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## Private and Public Sector Models for Entrepreneur, Small Business Owner, and Investor Immigration Pathways

Shane Dizon

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# PRIVATE AND PUBLIC SECTOR MODELS FOR ENTREPRENEUR, SMALL BUSINESS OWNER, AND INVESTOR IMMIGRATION PATHWAYS

SHANE DIZON\*

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## INTRODUCTION

A pathway to permanent residence or citizenship for undocumented immigrants has been a linchpin of the contemporary United States immigration debate and remains a hot-button political issue for everyday Americans.<sup>1</sup> While popular support for such pathways has generally increased,<sup>2</sup> pockets of acute opposition to such pathways have only polarized.<sup>3</sup> Meanwhile, policy think tanks across the political spectrum

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1. See, e.g., IPSOS, THOMSON REUTERS, CORE POL. DATA (2019), [https://www.ipsos.com/sites/default/files/ct/news/documents/2019-06/2019\\_reuters\\_tracking\\_-\\_core\\_political\\_2020\\_democratic\\_primary\\_tracker\\_06\\_06\\_2019\\_0.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2019-06/2019_reuters_tracking_-_core_political_2020_democratic_primary_tracker_06_06_2019_0.pdf) [<https://perma.cc/UL7L-C927>] (finding that polling showed immigration tied with healthcare as the most important problem facing the U.S. today); MONMOUTH UNIV. POLLING INST., MONMOUTH UNIV., NATIONAL: PUBLIC WANTS GOP TO WORK WITH BIDEN (2021), [https://www.monmouth.edu/polling-institute/documents/monmouthpoll\\_us\\_012721.pdf](https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_012721.pdf) [<https://perma.cc/64J7-VCUR>] (finding that seventy-one percent of Americans view immigration as “very important” or “extremely important” for the federal government to address).

2. See, e.g., Victoria Balara, *Fox News Poll: 83 percent support pathway to citizenship for illegal immigrants*, FOX NEWS (Sept. 28, 2017), <https://www.foxnews.com/politics/fox-news-poll-september-28-2017> [<https://perma.cc/6HC6-G6QM>]; TIM MALLOY & DOUG SCHWARTZ, QUINNIPIAC UNIV., 61% OPTIMISTIC ABOUT NEXT FOUR YEARS WITH BIDEN IN OFFICE, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; 68% OF AMERICANS SUPPORT THE \$1.9 TRILLION STIMULUS RELIEF BILL (2021), [https://poll.qu.edu/images/polling/us/us02032021\\_uszn68.pdf](https://poll.qu.edu/images/polling/us/us02032021_uszn68.pdf) [<https://perma.cc/EU8B-YZGY>] (reporting that eighty-three percent of those polled support a pathway to citizenship for undocumented immigrants).

3. See, e.g., EMILY EKINS & DAVID KEMP, CATO INST., E PLURIBUS UNUM: FINDINGS FROM THE CATO INSTITUTE 2021 IMMIGRATION AND IDENTITY NATIONAL SURVEY (2021),

have put their thumbs on the scale with their own conceptions of pathways or the complete lack thereof.<sup>4</sup>

An immigration pathway has permeated many serious attempts at both comprehensive and piecemeal federal reform.<sup>5</sup> Well-meaning but eventually ill-fated attempts at grand legislative fixes to an immigration law system, whose last serious overhaul was in 1996, still reinforce this common theme.<sup>6</sup> On the other hand, states fed up with congressional inaction and under-resourced, ineffective, federal enforcement boldly take steps to discourage the continued presence of undocumented immigrants, preventing any sort of progress towards an immigration “pathway.”<sup>7</sup>

The most applicable plain meaning definition of “pathway” or “path” eventually directs us to the notion of a “course”: movement in a path “from point to point,” or “an ordered process of succession.”<sup>8</sup> Immigration law scholars have astutely commented on the “pathway” concept in both

<https://www.cato.org/survey-reports/e-pluribus-unum-findings-cato-institute-2021-immigration-identity-national-survey> [<https://perma.cc/G4D9-KNPB>] (noting greater Republican support for harsh immigration positions, such as stripping birthright citizenship from children born to undocumented immigrants in the U.S., tightening restrictions for immigrants to receive welfare and government assistance, and deporting legal immigrants who dislike America or believe America is a racist country).

