving countries, including the United States, currently use for selecting economic-stream migrants is designed to achieve a single, short-term goal: to meet the immediate needs of the labor market. Immigrants, however, are *permanent* additions to the labor force. It makes little sense to admit them *solely* on the basis of a specific job opening that may quickly become redundant or for a function that may offer few long-term benefits for either the employer or the country. Instead, a key goal of the economic migrant selection system should be to ensure that those who are admitted into a country as presumptive members of our society have a

3. DEMETRIOS PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS* 21 (1996).

4. We do not attempt to precisely define "highly skilled." Certainly education level, training experience, and adaptability are "skills" that are desirable in workers. But the desirability of certain qualities, and therefore the definition of "skilled," will change over time. We assume that certain qualities are likely to yield long-term economic benefits, but we recognize that any such list of qualities is imprecise and constantly changing.

5. GEORGE BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 190-91 (1999).

proper mix of skills and other attributes that maximize the probability of long-term success in the labor force.⁶

A “points test” is one way to select migrants who have such a mix of skills. Unlike an academic exam, a points test is a tool used to assess the level of human capital already present in potential migrants in specific areas deemed to be relevant to “success” in the host country’s economy. The test evaluates an applicant in areas such as work experience, education, and language ability — measurable qualities that may help predict long-term success in the labor market. A person’s potential for economic contribution, however, is also governed by less tangible factors such as imagination, creativity, adaptability, motivation, and resourcefulness. A point system could theoretically evaluate these intangibles by awarding points for qualities that indicate their presence in an applicant. For example, applicants might be assessed extra points under a broad category of adaptability if they have held a leadership role in teamwork arrangements, have had prior work or study in the host country, or have a family member in the host country who will act as a sponsor.⁷ Properly designed, a point system can be a transparent and efficient means for assessing the presence of skills in a migrant from which the host country will benefit over the long-term, rather than merely addressing temporary shortages in the labor supply.

In the second part of this article we consider two existing point systems and examine whether the criteria that they use for assessment are reliable predictors of future economic success.

The Limited Predictive Power of a Point System

Every immigration selection mechanism, including a point system, is limited in its ability to predict a migrant’s potential economic contribution to the host country. George Borjas notes that education, age, and occupation — the quantifiable characteristics emphasized by point systems — account for only about a third of the variation in earnings among workers in the United States.⁸ Intangible characteristics, which are not easily measurable, are the main determinants of what makes some workers successful and others unsuccessful.⁹ Furthermore, some evidence suggests that historically the difference in earnings between family-based migrants and migrants selected for their skills disappears after ten to twenty years.¹⁰

6. PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 145.

7. *Id.* at 162.

8. BORJAS, *supra* note 5, at 193.

9. *Id.*

10. Harriet Orcutt Duleep & Mark C. Regets, *Admission Criteria and Immigrant Earnings Profiles*, 30 INT’L MIGRATION REV. 571, 579-83 (1996). The populations that were compared in the article had been admitted to the United States, which selects migrants according to immediate labor market needs. *Id.* at 571. A point system may produce different long-term results. Also, the difference in earnings during the first 10 to 20 years should not be ignored.

Even though migrants who enter the host country based upon their kinship ties or for humanitarian reasons may eventually experience the same degree of economic success as skills-based migrants selected by a points test, it is nevertheless the presence of a particular set of skills that yields economic success.¹¹ Paul Miller, an economist at the University of Western Australia, notes that measurable characteristics do have a determinative effect on the employment rates of migrants and that those with characteristics that are positively correlated with economic success fare better whether they are admitted through a point system, for humanitarian or family reasons, or by some other method.¹² It is no surprise that migrants who develop skills that are needed in the labor market are economically successful regardless of their immigration status at entry.

In the second part of this article, we examine which elements of existing point systems most accurately predict future economic success.

Prerequisites for a Point System

In addition to ensuring that economic-stream migrants bring with them a desired set of skills, we believe that a point system should require all participants to satisfy three prerequisites. First, prospective immigrants should have a job offer from an employer in the host country. Second, they should have at least three years' work experience in the field for which they are being sponsored. Third, the sponsoring employer should make a commitment to pay the applicant the higher of (a) the actual wage the employer pays to other similarly qualified and employed individuals, or (b) the prevailing wage rate for the occupation in the area of employment.¹³ We set forth our rationale for these requirements below.

Employer Sponsorship Requirement. The primary benefit of an employer sponsorship requirement is that it ensures that the labor market is the primary arbiter of which skills will be most favored in the country's economy and therefore in its selection of economic-stream migrants.¹⁴ An offer of employment demonstrates that a particular migrant's set of skills will meet a particular need in the country's economy. Such an offer is also inherently sensitive to the needs of local labor markets, needs that often differ from the perceived needs of the national labor market. Potential migrants with job

11. Paul Miller, *Immigration Policy and Immigrant Quality: The Australian Points System*, 89 AM. ECON. REV. 192, 194-96 (1999).

12. *Id.* Miller correlated the unemployment rates of immigrants in Australia with their educational attainment, age, age at arrival, region of residence, birthplace, and family characteristics. *Id.*

13. PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 147.

14. The weakness of a point system in which a governmental body limits or rewards members of certain professions based upon perceived labor market needs is the inability of such a body to accurately predict the real needs of the labor market or to keep pace with changes in workforce needs. See MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 102-03 (1998); see also DEP'T OF IMMIGRATION AND MULTICULTURAL AFFAIRS (DIMA), REVIEW OF THE INDEPENDENT AND SKILLED-AUSTRALIAN LINKED CATEGORIES 4 (1999) [hereinafter DIMA REVIEW].

offers would form a pool of people whose skills are in immediate demand by the labor market. From that pool, a point system selects those migrants who will be most able to adapt their skills over the long-term to the changing needs of the labor market. These benefits are not lost even if the demand for visas does not exceed their supply, i.e., the system does not select from a pool of applicants, but merely provides a mechanism for eligible migrants to enter. In such a situation a point system would still ensure that a certain basic skill level will be present in all those who are admitted.

The employer sponsorship prerequisite makes the selection process more nuanced than a points test alone could be. A points test cannot very well discern gradations of skill within a profession (other than work experience). An employer can. For example, two journalists might be assessed similarly on a points test if their training and levels of experience are comparable, but one journalist may nevertheless be a clearer writer than the other. A computer programmer who knows several programming languages would look the same on a points test as a programmer who is adept in only one. Employers are best positioned to discern between such gradations of skill.

Assuming the existence of an efficient point system, there should be little need for extra incentives for members of a particular profession to immigrate to fill a gap in a country's labor supply. Given that a job offer is a requirement for any skills-based migration, and that an efficient point system poses minimal procedural barriers to impede a migrant's access to the benefits offered by an employer, the incentives that the labor market produces on its own to encourage an increase in the supply of workers in a particular profession will be readily available for potential migrants to enjoy. As demand rises for workers with a particular set of skills, so would the incentives for those workers to migrate.

An additional benefit of employer sponsorship is the role that it serves as a validation of overseas educational and professional credentials.¹⁵ Highly skilled workers who are admitted by a point system often find that their overseas educational credentials are not recognized in the host country or that they cannot obtain employment in the industry in which they were trained to work.¹⁶ An offer of employment gives the migrant a durable and portable validation of her credentials.

Employer sponsorship has been demonstrated to be a key contributor to economic success among migrants. Studies that surveyed immigrants to

15. See Rachel M. Friedberg, *You Can't Take It with You? Immigrant Assimilation and the Portability of Human Capital*, 18 J. LABOR ECON. 221 (2000) (discussing the importance of the recognition of foreign professional credentials).

16. See MAYTREE FOUNDATION, BRIEF TO THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION REGARDING BILL C-31, IMMIGRATION AND REFUGEE PROTECTION ACT 13-14, app. (Aug. 18, 2000) (discussing these difficulties for economic-stream migrants in Canada), available at http://www.maytree.com/RefugeeImmigrantProgram/Publications/maytree_publications.html.

Australia and Canada clearly indicated that migrants sponsored by an employer experienced consistently lower levels of unemployment and higher income levels than those who entered without such sponsorship.¹⁷ Part II of this article discusses further this evidence.

Experience Requirement. As a rule, experienced workers make a more immediate contribution to their employer and to the broader economy than do inexperienced workers. Furthermore, admitting inexperienced economic-stream migrants to the host country could create unnecessary competition for domestic workers vying for entry-level positions. Therefore, we propose that an individual must have at least three years¹⁸ of prior work experience in the specific field for which an employer is recruiting to be eligible for permanent resident status.¹⁹

Wage Attestation. The third prerequisite ensures that a large number of otherwise eligible migrants will not drive down wages for domestic workers. An employer sponsoring a migrant would be required to attest that it will pay the foreign worker the higher of (a) the actual wage the employer pays other individuals who are similarly employed with similar qualifications or (b) the prevailing wage rate for the occupation in the area of employment.²⁰ Nothing in the selection system should encourage employers to “prefer” hiring foreign workers simply because they are cheaper. Doing so amounts to a governmental subsidy to employers who hire foreign workers to the detriment of domestic workers.²¹

Other Areas of Assessment

Family Sponsorship. Some existing point systems grant extra points to applicants who have a family member in the host country who is willing to act as a sponsor.²² The economic effects of family sponsorship for skills-

17. See CITIZENSHIP AND IMMIGRATION CANADA (CIC), SKILLED WORKER IMMIGRANTS: TOWARDS A NEW MODEL OF SELECTION 33-35 (Nov. 1998), available at <http://www.cic.gc.ca/english/pdf/files/pub/selmod-e.pdf> (last visited May 28, 2001) [hereinafter CIC Study]; DIMA REVIEW, *supra* note 14, at 25, 29; ADRIANA VANDENHEUVEL & MARK WOODEN, NEW SETTLERS HAVE THEIR SAY – HOW IMMIGRANTS FARE OVER THE EARLY YEARS OF SETTLEMENT 35 (1999) (discussing findings of the DIMA's Longitudinal Survey of Immigrants to Australia 1994-1999, data available on LSIA CD-ROM, Kingston: Catalyst Interactive, ver. 1.0, 1999) [hereinafter LSIA Study].

