

## The Immigration Act of 1990: Unfinished Business a Quarter-Century Later

By Muzaffar Chishti and Stephen Yale-Loehr

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### Executive Summary

The *Immigration Act of 1990* was a significant milestone, representing the first major overhaul of the U.S. legal immigration system in a quarter-century. The law attempted to create a selection system that would meet the future needs of the economy by moving away from a near-total focus on family-based immigration and toward admission of more immigrants based on their skills and education. Sponsors of the legislation believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the “best and the brightest” in the global labor market. The law also made a number of changes to the nonimmigrant visa categories and other aspects of U.S. immigration law.

Congress has not significantly revised the U.S. immigration selection system since the law was passed, despite a number of efforts. In the intervening 25 years, the number and percentage of immigrants selected on the basis of their skills has increased, but only modestly—representing just 15 percent of all immigrants admitted for permanent residence in 2014—and other changes the legislation enacted are now out of date. An immigration policy that remains static for a quarter-century in an economy as large and dynamic as the United States represents serious neglect of the potential that immigration holds for economic vitality and competitiveness. Lawmakers must develop a system that introduces needed flexibility into a visa allocation system that is currently frozen in a 25-year-old design.

### I. Background

The last major overhaul of the U.S. immigration system occurred a little more than 25 years ago, in November 1990, when Congress enacted the *Immigration Act of 1990*. In signing the bill, President George H.W. Bush called it the most comprehensive revision to U.S. immigration law in 66 years.<sup>1</sup> This issue brief addresses what the 1990 Act did and did not accomplish.

The principal goal of the legislation was to design an immigration selection system that would meet the future needs of the country. Building on changes enacted in 1952 and 1965—the latter of which eliminated the national-origins quota system—the 1990 Act contained family-sponsored and employment-based legal permanent residence (also known as green card) provisions that continue to determine the number and characteristics of immigrants admitted to the United States today.

The ideas underlying the 1990 Act date back to the 1981 recommendations of the Select Commission on Immigration and Refugee Policy (SCIRP).<sup>2</sup> Better known as the Hesburgh Commission after its chairman, Father Theodore Hesburgh, the then-President of Notre Dame University, the panel put forward a blueprint for comprehensive immigration reform that was partially enacted in the *Immigration Reform and Control Act of 1986* (IRCA).<sup>3</sup> However, IRCA focused primarily on illegal immigration by establishing sanctions on employers for hiring unauthorized immigrants and by regularizing the status of unauthorized immigrants who had resided in the country for more than five years.<sup>4</sup>

The 1990 Act was intended to complete the agenda the Hesburgh Commission proposed, by overhauling the legal immigration categories. According to Sen. Alan K. Simpson, the Wyoming Republican who was one of the primary sponsors, the 1990 Act was the culmination of a decade-long effort to “close the back door” of illegal immigration “while we open the front door wider to skilled immigrants of a more diverse range of nationalities.”<sup>5</sup>

The Senate approved its version (S. 358) in July 1989. After numerous hearings and markups, the House of Representatives passed a very different bill (H.R. 4300) early in October 1990. At first, prospects for reconciling the two versions seemed bleak, as negotiators from the two chambers could not agree on a number of issues, especially an overall cap on immigration. Only after a sometimes acrimonious debate and what Simpson called an “anguishing compromise” did negotiators reach agreement on the major issues.

The Senate quickly passed the compromise bill on October 26 by an overwhelming 89-8 vote. However, the legislation stalled in the House when a group of Hispanic representatives, led by Rep. Edward R. Roybal (D-CA), prevented the bill from reaching the House

floor. The lawmakers objected to a provision that would have provided for a pilot program in three states to test the use of driver’s licenses as work authorization documents. Roybal and other opponents argued that it would be the first step toward a national identification card—a move that could lead to discrimination against ethnic minorities. After heated debate and consultation with Senate sponsors, supporters of the legislation agreed to remove the pilot program. The House approved the compromise in a 264-118 vote on October 27. President Bush then signed it into law on November 29, 1990.

## II. Major Provisions of the 1990 Act

The 1990 Act touched upon many facets of the legal immigration system—from significant additions and changes to immigrant and nonimmigrant visa programs, to creation of Temporary Protected Status, and revisions to some IRCA-mandated enforcement policies.

### A. Immigrant Visa Changes

The 1990 Act overhauled the legal immigration system by redesigning three streams of immigration: family-sponsored, employment-based, and diversity-based. The 1990 law did not significantly change the existing fourth immigration stream: refugees and asylees. While the legislation capped the total number of immigrant visas, starting at 700,000 for fiscal years (FY) 1992-94, the structure of the law virtually guaranteed a higher number of immigrants each year.

The concept of an annual cap on immigration first appeared in the Senate bill after senators heard testimony that in “the same way as a household budget, [a specific annual level of immigration] can be an important

disciplining device in policymaking, forcing us to determine our priorities thoughtfully and to make our choices consistent with the nation's overall highest interest within agreed limits.”<sup>6</sup>

Within the initial 700,000 cap, 465,000 visas were to go to family-sponsored immigrants, 140,000 to employment-based immigrants, 55,000 to the spouses and children of those legalized under the 1986 law, and 40,000 to special transition programs.<sup>7</sup> From FY 1995 onward, the immigration cap was supposed to decrease to about 675,000 a year. That total was to be comprised of 480,000 family-sponsored immigrant visas, 140,000 employment-based visas, and 55,000 diversity visas.

However, in setting a cap on family-based immigrant visas, Congress exempted the immediate relatives of U.S. citizens. The 1990 Act also established four capped family preference categories.<sup>8</sup> To protect family-sponsored preference immigrants from the ever-increasing number of immediate relatives, the 1990 law specified that the number of family preference visas could not drop below 226,000 a year.<sup>9</sup> This is known as the family preference “floor.” Because of this floor, and because the number of immediate relatives remained uncapped under the 1990 Act, the overall family cap is not a firm limit—it can be and is pierced every year.

In addition to caps on most immigrant visa categories, U.S. immigration law has included per-country caps since 1921. Before 1990, those limits were about 20,000 per country per year and resulted in long backlogs for nationals of some countries. For example, in 1990, applicants from the Philippines in the then-third preference category (professionals and persons of exceptional ability) had to wait 15 years to immigrate to the United States; Philippine applicants in the then-fifth preference category (brothers and sisters of U.S. citizens) had to wait 12 years. The 1990 Act increased per-country ceilings to about 26,000 per country per year.

