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BREAKING BUREAUCRATIC BORDERS: A NECESSARY STEP TOWARD IMMIGRATION LAW REFORM

LENNI B. BENSON

TABLE OF CONTENTS

I. The Real Borders ........................................................................... 205
II. The Current Immigration Process: Map and Territory................... 214
   A. Mapping Eligibility ................................................................. 214
   B. Three Stops on Map to Employment-Based Immigration ...... 218

* Professor of Law, New York Law School. Many people contributed to this Article and I have mentioned their specific participation in appropriate sections below. In particular, I benefited from the comments of Professors Peter Schuck, Margaret Taylor, Hiroshi Motomura, Stephen Yale-Loehr, David Martin, and Jeffrey Lubbers. I appreciate the contributions of NYLS faculty members: Michael Botein, Stephen Ellmann, Karen Gross, Seth Harris, Carlin Meyer, and Don Zeigler. I was also greatly assisted by Timm Esque and several former or current students including Michael Fahy, Anna Kozoulina, John Deikman, Brenda Cooke, Alice Youngbar, and Lisa Compagno.

Following in the tradition of other administrative law studies of immigration procedure, I examine the adjudication procedures from the view of the people and businesses seeking immigration benefits, as well as from the perspective of the agencies making the decisions. Research for this Article included discussions with senior examiners, review of years of written minutes of liaison meetings between attorneys and agency personnel, review of published and unpublished agency decisions, examination of Congressional testimony, GAO reports and other sources, as well as interviews of many government officials, attorneys, and scholars working in the field.

In addition, I interviewed current participant users of the agencies’ programs, and relied on knowledge gained during more than ten years of experience in private practice submitting employment-based petitions. I particularly thank Stephen Fischel and Charles Oppenheim of the Department of State, and Harry Sheinfeld of the Department of Labor, for their comments. However, they did not provide official statements of agency positions nor does their cooperation signal their agreement with the observations or suggestions made in this Article. Furthermore, I also gained insight from participation in 1998 and 1999 on a special task force organized by the American Council for International Personnel (ACIP), a non-profit organization representing more than one hundred large employers, each of whom has at least one thousand employees worldwide. The task force and others were invited by the Department of Labor to participate in several informal discussions concerning reform of labor certification procedures. I am grateful to Lynn Shotwell of ACIP for her assistance and insight.

203
C. Navigating Through the Territory ........................................... 220
  1. First Stop—The Labor Certification Process .................... 223
     a. Initial Strategy—Utilizing Non-immigrant and Immigrant Visas 224
     b. Department of Labor Adjudication .................................. 226
     c. Defining the Job Requirements .................................... 228
     d. The Recruitment Phase ............................................. 232
     e. Searching for a Short-Cut: A Waiver of Labor Certification 241
  2. Second Stop—INS Immigration Petition .......................... 249
  3. Third Stop—Visa Petition in Hand .................................. 253

III. Analyzing the Problem at its Roots ...................................... 262
     A. Integrity, Efficiency, and Transparency: The Essential Process Values 262
     B. Process Values Undermined: Three Sources of Bureaucratic Borders 264
        2. Delegation to Multiple Agencies .................................. 274
        3. Territorial Culture ............................................... 282
           a. Congressional Mandates and Dictated Priorities ......... 282
           b. Resources and Resource Allocation .......................... 285
           c. Agency Training and Strategic Planning ..................... 286
           d. The Sophistication of the Participant ....................... 288
           e. The Fear of Fraud ............................................... 289
           f. Anonymous Adjudication—Lack of Accountability ... 290

IV. Radical Reform v. Incremental Pragmatism ........................... 290
     A. Responses to the Process Borders .................................. 290
     B. Structural and Substantive Changes ............................... 298
        1. Create a Coordinating Authority ................................. 298
        2. Eliminate Department of Labor Role, It Is Not Essential 301
        3. Elevate Administrative Appeals .................................. 305
        4. Privatize Aspects of Adjudications ............................. 307
     C. Measuring Performance and Bringing Process to Light ........ 309
        1. Create a Feedback Source to Keep Measurement and Accountability Paramount 309
        2. Improve Public Reporting of Procedure ....................... 311
        3. Use of Technology for Communication and Efficiency .... 315
        4. Measuring Performance and Participant Satisfaction ...... 316
        5. Publish More Administrative Decisions ......................... 318
     D. Incentives to Improve Performance ................................. 323
        1. Fiscal Accountability and Incentives ........................... 323
        2. Fees Tied to Performance ......................................... 324
        3. Adjudicate On Time or Approve the Petition ................ 325
        4. Create New Mandamus Statutes .................................. 327
        5. Increase Resources to Deter and Prosecute Fraud .......... 328

Conclusion ................................................................................. 331
I. THE REAL BORDERS

When we think of borders as barriers to immigration, we picture the imaginary lines separating the United States from Canada and Mexico. Perhaps we think of physical signs such as fences or border patrol checkpoints. But, there are other borders that have a much greater impact in determining who we accept and who we keep out. Congress, by enacting substantive immigration law, defines our selective admission system. These laws erect legal borders that reflect the policy choices Congress has made about who may enter to work or to join family in the United States. But beyond this initial border, the agencies that implement the immigration laws have erected powerful process borders. These process borders, fostered by congressional neglect and strengthened by a lack of coordination among the agencies, distort substantive immigration policy. Far too often, the bureaucratic process borders control who immigrates. Process in any legal system is important, but it is of special concern in immigration law with its opacity, frequent lack of published decisions, and culture shaped by bureaucrats and non-lawyers. In many situations, immigration adjudication is almost completely insulated from political oversight and judicial review.

1. Scholars such as Jerry Mashaw have amply demonstrated, an adequate analysis of administrative law process requires not only an examination of substantive legal provisions and the agency procedures, but an assessment of the larger context within which they operate. See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 103 (1983) (stating different aspects which must be considered in analysis); see also Colin S. Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65, 76-77 (1983) (providing discussion on rulemaking).

2. See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 24 (Greenwood Press 1974) (1938) (discussing role of administrative tribunals and importance of efficiency in administrative process); see also HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 152-57 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (prepared for publication from 1958 tentative edition by William N. Eskridge, Jr. and Philip P. Frickey) (focusing on lawyers and courts to define fair adjudicatory policies). Lawyers are, of course, not the only people sensitive to the importance of fair process, but in other adjudicative systems, where lawyers and legally trained judges dominate the operations, many essential process values are shared due to tradition, jurisprudence, and the emphasis on process in legal education. See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13-25 (1980) (providing comparative discussion of process culture in other agencies).

3. One reason behind this insulation is that while many areas of administrative law have low levels of judicial review, in immigration law, almost none of the decisions made by the Department of State are subject to judicial review. See James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 WASH. L. REV. 1, 26 (1991) (stating judicial review of consular discretion is limited). Many other challenges have faced the judicially created tradition of giving immigration statutes and decisions extraordinary deference as a re-
In addition to these important concerns, immigration administration and adjudication should be examined for special reasons. First, the immigration laws are designed not merely as a system that conveys benefits for people permitted to enter and reside in the United States but, at the same time, the law defines by omission those excluded from legal immigration. In part, our "illegal immigration" problems result from the prospective immigrant's inability to understand and rely upon our legal immigration system.

Second, the immigration system affects millions of people, including those admitted each year in either permanent or temporary categories, those waiting because of quota backlogs, and, of course, those denied the right to immigrate. Moreover, the system affects members of existing communities as much, if not more, than those hoping to enter because almost every visa category involves an employer or family member acting as the non-citizen's sponsor. The adjudication of immigration eligibility is one of the


Further, most people never seek judicial review of Immigration and Naturalization Service (INS) decisions, which concern business or family-based petitions. There are so many different ways to obtain immigration benefits, for many people, the most economic and productive strategy is to file in a different category or re-file the visa petition with additional supporting evidence. Many areas of administrative law are made visible by the active participation of special interest groups and the participation of political actors. In one sense, the group of people most affected by immigration law is unlike others impacted by administrative law for immigrants are not eligible to participate in our political process. See Gerald M. Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 MICH. L. REV. 1092, 1100 (1977) (commenting on how right to vote is not extended to aliens); see also Thomas Alexander Aleinikoff et al., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 571-93 (4th ed. 1998) (including a compilation of essays discussing alien suffrage and political participation). Of course, other groups interested in obtaining immigration for others or in limiting immigration may actively participate in the system, but these groups are necessarily one step removed from much of the actual operation of the law. See id. at 581 (implying because native born citizens have the right to vote, they do not concern themselves with immigrant voting rights).

4. Currently the United States admits less than one million immigrants each year while millions of others await agency adjudication of immigration related petitions. See infra Figure 1, p. 215; see also INS., 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 14-18, 48 (2000) [hereinafter 1998 INS YEARBOOK] (documenting 660,477 individuals were granted legal permanent status in 1998); Immigrant Visa Preference Numbers for September 2001, 78 INTERPRETER RELEASES 1301, 1335 (2001) (demonstrating backlog and indicating which priority dates are current).

5. Congressional offices routinely assign staff to handle constituent inquiries con-
most important governmental acts touching an individual's life. American businesses expend substantial time and resources to secure work authorization for prospective immigrants.6 The problems can be so complex and overwhelming that participants feel lost in a procedural maze. The result is a denial of a fundamental right: namely, to make an independent choice where to live, work, and travel.7

Finally, when the administrative process frustrates the existing substantive provisions, distrust in the law and the government grows.8 Inadequate reporting, inconsistent adjudication, prolonged delays, and bureaucratic morass foster indifference. These same problems lead policy analysts to extreme solutions, ranging from open borders to moratoria, or even a complete ban on new immigration.

While these bureaucratic process borders are pervasive throughout the system, they have increased and dominate the immigration categories related to employment.9 More important, the disparity between what appears


6. These costs are difficult to quantify; they may include internal expenses for preparation of visa petitions, attorneys fees, and advertising costs. See infra note 103 and accompanying text (estimating expenses).

7. These are all essential components of human life, even if not yet rights fully protected by positive law. The focus of this Article is not to make a rights-based assessment of the duties the U.S. government owes to individuals. Some of the aspects of the process may be protected by treaty provisions, statutory mandates of the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA), or by the Due Process Clause of the U.S. Constitution. See Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1524 (1994) (defining immigrant status and determining immigrant eligibility); Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994 & Supp. V 1999) (setting forth procedural safeguards).

Rather than build legal arguments, however, this Article addresses policy planners and those responsible for implementing the law. Nevertheless, many of the problems documented here have and will give rise to litigation. See Jocelyn Y. Stewart, INS Is Sued Over Delays in Processing Applications, L.A. TIMES, Aug. 29, 2000, at A3 (discussing class action lawsuit filed by family members against INS for placing immigrants at risk of deportation by not processing their applications in a timely fashion). In rare cases, delay may even lead to special relief. See, e.g., Salameda v. INS, 70 F.3d 447 (7th Cir. 1995) (vacating order denying suspension of deportation).


9. There are three main categories of legal immigration: family-based, employment-based, and humanitarian relief. See generally infra Part II.A.
to be the substantive design and the actual operation of the law has grown exponentially. In 1998, despite high demand, the government issued fewer than fifty-five percent of the authorized employment-based visas. In 1999, the figure fell to thirty-eight percent of authorized employment-based visas. With the explosion of new technology, business mobility, and increased global trade, employment-based immigration has become an important part of many sectors of our economy. The immigration process is so replete with procedural obstacles that employers and would-be immigrants are unable to predict when or if their petitions will be approved. The

10. See 1998 INS YEARBOOK, supra note 4, at 48 (providing data on numbers of immigrants admitted through employment petitions). In the FY 1998, only 77,476 employment-based visas were issued out of the possible pool of 140,000. See id. In FY 1999 only 61,936 visas of 160,898 were issued. In FY 2000, the percentage increased to seventy-eight percent or 111,1065 of 142,299 authorized visas. See Interview with Charles Oppenheim, Chief Immigrant Visa Control and Reporting Division, Department of State (July 17, 2001); see also E-mail from Michael Hoefer, INS Statistics Division, to author (July 16, 2001) (on file with author) (confirming as of July, 2001, the agency had not yet released this data for FYs 1999 and 2000). The 1999 and 2000 numbers provided here do not include all INS controlled adjudications; rather, they include only those that require visa numbers from the Department of State. See infra Figure 1, p. 215 (illustrating gaps since 1992). The failure to issue the visas was primarily due to the government’s inability to process the applications. See discussion infra Part II.C. In recent legislation, Congress authorized the reallocation of 130,000 unused employment-based visas. See American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 104, 114 Stat. 1251, 1252-53 (codified at 8 U.S.C. § 1152(a)(5)(A) (1994 & Supp. V 1999)) (setting forth provision to reallocate visas). This law also removes the per-country limit in instances where the overall applicant demand for employment-based visas is less than the numbers available without regard to those limits. This determination will be made quarterly, based on a comparison of the overall demand versus the available numbers. "If the total number of [employment-based] visas . . . exceeds the number of qualified immigrants who may otherwise be issued such visas [during the same period], the visas made available under that paragraph shall be issued without regard to the numerical limitation . . . during the remainder of the calendar quarter." INA § 202(a)(5)A, 8 U.S.C. § 1152(a)(5)(A) (1994 & Supp. V 1999); see also Immigrant Visa Preference Numbers for December 2000, 77 INTERPRETER RELEASES 1625, 1648 (2000) (providing current priority dates for employment-based visa applications); see generally VISA BULL. (Dec. 2000), available at http://dosfan.lib.uic.edu/ERC/visa_bulletin. As will be discussed below, this type of solution is, unfortunately, purely reactive and does not prevent the process border distortions.

uncertainty leaves businesses unable to plan efficiently and employees unable to change jobs. Worst of all, employees remain dependent, sometimes for years, on the sponsoring employer's good will throughout the immigration process.

There are several sources of process obstacles. Under our current immigration system, both family and employment-based categories face multi-year processing delays. Three separate federal agencies may be involved in adjudicating one immigrant petition.\(^{12}\) These are the Immigration and Naturalization Service (INS), the Department of Labor and the Department of State. While the actual language of the Immigration Nationality Act (INA) delegates to the Attorney General, Secretary of Labor, or Secretary of State, the responsibility falls to three agencies.\(^{13}\) The INS is a division of the Department of Justice.\(^{14}\) The Department of Labor has assigned immigration adjudication to the Employment and Training Administration, Office of Workforce Security.\(^{15}\) The Department of State places central administrative authority in the Bureau of Consular Affairs, but the INA guarantees each consular officer abroad has independent adjudicative authority.\(^{16}\) These agencies are guided by their own internal rules and are

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12. It is hard to compare administrative agencies' structures, let alone how well they function. While this Article analyzes three agencies (the Department of Labor, the Immigration and Naturalization Service, and the Department of State), another study systematically measured federal management performance of twenty agencies based on five criteria, with the goal of prompting them to manage better. See ALAN K. CAMPBELL PUB. AFFAIRS INST. OF SYRACUSE UNIV. MAXWELL SCH. OF CITIZENSHIP & PUB. AFFAIRS, FEDERAL GRADE REPORT 1999 (1999) [hereinafter 1999 GRADE REPORT], available at http://www.maxwell.syr.edu/gpp/Federal/fedreport1999.htm; see also Anne Laurent, Stacking Up: The Government Performance Project Rates Management at 15 Federal Agencies, GOV'T EXECUTIVE, Feb. 1999, at 13 (outlining and discussing Project in detail). The INS was given an overall grade of C-, while its high volume adjudication counterparts scored as follows: Social Security Administration, A; Veterans Health Administration, B; Internal Revenue Service, C. See id. at 14.


14. See DOJ Organization of the Department of Justice, 28 C.F.R. § 0.105 (2001) (describing powers and responsibilities of the Commission of INS within Department of Justice).


given little direction from Congress. The lack of clear standards, complex substantive and procedural rules, and redundancy in adjudication create process obstacles, so significant to U.S. immigration law, that in many cases the adjudication hurdles are more burdensome and restrictive than the substantive law itself.

One of the roots of process obstacles is the ineffective structural delegation of authority among the agencies involved in the immigration process. Multi-agency adjudication leads to redundant and unnecessarily fragmented decisions. Furthermore, there is a lack of coordination between the agencies that creates problems when the requirements and policies of one conflict with those of another.\textsuperscript{17} In turn, non-precedent agency decisions sometimes contradict one another, leading to conflicting adjudication of similar visa petitions. At times, these differences in interpreting the law could lead participants to forum shop among agencies with parallel responsibilities in an effort to manipulate the adjudication process.

Another significant contributor to process obstacles is the opacity of both the substantive and procedural requirements of immigration law. Immigration law creates multiple pathways to immigrant status. There are currently more than nine separate employment related categories, several of which contain subcategories, permitting a foreign worker to immigrate. However, due to the complexity of the law and process delays, an individual rarely takes a direct path to immigration. Instead, most non-citizens\textsuperscript{18} first use some of the nineteen non-immigrant or temporary visa categories while completing the journey through the immigration process.

Delay not only frustrates the purpose of the immigration law, but at times serves to negate it.\textsuperscript{19} Some delays spring from horrific bureaucratic
backlogs. For instance, Congress established employment-based immigration to immediately fill any position for which no qualified and willing U.S. worker could be found.\(^{20}\) However, it can take four years to complete the immigration process. Despite high demand, process obstacles caused fewer than sixty percent of the allocated employment-based immigrant visas to be actually issued.\(^{21}\) In other cases, particularly those that are age and relationship sensitive, process controls so completely that the immigrant loses eligibility altogether. For example, a child turning twenty-one years old before her family can complete the immigration process cannot immigrate with her parents until a much later time.\(^{22}\)

Thus, the statutory provisions, regulations, and implementing forms and instructions, as complex as they are, are only the map; they are a theoretical depiction of the route one might take to immigrate. In reality, a person wishing to determine her eligibility for immigration faces a gap between what is theoretically possible and the reality of the adjudication process. While a map shows the general distance between one place and another, it cannot show the difficulty an individual encounters along the journey, or whether the journey can be completed at all. The map is not the territory.\(^{23}\)

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\(^{20}\) See INA § 212(a)(5), 8 U.S.C. § 1182(a)(5) (1994 & Supp. V 1999) (stating unskilled and skilled laborers are inadmissible unless there are not sufficient workers who are able, willing, and qualified to fill these positions).

\(^{21}\) See infra Figure 1, p. 215 (illustrating gap between authorized and issued visas).

\(^{22}\) The parents can petition for their adult, unmarried child, but the current backlog in this category suggests a ten year wait before the family can be reunited. See INS Revocation of Approval of Petitions, 8 C.F.R. § 205.1(a)(3)(i)(F) (2001) (stating if a child turns twenty-one prior to immigrating with family, the son or daughter cannot accompany them and family may file a petition on the son or daughter’s behalf); Immigrant Visa Preference Numbers for September 2001, 78 INTERPRETER RELEASES 1301, 1335 (2001) (demonstrating backlog and indicating priority dates for unmarried son or daughters of permanent residents); see also INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A) (1994 & Supp. V 1999) (qualifying only the spouses, children, and unmarried sons or daughters of permanent residents for visa petitions). If the child marries during the waiting period, she may only be sponsored if the parents become U.S. citizens. See INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (disqualifying married son or daughters of permanent residents). The quota delay in the category for married children of citizens is also significant. As of August 2000, the applicant could expect a wait of six years or more. See Immigrant Visa Preference Numbers for August 2000, 77 INTERPRETER RELEASES 937 (2000) (indicating Family-Based Third Preference).

These process borders have received little scholarly attention. Most immigration law analysis focuses on issues related to the first border: who should be allowed to immigrate, who should be barred, and what is the constitutional status of immigrants in various circumstances. When scholars do address particular procedural obstacles to the attainment of immigration goals, they seldom examine the intricacies of the bureaucratic system that erected the obstacles in the first place. When scholars ignore

24. This may be partly due to the fact that these obstacles are more difficult to trace. They are rarely revealed by reading judicial opinions, or by parsing statutes and regulations. Moreover, as discussed in Part III, infra, the agencies involved make study difficult by failing to gather, publish, or otherwise allow access to data concerning much of their work. The study of informal adjudication is inherently difficult, but the particular lack of transparency in the immigration adjudication process compounds the problems.

Despite the lapse of thirty years since Kenneth Culp Davis called upon law scholars to pay more attention to decisionmaking role of administrative officials, this work has largely been left to political scientists, sociologists, and historians. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY vii (1969) (discussing law and decisionmaking role of administrative officials). See, e.g., Kitty Calavita, The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910, 25 LAW & SOC. INQUIRY 1, 34-35 (2000) (examining decisionmaking by border officers enforcing one aspect of Chinese exclusion laws and providing insights of continuing relevance); Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 COLUM. L. REV. 1 (1998) (discussing theoretical examination of administrative process).


or gloss over the process, they render irrelevant much of their otherwise thoughtful analysis of substantive immigration law and proposals for reform. In reality, these process borders, control or distort the substantive policy.\textsuperscript{27}

Unfortunately, governmental studies are almost always flawed because the studies focus on a single agency.\textsuperscript{28} While serious critique of each agency's operations is necessary, the failure to adequately address the interaction of the agencies' procedures reinforces the existing process borders between the agencies. Reforms or process problems in one agency dramatically affect the operations of the others. More importantly, the experience of moving through the immigration process is made more chaotic by a lack of coordination and control of the entire process.

I contend the sources of the process borders must be studied and understood so that the borders can be dismantled. This Article begins that study and recommends several changes critical to fundamental procedural change. The Article proceeds in four parts. Part I discusses the significance of process to the administration of immigration law and introduces the sources of the bureaucratic borders. Part II maps the categories of legal immigration and uses a detailed narrative to describe the interaction of the three agencies that control immigration. The narrative also reveals the strategies representative participants—an employer and an immigrant—must use to successfully navigate across the process borders. This narrative demonstrates many of the systemic process failures. Part III identifies three process values: integrity, efficiency, and transparency and illustrates how several key sources of bureaucratic borders, independently and in concert, diminish these qualities in immigration adjudication. Part IV uses the focus on administrative process to evaluate several radical proposals for reform and proposes pragmatic incremental changes aimed at

\begin{quote}

27. In order to focus on what I call process borders, I have chosen to take the law's substantive provisions at face value (i.e., as intending what they purport to do). Some may view this approach as naive or otherwise flawed, theorizing that process is inseparable from substance, and the attempt to separate them nonsensical. Since substantive immigration law is the outcome of political compromise, one cannot improve the process without addressing the politics, which produced the substantive provisions in the first place.

\end{quote}
reducing and breaking down the process borders.

II. THE CURRENT IMMIGRATION PROCESS: MAP AND TERRITORY

A. Mapping Eligibility

No person simply immigrates to the United States. Only those who fit into a specific statutory category qualify for permanent residence. The 1952 adoption of the INA\(^\text{29}\) divided immigration into three general categories. One is intended to reunite families,\(^\text{30}\) another allows limited immigration based on employment relationships,\(^\text{31}\) and a third gives specific kinds of humanitarian relief such as registry\(^\text{32}\) or political asylum.\(^\text{33}\) The statutory scheme maps who may immigrate, laying out only the broad substantive and procedural contours.

Qualifying in any particular visa category is only part of the path, for Congress has rationed and apportioned visas under strict quotas. One group, immediate relatives,\(^\text{34}\) is exempt from a precise quota limitation. Furthermore, family and employment-based visas are divided among a series of preferences or priorities.\(^\text{35}\) Since 1992, when the current preferences began operating, immigration in the family and employment based categories combined has ranged between approximately 661,000 and 952,000.\(^\text{36}\)

\begin{itemize}
  \item 30. See INA § 202(a)(1), 8 U.S.C. § 1151(b)(2)(A)(i) (stating immediate relatives are aliens not subject to direct numerical limitations).
  \item 31. See INA § 203, 8 U.S.C. § 1153(b) (establishing preference allocation of immigrant visas for employee-based immigrants).
  \item 32. See INA § 249, 8 U.S.C. § 1259 (setting forth provisions of legalization registry).
  \item 33. See INA § 208, 8 U.S.C. § 1158 (establishing asylum provisions).
  \item 35. See INA § 203(a), 8 U.S.C. § 1153(a) (allocating a minimum of 226,000 family-sponsored immigrant visas). The greater the number of immediate relatives, the lower the quota number permitted in the family-based category. Family-based immigrant quotas can expand to a high of 480,000 per year. See INA § 201(c), 8 U.S.C. § 1151(c) (establishing worldwide level of family-sponsored immigrants); see also id. § 1151(d) (authorizing 140,000 employment-based immigrants). In addition to quotas for the total number of immigrants, until 2001, the law strictly limited immigration from any individual country to seven percent of the total number of visas issued to avoid domination of any category by nationals from a single country. In late 2000, Congress authorized an exemption from the per country ceiling cap in any year in which all of the 140,000 employment-based visas have not been issued. The significance of this exception is discussed in Part II.C.3.
  \item 36. Total legal immigration, as indicated in Figure 1, is larger due to other miscellaneous categories of immigration such as refugees, the 1986 legalization program, and the di-
The preference categories and quota allocations can be briefly summarized as a hierarchy where the "best and brightest" are given priority over other immigrants and are frequently exempted from onerous requirements. The first employment-based preference includes people of extraordinary ability, outstanding academics and researchers, and multinational executives and managers.  

The second preference contains persons with exceptional abilities or advanced degrees and normally requires a labor certification unless the employment of the non-citizen can be of demonstrated benefit to the national interest. The third preference is for all other professionals and skilled workers who successfully obtain the labor certification and contains a limited subcategory, only 10,000 visas, of low-skilled workers who have a labor certificate. The fourth preference is reserved for certain special immigrants and religious workers and is generally exempt from any labor market test. The fifth preference is available to investors with the ability to commit $500,000 to $1 million in businesses.
generating at least ten new positions.\textsuperscript{41}

**Figure 2: Immigrant Visa Allocation**

<table>
<thead>
<tr>
<th>Visa Category</th>
<th>Description of Criteria</th>
<th>Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate Relatives</td>
<td>Spouse, minor children, and parents of U.S. citizens</td>
<td>There is no quota limit on this category. There is no labor certification (NLC) required.</td>
</tr>
<tr>
<td>Family First Preference</td>
<td>Adult Unmarried Sons and Daughters of Citizens; (NLC)</td>
<td>23,400 plus any numbers not required for fourth preference</td>
</tr>
<tr>
<td>Family Second Preference</td>
<td>Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents; (NLC)</td>
<td>114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers</td>
</tr>
<tr>
<td>Family Third Preference</td>
<td>Married Sons and Daughters of Citizens; (NLC)</td>
<td>23,400, plus any numbers not required by first and second preferences</td>
</tr>
<tr>
<td>Family Fourth Preference</td>
<td>Brothers and Sisters of Adult Citizens; (NLC)</td>
<td>65,000, plus any numbers not required by first three preferences</td>
</tr>
<tr>
<td></td>
<td>The total number of immediate relatives varies the family preference limits</td>
<td>Total: 226,000 floor 480,000 ceiling</td>
</tr>
<tr>
<td>Employment First Preference</td>
<td>Priority Workers: (NLC) a) extraordinary ability in the arts, sciences, or business b) outstanding researchers and professors c) multinational executives and managers</td>
<td>28.6% of the worldwide level, plus any numbers not required for fourth and fifth preferences [minimum 40,040]</td>
</tr>
<tr>
<td>Employment Second Preference</td>
<td>Advance Degree Professionals or Exceptional Ability in the Arts and Sciences Labor Certification Required or National Interest Waiver</td>
<td>28.6% of the worldwide level, plus any numbers not required by first preference [minimum 40,040]</td>
</tr>
</tbody>
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<tr>
<td>Employment Third Preference</td>
<td>Skilled Workers, Professionals, and Other Workers Labor Certification Required or Schedule A Waiver 5,000 of the 10,000 for other workers have been temporarily allocated to other immigrants due to special relief legislation.</td>
<td>28.6% of the worldwide level, plus any numbers not required by first and second preferences, [minimum 40,040] not more than 10,000 of which to “Other Workers.”</td>
</tr>
<tr>
<td>Employment Fourth Preference</td>
<td>Religious Workers and Certain Special Immigrants; (NLC)</td>
<td>7.1% of the worldwide level [minimum 9,940]</td>
</tr>
<tr>
<td>Employment Fifth Preference</td>
<td>Employment Creation; (NLC) Millionaire Investors not less than 3,000 of the total are reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers</td>
<td>7.1% of the worldwide level, [minimum 9,940]</td>
</tr>
<tr>
<td>Diversity</td>
<td>Lottery for low-admission countries. Applicants must have the equivalent of a U.S. degree or two years of work experience; (NLC).</td>
<td>Total: 140,000 min. spill down from family preferences can Increase this number</td>
</tr>
<tr>
<td></td>
<td></td>
<td>55,000 [This category was temporarily reduced by 5,000 due to special relief for Central Americans.]</td>
</tr>
</tbody>
</table>

The existence of the quota limits and preferences makes identifying the appropriate category for a potential immigrant only part of reading the map. The quota limitations and per country restrictions add a layer of complexity that makes some categories undesirable if not illusory. For example, the INA contains a category authorizing the immigration of brothers and sisters of adult U.S. citizens. The statute authorizes 65,000 people in this category each year.42 My current estimate of a date of visa availability in this category is close to fifteen years. For people from the Philippines the wait may exceed twenty-five years.43

Calculating when an individual is eligible to immigrate under the substantive law is like looking at a map depicting an island only several miles

42. See INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (indicating qualified immigrant siblings must be at least twenty-one years old).

43. See infra Part II.C.2 (discussing difficulty in predicting visa quota movement and how no one can predict exact processing times, while estimates here are based on watching the movement of visa categories over several years).
out to sea. What you cannot see is that ferry service to the island is very limited. The ferry may be slowed further depending upon the tides, current, and number of people on board. Unless you are willing to wait, you simply cannot get there from here.

Individuals examining the immigration map usually evaluate both the family-based and employment-based options. If the delay in the brother and sister category means a fifteen year wait, the family and the immigrant will naturally seek a more expeditious route. Other people simply lack the qualifying family relationship and immediately turn to the employment-based categories. This Article focuses on employment-related immigration, but similar or more egregious problems plague the family-based immigration cases.

**B. Three Stops on Map to Employment-Based Immigration**

To immigrate in the employment-based categories, an individual must first secure permission from each of the three separate “sovereigns” guarding the territory. Congress authorized three federal agencies, the INS, the Department of Labor, and the Department of State, to administer the immigration system. Travelers through this territory find that at times more than one agency controls the jurisdiction, and thus can limit their ability to progress to the next stop on the journey. Congress’s selection of particular agencies reflects some of the complex policy goals of the INA. The Department of Labor protects U.S. labor and provides expertise on labor conditions. The Department of State operates as a pre-screener of immigrants before they reach our shores and also aids in the identification of undesirable aliens based on the consular officer’s understanding of the

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44. See infra Part II.C (discussing national interest waiver of labor certification and how the INA exempts a few categories from Department of Labor review).

45. See APA, 5 U.S.C. § 555 (1994 & Supp. V 1999) (dividing agency action into rule making and adjudication, but contemplating some adjudication can be conducted less formally with no statutory requirements for personal appearances or hearings). Much of the adjudication examined in this Article is informal adjudication. The term “informal adjudication” describes such informal procedures. See 5 U.S.C. § 553 (describing rulemaking process where interested persons participate in rulemaking). Almost all of the adjudications discussed in this Article are made by agency officials reviewing forms and supporting written materials without any direct interaction with the applicant. See also Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739, 739 n.1 (1976) (defining “informal adjudication[s]” as “administrative decisions that are not governed by statutory procedures, but which nevertheless affect an individual’s rights . . . .”).

foreign country conditions.\textsuperscript{47} The INS identifies aliens entitled to immigration benefits and removes those persons not authorized to reside in the United States.\textsuperscript{48}

The first stop requires a test of the labor market. Unless specifically exempted, such as the family-based categories, all immigrants, or, more specifically, their employers, must prove to the Department of Labor\textsuperscript{49} that their employment will not harm U.S. working conditions or wages and, more dramatically, will not displace U.S. workers.\textsuperscript{50} This first stop on the journey, the labor certification requirement, is often the most significant hurdle to employment-based immigration.

After the labor certification is obtained, the employer must file an immigrant petition with the INS seeking classification in one of the five basic employment preferences.\textsuperscript{51} This is the second stop toward employment-based immigration. Qualification in a higher preference can be important when worldwide demand indicates the quota or per country limitations might be reached. The preference classification can mean the difference between immediate qualification for immigration or a potential wait of many years.\textsuperscript{52}

Finally, the third stop requires the immigrant to prove that she is eligible

\textsuperscript{47} See INA § 212, 8 U.S.C. § 1182 (listing grounds of inadmissibility).


\textsuperscript{49} Within the Department of Labor, the labor certification program has been assigned to the Employment and Training Administration. Unless otherwise specified, the use of the name Department of Labor refers to the Employment and Training Administration and its reorganization. See EMPLOYMENT & TRAINING ADMIN., DEPT' OF LABOR, WORKFORCE SECURITY, at http://workforcesecurity.doleta.gov (last visited Jan. 29, 2002) (noting in Spring of 2000, the Secretary of Labor created a new division, the Office of Workforce Security, which has taken over management of labor certification program and other certifications required under the INA).

\textsuperscript{50} See INA § 212(a)(14), 8 U.S.C. § 1182(a)(5)(i)(II) (excluding employment of aliens who will adversely affect U.S. workers similarly employed); see also Bulk Farms, Inc. v. Martin, 963 F.2d 1286 (9th Cir. 1992) (finding as law developed in this area, labor certification could not be obtained for self-employment because Department of Labor required a bona fide test of labor market); Hall v. McLaughlin, 864 F.2d 868 (D.C. Cir. 1989) (holding labor certification is appropriate only where the employer is not a sham corporation and is separable from non-citizen employee seeking a particular position).

\textsuperscript{51} See INA § 204, 8 U.S.C. § 1154 (1994) (stating if employer believes non-citizen qualifies for an exemption from a certification requirement, employer bypasses Department of Labor procedures and applies directly to INS for immigrant preference classification).

\textsuperscript{52} See infra Part II.C (discussing how erratic visa movement of recent years makes it impossible to predict length of waiting period and it effects processing delays).
to immigrate and not subject to any qualitative ground of inadmissibility such as contagious disease, visa fraud or immigration violations, criminal conduct, etc. The third stop can take place at a U.S. consulate overseas or at the INS through a procedure called "adjustment of status." Thus, an individual immigrant may choose between the overseas immigrant processing or, if eligible, to complete the transition within the United States through the adjustment of status process.

C. Navigating Through the Territory

Immigrating to the United States is much more than simply mapping the routes of eligibility and diagramming the three stops at the federal agencies. Just as a two-dimensional map does not reveal the physical qualities of the territory it depicts, it also fails to reflect the experience of the person making the journey. In immigration law, process obstacles are the most significant contributor to the huge differences between the design of the map and the experience of journeying through the territory. The reality of the process is far different from the idealized map. Although the immigration law authorizes at least 140,000 employment-based immigrants per year, in most years, far fewer visas were actually issued.