18. We recommend that three years of part-time work at an academic institution, such as doing research or being a teaching assistant for courses, should count as the equivalent of one year of specialized work experience.

19. PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 148.

20. Domestic workers would also be protected by the limited supply of visas. The total number of visas could be limited to ensure that the entrance of foreign workers would not disrupt the labor market. If the supply of visas were regularly exhausted, the number of points required to be eligible for a visa could be raised. Given the lack of clear evidence to show that a points test can readily distinguish between gradations of skill, we do not attempt to determine whether it would be economically more beneficial to the host country to raise the pass mark or simply grant visas on a first-come, first-served basis in a situation where the demand for visas exceeds their supply.

21. PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 148.

22. Australia has adopted one such system. See discussion *infra* Part II.B (discussing family sponsored migrants in the Australian selection system).

based migrants are unclear. It seems likely that the presence of a family sponsor would aid the migrant in assimilating to the host country and lower the risk that the migrant would become an economic burden on the host country in the event of financial hardship. There is scant empirical evidence, however, to prove or disprove that the presence of family members translates into enhanced economic benefits to the host country, particularly if the weight given to other areas of preparedness, such as language proficiency and level of education, is effectively decreased by granting points for a family relationship.²³ Nevertheless, it does not seem implausible that the support provided by a family member could make up for weaknesses in other areas that are assessed by a points test.

The presence of a family sponsor yields two primary benefits: (1) the family sponsor aids in the migrant's assimilation, and (2) the family sponsor minimizes the short-term financial risk that the migrant poses to the government. An employer sponsorship prerequisite partially offsets the aid in assimilation that a family sponsor provides to the extent that such assistance consists of aiding the migrant in obtaining employment. A job offer also erases the short-term risk of economic cost to the host country posed by the migrant.

Some evidence indicates that economic benefits result from the kinship ties enjoyed by family-based migrants.²⁴ It is not clear, however, that these benefits would readily make up for a lower level of aptitude in other areas assessed by the test. Studies of both the Canadian and Australian point systems indicate that skilled migrants who received points for the presence of a family sponsor economically underperform migrants who have no such sponsor and, by implication, received more points in other areas of the test.²⁵

In our view, the purpose of a points test is to ensure long-term economic returns. It may be that the presence of a family sponsor could be shown to yield long-term benefits, but we have not seen empirical evidence that clearly validates that claim. Therefore, taking a family relationship into account seems out of place on a points test until such evidence is presented.

Assuming for the sake of argument that the presence of a family relationship between the migrant and a resident of the host country does yield long-term economic returns, the family relationship that is allowed

23. See discussion *infra* Part II.A (discussing family sponsorship in the Canadian selection scheme).

24. See Duleep & Regets, *supra* note 10; Harriet Orcutt Duleep, *Immigrant Economic Assimilation and Admission Policy: Individual, Family, and Community Perspectives 9-10* (1997) (unpublished paper prepared for the 1997 Population Association of America conference) (on file with authors).

25. See LSIA Study, *supra* note 17, at 25, 29; CIC Study, *supra* note 17, at 45-48; see also discussion *infra* Part II.

to “count” as a mark in favor of admitting a particular migrant should include any relationship that can be shown to yield economic benefits to the country. In contrast to a family-based immigration program, which might limit sponsorship eligibility to immediate family members, family sponsors in the economic-stream could include immediate family, grandparents, cousins, nieces, nephews, or even good friends as long as they can be shown to enhance the long-term economic contribution of the applicant. A secondary benefit, based on the criteria we use to evaluate policy governing economic-stream migration, is that families are united – the primary goal of a family-based migration program.

Other Factors. Other qualities may be indicators of economic success among skills-based migrants. The presence of a spouse or family member who also scores well on a points test would indicate a heightened potential economic benefit to admitting the migrant. The factors already noted above that contribute to “adaptability” could be rewarded. These factors, however, should carry relatively little weight, as it is unclear that the long-term economic benefits yielded by migrants with these qualities would be significantly higher than those without them.

A particular immigrant-receiving country may find it useful to add elements designed to meet specific needs of that country. For instance, if a country wants to populate a certain geographical area with skilled workers, the host country could give extra points to migrants willing to settle in designated areas. Given that the presence of a family sponsor in the designated area may provide an added incentive for the migrant to stay in that area, such a relationship may merit extra points or a waiver for certain prerequisites such as employer sponsorship.²⁶

Procedural Advantages of a Point System

Even if a point system were not clearly superior to other methods of selecting skilled migrants as determined by the long-term economic contributions made by those migrants, implementing such a system would still yield a separate procedural advantage: streamlining the immigration process and yielding transparent, objective, and flexible criteria for selecting skilled immigrants.²⁷ Additionally, a point system enhances the “offer” made by the host country to the potential migrant. These procedural advantages alone justify the implementation of a point system.

The most important factors in a decision to migrate will probably be unaffected by the selection program that the host country employs. For instance, the presence of family and a culturally familiar community in the

26. Australia’s Skilled-Family Sponsored immigration category employs such a mix of factors. See *infra* Part II.B.

27. See PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 125.

host country or a favorable business climate²⁸ may be more important to a migrant than the mechanics of the migration process. Nevertheless, the selection system can affect the migrant's decision, and a point system yields several procedural benefits to the migrant.

First, a point system offers transparency in that it allows the migrant to assess his or her own chances of being able to immigrate. Potential migrants can thus better decide whether to pursue the process at all. This transparency also benefits policy makers and voters in that they are better able to understand how immigrants are being selected. A transparent and readily understood policy helps to ensure that the system is implemented in a consistent fashion for all applicants. By contrast, the current system in the United States is complex and confusing.²⁹ Processes whose outcomes are not predictable contribute to avoidable inefficiencies in the system and invite manipulation and abuse.³⁰

Second, a point system provides mobility to the migrant, allowing the migrant to leave an employer and pursue new opportunities as they arise. Given that the presence of a more attractive opportunity for a worker is one indicator of heightened demand for that worker's skills, this benefit to the migrant also results in the labor market demands being more quickly met and in subsequent increased economic returns to the host country.

Third, a point system improves efficiency in the selection process and therefore demands less time of the migrant, her employer, and those that oversee the process.³¹

II. ECONOMIC-STREAM MIGRANT SELECTION IN CANADA AND AUSTRALIA

In this section we examine two existing points tests, looking closely at the degree to which they are able to select the economic-stream migrants who are most able to succeed in the host country's economy. We also discuss the ways in which these tests diverge from or confirm the framework outlined above in Part I.

28. One study of Canada's business immigration programs noted that high taxation and a stifling regulatory climate discouraged businesses from flourishing and made some areas of Canada unappealing for immigrant investors and entrepreneurs. DAVID LEY, *SEEKING HOMO ECONOMICUS: THE STRANGE STORY OF CANADA'S BUSINESS IMMIGRATION PROGRAM* 2, 22-28 (May 2000) (part of the Research on Immigration and Integration in the Metropolis Working Paper Series), available at <http://riim.metropolis.net/Virtual%20Library/2000/wp0002.pdf> (last visited May 28, 2001).

29. See PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 37-69 (explaining in detail the current economic-stream migrant selection process in the United States).

30. *Id.* at 125.

31. We estimate that the savings for employers and government agencies in the United States that would result from the elimination of the labor certification process would be approximately \$59 million to the Department of Labor and between \$135 million and \$270 million to employers. *See id.* at 146.

A. Canadian Migration Policy

Canada's immigration program is divided into family, economic, and humanitarian streams. In contrast to other immigrant receiving countries, economic-stream migrants make up the majority of those immigrating to Canada, accounting for slightly more than half of total immigration. Attracting these migrants has become increasingly important, as the federal government anticipates that immigrants will provide the only source of workforce growth by the year 2011.³² The table below shows the composition of Canada's immigrant stream as well as the planned levels of immigration that are set each year by the Minister of Citizenship and Immigration.³³

	1999			1998			1997		
	Plan*	Actual	% of Total	Plan*	Actual	% of Total	Plan*	Actual	% of Total
Family	53,500	55,216	29	53,500	50,880	29	58,400	59,953	28
Economic	117,900	105,404	56	115,900	94,967	55	102,000	125,465	58
Skilled worker	100,200	92,394	49	96,600	81,191	47	82,000	105,538	49
Business	17,700	13,010	7	19,300	13,776	8	20,000	19,927	9
Humanitarian	22,100	24,367	13	24,100	22,700	13	26,100	24,130	11
Other	6,500	4,767	3	6,500	5,415	3	8,500	6,174	3
Total	200,000	189,754	100	200,000	173,962	100	195,000	215,722	100

* Planned immigration levels are expressed as a range. Only the lower limit of the range is listed here. With the exception of economic migration in 1997, the upper limit of the goal was never exceeded in any main category of immigration.

