Written Testimony of

Stephen H. Legomsky
The John S. Lehmann University Professor Emeritus
Washington University School of Law
[Legomsky@wustl.edu]

Before the

United States Senate
Subcommittee on Immigration, Citizenship, and Border Safety
Committee on the Judiciary

Removing Barriers to Legal Migration to Strengthen our Communities and Economy
March 15, 2022

Mr. Chairman, Ranking Member Cornyn, and Honorable members of the committee, thank you for the opportunity to testify before you. My name is Stephen H. Legomsky, and I am the John S. Lehmann University Professor Emeritus at the Washington University School of Law. I taught U.S. immigration law for more than 30 years and am the author (co-author starting with the fifth edition) of the law school textbook "Immigration and Refugee Law and Policy." This book is now in its seventh edition and has been the required text for immigration courses at 193 U.S. law schools since its inception. From 2011 to 2013, I had the honor of serving as the Chief Counsel of U.S. Citizenship and Immigration Services, in the Department of Homeland Security. I have also had the privilege of advising both Democratic and Republican administrations and several foreign governments on immigration policy. I have held visiting academic appointments at universities in twelve countries.

By way of background, I find it useful to think of our current laws as comprising three sets of requirements for the lawful admission of immigrants to the United States:

First, many members of the public mistakenly believe that our current laws permit anyone to immigrate legally to the United States as long as they don't have a criminal background or other negative baggage and are willing to wait their turn in line. But as members of this subcommittee are well aware, our laws take the opposite approach. Being free of such disqualifying characteristics is not enough. To be admitted as a lawful permanent resident (LPR), a person must also affirmatively qualify under one of several specific categories created by Congress. The main categories are those seeking unification with specified family members who are U.S.

citizens or LPRs, those whose occupational skills are needed by U.S. employers, those who hail from countries that in the past five years have sent relatively few immigrants to the United States, and refugees. A person who doesn't fall within any of those four categories (or a handful of much smaller miscellaneous categories) cannot lawfully immigrate to the United States.

Second, the Immigration and Nationality Act contains more than 20 pages laying out the grounds on which otherwise qualified intending immigrants are ineligible. These inadmissibility grounds generally relate to criminality, national security, communicable diseases, likelihood of becoming a public charge, protection of the U.S. labor force, and the integrity of the immigration system itself.

Third, with some important exceptions, there are annual numerical limits on the admission of qualified immigrants. Those limits are of two kinds. There are annual numerical ceilings for each category (and many subcategories) of immigrants – family immigration, employment immigration, etc. Within each of those categories, there are additional annual limits on how many immigrants may be admitted from a single country.

In the past three decades Congress has enacted several laws concerned principally with immigration enforcement. Not since the Immigration Act of 1990,[1] however, has Congress taken any major action to update our nation's policies on legal immigration. In the intervening decades, much has changed, and there is now ample reason to revisit the system that governs the lawful admission of immigrants to the United States.

Examining the decennial U.S. Census reports, FWD.us found that "between 2010 and 2020, the U.S. saw its slowest population growth of any decade since the 1930s."[2] Similarly, the George W. Bush Institute found that immigration as a percentage of the U.S. working age population decreased during the period studied, 1992 to 2014.[3]

Those trends are concerning, because the overwhelming majority of the many extensive empirical studies, cited below, have found immigration and its effects on the U.S. population to be important components of our nation's economic growth. In this testimony, I won't try to rehash the statistical details of those studies, but a brief outline of the benefits that they have highlighted might be useful.

Concluding that immigration has been, and continues to be, a net economic benefit, the studies have emphasized several of its effects. Immigrants supply labor to geographic areas and sectors of the labor market that cannot attract sufficient numbers of American workers. Immigrants tend to gravitate to fields in which specialized skills essential to the particular jobs are in short supply.

---

1 Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990).
2 FWD.us, Immigration Facts: The Positive Economic Impact of Immigration (July 21, 2020), https://www.fwd.us/news/immigration-facts-the-positive-economic-impact-of-immigration/.
3 George W. Bush Institute, Pia Orrenius, Benefits of Immigration Outweigh the Costs, The Catalyst (Spring 2016, issue 2), https://www.bushcenter.org/catalyst/north-american-century/benefits-of-immigration-outweigh-costs.html.

