

# Reducing Visa Waste: Model Legislation to Promote High-Skilled Immigration

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## Executive Summary

- Administrative errors by United States Citizenship and Immigration Services (USCIS) and the State Department lead thousands of immigrant visas to go unused each year. This was especially problematic during the Covid-19 pandemic, when more than 100,000 visas were lost because of administrative errors.
- Small changes in the formula for visa spillovers from year to year can reduce visa waste and favor highly skilled immigrants by allocating more employment-based visas and fewer family-based visas.

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## Introduction

The 1990 Immigration Act set the current numerical caps for the number of permanent immigrant visas available per year. These visas—commonly called “green cards”—grant permanent residency, the right to live and work legally in America indefinitely, and the opportunity to apply for U.S. citizenship after residing in the country for a number of years. Currently, there are five broad categories of immigrants:



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- Immediate Relatives of U.S. Citizens (no numerical cap)
  - Spouses
  - Unmarried children under age 21
  - Parents of U.S. citizens, aged 21 and older
- Family-Sponsored Immigrants (capped between 226,000 and 480,000, but the cap has been 226,000 for over a decade)
  - FB-1: Up to 23,400 unmarried children, aged 21 and older, of U.S. citizens
  - FB-2: Up to 114,200 spouses and children of green-card holders (FB-2A) and unmarried adult sons and daughters of green-card holders (FB-2B)
  - FB-3: Up to 23,400 married adult sons and daughters of U.S. citizens
  - FB-4: Adult siblings of U.S. citizens
- Employment-Based Immigrants (140,000)
  - EB-1: Up to 40,040 immigrants of “extraordinary ability,” such as outstanding professors and researchers, and multinational executives and managers
  - EB-2: Up to 40,040 immigrants with advanced degrees or “exceptional ability” who are sponsored by employers or with a national interest waiver
  - EB-3: Up to 40,040 skilled, professional, or other workers for certain unskilled jobs sponsored by employers
  - EB-4: Up to 9,940 “special” immigrants, including religious workers, abandoned juveniles, international organization employees, certain broadcasters, and others
  - EB-5: Up to 9,940 immigrant investors who invest at least \$1,050,000 in a business that creates at least 10 jobs for U.S. workers or invests \$800,000 in a targeted employment area
- Diversity Immigrants: Up to 55,000 immigrants with at least a high school diploma or equivalent who won a complex lottery for those born in countries that have sent fewer than 50,000 immigrants to the U.S. in the last five years
- Refugees and Asylees: Immigrants who can demonstrate that they were persecuted or fear persecution because of their race, religion, nationality, political opinion, or membership in a particular social group. Refugees are those who meet these criteria but are outside the U.S.; they are vetted by the United Nations and U.S. government before entry. Asylees are those who meet these criteria and are already present in the U.S. or are seeking admission at a port of entry.
  - Refugees: President sets the cap
  - Asylees: No cap



Because there are more qualified immigrants than available visas, the State Department imposes cutoff dates, called “priority dates,” such that only immigrants who applied before a certain date can obtain the green card that they qualify for on a first-come, first-served basis.

In addition to these numerical caps, no more than 7% of all immigrant visas can be allocated to immigrants from a specific country of birth. The practical effect of the per-country caps is that the worldwide numerical caps delay permanent residence for immigrants from some countries more than for those from other countries. In the family-based categories, the total caps are binding for all immigrants, but they result in a decades-longer wait only for Mexicans, Filipinos, Indians, and Chinese; in the employment-based categories, the caps are binding only for Indians and Chinese in the EB-1 category and for Indians in the EB-5 category. Immigrants born in other nations do not have to wait for green cards.

Tables 1 and 2 show the backlogs caused by the worldwide caps for both employment- and family-based visas.

**Table 1**

**Backlogs for Family-Based Visas**

Family-Sponsored	Rest of the World	CHINA	INDIA	MEXICO	PHILIPPINES
F1	01SEP17	01SEP17	01SEP17	01APR05	22APR15
F2A	01SEP23	01SEP23	01SEP23	01SEP23	01SEP23
F2B	01JAN17	01JAN17	01JAN17	01AUG04	01OCT13
F3	01MAR10	01MAR10	01MAR10	15JUN01	08NOV03
F4	01MAR08	01MAR08	22FEB06	15APR01	22APR04

Note: Dates shown are the date by which an applicant would have had to apply in order to receive the visa. C = Current; meaning there’s no backlog to receive the immigrant visa. The cutoff dates for filing are organized as DDMMYY.