Economic-stream migration in Canada consists of skilled workers and business migrants. The admission criteria for business migrants are based on the level of financial investment that the prospective immigrant commits to Canadian enterprises. Skilled workers are those who qualify to immigrate by passing a points test, and it is Canada's implementation of that selection process that we investigate in this section.

32. Luiza Chwialkowska, *Ottawa Fears Labour Time Bomb*, NATIONAL POST (Canada), June 25, 2001, at A1 (noting that Canadian-born workers accounted for 87% of the growth in the work force during the first half of the 1980s, 55% during the second half of that decade, and only 29% of the growth during the first half of the 1990s).

33. CITIZENSHIP AND IMMIGRATION CANADA, FACTS AND FIGURES 1999: IMMIGRATION OVERVIEW, IMMIGRATION REPORT CARD 1999, at 3 (2000), available at <http://www.cic.gc.ca/english/pdf/files/pub/facts99e.pdf>; CITIZENSHIP AND IMMIGRATION CANADA, FACTS AND FIGURES 1998: IMMIGRATION OVERVIEW, IMMIGRATION REPORT CARD 1998, at 3 (1999), available at <http://www.cic.gc.ca/english/pdf/files/pub/facts98e.pdf>; CITIZENSHIP AND IMMIGRATION CANADA, FACTS AND FIGURES 1997: IMMIGRATION OVERVIEW, IMMIGRATION REPORT CARD 1997 (1998), available at http://www.cic.gc.ca/english/pub/facts97e/index_e.html.

1. *Skilled Migrant Selection in Canada: A Changing Selection Process*

In 1998 Canada's Minister of Citizenship and Immigration issued a report that called for significant changes in all areas of Canada's immigration and refugee policy.³⁴ The report criticized the current skills-based migrant selection scheme for its focus on the particular occupations of prospective economic-stream migrants, rather than identifying migrants with flexible and transferable skills.³⁵

The current selection system is premised on the capacity of governments to intervene significantly in the management of labour markets and to match the skills of foreign applicants to specific Canadian labour market shortages. However, in a world where technological change is the norm and industries appear and disappear almost overnight, it is no longer possible to micro-manage labour market supply and demand.³⁶

Many of the reforms suggested by the report have been proposed as regulations under the Immigration and Refugee Protection Act currently pending before the Canadian parliament.³⁷ The proposed selection system shifts away from an occupation-based selection model to one that emphasizes education and adaptability as indicators of the presence of a flexible range of skills that will meet changing economic demands.³⁸ The proposed changes to Canada's points test reveal the relative importance of each area of assessment in predicting long-term economic success of prospective economic-stream migrants.

34. CITIZENSHIP AND IMMIGRATION CANADA, BUILDING ON A STRONG FOUNDATION FOR THE 21ST CENTURY: NEW DIRECTIONS FOR IMMIGRATION AND REFUGEE POLICY AND LEGISLATION (1998), available at http://www.cic.gc.ca/english/about/policy/lr/e_lr.html (last visited June 5, 2001) [hereinafter CIC Policy Statement].

35. *Id.* at 28.

36. *Id.* at 29.

37. Immigration and Refugee Protection Act, Bill C-11, 37th Parliament (2001) (Can.), available at http://www.cic.gc.ca/english/pdf/files/pub/C-11_3.pdf (last visited June 6, 2001). After the Act is passed, the accompanying regulations will be subject to public comment and will likely enter into force in mid to late 2002. See E-mail from Mark Davidson, Acting Director, Economic Policy and Programs Division, Citizenship and Immigration Canada, to Christoph Hoashi-Erhardt (June 25, 2001, 11:21:00 EDT) (on file with authors).

38. CIC Policy Statement, *supra* note 34, at 30; CITIZENSHIP AND IMMIGRATION CANADA, BILL C-11, IMMIGRATION AND REFUGEE PROTECTION ACT: EXPLANATION OF PROPOSED REGULATIONS, at <http://www.cic.gc.ca/english/about/policy/c11-reg.html> (last modified Mar. 15, 2001) [hereinafter CIC Proposed Regs.].

2. *The Current and Proposed Points Test for Independent Applicants*

The table below outlines the areas of assessment in the current and proposed points tests.³⁹

Current Canadian Point System	Area of Assessment		Proposed Canadian Point System
10*	Occupation		—
	0-10 points awarded depending on perceived demand for and supposed skill level required by each job on the General Occupations List. ⁴⁰	No corresponding factor.	
18*	Education/Training Factor (ETF) ⁴¹		—
	Each occupation on the General Occupation List is assigned from 1-18 points.	No corresponding factor.	
16	Education		25
	Graduate degree: 16 points Bachelor's degree: 15 points Other post-secondary program or trade certificate: 10-13 points Secondary school completed: 5-10 points.	Graduate degree: 25 points Bachelor's degree: 20 points Other post-secondary program or trade certificate: 20 points Secondary school completed: 5 points	
8*	Work Experience		25
	2-8 points depending on number of years of experience and ETF of intended occupation.	25 points for 4 years of recent skilled work experience. Decrease of 5 points for each year less of experience to 10 points for 1 year.	

39. CITIZENSHIP AND IMMIGRATION CANADA, GUIDE FOR INDEPENDENT APPLICANTS, at <http://www.cic.gc.ca/english/immigr/guide-ce.html> (last visited June 1, 2001) [hereinafter CIC Guide]; CIC Proposed Regs., *supra* note 38.

40. The General Occupation List specifies the occupations that are open to skilled migrants. The list is compiled in consultation with Human Resources Development Canada ("HRDC") and excludes some highly skilled occupations such as medical doctors. Under the current system the applicant must have an intended occupation on the list unless she has already arranged for employment or a visa officer uses positive discretion to overcome the barrier. *See* CIC Study, *supra* note 17, at 49; CITIZENSHIP AND IMMIGRATION CANADA, GENERAL OCCUPATIONS LIST (May 21, 1997), available at <http://www.cic.gc.ca/english/immigr/occ/occup1.html> (last visited June 6, 2001) [hereinafter CIC Occupations List].

41. The Education/Training Factor was previously called the "Specific Vocational Factor." *See* CIC Study, *supra* note 17, at 13.

Current Canadian Point System	Area of Assessment		Proposed Canadian Point System
15	Language Ability		20
	Fluency in both official languages: 15 points Fluency in one official language: 9 points Gradations of skill reflected.	Fluency in both official languages: 20 points Fluency in one official language: 16 points Gradations of skill reflected less.	
10	Age		10
	10 points granted for those 21-44 years-old. Two points fewer granted for each year of age over 44 or under 21.	No change from current system.	
10**	Arranged Employment		10
	10 points for a job offer that has been validated by Human Resources Development Canada.	No change from current system.	
—	Adaptability		10
	Does not exist in current system.	Up to 10 points may be gained for qualities including family member in Canada, study/work experience in Canada, an informal job offer and spouse's education.	
5	Family Member in Canada		—
	5 points for those with a sibling, parent, grandparent, aunt/uncle, niece/nephew in Canada.	One of several possible qualities assessed under Adaptability.	
10	Personal Suitability		—
	Up to 10 points for perceived adaptability, motivation, initiative, and resourcefulness.	Will not be retained.	
8	Demographic Factor		—
	8 points for every applicant. Can be adjusted to effectively raise or lower the pass mark.	Will not be retained.	
110	Total		100

* These factors are determined entirely or in part by which occupation the applicant selects from the General Occupations List.

** Arranged employment in occupations with an ETF of 15 or more allows the applicant to raise her Occupational Factor to 10.

Under the current system, an applicant must score at least 60 points to merit consideration and 70 points to pass. Up to an additional 10 points may be assessed at an interview with a Canadian immigration official. This makes it possible for an applicant who scores a 60 on the test to reach the pass mark of 70 points.

3. *Analysis of Proposed Canadian Reforms*

In November 1998, the Economic Policy and Programs Division of Citizenship and Immigration Canada (“CIC”) released a report that evaluated each factor included in Canada’s points test.⁴² The study sought to determine the relative importance of each element of the test in predicting the “economic success” of skills-based migrants. Relative “economic success” was determined by comparing the incomes and participation in Canada’s unemployment insurance program over time of migrants who arrived in the same year and had similar scores in a particular area of the test.⁴³ The regulations under the proposed Immigration Act⁴⁴ clearly reflect the findings of this study.⁴⁵

Overall Predictive Power of the Points Test. The study first considers the ability of Canada’s points test as a whole to predict economic success by comparing the eventual economic success of migrants grouped according to their overall scores. The results indicate that the current points test is a reasonable predictor of future employment earnings and incidence of unemployment.⁴⁶ This is particularly true among those with the highest and lowest scores. Even over many years, top performers on the points test retain their position as those with the highest incomes and lowest levels of unemployment, while lower income levels and higher levels of unemployment persist over time for those with the lowest scores.⁴⁷ By contrast, the correlation between economic success and performance on the points test is weak among middle performers, i.e., a difference in score among middle performers is not a reliable predictor of differing economic success.⁴⁸

Occupational Factor and Education and Training Factor. Under the current selection system in Canada, the most important factor in assessing points for an applicant is her intended occupation, i.e., the occupation in which the applicant has experience and is qualified, and which the applicant is prepared to follow in Canada.⁴⁹ That significant weight is given to the applicant’s intended occupation is evidenced by the fact that four areas of assessment on the exam, which together account for a possible 56 points on a

42. CIC Study, *supra* note 17.

43. *Id.* at 4.