What explains the gap between visas authorized and visas granted? The major contributors are the process obstacles blocking the way of legitimate

53. See INA § 212, 8 U.S.C. § 1182 (listing grounds for inadmissibility).

54. See INA § 245, 8 U.S.C. § 1255 (1994 & Supp. V 1999) (noting classes of aliens who are ineligible to receive visas and are excluded from admission). The adjustment of status procedure is not automatic and the criteria for eligibility to use the procedure are quite complex. Basically, the procedure is usually restricted to immigrants who have not violated their non-immigrant status and who have entered the United States lawfully, but many exceptions and additional limitations apply. Moreover, the INS retains the authority to deny an adjustment in an exercise of discretion. See generally INA § 245(a), 8 U.S.C. § 1254a(a) (1994) (describing visa processing for those abroad). There is no administrative appeal of this denial; however, some individuals renew the application to adjust in removal proceedings and others reapply through the immigrant visa processing abroad.

55. It is possible that Congress or the implementing agencies made the "design" intentionally flawed and perhaps covertly meant to create the discussed process obstacles. I recognize that some interested parties would not want to take steps to remedy the process obstacles if the result was greater immigration. However, I assume Congress intended the system to at least preserve the number of visas authorized under our quota system, since increased immigration in this context could not exceed the authorized amount. In the fall of 2000, Congress passed legislation authorizing the recapture of the unused employment-based visas, which is more evidence of the thwarted policy. See infra Part II.A.C (assuming immigration law obstacles are unintended consequences of failure to pay adequate attention to problem causing sources).

56. See supra Figure 1, p. 215 (discussing gap between issued and authorized employment-based immigrant visas).
foreign workers seeking to immigrate to the United States. The failure of
the agencies involved to adjudicate visa petitions and to complete the im-
migration applications of individuals with approved petitions in a timely
fashion burdens the whole system. The unused visas illustrate how pro-
cess failures distort policy choices Congress made in adopting the INA.

To illustrate these territorial conditions and the factors contributing to
the gaps, I will present a hypothetical exploring how I, as an immigration
lawyer, might evaluate the route in a consultation with an employer and a
potential immigrant. I have intentionally selected the example of a "high
tech" employer seeking to hire an engineer from China with a masters de-
gree in computer software engineering. Not only does this scenario repre-

57. Interviews with Stephen Fischel, Department of State Visa Office, over 1999,
2000, and 2001. Frequently the Department of State Visa Bulletin reports the availability of
visas is impossible to predict because of the slowdown in INS processing. It is my conten-
tion that all three agencies contribute to the gap.

58. In one sense the employment-based visas were not missing, thus requiring the State
Department to reallocate these visas in the next fiscal year to the family-based immigrants.
See INA § 203, 8 U.S.C. § 1153 (1994 & Supp. V 1999). However, in some years, the visas
were not recaptured because the amount of allowable family-based visas is limited. See id.
§ 1153(a)(2) (guaranteeing only minimum of 226,000 family-based visas). For example, in
1998, the employment-based visas were not recaptured because the 226,000 minimum was
the default rule. Therefore, it is inaccurate to say all unused employment-based visas are
added to family-based quota limits in the following year.

59. Before I became a full time law professor, I was a partner in the international law
firm of Bryan Cave. I represented business and individual clients in immigration matters for
over ten years. I have also based my advice on the comments and suggestions of several
current practicing lawyers: Stephen Yale-Loehr, Veronica Jeffers, Frances Berger, Alicia
DiBacco, and Luiza Muniz.

The narrative addresses a situation in which the client(s) are represented, resources are
available to pursue the process, and the participants are comparatively sophisticated. This
may be true with some frequency in the context of business immigration, but in other cate-
gories the large majority of those filing are unrepresented. Significant numbers of unso-
plicated participants only increase the costs—particularly the social costs to the would-be
immigrant and her family—but also increase the irrationality and opacity of the system. In
those situations, the lengthy processing delays, the overall lack of predictability, and the im-
 pact of the adjudication to the individual or small business is even more important.

There are no hard statistics about the number of people who are unrepresented. I re-
quested data from the business adjudications section of the INS. I suspected the agency had
this data because an attorney must file a notice of appearance (Form G-28) with each visa
petition or application. My request went unanswered. Cf. Taylor, supra note 26, at 1665
n.60 (finding little statistical documentation estimating number of attorneys appearing in
deporation and exclusion proceedings, and indicating best evidence suggested attorneys
represented less than twenty percent of all people appearing before the immigration court).
One person I interviewed recalls the Regional Director of an INS Service Center reported
that less than twenty percent of all petitions and applications received at the Service Center
were represented by attorneys.
sent one of the most common categories of immigrant, it should also represent a fairly non-controversial example. Even those calling for drastic reductions in immigration to the United States usually exempt foreign workers with strong academic credentials. Moreover, this scenario does not present any of the complications, such as self-employment or nontraditional education, which typically frustrate an expeditious route to employment-based immigration. Congress meant to facilitate the entry of people like this engineer. By examining this hypothetical we can see whether the immigration law is working as it was designed.

“Computer Software Inc” (CSI), a large corporation located in Northern California, is a leading designer of software for business applications. The company has more than five hundred employees, is publicly traded, and has been in business for more than ten years. Last year, CSI recruited at the major engineering schools in the United States. It interviewed candidates with master’s degrees and offered a position to a top student from Cal Tech, Mae Cheng. She is a national of the People’s Republic of China. She will complete her master’s degree in electrical engineering in June and wishes to immediately begin her employment with CSI. CSI selected Ms. Cheng both because of her strong academic performance, and because she worked on a pioneering programming language. This language will likely become one of the linchpins to a new line of software products developed by CSI.

Ms. Cheng is legally in the United States on an F-1 student visa. Her


61. This is a fictional corporation, but closely resembles any number of major employers who regularly use the employment-based immigration system. Some of the high-tech firms who have testified to Congress about their need for foreign labor include: Microsoft, Sun Microsystems, Intel, and Cisco Systems. See, e.g., Statement of Heidi Wilson, Corporate Immigration Manager, Sun Microsystems, Congressional Field Hearing on the INS (Feb. 25, 2000) [hereinafter Congressional Field Hearing] (discussing business processing concerns with INS), available at http://www.shusterman.com/wilson.html.


63. All of the non-immigrant visa categories are known by an alphabetical shorthand
non-immigrant visa status is typical of millions of other foreign persons within the United States. In 1999, there were approximately 514,723 foreign students studying in the United States.\footnote{See NAFSA: ASS'N OF INT'L EDUC., IMPORTANT DATA ON INTERNATIONAL EDUCATION EXCHANGE TO AND FROM THE UNITED STATES (2000), at http://www.nafsa.org/content/PublicPolicy/DataonInternationalEducation/FactSheet.htm (detailing numerous statistics concerning international students in the United States).} Student visa status allows full-time students to work following graduation to gain "practical training," usually a period of twelve months.\footnote{See INS Nonimmigrant Classes, 8 C.F.R. § 214.2(f)(10) (2001) (setting forth complex regulations defining eligibility and length of practical training); see also supra Part IV.B.4 (discussing significant amount of attention Congress has devoted to this visa category which has, at times, been a focus of intense INS scrutiny).} Provided Ms. Cheng meets all of the regulatory criteria, she should be able to receive permission from the INS to work for twelve months following her graduation. At the time of her interview with CSI, the company recruiter asked her if she was authorized to work in the United States on a permanent basis.\footnote{It would be a potential violation of Title VII of the 1964 Civil Rights Act to ask if Ms. Cheng is a U.S. citizen or lawful permanent resident. See INA § 274B, 8 U.S.C. § 1324(b)(a) (1994) (forbidding employers from discriminating against other classes of non-citizens authorized to remain in the United States such as refugees and asylees). Sophisticated employers have formulated the question as permanent work authorization to identify candidates who are foreign students. This formulation is not necessarily appropriate for all companies and the Equal Employment Opportunity Commission (EEOC) has said that a pattern of refusing employment to nationals of a specific country, even if they are not authorized to work within the United States, may constitute national origin discrimination, which is also prohibited by Title VII.} Ms. Cheng explained she would have a period of practical training, but to continue her employment in the United States, CSI would have to sponsor her for a "green card."\footnote{"Green card" is a slang term for status as a lawful permanent resident. The actual card is no longer green. See Form I-551.}

1. First Stop—The Labor Certification Process

CSI has hired other foreign nationals and has a sophisticated Human Resource coordinator, Margaret Jones,\footnote{Margaret Jones is also a fictional character. She represents many sophisticated users of the immigration system. She is named after Margie Jones, an immigration specialist at Intel Corporation and one of the people interviewed for this Article.} who is very experienced in immigration law. Although the Human Resources Department and in-house counsel supervise routine matters and often prepare visa petitions, it is company policy to consult with outside immigration counsel to develop the strategy which refers to the subsection of the INA which defines the non-immigrant category. See INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (1994) (creating visa for study in United States provided student maintains a permanent residence abroad).
in each new case.

a. Initial Strategy—Utilizing Non-immigrant and Immigrant Visas

CSI can sponsor Ms. Cheng for an immigrant visa, but only after the Department of Labor certifies that CSI successfully established the lack of available and qualified U.S. workers. Ms. Cheng’s period of practical training, based on her former student status, would most likely be exhausted before the completion of the immigration procedures. It is because of this delay that the best course of action is to obtain an H-1B visa.

The H-1B is a temporary visa status reserved for persons working in specialty occupations. These are professions that normally require no less than a baccalaureate degree in a field related to the occupation. The H-1B status enables Ms. Cheng to work for the company for an initial period of three to six years. Although the mutual goal of employer and employee is to obtain permanent residence in the United States for Ms. Cheng, unless CSI is willing to wait several years to hire Ms. Cheng, she will need a more flexible temporary status giving her work authorization while the immigration process continues.

The H-1B work authorization will allow her to work for CSI while the permanent process is on-going. While in H-1B status, however, Ms. Cheng is dependent upon CSI for work authorization and legal status. If she discontinues working for CSI, even if she does not accept other employment, her status is terminated. Furthermore, it is possible that the permanent residence application process would not be complete before the six years of H-1B status expires. At such time, Ms. Cheng may be forced to take a leave of absence or relocate to a CSI office abroad. Any continuation of employment without authorization could have serious consequences for

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69. See INA § 214(g)(4), 8 U.S.C. § 1184(g)(4) (1994 & Supp. V 1999) (limiting H-1B workers to six consecutive years). Usually, a sophisticated foreign student will then ask why give up the time granted on her practical training and wonder why the attorney is recommending an immediate H-1B petition. Since 1997, immigration attorneys have routinely recommended filing the H-1B as early as the regulations allow because the H-1B category has been oversubscribed. The H-1B change of status may be filed while the noncitizen is still a student or during practical training. By late spring of each year, there are no new petitions until the fiscal year begins anew on October 1. See INA § 214(g)(1)(A)(i), 8 U.S.C. § 1184(g)(1)(A)(i) (restricting H-1B category to 65,000 new positions in 1999); American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 8 U.S.C. 1182(a) (Supp. V 1999)) (expanding this limit temporarily in 1998 to 115,000). To ensure that an H-1B will be available, foreign students have often had to forgo some of the time allocated pursuant to practical training to ensure H-1B status. See Interview with Frances Berger, Attorney at Law, Law Office of Frances Berger, New York, New York (Aug. 15, 2000).
This strategy of developing a parallel path to keep the individual in temporary or non-immigrant status while pursuing the immigrant petition is essential to journeying through this territory. Participants in the system naturally seek ways to minimize delays, cost, and uncertainty. The frustrations of the permanent system have led to widespread reliance on non-immigrant visas as a method of bringing and retaining foreign workers in the United States.

The adjudicating agencies are unhappy with the dual-track strategy, believing it borders on fraud. Some agency procedures specifically require that a non-immigrant visa petitioner disclose if they are simultaneously pursuing an immigrant visa. The substantive requirements are silent on this process. The adjudicating agencies, however, view such a filing as inconsistent with the required temporary intent when the applicant has previously filed an immigrant petition.

The consequences of the dual strategy are increased work for the agencies adjudicating the non-immigrant petitions and a distortion of the employer/employee relationship. Almost all of the non-immigrant work categories require the employer to sponsor the foreign worker. Thus, as we see in the above example, the worker becomes dependent on the sponsoring

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70. See INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (containing exclusions from immigrating if individual has remained unlawfully in the United States). A person who accrued less than a year but more than 180 days of "unlawful presence" can be banned for three years and unlawful presence over one year can result in a ten year bar. These bars are only triggered if an individual departs the United States and seeks to reenter. Unfortunately, although these bars were enacted in 1996, the INS has yet to issue regulations defining "unlawful presence." See also INA § 274A, 8 U.S.C. § 1324a(a) (1994) (making employers subject to civil and even criminal penalties for continuing to employ an individual who is no longer authorized to work in the United States).

71. Several officials told me they believed the statutory exemption from maintaining temporary intent was a mistake and inappropriately blurred the line between immigrant and nonimmigrant status. In interviews, many government officials referred to the dual intent as "fraud." See generally David Lazarus, A Question of Fraud: Silicon Valley Pushes for More Foreign Workers Despite Federal Probes, S.F. CHRON., Sept. 21, 2000, at A1 (discussing agency concerns about fraud in non-immigrant eligibility).

72. See, e.g., INS Nonimmigrant Classes, 8 C.F.R. § 214.2(h) (2001) (stating employers using H-1B petitions do not have to show they have a temporary need for the worker unlike other non-immigrant categories where the employer bears the burden of establishing need for foreign worker is not long term). Further, the INA specifically recognizes that non-immigrants in this category and the intra-company transferees categories (L-1) may have dual intent—the intent to pursue permanent resident and non-immigrant status simultaneously. See also INA § 214(b), 8 U.S.C. § 1184(b) (declaring guidelines for admission of non-immigrants, including presumption of status); 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 20.06[3] (2001) (discussing "dual intent" principle for aliens entering temporarily).
employer to complete the immigration process. In 1990, Congress formalized the six-year cap on H-1B non-immigrant status. Congress hoped that by putting a time limit on the H-1B, employers would become less reliant on foreign labor. Shorter visas also discourage long-term guest workers. Guest worker programs are problematic because of the dependence of the worker on the benevolence of the sponsor and because these workers are not necessarily entitled to become permanent residents.

Congress created other problems, however, by capping the length of many non-immigrant stays and requiring non-immigrant visas be issued in short periods such as eighteen to thirty-six months. The shorter approval dates mean employers and workers must file renewals or extensions if available. In turn, processing the renewals increases the agency adjudication workload and expense. Employers and employees are forced to proceed almost immediately to the immigrant-visa track because they fear running out of non-immigrant work authorization before completing the immigration process. If the permanent process was not so bogged down in slow multiple layers of adjudication, it might be possible to truly limit non-immigrant categories to a short period. However, limiting the duration of temporary visas without ensuring the efficient operation of the permanent process is unfair to the participants in the system.

b. Department of Labor Adjudication

Before the company can sponsor Ms. Cheng for permanent resi-

73. Prior to this time, the INS had limited the visa duration by regulation alone. Many other non-immigrant categories contain no statutory caps, but the agencies begin to question the temporary nature of the status when stays extend beyond five or six years. See GORDON ET AL., supra note 72, at § 20.06[3] (discussing non-immigrant intent).


75. It is difficult to generalize about the non-immigrant categories because the rules differ for each one. See, e.g., INA § 214(a), 8 U.S.C. § 1184(a) (establishing time limits for admission into the United States for non-immigrants). Where Congress has not specified the exact length of time, the INS and Department of State either adopted regulations regarding the time periods or made ad hoc, case-by-case determinations.

76. In 1999, Sun Microsystems testified that it might have to fire one hundred employees who had reached the end of their authorized stay before the agencies completed the immigrant related adjudications. See Congressional Field Hearing, supra note 61.
dence, CSI must prove to the Department of Labor that there are no qualified U.S. workers willing to accept the position at the prevailing wage on the terms and conditions offered.\textsuperscript{77} The burden is on the employer to qualify each position separately before the company can employ a foreign worker.

U.S. immigration laws have long been concerned with the protection of American labor. At one time the law specifically prohibited the entry of non-citizens for whom work contracts had been arranged in advance.\textsuperscript{78} In 1952, this system was repealed, and in its place Congress substituted the labor certification requirement. Originally, the statute authorized the Secretary of Labor to preclude the entry of specific immigrants or classes of immigrants if the Secretary found they were coming for employment that would displace American workers or undercut wages and working conditions of similarly situated American workers.\textsuperscript{79} In reality, the Labor Secretary rarely issued certifications to exclude immigrant foreign workers.\textsuperscript{80}


\textsuperscript{78} See Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 (enacting one-thousand dollar fine for every violation). However, the fifth section exempted four groups from the terms of the act: foreigners temporarily in the United States and engaging other foreigners as secretaries, servants, or domestics; skilled laborers; professional actors, artists, lecturers, or singers, or persons employed strictly as personal or domestic servants; and assistance by a resident of a member of his family or a personal friend to come for the purpose of settlement. See id. § 5. For further account of this Act, see E. P. Hutchinson, Legislative History of American Immigration Policy 1798-1965, 87-89 (1981) (describing immigration bills affecting contract labor); 39 Immigration Comm'n Report 33-34 (1970) (describing historical events surrounding Act of Feb. 26).

\textsuperscript{79} Section 212(a)(14) of the INA provided in pertinent part as follows:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

\ldots

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission into the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.


\textsuperscript{80} Only six negative certifications were issued between the years 1957 and 1961, and a total of fifty-six were issued from the years 1957-1965. Initially, the Secretary of Labor issued a certification only when an employer was visibly using foreign workers to lower labor standards or to break a strike, and a complaint, generally, was filed by the union. See
The Immigration and Nationality Act of 1965\textsuperscript{81} shifted the burden to the sponsoring employer to secure a labor certification before an individual could be admitted to the United States. The stated purpose of this shift was to protect the U.S. labor market from the influx of both skilled and unskilled foreign labor.\textsuperscript{82} This converted the labor certification from a passive requirement, to be fulfilled only if the Secretary of Labor demanded it, to an active requirement, to be fulfilled by all employers seeking to hire immigrants.\textsuperscript{83}

c. Defining the Job Requirements

CSI must begin the process by describing, within the confines of the proscribed Department of Labor form, the permanent position job duties.\textsuperscript{84}


\textsuperscript{83} Section 212(a)(14) was amended in section 10 of the INA of 1965, Pub. L. No. 89-236, § 10, 79 Stat. 911, 917, and now provides:

(a) Except as otherwise provided in this chapter, the following classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

\begin{itemize}
  \item [(14)] Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8)).
\end{itemize}


\textsuperscript{84} The heart of successful labor certification drafting requires careful attention to the job duties and requirements. \textit{See generally Austin T. Fragomen, Jr. & Steven C. Bell, Labor Certification Handbook} (Clark Boardman Callaghan 1997) (summarizing labor certification requirements and process); Lenni B. Benson & Roxana C. Bacon, \textit{A Practitioner's Guide to Successful Alien Labor Certifications}, 88-5 Immigr. Briefings 1 (1988) (providing advice on drafting a successful labor certification application).
They must also define the minimum education, training, and experience requirements necessary to perform the job. The second part of the form requires Ms. Cheng to describe her education and work experience.

CSI recruits at the nation’s top engineering programs. Ms. Cheng possesses unique knowledge about a new programming language. She gained this knowledge while working toward her master’s degree. It took months to find Ms. Cheng and she is the only person CSI believes to be qualified for the job.

Before CSI submits the labor certification application to the Department of Labor Regional level, they first submit the forms to the local State Employment Service Agency (State Agency) for processing. The State Agency has contracted with the federal Department of Labor to supervise the job requirements and recruitment for the position, and to determine the prevailing wage. To protect U.S. workers from foreign labor willing to work at reduced rates, the statute requires that the Department of Labor certify that the employment of the foreign worker will not harm U.S. wages or working conditions. Thus, the determination that CSI will pay the prevailing wage is a key aspect of the certification process.

Further, the Department of Labor mandates the firm only requires job related education or experience qualifications that reflect CSI’s minimum requirements. In other words, CSI may not use the certification process to seek the most qualified or even those equally qualified to Ms. Cheng. Rather, they must open the position to all minimally qualified applicants. The State Agency reviews the forms and determines if the educational requirements and job experience complied with the usual requirements for the occupation. If the State Agency finds that the requirements were higher than those set as the norm for the industry and occupation, the State Agency might instruct CSI to modify the forms to allow a broader pool of

85. The Department of Labor regulations require that the employer state the minimum qualifications rather than the most desirable qualifications. The view of the Department of Labor is that to test the availability of qualified workers, the employer must state the minimum qualifications. See Employment & Training Admin. Labor Certification Process, 20 C.F.R. § 656.21(b)(5) (2001) (declaring employers must accurately detail minimum requirements for job opportunities concerning aliens); see also In re Applied Magnetics Corp., 90-INA-105 (BALCA 1991), available at 191 WL 224001 (denying labor certification).

86. See 20 C.F.R. § 656.21(a) (detailing labor certification process for aliens).

87. See In re Hathaway Children’s Serv., 91-INA-386 (BALCA 1991) (en banc) (discussing prevailing wage requirement); see also In re Abelardo Chaidez, 93-INA-256 (BALCA 1994), reprinted in 13 IMMIGR. REP. B3-20 (discussing prevailing wage requirement concerning employer’s incorrect calculations).

88. The majority of denials and administrative reviews concern wage disputes. See GORDON ET AL., supra note 72, § 44.05(2)[d] (describing how labor certification procedures affect U.S. labor and prevailing wage issues).
applicants to meet the qualifications. 89

CSI says it wants Ms. Cheng because of her high grades and her expertise in the new programming language. However, the Department of Labor may consider that requirement a "special or restrictive requirement." 90 If CSI submits the labor certification with the programming language requirement, the Department of Labor will require CSI to prove why the language is essential to the operation of the business. Similarly, CSI should drop the grade point average requirement unless CSI uses that criteria for all of its employees and can document how this requirement is necessary to its business operations. 91

Next, CSI must consider the necessity of the requirement of a masters degree in computer engineering. In many regions, the State Agency and Department of Labor insist that the employer open the job recruitment to engineers with a masters degree or with a bachelors degree plus three years of experience. 92 The Department of Labor believes the masters degree requirement is not really a minimum requirement because so many engineers learn skills on the job. Instead, the agency views it as a way to tailor the criteria to fit the foreign worker or to reduce the number of qualified appli-

89. The Department of Labor used several publications to determine the minimum requirements for occupations. For many years the Department of Labor relied upon the Dictionary of Occupational Titles (DOT) to describe basic job duties for occupations and on the Occupational Outlook Handbook (OOH) to define educational, training, and work experience required to enter the occupation. See O*NET, DICTIONARY OF OCCUPATIONAL TITLES (JIST Works, Inc. 1998) (describing job descriptions of U.S. workforce); see also BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK—BULLETIN 2450 (2000-01 ed.) (setting forth projections of various occupations). Obviously, these giant catalogs cannot keep pace with changing economies, technologies, and forms of education. The agency has plans to replace the catalog with a computerized system called O*NET.

90. All foreign language requirements are assumed to be unduly restrictive. See 20 C.F.R. § 656.21(b)(2)(i)(C) (declaring job opportunity requirements cannot require knowledge of a foreign language). Computer languages are treated more generously, but at times the Department of Labor has demanded extensive corroboration of the necessity of this requirement.

91. See 20 C.F.R. § 656.21(b)(2) (stating employer may only demand skills, knowledge, abilities and conditions of employment, which are normally required to satisfactorily perform the job); In re Computer Programming & Sys. Inc., 97-IN-158 (BALCA 1998), available at 1998 WL 124747 (rejecting specific grade point average and course requirements as unduly restrictive). Similarly, the Department of Labor will only allow employers to use objective criteria. See also 20 C.F.R. § 656.21(b)(6) (describing standards for the labor certification process). Generally, standards frequently used in hiring decisions, such as "strong communication skills," cannot be required in a labor certification application.

92. There are no regulations or cases which expressly document this agency interpretation.
cants. 93

Although CSI is at the step of obtaining the prerequisite labor certification, the employer and employee anticipate that the INS will later classify the job in one of the immigrant preferences based on the stated minimum requirements in the labor certification application. The second preference category is reserved for non-citizens with exceptional abilities in the arts, science, or business, or those in positions requiring an advanced degree. 94

Although, as of the fall of 2001, most of the employment-based categories have no quota backlogs, several times over the past eight years, demand in the third preference category for professionals and skilled workers has had a significant backlog. 95

Inclusion in the higher preference category may mean Ms. Cheng avoids extra months, if not years, of waiting for permanent resident status. They may want to preserve the masters degree requirement because the INS will later refuse to classify the position in the employment-based second preference visa category without it. 96 Additionally, because Ms. Cheng was born in China, she could be subject to a longer wait due to the per country cap. 97

Ms. Jones decides to keep the degree requirement. 98

When examining the job requirements, particularly an advanced degree,


96. See INS Immigrant Petitions, 8 C.F.R. § 204.5(k)(2) (2001) (defining “masters degree” as the equivalent of a U.S. masters degree or a bachelors degree and “at least five years of progressive experience” in the occupation). But see Letter from Flora T. Richardson, Chief of the Department of Labor’s Division of Foreign Labor Certification, to Edwin R. Rubin, Esq., Rubin & Dornbaum (Apr. 30, 1993), reprinted in 70 INTERPRETER RELEASES 922 (1993) (noting Department of Labor requires, for most positions, only three years of experience to meet the equivalent of a masters degree). This conflict and related litigation is discussed infra Part II.C.2.

97. See discussion of the visa category strategies, infra Part II.C.2.

98. The employer must determine the minimum job requirements, but obviously the employee is affected by the decision. It is not uncommon for an attorney to face contradictory demands from the employer and employee. See Bruce A. Hake, Dual Representation in Immigration Practice: The Simple Solution is the Wrong Solution, 5 GEO. IMMIGR. L.J. 581, 587 (1991) (discussing common ethical problems of these contradictory demands). For a bar opinion discussing the conflict, see Los Angeles County Bar Ass’n, Ethics Comm., Formal Op. 465 (1991) (stating lawyers must obtain informed written consent to dual representation of both employer and alien employee in labor certification).
the Department of Labor concerns itself with fraud. The Department of Labor believes that many of these positions would be suitably filled by U.S. workers without advanced degrees, but with experience in the field. In essence, the agency believes employers tailor job requirements, like advanced degrees, to fit only the non-citizen petitioner. However, employers face confusion in trying to satisfy the Department of Labor and at the same time accurately describe the job requirements. An employer filing a labor certification application is required by statute to have a non-citizen suitable for the position. Naturally then, the individual’s qualifications meet the job requirements. Presumably that is why the employer hired her in the first place. The Department of Labor, however, is suspicious of any non-citizen employee that meets the exact job requirements.

Furthermore, the Department of Labor makes a case-by-case adjudication to evaluate whether U.S. workers are available for the position. The statutory delegation is broad and contains few parameters. These case determinations have, among other things, sought to define when a job requirement is “normal and usual” for the position. The vagueness of this standard and its obvious dependence on the facts in the case combined to create a burdensome adjudication process. From its inception, the Department of Labor program has been criticized for a lack of transparency and perceived lack of uniformity. When an agency chooses case adjudication it necessarily reduces the ability of participants to predict the outcome of any particular application, unless the participant has a great deal of experience in similar applications or the participant has studied reported decisions of the agency. In addition to the opaque nature of the substantive rules, the Department of Labor has rarely published detailed procedural rules.

**d. The Recruitment Phase**

Notwithstanding the difficult recruitment for CSI and Ms. Cheng’s ex-

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99. See Labor Department Creates New Procedures and Standards for Certification and Review of Applications for Alien Employment in Nonagricultural Occupations, 51 INTERPRETER RELEASES 1, 4 (1974) (stating “t]he need for more precise and definite information ... is generally acknowledged.”); see also Rodino, supra note 80, at 245-46 (noting growing impracticality of present labor certification program and lack of uniform standards among regional offices).

100. Only administrative appellate decisions are reported in the labor certification context. See discussion infra Part IV.B.3.

101. The first published rules and the Technical Assistance Guidelines (TAG) were created in direct response to intense criticism by members of Congress and the Administrative Conference. See Zengerle, supra note 26. Nevertheless, between the publication of the TAG and today, few rules have been promulgated under the APA. Instead, the agency tends to rely on information memoranda to the field and General Advisory Letters.
traordinary educational achievement, the Department of Labor has traditionally disregarded all prior recruitment efforts. When an employer seeks a labor certification, the agency requires the sponsor to complete a new recruitment effort to prove that no qualified worker is willing to accept the offered position. There is no filing fee for the certification procedure. The costs, however, such as attorneys’ fees, and the advertising directed by the agency, however, can be very high. In some cases, the Department of Labor requires multiple publications in specialty professional journals—the costs of such advertisements can range from $1,000 to $5,000. Even advertising in a newspaper of general circulation for the required three days can cost $850 or more.

CSI must file the application in California, the state where the job is located. Labor certifications are valid only for the location or “metropolitan statistical area” where the case was initially filed. The presence of a higher concentration of high technology industries or immigrant populations in some regions of the Department of Labor can increase the volume and cause delays in processing. Because there are many companies in Northern California hiring foreign workers, the Department of Labor’s Region IX, of which California is a part, is one of the most backlogged. In 1999 and 2000, the Department of Labor took three years to process a regular labor certification case there. In New York the delay was four

102. In 1997, the Department of Labor expanded a program called “Reduction in Recruitment.” See infra notes 121-42 and accompanying text (describing Reduction in Recruitment program). Because it is not available in all cases, I have chosen to describe the traditional and default procedures. Moreover, the continued viability of the unsupervised reduced recruitment program is in question due to the 2001 downturn in the economy.

103. There is little documented evidence of the costs of preparing labor certifications. One 1995 news story estimates attorney’s fees range from $5,000 to $10,000 or more to prepare and file the labor certification. See Ann Davis, Skilled Foreign Recruits Could Face Higher Hurdles, NAT’L L.J., Aug. 21, 1995, at B1; see also Michael D. Patrick, Reduction in Recruitment, N.Y. L.J., May 14, 1998, at 3 (illustrating through a hypothetical high expense, $20,000 per print advertisement, and low success of traditional methods to recruit for software positions). Based on my own representation of clients and interviews with immigration attorneys, the advertising and legal fees range from $5,000 to $20,000 in most cases. These estimates do not include the time and other expenses spent by the human resources department. Several people asked to remain anonymous when I asked about fees. At least one corporation budgets a minimum of $10,000 per immigrant for internal and external costs related to the immigration process.

104. Several sources told me confidentially that advertising was approximately $1,000-$1,500 per case.


106. The vast majority of labor certification applications are filed in Region IX, which includes California. In the Reduced Recruitment adjudication, cases might be approved in a few months. However, due to expanded use the expedited process began to slow dramati-
years, and in Boston nearly three. In contrast, Philadelphia had no significant backlog and cases were adjudicated within a few months. ¹⁰⁷

As stated above, the State Agency is responsible for instructing the employer about the quality and quantity of recruitment needed to document the lack of a qualified worker. The State Agency will instruct CSI to prepare an advertisement listing all the essential information, except company identity on the ETA form in either a newspaper or a specialty journal publication. ¹⁰⁸ Instead of applying to CSI, the applicant would apply to a post office box at the State Agency. In this manner, the State Agency adjudicator can theoretically monitor the qualifications of the people who applied for the position. The Department of Labor requires that all applicants who appear to meet the minimum qualifications be interviewed by CSI.

Most employers find the interview stage to be one of the most difficult aspects of the labor certification process. They dislike interviewing applicants for a position they perceive as "filled." In a sense CSI must seriously consider the qualifications of each applicant; but they are under no obligation to hire any of the applicants. If a qualified applicant is found, the labor certification cannot be issued. CSI, however, is not mandated to offer employment to the applicant. Instead, they could simply elect to continue with the temporary employment of Ms. Cheng and abandon the labor certification application. ¹⁰⁹

The thirty-day recruitment period may also be a difficult period for Ms. Cheng. ¹¹⁰ She cannot play a role in evaluating or interviewing the applicants, even if she knows that CSI is recruiting to fill her position. Attorneys also play a limited role in the recruitment. They can simply guide CSI to document each stage of the recruitment to establish contact with the applicants, but cannot control or conduct the interviews. Traditionally, attorneys counsel employers to use certified mail with return receipts for all correspondence between applicants and the employer because the Department

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¹⁰⁷. It is difficult to explain why delays varied so dramatically. Workload differences account for some proportion, but the regional office's application of substantive criteria could also explain longer processing times. Generally, regions with stricter standards took longer. See Interview with Veronica Jeffers, Senior Associate, Fragomen, Del Rey, Bernsen & Loewy (Aug. 28, 2000) and other anonymous sources.

¹⁰⁸. The state agency also opens a local job order number at the same time the employer is advertising. At least theoretically, the job order posting allows the state agency to reach unemployed workers who might be seeking employment through its job offices.


¹¹⁰. See id. § 656.24 (mandating length of recruitment and describing procedure for labor certification determinations).
of Labor has often been suspicious about the good faith nature of the recruitment.  

Within forty-five days of the end of the recruitment period, CSI must submit a recruitment report to the State Agency. In this report, CSI documents that their job requirements are reasonable and that no qualified applicant applied. The State Agency reviews the recruitment results and forwards the application to the federal regional office of the Department of Labor for final adjudication.

At the regional office, a staff headed by a certifying officer reviews both CSI's original application and the State Agency activity and recommendations, and then makes a final evaluation about whether CSI has demonstrated a shortage of qualified workers. The Certifying Officer (CO) is not bound by any of the recommendations or actions the State Agency took. If the CO finds that CSI has inadequately tested the market, added unduly restrictive job requirements, or offered an inadequate wage, then the CO remands the case to CSI with a Notice of Findings. CSI can either accept the modifications ordered by the CO and begin a new recruitment period including new advertising, or rebut the notice of findings in an effort to convince the CO that the market test was appropriate. If the CO is ultimately satisfied that the labor market test has been properly conducted, the Department of Labor affixes a multi-colored ink stamp to the original forms and returns them to CSI. If the CO rejects the rebuttal, the labor cer-


112. The recruitment report must: (1) identify recruitment sources by names; (2) give the number of all U.S. workers responding to the recruitment; (3) give the name, address, and resume of all applicants; and (4) explain the objective job-related reasons for rejecting any qualified applicant. See 20 C.F.R. § 656.21(b)(1)(i)(A)-(F); see also Technical Assistance Guide (TAG) 64-65 (1981).

113. See In re S. Balian Designs, 89-IN-299 (BALCA 1991) (indicating employer made inadequate efforts to contact applicants).

114. See In re Info. Indus., 88-IN-82 (BALCA 1989) (finding certain job requirements are too stringent).

115. Employers may offer a wage, within five percent of the prevailing wage, but it can only include guaranteed income. See 20 C.F.R. § 656.20(c)(3) (explaining wage is not commission, bonus, or incentive based). Industries where income is conditional upon performance offer a greater challenge because the guaranteed wage may be low. If a position is covered by the Davis Bacon or Contract Service Act, the prevailing wage determination is much more restrictive. See General Administrative Letter 2-98 (Oct. 31, 1997) [hereinafter GAL 2-98] (designating Occupational Employment Statistics (OES) wage data as the primary required source for all wage determinations).