Source: U.S. State Dept., Visa Bulletin, November 2023

**Table 2**

**Backlogs for Employment-Based Visas**

Employment-based	Rest of the World	CHINA	INDIA	MEXICO	PHILIPPINES
1st	C	01AUG22	01JUL19	C	C
2nd	01JAN23	01JAN20	15MAY12	01JAN23	01JAN23
3rd	01FEB23	01SEP20	01AUG12	01FEB23	01JAN23
Other Workers	15DEC20	01JUN17	01AUG12	15DEC20	15MAY20
4th	01MAR19	01MAR19	01MAR19	01MAR19	01MAR19
Certain Religious Workers	01MAR19	01MAR19	01MAR19	01MAR19	01MAR19
5th Unreserved (including C5, T5, I5, R5)	C	01JAN17	01APR22	C	C
5th Set Aside: (Rural - 20%)	C	C	C	C	C
5th Set Aside: (High Unemployment - 10%)	C	C	C	C	C
5th Set Aside: (Infrastructure - 2%)	C	C	C	C	C

Note: Dates shown are the date by which an applicant would have had to apply in order to receive the visa. C = Current; meaning there’s no backlog to receive the immigrant visa. The cutoff dates for filing are organized as DDMMYY.

Source: U.S. State Dept., Visa Bulletin, November 2023

The backlog of immigrant petitions is so severe that a highly educated Indian engineer or physician who is seeking an EB-2 visa would have to wait over 100 years to obtain a green card if his I-140 petition were approved today. Only this year did the numerical caps become binding for all immigrants in the EB-2 and EB-3 categories, even though they are backlogged for only a few months.

Highly skilled Chinese and Indian immigrants are most harmed by immigrant visa caps, which is concerning because these are the two most innovative ethnic groups in the United States. Individuals of Chinese and Indian ethnic origin filed over 22% of all patents<sup>1</sup> in the U.S. in 2019, despite constituting about 3.3%<sup>2</sup> of the population. Immigrant visa caps have implications not only for economic growth but also in the context of power competition between the U.S. and China—every high-skilled Chinese immigrant who comes to the U.S. is one fewer high-skilled worker in China, thus reducing their tax base, innovation, and future population while increasing America's.

Some members of Congress have proposed increasing the worldwide numerical caps because they have not been updated since 1990. Proposed reforms include:

- Exempting spouses and children of EB principal immigrants from the cap, effectively doubling the 140,000 cap and practically ending the backlog
- Formally increasing the number of EB visas
- Shifting visas from other categories toward the EB visa system, by ending the diversity visa lottery and giving those 55,000 visas to the EB categories
- Visa recapture: allowing unused and lost visas to be used in later fiscal years

Others want to do away with the per-country caps entirely, which would allow certain highly skilled Chinese and Indian immigrants who are already approved for green cards to adjust their status and become permanent residents. However, this would lead to severe, decades-long backlogs for highly skilled immigrants from all other countries.

But there is a way to expand highly skilled immigration and reduce low-skilled immigration without eliminating visa categories or changing the legal limits: Fix the spillover formula.

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## Why Is There Visa Waste?

The 1990 Act allocated a maximum of 480,000 immigrant visas for extended family members of U.S. citizens and permanent residents (the FB categories), which include adult children of U.S. citizens and permanent residents, spouses and minor children of permanent residents, and siblings of U.S. citizens. It also covers the spouses and minor children of all those individuals. But the actual annual limit on FB visas is determined by this formula:

$$480,000 - \text{number of immediate relatives of U.S. citizens} + \text{unused EB visas} \geq 226,000$$

The immediate relatives of U.S. citizens—i.e., their minor children, parents, and spouses—are exempt from any numerical limits on immigration. Congress decided that the number of FB visas—for non-immediate relatives—would be determined by subtracting the actual number of immediate-relative immigrants from 480,000, and then adding the number of unused EB visas from the last fiscal year. However, Congress also set a floor for the number of available FB visas at a minimum of 226,000, even if the formula arrives at a lower number.