The 1990 law carved the 140,000 employment-based (EB) immigrant visas into five categories, as follows:

- Forty thousand green cards each year are for “priority workers.” These EB-1 recipients include immigrants of extraordinary ability, outstanding professors and researchers, and certain executives and managers of multinational corporations.
- Another 40,000 visas, those in the EB-2 category, are for members of the professions (including architecture, engineering, and medicine) that hold a master’s degree or higher as well as noncitizens of “exceptional ability.”
- A third set of 40,000 visas is reserved for three groups: professionals who hold at least a bachelor’s degree; skilled workers (occupations that require at least two years of experience); and “other workers” (occupations that require less than two years of experience). “Other workers” were only eligible for 10,000 of the 40,000 visas in the EB-3 category, and a 1997 law further reduced this limit to 5,000.
- The fourth EB category allocates 10,000 visas annually for “special immigrants,” including religious workers.
- The EB-5 category sets aside 10,000 green cards a year for people who invest \$1 million (or \$500,000 in designated high-unemployment and/or rural areas) into a company that creates at least ten full-time jobs for U.S. workers.

The 1990 Act also called for a three-year pilot program under which the U.S. Department of Labor (DOL) was to decide whether labor shortages or surpluses existed in up to ten occupational classifications. Among the factors to be considered in this determination were labor market data and approved labor certifications (i.e., the number of requests received and approved by DOL from employers who wish to sponsor noncitizens for an EB visa and are able to demonstrate their efforts and inability to recruit a U.S. worker for the position). If the

Labor Department found a shortage in an occupational classification, a blanket labor certification would be issued for job offers in that category. If a surplus existed, DOL could still approve a labor certification for a job in that classification if the employer demonstrated “extensive recruitment efforts” and met all the requirements for certification. The Labor Department issued a proposed rule in 1993,<sup>10</sup> but never implemented the program because of political controversies and methodological concerns about how to determine labor shortages and surpluses.

Beginning on October 1, 1994, the law provided for a new stream of immigrants, known as “diversity” immigrants. This provision had its roots in the Hesburgh Commission report, which, along with family unification and economic growth, recommended “diversity consistent with national unity” as one of the three goals of U.S. immigration policy.<sup>11</sup> While the commission did not define diversity, Congress made an attempt to do so in IRCA by including a temporary program to allocate 5,000 immigrant visas in 1987 and 1988 to nationals of countries adversely affected when the 1965 *Immigration and Nationality Act* (INA) terminated the national-origins quota system. Thirty-six countries were deemed adversely affected, and more than 1 million people applied for a green card under the new NP-5 visa program in 1987 and 1988. In late 1988, Congress extended the NP-5 program for two years and increased the number of visas to 15,000 per year.

The 1990 law created a permanent diversity program by setting aside 55,000 immigrant visas (reduced to 50,000 in 1997) for nationals of countries from which fewer than 50,000 individuals immigrated in the preceding five years. In addition, for FY 1992 through FY 1994, the law made 40,000 transitional visas available for nationals of countries adversely affected by the 1965 law, with at least 40 percent of those visas earmarked for Irish nationals.

## B. Nonimmigrant Visa Changes

Before the 1990 law, the immigration statute defined 14 categories of nonimmigrants, from “A” (ambassadors and other diplomats and their families and domestic staff) to “N” (parents and children of certain special immigrants). The 1990 Act mixed up this alphabet soup further by amending most of the existing nonimmigrant categories and creating four new ones.<sup>12</sup>

On the whole, the changes to the nonimmigrant visa categories reflected a continuing battle between labor unions and business groups over the numbers and types of foreign nationals who could enter the United States to work, and under what conditions. On the one hand, Congress recognized that the supply of foreign temporary workers “has not kept up with the demands of American business in the international marketplace.”<sup>13</sup> On the other, lawmakers heard testimony that U.S. workers should have a first claim on U.S. jobs, and the AFL-CIO and other union groups pressured Congress to put numerical limits on the number of work-based nonimmigrants.<sup>14</sup> That tension continues today.

Almost all of the nonimmigrant visa provisions ultimately included in the 1990 law first appeared in the House bill. The House wanted to limit nonimmigrant visas and increase immigrant visas instead. The three sections that follow outline some of the key provisions.

### 1. *Visa Waiver Pilot Program*

IRCA authorized a three-year nonimmigrant visa waiver pilot program for business visitors and tourists from designated countries. Starting with two countries (the United Kingdom and Japan) in 1988, the pilot program was extended in 1989 to allow nationals from France, Germany, Italy, the Netherlands, Sweden, and Switzerland to visit the United States for up to 90 days without having to first obtain a B nonimmigrant visa from a U.S. consular post overseas.

**Table 1. Countries Admitted to the Visa Waiver Program, 1988–Present**

| Year | Countries Admitted                                                                                                              |
|------|---------------------------------------------------------------------------------------------------------------------------------|
| 1988 | Japan, United Kingdom                                                                                                           |
| 1989 | France, Germany, Italy, Netherlands, Sweden, Switzerland                                                                        |
| 1991 | Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, Spain |
| 1993 | Brunei                                                                                                                          |
| 1995 | Ireland                                                                                                                         |
| 1996 | Australia                                                                                                                       |
| 1997 | Slovenia                                                                                                                        |
| 1999 | Portugal, Singapore                                                                                                             |
| 2008 | Czech Republic, Estonia, Hungary, Republic of Korea, Latvia, Lithuania, Malta, Slovakia                                         |
| 2010 | Greece                                                                                                                          |
| 2012 | Taiwan                                                                                                                          |
| 2014 | Chile                                                                                                                           |

Source: U.S. Department of Homeland Security (DHS), “Visa Waiver Program Requirements,” updated April 6, 2016, [www.dhs.gov/visa-waiver-program-requirements](http://www.dhs.gov/visa-waiver-program-requirements).

More than 6.4 million people entered the United States without visas in the first 27 months of the Visa Waiver Program.<sup>15</sup> The pilot program was due to expire September 30, 1991. However, in July 1990 the State Department recommended continuing the program for another three years. Congress agreed and integrated a revision and extension of the Visa Waiver Program into the 1990 Act. After several more extensions, Congress made the program permanent in 2000.