116. See 20 C.F.R. § 656.25 (providing procedure for certifying officers when inadequacies are found); see also GORDON ET AL., supra note 72, § 44.05[c] (describing process that is incurred by certifying officers).
tification is denied and, under current regulations, CSI may not re-file for the same position for six months. 117

If the certification is denied, then CSI could seek an administrative review of the CO denial by filing an appeal with the Department of Labor's Board of Alien Labor Certification Appeals (BALCA). 118 If the appeal is denied, they could file a petition for judicial review in federal district court under the Administrative Procedure Act (APA). 119 Nevertheless, employers never seek either administrative or judicial review of a denial of labor certification. 120

At this point, Ms. Jones asks whether this case is a good candidate for the Department of Labor Reduction in Recruitment procedures. Although the Department of Labor regulations had included a Reduced Recruitment procedure where employers could document adequate prior recruitment, the regional offices rarely used the procedure. Forced by an expanding caseload and significant budget cuts, 121 in 1997 the Department of Labor revived the Reduction in Recruitment procedures to streamline adjudication. 122 By 1999, the Department of Labor was willing to accept evidence

117. See 20 C.F.R. § 656.29(a) (establishing amount of time allotted to re-file for a certain position).

118. See discussion infra Part II. One attorney reported that BALCA routinely took twenty months to adjudicate an appeal. See Audio tape: Linda Rose, Remarks at the 2000 American Immigration Lawyer's Association (AILA) National Conference, Chicago, Ill. (June 15, 2000) (on file with author).


120. It would rarely be cost effective to seek such review, except if an employer could find no other way to conduct labor market tests. BALCA maintains the position that the non-citizen worker has no standing to seek review of a denied certification. See In re Pat's Pizza Ristorante, 97-INA-396, 1998 BALCA LEXIS 228 (BALCA Feb. 24, 1998). Some courts have allowed the employee to seek judicial review of the Department of Labor actions. See, e.g., Gladysz v. Donovan, 595 F. Supp. 50, 52-53 (N.D. Ill. 1984) (granting standing to alien to pursue claim).

121. The drop in available funds for the labor certification program illustrates the Department of Labor's resource problems. In FY 1993, $57 million were allocated for the alien labor certification program at the state agencies. The appropriations have dropped steadily since then, to $49.8 million in FY 1994, $51 million in FY 1995, $45.7 million in FY 1996, and $31.3 million in both FY 1997 and FY 1998. The amount budgeted for the administration of the labor certification program for the FY 1999 was $36.3 million, FY 2000 was $40.9 million, and FY 2001 was $26.1 million. The decrease in the funds allocated to labor certification prompted reductions in staff and the flight of experienced staff at many state agencies. See Steven A. Clark et al., Labor Practice Advisory: Highlights of the April 3 AILA-DOL Liaison Meeting, 16 AILA MONTHLY MAILING 343, 345 (May 1997).

122. See General Administrative Letter 1-97 (Oct. 1, 1996) [hereinafter GAL 1-97] (providing information on how the Department of Labor made adjudication more efficient). See a recommendation for streamlining labor certification in Vice President Al Gore,
of past recruitment, provided the employer advertised for a minimum of six
months and the employer documents that no qualified person applied for
the position. 123 The program dispenses with most of the State Agency’s
role in supervising wages and job requirements, as well as the State
Agency’s assessment of the adequacy of the prior recruitment. Both the
State Agency and the Department of Labor prioritize processing of Reduc­
tion in Recruitment labor certifications. Although the Department of Labor
refused to formally adopt regulatory change, through interpretive letters it
has expedited the adjudication process for a group of large employers or for
employers seeking specific job categories. 124

Various Regional offices of the Department of Labor were slow to adopt
this procedure, including Region IX, which was one of the most cautious.
The Regional offices originally authorized the procedure in limited occu­
pations where past experience suggested employers could document labor
shortages. There was no, and continues to be no official list of occupa­
tions, only unofficial discussions with Regional COs and word of mouth
communication among members of the immigration bar. 125 The problem
for employers selecting Reduction in Recruitment is that, should the case
ultimately be rejected for unsupervised recruitment, the employer must re­
file the labor certification and proceed with new advertising as directed by
the agency. The major risk of this procedure is that the employee’s priority
date, or place in line for an immigrant visa, will not be established as of the
reduction in recruitment filing, but rather at the next regular application. 126

ACCOMPANYING REP. OF THE NAT’L PERFORMANCE REV. 41, 44 (1993) (noting report was
instrumental in moving agency toward the reduced recruitment approach). See generally
Gary Endelman, Through the Looking Glass: The Impact of GAL 1-97 and the Future of
Labor Certification, 74 INTERPRETER RELEASES 1461 (1997) (describing overall effect of
labor certification regulations).

123. Notwithstanding the issuance of GAL 1-97, many regions of the Department of
Labor did not immediately adopt the reduced processing according to interviews with attor­
nies throughout the United States, which confirmed the delay in implementation.

124. See GAL 1-97, supra note 122 (establishing applications meeting a limited review
criteria will be expedited for approval when they are received in the Regional Office); see
also Laurreta v. Herman, No. 98–56061 (9th Cir. Mar. 5, 1999) (court order).

125. The Department of Labor does not publish any list or criteria allowing employers
to determine whether the position is eligible for the reduction in recruitment procedure. In­
stead, attorneys rely on informal communication with the agency such as quarterly liaison
meetings or telephone calls. A non-specialist may not have any awareness of this proce­
dure.

126. On July 26, 2000, the Department of Labor issued a proposed regulation to allow
the retention of the first priority date and the transfer of a regular labor certification applica­
tion to the reduction in recruitment procedure. See Employment and Training Administra­
posed regulation, however, only applies to cases filed prior to July 26, 2000. The risk of
losing a priority date can be especially significant for nationals of India and China because
Although Region IX is open to Reduction in Recruitment, CSI must consider that the state agency in California has had a policy of limiting reduction in recruitment where the employer had any special requirements. Therefore, CSI might file for Reduction in Recruitment first. If the Department of Labor denies the application, they may have to start over with a traditional labor certification filing. Although CSI would like to file both at the same time, the Department of Labor precludes simultaneous filings for the two procedures.

Clients naturally ask the attorney to assess their prospects to obtain a labor certification. Historically the rate of approval has been quite high. For cases that are not withdrawn at the state agency level, the national agency approval rate is approximately ninety-six percent. Still, an employer will not reach the final adjudicatory stages if the labor certification is stalled at the state level because of agency suspicions that the labor tests were conducted unfairly.

In recent years, the approval rate may have grown even higher, apparently in response to pressure to reduce the growing backlogs. In June 1999, an official of the Department of Labor discussed the agency’s push to reduce the backlog of labor certification cases. He said that the regional offices had completed a “remarkable” number of cases, “well over 25,000 processed in the last six months.” He then paused briefly and said, “They’re all approvals.” He further commented, “I guess if you want to get a little more philosophical you can wonder . . . whether some unmeritorious cases might be rolled into that but that’s a philosophical issue I am not going to try to wrestle with right now.”

The work necessary to approve a case is the ministerial placement of a stamp, and the work to deny a case involves the CO preparing a written Notice of Findings presenting the reasons the case might be denied. This is followed by consideration of the rebuttal evidence submitted by the em-

the employment-based visas have not consistently remained available for natives of these countries.

127. See infra Figure 3, p. 240 (statistical data provided by Patrick W. Stange, Department of Labor, Aug. 30, 2000, on file with author). See also Papademtriou & Yale-Loehr, supra note 60, at 154-55 (describing approval rates).

128. See generally Papademtriou & Yale-Loehr, supra note 60 (discussing reduction in employment-based immigration). The Department of Labor has not regularly collected statistical data about cases filed with the state agencies alone. See Interview with Harry Sheinfeld, Senior Counsel for the Employment and Training Administration of the Department of Labor (Sept. 6, 2000).

129. Audio tape: Harry Sheinfeld, Senior Counsel for the Employment and Training Administration of the Department of Labor, Statement at the AILA Annual Conference, Seattle, Wash. (June 12, 1999) (on file with author).

130. Id.

131. Id.
ployer, which is done prior to preparing a final written assessment of why the case should still be denied. Given this process, it is easy to see that denying a case takes much more work than approving one. Thus, the pressure of the backlog and the tremendous amount of resources needed to complete a case-by-case adjudication ultimately led to what appears to have been summary adjudication or, as some who are critical of the program might say, the absence of any adjudication. This summary approach appears to be the best solution the Department of Labor can fashion. 132

In 2000, the pace of reducing the backlog continued to be quite rapid. In June 2000, the Department of Labor reported on recent backlogs and workload reduction plans. 133 The agency reported that in FY 1998 the agency processed over 40,000 labor certification applications and in 1999, over 72,000 cases. 134 The backlog of un-adjudicated cases was 75,400 at the beginning of the fiscal year, and was expected to be at 40,400 by October 2000. 135 This represented a large reduction from prior backlogs. The backlogs had grown dramatically even though overall filing rates remained relatively steady. 136

132. For several years the Department of Labor has mentioned a new streamlining procedure, which eliminates most of the role of the state agencies and may go further toward summary adjudication. See infra Part IV.B.2 (discussing streamlined electronic review program). To be fair, the Department of Labor is operating under tremendous resource constraints. Agency requests for more resources or the statutory authority to charge a user fee have not been successful. The failure of Congress to allocate more funds to this agency reflects, at least in part, a lack of commitment to the supervised testing of the labor market. Here, the process failures signal a real failure of substantive policy as well. Of course, it is unlikely Congress wants to remove all labor testing because of the possible political backlash. See infra Part IV.B.2 (discussing elimination of Department of Labor's role altogether).

133. See Memorandum from Raymond Bramucci, Assistant Secretary for Employment and Training, to Deputy Secretary Department of Labor (Feb. 24, 2000), reprinted in 77 INTERPRETER RELEASES 796, 796-803 (2000) (stating if plan suggested is successful, backlog at Department of Labor will be reduced to zero by FY 2001, assuming no other immigration programs are implemented during this time).

134. See id. at 799 (examining amount of applications processed over a two year span).

135. See id. at 801 (estimating Department of Labor's backlog reduction goals).

136. See id. (predicting 90,000 new filings for FY 2000). In FY 1999, the Agency completed 77,979 cases at the regional level. See id. at 798.
In late 2000, Congress threw a major "monkey wrench" into the Department of Labor’s effort to reduce the backlog. For four months, Congress revived a provision of the immigration laws which allows an individual who has worked without authorization, overstayed a temporary visa, or entered the United States without permission to seek permanent resident status, provided he or she is eligible under the family or employment visa categories. \(^{137}\) One of the ways to preserve eligibility to adjust status under the limited statutory provision was to file a labor certification application prior to the April 30, 2001 deadline. \(^{138}\) In June, the Department of Labor reported more than 230,000 new labor certification applications filed with the state agencies during the four-month application period. \(^{139}\) The Department of Labor estimated that the pending backlog of cases was close to 300,000 as of June of 2001. \(^{140}\)

Such erratic adjudication and workload greatly impacts other aspects of the system. For instance, delays in adjudicating labor certifications result in greater filings of temporary visa extensions, burdening other agencies and draining valuable time and resources from completing immigrant petitions. Furthermore, large numbers of labor certification approvals following long delay and backlog create distrust in the adjudicative process. That distrust is not just prevalent among potential immigrants, but also among

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138. See id.
140. See id.
other agencies involved in later stages of the process.\textsuperscript{141}

Based on the high overall approval rates, it is likely that CSI will successfully obtain a certification for Ms. Cheng if the employer carefully prepares the application and follows agency procedures. The more difficult question to answer, however, is \textit{when} it will be issued. Notwithstanding the effort to reduce backlogs, in some parts of the country labor certification applications still take several years to process unless the case fits into the Reduction in Recruitment criteria. Given the huge new filings made in spring 2001 and the recent downturn in hiring in the high-tech industries, it is unclear whether the Department of Labor will continue to offer a Reduction in Recruitment procedure for these or other cases.\textsuperscript{142}

e. \textit{Searching for a Short-Cut: A Waiver of Labor Certification}

Given the cost and delay in obtaining the labor certification and the employer's natural reluctance to spend time on recruitment, an attorney will consider waivers of the labor certification requirement. Several statutory categories do not require labor certification, such as family-based immigration or successful asylum applications. In the employment-based categories, there are labor certification exemptions for multinational executives and managers, for persons with extraordinary ability in the arts and sciences, and for outstanding professors and researchers.\textsuperscript{143} The INS adjudicates these applications directly, allowing a "waiver" of the labor certification process. If Ms. Cheng fits into one of these categories, CSI would be exempt from filing the labor certification application.

In addition, the Department of Labor created lists of occupations subject to special procedures granting persons a "short cut" through the labor certification process. The first occupational list known as Schedule A, identifies four classes of employment that the Department of Labor pre-certified as labor shortage occupations.\textsuperscript{144} The Department of Labor cross-delegated

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\textsuperscript{141}. \textit{See} discussion \textit{infra} Part III.B.3.c.

\textsuperscript{142}. \textit{See} Chief Dale Zeigler, Alien Labor Certification Program, Statement at the Annual Conference of the AILA, Boston, Mass. (June 22, 2001) (notes on file with author).

\textsuperscript{143}. \textit{See} INA § 203(b)(1), 8 U.S.C. § 1153(b) (1994 & Supp. V 1999) (stating exceptional ability may exist in the sciences, arts, education, business, or athletics); INS Immigrant Petitions, 8 C.F.R. § 204.5(k)(2) (2001) (defining exceptional ability in the sciences, arts, or business to mean "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."); \textit{see also} Employment & Training Admin. Occupational Labor Certification Determinations, 20 C.F.R. § 656.10 (2001) (mandating professions, abilities, and expertise as eligible for Schedule A classification).

\textsuperscript{144}. \textit{See} 20 C.F.R. § 656.10 (explaining original Schedule A listed twenty shortage occupations: Accounting and Auditing, Architecture, Chemical Engineering, Industrial Engineering, Mathematics, Mechanical Engineering, Metallurgy and Metallurgical Engineering, Mining and Petroleum Engineering, Nuclear Engineering, Nursing, Pharmacy, Physical
to the INS the authority to determine whether the employment opportunity met the Schedule A criteria. Thus, an individual seeking this waiver of the labor certification process bypasses the Department of Labor and the first step altogether.

The Schedule A occupations are registered nurses, physical therapists, persons of exceptional ability in the arts and sciences and managers and executives of multinational corporations employed outside of the United States by the multinational for at least one year. Schedule A, adopted in 1976, continues in operation today, although exceptional performing artists and the multinational executives and managers have been deleted. These individuals are now exempt from labor certification pursuant to statutory exemptions. If Ms. Cheng were in one of these occupations, she would qualify to bypass the Department of Labor certification process.


145. See INS Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole, 8 C.F.R. § 212.15(e) (2001) (designating only licensed registered nurses qualify for exemption).

146. See id. § 212.15(g)(4)(i) (stating physical therapists must also be licensed by state of intended employment and are subject to a foreign credentialing exam requirement).

147. See discussion infra Part IV.A. Although this category uses language identical to one of the 1990 employment-based immigrant visa criteria, the regulatory definitions are not identical. Proving “exceptional” skills for the waiver is a higher standard than the standard to obtain inclusion as a second preference immigrant. Although the 1990 criteria created a number of statutory exceptions to the labor certification requirement for people who have demonstrated “extraordinary ability,” or who can establish that they would contribute to the national best interests, Schedule A’s “exceptional ability” standards remain a possible alternative.

148. This Schedule A classification also parallels a category in the 1990 employment-based preferences. Here the elements of the Schedule A pre-certification of labor shortage are identical to the requirements of the First Preference Employment-Based category for multinational managers and executives.


151. An analogy to Schedule A was developed in the labor market information (LMI) pilot program that was proposed in conjunction with the Immigration Act of 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 122(a), 104 Stat. 4994, 4994-95. The LMI would have eliminated the Schedule A occupations list by directing the Secretary of Labor to conduct a labor market information pilot program for employment-based immigrants to
At the same time that the Department of Labor and INS created the Schedule A shortcut, the Department of Labor introduced Schedule B, listing occupations the agency deems to be in oversupply. The list, which may seem anachronistic today, having not been amended since 1976, is fairly lengthy. It generally includes low-skilled, entry-level positions. The Department of Labor believes U.S. employers can quickly train available U.S. workers to fill these jobs even where shortages may exist. Thus, conceptually, Schedule B is a roadblock on the map or a "Do Not Enter" sign. Clearly, Ms. Cheng's position is not a Schedule B occupa-

determine whether the permanent alien labor certification process could be streamlined by supplementing this case-by-case process with an approach utilizing lists of occupations in which there are labor shortages or surpluses. The legislation provided, under the pilot program, a determination would be made that labor shortages or surpluses exist in up to ten defined occupational classifications. The legislation, section 122(a) of the 1990 Immigration Act, required that in making these determinations, the Department of Labor consider occupations that have been previously approved under the permanent alien labor certification program as well as labor market and other related information. The pilot program was set to sunset in 1994. See id. Although the Department of Labor issued proposed regulations, controversies over the market information methodology and opposition from a wide range of interest groups killed the pilot program. See also Gary E. Endelman & Robert F. Loughran, The Reality of Reliance: Immigration and Technology in the Age of Global Competition, 93-7 IMMIG. BRIEFS 1 (1993) (focusing on connection between foreign-born scientists and the immigration bar).

152. See Employment & Training Admin. Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656.11(a) (2001) (itemizing Schedule B occupations including: assemblers, gas station attendants, parking lot attendants, personal service attendants, amusement attendants, recreation attendants, bartenders, level II bookkeepers, caretakers, cashiers, charworkers and cleaners, chauffeurs and taxi drivers, hotel and motel cleaners, clerk typists, grocery clerks and checkers, general clerks, hotel clerks, short order cooks, counter and fountain workers, dining room attendants, electric truck operators, elevator operators, floorworkers, groundskeepers, guards, any industry helpers, household domestic service workers, housekeepers, janitors, key punch operators, kitchen workers, common laborers, farm laborers, mine laborers, loopers and toppers, material handlers, nurses' aides and orderlies, packers and markers and bottlers, porters, receptionists, sailors and deck hands, sales clerks, sewing machine operators and handstitchers, stock room and warehouse workers, streetcar and bus conductors, telephone operators, lesser skilled typists, recreation and amusement ushers, and yard workers).

153. See id. § 656.1(a) (indicating there must not be "sufficient [U.S.] workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States" before certain foreign workers are admitted).

154. See id. § 656.11(c); id. § 656.23 (2001) (informing prospective employers of possibility of obtaining a labor certification for a Schedule B position when an employer justifies job duties or requirements which alter job). In reality, however, few employers seek Schedule B certifications because these positions are categorized by the Department of Labor as requiring less than two years education or training. Accordingly, the INS will classify the immigrant petition in the employment-based third preference for "other workers." INA § 203(b)(3), 8 U.S.C. § 211 (1994). This category is limited to 10,000 persons a year and
Ms. Cheng may also want to know whether she qualifies for the "National Interest Waiver." She has heard fellow Chinese students discussing this strategy as a way of bypassing the lengthy labor certification process and avoiding the recruitment of U.S. workers for her position. Congress created the national interest waiver in 1990. The waiver is theoretically available to any non-citizen with an advanced degree, or one who can establish that her credentials make her an alien of exceptional ability. Because of Ms. Cheng's advanced degree, the statute does not require that she prove she is "exceptional," but rather she and CSI must establish that her employment will make a significant contribution to the national interest of the United States.

There is no regulatory definition of what constitutes immigration in the national interest. CSI must primarily rely on the decisions of the INS Administrative Appeals Office (AAO). Shortly after the passage of the thus, there is usually a multi-year wait in this category for immigration. See id. § 201. It is beyond the scope of this Article to question the wisdom of the 10,000 visa cap for low-skilled jobs. Moreover, beginning in FY 2000, 5,000 of the 10,000 visas are reallocated to immigrants receiving benefits under the Nicaraguan Adjustment and Central American Relief Act of 1997. See Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, § 202, 111 Stat. 2193 (codified as amended in scattered sections of 8 U.S.C.). For a discussion of the need for these workers compare PAPADEMETRIOU & YALE-LOEHR, supra note 60, at 144-64, with AILA, ESSENTIAL WORKERS KEEP THE ECONOMY GROWING (on file with author), available at http://www.aila.org (last visited Dec. 14, 2001).

155. A third schedule, Schedule C, was promulgated in 1967, but only briefly implemented. See Immigration; Availability of, and Adverse Effect Upon, American Workers, 67 Fed. Reg. 887 (Jan. 25, 1967). The regulation was cancelled in 1971. Schedule C precertified skilled and unskilled occupations found to be in short supply in certain regions, with the requirement that the alien work only in that geographic area. See id.

156. See INA § 203(b)(2)(D), 8 U.S.C. § 1153 (b)(2)(B) (1994 & Supp. V 1999) (mandating Attorney General may waive labor certification when deemed to be in the national interest). However, the statute does not define "national interest" and the INS declined to define it in the regulations, preferring flexibility of a case-by-case basis, but stating that the alien "must make a showing significantly above that necessary to prove 'prospective national benefit' [required of aliens seeking to qualify as 'exceptional']." Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,900 (Nov. 29, 1991); see also Memorandum from R. Michael Miller, Acting Assistant Commissioner for Adjudications, INS, to Michael L. Aytes, Director, INS Service Center Operations, INS, File No. HQ 204.24-C (May 4, 1993), reprinted in 70 INTERPRETER RELEASES 1150, 1151 (1993) (stating "the AAU is not planning at this time on publishing a precedent decision on the [national interest waiver] issue.").


158. See generally INS Powers and Duties of Service Officers; Availability of Service Records, 8 C.F.R. § 103.1(0)(3) (2001); id: § 103.3(a) (mandating creation of AAO through
1990 Act, INS regulations stated the government thought the qualifications should be flexible and develop on a case-by-case basis of adjudication. This continued for several years until many of the INS adjudicators became uncomfortable with the lack of consistency in the type of cases approved. In 1995, the agency proposed regulations restricting the category by requiring proof of national, as opposed to regional or local contributions to the national interest. The INS also proposed several other narrowing qualifications. Commentators vigorously attacked the proposal as an extreme restriction of the category. The proposed regulations were allowed to die, and were never amended or re-proposed.

In 1998, the Wall Street Journal published a long article discussing the national interest waiver and citing examples of approved cases. The story skeptically examined some of the approved cases. They included a photographer of people indigenous to the Amazon rain forest, but who drove taxis to earn a living; a novelist with a single publication of a science fiction novel including gay characters; an acupuncturist, who specialized in lower back pain; and a twenty-seven year old video filmmaker, who hoped to produce a "'youth-oriented global news network." The story documented the frustration within the INS concerning the lack of guidelines for adjudicating these petitions. Ed Skerrett, a senior INS examiner responsible at that time for review of these adjudications, was quoted as saying, "Sometimes we wondered . . . 'how could they possibly approve a case like that?'" Further, the story reported that the inability of issuing regulations providing more substance to the category was leading the AAO to issue a precedent decision aimed at giving more definition to the category. In re New York Department of Transportation, set forth the

Agency regulations). No form of administrative review is mandated in the INA.

159. See Employment-Based Immigrants, 56 Fed. Reg. at 60,900 (stating each case will be "judged on its own merits.").

160. See Employment-Based Immigrants, 60 Fed. Reg. 29,771, 29,776-78 (June 6, 1995) (proposing four elements a petitioner must satisfy to qualify for national interest waiver).

161. See id. at 29,772 (proposing to clarify the "portions of the regulations which have been problematic for the Service and the public.").


163. Id.

164. Id.

165. See id. (stating after members of the public objected proposed rules, "the INS backed off. Instead of defining the national interest officially, the INS set out to define it—or so say its critics—by stealth.").

166. No. 3363 (B.I.A. 1998) (interim decision) (providing factors to be considered in
same narrowing criteria which the proposed regulations championed.\textsuperscript{167} In other words, the INS made a change in the criteria through informal adjudication rather than rulemaking.\textsuperscript{168}

In this first precedent decision, the INS began to define some of the qualifications for the waiver.\textsuperscript{169} The case established a three-part test for evaluating the non-citizen’s potential contribution to the national interest. First, the employer must show that while the employee will make a contribution in the “national interest,” this contribution must be of such significant magnitude to outweigh the governmental interest in requiring the labor certification market tests.\textsuperscript{170} The AAO acknowledged that the engineer in that case would make a contribution to the design of New York bridges, but the sponsor failed to show how that contribution substantially benefited the nation as a whole. Second, the employer must demonstrate that the alien has a proven track record of accomplishments and that she is individually important to the completion of the project or activity.\textsuperscript{171} Making a contribution to a team of skilled professionals is not sufficient.\textsuperscript{172} Third, the agency found that even where the employer documents a shortage of available workers, a labor shortage was not relevant to a determination of the national interest.\textsuperscript{173}

evaluating a national interest waiver request).

\textsuperscript{167} See, e.g., Nathan A. Waxman, The New York State Department of Transportation Decision: The End of the Road for the National Interest Waiver?, 75 INTERPRETER RELEASES 1289 (1998) (discussing Waxman’s strategy in submitting successful national interest waiver cases prior to the issuance of the AAO decision).

\textsuperscript{168} See David H.E. Becker, Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply Its Decisions Retroactively?, 52 ADMIN. L. REV. 219 (2000) (discussing New York State Department of Transportation case and setting forth arguments for evaluating the legitimacy of the INS administrative decision in lieu of rulemaking); see generally Russell L. Weaver, Chenery II: A Forty-Year Retrospective, 40 ADMIN. L. REV. 161 (1988) (discussing proposition that agencies are generally free to choose between rulemaking or adjudication absent specific statutory restrictions).

\textsuperscript{169} See Adam J. Rosser, Note, The National Interest Waiver of IMMACT90, 14 GEO. IMMIGR. L.J. 165, 166 (1999) (claiming case was first to address national interest waiver).

\textsuperscript{170} See generally In re New York State Dep’t of Transp., No. 3363 (providing petitioner’s employment must be substantial and national in scope).

\textsuperscript{171} This element makes it difficult for large employers with highly-skilled personnel to argue that any single employee is essential to the national interest. In many unreported decisions, the INS has stated that the strength of the petitioner indicates that the firm will be able to continue without the services of the single individual unless that individual can be shown to be unique. See GORDON ET AL., supra note 72, § 39.04 (discussing cases where petitioning employees are professionals with exceptional ability).

\textsuperscript{172} See id. § 39.04 (defining visa applicant’s required exceptional ability).

\textsuperscript{173} See In re New York State Dep’t of Transp., No. 3363 at 4 (stating waiver is not based only on a labor shortage, since “labor certification process is already in place to address such shortages.”).
To qualify for a national interest waiver, Ms. Cheng must meet this three-part test. Most likely, the INS will require a third-party expert affidavit about her achievements and contributions to the software engineering field. She must also have someone outside of her educational institution, and not personally interested in her employment, assess her contributions to the national economy and the development of this field.

Determining an individual’s chance for approval of a national interest waiver is difficult, as previous approvals are unreported. Furthermore, denials of petitions at that level are unpublished and no opinions are prepared for approved cases. Although there is a lack of approved cases to serve as guidance, informal minutes of liaison meetings between the regional service center personnel and the American Immigration Lawyer’s Association (AILA), along with word-of-mouth, are all one has to determine what criteria the service center employs in adjudicating cases. Occasionally, a service center prepares an informal memorandum discussing evidence or documentation needed to support the visa petitions. Similarly, but perhaps more surprising, the AAO does not publish its non-precedent decisions. A few publishers, however, gather non-precedent decisions and publish them. The AAO also designates very few of its decisions as precedent. Oddly, these cases are published with Board of Immigration

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174. These informal memoranda are not published in the Federal Register, nor made public in any systematic way. The usual way to gain access to this information is through the AILA publications or experienced immigration attorneys. See, e.g., Texas Service Center, National Interest Waiver Advisory Information Memorandum of May 22, 1998, reprinted in 17 AILA MONTHLY MAILING 670-71 (July/August 1998); California Service Center Adjudicating Officers Comments Business Product Line Liaison Meeting on September 18, 1998, reprinted in HOT TOPICS IN EMPLOYMENT BASED IMMIGRATION 62-67 (Martin L. Rothstein & James D. Acoba eds., 1999).

175. Interview with Stephen Yale-Loehr, Of Counsel, Tree, Walsh & Miller, LLP, Ithaca, NY, Adjunct Prof., Cornell Law School (Sept. 6, 2000) (describing procedures Matthew Bender uses to obtain non-precedent AAO decisions) (notes on file with author).

176. For example, INTERPRETER RELEASES, a weekly immigration newsletter periodically provides summaries of non-precedent AAO decisions. See, e.g., AAO Case Summaries, 77 INTERPRETER RELEASES 183, 183-86 (2000). Matthew Bender also regularly solicits unpublished cases from its readers and occasionally publishes summaries of these cases in Bender’s Immigration Bulletin, a weekly immigration magazine. According to Daniel M. Kowalski, Editor-in-Chief of Bender’s Immigration Bulletin, he receives approximately two cases a month. This publication is only available to subscribers or in libraries that have subscriptions. See Interview with Stephen Yale-Loehr, Of Counsel, True, Walsh & Miller, LLP, Ithaca, NY, Adjunct Prof., Cornell Law School (June 15, 2000) (notes on file with author).

177. In the past ten years, I could locate only six precedent decisions out of approximately 4,000 AAO cases per year. See Interview with Stephen Yale-Loehr, Of Counsel, True, Walsh & Miller, LLP, Ithaca, NY, Adjunct Prof., Cornell Law School (Sept. 6, 2000) (notes on file with author).
Appeals (BIA) opinions. Attorneys specializing in immigration law sometimes request the non-precedent decisions under the Freedom of Information Act (FOIA), and try to discern trends or consistency in the various decisions. Thus, due to the administrative set-up of immigration proceedings, it is extremely rare to seek judicial review of the denial of one of these waivers.

In the end, CSI could conclude that it might be worth the time and expense of pursuing both the labor certification and the national interest waiver simultaneously. There are no regulations precluding the company from filing for the labor certification with the Department of Labor, while at the same time filing for an exemption with the INS. The company, however, may be hesitant to take this course of action, because other foreign workers might come to expect CSI to go to this expense for each of them.

The national interest waiver exemplifies the problems that occur when Congress fails to set out clear criteria. The agencies involved in adjudication have little guidance and, therefore, make erratic decisions. The par-

178. Cf. INS Powers and Duties of Service Officers; Availability of Service Records, 8 C.F.R. § 103.9(b) (2001) (requiring retention of all unpublished decisions). The editors at Matthew Bender reported it sometimes takes months to obtain access to the unpublished cases even though all are supposed to be available at the national reading room. Approximately once a month they make a new FOIA request. See Interview with Stephen Yale-Loehr, Of Counsel, True, Walsh & Miller, LLP, Ithaca, NY, Adjunct Prof., Cornell Law School (Sept. 6, 2000) (notes on file with author) (stating “Matthew Bender uses FOIA to obtain non-precedented AAO decisions”); see also E-mail from Stephen Yale-Loehr, Of Counsel, Tree, Walsh & Miller, LLP, Ithaca, NY, Adjunct Prof., Cornell Law School to author (Sept. 6, 2000) (on file with author).


181. The expense and time involved in seeking judicial review is rarely worth it when there is no rule against the employer filing in a different category or even refilling in the same category with additional or different evidence. In one rare case, the alien, acting as a self-petitioner, successfully challenged the INS denial on the basis that the agency disregarded the testimony of experts presented without sufficient explanation of why the evidence was not clear and convincing for eligibility of a waiver. See Laila Mnayer v. INS, No. 94-2673, 1995 U.S. Dist. LEXIS 21932 (S.D. Fla. June 20, 1995).

182. There are no limits on how many simultaneous petitions it may file with the INS. The company could file in the outstanding researcher category while filing in the national interest waiver.
2002] BREAKING BUREAUCRATIC BORDERS 249
ticipants, in turn, cannot be sure where their case will come out because the system lacks transparency. The lack of reported decisions in this area makes advising a client extremely difficult. No attorney can be sure whether a particular case will be approved for a national interest waiver because there are few decisions with which to compare the facts of their case.

2. Second Stop—INS Immigrant Petition

Following labor certification, CSI must file an immigrant petition with the INS. This petition is made on a form called I-140. Throughout 1999 and 2000, the California region of the INS routinely required nearly twelve months to adjudicate the immigrant visa petition.\(^{183}\) By the summer of 2001, the INS reported that processing times were down to approximately seven to nine months.\(^{184}\) Added together CSI and Ms. Cheng have survived four to five years of waiting before the final stage, Ms. Cheng’s individual immigrant visa application. This assumes traditional labor certification, I-140 processing, and does not take into consideration immigrant visa availability for second preference emigrants from China.\(^{185}\) As such, the waiting period in this second stop varies.

CSI must file an I-140 petition on behalf of Ms. Cheng demonstrating that she is qualified to accept the certified position and that CSI can pay the certified wage before she can proceed with her individual application for an immigrant visa. The I-140 petition gives the INS the opportunity to make an independent determination concerning Ms. Cheng’s qualifications and the job as described by CSI in the original labor certification filing. It also determines the preference category into which Ms. Cheng will be placed. The INA contains five employment-based preference categories that in turn are subdivided into approximately twelve subgroups.\(^{186}\) After the filing, the INS assigns the approved I-140 petition a formal “priority date.” This date will later determine the individual’s place in line for a visa under the quota limitations.\(^{187}\) For categories requiring labor certification, the INS allows the priority date to relate back to the date of the filing of the labor certification. For almost all other cases, the priority date is the date of the

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183. The delay rate was calculated by reviewing monthly progress reports published in AILA Monthly Mailings, entitled Immigration Today. Confirmation of the delays was confirmed by conducting interviews with attorneys in private practice.

184. The California Region has jurisdiction over CSI’s petition because the job is located in California.


186. See id. § 203(b), 8 U.S.C. § 1153(b).

filing of the I-140 petition.  

A critical part of determining how long the process takes requires knowledge of the demand and quota limits on each of the immigrant visa categories. As explained earlier, almost all immigrants are subject to preference category quota limitations and individuals are further limited if they come from a country with high demand for immigration. Furthermore, the INA contains a category for employers to sponsor individuals who possess an advanced degree or exceptional ability in the arts, sciences, or business in a permanent position that requires the education and skill level. This category is called employment-based second preference (EB-2). Each year, a minimum of 40,040 of the 140,000 employment-based visas are allocated to this category.  

It is likely that Ms. Cheng, because of her master’s degree, fits in this category. The INS ultimately determines whether Ms. Cheng meets the statutory qualifications for inclusion in this higher preference category. Inclusion in a higher category may mean that Ms. Cheng avoids the potential of quota limitations which add to the processing delays she will have already experienced. For example, for most people, the employment-based second preference category is available regardless of the individual’s priority date, but in the employment-based third preference the category has frequently been subject to a several year backlog. Most importantly, because of high visa demand in India and China, these countries have experienced several quota delays in both the second and third employment-based preferences. Unfortunately, Ms. Cheng is from one of these oversubscribed countries and, therefore, she will want to have as high a preference as possible.  