Due to rising numbers of immediate-relative immigrants, this minimum has been the actual number of available visas for over a decade, and this trend will likely continue indefinitely. From 2001 to 2019, the average number of immediate relatives admitted each year was about 474,000. Furthermore, the figure has been trending upwards: in 2001, about 440,000 immediate relatives were admitted; in 2019, that number rose to nearly 506,000.<sup>3</sup> Even if parents of U.S. citizens were excluded from the immediate-relative category or outright eliminated, the FB visa formula would still yield less than 226,000 annual slots, and so the unused EB visas would still be lost.

The practical consequence of the worldwide caps is that every time there are unused employment-based (EB) visas, these will not be used in the FB categories or in future years in the same EB categories.

The 1990 act also allocated 140,000 immigrant visas to the EB categories, which are subdivided into EB-1 through EB-5. The first three are allotted 40,040 visas each (28.6%), while the last two receive 9,940 each (7.1%). But not all these are really employment-based; the last two categories are for special immigrants, such as Iraqi translators or abandoned juveniles, and investors, respectively. In addition, the numerical limits for these categories include the minor children and spouses of the self-sponsored or employer-sponsored immigrant. Therefore, the true numerical limit on the number of employment-based immigrants is far lower than even 60,000 annually. For context, this is just 0.018% of the U.S. population in employment-based permanent migration.<sup>4</sup>

Unlike the FB formula, the EB formula should not waste visas because the number of available EB visas can be greater than 140,000 if there were unused FB visas the previous year. Thus, the EB formula is simply:

$$140,000 + \text{unused FB visas}$$

But how can there be unused visas in any category if there are backlogs?

The reason is administrative errors. If USCIS and the State Department do not process the allocated visas in time by the end of the fiscal year on October 31, the visas are left unused. This can happen for a number of reasons—chiefly, errors in estimating visa demand and speed of processing, as well as external factors such as the Covid-19 pandemic, which resulted in office closures.

From fiscal years 2008 to 2019—thus excluding the extraordinary impact of the Covid-19 pandemic, as well as previous visa recapture measures—the executive branch wasted 6,300–7,900 visas annually that could have gone to the employment-based categories but did not, as a consequence of the formula design. Moreover, in several years, the executive branch has “overused” visas in the employment-based category, going beyond authorized caps with no compensation mechanism in future years. This lack of a compensating mechanism for visa overuse risks giving the executive branch a blank check to expand legal immigration in an unlimited way by simply hiding behind estimation errors.

The reason for differences in the visa estimates is that there is a reporting discrepancy between the Department of Homeland Security (DHS) and the State Department. According to DHS data, an average of 6,375 family-based visas were left unused every year; according to the State Department, 7,874 visas were left unused.

# Reform Proposal Explained

It may seem contradictory, but we can increase the number of highly skilled immigrants who receive a green card—without increasing the net number of new foreigners who come to the U.S.—by fixing the green-card spillover formula.

The model bill proposed below fixes an oversight in the Immigration and Nationality Act by formalizing the FB visa floor as the new FB immigration level, setting it at 226,000 annually. And to ensure that no visas are lost—and that highly skilled immigrants benefit most from this reform—unused visas in EB and FB categories will carry over to the EB immigrant visa allocation for the following year. If the opposite occurs—i.e., if USCIS or the State Department issues more FB or EB immigrant visas than allowed—this bill would require that the overused visas be subtracted from the FB category the following year.

To estimate the effect that this reform would have in future years, I made two calculations based on visa issuance from 2008 to 2019 (to exclude past visa recaptures and the effect of the pandemic). If we use DHS statistics, this proposal would result in authorizing about 4,400 additional EB immigrant visas and 5,400 fewer FB immigrant visas annually. If we use State Department statistics, it would result in authorizing 7,000 more EB immigrant visas and 800 fewer FB immigrant visas annually. The average effect, based on these two sources, would be 5,960 more EB visas and 3,104 fewer FB visas (**Table 3**).