Currently, 38 countries participate in the Visa Waiver Program (see Table 1). More than 21 million people entered the United States in FY 2014 on a visa waiver.<sup>16</sup> Over the years, and especially in the post-9/11 period, the United States has tightened procedures for visa waiver applicants to ensure only legitimate short-term travelers use the program. For example, every prospective visa waiver traveler undergoes counterterrorism screening and must receive approval through the Department of Homeland Security (DHS) Electronic System for Travel Authorization (ESTA) before coming to the United States.<sup>17</sup>

In late 2015, Congress further tightened security controls by passing legislation that bars foreign nationals from participating in the Visa Waiver Program if they have visited Iraq,

Syria, Iran, or Sudan at any time since March 1, 2011, with the option of designating additional countries in the future.<sup>18</sup> The new law also excludes from the program individuals who are dual nationals of a visa waiver country and Iraq, Syria, Iran, or Sudan. In February 2016, the administration also barred individuals from participating in the Visa Waiver Program if they have visited Libya, Somalia, or Yemen since March 1, 2011.<sup>19</sup>

## 2. *H Visas for Temporary Workers*

Congress originally enacted an H nonimmigrant visa category for temporary workers in 1952. IRCA subdivided the category:

- H-1 visas were for individuals of “distinguished merit and ability.” This included professionals, artists, athletes, entertainers, and prominent business people who lacked professional credentials.
- H-2A visas were for temporary workers coming to perform agricultural labor or services. The H-2B category was for foreign nationals entering the United States to perform temporary nonagricultural labor or services for

which no qualified U.S. workers could be found.

- The H-3 classification was available for foreign trainees.

Use of the H visa category increased more than 315 percent during the 1980s, from 44,770 admissions in 1981 to 141,380 in FY 1989.<sup>20</sup> The H-1 jump was particularly noticeable, with 89,856 admissions in FY 1989 compared to 39,944 six years earlier.<sup>21</sup>

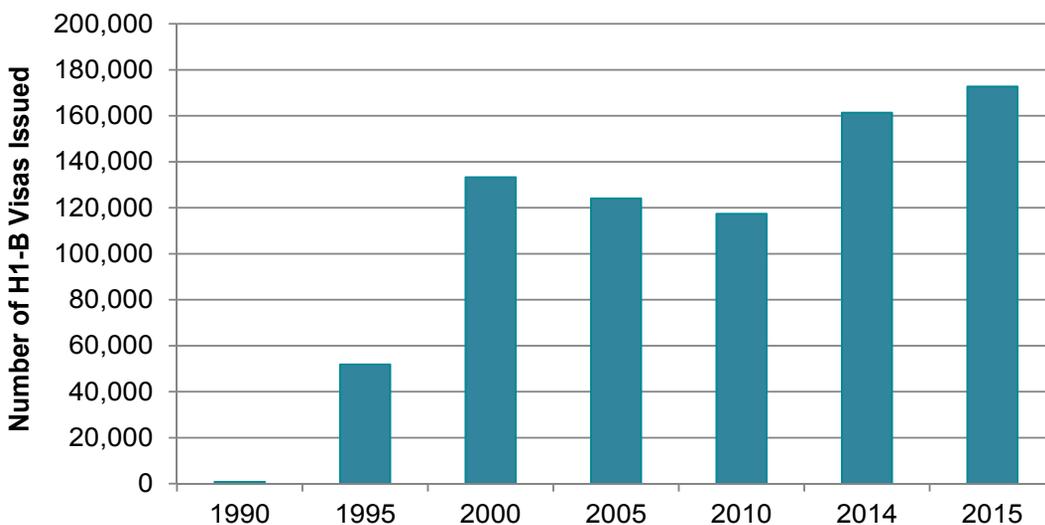
Unions were concerned about allowing H-1 nonimmigrants to work in the United States without any prior labor market test for determining the availability of qualified U.S. workers. They were especially concerned about foreign nurses and entertainers, who constituted about half of all H-1 admissions. A 1987 study by outside experts found that the increased admission of H-1 workers had no adverse impact on U.S. labor,<sup>22</sup> but that did not assuage union fears. Congress partially responded to those concerns by enacting the *Immigration Nursing Relief Act of 1989* (INRA), which split foreign nurses from

the main H-1 category and placed them into a new H-1A category for a five-year period. The remaining H-1 visa recipients were reclassified as H-1B.

INRA also required employers to attest that hiring foreign nurses wouldn't adversely affect the wages and working conditions of U.S. nurses, and that they would be paid at the same rate. Congress included a similar attestation requirement for H-1B employers in the 1990 law. Legislators also narrowed the H-1B category in 1990 by moving foreign nationals with "extraordinary" ability in the sciences, arts, education, business, or athletics to a new "O" nonimmigrant visa category and performing artists to a new "P" category.

The 1990 Act capped the annual number of new H-1B visas at 65,000 and H-2B visas for temporary nonagricultural workers at 66,000. The number of H-1B visas used per year has, however, grown over time. Close to 81,000 H-1B visas were issued in FY 1997. That more than doubled to 172,748 H-1B visas in FY 2015 (see Figure 1).<sup>23</sup> Visas are for both initial and continuing

**Figure 1. H-1B Visas Issued, FY 1990–2015**



Source: U.S. Department of State, "Nonimmigrant Visa Statistics," FY1997-2015 NIV Detail Table, accessed June 1, 2016, <http://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>.

employment, and therefore appear to exceed the congressional cap on the number of initial H-1B visas that can be granted each year.

The number of H-2A and H-2B visas has also grown, though the absolute number of visas granted remains smaller than H-1B visas. In FY 1997 the State Department issued 16,011 new and returning H-2A visas for agricultural workers; by FY 2015, that number had grown to 108,144. Similarly, in FY 1997 the State Department issued 15,706 new and returning H-2B visas for nonagricultural temporary workers, a number that increased to 69,684 in FY 2015.<sup>24</sup>

### 3. *Other Nonimmigrant Visa Changes*

Changes to other existing nonimmigrant visa categories included expanding the E category for investors to individuals investing in a wider range of goods and services, initiating a pilot program to permit F-1 students to work off-campus, and revising the definitions of “executive” and “manager” in the L-1 intracompany transferee category. Business and labor interests each won some rounds in the continuing battle over how many foreign nationals should be admitted in different visa categories. Businesses prevailed primarily in the areas where labor showed less interest, such as intracompany transferees. Unions won in the areas they were more concerned about, such as entertainers and nurses. Overall, the result was a decidedly more complex nonimmigrant visa system that the Immigration and Naturalization Service (INS) and the State Department Bureau of Consular Affairs would have to administer without additional resources.

#### C. *Other 1990 Act Changes*

The 1990 Act made several other changes to U.S. immigration law in addition to revising the nonimmigrant and immigrant visa categories. The following six provisions are particularly relevant to today’s immigration debate.