Immigrants are highly entrepreneurial, starting new businesses at much greater rates than U.S. citizens. Being younger on average than U.S. citizens, they increase the ratio of active workers to retirees, thus, among other benefits, fortifying the financial stability of the Social Security system. And by increasing the overall supply of labor, they help to brake some of the inflationary effects on consumer prices.[4]

To be fair, not everyone shares those views. Organizations whose missions are to advocate reductions in immigration see current levels of immigration as imposing net economic costs.[5] Among economists, that is very much a minority perspective.

Nor are the benefits of immigration limited to the economy. The family unification program – the largest component of legal immigration – reflects the fundamental value that Americans have placed on family unity and our recognition of the multiple long-term harms of prolonged separation. Reunification of the family also fosters immigrants' full-fledged integration into American life. The ethnic diversity that immigration supplies enriches our cultural lives. Opportunities for legal immigration diminish the incentive for illegal immigration. And free market economists emphasize the link between generous immigration policies and the optimal matching of supply and demand.

Today, however, so many of these benefits are needlessly diminished by the mounting backlogs of qualified immigrants who must wait years to be admitted. These backlogs create hardships for the applicants themselves, the U.S. citizen and LPR family members who await them, and the employers who have demonstrated the need for their labor. But they do more harm than that. They delay these immigrants' contributions to the overall economy and to the country as a whole. Moreover, for those individuals and families who are already lawfully present in the United States on temporary visas, speeding their adjustment to full-fledged permanent resident status would help clear the backlog, in the process freeing them to maximize their contributions and accelerating their full integration into American life.

---

4 Among the recent studies finding immigration to be a net economic benefit are FWD.us, Immigration Facts: The Positive Economic Impact Of Immigration (July 21, 2020), https://www.fwd.us/news/immigration-facts-the-positive-economic-impact-of-immigration/; Center on Budget and Policy Priorities, Arloc Sherman, Danilo Trisi, Chad Stone, Shelby Gonzales, & Sharon Parrott, Immigrants Contribute Greatly to U.S. Economy, Despite Administration's "Public Charge" Rule Rationale (Aug. 15, 2019), https://www.cbpp.org/sites/default/files/atoms/files/8-15-19pov.pdf; Mercatus Center, George Mason University, Daniel Griswold, The Benefits of Immigration: Addressing Key Myths (May 23, 2018), https://www.mercatus.org/publications/trade-and-immigration/benefits-immigration-addressing-key-myths; National Academy of Sciences, The Economic and Fiscal Consequences of Immigration (2017), https://www.nap.edu/read/23550/chapter/1; and George W. Bush Institute, Pia Orrenius, Benefits of Immigration Outweigh the Costs, The Catalyst (Spring 2016), https:/www.bushcenter.org/catalyst/north-american-century/benefits-of-immigration-outweigh-costs.html.

5 Numbers USA, for example, advocates "reducing immigration by half in the short run." https://www.numbersusa.com/. Its website declares that "The immigration tidal wave of the last three decades has made it impossible for Baby Boomers to ever enjoy the 1970s dream of a stabilized country." See Numbers USA, Unsustainable Population Increase, https://www.numbersusa.com/problems/unsustainable-population-increase.

Thus, my main objective in this testimony is to describe and recommend several ways in which Congress could clear the backlog, prevent the creation of future backlogs, and significantly shorten the waiting periods for those who meet our existing requirements for admission as LPRs. Many of these reforms appear in bills that have already been introduced in the present Congress.

My view, for all the reasons outlined above, is that the U.S. could, and should, significantly increase the number of immigrants whom we admit each year. Importantly, however, the proposals in the first four sections of this testimony do not require doing so. They do not change the substantive eligibility criteria for immigrating and thus do not increase total immigration in the long term. They merely shorten the waiting times for individuals who already qualify for LPR status and thus will eventually be admitted in any event. With these measures, Congress would be speeding their reunification with close U.S. family members and/or their ability to serve the U.S. businesses that need their labor. The key, in other words, is that shortening the waiting periods would change the *timing* of the immigrants' arrivals but not the total long-term *numbers*.

