

**Prepared Testimony by Lynden D. Melmed**

**Former Chief Counsel, U.S. Citizenship and Immigration Services  
Partner, Berry Appleman & Leiden LLP**

**U.S. Senate Committee on the Judiciary  
Subcommittee on Immigration, Citizenship and Border Safety**

**on**

**Removing Barriers to Legal Migration to Strengthen our Communities and Economy**

**Washington, D.C.**

**March 15, 2022**

**Introduction**

Chairman Padilla and Ranking Member Cornyn, thank you for the opportunity to appear before this Committee to discuss barriers to legal migration. My name is Lynden Melmed and I previously served as Chief Counsel of U.S. Citizenship and Immigration Services (USCIS). Today, I am a partner at Berry Appleman & Leiden LLP and serve on the Advisory Board of the Migration Policy Institute.

My testimony today will focus on barriers to skills-based migration, and my comments are informed by my time in government and my subsequent representation of hundreds of companies that touch every corner of the U.S. economy.

**Background**

It isn't easy to immigrate to the United States through employment channels. Unless subject to narrow exceptions, every applicant's employer must obtain a certification from the Department of Labor that there are no qualified, willing and able U.S. workers. Then, the applicant or employer must prove to U.S. Citizenship and Immigration Services (USCIS) that the applicant qualifies for one of a few preference categories. And finally, the applicant must apply for an immigrant visa at a U.S. consulate overseas or apply to adjust his or her status from within the United States. The process involves thousands of pages of documents (with no opportunity for electronic filing), and it takes years for the government to process the paperwork.

Separate and apart from government processing requirements, an immigrant must also wait in line until a green card number is available. Congress allocates 140,000 green cards a year to employment-based immigrants, and that number includes spouses and children. No more than 7 percent of those visas (less than 10,000) may go to a single nationality. This limitation is otherwise known as the "per country" limit. The Department of State administers the visa wait list, known as the "Visa Bulletin," and an applicant may not apply for an immigrant visa or apply to adjust his or her status until a green card number is available.

If you ask any company in any industry what the single biggest problem is with the U.S. high-skilled immigration system, you will encounter something rare in the immigration debate: consensus. All agree that the lengthy green card backlog is the central problem. Yes, processing delays at the agency are

disruptive and costly and need to be addressed, but those are often *symptoms*. The cause is an outdated green card system that undervalues skilled immigration, which in turn leads to untenable backlogs.

### **A System at a Tipping Point**

The issue of wait times for employment-based migration is reaching a tipping point. When I joined the government in 2002, not a single employment-based immigrant – irrespective of nationality – had to wait for a green card number. Two decades later, it is estimated there could be as many as 1.4 million employment-based immigrants in the backlog and nationals of India and China face decades long wait times.<sup>1</sup> The employment-based green card backlog is now ten times the total number of green cards made available in any year for those visa categories.<sup>2</sup> If trends continue, a green card may be unattainable for the vast majority of skilled immigrants unless applicants are willing to commit to years of government processing *and* a multi-year wait for a green card number.

Compounding the outdated numerical limits, hundreds of thousands of green card numbers have been wasted because the agency was unable to process all allocated visa numbers.<sup>3</sup> Last year, the agencies failed to use approximately 80,000 of the available employment-based green card numbers. Halfway through the current fiscal year, the data suggests the agencies will fall short again, perhaps by an even bigger amount.

Congress created a complex system to allow unused green card numbers to spill over and across to other visa categories to ensure that all available green cards would be used. The only reason Congress contemplated that green card numbers would go unused was a lack of demand in either the family- or employment-based categories. Of course, there is now overwhelming demand for the limited number of green cards, and the annual caps have not been updated since 1990 despite the dramatic changes that have occurred since then.<sup>4</sup> Administrative shortfalls now have a larger impact on immigration levels and flows than any legislation passed by Congress in the past few decades. This problem persists even though the immigration agencies have legal authority to remediate prior failures by recapturing and issuing the green card numbers they failed to use.

### **Consequences for the U.S. Economy and Key Industries**

#### *Lengthy Wait Times Make the U.S. Less Competitive*

Knowing that they will have to wait for decades for a green card in the U.S., highly skilled foreign nationals will take their talents to other countries such as Canada that have more welcoming immigration systems, where they can envision building lives and careers.<sup>5</sup> Canada welcomes the same number of immigrants under its family categories as the U.S. but *12 times* more legal immigrants under its economic category as the U.S.<sup>6</sup> In 2022, 56 percent of new immigrants to Canada will enter through economic pathways.

---

<sup>1</sup> David J. Bier, *Family and Employment Green Card Backlog Exceeds 9 Million*, Cato Institute (Sept. 29, 2021), <https://www.cato.org/blog/family-employment-green-card-backlog-exceeds-9-million>.