#### 1. *Temporary Protected Status*

After many failed attempts dating back to 1983, the 1990 law included a new Temporary Protected Status (TPS) category for noncitizens in the United States who are temporarily unable to return to their countries because of armed conflict or environmental disaster. In addition to establishing a generic statutory basis for TPS, Congress designated El Salvador as the first country whose nationals could seek TPS as a result of civil war. News articles at the time estimated that up to 500,000 unauthorized Salvadorans would qualify for TPS as a result.<sup>25</sup>

The newly created status included specific limitations: TPS only benefits individuals from an affected country who are already in the United States. Individuals cannot apply for TPS overseas. To qualify for TPS, a person must establish that he or she: (a) is a national of a designated country; (b) has continuously lived in the United States since the date designated by the U.S. government; (c) has not been convicted of any felony or two or more misdemeanors committed in the United States; (d) does not pose a national security risk; and (e) registers in a specified timeframe.

TPS does not include a path to permanent residence, and the Senate is forbidden from considering any legislation that would provide such a route unless three-fifths of the Senate agrees. Individuals granted TPS can, however, obtain work permits.<sup>26</sup>

Since 1990, nationals of 21 countries have been eligible to receive TPS for varying lengths of time (see Table 2). As of June 2016, more than 323,000 people from 13 countries have TPS. More than 60 percent of these individuals are from El Salvador.

Despite the statutory prohibition on transitioning to permanent resident status, many of the original TPS beneficiaries have ultimately qualified for green cards through family relationships or employer sponsorship.

**Table 2. Countries Designated or Redesignated for Temporary Protected Status After 1990**

| Country      | Year of First Designation | Reason for Designation           | Current or Potential Beneficiaries |
|--------------|---------------------------|----------------------------------|------------------------------------|
| Liberia      | 1991                      | Armed conflict, disease outbreak | 4,000                              |
| Somalia      | 1991                      | Armed conflict                   | 270                                |
| Sudan        | 1997                      | Armed conflict                   | 600                                |
| Honduras     | 1999                      | Hurricane aftermath              | 61,000                             |
| Nicaragua    | 1999                      | Hurricane aftermath              | 2,800                              |
| El Salvador  | 2001                      | Earthquake aftermath             | 204,000                            |
| Haiti        | 2010                      | Earthquake aftermath             | 50,000                             |
| South Sudan  | 2011                      | Armed conflict                   | 300-500                            |
| Syria        | 2012                      | Armed conflict                   | 10,000                             |
| Sierra Leone | 2014                      | Disease outbreak                 | 2,000                              |
| Guinea       | 2014                      | Disease outbreak                 | 2,000                              |
| Nepal        | 2015                      | Earthquake aftermath             | 10,000-25,000                      |
| Yemen        | 2015                      | Armed conflict                   | 500-2,000                          |

Source: U.S. Citizenship and Immigration Services (USCIS), “Temporary Protected Status,” accessed June 1, 2016, [www.uscis.gov/humanitarian/temporary-protected-status](http://www.uscis.gov/humanitarian/temporary-protected-status).

## 2. Administrative Naturalization

Until the 1990 Act, naturalization was entirely a judicial function. Congress enacted the first federal nationality and citizenship law in 1790, 85 years before it imposed any controls on immigration. Under judicial naturalization, INS handled the administrative processing of naturalization applications, and forwarded to the courts its recommendations to grant or deny citizenship. A court made the final decision in each case. Over the years, backlogs developed in both INS and in federal and state courts. In some jurisdictions, individuals had to wait up to two years from the time they filed their application until they were sworn in as U.S. citizens. The 1990 law allowed INS to make the final naturalization decision and also to administer the oath of citizenship—a function its successor, U.S. Citizenship and Immigration Services (USCIS), now shares with courts.

dition of aggravated felony, making a larger number of noncitizens deportable, and eliminated the power of federal judges to recommend against deportation in compelling cases. The law also expanded the ability of immigration judges to enter deportation orders *in absentia*, when noncitizens fail to appear at their hearings. It also expanded court authority to sanction lawyers for frivolous conduct, restricted the right of judges to reopen deportation proceedings, and limited respondents’ time to procure counsel.

In enacting these provisions, Congress was driven by two concerns: (1) that individuals in deportation proceedings and noncitizens convicted of crimes had too many rights, and (2) that noncitizens and their attorneys unnecessarily delayed deportation proceedings through frivolous motions and appeals, and by not appearing at court proceedings.

## 3. Enforcement Provisions

The 1990 law included a number of disparate enforcement provisions. It expanded the defi-

## 4. Employer Sanctions Revisions

IRCA enacted a sanctions regime for employers who hired foreign nationals not authorized to

work in the United States, and created anti-discrimination protections for job applicants. These were modified by the 1990 Act, which substantially increased financial penalties for violating the law and created a new category of fines for employees who use fraudulent documents. The law also exempted recruiters from having to screen applicants for work authorization. At the same time, it prohibited employers from insisting that their employees present more or different types of acceptable documents for employment. It also barred employers from retaliating against workers who bring a discrimination claim against them.

## 5. *Revised Grounds of Excludability and Deportability*

Since the late 1890s, the immigration statute has listed various grounds on which a noncitizen could be refused entry to the United States. By 1990 there were more than 30 grounds of excludability. The 1990 Act revised these grounds and grouped them into nine categories: (1) health-related; (2) criminal related; (3) security related; (4) being a “public charge,” i.e., likely to become dependent on government assistance; (5) relating to labor certification and qualifications; (6) relating to illegal entry and immigration violations; (7) relating to immigration document requirements; (8) relating to falsely claiming U.S. citizenship; and (9) miscellaneous grounds.

Similarly, the 1990 Act revamped the 19 grounds for deportation included in the INA, establishing the following five categories: (1) grounds relating to excludability at time of entry or adjustment of status and status violations; (2) criminal grounds; (3) grounds relating to failure to register and falsification of documents; (4) security related grounds; and (5) being a public charge.

## 6. *Commission on Legal Immigration Reform*

Finally, the law created a nine-member Commission on Legal Immigration Reform to review and evaluate the impact of the 1990

Act, and to make recommendations for change to Congress. Known as the Jordan Commission after its chair, Barbara Jordan, a former Democratic congresswoman from Texas, it issued several reports.