44. See Immigration and Refugee Protection Act, Bill C-11, 37th Parliament (2001), available at http://www.cic.gc.ca/english/pdf/files/pub/C-11_3.pdf (last visited June 6, 2001).

45. See CIC Proposed Regs., *supra* note 38.

46. CIC Study, *supra* note 17, at 5.

47. *Id.* at 5-8. This might appear to contradict the findings of Duleep and Regets. See Duleep & Regets, *supra* note 10. It should be remembered, however, that Duleep and Regets compare larger groups of migrants (with greater variation in each group) and find that the wage differential between groups disappears over time. *Id.* One should not conclude from that that within each of those groups initial income differentials do not persist. It is the income growth rate of the *groups* that differs, not the growth rate of the constituent members of the groups.

48. CIC Study, *supra* note 17, at 5-8. This could support the assertion that a points test should be used only as a pass/fail tool and not as a means of selecting from within a group of applicants who meet a minimum threshold pass mark.

49. CIC Guide, *supra* note 39.

test for which an applicant must receive 60 points to merit consideration, depend in part or entirely on the applicant's intended occupation.⁵⁰

The current system grants up to 10 points to the applicant based on the perceived need for the applicant's intended occupation in the Canadian labor market. Each intended occupation is listed on the General Occupations List along with an Occupational Factor: the number of points that allegedly reflects the demand for that occupation.⁵¹ For example, Chefs and Heavy-Duty Equipment Mechanics have high occupational factors (10 points each), while the occupational factor for Historians and Physicists is only one point.⁵² The current system also assesses points for the level of training that is required for the applicant's intended occupation. This is the Education/Training Factor ("ETF").⁵³ With up to 18 points assessed, ETF is the most heavily weighted factor on the test. Historians and Physicists have high ETFs (18 points each), while Chefs and Heavy-Duty Equipment Mechanics have relatively low ETFs (7 points each).⁵⁴

The CIC study notes that the occupational factor is simply not a reliable indicator of future economic success. The highest marks for occupational factor frequently do not result in the highest income levels or lowest levels of unemployment.⁵⁵ The occupational factor is a poor proxy for labor-market demand because the actual demand for particular occupations varies widely between local labor markets.⁵⁶ Merely because there appears to be a national shortage of workers in a particular occupation does not mean that a migrant in that occupation will find work in his or her particular community.⁵⁷ The study also recommends the elimination of ETF for two reasons. First, ETF replicates points assessed for education and is incorporated into the number of points assessed for experience, leading to concerns about double-counting.⁵⁸ Second, it is a very complicated factor that makes the selection system confusing and opaque for potential immigrants despite its theoretical elegance.⁵⁹ Therefore, both the occupational factor and the ETF have been eliminated on Canada's proposed points test.⁶⁰

50. *Id.*

51. See CIC Occupations List, *supra* note 40.

52. *Id.*

53. In 1997, ETF replaced the Specific Vocational Factor ("SVP"). The data used by the CIC study predate this change; however, the study's conclusions remain applicable, as ETF closely resembles the SVP. See *supra* note 41 and accompanying text.

54. CIC Occupations List, *supra* note 40, at 3, 6, 8.

55. CIC Study, *supra* note 17, at 36-39.

56. *Id.*

57. The CIC has voiced its concern that the existing system gives successful applicants the erroneous impression that they will easily obtain employment in their intended occupation. See CIC Policy Statement, *supra* note 34, at 29.

58. E-mail from Mark Davidson, Acting Director, Economic Policy and Programs Division, Citizenship and Immigration Canada, to Christoph Hoashi-Erhardt (Nov. 1, 2000, 16:11:15 EST) (on file with authors) [hereinafter Davidson]; see also CIC Study, *supra* note 17.

59. Davidson, *supra* note 58.

60. CIC Proposed Regs., *supra* note 38.

Education. The CIC study concludes that education is “the clearest and most basic pointer to an individual’s human capital” and that it is “a pivotal factor” in predicting long-term economic success.⁶¹ The study also notes that the employment earnings of those with college diplomas and trade certificates are quite similar.⁶² Reflecting these findings, the proposed system appears to place more emphasis on education than does the current one; however, the elimination of other factors that incorporate educational level offsets the proposed increase in points.⁶³ The proposed system would award 25 points to applicants with graduate degrees, while those with a bachelor’s degree would receive 20 points.⁶⁴ Applicants with three years of training leading to a trade certificate or apprenticeship would also receive 20 points, reflecting the increased value placed on skilled trades in the proposed system.⁶⁵ By contrast, under the current system 16 points are assessed for applicants with graduate degrees, 15 points for those with undergraduate degrees, and only 13 points for post-secondary vocational education or an apprenticeship.⁶⁶

Work Experience. Both the current and proposed systems assess points for work experience, though the proposed system would weigh it much more heavily than does the existing one. In the current system up to 8 points can be assessed for the applicant’s work experience, though the number of points awarded depends both on the amount of experience that the applicant has and on the ETF of the applicant’s intended occupation.⁶⁷ The proposed system eliminates the connection between points assessed for experience and the applicant’s occupation. Instead, it would award up to 25 points for experience in any skilled occupation.⁶⁸

It is noteworthy that the proposed points test differs sharply in the manner in which it evaluates work experience from the recommendations made in the CIC study.⁶⁹ The study notes that the current system for assessing experience does not accurately predict economic success, except for those with the highest ETF levels.⁷⁰ The study concludes that only if work experience is more closely linked with ETF will it serve as a reliable proxy for human capital development from work.⁷¹ The study notes that the existing system

61. CIC Study, *supra* note 17, at 9.

62. *Id.* at 9-10.

63. See Davidson, *supra* note 58. Davidson cautions against assuming that the proposed system will emphasize education more than the current system. “On a simplistic level it appears that we are increasing the weight assigned to education from 16 to 25. However at present there are significant overlaps between Education and the ETF factor and we are now proposing eliminating the ETF factor.” *Id.*

64. CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

65. *Id.*

66. CIC Guide, *supra* note 39.

67. *Id.*

68. CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

69. Compare CIC Proposed Regs., *supra* note 38, with CIC Study, *supra* note 17, at 17-18.

70. CIC Study, *supra* note 17, at 17.

71. *Id.* at 17-18.

assesses the same number of points for workers of similar experience even if their occupations yield very different levels of economic success.⁷² For example, an actuary with one year of experience receives the same number of points for work experience as a waiter who has worked for two years, yet the income of the actuary will likely be higher.⁷³ The study therefore recommends that ETF play an *increased* role in determining the number of points awarded for experience.⁷⁴ Nevertheless, in the interest of instituting a system that may be easily understood by all participants, the proposed point system eliminates ETF as a factor in assessing points for experience. One CIC official notes, "We are trying to build a system where the average client [and] Canadian citizen can easily understand how immigrants are being selected. We also want to build a system that is more objective, allowing for greater consistency and transparency in decision making."⁷⁵ The elimination of ETF as a factor in assessing experience points will also help to remedy a bias in the current system against applicants with skilled trades (as opposed to university) training.⁷⁶

Language Ability. Both the current and proposed points tests assess the applicant's language ability. The CIC study indicates that there is a very close correlation between language ability and economic success.⁷⁷ This correlation remains strong even over the long-term: the income gap between those who entered with strong language abilities in one of Canada's official languages and those whose language abilities were weak at entry persists even after fifteen years.⁷⁸ One explanation for this is that a lack of language facility impedes one's ability to fully use and develop one's human capital, resulting in a depressing effect on one's long-term position in the labor market.⁷⁹

The study also concludes that bilingualism yields only marginal economic benefits.⁸⁰ While particular jobs may require a second language, there does not appear to be a clear economic benefit to speaking a second language.⁸¹ Therefore, the study recommends decreasing the points assessed for facility in a second language but retaining some weight for a second language, given Canada's national interest in promoting bilingualism.⁸² The conclusions of the study are reflected in the proposed selection system.⁸³ It would assess a greater number of points for language ability (up to 20) than does the current

72. *Id.* at 17.

73. *Id.*

74. *Id.*

75. Davidson, *supra* note 58.

76. *Id.*

77. CIC Study, *supra* note 17, at 20.

78. *Id.*

79. *Id.* at 21.

80. *Id.* at 27-30.

81. *Id.*

82. *Id.* at 1, 27.