**Table 3**

## Average Impact Estimates for Proposed Reform

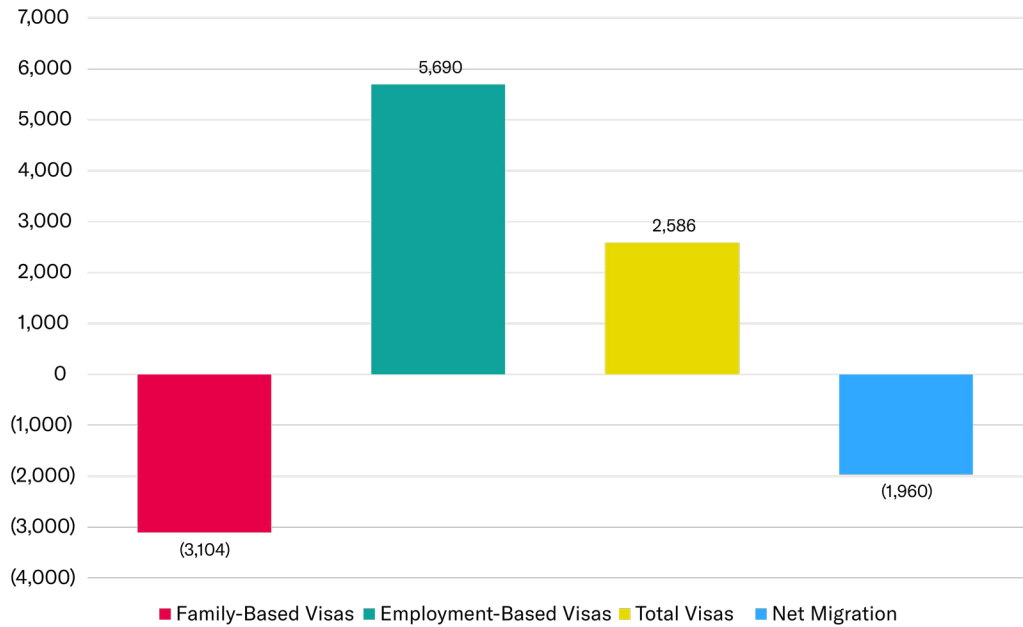
Net EB immigrant visas	Net FB immigrant visas	Net immigrant visas	Net immigrant arrivals
5,960	-3,104	2,586	-1,960

Although this would clearly increase the total number of green cards that are used, it would not result in more immigration (**Figure 1**). This is because the overwhelming majority of immigrants waiting for EB visas are already residing and working in the U.S. and will continue to do so as they wait for green cards. Fewer than 14% of EB visa recipients are new arrivals; the other 86% are immigrants already here on temporary visas who receive adjustment of status. But those on the FB backlog are overwhelmingly living abroad and cannot come to the U.S. until they receive their visa. Nearly 88% of FB visas are new arrivals. Thus, increases in EB visas do not change net migration significantly, but changes in FB visas do.

The average impact of the bill would be about 2,000 fewer net new immigrants annually to the U.S., while increasing the number of employment-based immigrants—who are more highly educated, higher paid, and more likely to be proficient in English than family-based immigrants.

**Figure 1**

**Net Effects of Proposed Reform**



# Proposed Amendment Text

A bill to amend INA § 201 (8 U.S.C. § 1151), prioritize highly skilled immigrants, and avoid the loss of available visas

**Section 1. Short Title**

**Section 2. Purposes**

The purposes of this Act are as follows:

- (1) To achieve the intent of the Immigration and Nationality Act by fixing the immigrant visa spillover formula, thereby ensuring that the worldwide level of immigration set by Congress is met
- (2) To give priority to employment-based immigrants in the spillover of unused immigrant visas
- (3) To reduce immigrant visa backlogs in highly skilled visa categories

**Section 3. Amendment**

Subsections (c) and (d) of Section 201 of the Immigration and Nationality Act (Worldwide Level of Immigration) (8 U.S.C. § 1151) are amended as follows:

**(c) Worldwide level of family-sponsored immigrants**

(1)(A) The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is subject to subparagraph (B), equal to:

- (i) ~~480,000, minus~~ 226,000, plus
- (ii) the sum of the number computed under paragraph (2) and the number computed under paragraph (4), plus
- (iii) the number (if any) computed under paragraph (3).
- (iv) The number computed under this paragraph for a subsequent fiscal year is the difference (if negative) between the maximum number of visas that may be issued under Section 1153(b) of this title (relating to employment-based immigrants) during the previous fiscal year and the number of visas issued under that section during that year, **if that difference is negative (more visas were issued than authorized).**

(B)(i) For each of fiscal years 1992, 1993, and 1994, 465,000 shall be substituted for 480,000 in subparagraph (A)(i).