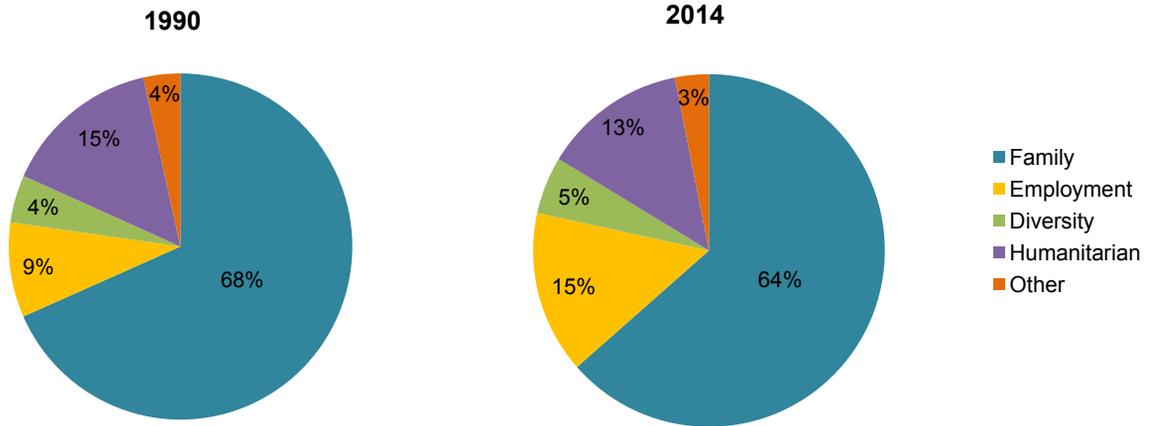
The commission issued its first interim report, *U.S. Immigration Policy: Restoring Credibility*,<sup>27</sup> in 1994. It focused primarily on controlling illegal immigration and made recommendations for border management, worksite verification, and impact aid for states affected by illegal immigration. The second interim report, *Legal Immigration: Setting Priorities* (1995),<sup>28</sup> addressed family- and employment-based immigration, refugee admissions, naturalization, and immigrant integration measures. The Commission released two final reports in 1997: *U.S. Refugee Policy: Taking Leadership*<sup>29</sup> and *Becoming an American: Immigration and Immigrant Policy*.<sup>30</sup>

Congress failed to act on most of the Commission's recommendations. However, after the terrorist attacks of September 11, 2001, Congress partially implemented one of the Commission's major recommendations by splitting the INS into separate agencies: two for enforcement (U.S. Immigration and Customs Enforcement, or ICE, and U.S. Customs and Border Protection, or CBP) and another for administering immigration benefits: USCIS.<sup>31</sup>

## III. Congressional Goals and the Results of the 1990 Act

If the experience of the last 25 years is any indication, the goals of the authors of the 1990 Act have been met with varying degrees of success. The number of employment-based immigrants has increased, but not as much as intended. Some new streams of immigrants have been added, but changes in the global economy have made some aspects of the legislation outdated.

**Figure 2. Composition of New Legal Permanent Residents, 1990 and 2014**



Sources: DHS, *2014 Yearbook of Immigration Statistics* (Washington, DC: DHS, 2016), [www.dhs.gov/sites/default/files/publications/LPR%20Flow%20Report%202014\\_508.pdf](http://www.dhs.gov/sites/default/files/publications/LPR%20Flow%20Report%202014_508.pdf); U.S. Immigration and Naturalization Service (INS), *1990 Statistical Yearbook of the Immigration and Naturalization Service* (Washington, DC: INS, 1991).

### A. Shifts in Legal Immigration Patterns

One of the principal goals of the 1990 Act was to increase the pool of skilled and educated immigrants eligible for permanent residence, both in absolute terms and in relation to immigrants entering through family-based criteria. Sponsors of the law believed that easing the admission of higher-skilled immigrants would be good for the economy and increase the United States’ competitive edge in attracting the “best and the brightest” in the global labor market. Similarly, the position of the executive branch, expressed in an October 1990 letter, stated that passing the immigration bill would “increase employment-based immigration from 54,000 to 140,000. New criteria will ensure most of these immigrants are highly skilled. These additional workers will help relieve labor shortages in key technical areas, allow more professional services in rural areas, and improve the competitiveness of our workforce.”<sup>32</sup>

A quarter-century later, there has been some shift in the categories of immigrants admitted to the United States. But it has not been as dramatic as its sponsors expected. Since 1990, the overall number of foreign-born individuals in the United States has grown

dramatically, from 19.8 million to 42.4 million in 2014.<sup>33</sup> Foreign-born individuals accounted for 7.9 percent of the U.S. population in 1990; they now comprise 13.3 percent. While the employment-based component of newly admitted immigrants has increased from 9 percent in 1990 to 15 percent today, more than half of employment-based immigrant visas are issued to workers’ family members, making the share of actual workers admitted on the basis of their skill close to 7 percent. Family-sponsored immigration still accounts for 64 percent of total immigration, down slightly from 68 percent in 1990 (see Figure 2).

Thus, employment-based immigration remains a relatively small component of permanent legal immigration to the United States. In addition, the 1990 law limited the admission of immigrants in low-wage occupations to 10,000 (further reduced by Congress to 5,000 in 1997). By decreasing the number of opportunities for the legal immigration of low-skilled workers to a trickle, more began to enter illegally. Twenty-five years later, the unauthorized population in the United States has grown almost threefold, to an estimated 11.02 million.<sup>34</sup>

**Table 3. Top Ten Countries of Origin for New Legal Permanent Residents, 1990 and 2014**

| Country            | Share of All Legal Permanent Residents (%) | Country                  | Share of All Legal Permanent Residents (%) |
|--------------------|--------------------------------------------|--------------------------|--------------------------------------------|
| <b>1990</b>        |                                            | <b>2014</b>              |                                            |
| Mexico             | 58.0                                       | Mexico                   | 13.2                                       |
| El Salvador        | 6.4                                        | India                    | 7.7                                        |
| Guatemala          | 2.5                                        | China, People's Republic | 7.5                                        |
| Soviet Union       | 2.2                                        | Philippines              | 4.9                                        |
| Vietnam            | 1.9                                        | Cuba                     | 4.6                                        |
| Philippines        | 1.8                                        | Dominican Republic       | 4.4                                        |
| Iran               | 1.7                                        | Vietnam                  | 3.0                                        |
| Colombia           | 1.5                                        | Korea, Republic of       | 2.0                                        |
| Poland             | 1.2                                        | El Salvador              | 1.9                                        |
| Dominican Republic | 1.1                                        | Iraq                     | 1.9                                        |

Sources: DHS, *2014 Yearbook of Immigration Statistics*; INS, *1990 Statistical Yearbook*.

At the same time, there has been a significant shift in countries of origin in the last 25 years (see Table 3). Mexican nationals, who accounted for 58 percent of all permanent residents admitted in 1990, represented 13.2 percent in 2014. While India and China were not even among the top ten sending countries of lawful permanent residents in 1990, they accounted for 7.7 percent and 7.5 percent respectively of admissions in 2014. Their combined share outpaces that of Mexico, evidencing a shift to immigration from Asian countries since 1990.