83. CIC Proposed Regs., *supra* note 38.

system, but it would more heavily weight fluency in the first official language (either English or French – 16 points), and would award only 4 points for fluency in the second official language.⁸⁴ The proposed selection system allows for standardized testing to assess the applicant's language ability, as recommended by CIC's study.⁸⁵

Age. Both the current and proposed tests award points for age. On both tests, applicants receive 10 points if they are between 21 and 44 years old. Two points are deducted from the 10 possible points for each year of age over 44 or under 21.⁸⁶ The study confirms that older workers tend to benefit from high levels of education, experience, and arranged employment while the youngest workers have difficulty entering the labor market and retaining employment.⁸⁷ The majority of workers between 25 and 49 experience similar wage growth, indicating that there is little need in further gradation of the points awarded.⁸⁸

Arranged Employment. Both systems assess 10 points to applicants who have a validated job offer from an employer in Canada.⁸⁹ The proposed system would also award 5 points under the Adaptability category to applicants who have an informal (i.e., not validated) job offer in Canada.⁹⁰ The CIC study indicates that arranged employment not only yields immediate economic benefits to the immigrant, but also that those who enter with a job offer retain their economic advantage over time.⁹¹ The study suggests that migrants who have prearranged employment are most likely to find work in occupations that will more fully use and develop their human capital. Migrants who do not have a job offer are more likely to be forced to accept employment below their capabilities.⁹²

The relatively small number of points awarded for arranged employment is not commensurate with the strength of this factor for predicting future economic success. We believe that arranged employment should be required of all participants if a point system were implemented in the United States given the evidence contained in the CIC study as well as evidence from Australia's experience that we discuss in the next section.⁹³

Family Member in Canada. Under the current system, 5 points are awarded to applicants who have immediate family members, grandparents,

84. *Id.* at pt. 1, div. 1.

85. *Id.*; CIC Study, *supra* note 17, at 28.

86. CIC Guide, *supra* note 39; CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

87. CIC Study, *supra* note 17, at 31-32.

88. *Id.*

89. A "validated job offer" is one for which a Human Resources Canada Center has certified that no suitably qualified Canadian or permanent resident is available to fill the position. Note that unlike labor certification in the United States, validation is not a requirement for entering Canada. *See* CIC Guide, *supra* note 39.

90. CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

91. CIC Study, *supra* note 17, at 33-35.

92. *Id.* at 33.

93. *See infra* text accompanying notes 148-56; *see also* LSIA Study, *supra* note 17.

an aunt or uncle, or a niece or nephew who reside in Canada. The CIC study notes that awarding points for a family relationship effectively promotes the acceptance of marginal candidates.⁹⁴ Migrants who received points for a family relationship had consistently lower incomes than those who did not receive those points.⁹⁵ Nevertheless, the proposed points test includes the possibility of gaining 5 points under the new Adaptability category if a relative lives in Canada.⁹⁶ While it may be that points will continue to be awarded for family relationships in the interest of family unification, it is odd that this factor would be placed in a category that purports to be an indicator of future economic success.

Evaluation at Interview. Under the current system up to 10 additional points may be assessed by an immigration officer at the applicant's interview for perceived "adaptability, motivation, initiative, and resourcefulness."⁹⁷ The proposed system would eliminate this factor. The proposed regulations promise, however, to "preserve the ability of an immigration office to exercise discretion when they believe that the total points awarded do not properly reflect an applicant's potential."⁹⁸

Demographic Factor. The demographic factor is assessed for every applicant at the same level. The factor can range from zero to 10 points and is currently set at 8. This serves as a means of changing the pass mark. As it is awarded to every applicant, it does not distinguish one from another or predict economic success.⁹⁹ Under the proposed system the pass mark itself would be set by the Minister, so it is not necessary to have a factor that is in effect a substitute for a variable pass mark.¹⁰⁰

B. Australian Migration Policy

Each year Australia's Department of Immigration and Multicultural Affairs ("DIMA") sets a desired level of permanent family-based and economic-stream migration. The overall size of Australia's planned program has fluctuated from year to year.¹⁰¹ Since 1995, however, skilled migration has grown steadily as a proportion of Australia's entire planned migration program, reflecting the government's desire to enhance the economic benefits of migration.¹⁰² Planned and actual migration levels are shown in the table

94. CIC Study, *supra* note 17, at 45-48.

95. *Id.* at 47.

96. CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

97. CIC Guide, *supra* note 39.

98. CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

99. CIC Study, *supra* note 17, at 44.

100. CIC Proposed Regs., *supra* note 38, at pt. 1, div. 1.

101. DIMA REVIEW, *supra* note 14, at attachment A, tbl. 2. Australia's planned level of migration decreased gradually from 124,700 in 1988-89 to 62,800 in 1993-94. *Id.* The program has increased in size since 1993-94, although the proportion of family migration has decreased. *Id.*

102. MIGRATION PROGRAM, DIMA, 2001-2002 MIGRATION AND HUMANITARIAN PROGRAMS—DISCUSSION PAPER 9-10 (undated).

below.¹⁰³

	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01
Planned family migration (relative size*)	44,500 (59%)	56,700 (70%)	44,580 (62%)	31,310 (47%)	32,040 (48%)	32,000 (48%)	34,400 (46%)
Actual family migration	37,078	46,458	36,490	21,142	21,501	19,896	—
Planned skilled migration (relative size*)	30,400 (41%)	24,100 (30%)	27,550 (38%)	34,670 (53%)	35,000 (52%)	35,333 (52%)	40,000 (54%)
Actual skilled migration	20,210	20,008	19,697	25,985	27,931	32,350	—

* These percentages represent only values relative to each other; they do not accurately reflect relative contribution to the entire migration program.

Australia's migrant selection scheme groups economic-stream migrants into three broad categories: General Skills Migrants, Employer Sponsored Migrants, and Business Skills Migrants. General Skills migrants are those who are selected using a points system, and it is on that group that we focus in this section.

1. *General Skills Migrants*

The General Skills category accounts for 68%¹⁰⁴ of planned economic-stream migration for fiscal year 2000-01. This category includes the following subcategories:

1. **Independent migrants** are those who enter Australia with no sponsor and are admitted if they pass a points test. The planned number of independent migrants in 2000-01 is 21,350.¹⁰⁵
2. **Skill-matching migrants** are those whose skills may fill labor supply lacunae in a specific geographical area of Australia. Information about each skill-matching applicant is contained in Australia's Skill Matching Database, which is made available to employers. A state or territory government or an employer located in a designated state or territory may nominate a migrant listed in the database for employment, at which point the migrant will be permitted to immigrate. Skill-matching migrants are not subject to a points test. However, they must meet the prerequisites for participation in the General Skills migration program outlined below.

103. DIMA, Australian Immigration Statistics: Recent Migration Program Numbers, at <http://www.immi.gov.au/statistics/migrant.htm> (last modified Sept. 5, 2001); DIMA REVIEW, *supra* note 14, at attachment A, tbl. 2; STATISTICS SECTION, DIMA, IMMIGRATION UPDATE: JUNE QUARTER 2000, at 7 (2000), available at http://www.immi.gov.au/statistics/publications/immigration_update/update.pdf (last visited Sept. 21, 2001).

104. This figure was calculated by summing the planned level of each subcategory of General Skills Migration and dividing that number by the planned level for overall skill-stream migration. See DIMA, Fact Sheet 2: Key Facts in Immigration, at <http://www.immi.gov.au/facts/02key-2.htm> (last visited Sept. 21, 2001) [hereinafter DIMA Fact Sheet].

105. *Id.*

3. **Family-sponsored migrants** are those who have a family sponsor with a qualifying relationship to the applicant. The migrant must also have an assurer – an Australian citizen or permanent resident living in Australia who agrees to assume financial support for the applicant if necessary. The sponsor and assurer may be the same person.¹⁰⁶ The number of family sponsored migrants in the General Skills Category planned for fiscal year 2000-01 is 5,950.¹⁰⁷

There are two subcategories of family sponsored migration:

- 1) *Skilled-Regional Sponsored* migrants are those whose sponsor lives in a designated area of the country where the government wishes to encourage the settlement of skilled migrants. A sponsor for a Skilled-Regional Sponsored migrant may be an immediate family member, a niece or nephew, a first cousin, or a grandchild. Skilled-Regional Sponsored Migrants are not subject to a points test, though they must also meet the prerequisites for participation in the General Skills migration program outlined below.¹⁰⁸
- 2) *Skilled-Australian Sponsored* (“SAS”)¹⁰⁹ migrants are those with sponsors in any area of the country. SAS migrants must pass the points test, however, they are granted extra points for the sponsorship. Sponsorship is limited to an immediate family member or a niece/nephew.¹¹⁰

2. *Prerequisites for Skills-Based Migration in Australia*

In February 1999, DIMA published the results of an extensive review of Independent and Skilled-Australian Linked (now SAS) migrant categories.¹¹¹ DIMA’s review recommended substantial revisions in several areas of the selection process. One recommendation was the introduction of minimum threshold requirements for “core selection criteria.”¹¹² The three core selection criteria are Skills, Age, and English language skills.¹¹³ The “skills” selection criterion was defined as “skills that meet Australian requirements for an occupation that requires a degree, diploma or trade-level qualifications and at least twelve months recent employment in a skilled occupation at the time of application.”¹¹⁴

106. DIMA, GENERAL SKILLED MIGRATION 23 (2001), available at <http://www.immi.gov.au/allforms/order.htm> (last visited Sept. 21, 2001) [hereinafter DIMA GUIDE].