To be clear, immigration would increase in the short term following the changes, but those increases would be almost[6] entirely offset by the corresponding decreases in subsequent years. If Congress is otherwise amenable to these proposals but concerned about the magnitude of the short-term impact, it could phase in the changes over a specified number of years.

With or without a phase-in period, the statutory changes recommended here would necessitate at least a short-term increase in the resources required for processing. The lion's share of those additional resources would be the fees paid by the increased number of applicants. As the subcommittee is aware, until, I believe, the current fiscal year, USCIS has had to rely solely on higher and higher application fees to fund the processing of applications. The supplemental funding that Congress provided for the current fiscal year is a very helpful step.

Section I of this testimony examines ways to raise the worldwide caps on the admission of LPRs. Section II recommends reclassifying the family-sponsored "2As" (spouses and unmarried children of LPRs) as cap-exempt immediate relatives. Section III advocates raising the per-country limits. Section IV prescribes early filing of adjustment of status applications for certain employment-based immigrants. Section V calls for repealing the so-called "3/10" bars and lifelong bars that create inadmissibility based on past unlawful presence.

I
RAISING THE WORLDWIDE CEILINGS

Under current law, the formula for computing the annual worldwide ceiling for family-sponsored immigrants is (with some minor modifications) as follows: 480,000, plus any employment-based

6 The only reason I add the qualifier "almost" is that, when waiting times are long, a certain number of qualified applicants die, age out, or give up before their priority dates become current.

visas that went unused during the preceding fiscal year, minus the number of immediate relatives admitted in the preceding fiscal year, but subject to a minimum final figure of 226,000. The formula for computing the worldwide employment-based ceiling is 140,000 plus any family-sponsored visas that went unused during the preceding fiscal year. Within each of those two programs, different subcategories of immigrants are subject to additional numerical limits. Immediate relatives and certain miscellaneous categories are exempt from all such numerical limits.

As with most of the reforms described in the next three sections, raising these ceilings without changing the substantive eligibility requirements for LPR status would not increase total long-term immigration. It would merely change the timing, shortening the waits for the affected categories. There are at least three ways to do this:

The simplest way to raise the ceiling would be to increase the base numbers in the statutory formulas, from 480,000 and 140,000 for family-sponsored and employment-based immigrants, respectively.

Second, over the past two decades, hundreds of thousands[7] of immigrant visas authorized by Congress have gone to waste, largely because of bureaucratic delays and more recently because of Covid travel restrictions. At the same time, the backlog of approved petitions (the first step in the admission process for most categories of LPR) has grown to an estimated 9 million, of which approximately 83% are family-sponsored and 17% employment-based.[8] Congress could reduce the huge backlogs in applications for both immigrant visas and adjustment of status by recapturing those visas. The idea would be to increase the statutory ceilings for both family-sponsored and employment-based visas by the number of visas that went unused in each program from 1992 (when the current statutory formulas first became effective) to the present.

Third, Congress could amend the formula for computing the worldwide family-sponsored ceiling

---

7 All agree that the number of unused visas available for recapture is in the hundreds of thousands, but a more precise figure has eluded consensus. The disagreements reflect both substantive policy choices in the reach of the various legislative proposals and differences in the methodologies that have been used to compute the bottom line numbers. An excellent summary is provided by David J. Bier, Cato Institute, Different Green Card Recapture Proposals Offer Wildly Divergent Outcomes (Oct. 28, 2021), https://www.cato.org/blog/different-green-card-recapture-proposals-offer-wildly-divergent-outcomes. For each of the programs (and in this testimony the emphasis is on the family-sponsored and employment-based programs), for each fiscal year from 1992 through 2021, Bier compared the worldwide limit produced by the statutory formula with the corresponding number of immigrants actually admitted. Adding up those annual differences for the entire period, he estimated the total numbers of unused visas as 556,112 for family-sponsored immigrants and 578,342 for employment-based immigrants. The Congressional Research Service provided lower estimates of the unused visas -- 247,000 family-sponsored and 194,100 employment-based. It described its methodology as that "used by the Department of State (DOS)," but it did not further elaborate. See https://crsreports.congress.gov/product/pdf/IN/IN11811.