## B. H-1B Temporary Professional Workers

As stated above, until the 1990 Act, H-1 visas were uncapped. As part of a political compromise, the 1990 law set an annual cap of 65,000 for new H-1Bs. The law also requires employers to make four attestations before they hire an H-1B worker: (1) they will pay H-1B workers the same wage as similarly employed U.S. workers; (2) hiring H-1B workers will not adversely affect the working conditions of similarly employed U.S. workers; (3) there is no strike or lockout at the time of the filing; and (4) notice of the attestation is posted at the workplace and given to the H-1B worker.

The law did not, however, quell the controversy surrounding H visas. In 1998 Congress amended the law by adding a \$500 fee for each H-1B worker sponsored by an employer—a provision that would fund training and scholarship programs intended to help U.S. workers close skills gaps, thus reducing the need for H-1B workers.<sup>35</sup> The same law temporarily increased the H-1B cap to 115,000 for FY 1999 and FY 2000, because the H-1B program had become oversubscribed and because of an expected increase in the demand for foreign professionals to help U.S. companies deal with software problems as computer systems rolled over into the new millennium (the Y2K challenge).

The 1998 law also introduced the concept of “H-1B-dependent employers.” Companies and organizations in this category, as well as those that had committed a willful misrepresentation in a recent H-1B application, were required to provide additional proof that U.S. workers were not being displaced. An employer is considered H-1B dependent if it employs more than a certain percentage of H-1B workers, depending on its size (e.g., more than 15 percent if the employer has more than 50 employees). Reaching this compromise took months of wrangling among labor unions, employers, Congress, and the White House.<sup>36</sup>

In 2000, Congress modified the H-1B program yet again.<sup>37</sup> In response to employer pressures, it temporarily increased the H-1B cap to 195,000 for FY 2001, 2002, and 2003. The 2000 law also exempted universities and nonprofit research institutions from the H-1B cap and doubled the fee (now \$1,000 per sponsored employee) to increase funding for the retraining of U.S. workers.

The *H-1B Visa Reform Act of 2004*, enacted as part of a consolidated appropriations bill, returned to the original cap of 65,000, but added a separate annual cap of 20,000 for H-1B applicants with advanced U.S. degrees. The 2004 law also increased the fee to fund the retraining of U.S. workers to \$1,500 for companies with 26 or more employees and reduced it to \$750 for smaller companies. The law also added a \$500 anti-fraud fee and expanded the investigative authority of the federal Labor Department.

The debate over the H-1B limit continues, for a variety of reasons. After the annual H-1B cap fell back to 65,000, the quota began to be reached earlier and earlier each year. Applications for new H-1B workers can be filed starting April 1 in each fiscal year. In FY 2007, the limit was reached in the first two months. In FY 2008, the 65,000 quota was reached on the very first day. USCIS, which administers the program, used a lottery system to determine which H-1B petitions would proceed for adjudication. USCIS resorted to a lottery system again the following year.

In FY 2010 and FY 2011, the number of H-1B petitions decreased because of the recession, but the quota was still reached before the end of each fiscal year. By FY 2015, the economy had improved and the H-1B lottery was again used to select from an overfilled pool of applications. That year, USCIS received about 172,500 H-1B petitions during a one-week filing period. In FY 2016, USCIS received almost 233,000 H-1B petitions during the same period.<sup>38</sup> That meant that employers had only about a 25 percent chance of getting an H-1B petition accepted for adjudication.

The increasingly limited access of H-1B visas has precipitated strong reactions and lobbying efforts from all corners of the business community.<sup>39</sup> At the same time, some prominent members of Congress and representatives of U.S. labor groups continue to complain about losing U.S. jobs to H-1B workers. For example, Senator Charles Grassley (R-IA), Chairman of the Senate Judiciary Committee, stated in March 2015 that the H-1B program “has become a government-assisted way for employers to bring in cheaper foreign labor, and now it appears these foreign workers take over—rather than complement—the U.S. workforce.”<sup>40</sup> Newspaper accounts have reported that major companies such as Southern California Edison and The Walt Disney Company replaced U.S. employees with H-1B workers.<sup>41</sup> In response, in November 2015 Grassley and Senator Richard Durbin (D-IL) introduced a bill to reform the H-1B (and L-1) programs.<sup>42</sup>

More recent investigative reports have suggested that some outsourcing firms are increasingly dominating the H-1B program by “learning to game the H-1B system without breaking the rules.”<sup>43</sup> This is accomplished, the reports argue, when outsourcing firms flood the pool of H-1B applications from which the winning applicants are selected by the H-1B lottery, thus increasing their chances of success. These reports have found that of the 20 companies that received the most H-1B visas in 2014, for example, 13 were global outsourcing firms. The top 20 companies received about 40 percent of the visas, while more than 10,000 other firms received far fewer visas.<sup>44</sup>

### C. EB-5: The Rise of Immigrant Investors

The concept of allocating green cards based on investment in the United States drew vigorous objections during debate over the 1990 Act. For example, Rep. John Bryant (D-TX) decried “the sale of American citizenship”<sup>45</sup> and Senator Dale Bumpers (D-AR) unsuccessfully tried to delete the EB-5 program from the Senate bill, arguing that there “ought not to be a price put on American citizenship.”<sup>46</sup> The Bumpers amendment failed by eight votes.

Initially, the EB-5 program attracted few investors because individuals were required to invest in their own job-creating companies and to demonstrate a direct link between their investment and the creation of ten or more jobs. In late 1992, Congress expanded the EB-5 program with a pilot program that allowed for investments in “regional centers.” Investors in these regional centers were given the advantage of being able to count jobs created both directly and indirectly by their investment.