107. DIMA Fact Sheet, *supra* note 104.

108. DIMA GUIDE, *supra* note 106, at 19-20.

109. The SAS category was called “Skilled-Australian Linked” (“SAL”) in previous schemes. We refer to the category by the new acronym, although “SAL” is still frequently used.

110. DIMA GUIDE, *supra* note 106, at 21.

111. DIMA REVIEW, *supra* note 14.

112. *Id.* at 3-4, 12, 35-53.

113. *Id.* at 3.

114. *Id.*

At the review's recommendation, all General Skills applicants must now meet the following prerequisites:¹¹⁵

1. The applicant must be under 45 years old.
2. The applicants must speak "vocational English."¹¹⁶
3. The applicant must have a diploma from a post-secondary educational institution or a trade certificate requiring a similar level of education. In a few cases work experience can be substituted for formal educational credentials.¹¹⁷
4. The applicant must have elected an occupation from the "Skilled Occupations List" ("SOL") in which they have work experience. As outlined below, each occupation on the SOL is assigned a point value. The experience prerequisite depends on this value. Those with nominated occupations worth 60 points must have at least 12 months of experience in *any* occupation listed on the SOL during the 18 months preceding their application. Those with nominated occupations assessed at 40 or 50 points must have two years of experience in *any* listed occupation during the three years preceding their application.¹¹⁸ There is no requirement or guarantee that the migrant will work in her nominated occupation upon arrival.¹¹⁹
5. The applicant must obtain an individualized skills assessment from an independent professional society with which her nominated occupation is associated. The assessing body determines whether the applicant's qualifications are suitable for the nominated profession. Assessments are for immigration purposes only, and merely allow the applicant to apply under a particular nominated profession. A positive determination by an assessing authority does not mean that the applicant will be able to work in her nominated profession upon arrival. An applicant may apply for multiple skills assessments to determine the nominated occupation under which she would like to apply.¹²⁰

3. *The Points Test for Independent and Skilled-Australian Sponsored Migrants*

Independent and SAS migrants who meet the basic threshold requirements are then evaluated using a points test. The table below summarizes the areas

115. DIMA GUIDE, *supra* note 106, at 6-7; *see also* DIMA REVIEW, *supra* note 14, at 3-4.

116. Vocational English is defined as a score of at least 5.0 out of 9.0 on all components of the International English Language Testing System exam ("IELTS"). DIMA GUIDE, *supra* note 106, at 6-7.

117. *Id.* at 6.

118. *Id.*; *see also* DIMA REVIEW, *supra* note 14, at 4.

119. E-mail from Mary Crock, Senior Lecturer, Faculty of Law, University of Sydney, to Christoph Hoashi-Erhardt (Oct. 19, 2000, 03:00:50 EDT) (on file with authors); E-mail from Pamela Arber, Research Section, DIMA, to Christoph Hoashi-Erhardt (Oct. 19, 2000, 00:04:21 EDT) (on file with authors) [hereinafter Arber]. Despite the lack of such a requirement, the assessment process and the specificity of experience required for many professional and trade occupations results in most applicants desiring to work in their nominated occupation. Arber, *supra*.

120. DIMA GUIDE, *supra* note 106, at 7, 50-51.

in which points are assessed:¹²¹

<i>Area of Assessment</i>	<i>Maximum Points</i>	<i>Notes</i>
Skill	60	Occupations requiring an educational degree specific to the occupation: 60 points Occupations requiring a more general degree: 50 points Occupations requiring training that is yet more general: 40 points
Age	30	18-29 years: 30 points 30-34 years: 25 points 35-39 years: 20 points 40-44 years: 15 points
English language ability	20	"Competent" English: ¹²² 20 points "Vocational" English: ¹²³ 15 points
Specific work experience	10	Nominated Occupation assessed 60 points for Skill and 3 years of recent experience <i>in that occupation</i> : 10 points Nominated Occupations assessed 40, 50, or 60 points for Skill and 3 years of recent experience <i>in any skilled occupation</i> : 5 points
Occupation in demand/job offer	10	Occupation in demand but no job offer: 5 points Occupation in demand with job offer: 10 points
Australian qualifications	10	Australian degree/trade qualification: 5 points Australian Ph.D.: 10 points
Spouse skills	5	Spouse satisfies prerequisites for general skills migration: 5 points
Bonus points	5	Any <i>one</i> of the following: 5 points <ul style="list-style-type: none"> • Capital investment in Australia • Australian work experience • Fluency in one of Australia's community languages
TOTAL	150	
Qualifying sponsor relationship	+15	For SAS applicants only: +15 points

121. *Id.* at 29-37.

122. IELTS score of at least six on each of the four components of the test – speaking, reading, writing and listening. *Id.* at 31.

123. IELTS score of at least five on each of the four components of the test – speaking, reading, writing and listening. *Id.*

Independent Migrants. Independent migrants are those who have met the basic criteria for general skills migration and who do not have a sponsor (either family or employer) in Australia, and there is no limitation on where an independent migrant may choose to live or work. Independent migrants must score 110 points on the points test to be eligible to immigrate. If the applicant scores below the pass mark but above the “pool mark” of 70 points, her application will be held in reserve (“pooled”) for up to two years after assessment.¹²⁴ If, during that two-year period, the pass mark is lowered such that the applicant’s score is now equal to or higher than the new pass mark, the application will be considered further.¹²⁵

Skilled Australian Sponsored Migrants. Like Independent migrants, SAS migrants are not limited geographically and must be assessed by the points test. The pass mark for SAS migrants is also 110 points, though they also receive 15 points for having a family sponsor and an assurer.¹²⁶ The family sponsor must be a parent, child, sibling, niece or nephew.¹²⁷ The pool mark for SAS migrants is 105 points.¹²⁸

4. *Analysis of the Australian Points Test*

Skill. The first area of evaluation on the points test is skill. An applicant can receive 40, 50, or 60 points for skill, accounting for up to 55% of a passing score. The point value associated with each occupation on the SOL is assigned by the professional body responsible for skills assessments for that occupation. Applicants receive the points associated with their nominated occupation regardless of their level of experience in it.¹²⁹

Sixty points is granted for occupations that require a degree or trade certificate that is specific to the occupation.¹³⁰ Such occupations include chiropractors, solicitors and barristers, and butchers.¹³¹ Occupations that require more general training and a degree, though not necessarily a degree specific to the occupation, are awarded 50 points.¹³² These professions include actuaries, acupuncturists, and biomedical engineers.¹³³ Occupations

124. *Id.* at 26.

125. *Id.*

126. *Id.* at 26, 37.

127. *Id.* at 37.

128. Given the heightened pool mark relative to independent migrants, it is advantageous to apply for the SAS category only if the applicant would not otherwise reach or score within five points of the pass mark on the points test. Assuming that there is an abundant supply of visas in all categories and subcategories, SAS migrants who will not score within five points of the pass mark would be better off applying as independent migrants to take advantage of the more generous pool mark and the lack of a sponsor/assurer requirement.

129. As noted above, all general skills migrants must meet certain basic work-experience requirements. Work specific to the applicant’s nominated occupation is evaluated elsewhere on the points test.

130. DIMA GUIDE, *supra* note 106, at 29.

131. *Id.* at 51-60.

132. *Id.* at 29.

133. *Id.* at 51-60.

requiring still less specific training are awarded 40 points.¹³⁴ These professions include massage therapists, office managers, and stockbrokers.¹³⁵

It is noteworthy that unlike Canada's point system, Australia does not have a separate assessment category for education.¹³⁶ Instead, Australia assigns points to particular *occupations*, much as Canada's current selection system uses an ETF to reflect the skill level required by a particular occupation.¹³⁷ Yet unlike Canada, which has proposed eliminating the ETF because it is largely a proxy for education,¹³⁸ Australia has opted to retain occupation-based, rather than education-based, points assessment. This emphasis reflects the research cited in DIMA's review. The research concluded that it is the *specificity* of education, not the *quantity* of education, that leads to labor-market success.¹³⁹ DIMA's review states:

Labour market outcomes are strongest where the field of qualification involved a body of knowledge specific to a particular occupation. The study concludes that migrants trained in job-specific fields such as nursing, computing and accountancy were more likely to obtain professional employment than those with qualifications in more generalist fields such as "society and culture," natural and physical sciences and economics.¹⁴⁰

This conclusion seems reasonable, but nevertheless startling in a climate in which having generic, broad, and readily transferable skills is often considered most desirable.

The differences in the points assessed for certain professions on the SOL are also of interest. Professions that are grouped together on the list and appear to require similar levels of skill are not necessarily assessed by the same professional society. In some areas there appears to be a greater correspondence between the *agency* that assessed a particular profession and the points that it received than between the skills required for the profession and the number of points received. For instance, "Managers/Administrators" is one subcategory listed on the SOL.¹⁴¹ Every occupational listing in that subcategory that was assessed by the Australian Institute of Management ("AIM") received 60 points.¹⁴² In contrast, every occupation listed in the same subcategory that was assessed by Vocational Education and Training

134. *Id.* at 29.