In an effort to ensure the earliest immigration date possible, CSI and Ms. Cheng will seek classification in the second preference based on CSI’s requirement of a master’s degree for the position. As stated earlier, the INS examines the job requirements as described in the initial labor certification to the Department of Labor. Therefore, it is important that CSI describe the position as one requiring an advanced degree. While the petitioning process after the completion of labor certification takes twelve months, no one

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188. Learning to preserve, trade, and recapture priority dates is one of the prized skills in immigration law. See Dep’t of State Visas: Documentation of Immigrants under the Immigration and Nationality Act, as Amended, 22 C.F.R. § 42.53(b)-(c) (2001) (providing guidelines to obtaining different priority dates); see also Solomon, supra note 187, at 1-2 (explaining how priority dates are obtained, maintained, transferred, and lost).

189. See generally GORDON ET AL., supra note 72, § 39.04 (explaining EB-2 visa category).

can predict exactly when Ms. Cheng's priority date will authorize her to apply for adjustment of status to become a permanent resident. Only when her priority date matches or precedes the dates listed by the Department of State can she move to the final stop on the immigration map. Furthermore, the INS could challenge the bona fide nature of CSI's master's degree requirement, notwithstanding Department of Labor approval.

Recently, this conflicting treatment of the master's degree requirement resulted in a class action lawsuit that required the INS to approve moot cases for EB-2 classification. The lawsuit arose because the INS began to reinterpret Department of Labor standard requirements for recruitment of positions requiring advance degrees. For a number of years Region IX of the Department of Labor required employers to expand a master's degree requirement to a master's degree or five years of progressive experience. The philosophy of the Department of Labor was to expand the pool of U.S. workers qualified for entry-level high-tech positions. When an employer insisted that only persons with master's degrees were qualified, the employer had to document why the degree was essential and that the requirement was a reasonable and standard requirement of the position. In some cases, the non-citizen did not have a master's degree but the employer wished to require a master's degree or work experience equivalent to more closely capture the minimum requirements of the position and also position the alien for qualification in the advanced degree preference category. Hundreds of labor certifications stated that the employer's minimum requirement was a master's degree or progressive experience. For many years, the California Service Center of the INS approved I-140 immigrant petitions classifying aliens who had these labor certifications in the employment-based second preference category.

In 1997, the California Service Center of the INS suddenly denied these I-140 petitions, stating the alien was not a qualified advanced degree holder or that the employer did not genuinely require an advanced degree for the position because the labor certification provided for an alternative. After denials, several employers and aliens successfully challenged the INS adjudication on a number of legal and procedural grounds.

191. Region IX includes California, Hawaii, and Arizona. In the most recent Department of Labor reorganization, this region will expand to include Oregon and Washington.


What are the lessons of this litigation? While some might dismiss the INS' actions as a blunder or blame poor drafting of the labor certification by the employer, the conflict illustrates several problems. First, it signifies that the INS adjudicators are leery of basing immigration benefits on educational attainment. The INS took the ambiguous standard in the statutory provisions to mean second preference is not only limited to individuals with advanced degrees, but the offered position must itself require an advanced degree for performance of the job duties. Perhaps this is a reasonable interpretation by the agency, but if the job requirements are of such significance, Congress should have been more explicit. Given there is no requirement that the immigrant remain in the position for any particular period after immigrating, it would also be reasonable to assume that Congress sought to measure the value of the immigrant by their past academic achievements and not by the precise work to be performed.

More important, however, is the aspect of this litigation which demonstrates how the lack of coordination between the Department of Labor and

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194. The exact language of the provision is that second preference visas may be issued to:

[Q]ualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.


This Article is not meant to debate the merits of the substantive provisions, people with high education versus lower education, etc. However, the story is an example that policy makers should heed if serious consideration is given to a point system. Today's agency adjudicators do not appear to value the degree as a clear dividing line among potential beneficiaries. Cf. PAPADEMETRIOU & YALE-LOEHR, supra note 60, at 144 (advocating selecting immigrants for their skills rather than tying immigration to any particular job offer given reluctance of Congress to mandate remaining same position).

195. For example, where Congress was skeptical about the value of degrees standing alone, they specifically said so. Consider the provision concerning the definition of "exceptional ability:"

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.


196. Designing time requirements for any position is problematic and undoubtedly controversial because it would create a form of "indentured" employment. However, the continued delays and obstacles in processing immigration cases are creating de facto forms of indentures.
the INS adjudications resulted in conflicts for the agencies and for the participants in the system. Certainly the class action resolved some of the issues, but the litigation was years in formation.\textsuperscript{197} Hundreds, perhaps thousands, of employers considered these conflicting adjudications and decided how to handle the problem in the preparation of the labor certification and visa petitions. The turmoil and uncertainty resulted in additional costs and added months to the processing times because adjudicators more closely examined the employer's criteria for employment. The fact the litigation was decided adversely to the INS also harms the system in that it may encourage other challenges to the agency interpretations, or, at least, it makes the participants in the system less trustful of the agency interpretations.

By delegating the labor certification to the Department of Labor, with its mission of broadening the recruitment in search of qualified workers, and the role of visa petition adjudication to the INS, which is concerned with the over expansive use of the higher preference categories, Congress planted the seeds of conflict. Often the procedures implementing the adjudications reflect little awareness of the other agencies' adjudication procedures or even of the documentary record submitted in the first adjudication.\textsuperscript{198} Instead, Congress should have provided for some high level of oversight, policy development, and strategic planning necessary to the communication of the rules to the participants and to an expeditious and consistent adjudication.

3. Third Stop—Visa Petition in Hand

Following approval of the I-140 procedure, Ms. Cheng may adjust her status when her priority date is current. Each month the Department of State reports the current priority dates for each of the visa categories. An experienced attorney can usually approximate the visa movement based on past experience, but cannot guarantee that the quota will be available on any particular date.\textsuperscript{199} For example, in 1998 and 1999 the EB-2 category

\textsuperscript{197} The INS did not amend its regulations; however, it did adopt a policy memorandum seeking to clarify the standards for advanced degree requirements. \textit{See Memorandum from Michael D. Cronin, INS Acting Associate Commissioner Office of Programs, and William R. Yates, INS Deputy Executive Associate Commissioner Office of Field Operations, to all Service Center Directors and all Regional Directors (Mar. 20, 2000), reprinted in Opportunity to File Untimely Motions to Reconsider Decisions Denying EB-2 Immigrant Visa Petitions, 65 Fed. Reg. 41,093, 41,095 (July 3, 2000) (clarifying requirements, which govern immigrant visa petitions under second preference category).}

\textsuperscript{198} \textit{See infra Part III (discussing similar conflict between Department of Labor and INS treatment of past employment experience).}

\textsuperscript{199} The Department of State does not publish estimates of waiting times. Rather, it provides a monthly \textit{VISA BULLETIN} listing the dates of the petitions currently being accepted
became backlogged for people born in China or India but remained current for all other countries. For several months of both fiscal year 1999 and 2000, the Department of State reported that the EB-2 category was oversubscribed because of the country quota limitation. As the fiscal year progressed and the Department of State realized fewer visas had been issued to nationals of India and China in this category, the Department of State removed the two year wait and listed the category as immediately current for the last month of the fiscal year. Although many individuals filed for adjustment of status or immigrant visa processing in that final month, not all visas could be issued under such short notice. As a result in fiscal year 1998, despite qualified immigrants from India and China, only 14,384 of 40,040 EB-2 visas were issued. These low numbers worsened in 1999, when only thirty-eight percent of all the employment-based visas were actually used.

The EB-2 backlog of 1999 demonstrates that often the procedures put into place to implement the adjudications reflect little awareness of the other agencies' adjudication procedures or even of the documentary record submitted in the first adjudication. The lack of high-level oversight, policy development, and day-to-day coordination exacerbate the problems created by the statutory requirements.

Was this erratic EB-2 visa movement due to the substantive limits of the...
quota numbers and country origins or was it due to process failures within
the agencies responsible for calculating visa movement? At least in part,
the perceived backlog was due to a failure of the INS to timely adjudicate
and report I-140 immigrant petitions. The Department of State received a
large number of approvals from the INS in the spring of 1999. Accordingly it predicted larger annual demand and moved the visa processing date
backward to avoid issuing visas in excess of the annual cap. However, the
increase in approval rates did not signal a new and higher demand for visas,
but rather, the inefficiency and inconsistency of INS adjudication. The
process failure of one agency and lack of information about the failure, led
another agency to a second process dilemma which in turn has generated a
third process problem.

Delay distorts the entire immigration system. One of the most dramatic
examples is the erratic movement of the quota dates. When the INS does
not process adjustment of status cases at the rates normally expected, or in

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205. Here is text from a 1995 Visa Bulletin, which illustrates the problem:
NOTE ON FUTURE PREFERENCE VISA AVAILABILITY

Cut-off date movement in several immigrant categories during the first five
months of FY-1995 has been greater than might ordinarily be expected. This is
because fewer applicants are appearing for interview or obtaining visas at consular posts
abroad as a result of the 1994 amendment to the adjustment of status provision in the
Immigration and Nationality Act (INA). (Most qualified immigrant visa applicants
who are in the United States may now seek adjustment of status through INS even if
they are not in lawful nonimmigrant status; previously, most applicants who were not
maintaining lawful visa status were prohibited from such adjustment at INS and had
to travel abroad to make their formal immigrant visa applications. Further, the INA
now stipulates that most persons who are NOT in lawful nonimmigrant status at the
time of departure from the U.S. cannot be issued immigrant visas at a consular office
abroad within 90 days of such departure. These provisions taken together have re­sulted in fewer immigrant visa applications at consular offices since October 1994
and more applications filed with INS for adjustment of status.)

Although visa number use at consular offices has thus declined, the corresponding
increase in INS number use has not yet become apparent, since INS offices will need
time to process the adjustment of status applications. The result has been a temporary
decrease in visa number use, which has permitted faster cut-off date movements.

Once the cases of the additional adjustment of status applicants begin to be
brought to final action in large volume, there will be a significant increase in INS visa
number use and cut-off date movements will necessarily slow or stop. Moreover, in
some categories (such as the "Other Worker" category, for instance, where there has been particularly rapid recent cut-off date movement), cut-off date retrogression is a
definite possibility.

Interested parties should be aware that the recent rate of cut-off date advances will
not continue indefinitely, but it is not possible to say at present how soon a signifi­cantly increased INS number use will influence the cut-off date determinations.

9502bulletin.html.
some cases, suspends adjudication altogether because the officers are working on other types of petitions, the Department of State has no way to predict future visa availability. The Visa Office predictions of future availability are necessarily conservative for there is no data source, which tells the officers how many people will apply for immigration in any one month. Although the Visa Office knew hundreds of approved immigrant petitions awaited action in pending adjustment of status applications, the office bases its calculation of visa movement on the demand in the prior month. The Visa Office then predicts future visa demand based on the prior month movement and adjusts the priority dates accordingly. When the INS is not processing cases or is doing so very slowly, the demand appears to fall and the Visa Office reports no backlog in the category. But, as the INS adjudicates cases in large batches, the Visa Office suddenly reports a multi-year delay in the category. Although the Visa Office tries to warn those waiting that movement may be erratic, it takes an experienced observer to understand the movement of the visa backlogs. This problem was particularly acute from 1995 through 1998 when the second and third preference categories appeared to be current, only to retrogress several years for nationals of India and China due to batch processing by the INS.

206. In an August AILA liaison questions and answers session with the Vermont Service Center (VSC), AILA asked, “Why has the processing of I-130’s remained stagnant for at least the past five months?” The VSC answered, “A while back, HQ provided the VSC with a list of priorities, i.e. I-90’s, TPS, 765’s, etc. I-130’s were not considered a priority at that time; consequently we have not touched these.” See AILA’s 1999 Annual Conference on Immigration Law, available at http://www.alia.org (last visited Dec. 15, 2001).

207. Simply counting the number of approved immigration petitions is not sufficient, for people sometimes do not choose to pursue immigration at the time their petition is approved or for some other reason they are temporarily ineligible to immigrate. Because dependent family members are also counted in this immigrant category, but the I-140 petition does not identify the total number of family members, who will accompany the immigrant, there is no way to predict the exact number of visas required even if one could count I-140 petitions.

208. The Visa Office measures demand by recording phone call requests from INS officers to the Visa Office. Demand is also measured by visa issuance at the posts around the world. The Visa Office makes its calculation during the first week of each calendar month after the visa use of the prior month is tallied. See, e.g., 8 VISA BULL. 24 (2000) (describing visa availability and publication dates), available at http://dosfan.lib.uic.edu/ERC/visa_bulletin/2000-10bulletin.html (last visited Jan. 6, 2002).

209. See 8 VISA BULL. 21 (2000) (reporting employment based petitions in second preference category are current only for petitions with priority dates before April 15, 1998, and in third preference wait goes back to petitions which predate June 1, 1997), available at http://dosfan.lib.uic.edu/ERC/visa_bulletin/2000-08bulletin.html. The backlogs for India are similar: second preference requires a priority date of prior to September 15, 1999, and for third preference before February 1, 1997. See id.; see also 8 VISA BULL. 14 (2000) (showing no backlog in this category), available at http://dosfan.lib.uic.edu/ERC/visa_bulletin/2000-01bulletin.html; 8 VISA BULL. 23 (2000) (indicating there is only a
Furthennore, the inability to estimate the demand meant the Visa Office sometimes had to aim short, resulting in fewer visas being issued in the year than authorized by the quota.\textsuperscript{210} In an effort to fix the problem, Congress created a "band-aid" approach by recapturing the unused visas of fiscal years 1999 and 2000 and adding them to the per country cap in an attempt to restore the level of some of the employment-based visas.\textsuperscript{211}

Whenever the State Department indicates the numbers are current for a visa category, or moves the quota priority date significantly, individuals waiting in the backlog can immediately file for either adjustment of status or immigrant visa processing.\textsuperscript{212} If the quota subsequently retrogresses and the individual's priority date is no longer current, they are not denied adjustment or visa processing, instead the adjudication of their individual petition is held in limbo.

Moreover, for non-citizens seeking adjustment of status, like Ms. Cheng, the limbo status is not necessarily a benign state. Dependent family members are not entitled to work authorization and may need permission to travel outside the United States while the adjustment of status application is pending. If the limbo continues for a long period, and in some situations the retrogression has lasted an entire fiscal year and in other cases, a period of many months, Ms. Cheng may need renewal of the work authorization and travel permission. Another typical headache of the limbo status is that several pieces of evidence necessary to the adjustment application become stale or unusable. Fingerprints required to determine if the applicant has a criminal record are valid for fifteen months, while medical exams completed with designated physician remain valid for only twelve months.

Thus, both the Department of State and INS have to keep track of and hold in indefinite status these limbo cases. Due to the large number of visas allocated for fiscal year 2001 and the inability of INS to give estimates of anticipated demand, the Visa Office opened the employment-based categories in July and August of 2001.\textsuperscript{213} By posting these categories with no current backlog, any worker in any employment-based category could file for adjustment of status or overseas visa processing. Suddenly, individuals who thought they had to wait years for an immigrant visa were now eligible

\textsuperscript{210} See supra Figure 1, p. 215.
\textsuperscript{211} See \textit{American Competitiveness in the Twenty-first Century} Act of 2000 \$ 102(b) (codified as amended in scattered sections of 8 U.S.C.) (discussing purposes for Act).
\textsuperscript{212} See \textit{id}.
to file for immigration. If thousands of people take advantage of this new eligibility and file, the INS will face large new workloads. Eventually as the agency reports this new demand, the Visa Office will reestablish the cut off dates in some, or potentially all categories. Another side effect of posting open visa categories is that it could lead to the erroneous perception by some employers or non-citizens that the easy way to immigrate to this country is through employment. The Visa Bulletin cannot give an accurate picture of the real demands because there is no statutory mandate that the INS report accurate or necessary information to the Visa Office.

If Ms. Cheng navigates the labor certification process or the waiver, and successfully obtains the right I-140 preference classification, she can at last proceed to her individual application for permanent resident status. If she has managed to retain her non-immigrant status through the many years of processing and has never violated her status with unauthorized work or travel, she can apply for adjustment of status, a procedure which will allow her to transfer from non-immigrant to permanent resident.214

In major U.S. cities, the adjustment of status procedure requires a wait of twelve to thirty-six months. During this wait, Ms. Cheng may not travel outside the United States without permission.215 However, she and her dependent family members may receive work authorization during the adjustment application period. If she determines that overseas immigrant processing in her native country might be more expeditious, she can pursue that route. However, if Ms. Cheng failed to identify that choice at the time CSI filed the I-140 petition, she may face an additional twelve-month delay before the INS notifies the Department of State of her eligibility for immigrant visa processing. Even assuming she originally selected the overseas


215. The INS amended the regulation to allow H-1B and L-1 non-immigrants to travel provided that the underlying non-immigrant petition was valid at the time they seek reentry. See Adjustment of Status; Continued Validity of Nonimmigrant Status, Unexpired Employment Authorization, and Travel Authorization for Certain Applicants Maintaining Nonimmigrant H or L Status, 64 Fed. Reg. 29,208-12 (June 1, 1999) (amending 8 C.F.R. §§ 214.2, 245). The requirement of obtaining advanced parole for all travel, while an individual is going through the adjustment of status procedures, has been one of the most criticized requirements. The INS has maintained that once an individual files an application for adjustment of status she has demonstrated an intent to remain permanently in the United States and thus, the INS cannot allow readmission using a non-immigrant visa. A second rationale for requiring parole is that an individual who enter the U.S. territory under a grant of parole has not clearly been admitted and thus may be subject to exclusion rather than deportation. Given the 1996 amendments which in many respects unified the exclusion and deportation procedures into single removal procedures, there no longer appears to be a sound rationale for requiring the parole procedure. See Part IV.A for a related reform proposal.
2002] BREAKING BUREAUCRATIC BORDERS 259

adjudication process, delays at some posts are more than six months and in
countries where immigration demand is high, a wait of one year is not excep-
tional.

However, the decision to choose overseas processing is also subject to
timing and adjudication risks. Let us imagine that Ms. Cheng, in an effort
to avoid the multi-year delay for adjustment of status in the United States,
requests processing of her immigrant visa petition in her home country. In
several countries, notwithstanding the size of the territory or the popula-
tion, the Department of State only authorizes a single post to issue immi-
grant visas. In China that post is Guangzho. The workload at these posts
varies, but in most situations, the Department of State reports that immi-
grant visa processing can be scheduled within two to four months of re-
ceiving the approved I-140 petition. At times, Department of State re-
sources have not been sufficient to meet demand and at some posts, the
delays can approach one year.\(^{216}\)

Even when her interview date is reached, Ms. Cheng may face another
re-adjudication of her eligibility for inclusion in the employment-based
second preference. It is possible for a consular officer to return a petition
to the INS for reassessment of the bona fides of the petition.\(^{217}\) The consu-
lar officer may be skeptical of the employee's qualifications for the labor
certification or of the company's ability to pay the wage certified in the pe-
tition. CSI, as a large employer, should not face this problem, and Ms.
Cheng's U.S. master's degree also mitigates against consular suspicion, but
the consular officer does have the power to return petitions to the INS for
investigation or reconsideration for revocation.\(^{218}\) These overlapping juris-

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216. Haiti is an example of a post that has experienced long delays. See Interview with
Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance,
Department of State, Visa Office (July 28, 2000) (on file with author).

217. While the consular officer does not have the authority to revoke the immigrant pe-
tition, the consul may refuse to issue an immigrant petition where the evidence suggests that
the employer could not prove it can pay the certified wage. See Dep't of State Visas:
Documentation of Immigrants under the Immigration and Nationality Act, as Amended, 22
C.F.R. § 42.81 (2001). While the regulations state the consular may not re-adjudication pe-
titions, the consular can refuse to issue the immigrant visa unless the INS reaffirms its ap-
proval of the immigrant petition. See Dep't of STATE, 9 FOREIGN AFF. MANUAL, § 42.43
Department of Labor has granted the INS and consular officers the authority to invalidate
labor certifications where they believe the certification was secured by fraud or misrepre-
sentation. See Employment & Training Admin. Labor Certification Process for Permanent
create by these overlapping jurisdictions are considered in Part III. See infra Part III.B.1
(discussing sources of process obstacles).

218. See INS, Revocation of Approval of Petitions, 8 C.F.R. § 205 (2001) (promulgating
requirements for revocation of immigrant petitions); see also 20 C.F.R. § 656.30(d) (reiter-
dictions and redundant adjudications are usually justified as necessary to detect or deter fraud. Even if a consular officer issues an immigrant visa stamp in a passport, when Ms. Cheng arrives at the U.S. border, the INS inspector may once again make an independent determination about her eligibility for the visa classification and her admissibility.219

Still, the clients want to know how long the process will take.220 No one can predict the exact processing times because of system complexity and the lack of information from the agencies. The best anyone can do is explain the basic patterns and time frames experienced by similarly situated clients. Adding all of these procedures together, CSI and Ms. Cheng may wait several years for the labor certificate, unless Ms. Cheng qualifies under some of the streamlined procedures. Then, they could potentially wait one year for the immigrant visa petition and one to two years to complete the adjustment procedures or overseas processing. The bottom line is, it

219. The most likely ground of inadmissibility would be an allegation of fraud or misrepresentation in the visa application. See INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (1994 & Supp. V 1999). Immigration law contains multiple grounds of exclusion, which may bar a person’s entry to the United States. See id. These include criminal conduct, terrorist activity or affiliation, past immigration violations, poverty, illness, and the examiner’s assessment of the person’s intentions regarding their stay in the United States. See generally id. § 1182(a).

220. Some employers have already encountered employees who select job offers based on the ability of that employer to expedite the immigration process. See Interview with Margie Jones, Immigration Specialist, Intel Corporation (Aug. 15, 2000) (on file with author). The clients will also ask how much will it cost. Most attorneys who specialize in immigration law charge a flat fee for the various steps in the immigration process rather than a charge for the hours spent in pursuit of the client’s goals. As process obstacles have multiplied, attorneys have sometimes added hourly or additional fees when a client requires that the attorney try to expedite the petition or hound the agency in the hope that the “squeaky wheel” will make the adjudication proceed more quickly. In addition, the clients will undoubtedly face additional procedural costs due to the need to extend or renew non-immigrant status or to pursue interim work authorization or permission to travel during the last step in the immigration process. See Interview with Attorney Frances Berger, Law Office of Frances Berger (Aug. 8, 2000) (on file with author).
takes a total of four to seven years for completion. Lastly, CSI must continue to offer Ms. Cheng the same position throughout this process. Furthermore, Ms. Cheng must accept the terms and conditions of employment as described in the underlying petition, regardless of the length of time required to complete the adjudication procedures. A simple promotion or change of job location could invalidate the entire petition.

As previously mentioned, if CSI wants to ensure the recruitment will satisfy the Department of Labor, they will choose the regular labor certification process. This process typically requires three to four years in most of the busy regions. If they are willing to gamble that the prior recruitment is sufficient, or are willing to invest six months of recruitment designed to satisfy the Reduction in Recruitment criteria, they may get a result within two to four months. However, process delays are not limited to the Department of Labor. They are only the first stop on the immigration map.

Moreover, the entire petition is predicated on the concept that Ms. Cheng is going to accept a specific job with CSI. The employer must remain a viable business and must continue to offer the position certified by the Department of Labor or approved by the INS. Since even relatively minor changes can invalidate the petition, the participants in the process often feel ethically bound to continue outmoded employment relationships solely to aid the individual in completing the immigration process. In other situations, the parties will simply agree not to inform the government about the changes. The ethical pressures put on all the participants, are caused largely by the lengthy process, and are enormous.

Long processing times for adjustment of status also exacerbate hardship to the applicant if the application for adjustment of status is ultimately denied. The family can rarely be returned to the prior non-immigrant status.

221. See supra Part II.C.1.d (discussing Reduction in Recruitment).
222. As will later be shown, the Department of Labor appears to be on the verge of implementing dramatic streamlining of its adjudication approach in an effort to eliminate all backlogs. See infra text accompanying notes 272-81 (discussing Department of Labor processing and reforms).
223. Although the American Competitiveness in the Twenty-first Century Act created some limited options for non-citizens to change employers, in general, the worker is dependent on the employer to continue to offer the job throughout the entire long road to immigrant status. See American Competitiveness in the Twenty-first Century Act of 2000, § 104, 8 U.S.C. § 1152 (Supp. V 1999).
224. It is a common theme in ethical literature designed for use by immigration lawyers to discuss how to handle the situation where either the employer or the employee has informed the attorney of an intention to terminate or alter the employment relationship. See, e.g., AM. IMMIGR. LAWYERS ASS'N, ETHICS AND YOUR IMMIGRATION PRACTICE: HAVE YOU CONSIDERED . . . (Alfonso Caprara et al. eds., 1998). See also supra note 98 and accompanying text.
due to the long processing delay and so, if a family is denied adjustment of status processing, they may face a period of unauthorized presence in the United States. Although denials of adjustment of status in business immigration cases are fairly rare, the hardship mounts when there is a delay in the adjudication of the original application.\textsuperscript{225}

Obviously, the effect of the erratic processing is confusion, lack of predictability, and aggravated participants. The less obvious impact is that people can get caught in the middle of immigrant processing and, as was previously explained, the long period of "limbo" increases the need for the \textsc{INS} to make repeat adjudications of the essential elements of the adjustment of status application.

\section*{III. Analyzing the Problem at Its Roots}

\subsection*{A. Integrity, Efficiency, and Transparency: The Essential Process Values}

Where did all of the delay, confusion, and redundant procedures come from? Why is it so difficult for attorneys, let alone the immigrants, to understand how to get from there to here?\textsuperscript{226} The process obstacles are largely the result of the fundamental structure of the immigration adjudication system.\textsuperscript{227} This structure is built out of the substantive statutory provisions, the tripartite delegation to agencies with conflicting missions, and the specific culture of the immigration adjudication system. In combination, or separately, these fundamental structural elements undermine the essential values that are necessary to promote an effective and strong adjudication system.\textsuperscript{228} I describe each value briefly before examining the sources of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{225} The \textsc{INS} Yearbook reports that the traditional denial rate is seven percent of all adjustment of status applications. \textit{See} 1997 \textsc{INS} Yearbook, \textit{supra} note 62, at 17.
\item \textsuperscript{226} As will be discussed later, these problems also frustrate people within the agencies and unnecessarily complicate the adjudications.
\item \textsuperscript{227} Following in the tradition of administrative reform papers sponsored by ACUS, I have both identified structural and statutory factors that contributed to the problems in the adjudications and developed paradigmatic criteria essential to effective reforms. Professor David Martin identified similar structural problems in his analysis of the \textsc{INS} adjudication of political asylum claims during the late 1980s. \textit{See generally} Martin, \textit{supra} note 26 (arriving at similar conclusions by attributing problems in process to its fundamental structure).
\item \textsuperscript{228} Professor Martin also identified four key objectives of a good asylum adjudication scheme: speed, fairness, accuracy, and consistency. \textit{See} Martin, \textit{supra} note 26, at 1322-36. Professor Martin referred to these criteria as key objectives, I will borrow the term process values from Jerry Mashaw. \textit{See} Mashaw, \textit{supra} note 1, at 88; \textit{see also} Robert S. Summers, \textit{Evaluating and Improving Legal Processes—A Plea for "Process Values,"} 60 \textsc{Cornell} L. \textsc{Rev.} 1, 3 (1974) (attributing rationality, humanity, and regard for dignity and privacy as "process values"). Although Summers and Mashaw grounded the process values in the requirements of Constitutional Due Process, I use the term more broadly to reflect those val-
\end{itemize}
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process failures, and the way in which these values are inadequately fostered and protected.

The first of these values, and the most essential to the ability of the administrative adjudication to conform to the substantive law, is integrity. The integrity of the adjudication system measures the degree to which it produces accurate, consistent, and fair results. Accuracy ensures the law is being carried out, and not undermined through error or fraud. Consistency, not only of outcome, but also of treatment along the way, is required to maintain fairness among and between participants, and thus, is necessary to foster respect for and trust in the system. In addition, consistency allows the agency to anticipate and manage workloads, as well as to evaluate agency performance.

Obviously the need to protect the integrity of the decision making is a difficult task. As will be discussed below, the desire to produce accurate and correct adjudications must be balanced against the burdens on the applicants and the resources available to fund the agency operations. Frankly, the fear of fraud is one of the single most important aspects of immigration adjudication and any procedural reforms must give adequate consideration to this concern.

An efficient system successfully manages the agency resources to complete accurate adjudications by acting in a timely manner. Efficiency also refers to the ability of the system to carry out congressional mandates with other qualities that are important while not constitutionally required.

Similarly, Professor Stephen Legomsky evaluated the existing forms of administrative and judicial review of a wide range of immigration related adjudications. See Legomsky, supra note 26, at 1313 (citing Roger C. Cramton, Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings, 16 ADMIN. L. REV. 108, 111-12 (1964)) (discussing three goals of any administrative process). Legomsky focused on essential process values or goals of good administrative process: accuracy, efficiency, acceptability (meaning perceived fairness), and the requirement of consistency. See id. He emphasized the need to integrate the study of adjudication objectives with an understanding of the attributes of the cases and the attributes of the organization making the adjudication. See id. To choose the optimum forum, the administrative process designer must consider both the task and the organization. See generally David P. Currie & Frank I. Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 COLUM. L. REV. 1 (1975).

Accuracy alone is insufficient. From the agency perspective, preventing "false positives" is one of the most important design features. See Martin, supra note 26, at 1267-70 (using this term).

When the 1986 legalization programs went into operation, the low level of evidence needed to qualify for amnesty as a Seasonal Agricultural Worker may have contributed to the distrust the adjudicators demonstrated in reviewing the applications of many groups. The claims of black Haitian agricultural workers were denied at a rate many times greater than the denial rates of white workers. See Jean v. Nelson, 727 F.2d 957, 962 (11th Cir. 1984), modified, 472 U.S. 846 (1985).
out unnecessary duplication, delay, and costs. Efficiency is important to any adjudication system, but it is doubly so here where the decisions control the lives of the immigrant and her family and may be of central economic importance to the sponsoring employer. The lack of resources or the mismanagement of resources has led to long processing delays and redundant procedures. In a system with so many parts, efficiency requires that resources be distributed fairly and appropriately. Moreover, efficient management would integrate the operation of each part with the whole.

Transparency ensures that participants in a system are able to understand both its substantive legal requirements and the processes employed to attain them.\(^{231}\) It refers, as well, to the participant's abilities to predict with reasonable accuracy the likely outcomes of proceedings. It is of especially great importance in a system administered by three agencies that play differing, but related, roles.\(^{232}\) Systems that lack transparency are likely to lack consistency as well, thus, undermining the system's integrity and, therefore, respect for the system. Lack of transparency also impedes efficiency by creating increased numbers of appeals and reviews, as well as inappropriate applications and requests.\(^{233}\)

### B. Process Values Undermined: Three Sources of Bureaucratic Borders


Statutes sometimes specify the procedures to be followed in carrying out

\(^{231}\) Other writers have used the term transparency as the measure of clarity in the substantive provision of law. Transparency is an important factor in measuring the precision of the law. See Diver, supra note 1, at 76 (focusing primarily on the transparency of substance rather than on the clarity of the procedures used); see also Mashaw, supra note 1, at 90 (stating "the transparency of a decision process—its openness and comprehensibility—will make a worthwhile contribution to the sense of self-respect of any participant . . . .").

\(^{232}\) Because the three agencies should coordinate actions, the lack of transparency in procedures makes it more difficult to manage that coordination. Moreover, the technological systems of the agencies are so poor that it is extremely difficult to locate and track individual petitions. When agency managers cannot estimate the workload or productivity of existing adjudicators, it is extremely difficult to reduce backlogs, or identify necessary improvements. Even when the GAO or Congress is critical of one of the agency's systems and workload management, the critic rarely considers the larger inter-agency complications. See, e.g., GAO Report, supra note 28. The report does not mention the need for the INS to coordinate technological systems with the Department of State or the Department of Labor.

\(^{233}\) Professors Diver and Sofaer concluded that the vague standards in the adjustment of status provisions and the failure of the INS to either adopt rules or to publish cases concerning the exercise of discretion in these applications led to wasted resources within the INS and to a high rate of reversal upon administrative or judicial review. See generally Diver, supra note 1; Sofaer, supra note 26.
statutory mandates, albeit, in quite general terms. A statute could mandate that an agency establish and publish rules, or it might create the structure for a “trial-like” adjudication system.\(^{234}\) Frequently, Congress leaves open the issue of how the agency will conduct its adjudications.\(^{235}\) Providing for flexibility in developing procedures is not, in and of itself, a design flaw. It is the lack of specificity in the INA that makes the agencies’ interpretations very important. The divided responsibility, discussed in the next subsection, compounds the problems of informal interpretations and lack of transparency in the adjudication criteria. Each agency has different approaches to its adjudications. The three do not necessarily share the same adjudication priorities and they vary in the frequency with which the agency will promulgate regulations or issue precedent decisions.

In business immigration, Congress has done little beyond delegating responsibility to a three-headed monster. It has not only failed to specify details of the adjudicatory system, but also has left to the agencies the job of delineating the specific content and definition of far too many vague substantive categories. Vague standards necessitate a process to determine who qualifies under the standard. Thus, the process itself becomes a more significant factor in the outcome of the adjudication. Like many other agencies, the INS, Department of State, and Department of Labor chose to implement the law through informal adjudication. These adjudications are exempt from the quasi-trial type procedures of the APA.\(^{236}\) To guide the informal adjudications, agencies may promulgate regulations, publish administrative decisions, or adopt guidelines and informal policy statements.

In many situations, agencies use a variety of informal procedures. However, in the business immigration arena, the task of determining the “law” and understanding the procedures is more complex because the three agencies have completely separate approaches to the development of the law and have no formal coordination amongst themselves. For example, the Department of State routinely promulgates regulations under the full rule-making procedures of the APA and publishes a Foreign Affairs Manual (FAM) containing instructions regarding the application of the regulations.\(^{237}\) The manual also documents procedures for Department of State


\(^{235}\) In some situations, where Congress has required a “hearing on the record,” courts have required formal adjudication procedures under the APA. See 5 U.S.C. §§ 554, 556-557 (1994 & Supp. V 1999). The INA does not include a requirement of a hearing for any of the business immigration procedures discussed in this Article.

\(^{236}\) See id. § 553 (authorizing informal agency adjudication). See Verkuil, supra note 45, at 740 (inferring APA and Due Process Clause provide only minimal requirements for most informal adjudication).

\(^{237}\) See DEP’T OF STATE, 1 FOREIGN AFF. MANUAL § 000, available at
The Department of State regularly publishes copies of its memoranda to the field regarding changes in procedures or noting special emergencies. However, there is no administrative or judicial review of Department of State regulations and adjudications.