8 David J. Bier, Cato Institute, Family and Employment Green Card Backlog Exceeds 9 Million (Sept. 29, 2021), https://www.cato.org/blog/family-employment-green-card-backlog-exceeds-9-million.

by eliminating the deduction for the preceding year's immediate relative admissions.[9] That deduction was never part of the immigration laws until the Immigration Act of 1990. It needlessly constrains the timely admission of qualified family-sponsored immigrants and pits them against immediate relatives, when both groups have compelling needs for family reunification.

This change would also eliminate two other adverse consequences of the current formula. First, the practical result of deducting the number of immediate relatives from the visa allotment for family-sponsored immigrants has been that, year after year, the admissions of family-sponsored immigrants have bottomed out at the absolute statutory minimum of 226,000. Second, in turn, this has meant that Congress's decision to supplement the number of employment-based immigrants' admissions by allowing them to draw upon the preceding year's unused family-sponsored visas has become meaningless, as the latter figure is always zero.

II
RECLASSIFYING FAMILY-SPONSORED "2As" AS IMMEDIATE RELATIVES

As the subcommittee is aware, several different provisions of the INA govern the admission of lawful permanent residents for purposes of family reunification. The spouses and the under-age-21, unmarried children of United States citizens, as well as the parents of over-age-21 United States citizens, are classified as "immediate relatives." If otherwise admissible, they are admitted to the United States without any numerical limits.[10] Certain other individuals seeking immigration based on family reunification are classified as "family-sponsored" immigrants; unlike immediate relatives, they are numerically restricted. In addition, if a person is admitted for permanent residence under any of the family, employment, or diversity immigrant programs, the law grants the same status to his or her spouse and unmarried, under-age-21 children who accompany or follow him or her. Importantly, however, the law grants "accompanying or following to join" status only in the case of pre-existing relationships – i.e., cases in which the spouses married, or the children were born, before the principal immigrant's admission. After-acquired spouses and children of LPRs do not qualify as accompanying or following to join.[11]

---

9 In fiscal year 2021, the number of immediate relative admissions was 383,973. See USCIS Office of Immigration Statistics, Legal Immigration and Adjustment of Status Report Fiscal Year 2021, Quarter 4, Table 1B, https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration. In fiscal year 2020, the number of immediate relative admissions was 321,148. See USCIS, Yearbook of Immigration Statistics 2020, table 7d, https://www.dhs.gov/immigration-statistics/yearbook/2020. However, because the Covid travel restrictions greatly reduced admissions in both those years, the 2019 figures are likely more representative. In that year, 505,765 immediate relatives were admitted. See USCIS, Yearbook of Immigration Statistics 2019, table 7, https://www.dhs.gov/immigration-statistics/yearbook/2019/table7.

10 8 USC § 1151(b)(2)(A)(I). Under the INA, a "child" must be unmarried and under 21 and must meet various other conditions. 8 USC § 1101(b).

11 See 8 USC § 1153(d).

All the family preference categories except one encompass relationships to U.S. citizens. The one exception is the second preference, which covers the spouses and unmarried sons and daughters of LPRs. And within that second preference the subcategory known as "2As" merits special attention. These are the spouses and the unmarried, *under-age-21* children of LPRs (as opposed to LPRs' *adult* sons and daughters).[12]

Over the past twenty years, the waiting times for the 2As have steadily declined, to the point where, at this writing, the State Department Visa Bulletin shows the priority dates for 2As to be current, for all source countries.[13] Thus, for the time being, they may be admitted as soon as the administrative processing at all the various stages has been completed. But this has not always been the case, and under current law there is no guarantee it will remain the case. Because of the per-country limit discussed above, and the relatively higher demand from Mexico, the waits for Mexican 2As have typically been somewhat longer than their counterparts from other countries. The following table displays the waiting periods for 2As in selected recent years:

FAMILY-SPONSORED 2A WAITING TIMES
(rounded off to nearest half-year)[14]

Visa Bulletin	**Worldwide**	**Mexico**
March 2002	5.5	7.5
March 2007	5.0	6.5
March 2012	2.5	2.5
March 2017	2.0	2.0
March 2022	C	C

12 I have not yet been able to determine how many 2As were admitted in fiscal year 2021, as the USCIS Yearbook of Immigration Statistics for that year does not disaggregate the number of 2nd preference admissions that are within the 2A subcategory. The fiscal year 2020 Yearbook shows total 2nd preference admissions of 51,701 (line 47 of table 7d), of which 10,658 (8,358 new arrivals plus 2,300 adjustments of status, lines 81 and 82 of table 7d) were 2B admissions. The difference of 41,043 represents the number of 2As admitted in FY 2020. See https://www.dhs.gov/immigration-statistics/yearbook/2020. However, because FY 2020 admissions were greatly reduced by the Covid travel restrictions, the FY 2019 numbers are more likely representative. In that year, total 2nd preference admissions were 93,398 (table 7 of the 2019 USCIS Yearbook of Immigration Statistics), of which 14,533 were 2Bs (11,631 new arrivals plus 2,902 adjustments of status). The difference of 78,865 represents the number of 2A admissions in FY 2019. See https://www.dhs.gov/immigration-statistics/yearbook/2019/table7.

13 U.S. Dept. of State, March 2022 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-march-2022.html.

14 Sources: March 2002 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2002/visa-bulletin-for-march-2002.html; March 2007 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2007/visa-bulletin-for-march-2007.html; March 2012 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2012/visa-bulletin-for-march-2012.html; March 2017 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2017/visa-bulletin-for-march-2017.html; March 2022 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-march-2022.html.

As this chart shows, the waiting times for 2As can change rapidly, in response to annual fluctuations in both the supply of visas and the demand for them. While the trend in the last two decades has been one of decreasing waits, there is no way to be confident that this trend will not reverse. Rather than leave it to chance, Congress should consider legislation to reclassify 2As as immediate relatives, thereby assuring the speedy reunification of their nuclear families. There are several reasons to do so.

First, since the 2As are the *after-acquired* spouses and children of LPRs (the preexisting spouses and children having already received the same priority dates as the principal immigrants), the typical 2A petition is filed shortly after the relationship is formed. This means that, for the most part, we are talking about newlywed spouses and newborn babies. The most obvious reason to speed the immigration process is therefore the humanitarian one – the inherent hardship that occurs when newlyweds are separated for the first several years of their marriages (the typical duration of the waiting time until recently), and when parents and newborn babies are separated for the first several years of the child's life. In a nation that rightly trumpets family values, this problem requires fixing.

Humanitarian concerns aside, these long separations generate an assortment of other problems. They require LPRs to travel back and forth, as often as they can, to their countries of origin, frequently located in distant reaches of the world, in order to maintain some semblance of family life. Perhaps more importantly, these separations virtually invite illegal immigration. Human nature will have to be remade before new spouses willingly separate for the first several years of their marriages, or new parents willingly separate from their newborn babies for the first several years of their children's lives. For too many people, illegal immigration will prove to be an irresistible temptation. Finally, even the dates displayed in the monthly State Department Visa Bulletins tell us only how long ago those people who are receiving visas today had to have applied. They do not tell us how long someone who applies today will have to wait. The statutory supply of visas changes from year to year according to the formula; in addition, the number of applicants fluctuates from year to year. As a result, the applicants have no way to predict confidently how long it will take for the family to be together. Family and other planning becomes impossible.