135. *Id.* at 6, 51-60.

136. Compare DIMA GUIDE, *supra* note 106, at 26-37, with CIC Guide, *supra* note 39, and CIC Proposed Regs., *supra* note 38.

137. See CIC Guide, *supra* note 39.

138. See *supra* text accompanying notes 49-60.

139. DIMA REVIEW, *supra* note 14, at 39.

140. *Id.*

141. DIMA GUIDE, *supra* note 106, at 51.

142. *Id.*

Assessment Services (“VETASSESS”) received 50 points.¹⁴³ As a result, “Supply and Distribution Manager[s]” and “Sales and Marketing Manager[s],” which were assessed by AIM, both received 60 points.¹⁴⁴ At the same time, “Research and Development Manager[s],” which were assessed by VETASSESS, received only 50 points.¹⁴⁵ Similarly, in the “Professionals” category, “Agricultural,” “Electrical,” and “Civil” engineers all received 60 points, and were assessed by the Institute of Engineers, Australia (“IEA”).¹⁴⁶ At the same time, “Biomedical Engineer[s],” which were assessed by VETASSESS, received only 50 points.¹⁴⁷ These differences affect not only the number of points applicants in these categories are assessed for skill, but also the work experience prerequisite and the points that the applicant receives for specific work experience.

Age. Australia’s selection system is weighted towards younger migrants, though less so after the implementation of the changes recommended by the DIMA study, which narrowed the disparity between points awarded to younger and older migrants.¹⁴⁸ The selection system’s bias towards younger workers is partially explained by evidence from the comprehensive Longitudinal Survey of Immigrants to Australia (“LSIA”) that suggests that among independent migrants there is a positive correlation between age and *unemployment rate*, both initially and up to three and one-half years after settlement.¹⁴⁹

This evidence contrasts with the evidence presented in Citizenship and Immigration Canada’s (“CIC”) study of their selection program. The CIC study concluded that age is only a significant factor in predicting economic success at the tail end of working life and that older workers tend to benefit from high levels of education, experience, and arranged employment.¹⁵⁰ Anecdotal evidence presented in the DIMA’s review also confirmed the advantages enjoyed by older workers.¹⁵¹ Nevertheless, the Australian system continues to favor younger workers.

It would be interesting to study the correspondence between age and future economic success in a system that requires employer sponsorship for every applicant, a prerequisite that we proposed above. Because employer sponsorship tends to promote maximum use of the applicant’s human capital¹⁵² and because older workers tend to have more highly developed human capital,

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 52.

147. *Id.*

148. DIMA REVIEW, *supra* note 14, at 49.

149. DIMA REVIEW, *supra* note 14, at 48 (citing the LSIA Study); *see generally* LSIA Study, *supra* note 17.

150. CIC Study, *supra* note 17, at 31-32.

151. DIMA REVIEW, *supra* note 14, at 48.

152. This is evident from the level at which Business Skills and Employer Sponsored Migrants reported that they used their highest qualifications “often” or “very often” relative to the frequency

one might expect that in such a system there would be a positive correspondence between age and economic success, and an inverse correspondence between age and unemployment rate. In such a system, points assessed for age might be weighted more heavily towards older workers.

English Language Ability. English proficiency is a requirement for all general skills migrants and a higher level of facility in English is rewarded. The importance of facility in English is well documented.¹⁵³ A lack of proficiency in the host-country's national language prevents otherwise highly skilled workers from fully utilizing their human capital.

Specific Work Experience. The points assessed to an applicant in the area of specific work experience depend on the points assigned to the applicant's nominated occupation for Skill. Ten points are granted to applicants whose nominated occupation was assessed at 60 points for Skill and who have worked in their nominated occupation or a closely related one for at least three of the four years preceding the filing of their application.¹⁵⁴ Applicants whose nominated occupations are assessed at 40, 50, or 60 points for Skill and have worked in any occupation on the SOL for three of the four years preceding their application receive 5 points.¹⁵⁵ Applicants who merely meet the basic requirements for general skilled migration receive no points.¹⁵⁶

This system for assessing work experience bears a much closer resemblance to the recommendations set forth by CIC's study of Canada's selection system than does Canada's proposed points test.¹⁵⁷ The Australian system reflects the fact that experience in a more highly skilled job will more likely result in economic success than will the same amount of experience in a job requiring less skill. Just as CIC's study recommends that the level of points awarded should be linked to the ETF of the job, Australia's system rewards points based on the length of experience as well as the skill level required by the occupation of the migrant.

Occupation in Demand and Job Offer. Each year Australia's Department of Employment, Workplace Relations and Small Business ("DEWRSB") revises the Migration Occupations in Demand List ("MODL").¹⁵⁸ The list contains occupations for which the DEWRSB believes there to be an acute need.¹⁵⁹ The MODL currently contains twenty-one occupations, including computer professionals, pharmacists, chefs, and cabinetmakers.¹⁶⁰ An appli-

reported by all other categories of migrants, including Independent migrants. LSIA Study, *supra* note 17, at 35; *see also* CIC Study, *supra* note 17, at 31. This is discussed further at the end of this section.

153. *E.g.*, DIMA REVIEW, *supra* note 14, at 51; CIC Study, *supra* note 17, at 20; LSIA Study, *supra* note 17, at 27.

154. DIMA GUIDE, *supra* note 106, at 32.

155. *Id.*

156. *Id.*

157. Compare CIC Proposed Regs., *supra* note 38, with CIC Study, *supra* note 17, at 17-18.

158. DIMA GUIDE, *supra* note 106, at 33; *see also* Arber, *supra* note 119.

159. *See* Arber, *supra* note 119.

160. DIMA GUIDE, *supra* note 106, at 33.

cant whose nominated occupation appears on the MODL receives 5 points.¹⁶¹ If the applicant also has a job offer in that occupation she receives an additional 5 points.¹⁶²

DIMA has used lists similar to the MODL in the past but discontinued their use as a result of the difficulties in obtaining useful labor market statistics, given the localized nature of most labor shortages.¹⁶³ DIMA's review suggests that this list contains only occupations that are in "widespread, persistent and ongoing shortage."¹⁶⁴ DIMA's review also notes that "the past success of Independent and SAL migrants in finding employment, regardless of their occupational field, suggests that occupational targeting should be seen as a bonus rather than a core element of the points test."¹⁶⁵

It would be interesting to study the role of such a list in a system where a job offer was a requirement for any prospective immigrant but where labor market testing requirements were minimal or non-existent. Would the labor market's demand for workers in areas where the local labor supply is lacking create sufficient incentives for overseas workers with the most needed skills to migrate? Would the migration stream created under such a system respond to needs currently articulated by the MODL without requiring the creation and maintenance of such a list?

The fact that points are granted for a job offer only if the offer is in an occupation contained on the MODL seems inconsistent with the quantity of evidence indicating that there are substantial economic benefits derived from prearranged employment, regardless of the specific nature of the job. LSIA data indicate that Business Skills and Employer Sponsored migrants (those who own a business or who enter the country with a job offer) have consistently lower unemployment rates than all other categories of migrants, and that the disparity in unemployment rates persists, though to a lesser degree, over time.¹⁶⁶ CIC's review of their skilled worker selection system confirms this finding and notes that a job offer in any occupation benefits new migrants both initially and over the long-term.¹⁶⁷

Australian Qualifications. DIMA's review cites evidence that migrants who have been trained in Australia are more successful in the labor market than those who obtain their professional qualifications overseas.¹⁶⁸ This conclusion is reflected in the points test, which awards 5 points to applicants who have received a post-secondary degree from an Australian educational institution (10 points for a Ph.D.) and who have studied for at least one

161. *Id.* at 32.

162. *Id.*

163. DIMA REVIEW, *supra* note 14, at 55; *see also* CROCK, *supra* note 14, at 101.

164. DIMA REVIEW, *supra* note 14, at 55.

165. *Id.*

166. LSIA Study, *supra* note 17, at 28-29.

167. CIC Study, *supra* note 17, at 33.

168. DIMA REVIEW, *supra* note 14, at 62; *see also* Friedberg, *supra* note 15 (discussing the importance of local training).

academic year in Australia.¹⁶⁹

Other Areas of Assessment. DIMA's review notes that there are several other factors that may enhance the economic impact of Independent and SAS migrants.¹⁷⁰ The review notes that these factors are of relatively low importance and recommend that a limited number of points be awarded for their presence.¹⁷¹ Therefore, an applicant may receive 5 points for any one of the following, though the applicant cannot receive more than 5 points, even if she qualifies in more than one area:¹⁷²

- placing a minimum of AUD \$100,000 in an approved government investment;
- working for at least six months in Australia in one of the SOL occupations during the four years preceding filing the application; or
- fluency in one of Australia's community languages.

Qualifying Family Relationship. SAS migrants receive 15 additional points in recognition of the settlement assistance that a sponsor is able to provide.¹⁷³ DIMA's review notes that full points should be awarded regardless of which qualifying relationship is present between the migrant and sponsor as long as the sponsor is able to enter a legally binding commitment to support the applicant.¹⁷⁴ An interesting area of further investigation would be the economic effects of broadening the limits of whom may qualify as a sponsor. Would the economic benefits be diminished if any person could act as a sponsor for a migrant, whether or not the two had a family relationship?