Still, few people immigrated through the EB-5 category. Eighteen years on, in 2008, only about 1,400 people used the category.<sup>47</sup>

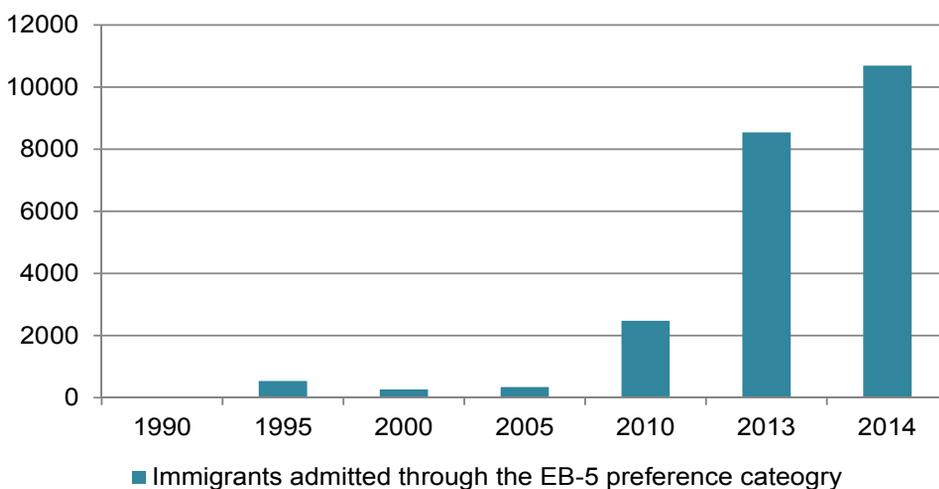
However, as the recession of 2008–09 closed many sources of domestic capital, U.S. businesses discovered the EB-5 program as an alternative way to finance some or all of their projects. By either setting up their own EB-5 regional centers or working with existing regional centers, many companies positioned themselves as attractive partners for foreign investors. This development breathed new life into the essentially dormant EB-5 program (see Figure 3).<sup>48</sup>

While USCIS approved fewer than 20 EB-5 regional centers between 1990 and 2008, as of early 2016 there were more than 800 regional centers across the country.<sup>49</sup> In one year alone, from FY 2008 to FY 2009, the number of EB-5 visas issued jumped from 1,443 to 4,218.<sup>50</sup> This number has grown every year since. In FY 2014, the EB-5 category reached its annual cap of approximately 10,000 for the first time.<sup>51</sup> USCIS currently has a backlog of more than 20,000 EB-5 petitions awaiting adjudication.<sup>52</sup>

Although EB-5 investors account for only about 1 percent of U.S. legal permanent immigration annually, the program has a much larger economic impact and considerable political visibility. EB-5 applicants have invested more than \$13 billion since 2008 and have created tens of thousands of jobs for U.S. workers.<sup>53</sup>

However, as the EB-5 program has grown in popularity, so have its problems. The Securities and Exchange Commission (SEC) is investigating alleged fraud in several EB-5 projects. When the EB-5 regional center program came up for reauthorization in the fall of 2015, Congress initially considered making signifi-

**Figure 3. Immigrants Admitted through the EB-5 Preference Category, 1990–2014**



Sources: DHS, *Yearbook of Immigration Statistics* (Washington, DC: multiple years), [www.dhs.gov/yearbook-immigration-statistics](http://www.dhs.gov/yearbook-immigration-statistics); 2014 based on U.S. Department of State, “Report of the Visa Office 2014”, accessed June 1, 2016, <https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2014.html>.

cant changes but ultimately, in December 2015, simply extended the program in its current form until September 30, 2016.

#### D. Employer Sanctions and the Growth of E-Verify

As noted above, a proposed pilot program to recognize driver's licenses as work authorization documents nearly killed the 1990 Act amid fears it would lead to a national identification card. Twenty-five years later, a national ID card has not materialized, but employer compliance with requirements to hire only authorized workers has increased due to the growth of the electronic verification of work authorization and increased enforcement at the workplace.

In 1996 Congress enacted a pilot program to test in five states an online system that would verify authorization to work in the United States.<sup>54</sup> Now called E-Verify, the program scans a worker's information against Social Security Administration (SSA) and DHS databases.<sup>55</sup> In 2003, Congress passed the *Basic Pilot Program Extension and Expansion Act of 2003*, which requires DHS to offer E-Verify enrollment to employers in all 50 states. In November 2008, the administration published a final rule requiring all federal contractors to participate in the program.<sup>56</sup>

Over time E-Verify has grown rapidly. Currently, more than 600,000 employers use E-Verify<sup>57</sup> and last year it checked the work authorization status of more than 27 million workers.<sup>58</sup> Like the EB-5 program, Congress must reauthorize E-Verify every few years. In December 2015, Congress reauthorized it until September 30, 2016 as part of an omnibus appropriations law.

Along with the rapid growth of E-Verify, the Obama administration also significantly expanded audits of employer compliance with IRCA basic employment verification requirements. The number of such audits increased from fewer than 500 in 2008 to more than 3,000 a year in 2012 and 2013.<sup>59</sup> The number of I-9 audits decreased to 1,320 in 2014.<sup>60</sup>

#### E. The Diversity Visa Program

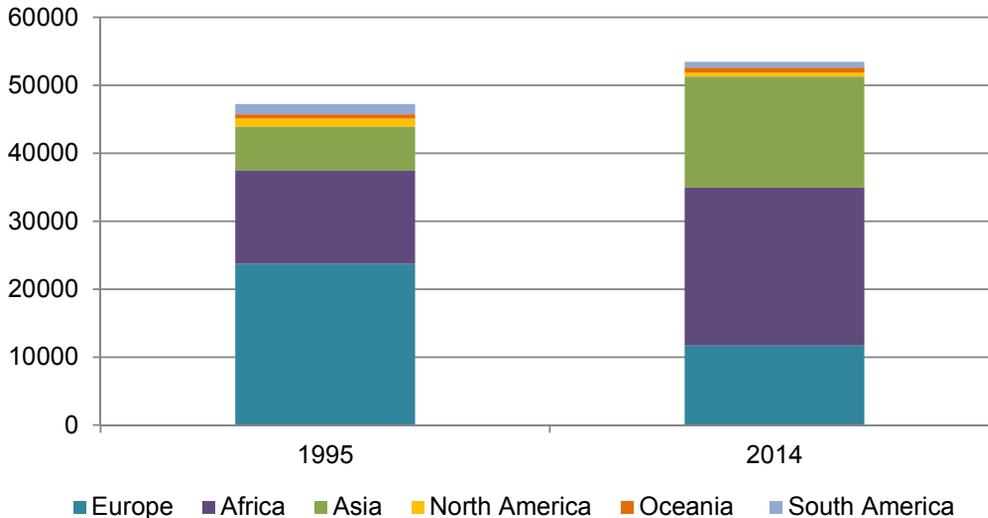
If the authors of the diversity visa provision in the 1990 legislation intended it to become a vehicle for the admission of immigrants from the pre-1965 "traditional countries of immigration" (i.e., European immigrants), it has had only mixed success. The composition of diversity visa beneficiaries has significantly changed over time. In FY 1995, the first year of the program, Poland and Ireland had the most recipients, and European countries accounted for almost half of all diversity immigrants. By FY 2014, African countries had become the dominant source of diversity immigrants (23,190 of approximately 50,000), and Europe was in third place regionally, after Asia (see Figure 4).