There is an easy solution: reclassify the current 2As as immediate relatives. Such a change would not only serve the humanitarian goal of uniting newlywed couples and parents of newborn babies, but also eliminate expensive and unnecessary periodic overseas travel by LPRs as they await the arrivals of their loved ones. It would provide young married couples and families with the predictability they need to plan the timing of future children. And it would eliminate one of the major incentives for illegal immigration.

III
RAISING THE PER-COUNTRY CAPS

The two previous sections concern the worldwide numerical caps on the overall family-sponsored and employer-based programs and on the specific preference categories within each of those programs. Applicants in both programs are also subject to per-country limits. With some exceptions, in any given fiscal year, current law provides that no more than 7% of the combined numbers of family-sponsored and employer-based immigrants may be admitted from a single country.[15] When a country reaches its statutory limit for a given fiscal year, complex statutory formulas distribute the available visas among the various preference categories for that country.[16]

The per-country limits reflect a collision of two opposing philosophies. On the one hand, suppose you and I are similarly situated -- for example, we are both the unmarried adult daughters of U.S. citizens. And suppose you have been waiting in the queue for several years and I apply today. It might seem unfair for the law to let me immediately skip ahead of you. Yet that is what will happen if you are from Mexico and I am from Norway. The explanation that *other* similarly situated Mexican applicants happen to outnumber *other* similarly situated Norwegian applicants – whom neither of us even know – is unlikely to satisfy you. After all, countries don't immigrate; people do. On the other hand, such nationality-based discrimination, while unacceptable in other contexts, serves the purpose of diversifying the country's immigrant population. In a sense, it all boils down to how we want to conceptualize immigrants – as individuals who should be treated equally when their circumstances are similar, or as delegates of their home countries.

Different people will hold different views on those issues. But, assuming for the sake of discussion that the diversity of our immigrant population is a worthwhile objective, I would suggest nonetheless that our current laws go too far in that direction and not far enough in the direction of equity among individuals in the same preference category.

I say this because in practice, year after year, the current per-country caps lead to extreme results. The March 2022 Visa Bulletin[17] provides numerous examples: Within the family-sponsored program, individuals from Mexico and the Philippines are hit particularly hard. In the first preference (the unmarried adult sons and daughters of U.S. citizens), the general waiting time is 7 years, but that wait increases to 10 years for Filipinos and 22.5 years for Mexicans. For 2Bs (unmarried adult sons and daughters of LPRs), the general waiting time of 6.5 years becomes 10.5 years for Filipinos and 21.5 years for Mexicans. Third preference immigrants (married sons and daughters of U.S. citizens) generally wait 13.5 years, but Filipinos wait 20 years and Mexicans 24.5 years. And for the fourth preference (siblings of adult U.S. citizens), the general wait of 15 years (slightly longer for Indians) rises to 19.5 years for Filipinos and 23 years for Mexicans.

In the employment-based program it is natives of China and India who bear the brunt of the per-country caps. For first preference immigrants (those with "extraordinary ability" in specified

15 8 USC § 1152(a)(2). For the dependent area of a foreign country, the corresponding figure is 2%. *Ibid*.
16 8 USC § 1152(e).
17 https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-march-2022.html.

fields, "outstanding" professors and researchers, and certain multinational executives and managers), all visas are current. But second preference immigrants (professionals with advanced degrees, including physicians working in shortage areas, and those with "exceptional ability" in specified fields) from China must wait 3 years and those from India 9 years; for everyone else the priority dates are current. And for third preference immigrants (skilled workers, professionals, and a limited number of "other workers"), natives of China face waits of 4 years, natives of India 10 years; again, the priority dates are current for all others.

Congress could, of course, simply repeal the per-country caps entirely. Immigrant visas would then be distributed to qualified applicants, within each preference category, on a first-come, first-served basis. Under such a system, those who are similarly situated with respect to the individual criteria for LPR status would be treated equally, without regard to nationality.

But Congress can remedy the most extreme results of the present system without going that far. It need only raise the per-country cap well above the current 7% level. How high to raise it is a judgment call, involving a tradeoff between individual equity and immigrant diversity. To aid that determination, Congress could ask the State Department Visa Office to study the impact that different per-country caps would have (a) on the distribution of immigrant visas by nationality and (b) on the resulting waiting times.