In contrast, the Department of Labor rarely issues formal rules and publishes few memoranda or informal policy statements. Yet, its administrative review procedures of denied labor certifications are the most formal adjudications made by any of the three agencies. When a labor certification is denied by the Regional Certifying Officer, the employer may appeal to a board of administrative law judges assigned to the area. This Board of Alien Labor Certification Appeals issues three times the number of INS precedent decisions.

The INS, while publishing more formal rules than the Department of Labor, does not frequently publish precedent administrative decisions regarding adjudications under the regulations and has infrequently published material as "Operating Instructions." Finally, even if the INS provided more detailed published regulations or more precedent decisions, the failure of Congress to provide a clear delegation of more precise standards may ultimately defeat the goal of flexibility in the adjudication. The INS has a history of reducing broad standards to extremely narrow rules via its

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238. See generally id. (describing procedural requirements consular officers must follow if the officer believes an applicant has made a fraudulent statement).

239. The Department of State Cables are published on the Department website and released to a range of industry publications. See Dep’t of State, Cables, at http://www.state.gov. However, they are not published in the Federal Register.

240. The decision of a consular officer is immune from judicial or administrative review and meant to guarantee consular officers independence. See INA § 104, 8 U.S.C. § 1104 (1994 & Supp. V 1999). The only administrative actions of the consular officers that are subject to internal administrative process or review are cases where the visa is denied due to fraud or misrepresentation requires See, e.g., Dep’t of State Regulations Pertaining to Both Nonimmigrants under the Immigration and Nationality Act, as Amended, 22 C.F.R. § 40.6 (2001); Dep’t of State, 9 Foreign Aff. Manual § 40.6, N1.1, available at http://www.foia.state.gov/masterdocs/09fam/0940006N.pdf (last visited Jan. 29, 2002). The Advisory Opinions of the Visa Office are not published either externally nor are they internally circulated among consular officers. See also Nafziger, supra note 3.

241. In the place of the Operations Instructions, the INS reported that it would be preparing separate Field Manuals. See INS, Operation Instructions, at http://www.ins.usdoj.gov/graphics/lawsregs/instruc.htm (last visited Jan. 29, 2002). A possible disadvantage of separate Field Manuals could be a failure of the agency to ensure cross-training and wider gulfs of understanding could grow between INS enforcement and adjudication. The Field Manuals are not available online and are not routinely distributed to public sources. In some cases, the failure to publish informal policy memoranda would be considered a violation.
regulations and interpretive decisions. The culture of the agency, discussed below, the history of the agency adjudications, and Congress's failure to insulate the agency from the political battles which face almost all immigration policy choices, encourage the agency to reduce the broad standards to narrow rules, such that they become of limited use.

The INS also has an old pattern of failing to adopt regulations altogether. For example, in 1979, the INS proposed a rule establishing stan-

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242. See infra Part III.B.3 (discussing territorial culture of the INS).

243. For example, the INS did not adopt regulations defining the non-immigrant investor (E-1/E-2) visa category until 1997. See Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. 48,138 (Sept. 12, 1997) (codified at 8 C.F.R. § 214.2(e)). The confusion between the INS and Department of State adjudication of this visa category resulted in frequent inconsistencies. See In re Walsh & Pollard, 20 I. & N. Dec. No. 3111 (B.I.A. 1988) (describing how Department of State granted E-2 status but INS refused admission because it interpreted the category more narrowly and how interpretations were not supported by any published regulations).

Another important example is the INS failure to adopt sufficient regulations defining the scope of permitted activity under the business visitor visa. The minimal definitions that appear in title 8, section 214.2, of the Code of Federal Regulations primarily describe special situations. This non-immigrant visa category may be the single most important tool for international business people, but the limits on the business activity permitted under this visa category have never been defined in the regulations. There have been few precedent decisions issued over the years. See, e.g., In re Cote, 17 I. & N. Dec. No. 336 (B.I.A. 1980); In re Hira, 11 I. & N. Dec. No. 1647 (B.I.A. 1966); In re W, 6 I. & N. Dec. No. 2783 (B.I.A. 1955). While some might argue that the lack of regulations adds flexibility for case-by-case consideration of admission at the border, the lack of clear standards makes it nearly impossible for a businessperson to argue for admission at the border and it makes it difficult to provide legal guidance to business clients. Because the INS is now empowered to summarily exclude even people with valid visas if the inspector believes the visa was obtained based on fraud, misrepresentation, or because the officer believes the individual holds the wrong visa category, the issue is of more pressing concern. The new expedited removal procedures do not provide for administrative or judicial review of the removal decision. See Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 CONN. L. REV. 1411, 1449-52 (1997) (discussing controversy surrounding lack of administrative and judicial review for persons subject to new expedited removal provisions). In one case, the INS denied admission to a Chinese businesswoman who presented a valid B-1 visa, maintaining that she needed a different visa stamp. There may be other cases, but the inability of scholars to study this procedure makes it difficult to measure its impact. See Karen Musalo et al., The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (2000) (examining INS expedited removal proceedings since 1997).

The INS has also refused to allow law professors or non-profit organizations to observe these expedited proceedings. See INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (1994 & Supp. V 1999). While the INS is required to produce information under the Freedom of Information Act (FOIA), section 552 of the APA states that there are bona fide exceptions to releasing information. See RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 8.3 (1995). Some statistical information was ultimately obtained after prolonged negotiations
standards for determining when an applicant should be granted adjustment of status as a matter of discretion. The INS later withdrew its own proposal stating it would be impossible to foresee all the necessary relevant factors needed to create a comprehensible list and any list created would be unnecessarily rigid. While flexibility may be a noble and equitable principal, the INS worried that clearly stated standards would result in increased litigation. Writing about this failure to promulgate rules, Professor Colin Diver rejected the INS assumption of increased litigation because most appeals of denied applications were granted. Therefore, he believed the INS could achieve greater uniformity and operate more efficiently if the agency promulgated rules. Further, clearer rules would create stronger precedent and reduce the amount of cases requiring "elaborate ad hoc justification."

The lack of clear rules in adjustment of status is even more troubling today. At the time Professors Diver and Sofaer were studying the procedure, the INS processed fewer than 200,000 applications for adjustment of status between the INS and the American Civil Liberties Union (ACLU). See Univ. of Cal., Hastings Coll. of Law, The Expedited Removal Study, at http://www.uchastings.edu/ers (last visited Jan. 29, 2002).

See supra Part II.C.3 (discussing adjustment of status). It is the process where an individual converts from non-immigrant or unlawful presence to permanent resident within the United States and thus does not have to complete her immigration at a U.S. consular post abroad. Professor Diver documented this example of the INS' rejection of the regulatory approach. See generally Diver, supra note 1 (providing a discussion on INS rule making).


See id.; see also Diver, supra note 1, at 94-95; Sofaer, supra note 26. Technically, there is no right to an administrative appeal of a denial of adjustment of status. See INS Adjustment of Status to that of Person Admitted for Permanent Residence, 8 C.F.R. § 245.2(a)(5)(ii) (2001). Applicants request reconsideration or may push for referral to the District Director or the Regional Service Center Director who has the authority to overturn the individual examiner's refusal. See INS Powers and Duties of Service, Department of Justice, 8 C.F.R. § 103.5 (2001). Many courts have ruled that when the INS denies adjustment of status, the court lacks jurisdiction due to a failure to exhaust administrative remedies, because the INA allows renewal of the application in removal proceedings. See, e.g., Cardoso v. Reno, 216 F.3d 512 (5th Cir. 2000); McBrearty v. Perryman, 212 F.3d 985, 986-87 (7th Cir. 2000). The government has also tried to argue the 1996 statutory amendments bar review of denied adjustment of status applications. See, e.g., Prado v. Reno, 198 F.3d 286 (1st Cir. 1999) (rejecting limit on subject matter jurisdiction).

See Diver, I note 1, at 95.

See id.

per year. In December of 1999, the INS reported more than 1,001,550 permanent resident adjustment applications were awaiting adjudication. Moreover, in the employment-based adjustment of status application, the adjudication is made at the Regional Service Center without any individual interview of the immigrant. Thus, one of the most important stops on the route to immigration is conducted by a nameless, faceless bureaucrat solely on the basis of the forms and supporting documentation submitted. Finally, the stakes have risen since the prior studies of the adjustment of status procedure. Prior to 1996, if the INS denied an application for adjustment of status in the exercise of discretion the immigrant could renew the application overseas at a U.S. consulate. This continues to be true, however, for any person who has acquired more than 180 days of unlawful presence in the United States. Departure from the physical territory of the United States triggers the operation of a new multi-year bar to immigration. Given the huge volume, the absence of a personal interview, and for some people, the importance of the decision, the continuing failure of the INS to promulgate clear rules is irresponsible. To compound the difficulties, for more than five years, the INS has failed to issue even proposed rules defining "unlawful presence." The lack of regulations makes it difficult for INS examiners and participants, but raises a particular problem for the U.S. consular officers who must make a case-by-case determination of inadmissibility due to the period of "unlawful presence." This one example illustrates the problems created by a lack of rules and the way this problem intensifies due to the multi-agency delegation.

These differences in promulgating rules or publishing policy may seem one of style, however, they are more significant. The manner in which an

250. See generally Diver, supra note 1; Sofaer, supra note 26.
252. In a few cases, the Regional Service Center may refer the case for interview at an INS District Office. See Interview with Frances C. Berger, Attorney at Law, Law Office of Frances Berger, New York, N.Y. (Aug. 15, 2000) (notes on file with author).
253. See GORDON ET AL., supra note 72, at § 51.01[1][b], [2][c], [3].
254. See INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1994 & Supp. V 1999). Unlawful presence of more than 180 days bars the individual from reentry for three years. If the individual has acquired more than 365 days of unlawful presence, the bar increases to ten years. See id.
256. See DEP’T OF STATE, CABLE No. 36, reprinted in 3 IMMIGR. BULL. 438 (May 1, 1998) (issuing a general cable providing an interim preliminary interpretation of INA § 212(a)(9), 8 U.S.C. § 1182(a)(9)).
257. This problem is discussed more fully in the next subsection. See infra Part III.B.2.
agency develops rules, whether by rule making or adjudication, shapes the information available to both the public consumers and the officers working within the agency. Moreover, the rulemaking or adjudication initiatives of one agency may conflict with or alter the policy choices of another agency. This was clearly the case in the master's degree employment-based second preference litigation discussed above. 258 Yet beyond litigation, these differences and failures to coordinate policy can lead to distrust between government actors regarding the accuracy of other agencies' adjudication because the standards, rationale, and procedures used to make the initial adjudication are unclear.

Consider the example of the INS adjudication of "National Interest Waiver." 259 Congress gave no express definition in the INA, thus, inviting the INS to determine whether the adjudications should be bounded by defining regulations or left open to case-by-case adjudication. 260 Because there are few published opinions describing approved cases, the outsider has few clues regarding the quality of the adjudication or the standards applied. We can see from the earlier discussion that the value of transparency has been left out of both the Congressional and agency choice. Ultimately, the client filing an application cannot know whether she meets the definition.

The lack of transparency means that businesses are unable to determine whether to go to the expense and trouble of filing such petitions. Individuals are uncertain as to the likelihood their petition will be granted and are unable to plan their lives, make living arrangements, give notice at existing jobs, and make judgments about alternative job offers in countries throughout the world. 261 Of course, the INS response to this critique will be that they purposely did not adopt regulations because the agency wanted to leave the greatest possible flexibility in the adjudication of qualifications. 262 While this is a noble goal, the agency could have adopted regulations giving the public

260. In a sense, this distinction is not so pure, for even when the agency published regulations, each case is still resolved based on the individual adjudicators application of the regulatory criteria to the facts of the case. In the cases of persons likely to fit the "national interest" category this is no small matter, for they are likely to have skills and expertise which cause them to be in great demand. If it is truly in the interest of the nation to bring them into the United States, such lack of transparency harms the national interest, because they are hardly likely to tolerate the uncertainty, duplication, and delay that characterize the current process.
guidance but preserving adequate room for the exercise of discretion. In fact, in the INS’ own regulations concerning qualifications for “Aliens of Extraordinary Ability in the Arts, Sciences or Business,” they set forth detailed examples of qualifying evidence, but retained flexibility by providing that if the prior standards “do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence to establish the beneficiary’s eligibility.”

Furthermore, from the national interest example we can see how Congress failed to consider efficiency in the operation of the process. If the Department of State or Department of Labor begin to perceive this category as a “loophole,” they may pressure the INS to restructure the adjudication standards or, in the case of the Department of State, find ways to force the INS to re-adjudicate approved petitions. Further, the other agencies could call for the INS to require greater documentation from the applicant to prove, to their liking, that she meets the definition. These pressures burden the system in general and lead to delays.

Perhaps more importantly, Congress’s failure to specify the nature of the process for the labor certification application severely undermines the integrity, as well as the transparency and efficiency, of the system. The INA states that the Secretary of Labor grants a labor certification, but the statute is silent about how that adjudication process must proceed. Originally, the Department of Labor tried to adjudicate the labor certification cases by comparing the application to general labor market information. If the Department had no statistical information indicating shortages in the occupation, the agency denied the certification. Employers challenged the agency procedure because the statute refers to certification of no “able, willing, qualified . . . and available” U.S. workers. The employers successfully argued that unless the Department could point to an available worker, the employer was entitled to the certification. The Department of Labor re-

263. See 8 C.F.R. § 204.5(h)(3) (including standards such as: “(i) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor; . . . [or] (viii) [e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation”).

264. Id. § 204.5(h)(4).

265. This type of distrust in the quality and accuracy of INS adjudication of EB-5 investor petitions leads directly to criticism of the program by the Department of State and the referral of cases back to INS headquarters. Eventually, the INS suspended the adjudication of its own petitions based on concerns about the quality of the adjudications taking place at its service centers. See infra Part IV.D.5 (discussing EB 5 adjudications).


267. Id.

268. See, e.g., Digilab, Inc. v. Sec’y of Labor, 495 F.2d. 323 (1st Cir. 1974) (holding
responded by requiring, in almost all situations, case-by-case supervised recruitment to ensure no such worker existed. Thus, Congress’s failure to more carefully consider the procedural implications of its statutory certification resulted in litigation and ultimately a cumbersome, difficult, and irrational procedure of trying to measure individual market failures.

Setting aside that classic example of the failure to design a process adequate to the task, the labor certification process has operated basically as a case-by-case test of the bona fides of the employer and the job conditions since 1977. For nearly a quarter of a century, the INS and Department of State have assumed the Department of Labor is making an adjudication of the working conditions and prevailing wage. The failure of Congress and the Department of Labor to adequately address the implications of the labor certification adjudication led to the horrific processing delays and expensive advertising and professional costs described previously. And while the obstacles and hurdles of the labor certification process clearly forced some cases out of the system, the overall approval rates were extraordinarily high. Given the frequency of approval, it is difficult to understand why employers and employees should have to endure $10,000 or more in adjudication costs and years of waiting.

As explained in Part II, in many parts of the country the delays in labor certification climbed to three and four years. Congress became frustrated with the operation of the program and began to dramatically reduce the labor certification program budget. The belt tightening and political pressures forced the Department of Labor to fashion expedited adjudication systems. The Department of Labor revived preexisting (but rarely used) Reduction in Recruitment regulations. Under those regulations, as detailed in Part II, employers submit evidence of past recruitment (unsuper-
vised by the Department of Labor or state agency) to prove the lack of available workers. However, the Department of Labor began an even more streamlined re-engineering of its procedures and proposed the development of an automated adjudication procedure. The proposed system will ask employers to submit a form to be electronically scanned for an initial review by a computer. This procedure would rely on employer attestation without supporting documentation. If the answers provided in the new form match Department of Labor criteria, the case would be approved without participation by the state agency or the Regional Certifying Officer. One official estimated the new procedure might result in nearly eighty-five percent of all filings being approved without further inquiry.

These examples also demonstrate that the current system does not sufficiently protect the value of integrity. As the Department of Labor streamlines its labor certification procedures, other agencies become concerned about "false positives." If the Department of Labor streamlines its adjudication to an attestation model where most cases pass through quickly with minimal review of the evidence, the other two agencies will become concerned that some cases were approved erroneously. It is highly likely that without coordination and trust in the Department of Labor procedures, the other agencies will delay or intensify their adjudication of immigrant petitions and individual visa applications to ensure the job offer is bona fide and the labor certificate deserved. Thus, the drive to protect the system

276. See discussion in text accompanying notes supra 122-26.
277. See Labor Certification Process for the Permanent Employment of Aliens in the United States, 65 Fed. Reg. 51,777 (Aug. 25, 2000) (to be codified at 20 C.F.R. pt. 656). This program is also discussed in Part IV.C.2. The announced notice of intent to propose a rule gives no details about the new program. The information discussed here is based on interviews with agency personnel and public comments made at the annual meeting of AILA held June 15, 2000, in Chicago, Ill. As of February 2002, the changes have not been implemented.
278. Information obtained during interviews with agency personnel and public comments made at the AILA's annual meeting.
279. See id.
280. It is unclear whether the criteria would differ from the substantive criteria applied at the current time. It will be difficult to assess the impact of this change because the criteria of the Regional Certifying Officers were not spelled out in detailed regulations and obviously adapted to changes in occupations or labor conditions. Thus a system which was already opaque may become impenetrable. In the past, attorneys often learned about current criteria through informal conversations with the Regional Certifying officers or through attorney/agency liaison meetings. See discussion of these meetings infra Part IV.
282. See discussion of re-adjudication across agency operations, supra Part II.
decreases efficient operations and outcomes become more obscured as cases are shuffled back and forth between the agencies. This problem is discussed further in the next section, which considers the specific process problems generated by splitting responsibilities among the three agencies.283

The failure to adequately consider the process requirements of the substantive provisions is a problem in many areas of law. However, in the specific context of business immigration adjudications, the vague statutes work a particularly devastating blow to transparency, integrity, and efficiency.

2. Delegation to Multiple Agencies

Many scholars have suggested, when Congress adopts vague standards and delegates adjudication to agencies, Congress is trying to look like it made hard policy choices while really shielding themselves from criticism.284 The delegation of the final adjudication to the agency allows members of Congress to blame the agency for approving the wrong cases or for failing to approve the right cases.285 Here, the situation is made even more complex by delegating closely related responsibilities to more than one agency.286 Further, because it is a general tenet of administrative law that courts will generally defer to an agency’s interpretation of a statute,287 including agency interpretation of how to implement the law, the confusing structural delegation issues in the INA contribute to immigration law’s insulation from judicial review. By selecting at least three federal agencies to implement the immigration laws without any one agency having authority over the other two, Congress laid the foundation for conflict and confusion. Of course, a chief executive wanting to control the three has authority over all, but the ability of the executive to continuously monitor the actions, policies, and management of immigration adjudications is obviously lim-

283. See infra text accompanying notes 284-314.

284. See generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 119-34 (1993) (arguing only theory of agency delegative process may be better, but practice of agency process is subject to same political pressures and arbitrariness as regular congressional legislative process).


286. The situation, in many ways, parallels the confusion when Congress delegates responsibility to both state and federal agencies.

ited to larger policy concerns. The INA does not mandate coordination, nor does it contain a mechanism for uniform reporting or even establish formal mechanisms for communication. Yet, adjudication choices made in one agency can have a dramatic impact on the workload and operations of another.

Structural delegation can at times leave one of the actors insufficient authority to act. The Department of State has limited authority to rescind or cancel visas if the consular officer and the Visa Office find that the beneficiary committed fraud. The consular officer may not revoke the underlying immigrant visa petition even if the consular officer has evidence to support a belief that the case was inappropriately approved. Instead, the consular will refer the case back to the INS for reconsideration or investigation. However, the INS will not take any action in the case. The beneficiary and petitioner become trapped in an administrative limbo. Setting aside the issue of which agency should have the authority to revoke a petition, the failure of the INA to consider the situation reflects a fundamental source of process problems that needs a remedy. The absence of clear statutory authority leaves the agency to battle out appropriate procedures and the varying priorities or resources of the agencies may leave both dissatisfied. Moreover, if the consular officer is not responsible for making the revocation decision, that officer may not feel accountable for his or her action. On the other hand, if the INS does not act on the revocation request or fails to inform the consular officer of the status of the case, the consular officer may distrust other agency adjudications or feel there is little point in

288. Similarly, other reports discuss and evaluate the performance of the immigration function, noting that the policies seem to be in regular tension—such as conflict between admissions policies which seek to enhance competitiveness and those that seek to protect U.S. workers. Furthermore, these reports identify poor relations between the executive and legislative branches of government on immigration issues produce a congressional tendency to micro-manage the issue and undervalue the expertise and experience of the agency’s managers and analysts. See Demetrios G. Papademetriou et al., Reorganizing the U.S. Immigration Function: Toward a New Framework for Accountability 28 (1998) (noting external accountability suffers in performance of immigration function).

289. See Dep’t of State Visas: Documentation of Immigrants under the Immigration and Nationality Act, as Amended, 22 C.F.R. § 42.82(a)(1) (2001) (stating visa may be revoked if consular office knows or is satisfied after investigation that the visa was received fraudulently).

290. Interview with Nancy-Jo Merritt, Partner, Littler Mendelson in Phoenix, Ariz. (Aug. 15, 2000) (confirming it is not uncommon for INS to fail to act upon referral from Department of State).

291. Interview with Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance, Department of State, Visa Office (July 28, 2000) (on file with author) (confirming consular officers became frustrated with lack of INS or Department of Labor resources to investigate fraud identified at overseas interviews).
challenging the INS action.

Another clear example of confusing delegation to the three agencies concerns the intersection of the labor certification requirement and the immigrant petition. While the INA requires all employment-based immigrants to obtain a labor certificate from the Department of Labor, the statute is unclear about the authority of the INS (or the Department of State) to inquire into the legitimacy of the labor certificate. In some cases, the INS questions the wage rate certified in the petition. More commonly, the INS has limited its inquiry to whether the employer can prove it is economically strong enough to pay the certified wage. In the rare cases challenging the authority of the INS to revisit the validity or terms of the labor certification, federal courts have had great difficulty in defining the scope and limit of the agency's authority. Over time, a line of cases developed holding that while the INS has the ultimate authority to determine if the immigrant is qualified for the visa category, the INS may not alter the job requirements certified by the Department of Labor. However, while attorneys and judges may be capable of parsing these cases, it is unclear that agency actors always understand the boundaries of their authority.

There are other examples in the INA. Section 204(b) of the INA instructs the INS to consult with the Department of Labor in adjudicating eligibility for the immigrant visa categories. In reality, the INS does not consult with the Department of Labor at all. What did Congress mean by this consultation requirement? Does the Department of Labor have the authority to interfere with INS adjudications? It is impossible to answer this question with certainty and yet, this is the kind of important question that must be considered if the agencies are going to be able to reduce process barriers.


293. See In re Great Wall, 16 I. & N. Dec. No. 142 (B.I.A. 1977) (holding District Director determined petitioner had failed to establish he was financially able to pay the salary rate as established in the job offer); In re Sonegawa, 12 I. & N. Dec. No. 612, 615 (B.I.A. 1967) (determining petitioner had ability to pay beneficiary stipulated wages of job offer and to meet conditions of certification).

294. See Masonry Masters, Inc. v. Thornburgh, 875 F.2d 898, 899-900 (D.C. Cir. 1989) (holding INS may evaluate employer's ability to pay prevailing wage at the time of the initial labor certification application).


296. See generally Mashaw, supra note 285.

297. See INA § 204(b), 8 U.S.C. § 1154(c) (1994).
All three of the essential process values are greatly compromised by this type of re-adjudication when the procedural limits and responsibilities of each agency are not well-defined. Perhaps the worst offense is the clear lack of efficient and effective adjudication. The agencies and the participants are demoralized when a case is kicked back and forth between the agencies and either falls into limbo or results in a lost immigrant visa. As discussed in Part IV, there may be times when the Department of State, due to its expertise in recognizing patterns of fraud in foreign countries, may be preserving the integrity of the immigration system by questioning the actions of the Department of Labor or INS. When those instances arise, the statute must provide a clear mechanism for resolving the issue and Congress and the administration must support the agencies with adequate resources to complete the investigations.

There are other examples of direct conflict between the substantive interpretations and procedural requirements of the three agencies. For example, Congress authorizes multinational employers to transfer employees temporarily to the United States who have at least one year of experience with the multinational at a foreign location and who possess "specialized knowledge." An alien is considered to [have] . . . specialized knowledge with respect to a company if the alien has a specialized knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company. These multinational employees are generally not eligible for immigration as employment-based first preference or priority workers because they do not meet the statutory definition of manager or executive. Accordingly, if the U.S. branch of the multinational wishes to sponsor this specialized employee for immigration, the employer will need to obtain a labor certificate. This seems to indicate that Congress meant to facilitate temporary admission of this category of worker but not necessarily to allow the employer to be exempted from a labor market test if the employer wishes to sponsor the worker for a permanent position.

The Department of Labor has long held that employers may not request experience gained with the same employer as a minimum entry require-
ment for a labor certification position. The philosophy of the Department of Labor is that the employer cannot normally include this experience as a minimum requirement because if the employer initially hired the employee without the skills, then the employer can similarly train a new worker. 302 However, the Department of Labor had not routinely applied this same restriction to experience gained with a related entity outside of the United States. 303 In 1990, the Department of Labor applied the rule against using prior experience to multinational employers. 304 Today, training or knowledge an employee acquired overseas cannot be used to justify the permanent need for the employee. Thus, the very specialized knowledge that made the employee eligible for the L-1B temporary visa, becomes a disadvantage in the labor certification processing. Department of Labor personnel become suspicious of the employer's minimum requirements. From the employer's perspective, it feels as if the multinational corporation is told to prove one thing to allow the admission of the foreign worker by the INS and to disavow the very same characteristics in the petition with the Department of Labor. Finally, assuming the labor certification is still issued, the INS becomes suspicious of the original finding that the employee was a person with specialized knowledge because that knowledge is not required in the labor certification and immigrant visa petition.

Some of the conflict between the Department of Labor and INS in the example above is created by the failure to waive the labor certification requirement for this group of multinational workers, and thus, the substantive statutory provisions can be blamed. A great deal of the confusion and contradiction however, arises from the way the agencies handle the same factual information and the fact that the vagueness in the statutory criteria forces the agencies to re-fight the political policy choices that Congress should have made in the statutory criteria.

The agencies have different agendas and thus, different concerns. While the agency differences are understandable, from the perspective of the participants, the system is baffling. Unsophisticated participants do not understand the intricacies of the agencies' policy goals. To them each stage of the process results in a change in the rules.

302. The employer can challenge this rule by making a showing that the employer can no longer train for the position due to severe time or economic pressures. See In re Indus. Inc., 88-INA-82, 1989 WL 250355, at *1 (BALCA Feb. 9, 1989) (en banc) (defining business necessity exception for this and other requirements).


The delegation to multiple agencies without building in coordination simply complicates the communication between the agencies. For example, the INS decided to process business immigration cases at the Regional Service Centers. This decision by one agency created a slow down in overall processing because the Regional Service Centers were unable to handle both the naturalization petition adjudication and the adjustment of status procedures with their existing resources. Moreover, the Regional Service Centers processed adjustment cases only if the employer and immigrant had first secured an approved I-140. By separating the filing into a two-step procedure, the Service Center necessarily required some repetitive action and lengthened the adjudication process.\textsuperscript{305} As delays became more and more onerous, immigrants began avoiding the adjustment of status procedure and switched to overseas immigrant processing with the Department of State. However, if at the time of original filing, the petitioner employer indicated that the immigrant would complete the final stop via adjustment of status processing, no formal notice of the I-140 approval is sent to the Department of State. As explained, many consulates will not accept copies of approval notices mailed to the employer. Before the Department of State accepted jurisdiction over the case, the employer must file a request for the INS to issue a written notice, directly to the Department of State, confirming INS prior approval. The INS requires the employer to file a form to obtain the notification.\textsuperscript{306} And, unfortunately, given the low priority of this type of petition, in some Regional Service Centers delays grew to twelve months or more simply to get this verification issued.\textsuperscript{307}

\textsuperscript{305} Until 1996, the INS had utilized a one-step procedure for immediate relatives and employment based cases where there was no current backlog in the visa category. In the one-step procedure, the immigrant petition and the adjustment of status application are adjudicated simultaneously.

\textsuperscript{306} See INS, FORM I-824, APPLICATION FOR ACTION ON AN APPROVED APPLICATION OR PETITION, available at http://www.ins.usdoj.gov/graphics/formsfee/forms/i-824.htm (last modified Jan. 29, 2002) (verifying to Department of State that INS has approved the visa petition).

\textsuperscript{307} Not all of the Regional Service Centers became this backlogged, but the lack of consistent processing between the Service Centers contributed to other problems. Some attorneys found it faster to file a new I-140 petition requesting overseas processing. The INS then had to adjudicate the same case twice. Apparently, the INS database does not necessarily signal to the examiner that this is a duplicate filing. See Interview with Frances Berger, Attorney at Law, Law Office of Frances Berger, New York, N.Y. (Sept. 3, 2000) (reporting comments made by immigration attorneys at AILA meetings). In addition to the duplicate filing, attorneys have also contacted consulates directly to see whether, and under what circumstances, they would accept the original INS issued approval notice with an attorney certified copy of the I-140 petition. Where this was allowed the immigrant could pursue both adjustment of status and immigrant visa processing, completing the process that resulted in the fastest decision. See Interview with Veronica Jeffers, Attorney, Fragomen,
Figures 4 and 5, I-824 Processing Time Lines

California Service Center I-824 Backlogs (in months)

- Employment-Based
- Family-Based
- Resident Related

*Yearly averages based upon incomplete reporting. Figures are based on Service Center reported processing times, and reports of actual processing times from immigration attorneys. Available reports include: 1997: November, December; 1998: May, November, December; 1999: February, March, April, July, August, October, November, December; 2000: January, March, May.

I-824 Processing Backlogs (in months)

- NE. Service Center
- TX. Service Center
- VT. Service Center

* Yearly averages based upon incomplete reporting. Figures are based on Service Center reported processing times, and reports of actual processing times from immigration attorneys. Available reports include:
1997: NE-December. TX-December. VT-October, November.
1998: NE-February, March, May, July, October, December. TX-January, April, May, July, August, October. VT-March, April, May, August, October, December.
1999: NE-January, March, April, July, August, October, November, December. TX-January, March, April, May, July, August, September, October, November, December. VT-February, June, July, August, September, October, November, December.

Del Rey, Bernsen & Loewy (Sept. 3, 2000).
By delegating power to three agencies, Congress failed to consider the good operation of the system as a whole. When no agency is in control of the entire process, the decision of one to require a new filing or original approval notices, complicates and expands the work of another agency. Moreover, the tremendous backlog in adjustment of status cases has triggered a marked increase in the Department of State’s immigrant visa processing workload. The agency could not anticipate this increase based on historical trends.

On one level, this example illustrates failure to communicate between agency databases. On another level, it is an extreme example of what happens when two agencies have authority over the immigration adjudication function, but have little or no cooperation between their operations. Further, attorneys and employers hoping to minimize delays in last stop adjudication, filed duplicate petitions or requested special processing and then abandoned the slower track application creating even more unnecessary work for the agencies.

In a few rare situations, the agencies negotiate adjudication procedures minimizing redundancy or streamlining the procedures. For example, the Department of Labor delegated to the INS the determination of which immigrants qualified for the exemption from labor certification found in Schedule A. The recent INS delegation of the adjudication of temporary agricultural worker petitions (H-2A) to the Department of Labor is another positive example. Delegation can save time in simply transmitting paper and information between the agencies. On the other hand, in some situations, the special expertise of the agency may be lost if it gives up its adjudication role. While the agencies should certainly consider these cross delegations, in some situations, it is more appropriate for Congress to make

308. Although the Department of State receives electronic information about the approval of I-140’s, the information is so often filled with errors that the agency insists upon written formal notification. See Interview with Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance, Department of State, Visa Office (July 29, 2000) (on file with author).


a careful assessment of the purposes of the adjudication and which agency
is most likely to have the resources and skills to make the accurate deter-
mination.

Part IV of this Article suggests some structural reforms aimed at lessen-
ing the duplicative delegations and eliminating conflicts. 312 Undoubtedly,
new issues will arise so long as multiple agencies share responsibility for
the immigration function. Unless measurement and feedback mechanisms
are fully developed between the actors, the tripartite delegation will con-
tinue to be a main contributor of interior process borders.

3. Territorial Culture

Many of the process failures arise from the failure of Congress and the
agencies to adequately contend with the internal and external forces that
shape the agency culture. 313 Although many of these factors operate in
other areas of administrative law, several are particularly strong in immi-
gration law. The failure to plan for and counteract these forces, has directly
contributed to the erosion of the essential process values.

a. Congressional Mandates and Dictated Priorities

Congress must bear a large part of the responsibility for the crisis in im-
migration adjudications. 314 Congress mandated express and implied priori-
ties in the statutes 315 or demanded prioritization of specific programs with

312. See infra Part IV.B.
313. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND
WHY THEY DO IT 91 (1989) ("Every organization has a culture, that is, a persistent, pat-
terned way of thinking about the central tasks of and human relationship within an or-
ganization."). Wilson goes on to note that many organizations have multiple cultures and the
relationship of the agency culture(s) to the agency mission may dramatically impact the ef-
fectiveness of the organization. See id. at 91-92. Here I am using culture in a broad manner
to encompass both the internal and external forces that shape the organizations.
314. Politics presents a treacherous double-edged sword for the INS' efficient and ap-
propriate facilitation of immigration. The highly political debate persists about how vigor-
ously the INS should control illegal immigration. When the INS engages in activities such
as surprise work-site inspection, criticism immediately flows from immigrant groups and its
conduct is subject to congressional scrutiny and investigation. Yet, on the other hand, if
lawmakers perceive the INS as remiss in their duties, they immediately capitalize on the
agency's unpopularity by encouraging resentment against it as congressional elections ap-
proach. A similar situation plagues other agencies, such as the IRS. See GOVERNMENT
PERFORMANCE PROJECT, supra note 12; see also Laurent, supra note 12, 13-18 (outlining
Government Performance Project in detail).
dating thirty day processing for H-1B and L-1 petitions).
the threat of reduced funding or of imposing new statutory mandates.\textsuperscript{316} For example, some statutory limits force an allocation of resources to a particular visa category without adequate consideration of how the allocation might disadvantage or paralyze a separate function. Two of the most obvious examples are the naturalization and H-1B petitions. When Congress pressures INS to reform and expedite its naturalization backlogs, the Service Centers move personnel away from the adjustment of status processing and the processing of the employment-based immigrant petitions.\textsuperscript{317} The limitation of the total number of H-1B visas, necessitated that the INS put auditing procedures in place to be sure they did not approve more H-1B visas than the statute allowed.\textsuperscript{318} Employers worrying about the cap filed large numbers of petitions in the winter and early spring to avoid being shut out of the category altogether.\textsuperscript{319} Moving adjudicators to meet the thirty-day deadline meant other visa petitions had to sit waiting for adjudication.