<sup>2</sup> David J. Bier, *1.4 Million Skilled Immigrants in Employment-Based Green Card Backlog in 2021*, Cato Institute (March 8, 2022), <https://www.cato.org/blog/14-million-skilled-immigrants-employment-based-green-card-backlogs-2021>.

<sup>3</sup> *Green Card Recapture and Reform Would Reduce Immigration Backlogs*, FWD.us (Apr. 13, 2021), <https://www.fwd.us/news/green-card-recapture/>.

<sup>4</sup> Julia Gelatt, *Explainer: How the U.S. Legal Immigration System Works*, Migration Policy Institute (April 2019), <https://www.migrationpolicy.org/content/explainer-how-us-legal-immigration-system-works>.

<sup>5</sup> *U.S. Immigration Policy: Lessons from Canada and Australia*, Business Roundtable (December 2019), <https://s3.amazonaws.com/brt.org/BRT-LessonsfromCanadaandAustraliaReportDec2019.pdf>.

<sup>6</sup> Richard Sanders, *A Layered Look at Canadian and U.S. Immigration*, Wilson Center (July 21, 2020), <https://www.wilsoncenter.org/article/layered-look-canadian-and-us-immigration>.

International students have already begun choosing Canada over the United States, which is a clear indicator that this country is becoming a less attractive destination. The National Foundation for American Policy (NFAP) found that between 2016 and 2019, international student enrollment dropped by 7 percent at U.S. universities, and increased by 52 percent at Canadian colleges and universities.<sup>7</sup>

There are ways that the U.S. employment-based migration system is still superior to Canada's system. The U.S. employer sponsorship model is very efficient at aligning immigrant skills with the labor market, which reduces the likelihood that the country will admit many highly skilled workers that end up underemployed.

What does it mean if talent goes elsewhere? Immigrants to the U.S. are more likely to study in high-demand science, technology, engineering, and mathematics (STEM) fields than native-born Americans,<sup>8</sup> and losing that talent stream will harm economic growth in industries key to our economic and strategic security.<sup>9</sup>

### *Increasing Skilled Immigration Will Improve the U.S. Economy*

U.S. immigration policy should reflect the widely accepted fact that our economy has benefited from immigrants' knowledge, skills and hard work – particularly in the high-demand science, technology, engineering and mathematics (STEM) fields and other high-demand fields. Expanding legal immigration would increase the pace of economic growth, lower the budget deficit by nearly \$3 trillion over 10 years, and boost per capita income by \$1,700 over 10 years.<sup>10</sup> Countless studies examining immigration from a variety of angles and using different methodologies have settled on this conclusion.<sup>11</sup>

Several members of this subcommittee have sponsored legislation that would recapture unused immigrant visas. A recent report by the Niskanen Center indicates that if the federal government recaptures 231,000 unused employment-based green cards, the policy would add \$216 billion to GDP over ten years.<sup>12</sup> If it recaptures 940,000 unused employment-based and family-preference green cards, the policy would add \$815 billion to GDP over ten years.

### *Skilled Immigration is Critical to Domestic Manufacturing*

With a renewed emphasis on domestic manufacturing, Congress should consider the role skilled immigrants play in that process. Dating back to the industrial revolution at the turn of the 19<sup>th</sup> century,

---

<sup>7</sup> *Analysis of U.S. and Canadian International Student Data*, National Foundation for American Policy (March 2022), <https://nfap.com/wp-content/uploads/2022/03/Analysis-of-International-Student-Data.NFAP-Policy-Brief.March-2022.pdf>.

<sup>8</sup> *The Economic Impact of Curbing Optional Practical Training*, Business Roundtable (December 2018), [https://s3.amazonaws.com/brt.org/BRT-OPTProgramReport\\_1.pdf](https://s3.amazonaws.com/brt.org/BRT-OPTProgramReport_1.pdf).

<sup>9</sup> Immigrants have been awarded 38 percent, or 40 of 104, of the Nobel Prizes won by Americans in chemistry, medicine and physics since 2000, according to an analysis by the National Foundation for American Policy (NFAP). *Immigrants and Nobel Prizes: 1901-2021*, National Foundation for American Policy (October 2021), <https://nfap.com/wp-content/uploads/2021/10/Immigrants-and-Nobel-Prizes-1901-to-2021.NFAP-Policy-Brief.October-2021.pdf>.

<sup>10</sup> *Benchmark Immigration Reform Would Boost Growth and Reduce Deficit*, American Action Forum (Apr. 9, 2013), <https://www.americanactionforum.org/press-release/benchmark-immigration-reform-would-boost-growth-and-reduce-deficit/>; Laura Collins, *Bolstering America's Economy Through Employment-Based Immigration*, George W. Bush Institute (February 2021), <https://gwbccenter.imgix.net/Resources/gwbi-immigration-employment-white-paper.pdf>.