Like the recommendations in sections I and II, this recommendation does not require changing any of the individual eligibility requirements for admission as an LPR and thus would not increase the total number of immigrants admitted over the long term. It would alter only the relative waiting times.

IV
ALLOWING EARLY FILING OF APPLICATIONS

Many of the current H-1B professional nonimmigrant (temporary) workers in the United States have approved petitions for employment-based LPR visas but have been waitlisted for admission as LPRs because of either the worldwide caps or the per-country caps or both. Within that group, the vast majority will be eligible for adjustment of status once their priority dates become current. But under 8 USC § 1255(a)(3), they cannot even file their adjustment applications until that time. That is because, for, adjustment of status, one statutory requirement is that "an immigrant visa … be immediately available to [the applicant] *at the time his application is filed* [my emphasis]." Because of the often lengthy processing times, that means adjustment cannot be granted until well after the applicant meets all the requirements for it. Congress could amend the adjustment of status provision to allow lawfully employed nonimmigrants to apply for adjustment, if otherwise eligible for it, when their priority dates are no more than a specified number of months later than the relevant priority dates displayed in the State Department Visa Bulletin.

Others have noted an important benefit of such an amendment. Although H-1B nonimmigrants

already hold limited permission to work, longstanding regulations allow the granting of a broader employment authorization to those with properly filed pending applications for adjustment of status.[18] Thus, with early filing, "applicants can receive employment authorization documents that allow them to work in any similar job, allowing them to leave their sponsoring employers for higher-paying jobs or to take promotions."[19]

The benefits of allowing early filing would extend to two other groups in particular. A certain number of children would avoid aging out (by turning 21[20]) while they are waiting for their priority dates to become current. And in cases in which early filing advances the time when H-1B temporary workers can adjust their status, it would simultaneously advance the time when their spouses, classified as H-4, would adjust status and thus receive authorization to work – an authorization that with limited exceptions H-4 status does not provide.

V
REPEALING THE 3/10 AND PERMANENT BARS FOR PRIOR UNLAWFUL PRESENCE

Unlawful presence in the United States can result either from unauthorized entry or from overstaying a nonimmigrant visa or other temporary authorization. Either way, not surprisingly, *current* unlawful presence is a basis for removal.[21]

But what about *past* unlawful presence? Until 1996, this was not a ground for either exclusion or deportation. In that year, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress added several new grounds for inadmissibility based on prior unlawful presence.[22]

Two of those grounds appear in 8 USC § 1182(a)(9)(B). With some exceptions and narrow discretionary waivers,[23] past unlawful presence for more than 180 days but less than a year, followed by departure from the United States before the commencement of removal proceedings,[24] makes a person inadmissible for three years. Past unlawful presence for one year or more, followed by a departure, makes the person inadmissible for ten years.

---

18 8 CFR 274a.12(c)(9).
19 David J. Bier (Nov. 30, 2021), https://www.cato.org/blog/build-back-better-act-immigration-provisions-summary-analysis.
20 8 USC § 1101(b)(1).
21 One who entered without inspection will generally be inadmissible under 8 USC § 1182(a)(6)(A)(i). One who overstayed his or her visa will generally be deportable under 8 USC § 1227(a)(1)(B and C(i)).
22 Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), Div. C, § 301(b)(1).
23 The exceptions are for minors, asylum applicants, domestic violence and trafficking victims, and certain others. There is also a discretionary waiver in cases where refusing someone admission would cause "extreme hardship" to their U.S. citizen or LPR spouses or parents.
24 Most likely, the reason for specifying that the departure must occur before the commencement of removal proceedings is that, if it occurs while removal proceedings are pending, the person would ordinarily already be inadmissible for five years under 8 USC § 1182(a)(6)(B)(failure to attend or remain in attendance at removal hearing).