Although Congress did not intend the agency to suspend other operations, the management of the agency responded to congressional and community pressure. However, the failure to adjudicate one type of petition means that pressure will mount in other categories or unnecessary work will be created. For example, if the immigrant petition cannot be processed in time, the employee will need a renewal of non-immigrant status. The extension petition could have been eliminated altogether if the INS had been able to process the I-140 in a timely fashion. The failure to adjudicate the adjustment of status applications meant that fewer people became permanent residents and a push to rush through cases created a bulge in the workflow. The sudden increase in workload resulted in delayed processing. Delayed processing means the initial grants of work or travel authorization expire. To obtain extensions of these, the individual must make a formal request and the INS has more work for its adjudication officers.\textsuperscript{320}

One bulge can build into a tidal wave five years later. In 1986, Congress authorized a legalization program resulting in more than three million peo-


\textsuperscript{317} See supra text accompanying notes 183-85 and 215-16 (discussing current backlog problems).

\textsuperscript{318} See supra note 58 and accompanying text (noting numerical limitations imposed by statute).

\textsuperscript{319} Interview with Frances Berger, Attorney at Law, Law Office of Frances Berger, New York, N.Y. (July 8, 2000).

\textsuperscript{320} See INS Nonimmigrant Classes, 8 C.F.R. § 214.2 (2000) (detailing general requirements for admission, extension, and maintenance of status).
ple becoming permanent residents over a five-year period. Because permanent residents cannot apply for naturalization until they have completed five years of resident status, the INS began to experience an upswing in the number of naturalization applications. If the INS allows backlogs to grow, and then, through special initiatives, completes the adjustment of status applications for record numbers of people, the bulge will reappear a few years later in naturalization applications and in relative petitions for the employees' family members who have not yet immigrated to the United States.

The executive branch can also pressure the agencies to shift priorities without adequate time to retool the process. More commonly, in immigration law, it is the failure of the executive branch to coordinate the priorities among the agencies involved in the adjudications that contributes to the process failures. While executive branch interference is undoubtedly a powerful source of process confusion, it lacks the permanence of a statutory mandate and therefore, should be more easily controlled within the administration.

Obviously, these mandates, interfere with the good operation of the adjudication system when the agency has insufficient time to anticipate the new programmatic priority. But perhaps less obviously, the attempt of Congress or the executive branch to control the adjudication priorities of the agencies can have an effect on the integrity of the agency operations. In some cases, the mandate results in a decrease in the accuracy and quality of the adjudications. In others, Congress or the executive may perceive an inappropriate rate of false positives in agency adjudications and craft controls, which dramatically slow down the adjudications in an effort to reduce error rates. Most recently, the operation of the naturalization program was a victim of the tug of war between the Executive's desire to expedite naturalization and Congress's move to tighten the quality controls because of its


322. See INA § 316(a), 8 U.S.C. § 1427(a) (1994). The residency requirement is only three years for people married to U.S. citizens. See INA § 319(a), 8 U.S.C. § 1430(a) (1994). There are other special exceptions. See generally id. § 319(b), 8 U.S.C. § 1430(b) (eliminating a residency requirement for applicants who are married to U.S. citizens who are government employees or are otherwise employed by a U.S. corporation); id. § 328, 8 U.S.C. § 1439 (stating other exceptions for applicants who have served in U.S. Army).

perception that too many unqualified people became citizens.\textsuperscript{324}

\textit{b. Resources and Resource Allocation}

If asked why the agency cannot produce efficient and rapid adjudications, agency management will always cite a lack of resources.\textsuperscript{325} However, this problem is more subtle than a mere lack of resources. Resources placed in the wrong places or inappropriately prioritized also affect agency operations. In some cases, Congress has given the agencies processing deadlines or authorized user fees but limited the program's ability to apply the fees to its operations.\textsuperscript{326} The natural result of interest group politics has led to statutory priorities that may not allow the agency to make the most appropriate management choices about spending. In other cases, it is not Congress but the administration that is directly responsible for sabotaging the agency operations by failing to adequately support the program or by diverting agency resources to other priorities.

In one detailed study, the National Academy of Public Administrators, concluded that the complex system of appropriations and user fees was directly responsible for management and performance failures within the INS.\textsuperscript{327} The Department of Labor lacks the statutory authority to charge user fees and due to large budget cuts, has extremely limited resources.\textsuperscript{328} These funding complications, particularly the lack of control, make the adjudication tasks more difficult.

\textsuperscript{324} In a sense, this is an inappropriate example because of the high political stakes in citizenship. Some critics perceived the controversy surrounding naturalization programs as a politic battle involving a democratic administration, which was rushing naturalization to gain new voters in the 1996 elections, and a Republican Congress, which was trying to taint the Clinton administration with claims of fraud on the system and to slow down the creation of new Democratic voters. \textit{See, e.g.}, David P. Schippers, \textit{Abusing the INS}, \textit{WALL ST. J.}, Aug. 23, 2000, at A22 (discussing politicization of INS by Clinton administration). Setting aside the very real political concerns, the naturalization program adjudication operations stole resources from other programs and the backlash against senior managers within the INS created problems for the implementation of other program reforms. \textit{See also} Interview with senior INS examiner (July 28, 2000) (regarding impact of naturalization audits and priorities on overall adjudications in the employment-based categories).

\textsuperscript{325} I have never heard an agency manager publicly report that the agency was fully staffed and that all equipment and facilities were ready to handle the work assigned. Of course, lack of resources is a common problem in administrative agencies.

\textsuperscript{326} \textit{See} Immigration and Naturalization Service User Fee Advisory Committee: Meeting, 64 Fed. Reg. 45,980 (Aug. 23, 1999).

\textsuperscript{327} \textit{See id.}

\textsuperscript{328} \textit{See supra} note 121 and accompanying text.
c. Agency Training and Strategic Planning

Again, the existence of three separate agencies with diverse missions, hiring, and training practices exacerbate and complicate the equation. It is a difficult job to train agency adjudicators in substance and procedure, but the failure to educate agency personnel about the operations and procedures of the other agencies can produce miscommunication, poor strategic planning and even such basic problems as computer systems that do not "talk" to one another.

Even within the confines of a single agency, the context factors are often the single most significant factor in creating process failures. The INS has been studied, audited, and criticized numerous times in the last several years. INS management constantly reacts to the audits and criticism and perhaps has not had sufficient time to develop long term strategic planning. The agency seems to jump from crisis to crisis: a new emergency, a new program, a new mandate from Congress or the auditors. However, even when planning initiatives were implemented they often were abject failures. The INS publicly stated the 1997 computer software system it developed to allow it to obtain meaningful information is incapable of keeping up with or providing accurate information for its workload in 2000. The inability to reasonably forecast work flow and user fee income meant the agency was improperly staffed and adjudication authority was not appropriately delegated when crunch times occurred. In the last few years, the crunches came in unprecedented waves.

On August 1, 2000, the General Accounting Office (GAO) issued a report criticizing INS management for failing to establish an enterprise architecture. "Enterprise Architecture" refers to both the operational

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329. The Inspector General of the Department of Justice testified that more than fifty percent of its resources were spent on INS audits alone. See Immigration Reorganization and Improvement Act of 1999: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 106th Cong. 20 (1999) (statement of Michael Bromwich, Inspector General, DOJ).


331. And the waves may be just beginning. Congress may soon consider a new amnesty program. If it is adopted the INS may be asked to adjudicate millions of new applications in a short time period. In the last formal amnesty program, the INS processed more than five million requests for legalization. Moreover, the tragic terrorist attacks of September 11, 2001, have renewed pressure on the INS.

332. "INS recognizes that it does not have an enterprise architecture and has taken some limited steps to develop one... Moreover, its current approach to managing the development of its architecture lacks fundamental controls." GAO REP. GAO/AIMD-60-212, INFORMATION TECHNOLOGY: INS NEEDS TO BETTER MANAGE THE DEVELOPMENT OF ITS ENTERPRISE ARCHITECTURE 2 (2000) [hereinafter INFORMATION TECHNOLOGY].
The goal of the plan is to identify both the current and target operating environments of the agency and how the business and technological functions will work together. Congress and the Office of Management and Budget (OMB) ordered all federal agencies to develop enterprise architecture plans. The GAO found INS management had no ability to measure workload and existing technological databases were created in a "stovepipe" fashion and were impossible to coordinate. The GAO report was highly critical of the Office of Information Resource Management's lack of coordination with the business operations of the agency. The report chronicles several years of management and technological problems within the INS despite large amounts available for systems development.

There can be other obstacles to training and retraining personnel. The union agreements may carefully define the job duties of various agency employees, and the collective bargaining agreement may not allow a change in duties without intensive negotiations. Similarly, the agency may have a subcontractor handling aspects of the procedure and changes in forms or filing requirements also requires re-negotiation of these public contracts.

Even locating adequate facilities to conduct training can be an enormous challenge. Shortly after David Martin became General Counsel of the INS, he planned to conduct significant training for the hundreds of new border patrol officers. Although he located a former military base which could be used to house the attorneys and to conduct the training, the training

333. See id. at 4.
334. See id. at 8-10.
337. See id. at 2-3.
338. See INFORMATION TECHNOLOGY, supra note 332, at 4-7. These problems have persisted despite huge capital outlays. "For example, INS plans to spend about $11 million in FY 2000 and another $10.5 million in FY 2001 to continue development of its CLAIMS 4, which supports the processing of applications and petitions for immigrant benefits and is intended to fully replace CLAIMS 3." Id. at 5. Millions more are to be spent on other agency operations regarding enforcement and for maintenance. In FY 2001 the total budget is $288 million on information technology. See id.
339. Interview with David Martin, Former General Counsel of INS and current Professor of Law, Univ. of Va. (Sept. 15, 2000).
plans were stalled because of the General Services Agency (GSA) contract requirements.340

Strategic planning is essential to efficient agency operations, but beyond the dictates of efficiency, the very integrity of the agency adjudications is at risk when the personnel are ill-prepared for the job at hand. Poor adjudications resulting in appeals or re-adjudication at later stages are both a waste of resources and a factor that builds distrust of the entire immigration system.

d. The Sophistication of the Participant

The vast majority of people filing applications and petitions with these agencies for immigration benefits are unrepresented.341 Many of them may not be fluent in English, or may not have attended American educational institutions. The well-represented and sophisticated participants in the system, such as large multinational employers or certain industry sectors,342 expect high levels of service and are frequently successful in gaining the ear of Congress or the agencies.343 Designing programs, forms, and information comprehensible to the diverse populations served by these agencies is a monumental challenge.344 Procedure failures sometimes arise because the agencies fail to adequately consider these differences and try to design a “one-size fits all” system. The failure of the agencies to sufficiently study the consumers of their services may be one of the most significant contributors to endemic procedural problems.

In a sense, the failure to adequately orient the agency operations to the sophistication of the participant diminishes the transparency of the agency

340. The General Services Agency must approve real estate development for government agencies among other aspects of general business operations.

341. See supra Part II.

342. A good example is the sheepgrower’s association, which has successfully handled the H-2A and labor certification applications for sheepherders for more than thirty years. Although not on Schedule A, sheepherders receive a form of modified waiver of the labor certification requirement.

343. A good example of special handling is found in the blanket L-1 petitions. In 1990, Congress authorized large multinational corporations to make one “blanket” non-immigrant visa petition, which became the mechanism by which the company can move large numbers of international personnel. See INA § 214(c)(2)(A), 8 U.S.C. § 1184(c)(2)(A) (1994 & Supp. V 1999). Although this procedure is now formally part of the INA, the agencies established the “blanket” petitions regulation. See GORDON ET AL., supra note 72, § 24.08 n.52; see also INS Nonimmigrant Classes, 8 C.F.R. § 214.2 (2001) (discussing regulations regarding blanket petition procedures); Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 52 Fed. Reg. 5738, 5742-45 (Feb. 26, 1987).

344. Of course, other federal agencies face similar challenges. The Internal Revenue Service (IRS) must plan for the individual filing and the sophisticated corporate filer.
operations. In immigration law, it is insufficient to publish regulations and interpretive policy memoranda when the agencies know the vast majority of users are not represented by skilled mediators such as attorneys. While rulemaking theoretically increases the transparency of the agency operations, it does not do so for participants who cannot comprehend the published rules.

In turn, this lack of transparency may contribute to inadvertent abuse of various immigration categories or weak applications for immigration benefits. Adjudicators become accustomed to weak applications, or to more egregious attempts to defraud the system, and therefore, tighten the adjudication standards and increase the processing demands for all participants resulting in less efficient operations. It is fundamental to the design of the agency adjudications that the agency attempt to evaluate the ability of the participant to understand both the substantive and procedural requirements.

e. The Fear of Fraud

Perhaps the one uniform concern in all of the immigration adjudications is the fear that the wrong people are "getting through" the system. Fear of false positives is endemic in all adjudication, but it is of particular concern in the distribution of limited benefits. Immigrant visas are most definitely a limited benefit.345 This fear is also appropriate because it is at least anecdotally true that people will try to defraud the immigration law to meet their personal goals. Marriage fraud is one of the most recognizable examples.346 At times the vague standards in the statutes combined with the agencies' failure to anticipate some kinds of fraud have led to wholesale suspension of adjudication.347 However, all too often, the agencies let the possibility of fraud drive the adjudication and fail to use measured approaches to adjudication which might both deter fraud and allow appropriate corroboration of essential facts. Rather than do the wrong thing, the agencies sometimes do nothing.

The fear of fraud is one of the most important features of the agency culture. If the agencies would increase the transparency of the procedural and substantive requirements, they would decrease the ability of the participants to commit fraud. However, in several interviews with agency ad-

345. See discussion supra Part I.
346. Of course, the government has often overstated the frequency of fraud. In litigation regarding the 1986 marriage fraud amendments, the INS admitted that the agency testimony that thirty percent of all marriage petitions were fraudulent. See INS Admits Fraud Survey Not Valid, 66 INTERPRETER RELEASES 1011 (1989).
347. The INS stopped adjudicating the millionaire investor petitions for more than two years because it believed the existing regulations and the prevailing adjudication standards were letting through unqualified investors.
judicators, I heard the opposite concern. The adjudicators feared that telling the participant what documentation was essential or necessary would lead to "tailor-made" applications. 348

The agency fear of fraud also cuts against efficient adjudications because the agencies sometimes layer the adjudications with demands for more or additional documentation or the Department of State may revisit factual assertions accepted by the INS. Some of the recommendations in Part IV are designed to anticipate and address the fear of fraud directly. 349 It is the failure to confront this fear that too often results in disorganized and disjointed adjudications.

f. Anonymous Adjudications—Lack of Accountability

Almost every adjudication made in the business immigration system is made anonymously. Petitions are "signed" by simulated electronic signatures of Regional Service Center directors. Sophisticated attorneys recognize initials if they are typed on the correspondence or, in the case of adjudications require an interview, they may have learned the names and titles of the individual officers. However, by and large, the process is anonymous to the participant. In some cases, the system may also be anonymous to the internal agency management. In several instances, the agencies admitted that they lacked adequate controls to identify the actions of individual examiners or the patterns of examiner behavior. 350

Even if this anonymity is sometimes appropriate for security reasons, the habit contributes to a culture within the agencies. Participants have difficulty knowing whom to contact, whom to praise, or whom to criticize. Managers within the agencies have limited measurement tools for evaluating the officers' performance. Anonymity could lead to a culture which lacks accountability and thus, to process failures.

IV. RADICAL REFORM V. INCREMENTAL PRAGMATISM

A. Responses to the Process Borders

Concern over immigration adjudication is growing throughout the

348. Interview with INS adjudicator (July 28, 2000). For example, consular officers sometimes report the story of seeing the same gold necklace in dozens of interviews because someone counseled the applicant for a visitor visa that he or she had to appear wealthy to qualify for a non-immigrant visa. See id.

349. See infra Part IV.C.

United States. One of the most dramatic examples arose in Iowa, traditionally a state with few new immigrants. In May 2000, a gubernatorial commission recommended that federal authorities authorize the State of Iowa to immediately recruit new foreign workers. The commission called for an Immigrant Enterprise Zone, entitling the state to priority processing of immigrant petitions for people seeking to settle in Iowa. The Iowa commission’s recommendation reflects an appreciation of one of the largest obstacles to new immigration, the process itself. Rather than focusing solely on new immigrant categories or the expansion of existing categories, the commission seeks to streamline the process.

In the face of bureaucratic borders built by congressional neglect and tripartite delegation, and compounded by the myriad of cultural and contextual factors I have detailed; how are the borders to be dismantled? What type of change can not only reduce these barriers but prevent them in the future? In this section, I briefly introduce some of the more radical responses which call for a wholesale change in the substantive policies. However, because I believe most of these types of reforms lack political support, at least in the short term, I will turn to incremental reforms, which can reduce the impact of the process borders. In some cases, these reforms may seem like I am merely redecorating the border walls; however, my emphasis on increasing the transparency of the entire immigration process will result in making the walls visible, a necessary first step to tearing them down.

Given the horrible delays and wasted resources spent in trying to measure the labor market, several scholars and policy makers have suggested deregulating the entire immigration system. They prefer “market-based”

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353. Iowa is not alone. Canada is liberalizing its immigration criteria and procedures to expand the rate of immigration. See Julian Beltrame, Canada’s Yawning Need for Immigrants Grows: Proposals Seek to Expand Pool of Skilled Workers, Bolster Social Programs, WALL ST. J., July 10, 2000, at A24. The Canadian Government has also identified processing delays as a major reason for lower immigration rates and is accordingly spending $40 million to expand the number of overseas immigration officers responsible for making the entry determination. Since 1998, Canadian provinces can adopt standards for immigration based on local rather than national needs, a concept that does not appear to be part of the Iowa proposal. See Immigration Act, R.S.C., c. I-2, § 6 (1985) (Can.).

354. See infra notes 359-62 and accompanying text.
approaches to selecting and limiting the number of employment-related immigrants.\textsuperscript{355} They recommend abandoning the current immigration system, substituting auctions,\textsuperscript{356} an optimal immigration tariff,\textsuperscript{357} or an immigrant tax surcharge\textsuperscript{358} as preferable methods of selecting immigrants. Others recommend the United States adopt a “point system” where individuals who amass points for academic credentials, work experience, or other objective criteria receive a priority immigration status.\textsuperscript{359} Some advocate allowing entry based on labor shortages in limited skilled occupations.\textsuperscript{360} To

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{355} See id.
\item \textsuperscript{358} Former Senator Alan Simpson (R-Wyo.) introduced legislation that would have eliminated the labor certification process for employers willing to pay a large fee. Senator Simpson had initially proposed a fee of twenty-five percent of a worker’s first-year salary, but the fee was lowered during the subcommittee markup to ten percent of the salary or $10,000, whichever was greater. The fees would be paid to private, industry-specific funds, which would expend half of the fee revenue for scholarships and fellowships for citizens and permanent residents studying “subjects of relevance” to the industry of which the employer paying the fee is a part; and the other half to be spent on training citizens and permanent residents in skills needed by the industry. The legislation entitled The Immigration Reform Act of 1996, died in committee and was never enacted. See S. 1394, 104th Cong. (1995). The idea was revived, however, in the 1997 U.S. Commission on Immigration Reform recommendations for changes in the procedures used in testing the labor market impact of employment-based admissions. Rather than use the lengthy, costly, and ineffective labor certification system, the Commission recommended using market forces as a labor market test, with businesses recruiting foreign workers paying a set per-worker fee in an amount sufficient to ensure there was no financial incentive to hire a foreign worker over a qualified U.S. worker. See U.S. COMM’N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 69 (1997) [hereinafter BECOMING AN AMERICAN].
\item \textsuperscript{359} See Papademetriou & Yale-Loehr, supra note 60; Borjas, supra note 25, at 290-99.
\item \textsuperscript{360} The current immigration system theoretically facilitates immigration for a limited number of occupations where the Department of Labor has certified a shortage of workers.
\end{itemize}
\end{footnotesize}
some degree, one of the motivations for these proposals is to eliminate case-by-case adjudication and the concomitant confusion, delay, and costs. While their embrace of deregulation is understandable, many of these scholars fail to recognize the degree to which their solutions require a governmental body to make determinations that cannot be accomplished fairly without some sort of adjudicatory process. Moreover, their proposals, thus, threaten to replicate some of the very process failures that have led them to embrace radical solutions.\(^{361}\)

For example, Professor Julian Simon, among others, proposes to auction the right to immigrate.\(^{362}\) Assuming he contemplates that Congress will establish limits on the number of allowable employment-based (or total) immigrants in any given year, and that visas will be auctioned to the highest bidders,\(^{363}\) considerable administrative procedure will still be needed.\(^{364}\) If the auction is directed to employers who buy the right to sponsor a single worker, it is possible that Congress will want to limit the number of visas a single employer could purchase to prevent the development of secondary markets or to prevent monopolizing sources of critical workers.\(^{365}\)

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\(^{361}\) It is not my purpose to methodically discuss the merits or disadvantages of all of these alternatives; but rather to identify the likely intrusion of process in almost every scheme.

\(^{362}\) See Simon, supra note 356, at 357-63 (indicating such a plan would (1) recruit younger immigrants, (2) allow for more equitable entry process into the United States, and (3) increase the overall economic welfare of the sending country).

\(^{363}\) Simon does not provide sufficient detail to know precisely what he contemplates, but this is a likely interpretation of his general proposal. See id.

\(^{364}\) See id. He does not address whether only employers will qualify to participate in the auction and I will assume that he would allow both employers and self-sponsoring immigrants to compete. If family categories remain outside the auction, it is possible that more affluent families would use the auction to bypass the lengthy quota delays in many of the family-based categories.

\(^{365}\) Secondary markets refer to the ability of the purchases to resell the visa slot. Congress and the agencies have become increasingly concerned about the growth of "job
other hand, families are included in the auction, the political ramifications of limited immigration, based on access to capital, raises serious political and social considerations. Of course, our current system is not cost-free. Many families are unable to sponsor immigrants because of the 1996 statutory amendment, which requires that the sponsor have an income greater than 125% of the poverty level. This economic requirement applies to family based immigration and in any employment case where the employee is related to the sponsor. It will be necessary to ensure that bidders truly have the requisite funds, as well as to ascertain the bona fides of bidders, to ensure they are not engaging in smuggling or fraud. Any limit on the allowable number of bids or on visa resale will necessitate regulation and auditing as well.

Thus, even putting aside the distastefulness of placing the American dream on the auction block, the system is less efficient than proponents

shops.” A job shop is a sophisticated temporary employment agency that uses non-immigrant visas to import workers who are later subcontracted to U.S. employers.


367. See M. Fix & W. Zimmerman, Welfare Reform: A New Immigrant Policy For the United States (1997) (indicating based on 1993 Census data, an estimated fifty-seven percent of Mexican or Central American families would be unable to meet this standards), available at http://migration.uni-konstanz.de/german/veranstaltungen/mm21/Fix.html; see also INS Affidavits of Support on Behalf of Immigrants, 8 C.F.R. § 213a.1 (2001) (defining federal poverty line as the level of income equal to the poverty guidelines as issued by the Secretary of Health and Human Services in accordance with certain guidelines).

368. In most governmental bidding schemes as well as other auctions involving large amounts of money, bidders are pre-screened to ensure their ability to carry out the bid.

369. See generally Peter Kwong, Forbidden Workers: Illegal Chinese Immigrants and American Labor (1998) (describing organized smuggling, extortion, and related abuses committed upon victims). Without screening and investigation, criminal syndicates might bid on the visas, and then re-auction them at higher prices, or indenture those to whom they are given. As Peter Kwong describes in his book, recent reports estimate that many Chinese nationals pay from $35,000 to $50,000 to organized smugglers who bring them to the United States. The victim pays part of this fee as a down payment and then must repay the “loan” over many years or face physical harm or harm to his or her family. In many situations, the smugglers arrange the employment and the wages are paid directly to the smuggler and only a stipend to the victim. In the recent past, the INS and Department of State have become particularly cautious about the sources of funds used to sponsor the “millionaire” investors. See In re Ha, Dec. No. 3051, 1998 BIA LEXIS 29, at *12-14 (B.I.A. July 31, 1998). This visa program is also discussed briefly in Part IV.C.5.

370. See 135 Cong. Rec. S57,769 (daily ed. July 12, 1989) (describing how Congress perceived the millionaire investment program, which allowed millionaires to immigrate to the United States, as a program which facilitated the “selling of citizenship”); see also David Hirson, Immigrant Investors: Five Years After, 95 IMMIGR. BRIEFINGS 1 (1995) (explaining program became more politically palatable once advertised as a job creation program).
While it appears that government need not ascertain anything other than who has the highest bid, in fact the government will have to engage in considerable administration and policing.

Among the central arguments for an auction are the assumptions that rational bidders would only sponsor desirable immigrants and that the auction would remove unnecessary government micro-management of employment decisions. It is not entirely clear all employment or immigrant decisions are purely rational. They may be made for emotional or political reasons. And while an auction may reduce the adjudication role of government, it is unlikely that Congress would completely eliminate the third stop of adjustment of status or visa processing where an individual immigrant must prove he or she is admissible. Further, an auction may be unfair to religious or nonprofit organizations or to other segments of society, who might not have the ability to compete in the purely economic realm of an auction.

Allocating immigrant visas by lottery is a close cousin to the auction, but without its economic attributes. The United States currently uses a lottery that allows 50,000 people per year to immigrate.\textsuperscript{371} The lottery visas are called “diversity visas” because this program limits immigration to people from countries designated “low admission states.”\textsuperscript{372} If a country has more than 50,000 immigrants over a five year period, the nation cannot participate in the diversity visa lottery.\textsuperscript{373} Assuming the lottery would replace the current employment-based categories, would the lottery have entry criteria such as a job offer or proven skills and education?\textsuperscript{374} If there are no qualifying criteria the system may be free of the general adjudication headaches, but is the system then a rational substitute for the selection of employment-based immigrants? It is difficult to imagine a political acceptance of pool-

\textsuperscript{371.} One of the benefits of an auction or of the tax system discussed next is the ability of the government to recoup costs of the immigration system or to defray costs of new immigration. Theoretically, the lottery could also charge for “tickets” and thus more closely emulate the auction or tax alternatives.


\textsuperscript{373.} See id. (outlining how visas should be distributed among natives of foreign states). In recent years, Congress has eliminated 5,000 of the diversity visas and allocated these to limited legalization program for certain Nicaraguans, Cubans, and people from former Eastern Block nations, see District of Columbia Appropriations Act of 1998, Pub. L. No. 105-100, 111 Stat. 2160.

\textsuperscript{374.} See INA § 203(c)(2), 8 U.S.C. § 1153(c)(2) (providing diversity visas are only available to individuals who completed equivalent of a U.S. high school education or who have at least two years experience in a job). Under the current employment-based third preference, even if an employee has a labor certificate, if the job is considered to require less than two years training or experience, the individual will be characterized as an “other worker” and only 10,000 visas per year are available for this category.
ing in a single lottery the petitions of software engineers and medical researchers with specialty cooks or nannies. But perhaps it is no less rational than the existing lottery.

Professor Howard Chang and others have instead suggested a "head tax" or optimal tariff. Immigrants with high skills, important jobs, or who demonstrate special attributes would pay a low fee, while immigrants who are relatively unskilled or likely to contribute less to the public weal would pay a higher tax. The empirical support for the proposition that lower-skilled workers use more resources than they contribute is, of course, hotly contested. Leaving aside the political battling over the taxation scheme, such a system would require a significant adjudicatory bureaucracy to assess, inter alia, the skills, education, training, experience, and available job opportunities of the taxed applicant.

Former Senator Alan Simpson and the Commission on Immigration Reform both have proposed that employers pay a tax in lieu of fulfilling labor certification requirements. Initially in the Immigration Reform Act of 1996, Senator Simpson set the fee at twenty-five percent of the proposed salary or $25,000 whichever was higher. It is unlikely that the proponents of the optimal tariff meant to quantify all human accomplishments into rigid tariff rate schedules. The designers would probably want to ensure flexibility and discretion in the adjudication. Indeed, one of the theories of the tariff is that the schedules could recapture the cost each immigrant would impose on the U.S. economy. How would this be measured? Annually, weekly, locally, regionally, nationally? The efficiency and transparency of the system are greatly reduced as the tariff scheme is altered to recapture the substantive goal it meant to reach.

375. See Chang, supra note 74, at 380 (arguing private sector would benefit from elimination of all restrictions on immigration of labor). Head taxes have an ugly racial and ethnic history in our country and for reasons similar to the auction, the scheme is likely to be perceived as a method of buying your way in if you are rich or resourceful.

376. See id.

377. Compare Borjas, supra note 25, with Simon, supra note 356.

378. See S. 1394, 104th Cong. (1995) (indicating tax rate should be either twenty-five percent of the proposed salary or $25,000, whichever is higher). See generally Becoming an American, supra note 358 (recommending strategies to prevent exploitation of immigrant workers and to facilitate a more efficient system in which to employ immigrant workers). Both proposals are aimed at streamlining the immigration process and recapturing some of the resources spent on lawyers, advertising fees, and internal costs spent in completing the existing cumbersome system.

379. For example, in an article which attempts to set up a variable tariff, Rex Khan suggests that the INS would measure several personal characteristics in order to set the appropriate tariff. He recommends such criteria as measuring health, education, language, job experience, education, intellect, and emotional intelligence. He acknowledges that he does not know of objective tests or measures for several of these criteria. See Khan, supra note
To the extent the tax is meant to serve as a disincentive to using immigrant, rather than American, workers, the effectiveness, however, requires varying the tax by job, employer, and potential immigrant. This tax assessment would entail considerable administrative process. To prevent employers from passing on tax costs to the foreign worker or making the system a covert purchases of immigration benefits, some sort of investigatory or grievance system would need to be administered. Any type of tax is, of course, vulnerable to the same issues of fraud, smuggling, and political distaste as the other proposals.

Another prominent proposal, one which has been adopted in part in Canada and Australia, is known as a “point system,” and operates by allocating points for desired qualities such as skill, education, job experience, net worth, existing job offers, and the like. The notion is that if the point of allocation is well designed, the government can quickly and clearly identify desirable immigrants. Plainly, such a system requires considerable administration and adjudication, for not only do the bona fides of claims to points need to be established, but also administrators must compare educational accomplishments among different educational systems, as well as training and skills which are differently understood and labeled. Moreover, measuring even less precise criteria, such as “past work experience” or individual “personal suitability,” requires a great deal of case-by-case

357, at 412-16.

380. Some employers would be dissuaded at costs much lower than twenty-five percent of salary, others would value the immigrant in other ways not necessarily reflected in the base salary. For example, the foreign worker may be expected to generate new sources of income for the employer or add a status or cachet to the employer’s workplace.

381. See generally PAPADEMETRIOU & YALE-LOEHR, supra note 60.

382. Advocates of this system suggest that an immigration scheme which focuses on the selection of skilled individuals who have demonstrated the ability to compete, to change, and to continue a pattern of “life long learning” are the type of immigrants we need in our society. See, e.g., PAPADEMETRIOU & YALE-LOEHR, supra note 60, at 162 (attempting to substitute past measurable achievements as a way to prove quality of adaptability).

383. For instance, questions will arise about whether a Class A welder in France is equivalent to a Class A welder in the United States, and so forth. Nor do all point systems rely on strictly objective criteria such as age or a score on a standardized language exam. See id. (suggesting a sliding scale of points be awarded for immigrants who demonstrate training or work experience which establishes individual’s potential to adapt in changing economic and technological environments).

adjudication. The reform most likely to garner political support involves enhancing the flexibility for the Department of Labor to pre-certify occupations and to create blanket waivers for persons qualified to enter those occupations. Yet this solution, too, continues to require considerable administrative process. Indeed, it was the Department of Labor that undermined the most recent effort to implement a shortage occupation approach.

So, at least for the moment, it is worth pursuing incremental, pragmatic reforms which might minimize or alleviate some of the worst of the failures of process by increasing the transparency of agency action, preserving the integrity of agency adjudications, and balancing the need for timely adjudication with orderly procedures. I have grouped these recommendations into several areas: structural or substantive reforms, measuring performance, and incentives for improved performance.

B. Structural and Substantive Changes

1. Create a Coordinating Authority

Far too many of the problems illustrated in this Article result from a lack of coordination of policies and priorities. Although the president could order coordination by the Attorney General, Secretary of Labor, and Secretary of State, it is, perhaps, politically expedient to allow immigration adjudicators to be responsible for implementing selection criteria. Generally speaking, the book largely focuses on the substantive requirements of the point system and its relative advantages over other selection criteria. Moreover, it appears to suggest a trust in the administrative expertise of the INS adjudicators that I do not completely share without more procedural protections. See infra Part IV.A (critiquing point system adjudication); BORJAS, supra note 25, at 194-95 (acknowledging potential for bias in criteria in a point system and suggests a similar potential for bias in how the adjudicator applies system).

In my view, this type of adjudication is more rationally related to the goals of the immigration system than attempting to conduct artificial tests of labor shortages. However, it is not inevitably adequately transparent or efficient, and attention to process is essential to making it so. Among other things, ensuring integrity will require that training and monitoring take place to avoid the likely tendency of adjudicators to make decisions biased toward the type of education and skills they personally value. The more the system is designed to ensure its substantive goals, the less likely it is that it will operate without substantial administrative adjudication.

385. See, e.g., PAPADEMETRIOU & YALE-LOEHR, supra note 60, at 144-70 (proposing specially trained INS adjudicators be responsible for implementing selection criteria). Generally speaking, the book largely focuses on the substantive requirements of the point system and its relative advantages over other selection criteria. Moreover, it appears to suggest a trust in the administrative expertise of the INS adjudicators that I do not completely share without more procedural protections. See infra Part IV.A (critiquing point system adjudication); BORJAS, supra note 25, at 194-95 (acknowledging potential for bias in criteria in a point system and suggests a similar potential for bias in how the adjudicator applies system).

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387. See supra note 151 and accompanying text (discussing rationale and history behind the proposed LMI program).
 dedication to remain a divided task. The reason for this is that it becomes more difficult to blame any single agency for program failures or for each agency to point fingers at the others. Also, each agency fears control by the other and, therefore, the cabinet level officers each want to protect their administrative turf.

Either Congress or the president should establish an authority to coordinate these functions. Ideally, the president would create a cabinet level office to coordinate the immigration function and Congress would support this structure with appropriate statutory reforms. The INS, standing alone without regard to the Department of State and Department of Labor, is a large federal agency employing over 25,000 people and operating with an annual budget of 3.9 billion dollars. Beyond mere size and expense,
the immigration operations touch millions of lives. As the economy continues to globalize, immigration policy will become more integrated with international trade policy. It is definitely time to prioritize immigration policy and if policy is to be implemented, then the administration of the immigration agency operations deserves equal attention.

Others have provided thoughtful reasons for the elevation of the immigration function to a cabinet level office. Rather than repeat those reasons, let me briefly clarify that I recommend placing all immigration related activity within this single new agency. Thus, for business related immigration, such a move would include the visa adjudication of the Department of State, the labor certification and temporary certifications of the Department of Labor, and all INS functions. While this Article focuses solely on business immigration, my recommendation applies equally to other aspects of immigration law, such as border inspections or the removal process. Accordingly, I would move all of the enforcement immigration operations into this same agency. While there are currently several calls for separating the benefits adjudication from the enforcement operations, the benefits of a unitary agency under the supervision of a cabinet level officer should be carefully examined before separating these functions.