5. *Employer Sponsored and Business Skills Migration*

The Employer Sponsored Migration Scheme, separate from the General Skilled Migration Program that we have discussed thus far, seeks to fill gaps in the Australian labor supply by providing employers with a mechanism for recruiting highly skilled migrants from overseas.¹⁷⁵ Generally, the employer must show that she has been unable to find an Australian citizen or resident who is suitable for employment before she may nominate an overseas employee.¹⁷⁶ Business Skills Migration is also distinct from General Skilled Migration in that it allows business owners and senior executives to move to Australia.¹⁷⁷ Each subcategory of business skills migrants is subject to a

169. DIMA GUIDE, *supra* note 106, at 34.

170. DIMA REVIEW, *supra* note 14, at 63.

171. *Id.*

172. DIMA GUIDE, *supra* note 106, at 36.

173. *Id.* at 37; DIMA REVIEW, *supra* note 14, at 8.

174. DIMA REVIEW, *supra* note 14, at 9.

175. See DIMA, EMPLOYER SPONSORED MIGRATION 4 (2000), available at <http://www.immi.gov.au/allforms/books5.htm> (last visited June 8, 2001).

176. *Id.*

177. DIMA, BUSINESS SKILLS MIGRATION 4-5 (2000), available at <http://www.immi.gov.au/allforms/books7.htm> (last visited June 8, 2001).

points test that seeks to assess the size, stability, and potential for long-term economic contribution of the migrant's business to Australia.¹⁷⁸

It is noteworthy that these categories are relatively small when compared with the planned levels for Independent and SAS migrants (5,800 Employer Sponsored¹⁷⁹ and 6,700 Business Skills¹⁸⁰ migrants are planned for fiscal year 2000-01, compared with 27,300 Independent and SAS migrants¹⁸¹). This is particularly striking when one considers the relative economic success portrayed by the LSIA data of Business and Employer-sponsored migrants compared with that of Independent migrants. Business and Employer-sponsored migrants consistently have lower unemployment rates both in the short- and long-terms than do Independent migrants.¹⁸² The percentage of these migrants who are employed in highly skilled jobs and not in semi- or unskilled jobs is markedly higher than it is for Independent migrants. This is true both initially and three and one-half years after settlement.¹⁸³ Business and Employer-sponsored migrants also enjoy a higher level of human capital employment in their work than do Independent migrants. While the difference decreases over time, a consistently higher percentage of these migrants responded that they use their highest qualification "often" or "very often" than did Independent migrants.¹⁸⁴

This evidence could be used to support an expansion of an employer-sponsorship requirement for all economic-stream migration. Employer-sponsorship, more than the mere presence of skills (even highly developed skills) or the presence of a family sponsor, appears to substantially enhance the ability of a migrant to quickly begin making an economic contribution to the host country in a job that fully uses her human capital. It would be interesting to investigate whether such sponsorship could be expanded in a manner that would neither burden the employer and employee nor do harm to local labor conditions and wages.

III. UNITED STATES' EFFORTS TO ADOPT A POINT SYSTEM

Canada and Australia have had a relatively long experience in selecting economic migrants through a point system. Despite the success in those countries, the United States has not adopted such a system.

Past Efforts to Pass a Point System. The U.S. Congress has considered but rejected a point system as part of a major overhaul of U.S. immigration policy. In 1989, several bills were proposed to add a point system component

178. *Id.* at 12-21.

179. DIMA Fact Sheet, *supra* note 104.

180. *Id.*

181. *Id.*

182. LSIA Study, *supra* note 17, at 25, 29.

183. *Id.* at 31.

184. *Id.* at 35.

to the existing immigration system.¹⁸⁵ Up to 54,000 “independent” immigrants (i.e., immigrants not chosen on the basis of their family relationships with either a U.S. citizen or permanent resident) would have been chosen on the basis of their scores on a point-assessment system. Twenty percent of these visas would be issued to those with the highest score in the point system. The remaining ones would be distributed randomly to those with a total of a certain minimum of points. The proposed criteria varied, depending on the exact bill involved, but included:

- age (up to 10 points);
- English language ability (up to 20 points);
- education (up to 25 points);
- prospective occupational demand (up to 20 points);
- occupational training and work experience (up to 20 points); and
- prearranged employment (job offer) (15 points).

The original rationale behind the point system proposal was to use it to expand immigration source country “diversity” while at the same time increasing the average skills and education of immigrants to the United States. Gradually, publicity about skill shortages led to the anchoring of the point system on occupations expected to experience shortages.

The proposed point system was soon shot down for a variety of reasons. Hispanic and other immigrants’ rights groups argued that including an English language component was racist and discriminatory. Labor unions perceived the bill as a threat to U.S. workers. The Department of Labor (“DOL”) contended that the bills overestimated the government’s ability to target immigrants to needed labor market adjustments.¹⁸⁶ When a major overhaul of the U.S. legal immigration system was finally enacted in 1990, a point system was nowhere to be seen.¹⁸⁷

Other Failed Experiments. As an alternative to a point system, Congress enacted a three-year pilot program in 1990 to consider using a “labor market information” (“LMI”) approach to select certain economic immigrants.¹⁸⁸ Unlike the individualized worker evaluation model, this method focused on making gross judgments about labor shortage and surplus occupations on the basis of general labor market information gathered primarily from national level data. Information regarding labor shortages and surpluses could be generated either indirectly, through the use of aggregate data collected for other purposes, or directly, through the use of focused interviews and surveys. Occupations that were determined to have a labor shortage would allow employers to bring in foreign workers without having to test whether

185. See, e.g., H.R. 672, 101st Cong. (1989); S. 448, 101st Cong. (1989).

186. *Senate Subcommittee Considers Immigration Reform Legislation*, 66 INTERPRETER RELEASES 289, 290 (1989).

187. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

188. Immigration Act of 1990, Pub. L. No. 101-649, § 122(a), 104 Stat. 4978, 4994 (1990).

domestic workers might be available for the position. Conversely, employers would be barred from bringing in foreign workers for occupations determined to have a labor surplus.¹⁸⁹

The DOL had funded a study in the early 1980's to explore the availability of labor market information to estimate national labor shortages by occupation. The authors of the study, Malcolm Cohen and Arthur Schwartz, put occupations through a number of screening tests to determine which ones might have a labor shortage.¹⁹⁰ Professor Cohen did another study in 1990 for the DOL that recommended using existing labor market information statistics from the DOL's Bureau of Labor Statistics in conjunction with expert analysis to create a list of shortage occupations.¹⁹¹ Because of concerns about the methodological reliability of the proposed approaches, the DOL never pursued this avenue further.

Despite these methodological concerns and general DOL discomfort with the approach, in 1990 Congress directed the DOL to conduct a three-year pilot LMI program to determine whether the foreign labor certification process could be streamlined by supplementing the existing case-by-case approach with lists of occupations in which labor shortages or surpluses may exist. Under the LMI program, the DOL was supposed to make a determination that surpluses or shortages existed in up to 10 defined occupational classifications.

After much delay and prompting from a congressional committee and a lawsuit by a company seeking to compel the DOL to implement the program, the department published proposed regulations for the LMI program in March 1993.¹⁹² The proposed rule sparked controversy from several organizations that claimed the LMI program would hurt U.S. workers by making it easier to hire foreign workers. The pilot program died a quiet death when it expired in 1994, without ever having gotten off the ground.

CONCLUSION

No government is an economic island – not even Australia.¹⁹³ As global economic integration increases at an ever-quicken pace, so does the competition for talented economic immigrants.

189. See generally PAPADEMETRIOU & YALE-LOEHR, *supra* note 3, at 122-23.

190. Malcolm Cohen & Arthur Schwartz, *Methodology for Determining Whether There Are Sufficient Workers Available in Various Occupations – An Aid in the Certification of Immigrants* (1982) (report to the Department of Labor's Employment and Training Administration).

191. Malcolm Cohen, *Study on the Feasibility of Using Labor Market Information for Alien Labor Certification* (1990) (report to the Department of Labor's Employment and Training Administration).

192. *Labor Dept. Finally Proposes Labor Market Pilot Program Regulations*, 70 INTERPRETER RELEASES 346 (Mar. 22, 1993) (summarizing Labor Market Information Pilot Program, 58 Fed. Reg. 15,242 (proposed March 19, 1993)).

193. See John Donne, *Devotions upon Emergent Occasions*, in BARTLETT'S FAMILIAR QUOTATIONS 254 (15th ed. 1980) (with apologies).

Yet economic considerations alone cannot drive an immigration policy in a democracy. For one thing, we still are not sure what characteristics best predict economic success for individual immigrants or for a country. For another, immigration policy serves a multitude of purposes in a democracy. Economic enhancement is just one of many worthy goals. Moreover, at least in the U.S. context, it is hard to make even incremental changes in immigration policy, let alone major conceptual shifts such as a move to a point system.

Despite these problems, we firmly believe that Australia and Canada are pursuing the right course through their respective point systems. As outlined in this article, a point system makes sense conceptually, practically, and procedurally. The United States should also enact a point system for selecting economic-stream migrants.