<sup>11</sup> See, e.g., Diana Furchgott-Roth, *Does Immigration Increase Economic Growth?*, Manhattan Institute (Dec. 2014); Gordon Hanson, *Immigration and Economic Growth*, Cato Journal (2012); Ekrame Boubtane, Jean-Christophe Dumont and Christophe Rault, *Immigration and Economic Growth in the OECD Economies, 1986–2006*, Oxford Economic Papers (April 2016).

<sup>12</sup> Jeremy L. Neufeld, Lindsay Milliken, and Doug Rand, *Stop the Incinerator: The high cost of green cards going unused and the benefits of recapturing them*, Niskanen Center (June 2021), <https://www.niskanencenter.org/wp-content/uploads/2021/06/5Niskanenpaper-5.pdf>.

immigrants have been a catalyst for increased manufacturing in the U.S.<sup>13</sup> Today, innovation drives advanced manufacturing. Companies that build plants in or move manufacturing operations to the U.S. must be able to transfer skilled workers to the U.S. Companies I work with evaluate both short-term and long-term immigration strategies when considering where to build manufacturing centers.

A warning sign for Congress is a study that evaluates how the U.S. immigration system compares with competitor countries. The United States ranked 9th out of 10 competitor countries, ahead of only Japan, a country historically closed to outsiders. This analysis found that America's near-bottom ranking among major advanced economies is due to U.S. laws and regulations that impose unrealistic numerical limits and excessive bureaucratic rules on hiring workers that the country's economy needs.<sup>14</sup>

### *Lengthy Wait Times Aggravate Healthcare Staffing Shortages*

The harms of the green card backlog touch every industry. Covid-19 and the healthcare crisis brought home to many Americans the critical role foreign workers play in that industry and the shortages that arise when access is restricted.<sup>15</sup> Lengthy green card times and delayed processing at U.S. consulates result in gaps in healthcare delivery, particularly in health professional shortage areas around the country.

In 2018, more than 2.6 million immigrants, including 314,000 refugees, were employed as healthcare workers.<sup>16</sup> 1.5 million of them were working as doctors, registered nurses, and pharmacists. Though immigrants represented 17 percent of the overall U.S. civilian workforce, they were 29 percent of physicians, 38 percent of home health aides, and 23 percent of retail pharmacists.

### **Consequences for Foreign Workers and Their Families**

Absent action by Congress or the agencies, many high-skilled immigrants from India – including those who graduate from U.S. universities and work for the world's leading companies – will face the choice of leaving the U.S. or remaining on a temporary work visa for their entire life. This is because the nationality-based limits that were established seventy years ago do not reflect current talent migration trends. The National Foundation for American Policy has written that “[w]ithout a change in immigration law, it will be sometime in the year 2216—195 years from now—when the last person born in India waiting today in the employment-based immigrant backlog is expected to receive a green card.”<sup>17</sup> This results in the U.S. losing key employees, including those in STEM fields where there already is a shortfall.

---

<sup>13</sup> Charles Hirschman and Elizabeth Mogford, *Immigration and the American Industrial Revolution From 1880 to 1920*, Soc. Sci. Res. 38(4), 897-920 (Dec. 1, 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2760060/> (“Without immigrant labor, it seems unlikely that the American industrial revolution would have been achieved at the same pace, scale, and profitability that it did.”).

<sup>14</sup> *State of Immigration: How the United States Stacks Up in the Global Talent Competition*, Business Roundtable (March 2015), <https://s3.amazonaws.com/brt.org/BRT-immigrationreport-2.pdf>.

<sup>15</sup> Silva Mathema, *Removing Barriers for Immigrant Medical Professionals Is Critical to Help Fight the Coronavirus*, Center for American Progress (April 2, 2020), <https://www.americanprogress.org/article/removing-barriers-immigrant-medical-professionals-critical-help-fight-coronavirus/>; *New Findings Confirm Predictions on Physician Shortage*, Association of American Medical Colleges (AAMC) (April 23, 2019), <https://www.aamc.org/news-insights/press-releases/new-findings-confirm-predictions-physician-shortage>; see also *AAMC Report Reinforces Mounting Physician Shortage*, AAMC (June 11, 2021), <https://www.aamc.org/news-insights/press-releases/aamc-report-reinforces-mounting-physician-shortage>.

<sup>16</sup> Julia Gelatt, *Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*, Migration Policy Institute (March 2020), available at <https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response>.

<sup>17</sup> Stuart Anderson, *Immigration Bill Shows Need to End Employment-Based Immigrant Backlog*, Forbes (March 1, 2021), <https://www.forbes.com/sites/stuartanderson/2021/03/01/immigration-bill-shows-need-to-end-employment-based-immigrant-backlog/?sh=17b6d2b7271a>.