The unitary executive and agency structure should also increase efficiency in immigration adjudications because procedures could be fully designed and implemented within the same "shop." Many of the cultural factors mentioned earlier, such as the fear of fraud or lack of coordinated priorities, would have a reduced ability to frustrate the adjudication operations. Minimizing these should also lead to greater integrity in the process. While transparency is not necessarily increased by folding the operations into a single agency, efforts to make the process more transparent will not

391. See discussion supra Part I.
393. These include the border patrol, Executive Office for Immigration Review, currently within the INS, and the Customs Service, currently within the Department of the Treasury.
394. To the outsider, the adjudication of legal immigration benefits and the enforcement of the borders and removal statutes may seem completely unrelated. However, many others and I perceive the system as an interconnected web. Moreover, as I discussed in Part II, a main factor in the culture of the immigration law adjudications is a fear of fraud. Separating the benefits section from the tools and resources of the enforcement section may unnecessarily complicate the adjudicator's responsibility to deter and detect fraud. See generally PAPADEMETRIOU ET AL., supra note 288, at 18 (recommending, with minor exceptions, a separation of functions but retaining both operations inside the immigration agency).
be hampered by the failure to integrate discussion of the other agencies’ roles. As I have described, current participants in the system have little understanding of the way in which the adjudication of one agency impacts the other, how the pieces fit together, or when the immigration process will come to an end. While creating a single agency with a high level executive will not solve all of the problems articulated in this Article, it is my belief that this change would go a long way to eliminate or reduce many of the process borders.

2. Eliminate Department of Labor Role, It Is Not Essential

As this Article has shown, the Department of Labor processing delays approached three to four years in many regions and pushed the agency to adopt alternatives to the regular processing procedures. In 1999 and 2000, the Department of Labor completed record numbers of adjudications by relying heavily on the Reduction in Recruitment procedure. Nevertheless, the Department of Labor continues to face increasing filings with decreasing resources. Within the last five years the budget for the program has been cut in half. Facing these huge cuts, the Department of Labor began to investigate a concept called Program Electronic Review Management System (PERM). The idea behind the program is to supplement the state level of review and the case-by-case adjudication by Regional Department of Labor staff with an automated computer review of forms submitted by the employer. These forms would require the employer to make an attestation as to recruitment conducted in the past and the terms and conditions of the job. As described in an official notice and in recent public meetings, the Department of Labor anticipates this would be an adjudication without supporting documentation. Originally, the Department of Labor had anticipated seeking statutory authority for post-approval auditing and sanctions for violations of the attestation requirements. In-

395. See supra notes 121-26 and accompanying text.
396. See supra note 121.
397. See supra note 272-81 and accompanying text.
399. See Audio tape: Statement of Jim Norris, Special Counsel, Employment and Training Administration, at meeting of the AILA Annual Conference, Chicago, Ill. (June 2000) (on file with author).
400. Based on my participation in agency discussions, I had understood the agency intended to follow the pattern in the non-immigrant H-1B visa attestation on the Labor Condition Application (LCA). The Department of Labor makes no adjudicatory decisions when the LCA is filed, but may pursue complaints or investigations regarding the validity of the
stead, however, the agency determined that for cases not clearly meeting
the program criteria, the Department of Labor would either require addi­tional evidence concerning the labor recruitment efforts or would require
the employer to conduct supervised recruitment. 401 One of the immediate
questions about the post-approval audits would be the impact on the indi­
vidual beneficiary of the labor certification. 402

The goal of PERM is to allow 80% to 85% of the cases to pass through
the automatic review without further inquiry by a Department of Labor
employee. 403 Approximately 15% to 20% of the cases would trigger indi­
vidualized adjudication and review. 404 Some of these cases would be se­
lected at random as a quality control. 405 Others would be selected for re­
view based on characteristics of the application. 406

attestations. The Employment and Standards Administration of the Department of Labor
has the responsibility for these investigations and enforcement actions. The INS authorizes
both fines and debarment penalties. See generally Angelo A. Paparelli & Catherine L.
Haight, Avoiding or Accepting Risks of H-1B/LCA Practice: Part I, 92 IMMIGR. BRIEFINGS
15 (1992). As of February 2002, no post-approval audit has been announced by the De­
partment of Labor.

401. See Labor Certification Process for the Permanent Employment of Aliens in the

402. It would be very disturbing if an employer’s failure to comply with all attestations
resulted in the loss of permanent resident status for an employee who may not have had any
power to control the employer. However, it would also be problematic if an employee, who
might have colluded with an employer to obtain a fraudulent labor certification, did not face
a rescission of permanent resident status. Current statutory and regulatory authority would
allow the INS to bring rescission proceedings within five years of the grant of permanent
resident status.

403. See Audio tape: Statement of Jim Norris, Special Counsel, Employment and
Training Administration, at the AILA Annual Conference, Chicago, Ill. (June 2000) (on file
with author). In subsequent interviews, several Department of Labor officials stated that the
program might have this capacity but it was not the goal of the system. Rather, establishing
the PERM system would allow regional certifying officers to prioritize their adjudications
and devote more time to cases requiring supervised recruitment. These officials vigorously
denied that there was any quota or processing goal for the program. Nevertheless, in several
public meetings where the Department of Labor presented the concept of PERM, the offi­
cials repeatedly stated that they were forced into this system because they had to complete
more adjudications with fewer funds. At several meetings the figure of 80% to 85% was
announced and the Department of Labor published the figure of 80% automated-approvals
in a “power point” slide. See DIV. OF FOREIGN LABOR CERTIFICATION, DEp’T OF LABOR, THE
PERM SYSTEM POWER POINT PRESENTATION (1999) (on file with author) [hereinafter PERM
SYSTEM].

404. See id.

405. See id.

406. As of the writing of this Article, the Department of Labor has not released details
of the adjudication triggers. I participated in several task force meetings with members of
affected industries, special interest groups, and high level Department of Labor policy ana­
lysts. Many suggested that factors such as an awareness of a work stoppage in an industry,
While the PERM adjudication model may be a modern and intelligent response to the adjudication requirements of the INA, it is unclear why the best agency to handle this adjudication is the Department of Labor. At least in cases that pass the automated adjudication, the process might be streamlined by allowing the INS to handle the entire operation. Cases triggering audits could be referred back to the Department of Labor for case-by-case adjudication.\footnote{407}

More radically, I question the continued need for participation by the Department of Labor altogether.\footnote{408} If the substantive goal of our law was to measure labor shortages and to find U.S. workers for open positions, it is time to call the program a failure. In an economy of more than 140 million jobs, the 65,000 average labor certifications issued per year represent less than half of one thousand percent of the total jobs.\footnote{409} Before the 1990 limitation on the “other worker” or low skilled category, labor certification might have been a more important restriction on the entry of lesser skilled workers.\footnote{410} Given that we continue to restrict the total number of employment-based visas, is the labor certification essential to the proper allocation of the potential pool of 80,800 visas in the employment-based second and third preference categories?\footnote{411} Moreover, obtaining the labor certificate in no way ties the immigrant to the specific job. Therefore, it would be more rational to measure the qualities of the immigrant rather than the job it-

\footnote{407. There is precedent for this cross-delegation between agencies. Since the 1970s the INS has evaluated whether individuals qualify for the Schedule A waiver of labor certification.}

\footnote{408. Several years ago the U.S. Commission on Immigration Reform similarly called for reorganization of the agencies responsible for the immigration function. See BECOMING AN AMERICAN, supra note 358, at 48. In addition to recommending a reorganization of the overall immigration agency functions, the Commission, in its final report, recommended eliminating the Department of Labor from the immigrant visa adjudications. The Commission, however, favored creating an enforcement role for the agency, allowing for greater investigations of fraud and enforcement of the wage and hour laws and the employer sanctions provisions. See id.}

\footnote{409. See BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, TABLE A-1. EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX AND AGE, available at http://www.bls.gov/news.release/empsit.t01.htm (last visited Jan. 29, 2002). As of August 2000, the economy contains 146,742,000 jobs.}

\footnote{410. See supra note 152 (describing Schedule B occupations as a deterrent to employers). Although waivers of the Schedule B bar to certification could be obtained whenever the employer could establish the complete absence of qualified, available workers. See GORDON ET AL., supra note 72, § 44.04[2].}

\footnote{411. All other immigrant categories are exempt from the labor certification requirement.}
Even if we wanted to retain a labor market test, the INS might, in consultation with the Department of Labor, develop criteria for labor certification adjudication similar to the proposed PERM program. The INS can learn to identify the cases where an employer has insufficiently tested the available market or is not offering the prevailing wage.

Assuming Congress wishes to retain the basic substantive provision requiring employers to prove the U.S. labor market cannot provide a qualified, willing, and available worker, the key issue in reform will be integrity. If a streamlined adjudication proposal allows employers to inappropriately certify shortages, eventually the public or the agencies will come to distrust the system. Even if the program were folded into the INS, the reality is that the substantive standard is susceptible to manipulation or fraud. If the program continues to be handled by the Department of Labor and labor certifications are issued, which the INS mistrusts, then the efficiency of the entire system will be impaired. Understandably, the INS slows down adjudication of the immigration visa petition in an effort to “hold the line” and deter visa fraud. As currently described, the transparency of the proposed PERM program is difficult to measure because few details have been released. But, it does appear the Department of Labor is unlikely to give employers advance guidelines about which occupations are appropriate for attestation approval or the necessary measure of recruitment. If the occupations were named and the recruiting standards spelled out, the agency is likely to feel that employers would tailor labor certification cases to fit the “approvable profile.”

412. This is the approach taken by Canada and Australia. See generally PAPADEMETRIOU & YALE-LOEHRL, supra note 60 (recommending similar approach). In each of these points systems, employment sponsorship and occupation are relevant to the points allocated to the individual but the job offer does not in and of itself control the entire immigration process.

413. Department of Labor specialists can train INS adjudicators or personnel already trained in this area can be relocated to the INS. To some degree Congress has already mandated that several of the immigration related adjudications are tied to information provided by other divisions of the Department of Labor. For example, the determination of the prevailing wage has been tied to the Bureau of Labor Statistics Occupational Employment Statistics (OES) database. See DEP’T OF LABOR, OCCUPATIONAL EMPLOYMENT STATISTICS, FOREIGN LABOR CERTIFICATION, available at http://workforcesecurity.doleta.gov/foreign/wageinfo.asp (last visited Jan. 29, 2002); see also GAL 2-98, supra note 115. OES is unfortunately a very limited database that contains fewer than nine hundred job categories and few allowances for skill level differences in the database. The Department of Labor has tried to put some flexibility into prevailing wage determinations by allowing employers to submit private surveys. But the INS should be capable of replicating this adjudication to the degree that most cases are automated and hard cases appear to need local state agency evaluation rather than the national office.
Perhaps no agency could design a labor certification adjudication model which preserves the integrity of the decisions, and operates efficiently in a transparent manner. At root, the difficulty in fashioning the ideal system lies with the particular character of the substantive requirement. By requiring employers to identify the immigrant beneficiary before commencing the labor market test, the system seems to ignore the conflict employer and employee must feel from the beginning. True reform of employment-based immigration adjudication will undoubtedly require serious reconsideration of this substantive requirement.

3. Elevate Administrative Appeals

The administrative appellate function must be improved and made more transparent. More than ten years ago, Professor Stephen Legomsky completed a study for ACUS concerning the optimal forum for review of immigration related adjudication. This comprehensive report discussed a wide variety of adjudications, from the trial type proceedings in deportation and exclusion hearings to the informal administrative review of visa petition adjudications. In that report, he explored a framework for selecting the appropriate forum for administrative review allowing the agency to balance efficiency with accuracy in adjudication. He specifically recommended that the Administrative Appeals Office be separated from the INS adjudications function to foster greater independence in decision making and to allow for more formal reporting of the decisions of this office. These recommendations have not been acted upon. The Administrative Appeals Office is under the control of the INS Associate Commissioner for Examinations and the hearing officers, while they may be senior INS examiners, are not necessarily lawyers and are not Administrative Law Judges.

As was previously mentioned, the decisions of the Administrative Appeals Office are not reported unless the decision is a precedent case. The current volume of appeals appears to be approximately 4,000 per year. Publishing the decisions of the INS at the appellate level is an obvious first step in making the adjudications more transparent. Publishing this small

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415. See Legomsky, supra note 26, at 1312-14 (discussing general criteria for choosing a review forum).
416. It was then called the Administrative Appeals Unit.
417. See Legomsky, supra note 26, at 1336-38.
418. There is no official reporting of the workload of this office. These numbers are based on an interview with attorney Nancy-Jo Merritt who has studied the operations of this office in connection with her representation of clients.
volume of cases would not be burdensome and should be even more valuable and less burdensome given the smaller volume of cases.

In its final report, the U.S. Commission on Immigration Reform similarly called for improvement in the appellate review of agency adjudications. The Commission called for the creation of a separate agency to handle review of the decisions made in connection with immigration law. In addition to review of the INS adjudications, this agency would also have jurisdiction over the decisions of the Department of State visa refusals.

It is beyond the scope of this Article to reconsider the pros and cons of requiring administrative or judicial review of all decisions of the Department of State. The common objection to administrative review of these decisions is that because the consular officers consider millions of non-immigrant visa applications, the volume of cases would be so high that any administrative review would be extremely costly and cumbersome. Yet this is a much smaller pool of cases and obviously involves significant interests of the U.S. business or family member.

The real value of administrative or judicial review to the operation of the administrative process is its ability to preserve integrity and to increase transparency in the operation of the system. Serious evaluation of the benefits and costs of review should be a fundamental part of administrative reform.

419. The INS has decided to publish all precedent decisions of the Board of Immigration Appeals. See Exec. Office for Immigration Review, DOJ, Board of Immigration Appeals Precedent Decisions, available at http://www.usdoj.gov/eoir/efoia/bia/biaindex.htm (last visited Jan. 29, 2001). The Department of Labor publishes all of the en banc decisions of the Board of Alien Labor Certification Appeals and the Office of the Administrative Hearing Office for Immigration Related Employment Discrimination Practices publishes all of its decisions. Both of these administrative appellate agencies operate separately from the agency itself and are staffed by Administrative Law Judges.

420. See Becoming an American, supra note 358, at 175-83 (1997).

421. See id.

422. The need for some sort of external administrative or judicial control over Department of State decisions has been debated for many years. See generally Nafziger, supra note 3 (discussing value of judicial review of consular decisions). More recently, the Commission on Immigration Reform found that while judicial review might be expensive and burdensome, administrative review would be beneficial to the participants and to the agency itself because of the resulting protections for consistency, accuracy, and fairness.
4. Privatize Aspects of Adjudications

Some adjudications the INS and other agencies must make in immigration cases require the agencies to be sophisticated analysts of a wide array of information. For example, the INS must evaluate whether a foreign educational credential is the equivalent of a U.S. degree. Currently, the agencies often request and rely upon third party evaluations of these degrees made by experts in the education related industries. Two of the most popular categories of non-immigrant visas, the foreign student and exchange visitor, are in a sense privatized, or the sponsoring institution selects the non-immigrant and issues the primary essential documents. While the government has not always monitored the private institutions sufficiently, in large part the programs operate in an effective manner.

It is difficult to see why separate agency adjudication of the qualities of the individual are essential if the sponsor is held accountable for the selection of qualified candidates. This model of private actor selection might be expanded to select non-immigrant or immigrant categories. Where Congress believes it is appropriate to test the bona fides of the individual's competence or qualifications, it may be possible to use existing non-profit organizations, which already make substantive evaluation of individual merit. Such repetitive adjudication is neither efficient nor transparent. Ab-


424. Of course, one of the fundamental problems in this area is that the INS and Department of State must also determine if the degree certificates are fraudulent.

425. There is nothing about these credential evaluators in the regulations, but experienced participants know that the agencies frequently ask for this corroboration.

426. These are not insignificant categories. Besides admitting a large number of people, many foreign students or exchange visitors, such as Ms. Cheng in the narrative discussed above in Part II, later change status to remain in the United States.

427. Recently, the INS has undertaken a number of technological experiments to create a more integrated communication and record keeping system between the INS and the educational institutions using the student (F-1) visa. See Kate Zernike & Christopher Drew, A Nation Challenged: Student Visas; Efforts to Track Foreign Students Are Said to Lag, N.Y. TIMES, Jan. 28, 2002, at A1. At one time the GAO severely criticized the INS for lack supervision of the student visa program. GAO, CONTROLS OVER NONIMMIGRANT ALIENS REMAIN INEFFECTIVE (1980), discussed in MILTON D. MORRIS, IMMIGRATION: THE BELEAGUERED BUREAUCRACY 113 (1985).

428. Congress already instructed the INS to consider the opinion of some private organizations in the adjudication of several non-immigrant visa categories such as the extraordinary ability in business, arts or science (O visa) or the outstanding entertainer or athlete (P visa). See INS Nonimmigration Classes, 8 C.F.R. § 214.2(o)-(p) (2001).
sent a negative private consultation, an individual could simply be issued the appropriate visa at the U.S. consulate. If a private organization issued a negative recommendation on the admission of the individual, then the INS could adjudicate the case to avoid undue private control and to ensure fair adjudication, thus fostering the integrity of the system. These same principles could be used to adjudicate the employment-based first preference extraordinary ability in those cases where a private evaluation could be obtained from a reputable non-profit organization.\textsuperscript{429}

The use of private parties does not mean that the agencies do not carefully design and oversee the private adjudications. It is unfortunate that recently some INS attempts to privatize operations were unsuccessful. For example, the INS suspected that citizenship exams administered by certain private organizations were rigged to pass unqualified applicants. The use of private Qualified Designated Entities, assisting in the legalization programs of 1986, was not uniformly successful and in some cases may have inappropriately prevented a qualified applicant from obtaining benefits.\textsuperscript{430} Still, rather than reject all privatization, it would be more beneficial to examine the characteristics of the public/private adjudication that have operated well and to identify the missing safeguards in other operations.\textsuperscript{431} This kind of systematic analysis may allow the agencies to test and implement other appropriate programs.

There may be other areas where the agencies could delegate adjudication

\textsuperscript{429} In the interest of fairness, and to maintain control over the quality of the adjudication, the INS may want to establish an accreditation and record-keeping requirement similar to the exchange visitor program or the registration of blanket multinational employers for the L-1 visa. \textit{See} INS Nonimmigrant Classes, 8 C.F.R. § 214.2(l), (j) (2001). While the accreditation process obviously necessitates an adjudication process, ideally it would be less cumbersome and result in economical adjudication of hundreds or thousands of individual petitions. Moreover, these private organizations would need to provide public information about costs, standards, and procedures to ensure fairness and accuracy. \textit{See generally Tracking International Students in Higher Education: Policy Options and Implications for Students: Hearing Before the House Educ. Comm. Subcomm. On 21st Century Competitiveness and Select Educ.,} 108th Cong. (2001) (statement of Michael Becraft, Acting Deputy Comm'r, INS) (commenting on foreign student visas).

\textsuperscript{430} \textit{See} Reno v. Catholic Soc. Serv., 509 U.S. 43, 46 (1993) (vacating judgment on grounds record was insufficient to decide all of jurisdictional issues and remanding to lower court to determine which class members were front-desked); Catholic Soc. Serv. v. Thornburgh, 956 F.2d 914, 916 (9th Cir. 1992) (affirming lower court granting summary judgement); Catholic Soc. Serv. v. Meese, 664 F. Supp. 1378, 1388 (E.D. Cal. 1987) (allegation was QDE's front-desk qualified applicants inappropriately turning away some bona fide applications).

\textsuperscript{431} By and large, the use of private physicians to conduct required medical exams has operated well for many years. The physicians must be certified by the Public Health Service. \textit{See generally GORDON ET AL., supra note 72.}
of some criteria to third parties. For example a private credit reporting agency might verify the viability of a business and the INS could find this sufficient to establish the company’s ability to pay the offered wage in a visa petition. Congress and the agencies should consider the availability of private sector evaluators for a wide variety of the immigration-related functions.

C. Measuring Performance and Bringing Process to Light

Important to any true attempt at reform are mechanisms to measure the effectiveness of agency operations and a formalized structure for continuous reporting, feedback, and re-engineering. In fact, the need for information to allow for continued flexibility and adaptation is critically important if other reforms are to be sustained. The following recommendations are designed to increase the transparency of the process in operation.

I. Create a Feedback Source to Keep Measurement and Accountability Paramount

A number of mechanisms could be used to generate feedback and measure performance for each of the agencies involved in immigration. Some of the mechanisms, such as congressional oversight hearings or sunset provisions that terminate programs, are so formal and highly visible that they actually might reduce the likelihood of objective and sober agency performance evaluation. While congressional oversight will obviously continue through committee hearings and the appropriations process, each agency needs the resources and expertise to monitor its own performance objectively. Given the abysmal record of immigration adjudications, close congressional oversight is imperative at this time. However, developing agency competence and the ability to monitor and correct its own performance should be the long-term goal.

In recent years, the INS hired outside consulting firms specializing in management and accounting systems. Congress should continue to ap-


433. Congress has demanded a great deal of reporting from the INS in recent years, specifically information about the H-1B non-immigrant visas and the naturalization adjudications. The effect of pinpointing various visa or petition categories has the unfortunate effect of leaving other program areas to founder as the agency understandably reroutes time and resources.

434. See 74 INTERPRETER RELEASES 1245 (1997) (confirming appointment of outside
appropriate sufficient funding for access to such independent expertise. However, the consultants should be required to gather data and information about agency performance from sources external to government. These include major participants in the system, such as industries which regularly rely on business visas, academic, and policy observers of the system, foreign governments regularly called upon to address the complaints of their nationals, and selected representatives of the different streams of immigrants.

Currently, several informal feedback opportunities operate, with various degrees of effectiveness, to provide the agencies with information about process problems and potential solutions. As an example, the AILA holds informal liaison meetings with national and regional personnel. Increasingly, these liaison meetings have been essential in reporting on processing times, new procedures and in designing effective solutions to problems. The agencies also hold liaison meetings with other institutional representatives of the participants in its system, such as the non-profit providers and humanitarian groups.

However, in many situations, the agencies' unwillingness or inability to incorporate suggested changes or to communicate its policies to the field limited the effectiveness of these informal meetings. Accordingly, Congress should consider mandating public liaison meetings and providing the staff and resources necessary to publish the text of the meetings and the agreed to recommendations. In the current procedures, AILA or other groups external to the agency usually write the minutes of the meetings and submit them to the agencies for approval. Although this is done in a very

consultants).

435. The INS did convene such a group when it hired outside consultants to advise it on reforming its operations. The consultant reports are not public, see Interpreter Releases where such reports are referenced. Still, there is a continuing need to create such advisory committees on an institutional level. Congress mandated the creation of one such committee to oversee INS operations at international airports. See 8 U.S.C. § 1356(d) (Supp. V 1999). The committee is required to publish notice of the meetings and to prepare written minutes. See Immigration and Naturalization Service User Fee Advisory Committee; Meeting, 65 Fed. Reg. 8209 (Feb. 17, 2000). At times, local advisory committees have also been established. See, e.g., New York District Advisory Committee. However, the minutes of these meetings reveal little or no information about the items discussed at the meetings. See, e.g., Minutes of March and June meetings (on file with author). If the advisory committees are to fulfill the role of providing feedback and increasing accountability, the minutes must be detailed and publicly available.

436. While the AILA performs this function very well, it is a private bar association and the liaison minutes are not routinely made available to the general public. To join AILA, an individual must be an attorney admitted to practice and the individual must pay dues. Although AILA offers some reduced dues for non-profit attorneys, membership is not free.

437. Apparently, AILA has been discussing a similar proposal. See Interview with Frances Berger, Member of AILA Board of Governors (Aug. 29, 2000).
expeditious manner and even when agency management commits to procedural reform, the minutes of these meetings are not consistently transmitted to the operational levels to guide the adjudicators.

Some, but certainly not all, of the topics discussed in the liaison meetings should be reduced to written policy memoranda. These memoranda should be widely distributed to commercial publishers and participant organizations. Further, they should be posted on the INS Web site and published in the Federal Register. Where accountability is essential and the agency has not initiated APA rulemaking, the non-governmental actors should consider formalizing the liaison agreements into petitions for rule making. 438 Although the petitions may never be promulgated as regulations under the APA, the agencies could publish rule proposals as policy memoranda when they are in general agreement with the petition.

While an agency is not required to take steps to actually promulgate rules based on a petition for rule making, the APA requires that, within a reasonable time, it either deny the petition or begin the rulemaking process. 440 In the immigration area, Congress should consider giving petitioners more power by creating a specific time period wherein the agency must explain why it will not act on the procedure recommended or notify petitioners of an adoption of similar or modified procedural solutions. With specific time frames, actors could petition federal district courts for an order for agency action or, if court participation is deemed too burdensome, for referral to a Congressional oversight committee. 441

2. Improve Public Reporting of Procedure

Some of the recommendations made here are easy to implement and


440. See 5 U.S.C. § 553(e); Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984) (discussing limits on judicial review of failure to act on a petition for rulemaking). Generally, courts have held there is no right to force the agency to consider the petition, but there may be limited review of the agency rejection of the petition. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 2.1.1 (1998) (gathering cases on petition for rulemaking).

441. While I recognize that these rulemaking efforts divert agency resources in the short term, forcing the agency to adopt more rules over time will increase efficiency and transparency.
greatly increase the ability of the participants to comply with filing requirements. Congress should consider creating a special provision for procedural rules for the agencies and, although not requiring the full APA rulemaking protocol, require the publication of all procedures in the *Federal Register* and on agency Web sites.\[442\] District offices of the INS, regional offices of the Department of Labor, state agencies, and the various consulates of the Department of State should maintain a public access library with these procedural memoranda, and whenever possible, post comments on their Web site addressing the local implementation of the procedures.\[443\] These local implementation comments are very important. Merely announcing a new national procedure will not result in uniform change. For example, after the Department of Labor adopted the Reduction in Recruitment procedure, the various Regional Certifying Officers implemented the program in very different ways, and in many regions Reduction in Recruitment was not widely available.\[444\] Posting information about the current status of implementation of new national policies is essential.

While the substantive law is difficult to comprehend, the ability of non-specialists to understand the procedural rules of the agencies is much worse. In recent months, with the growth of the Internet and government Web sites, more information is available, but even basic instructions about procedures and processing times are sorely lacking. Visit the INS Web site to learn how to sponsor your relative for immigration,\[445\] and you will find that as a U.S. citizen you can indeed sponsor your brother or sister. No-


\[443\] Publishing this data also has the side benefit of allowing the public to monitor at least one aspect of the performance levels of the agency. Some of the regional Department of Labor offices are posting special procedures and information about special filing requirements of the state agencies under regional supervision. See DEP’T OF LABOR, OCCUPATIONAL EMPLOYMENT STATISTICS, FOREIGN LABOR CERTIFICATION, available at http://www.workforcesecurity.doleta.gov/foreign.asp (last visited Jan. 29, 2002). The INS Web site is beginning to provide more detailed information about forms, the proper jurisdiction for processing the application, suggestions for supporting evidence, and current information on filing fees. The INS Regional Service Centers now have pages on the INS Web site. These pages contain helpful information about preparing applications for submission, mailing the documents, and supporting documentation. They do not contain processing time information. For how to file forms, see INS, FORMS, FEES, AND FINGERPRINTS, available at http://www.ins.usdoj.gov/graphics/formsfee/index.htm (last visited Jan. 29, 2002).

\[444\] Initially in New York, the state agency and regional office considered only specialty cooks to be an occupation suitable for reduction in recruitment. See Interview with Frances Berger, Attorney at Law, Law Office of Frances Berger, New York, N.Y. (Aug. 15, 2000).

where on the site, however, will you find a warning that the current waiting time in this category is approaching twelve years.\textsuperscript{446} Employers seeking information about sponsoring workers are rerouted to the Department of Labor Employment and Training Administration Web site.\textsuperscript{447} The Department of Labor has been improving the Web site but the quality and consistency of the information available makes it difficult to understand the regular and expedited processing procedures and the multi-year processing time differences in these procedures.\textsuperscript{448}

The Department of State Web site contains very helpful summaries of the immigration categories.\textsuperscript{449} However, this site, too, does little to explain the delays or complexity of the adjudication process.\textsuperscript{450} Consider the explanation of the labor certification requirement:

\begin{quote}
The applicant must complete DOL Form ETA-750B, Statement of Qualifications of Alien, and send this completed form to the prospective employer who completes Form ETA-750A, Application for Alien Employment Certification, Offer of Employment. The prospective employer submits both forms to the local office of the State Employment Service in the area in the United States where the work will be performed. The employer will then be notified by the appropriate regional office of the DOL of its approval or disapproval.\textsuperscript{451}
\end{quote}

It reduces a complex procedure to filling out forms.\textsuperscript{452} The description is

\textsuperscript{446.} There is a vague statement about how "demand may exceed supply" and a link to the Visa Bulletin. However, deciphering the Visa Bulletin is very challenging.


\textsuperscript{448.} An unusual exception is the Region III website (now renamed Region) which contained processing times for the various types of applications in its office. Perhaps this office publicized the times because the region was processing cases filed within the last two months. See Employment & Training Admin., Dep't of Labor, Atlantic Region, available at http://www.doleta.gov/regions/reg03/ (last modified Jan. 10, 2002). In contrast, the information for Region II (renamed Region 1) gave no processing times but did list a status phone line (212) 337-2193. These telephone numbers give tape-recorded information about the date of the cases being worked on. It is also possible to call and speak to an individual officer. The Region IX website was unavailable. AILA reports that Region IX has the worst backlogs and based on liaison minutes, cases filed more than four years earlier may still be awaiting adjudication.

\textsuperscript{449.} See generally Dep't of State, Visa Services, available at http://travel.state.gov/visa_services.html (last visited Jan. 29, 2002).

\textsuperscript{450.} It also contains one gross error. The site still refers to the Labor Market Information pilot program. Although authorized in 1990, the statutory authority sunset four years later and the program was never implemented. For a discussion of this program, see supra note 151 and accompanying text.


\textsuperscript{452.} While forms can be useful in guiding unsophisticated participants, far too often the immigration forms and accompanying instruction do not adequately inform the public about
irresponsible in its misleading simplicity. 453

Sophisticated participants may visit one of the public Web sites sponsored by law firms posting current processing time reports gathered by the AILA. 454 However, the reports themselves use different criteria for describing the estimated processing times and can be completely deceptive. 455 The INS Web site does not even link the user to these reports. Instead, the INS tells the reader that the estimated processing times are reported on the receipts issued at the time of filing an application. In reality, the receipt times are often incorrect. Participants can try to call the INS customer service line to learn estimated processing times, however participants are not provided with information about how to contact the local or regional office if a case is beyond that time frame. 456 Sophisticated participants may utilize internal agency tracking procedures, but the general public does not know these even exist. 457

the substantive criteria, adjudication standards, or processing times. Moreover, the forms are often out of date and infrequently updated.

453. Given the need for clarity in this field and the high number of people who rely on the government to provide the information, the Department of State could at least link to the Department of Labor site or do more to reflect the nature of the certification requirement.


455. For example, the Texas Service Center reported processing times do not reflect the actual time required because the time necessary to get the case assigned to an adjudicator is not reported. The real processing times may double in many cases. See Interview with Veronica Jeffers, Senior Associate, Fragomen, Del Rey, Bernsen & Loewy (July 31, 2000).

456. Interview with customer service representative concerning processing of naturalization petitions in New York. The representative assured me processing required a minimum of thirty-nine months. Receipts for these petitions said a processing time of up to thirty-six months. The Customer Service National Hotline processing information was contradicted by the Vermont Service Center representative, who said that cases pending that long were sometimes closed for inaction or had to be rerouted by special procedure to ensure New York District processing. Telephone interviews with anonymous customer service representatives (July 24, 2000).

457. It is difficult sometimes, even for trained immigration professionals, to identify the status of a pending application because of the bureaucratic factors that complicate the existing inquiry process (Visa Bulletin reports, automated phone systems, etc.). Currently, the California Service Center's (CSC) Director's Office created a backup to the existing inquiry process. The Director's Office houses an Information Officer to field questions and resolve problems, an Adjudication Officer, who can make final decisions on cases, and an Ombuds who is specifically focused on those cases that require extraordinary involvement from the Director's Office. The most appropriate time to turn to the Ombuds is when issues simply cannot or have not been resolved through any other means. While the Ombuds can identify and resolve problems in a timely manner, the CSC warns that the Ombuds can only remain beneficial if used sparingly. See California Service Center/AILA Liaison Meeting, 18 AILA MONTHLY MAILING 860-65 (1999).
Ideally, the government would create a single Web site that would answer the questions of a prospective immigrant or employer wishing to sponsor an immigrant. The physical jumping from site to site in cyberspace is a poor introduction to the reality of journeying through this territory. The inability to imagine who would prepare and maintain such a site is a further illustration of the structural problems inherent in this administration process.\textsuperscript{458}

3. \textit{Use of Technology for Communication and Efficiency}

Communication must be improved. As was discussed above, it can take the INS more than one year to communicate to the Department of State that the INS approved an immigrant petition.\textsuperscript{459} This is a gross abuse of public trust and an example of the INS' failure to set appropriate priorities. The technology of the three agencies should be developed in concert. If we are going to continue with three separate entities, then the enterprise architecture\textsuperscript{460} design of each agency must include coordination with the others. Apparently, the agencies appear unable to coordinate based on several years of reports to Congress about working groups and problems with the database designs.\textsuperscript{461} Congress, which created this three-headed monster, must take some of the responsibility and mandate coordination of the technological design.\textsuperscript{462}

Communication is essential to all three process values—integrity, efficiency, and transparency. Many of the problems identified in this Article are directly attributable to the agencies' failure to establish inter and intra agency communication. Communication with the public is obviously an essential ingredient of transparency.

\textsuperscript{458} See supra Part IV.B.1 (discussing need to create a coordinating authority).

\textsuperscript{459} See supra note 306 (discussing 1-824 processing times); see also supra Figures 4 and 5, p. 280.

\textsuperscript{460} See INFORMATION TECHNOLOGY, supra note 332, at 2 (discussing GAO report on poor state of INS technological planning referred to as an enterprise architecture).


\textsuperscript{462} Merely ordering the agencies to coordinate would be insufficient. In 1999 Congress ordered every agency to create a Central Information Officer. See discussion in GAO REPORT, supra note 28. Here Congress may need to create and fund a single office with the authority to control the agency appropriations and technological development.
4. Measuring Performance and Participant Satisfaction

In a popular book discussing efforts of governments to streamline and reform operations, the authors stress the need for government organizations to be "customer oriented."463 One of the techniques mentioned is to create an ombud, an office devoted to listening to customers and empowered to act on customer complaints.464 The INS does not have an official ombud office.465 Although recent proposed legislation466 suggested creating such an office, the INS opposed the concept and in its draft reorganization plan discussed creating a Customer Service Advocate.467 Ideally the INS would support both a Customer Service Advocate and an independent ombud because the two do not necessarily serve the same function. Further, neither the Department of Labor nor the Department of State have ombud offices.