This trend is, however, consistent with the aim of building diversity into the immigration system in that countries cycle off and onto the list of eligible sending countries. More than any other provision of immigration law, the diversity program has also been responsible for the growth of immigration from Africa, a sending region almost entirely absent in immigration streams before 1965.

## IV. Implications for Today's Immigration Debate

The *Immigration Act of 1990*—following on the heels of the *Immigration Reform and Control Act* and completing the unfinished agenda of the Hesburgh Commission—represented a significant achievement in addressing the challenges the United States had been confronting for many years, both in terms of legal and illegal immigration. Nonetheless, Congress in 1990 had limited knowledge of the state and nature of the future economy and the dynamics of supply and demand in an increasingly global market. The 1990 Act was also heavily influenced by the need to balance the demands of opposing interest groups, who similarly did not fully understand these dynamics.

**Figure 4. Diversity Visas Granted by Region of Birth, 1995 and 2014**



Sources: DHS, *2014 Yearbook of Immigration Statistics*; INS, *1995 Statistical Yearbook of the Immigration and Naturalization Service* (Washington, DC: INS, 1997).

Some of the changes in the law bore immediate fruit. For example, the number of employment-based immigrants increased, consistent with the goals of that time. However, important as the changes were, they are out of date now. An immigration policy that remains static for 25 years in an economy as large and dynamic as the United States represents serious neglect of the potential that immigration holds for economic vitality and competitiveness. As was true when the Hesburgh Commission was created, the country is once again confronted with challenges related to policy failures in the governance of both legal and illegal immigration. For more than a decade, political stalemates have stopped progress on a range of immigration issues.

The critical lesson from the 1990 Act and from both the important milestone immigration laws that preceded it—the *Immigration Act of 1965* and IRCA in 1986—is that they were achieved in a culture of greater political trust and bipartisanship than exists today, even though there

were strong policy disagreements and divided government.

The 1990 and 1986 laws also demonstrate that Congress was unable to accomplish the Hesburgh Commission agenda in one legislative step. It took two major pieces of legislation, four years apart, to get it done. This could also provide a lesson for breaking the present legislative stalemate.

Whether Congress takes a piecemeal or a comprehensive approach to resolving the immigration challenges the country now faces, consensus exists on one thing: the categories and number of immigrants admitted under the 1990 Act have remained largely unchanged during a time when both the U.S. and global economies have undergone multiple cycles of change. At the least, Congress should introduce needed flexibility into a visa allocation system that remains frozen in a 25-year-old design.<sup>61</sup>

***An immigration policy that remains static for 25 years in an economy as large and dynamic as the United States represents serious neglect of the potential that immigration holds for economic vitality and competitiveness.***

## Endnotes

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- <sup>8</sup> The first preference (F1) is for unmarried sons and daughters of U.S. citizens, and their minor children, if any. The second preference (F2) is for spouses, minor children, and unmarried sons and daughters (age 21 and older) of legal permanent residents (LPRs). The third preference (F3) is for married sons and daughters of U.S. citizens, and their spouses and minor children. The fourth preference (F4) is for brothers and sisters of U.S. citizens and their spouses and minor children, provided the U.S. citizens are at least 21 years of age. See U.S. Department of State, “Family-Based Immigrant Visas,” accessed June 29, 2016, <https://travel.state.gov/content/visas/en/immigrate/family/family-preference.html#1>.
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- <sup>12</sup> The O, P, Q, and R visas were the new nonimmigrant visa categories created. The O visa is for individuals of “extraordinary ability or achievement;” the P visa for athletes, artists, and entertainers; the Q visa for international cultural exchange visitors; and the R visa for religious workers. See U.S. Citizenship and Immigration Services (USCIS), “Temporary (Nonimmigrant) Workers,” last updated September 7, 2011, [www.uscis.gov/working-united-states/temporary-nonimmigrant-workers](http://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers).
- <sup>13</sup> *Family Unity and Employment Opportunity Immigration Act of 1990*, House Report no. 101-723, Part 1 (Washington, DC: Congress, 1990), 43.
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- <sup>61</sup> MPI in 2006 first recommended creation of a permanent, independent executive-branch agency that would make regular recommendations to the president and Congress for adjusting employment-based immigration levels. This nonpartisan commission, staffed by a professional corps of career economists, demographers, and other social scientists, would provide timely, evidence-based, and impartial analysis that is vital for informed policymaking. See Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou, and Michael Fix, *Immigration and America’s Future: A New Chapter* (Washington, DC: MPI Independent Task Force on Immigration and America’s Future, 2006), [www.migrationpolicy.org/research/immigration-and-americas-future-new-chapter](http://www.migrationpolicy.org/research/immigration-and-americas-future-new-chapter); Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumption, *Harnessing the Advantages of Immigration for a 21st-Century Economy: A Standing Commission on Labor Markets, Economic Competitiveness, and Migration* (Washington, DC: MPI, 2009), [www.migrationpolicy.org/research/harnessing-advantages-immigration-21st-century-economy-standing-commission-labor-markets](http://www.migrationpolicy.org/research/harnessing-advantages-immigration-21st-century-economy-standing-commission-labor-markets).

## About the Authors



**Muzaffar Chishti**, a lawyer, is Director of the Migration Policy Institute (MPI) office in New York, based at New York University School of Law. His work focuses on U.S. immigration policy at the federal, state, and local levels; the intersection of labor and immigration law; immigration enforcement; civil liberties; and immigrant integration.

Before joining MPI, Mr. Chishti was Director of the Immigration Project of the Union of Needletrades, Industrial and Textile Employees (UNITE).

Mr. Chishti has testified extensively on immigration policy issues before Congress. In 1992, as part of a U.S. team, he assisted the Russian Parliament in drafting its legislation on forced migrants and refugees. He is a 1994 recipient of the New York State Governor's Award for Outstanding Asian Americans and a 1995 recipient of the Ellis Island Medal of Honor.

Mr. Chishti was educated at St. Stephen's College, Delhi; the University of Delhi; Cornell Law School; and the Columbia School of International Affairs.



**Stephen Yale-Loehr** is Professor of Immigration Law Practice at Cornell Law School, and is of counsel at Miller Mayer in Ithaca, New York. He is co-author of *Immigration Law and Procedure*, the leading 21-volume immigration law treatise, published by LexisNexis. He is an MPI Nonresident Fellow.

Mr. Yale-Loehr graduated from Cornell Law School in 1981 cum laude, where he was editor-in-chief of the *Cornell International Law Journal*. He received the American Immigration Lawyers Association (AILA)'s Elmer Fried award for excellence in teaching in 2001, and AILA's Edith Lowenstein award for excellence in the practice of immigration law in 2004.

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