Given the desperation that drives so many millions of people to enter or remain in the United States without authorization, and given both the limited avenues for and the restrictions on legal immigration alternatives, these lengthy bars – imposed on individuals who in most cases have lived in the United States long enough to have formed close bonds -- seem disproportionate to the nature of the offense. It is telling that the criminal laws themselves classify entry without inspection only as a misdemeanor and do not make overstaying a visa a crime at all.

But the most severe consequences of these provisions fall on those undocumented immigrants who satisfy all of Congress's substantive eligibility requirements for LPR status. For them, the 3/10 bars create a procedural catch 22. They cannot travel to a U.S. consulate overseas to obtain visas, because, the moment they leave the United States, their "departures" will make them inadmissible for 3 or (in most cases) 10 years. The visas will be denied on that ground alone.[25] That would not be a problem if they could do the paperwork in the United States via adjustment of status. But that avenue is foreclosed as well if they entered without inspection, because adjustment is available only to those who were "admitted or paroled."[26] Those who overstayed nonimmigrant visas can overcome that hurdle, but they too will generally be ineligible for adjustment for a different reason, failure to have continuously maintained a lawful status.[27] (The continuous lawful status requirement for adjustment does not apply to immediate relatives, but it does apply to family-sponsored and employment-based immigrants.)

As noted earlier, repealing the 3/10 bars, unlike the proposals in all the previous sections of this testimony, would increase total immigration to some extent. That must be acknowledged. But it bears repeating that these barriers block individuals who meet all the substantive requirements for LPR status; that is, they fall squarely within one of the categories that Congress has chosen to admit (family, employment, etc.), they are not otherwise within any of the inadmissibility grounds, and their priority dates are current. Moreover, it is not only they who lose out. It is also all the other intended beneficiaries of the programs under which they seek admission – their U.S. citizen or LPR family members and the U.S. businesses that need their labor. Congress should repeal the 3/10 bars, thus allowing individuals who otherwise qualify for admission as LPRs to proceed to U.S. consulates to obtain visas without rendering themselves inadmissible.

Finally, the same IIRIRA provision that created the 3/10 bars created one other bar based on unlawful presence. Under 8 USC § 1182(a)(9)(C), a person who has been unlawfully present for more than a year (or who has been removed), and later reenters without being admitted, becomes inadmissible for life. There are only two escapes from this result, and both are discretionary: Once the person has been away for at least ten years, the Secretary of Homeland Security has the discretion to allow the person to reapply for admission. Discretion may also be exercised when

25 This statement is subject to the exceptions and the narrow discretionary waiver described in note 22 above.
26 8 USC § 1255(a).
27 8 USC § 1255(c)(2). The continuous lawful status requirement does not apply if the person's failure was "through no fault of his own or for technical reasons," *ibid*., but the meanings of those exceptions are unclear.

either the departure from the United States or the unlawful reentry was connected to the applicant's "battering or subjection to extreme cruelty."[28]

The lifelong bar seems excessive. The only people to whom it will be relevant are those who otherwise have some legal ground for admission, such as family in the United States. And as to them, the unlawful reentry alone is already sufficient ground for removal. Adding a lifelong bar on future admission means (subject only to the narrow discretionary waivers described above) that they will never again be permitted to enter the United States even to visit their U.S. family members, much less reunite with them on a permanent basis. Like the 3/10 bars, the permanent bar is both unnecessary and disproportionate to the nature of the offense. It too should be repealed.

CONCLUSION

It has been 32 years since Congress last meaningfully updated our system of legal immigration. Since then, massive backlogs have accumulated. Millions of immigrants who qualify for admission – and the American family members and businesses who sponsor them -- continue to wait for years. Statutory caps too low to accommodate present-day flows, combined with bureaucratic delays occasioned by inadequate resources and recently exacerbated by the Covid travel restrictions, account for these backlogs. It is with the goal of shortening the waiting periods for those whom Congress has made the decision to welcome to our shores that the recommendations in sections I through IV of this testimony are respectfully offered. The recommendations in section V reflect additional concerns rooted in the principle that punishment should be proportionate to the nature of the offense.

Thank you once more for the privilege of testifying before this subcommittee.

28 8 USC § 1182(a)(9)(C)(ii,iii).