If an ombud is to be effective, the office must be independent from the control of agency management but sufficiently connected to the agency to understand both the operations and how to resolve complaints or inquiries.468 One of the functions the ombud office could undertake would be to measure the satisfaction of participants in the system and to initiate inde-
dependent investigations of problems.  

If a formal ombud is not possible, then the agencies should create informal feedback mechanisms such as regular customer satisfaction reports. Businesses and immigrants should be questioned about their experience with the system at regular intervals throughout the process. The INS and Department of Labor should provide a formal receipt for approved petitions and a written denial for denied petitions. A questionnaire inquiring about timing, information, and service should be provided with every petition. These evaluations should be gathered by the agencies and special personnel devoted to analyzing trends in reported problems, delays, or complications.

As mentioned above, one of the chronic problems of the agencies is the anonymous nature of most adjudications. All employees should sign their work and wear name badges to allow participants in the system to provide reports on their treatment and conduct. The INS has long had the practice of signing all actions under the stamped signature of the District Directors or Directors of Regional Service Centers. The Department of Labor prepares correspondence under the name of the Regional Certifying Officer. The Department of State frequently protects the identity of

469. Of course, creation of this independent office would take additional resources and the ombud may, from time to time, interfere with the operations of the agency adjudications. However, given the current complete lack of adequate customer service, for at least a trial period, an ombud is an appropriate way to measure performance and perhaps remedy longstanding endemic problems.

470. The Department of State does not routinely issue receipts, but in the immigrant visa system the individual interviewer has a clear opportunity to provide participants with customer service evaluation forms, which could be mailed to a central office.

471. The participant should be assured that all responses on the customer satisfaction report will remain confidential. Notwithstanding the desire of Congress to limit the amount of paperwork, there are some information gathering requirements that should be given a high priority. See, e.g., William F. Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv. J. on Legis. 1, 116 (1987) (arguing agency paperwork should be evaluated on a cost-benefit basis); see generally 44 U.S.C. §§ 3501-3520 (1994 & Supp. III 1997) (requiring justification for new imposition).

472. This aspect of the administrative culture is discussed supra Part III.B.3.f.

473. Of course, some participants will abuse this privilege and potentially harass a governmental employee or inappropriately provide negative feedback. However, if feedback is continuously solicited and reported, the rare inappropriate evaluation will become obvious because of the number of contradictory reports of fair treatment from other participants. Moreover, employees of the government should be given some protection from sanction or unfair evaluation from participants in their job performance. Nevertheless, failing to collect the data simply because some will inappropriately blame the messenger disproportionately shifts the burden to the immigrants and other participants. Further, employees may be motivated by praise and expressions of gratitude from participants as well as commendation and respect from managers observing their performance as reported by these new sources of information.
overseas personnel for fear of terrorist attacks. Yet, the Department of State lists key officers at foreign service posts on its Web site and generally makes available names of consular officers.474

If there are sufficient and appropriate reasons why personal identity should not be revealed, then, at a minimum, all officers should be given a badge number so that public interaction with that particular individual can be tracked and reported.475 It seems strange that taxi drivers must display their names and license numbers but individuals making important and significant decisions about visa status or naturalization remain anonymous.

5. Publish More Administrative Decisions

Almost all of the adjudications discussed in this Article are made on the basis of written submissions of forms and supporting documents. The applicant submits the material by mail in most cases and awaits written action from the agency. For the most part, the INS and Department of Labor adjudications are made without personal contact with either the sponsors or the individual immigrants.476 Given the large and growing volume of adjudications, this form of informal and written adjudication makes practical sense. However, understanding the procedures used to properly file the applications, identifying the standards the adjudicator will apply, predicting the outcome in any particular case, and measuring the consistency of the adjudications are all extremely difficult, if not impossible tasks.

The approvals and denials of the various petitions at this adjudication level are not published. Individual applicants receive written denials containing a basic explanation of the reasons for the denial.477 If a case is ap-


475. Ironically, the border patrol, which has more physical contact with the public and are at times in dangerous confrontations, wear name identification on their uniforms.

476. It is possible in most Department of Labor regions to speak with an adjudicator on the telephone. This is very rarely the case in the INS.

477. The APA requires that the agency provide a brief statement of the grounds for denial. See 5 U.S.C. § 555(e) (1994 & Supp. V 1999). See also Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (mandating a statement of reasons for determination and evidence relied on as a matter of procedural due process). While it is not my intent to argue the constitutional requirement of due process necessitates this type of notice in all immigration cases, this practice has become fairly standard in the agency operations even if not constitutionally required. See generally Verkuil, supra note 26 (discussing INS failure to provide sufficient protections in denial of adjustment of status cases); Verkuil, supra note 45 (noting most agencies should include this element in informal adjudications).
proved, the only document issued by the agency is a standard approval notice. 478

In some visa categories, such as the national interest waiver discussed above, the lack of detailed regulations or informal policy memoranda make it difficult to assess the merits of any individual case or to gather the type of supporting evidence the agency desires. In other categories, where the regulations are more specific, issues arise about the interpretation of specific regulatory terms. In these areas, 479 publishing the denials would go a long way to making agency actions more transparent and at least providing some tools for measuring consistency and accuracy in adjudication. 480

While publishing all of the denials made at this level may, at first consideration, seem too labor intensive or burdensome for the agency, the overall rates of denial are fairly low. 481 Using optical scanning devices and posting denials to INS Web sites or making copies available through FOIA requests would aid participants in understanding the evaluative process of

In practice, the INS provides written denials, which may contain an explanation of both the evidentiary and legal inadequacies of the application. Some attorneys complain that these denials contain little specific information and contain boilerplate recitations. If these denials were to be publicly published it is possible that the agency would find it in its own interest to invest more time in providing detailed guidance to the public because this information might prevent future insufficient applications. At the current time, there are no regulations that prohibit re-filing. Some attorneys use the denials to redocument and resubmit the application for the same worker. Although administrative appeal procedures do exist, many attorneys find it more expeditious to simply refile. The current backlog for administrative adjudication of a business related petition is between eighteen and twenty-four months. See Interview with Nancy-Jo Merritt, Partner, Littler Mendelson in Phoenix, Ariz. (Aug. 15, 2000).

478. In the case of the Department of State, the individual receives a formal stamp in his or her passport. The INS uses a single page document called Form I-797. This form contains the name of the petitioner, beneficiary, and the visa category. If a petition is valid for a limited period of time, the length of the approval is also noted. See generally Memorandum from Thomas Cook, Acting Assistant Commissioner for Adjudications, INS, to All Regional Directors, All Service Center Directors, and Director, Administrative Appeals Office (Feb. 13, 2001), at http://www.ins.usdoj.gov/graphics/lawsregs/handbook/11blanke.pdf.

479. Ideally, the INS would publish all denials in all categories but initially it would be sufficient to identify those visa categories where transparency and vagueness in substantive criteria are of particular importance. Rather than the agency selecting these areas alone, I recommend an oversight committee, including members of the private bar, identify the visa categories for publication and to remove from the publication list those where adjudication standards appear to be well-established and accessible to participants.

480. Personal information should be expunged in the published decisions to protect the privacy of the individuals.

481. At least I believe the rates of denial are low. The INS does not formally report the adjudication rates for each visa category. My assumption is based on reviewing testimony before Congress, interviews with agency officials, and experienced immigration attorneys. The INS does report a seven percent denial rate for adjustment of status.
The publishing of denials would benefit the agency as well. Adjudicators would have the ability to search the work of other adjudicators. Agency management could study the operations and determine if national adjudication standards are appropriate. Congress and other observers might be better prepared to fine tune or refine the substantive criteria when the agency appears to be too restrictive or narrow in its adjudications. Currently, the stories of "rogue" adjudications must be gathered on an ad hoc or anecdotal basis. Special industry exemptions and procedures have often been built into the statute on the basis of this type of evidence. The publishing of denied cases could also deter applicants from filing frivolous or weak cases that fail to meet the substantive criteria.

At first glance, the Department of Labor appears to provide more pub-

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482. In August of 2000, the INS began posting to its Electronic Reading Room optically scanned copies of adjustment of status decisions, which had been considered by the Associate Commissioner for Examinations. See generally INS, ADMINISTRATIVE DECISIONS, at http://www.ins.gov/graphics/lawsregs/admindec/index.htm (last modified Dec. 14, 2001). The decisions included both denied and approved applications. In a telephone interview, Pamela Ball, INS Reading Room Specialist, the Electronic Reading Room (ERR), stated that the aim of the Administrative Decisions portion of the ERR is to be representative and not to be complete. INS wants the public to be able to get an idea of the nature of INS Administrative Decisions. Ms. Ball said the site is not meant to serve as a research tool for practitioners. She hoped that by September of 2000, the ERR would have several opinions posted for each of the types of administrative decisions handled by the INS examinations branch. Ms. Ball also said that all the opinions selected should be from the first three months of 2000. She also reported that the INS is thinking about putting all administrative decisions in CD-ROM format. According to Ms. Ball, the public could access the CD-ROM if they came to Washington, but she did not think the CD-ROM would be available at other offices. See Interview by Michael McCarthy, Reference Librarian, New York Law School with Pamela Ball, INS Reading Room Specialist, the Electronic Reading Room (Aug. 17, 2000). The INS regulations require each District and Regional Center maintain a reading room with copies of its decisions. See INS Powers and Duties of Service Officers; Availability of Service Records, 8 C.F.R. § 103.9(e) (2001). We found the New York District Reading Room was closed and apparently there are no plans to reopen it. See Interview by Michael McCarthy with several New York District INS employees (Aug. 21, 2000).


484. Potentially, the agency could meet some of these goals by making the Adjudicator Field Manuals and Examiner training materials publicly available. However, publication of denials may be preferable because adjudicators may not follow the agency manuals, and the agency does not update these materials with sufficient frequency. Despite FOIA requests, Matthew Bender, a commercial publisher, has been unable to obtain all of these manuals and training materials. See Letter from Stephen Yale-Loehr, Editor, Matthew Bender treatise, to Lenni B. Benson, Associate Professor of Law, New York Law School (Sept. 18, 2000) (on file with author).
lished decisions than the other agencies because currently the agency publishes all of the decisions of its appellate body, the Board of Alien Labor Certification Appeals (BALCA), on the agency Web site.\(^485\) However, as was previously discussed, few cases are denied and even fewer petitioners appeal.\(^486\) Also, publishing only at the appellate administrative level does little to provide immediate guidance for the applicant. Especially in recent years, where the Department of Labor has been reforming, retooling, streamlining, and prodding the system, it has been particularly difficult for participants to understand the current ground rules. This problem is compounded by the fact that labor certification involves both state agency officials and regional certifying officers who may, and frequently do, interpret the national policies in their own way.\(^487\)

The Department of Labor regulations require that before a labor certification application can be denied, the Regional Certifying Officer must issue a written Notice of Findings detailing the insufficiencies of the application.\(^488\) These decisions could be published and disseminated via the Web sites and commercial publishers.\(^489\) The state agencies frequently issue similar “assessment notices,” indicating changes the agency would like to see made in the initial application before the labor certification can be further processed.\(^490\) Publishing these notice of assessments would increase the transparency of the policy implementation, speed up correction by the national Department of Labor and perhaps, deter agency officials from pre-

\(^{485}\) See Dep’t of Labor, OALJ Law Library: Immigration Collection, at http://www.oalj.dol.gov/libina.htm (providing BALCA decisions) (last visited Jan. 29, 2002). These opinions are also published in Lexis and Westlaw. Summaries are also widely available in commercial reporters.

\(^{486}\) Todd Smyth, BALCA Administrator, reports a workload as follows: 1996 docketed, 495, disposed, 310; 1997 docketed, 559, disposed, 740; 1998 docketed, 294, disposed, 719; 1999 docketed, 313, disposed, 579. See Letter from Todd Smyth, BALCA Administrator, to Lenni B. Benson, Associate Professor of Law, New York Law School (on file with author).

\(^{487}\) Interview with Veronica Jeffers, Senior Associate, Fragomen, Del Rey, Bernsen & Loewy (Aug. 29, 2000).


\(^{489}\) In some cases, the Notice of Findings is rebutted and the case is approved. Ideally the agency would update the prior publication to indicate how the rebuttal was successfully made. But even short of this ideal, the Notice of Findings alone would be a vast improvement. In cases where the rebuttal is insufficient, the Department of Labor issues a final decision and these should also be transmitted to the public. See id. § 656.25(e) (discussing procedures to rebut a Notice of Finding determination).

\(^{490}\) Interview with Frances Berger, Attorney at Law, Law Office of Frances Berger, New York, N.Y. (Aug. 15, 2000); Interview with Veronica Jeffers, Senior Associate, Fragomen, Del Rey, Bernsen & Loewy (Aug. 25, 2000).
cipient changes unsupported by policy or precedent.\textsuperscript{491}

The Department of State does not publish any denials or opinions concerning individual cases and the decisions of individual consular officers are generally insulated from both administrative and judicial review.\textsuperscript{492}

Rather than perceive such a requirement as a burden, the Department of State might also consider the benefits such publication and review procedures would add to its operations. Just as in the INS adjudications, participants would have a clearer understanding of the necessary level of documentation required to support eligibility and of the standards applied to cases. The Department of State decisions would also be a formal method of communicating to the INS and Department of Labor problems the consular officers encounter in their individual adjudications. Congress would have a clearer picture of the areas of visa abuse and how the lack of clear standards might be leading to inappropriate denials of visas.

One of the objections usually made by the agencies to requests for more guidance about supporting documentation or the application of the criteria is that the agency does not want to be a school for impostors. In other words, by studying the denials and cases rejected for insufficient evidence, the fraudulent applicant is taught how to build a stronger facade. While this may be true and some applicants might go to extreme lengths to document false corporations or employment relationships, if the requested documentation is itself difficult to fabricate, the adjudicator should be more confident that the cases approved are actually deserving of approval. Nor does this suggestion mean that the agency would not be able to request different or additional supporting documentation should the examiner be in doubt of qualification.

\textsuperscript{491} I realize that requiring publication may also freeze the programs because the agency will proceed more cautiously than when it issued individualized written notices. Nevertheless, the agency does, at the current time, prepare these written statements and it should be willing to make the decisions public.

\textsuperscript{492} See Dep't of State Visas: Documentation of Nonimmigrants under the Immigration and Nationality Act, as Amended, 22 C.F.R. § 41.121(b) (2001); Dep't of State, 9 FOREIGN AFF. MANUAL § 41.121, PN 1 Visa Refusal (stating regulations provide consular officer must provide a brief written explanation of basis for refusal if the individual is ineligible for visa). In many cases the refusal is simply stated as "application accepted" but does not note the reason for ineligibility. See id. In any case where the applicant can articulate a bona fide legal issue, the applicant may request a legal opinion from the advisory opinion office of the Visa Office. See also Dep't of State Regulations Pertaining to Both Nonimmigrants and Immigrants under the Immigration and Nationality Act, as Amended, 22 C.F.R. § 40.6 (2001); Dep't of State, 9 FOREIGN AFF. MANUAL § 41.121, N1.1.
D. Incentives to Improve Performance

1. Fiscal Accountability and Incentives

All immigration procedures, except the labor certification application, require a user fee.\(^{493}\) In recent years, Congress greatly increased the authority of the INS to charge these fees and sought to pass on many of the costs of operating the immigration system to the participants.\(^{494}\) At times, fees also served other purposes such as generating funds from business immigrants to support border enforcement operations. Congress should more carefully consider building in incentives for agency performance by intelligent allocation of the user fees. The business lines of operations are demoralized and all incentives for efficiency are removed when almost all fees from those operations are directed to other agency functions. Therefore, as a paramount consideration, each operation should have sufficient appropriated revenue to staff its main adjudication operation and then additional user fee revenue should be used to expand staff to meet demands and move floating personnel from other areas when demand grows unexpectedly in a particular product line. The ability to be flexible and adaptable is not a traditional characteristic of government because of the long lag terms in funding and appropriation cycles. However, if immigration operations are going to keep up with market demands and changing country conditions or emergencies, the agencies must have the flexibility to use funds to move personnel quickly. As unfashionable as it may sound, the system should have a built in team of surplus adjudicators. In truth, there will probably never be surplus at current agency staffing levels, but the agency should be able to move these free agent teams when new needs emerge.

Just as state governments object to unfunded congressional mandates, Congress should listen to agency officials when new proposals are being considered and seriously review requests for expansion of staff or user fees to allow new programs to be implemented in a timely and effective manner. Congress frequently gives INS performance deadlines for various visa line products without accompanying the deadlines for appropriations and lead times necessary to implement the changes or programmatic responsibilities.

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Not all the fault can be placed on Congress. The agencies seem to adopt a “well, what can you expect, woe is us” attitude when these mandates appear. Here again, outside consultants and reporting from constituent participants can serve to mediate between Congress and the Executive. Hopefully, the informed dialogue would serve as a substitute for excuses and castigation.

2. Fees Tied to Performance

In the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) provisions concerning the H-1B, Congress gave the Department of Labor an incentive to adjudicate H-1B LCA forms within the seven days required by Immigration and Nationality Act § 212(n)(1).\[495\] If the agency reported substantial compliance with the LCA processing, Congress authorized that six percent of all fees collected by INS in the H-1B program be returned to the Department of Labor for equal spending on the LCA adjudication itself and the enforcement operations of the Department of Labor.\[496\] What the statute did not build in was reporting from participants in the system to verify the “substantial” compliance. If the agency is to be rewarded for on time performance, surely outside observers’ assessments of the performance is critical.\[497\] Apparently, the incentive that led to a significant improvement in agency performance. In 1998, before the ACWIA legislation was introduced, employers routinely faced delays of more than thirty days.\[498\]

The concept of incentives for good performance is an important one and should be carefully expanded. Even if only small amounts of revenue can be tied to the incentive, the process of measuring performance, and publicly reporting upon it is valuable in and of itself. However, reporting requirements should be more specific than an assertion of “substantial compliance” without corroborating details and reports from the consumers of the


496. See, e.g., Letter of Secretary of Labor Alexis M. Herman, to Vice President Albert Gore Jr. (Mar. 2, 2000) (certifying compliance in 1999, published on AILA Infonet).

497. As of July 2000, several Regional offices were reporting delays of up to thirty days to return the LCA form. See generally LAW OFFICES OF CARL SHUSTERMAN, GOVERNMENT PROCESSING TIMES, at http://www.shusterman.com (listing processing times for INS Regional Service Centers) (last visited Jan. 29, 2002). The entire fee sharing is, in a sense, laughable because the Department of Labor’s role in adjudicating an LCA is nonexistent. The regional offices of the Department of Labor do not make an independent evaluation of the LCA other than confirming the form is completed and signed. No review is made of the accuracy of the wage attestations or other substantive information collected on the form. The original of the form is returned to the employer for re-submission to the INS.

498. See id.
agency services.

In addition to incentives for good performance leading to the redirection of user fees, Congress should consider fee penalties and rebates. Fees paid to the agency for the processing of immigration petitions could be paid to the special escrow accounts of the general treasury. If the agency failed to adjudicate a petition within the parameters established by congressional oversight, the agency would forfeit a percentage of the fee with the percentage growing as the adjudication languished. Of course, the agencies should be allowed additional time to process cases where the agency can identify a “good cause” for the delay. For example, it takes longer to prepare a written denial than to issue a standard approval notice. If a petition is going to be denied the agency could transfer the case to a processing line affording greater flexibility. Such a system also requires outside monitoring of the reporting. The agency should not be the sole evaluator of their timely performance and excused delays.

At the end of 2000, Congress attempted to achieve some of these benefits by providing the INS with authorization to charge a fee for “premium processing.” The intention of the statutory provision was to allow special service to be given those participants requiring expedited processing in business cases provided the participant paid a premium fee. The fees are to be collected and reallocated to improve overall INS services. Unfortunately, as implemented, the program does not adequately address the impact of premium processing on the overall workload and priorities of the agency. Moreover, early critics of the program suggest that the program creates perverse incentives where the INS will focus solely on the premium cases in an effort to increase fees for the agency.

3. Adjudicate On Time or Approve the Petition

For certain applications and petitions, Congress should seriously con-

499. The federal government has an electronic payment system in development. The program is www.paygo.program and is being developed by a joint partnership between the government agencies and BancOne. The INS is one of the top priorities of the www.paygo.program. Indirect fee payment is already in use by the Department of State for the payment of visa fees.


501. See INA § 286(u), 8 U.S.C. § 1356(u) (Supp. V 1999) (setting fee at $1,000 in addition to “normal petition/application fee”).

502. See id. (stating the fee “shall be deposited as offsetting collections in the Immigration Examinations Fee Account.”).

503. See generally Endelman, supra note 122.
consider a mechanism of authorizing a specified period for the agency to complete adjudication and after the time period is exhausted, absent special formal tracking from the agency, the petition would be deemed approved and corroborating documents issued. This is the approach already utilized to grant work authorization to applicants for political asylum. The applicant must wait 180 days after filing a good faith application for asylum before the INS will issue temporary work authorization.\textsuperscript{504} One of the side effects of this provision has been to give the agency management target goals for handling asylum adjudication within six months. For cases filed after 1998 the agency has largely met this goal. When the proposal was originally made, scholars and governmental agents argued that although asylum applicants may find the lack of work authorization to be a hardship, this reform was essential because far too many applicants were simply filing for asylum to obtain temporary work benefits. The faster adjudication of asylum claims aided the bona fide claims and deterred the false claims.\textsuperscript{505}

While perhaps inappropriate for all categories, Congress might consider interim work authorization and lawful status for some non-immigrant petitions and the automatic approval of immigrant petitions pending longer than 120 days.\textsuperscript{506} The approval of the immigrant petition does not, in and of itself, authorize the individual to immigrate. He or she must still complete the immigrant visa or adjustment of status processing. The agency could one-step review the adjudication of the visa petition at the time of the individual adjudication if necessary.

I also advocate the automatic approval of employment-based adjustment of status applications pending longer than nine months. Potentially, this could grant permanent resident status to thousands of people.\textsuperscript{507} The

\textsuperscript{504} See INS Procedures for Asylum and Witholding of Removal, 8 C.F.R. § 208.7(a) (2001). The application for asylum must be pending for 150 days, after that, the INS has thirty days to decide to grant or deny the work authorization.

\textsuperscript{505} See generally Martin, supra note 26.

\textsuperscript{506} See INS Control of Employment of Aliens, 8 C.F.R. § 274a.12 (1997) (stating automatic approval or issuance of work authorization is already an approach used by INS). For example, if the INS can not adjudicate a request within 120 days for extension of non-immigrant status or within 90 days for work authorization filed in conjunction with an application to adjust status to permanent resident, the applicant may receive an automatic grant of work authorization for up to 240 days. See id.

\textsuperscript{507} It would undoubtedly also act as an incentive for people to file weak or even fraudulent applications. The agency would have to combat these tendencies by first adjudicating cases within the time frame so people knew the case would actually be examined. Second, the agency must publicize the tough, existing penalties for visa fraud that can result in permanent bars from immigrating as well as removal from the United States. The current statute also authorizes rescission of permanent resident status within five years of admission. The INS must establish by clear, convincing, and unequivocal evidence that the status
agency would know this and I can envision no better incentive for the agency to complete their adjudication. There is already a low rate of denial of these petitions. Moreover, should the grant have been inappropriate for substantive reasons such as fraud or ineligibility, the INS can pursue rescission proceedings to revoke the permanent resident status.

4. Create New Mandamus Statutes

While I am loath to rely upon the federal courts to manage the operations of these agencies, there is a role the courts can play to ensure that the agency acts. Under current law, an aggrieved party may seek a declaratory judgement or mandamus relief when the federal agency fails to act. While a court will only order the performance of a non-discretionary or ministerial act, litigants have found that the filing of a mandamus action can mysteriously move the agencies to action. Attorneys throughout the United States have filed mandamus actions against the Department of Labor, INS, and Department of State and many report that the usual resolution of these actions is that the attention of the Assistant U.S. Attorney assigned to the case moves the agency to act. Mandamus does not necessarily result in an approval. However, inaction is paralyzing for the petitioners and at least when a petition is denied, the parties can seek administrative review or regular judicial review. If the INA is modified to contain specific time frames for adjudicating visa petitions, then a special mandamus statute should similarly be adopted to authorize a federal court to order compliance with the deadline. The statute should provide an opportunity for the agency to explain why action was impossible within the mandated time frames, or why performance was excused under the statutory provision.

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508. See 1987 INS YEARBOOK, supra note 62, at 17 (reporting approximately seven percent of all adjudication cases are denied).

509. See 8 U.S.C. § 1256 (stating statute of limitations is five years).


511. See id. Mandamus requires that the petitioner establish a clear and certain claim; a nondiscretionary ministerial act; and no other available adequate remedy. See generally IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 623-24 (7th ed. 2000) (explaining and discussing mandamus jurisdiction).

512. Interview with Nadine Wettstein, Attorney, American Immigration Law Foundation (June 15, 2000).

513. In the past, some courts have read time frames within the INA as unenforceable. See Robertson v. Attorney Gen. of United States, 957 F. Supp. 1035, 1037 (N.D. Ill. 1997) (holding ninety day time limit to adjudicate removal of conditional resident status in a marriage case is not mandatory).

514. In my view, any mandated time frames should contain opportunities for the agen-
Attorneys fees should be available in cases where the petitioner can demonstrate that the delay was excessive and unjustified.

Some precedent exists for special mandamus or calendaring statutes.\footnote{515}{See INA § 336, 8 U.S.C. § 1447 (1994) (authorizing a court to take over the examination of qualification for naturalization if INS fails to complete the case within 120 days).} They have been a part of the naturalization laws since 1952 and few abuses have been reported. Even if the federal courts are not the right place to handle these calendaring or mandamus type petitions, Congress should consider creating a legislative court with the authority to order the agencies to act.\footnote{516}{See Legomsky, supra note 26 (discussing specialized Article I courts in immigration law); Maurice A. Roberts, Proposed: A Specialized Statutory Immigration Court, 18 SAN DIEGO L. REV. 1 (1980); see also M. Isabel Medina, Judicial Review—A Nice Thing?: Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 29 CONN. L. REV. 1525 (1997).}

Providing a federal court forum may seem excessive and expensive. However, without the formality and strength of the independent judiciary to force the government to act, it is hard to envision another mechanism available to provide relief in individual cases. One of the benefits of these judicial filings would be the documentation effect of knowing how many cases were filed and how long the agency delays lasted.

5. Increase Resources to Deter and Prosecute Fraud

If I had to identify a single source of process problems, it would be the agencies' fear of fraud. So many of the roadblocks in the immigration system are present because far too often, the process designers focused on the worst case scenario. There is no doubt that some people will lie to immigrate to the United States; but there will never be any fair method of ferreting out the cheat for closer scrutiny.\footnote{517}{At times, the lies or deception have been an understandable response to discriminatory or irrational line-drawing in the immigration laws. For example, the exclusion of Chinese immigrants led to many people claiming to be the sons or daughters of Chinese who had become U.S. citizens. Becoming a "paper" family member may have been the only way to immigrate. See generally LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995). In my own experience, business people did not defraud the government, but far too often, the immigration tail wagged the business dog. Promotions, transfers, and significant changes in work assignments were delayed because a change would have meant a loss of immigration benefits for a key employee. After the employee completed the immigration process, it was often the case that she changed jobs, employers, or locations.} The issue is how can the agencies design a process allowing flexibility to deter and detect fraud, but does
not create bottlenecks at every step.

Several of the agency officials I interviewed for this Article, and others whom I have observed over the past fifteen years repeatedly, said they wish they had the resources to follow up on suspicious cases and to prosecute both civilly and criminally those who commit fraud. Ideally, the threat of audit or post approval investigation should also deter would be lawbreakers. But U.S. administrative law is filled with statutes that allow for audit, fines, and sanctions that are rarely enforced. Interestingly, there are few civil sanctions directly connected with the employment-based immigration petitions described in this Article. But even where the immigration laws do require sanctions, they are frequently unsupported politically.

Another example illustrating that process design alone is insufficient is the employment-based fifth preference for millionaire investors. Congress created a program with a built-in second chance to evaluate the bona fides of the investment. Each immigrant entering in this category must refile at the end of two years of conditional permanent residence to verify that he or she actually made the required investment and created bona fide employment. While Congress attempted to build a statutory design to deter or detect fraud, the INS and the Department of State began to perceive significant numbers of cases as completely false or carefully tailored to meet the regulations while not actually requiring a true commitment of funds. Over time, the agency began to require more documentation concerning the source of funds, questioning the value of the investment and whether the funds were truly at risk. Lacking sufficient resources to adjudicate the petitions to remove the condition or the new applications for this preference, the INS simply froze the adjudications. Eventually, the INS suspended adjudication of the immigrant petitions while the agency reexamined the statutory and regulatory requirements. For more than two years cases sat still. Rather than issue new regulations, the agency issued


520. Congress delegated adjudication of the immigrant petition to the INS. This gave the INS responsibility for adjudicating complex commercial law issues surrounding the foreign investments. The statute provides little guidance about the limits on qualifying investment. The INA was not explicit about whether the investment of capital could be a passive rather than an active investment.

521. See INS, REPORT TO CONGRESS ON THE EB-5 INVESTOR VISA PROGRAM, available at http://www.aila.org (last visited Feb. 1, 2002). This report is required by the Omnibus
four precedent decisions discussing particularly complex financial arrangements.\textsuperscript{522} Based on the interpretative change, some people who had entered the United States as immigrant investors now faced a possible termination of their resident status because the INS no longer recognized the form of investment as valid.\textsuperscript{523} While the agency maintains these administrative decisions "clarified" the existing statutory and regulatory requirements, the investors believe the agency retroactively altered the qualifications for an investment.\textsuperscript{524}

After understanding the agencies' desire to prevent fraud, it seems necessary to create some ability to do post approval audits of those cases that demonstrate a need for further inquiry. Currently, the agencies' examiners feel incredible pressure to route out the fraudulent cases, and the problem will likely worsen. As discussed above, the Department of Labor has begun streamlining the labor certification process. Reduction in Recruitment is being utilized and the PERM attestation model is expected by Spring of 2001. It is likely that the INS and the Department of State will feel an even greater responsibility to catch the fraudulent cases because the Department of Labor engaged in cursory review. To relieve this burden Congress should authorize greater funding for fraud investigations. At the very least there should be increased support to investigate fraudulent cases and greater civil penalties for those that break the law.\textsuperscript{525}

\textsuperscript{522} See In re Soffici, No. 3359 (B.I.A. 1998); see also In re Ho, No. 3362 (B.I.A. 1998); In re Hsiung, No. 3361 (Ass'n Comm'rs Examinations, July 31, 1998); In re Izummi, No. 3360 (B.I.A. 1998).

\textsuperscript{523} See Barry Newman, Green Card Blues: A Visa Program to Spur Foreign Investments Creates Grief for Some, WALL ST. J., Feb. 26, 1999, at A1 (reporting on freeze and numbers of investors who might face a termination of permanent resident status and even potential deportation).

\textsuperscript{524} The legality of the agency retroactive decision making is in litigation. One district court has upheld the new interpretation as a gap-filler rather than the adoption of new substantive rules. See R.L. Inv. Ltd. Partners v. INS, 86 F. Supp. 2d. 1014, 1016 (D. Haw. 2000). Two class actions have been filed. See Ahn v. United States, C99-3950 SBA (N.D. Cal. filed Aug. 24, 1999) (cited in 76 INTERPRETER RELEASES 1350 (1999)); see also Chang v. United States, No. CV-99-10518-GHK (AJWx) (C.D. Cal. 2001) (cited in 78 INTERPRETER RELEASES 875 (2001)).

\textsuperscript{525} The Department of Labor has no statutory authority in the labor certification program to issue fines. If the agency believes the employer or immigrant lied on the forms or in supporting documentation, the agency can refer the case to the Department of Justice for criminal prosecution under title 18, section 1001 of the United States Code. These prosecutions are very rare. See Interview with Harry Sheinfeld, Department of Labor (Sept. 5, 2000).
From almost any viewpoint, the millionaire investor immigrant program has been a failure.\textsuperscript{526} I have selected it here because it illustrates that a lack of commitment to adequately staff and fund a visa program leads to costly litigation and program failure. If Congress considers more opportunities for post adjudication investigation, it must also ensure that initial adjudications are well supported and the agencies have adequate funds to use the post adjudication procedures. While I hope to encourage Congress to provide the agencies with these tools, I urge caution. It would be completely inappropriate to force participants to bear the burden of post adjudication audit or sanction if Congress fails to provide clear standards in the substantive statute, delegates to an incompetent agency and does not require adequate agency rule making to define the proper parameters of the visa program.

CONCLUSION

This Article explored the experience of passing through the territory of immigration adjudication. By introducing the complexity of the system, I have tried to give some idea of the contour, some texture to the outline of the immigration law—the map drawn by Congress. Similarly, by giving

\textsuperscript{526} This program is a good example of several of the process failures identified in the Article but it is beyond the scope of this Article to give a complete and detailed analysis. Even at its height, the program was nowhere near the 10,000 visas authorized per year. In 1997, the INS reported entry of only 1,361 of 10,000 fifth preference visas. See 1997 INS YEARBOOK, supra note 62, at 18 (1999) (charting immigrants admitted through various admission categories through FYs 1988-1997). The State Department reports that in FY 1999, only 256 visas were issued and in FY 2000, only 231 visas were issued. See Interview with Charles Oppenheim, Chief Immigrant Visa Control and Reporting Division (July 17, 2000).

For a critique, see Beth MacDonald, The Immigrant Investor Program: Proposed Solutions to Particular Problems, 31 LAW & POL'Y INT'L BUS. 403 (2000).

It also illustrates the failure to provide clear statutory standards. Did Congress intend to require “active” investment with participatory investors, or could an immigrant qualify on the basis of investment of funds via equity or debt financing? One of the key issues was the use of arrangements which appeared as equity investments, but upon more sophisticated analysis were more similar to debt financing. The INS was poorly equipped to anticipate some of the complex commercial investment arrangements used to qualify immigrant investors. See Memorandum from INS General Counsel David Martin to Paul Virtue, Acting Executive Associate Commissioner, INS Office of Programs (Dec. 19, 1997), reprint in 75 INTERPRETER RELEASES 332-49 (1998).

This program is another example where the interrelationship between the agencies became very important. Many of the objections to the immigrant investors came from consular officers who grew suspicious of INS approved “millionaire” petitions for very young men and women or for people who clearly had no business experience. See Interview with Stephen K. Fischel, Director, Office of Legislation, Regulations and Advisory Assistance, Department of State, Visa Office (July 28, 2000) (on file with author).
the readers of the map more information and understanding of the reality of
the U.S. immigration system, one can see the gaping chasm between map
and territory. By focusing both on the importance of process and the ne-
cessity of a system that protects the process values, integrity, efficiency,
and transparency, this Article demonstrates the great failure of the current
system—its lack of consideration of process. I trust policy analysts will
pay new attention to the role of process in any future system. Focusing on
the process elements can aid in designing new substantive provisions or re-
forming existing law to achieve the substantive objectives. Without the fo-
cus, pray, mark all maps, "beyond this place be dragons."  

527. Ancient cartographers warning.