~~(ii) In no case shall the number computed under subparagraph (A) be less than 226,000.~~

(2) The number computed under this paragraph for a fiscal year is the sum of the number of aliens described in subparagraphs (A) and (B) of Subsection (b)(2) who were issued immigrant visas or who otherwise acquired the status of aliens lawfully admitted to the United States for permanent residence in the previous fiscal year.

(3)(A) The number computed under this paragraph for fiscal year 1992 is zero.

(B) The number computed under this paragraph for fiscal year 1993 is the difference (if any) between the worldwide level established under paragraph (1) for the previous fiscal year and the number of visas issued under Section 1153(a) of this title during that fiscal year.

(4) **(A)** The number computed under this paragraph for a subsequent fiscal year is the difference (if any) between the maximum number of visas that may be issued under Section 1153(b) of this title (relating to employment-based immigrants) during the previous fiscal year and the number of visas issued under that section during that year, **if that difference is negative (more visas were issued than authorized), plus**

**(B)** The number computed under this paragraph for a subsequent fiscal year is the difference (if any) between the maximum number of visas that may be issued under Section 1153(a) of this title (relating to family-sponsored immigrants) during the previous fiscal year and the number of visas issued under that section during that year, **if that difference is negative (more visas were issued than authorized).**

(5) The number computed under this paragraph for a fiscal year (beginning with fiscal year 1999) is the number of aliens who were paroled into the United States under Section 1182(d) (5) of this title in the second preceding fiscal year

(A) who did not depart from the United States (without advance parole) within 365 days; and

(B) who (i) did not acquire the status of aliens lawfully admitted to the United States for permanent residence in the two preceding fiscal years, or (ii) acquired such status in such years under a provision of law (other than Subsection (b)) that exempts such adjustment from the numerical limitation on the worldwide level of immigration under this section.



(6) If any alien described in paragraph (4) (other than an alien described in paragraph (4) (B)(ii)) is subsequently admitted as an alien lawfully admitted for permanent residence, such alien shall not again be considered for purposes of paragraph (1).

**(d) Worldwide level of employment-based immigrants**

(1) The worldwide level of employment-based immigrants under this subsection for a fiscal year is equal to

- (A) 140,000, plus
- (B) the number computed under paragraph (2).

(2)(A) The number computed under this paragraph for fiscal year 1992 is zero.

(B) The number computed under this paragraph for fiscal year 1993 is the difference (if any) between the worldwide level established under paragraph (1) for the previous fiscal year and the number of visas issued under Section 1153(b) of this title during that fiscal year.

(C) (i) The number computed under this paragraph for a subsequent fiscal year is the difference (if any) between the maximum number of visas that may be issued under Section 1153(a) of this title (relating to family-sponsored immigrants) during the previous fiscal year and the number of visas issued under that section during that year, **if that difference is positive (fewer visas were issued than authorized), plus**

(ii) The number computed under this paragraph for a subsequent fiscal year is the difference (if any) between the maximum number of visas that may be issued under Section 1153(b) of this title (relating to employment-based immigrants) during the previous fiscal year and the number of visas issued under that section during that year, **if that difference is positive (fewer visas were issued than authorized).**



## Endnotes

- <sup>1</sup> Brad Chattergoon and William R. Kerr, “Winner Takes All? Tech Clusters, Population Centers, and the Spatial Transformation of U.S. Invention,” National Bureau of Economic Research (NBER), working paper no. 29456, November 2021.
- <sup>2</sup> Abby Budiman and Neil G. Ruiz, “Key Facts About Asian Origin Groups in the U.S.,” Pew Research Center, Apr. 29, 2021.
- <sup>3</sup> U.S. Dept. of Homeland Security, “Yearbook of Immigration Statistics.”
- <sup>4</sup> 60,000 divided over 331 million U.S. residents in 2020 equals 0.01813%.