Additionally, children of green card applicants can “age out” of their temporary visa status when they turn 21.<sup>18</sup> This means they not only lose their status, but also become ineligible to apply for their green card along with their parents. A few may be able to change visa classifications, but legal options are limited. If they cannot change classifications, they must depart the country they know as home.

## **Consequences for the Immigration System**

### *Green Card Wait Times Compound Agency Backlogs*

Lengthy green card waitlists increase agency backlogs and processing times for immigration benefit applications. Under current agency policy, high-skilled workers in the green card backlog must repeatedly apply to extend their nonimmigrant status or related work and travel documentation, often for years on end. The family of a high-skilled immigrant will file multiple applications while waiting for a green card number, and today the government often takes over a year to process an Employment Authorization Document (EAD) application, effectively forcing a business disruption on thousands of U.S. companies.

Those extra filings get added to a case backlog that is already insurmountable. In 2013, the agency had 3 million pending applications. Ten years later, the number of pending applications exceed 9.5 million.<sup>19</sup> The agency backlog will continue to grow in an exponential way unless and until Congress creates an off-ramp from temporary work visas or the agency reduces the frequency at which foreign workers must renew their status or associated documents. Issues that I know you are familiar with from constituent services, like delayed processing for EADs and Advance Parole travel documents, are often tied to unnecessary “churn” in the immigration system.

### *Backlogs Invite Judicial Interference in Agency Priorities*

In the face of these delays and untenable wait times, applicants often feel they have no choice but to seek relief in court. Though favorable court rulings may provide relief to some foreign nationals in the short term, USCIS is at risk of losing its ability to prioritize resources, and Congress is at risk of ceding its plenary authority over immigration law to district court judges.

Lawsuits against the State Department have targeted delays in visa processing during the pandemic.<sup>20</sup> Parties have also sued USCIS over its processing of work authorization documents for asylum seekers; foreign students seeking employment under the Optional Practical Training (OPT) program; spouses of foreign workers on E-2, H-4, and L-2 visas; and people adjusting to green cards within the U.S.

## **Policy Options**

How immigrants are prioritized, whether and to what extent nationality should be part of that prioritization, and how temporary visas should relate to immigrant visas, are all topics that are ripe for review. Other countries are moving quickly to make their immigration systems more attractive to global talent. By doing nothing, the U.S. is going backwards.

---

<sup>18</sup> Hafsa Fathima, *They Came to the U.S. as Children, But At 21, Their Legal Status Runs Out*, National Public Radio (NPR) (Aug. 4, 2021), [<sup>19</sup> Muzaffar Chishti and Julia Gelatt, \*Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes\*, Migration Policy Institute \(Feb. 23, 2022\), <https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden>.](https://www.npr.org/2021/08/01/1023393351/documented-dreamers-live-their-whole-lives-in-the-u-s-then-face-deportation-at-2; Meet Documented Dreamers, Improve the Dream, https://www.improvethe dream.org/stories; Documented Dreamers: An Overview, American Immigration Council (Aug. 20, 2021), https://www.americanimmigrationcouncil.org/research/documented-dreamers-overview.</a></p></div><div data-bbox=)

<sup>20</sup> *Id.*

Focusing on U.S. competitiveness and job creation, Congress has no shortage of options, including but not limited to the following:

- Increase the number of employment-based immigrant visa numbers available to immigrants who have the skills needed to grow the economy;
- Exempt classes of skills-based immigrants from annual limits to provide targeted benefits to those with certain skillsets or those working in particular industries that have the greatest need;
- Recapture unused immigrant visas from prior years, which would be particularly helpful to those who are already caught in the green card backlog;
- Evaluate whether immigration law should funnel all intending immigrants into temporary work visa categories;
- Allow high-skilled immigrants caught in the backlog to move off of temporary work visas and file adjustment of status applications;
- Protect children of long-term work visa holders who have maintained status, without creating a system that advantages or incentivizes those in that situation; and
- Expand opportunities for spouses of high-skilled immigrants to work in the U.S. to mitigate the harm of lengthy wait lists.

Congress should also increase oversight of the immigration agencies to ensure that the executive branch does not frustrate legislative intent. I encourage Congress to provide oversight of the agencies so that they:

- Utilize all available immigrant visa numbers, manage the visa waitlist in a more transparent manner, provide Visa Bulletin predictions six months in advance, and increase the number of adjustment of status applications available for adjudication;
- Recapture and preserve immigrant visa numbers to ameliorate the harm of agency inaction;
- Automatically grant work authorization to foreign workers who are at risk of losing employment due solely to agency processing delays;
- Eliminate unnecessary filing requirements, like the obligation to notify the agency every time a professional worker changes work locations; and
- Maintain consistency in granting immigration benefits (across agencies as well), particularly when applicants are seeking to extend their status in the U.S.

## **Conclusion**

In closing, I want to thank you for bringing attention to this important topic and I look forward to answering questions you have.