4. See, e.g., Brian Tashman & Naureen Shah, *The Time Is Now: Congress Must Pass Citizenship Legislation*, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/immigrants-rights/the-time-is-now-congress-must-pass-citizenship-legislation> [<https://perma.cc/8UY4-2422>]; MUZAFFAR CHISHTI, JULIA GELATT & DORIS MEISSNER, MIGRATION POL’Y INST., *RETHINKING THE U.S. LEGAL IMMIGRATION SYSTEM: A POLICY ROAD MAP* (2021), [https://www.migrationpolicy.org/sites/default/files/publications/Rethinking-LegalImmigration-Roadmap\\_FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/Rethinking-LegalImmigration-Roadmap_FINAL.pdf) [<https://perma.cc/ZGU7-4QTD>]; ALEX NOWRASTEH & DAVID J. BIER, CATO INST., *THREE NEW WAYS FOR CONGRESS TO LEGALIZE ILLEGAL IMMIGRANTS* (2019), <https://www.cato.org/immigration-research-policy-brief/three-new-ways-congress-legalize-illegal-immigrants> [<https://perma.cc/VWY4-HBWT>]; cf. CTR. FOR IMMIGR. STUD., *HIRE AMERICAN: 20 PRESIDENTIAL ACTIONS NEEDED TO REDUCE WORK VISAS AND PERMITS* (2020), [https://cis.org/sites/default/files/2020-06/hire-american-5-20\\_0.pdf](https://cis.org/sites/default/files/2020-06/hire-american-5-20_0.pdf) [<https://perma.cc/F66G-WW3T>].

5. See, e.g., Michelle Hackman & Tarini Parti, *Democrats Consider Piecemeal Approach to Immigration Bills*, WALL ST. J. (Feb. 18, 2021), <https://www.wsj.com/articles/democrats-consider-piecemeal-approach-to-immigration-bills-11613656888?page=1> [<https://perma.cc/4JWJ-A9WF>].

6. See, e.g., Comprehensive Immigration Reform Act of 2007, S.1348, 110th Cong. (2007); Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013); Reforming American Immigration for Strong Employment Act, S.354, 115th Cong., (2017); Dream Act of 2021, S.264, 117th Cong. (2021).

7. See, e.g., S.B. 1070, 2010 Leg., 2nd Reg. Sess. (Ariz. 2010) (state law creating a misdemeanor infraction for an undocumented immigrant who applies for or solicits work, and that permits warrantless arrests of any individuals whom a state officer has probable cause to believe is removable); Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006) (local law fining landlords for renting to undocumented immigrants and suspending licenses of business who employ undocumented immigrants).

8. *Pathway*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/course> [<https://perma.cc/QLP2-HND8>] (last visited Feb. 4, 2022).

normative and granular strokes.<sup>9</sup> They have expressed understandable discomfort with the entire notion of an earned grant of permanent residence or citizenship as an exacerbation of pre-existing hardship, systemic racism, and the pernicious consequences of American intervention.<sup>10</sup> However, they have also acknowledged the political reality that a pathway of several steps, rather than envisioning permanent residence or citizenship as a light switch to turn on, or a binary pole jump from the “zero” of undocumented status to the “one” of a better stage, is necessary to ensure long-delayed legislative reform comes to fruition, even as they persuasively argue for a larger array of guideposts in its construction.<sup>11</sup> Regardless of their normative stances on a pathway, they all agree that the productive discussion of one will require more than the binary characterization of the have-nots (those without legal status under United States immigration law) and the future haves (those with permanent residence and citizenship).<sup>12</sup>

It is from these guideposts that this Article takes its cues. Part I begins with a necessary threshold task: attempting to create a working definition of immigration pathway. This task builds on the work of a previous scholarly attempt to state plainly what the elements of that definition might be.<sup>13</sup> Part I posits that this working definition contains four elements. The first two—actions and time—seem self-evident from political discourse, past and ongoing attempts at comprehensive immigration reform, and scholarship alike. This Article also notes that actions required by a pathway can be subdivided into public actions and private ones, and that such a division foreshadows the critical role private behavior plays in a pathway. However, the last two—progression and

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9. David J. Bier, *Reforming the Immigration System: A Brief Outline*, CATO INST. (Nov. 11, 2020), <https://www.cato.org/study/reforming-immigration-system-brief-outline#illegal-immigrants-us-system> [https://perma.cc/4L5S-Q6WC].

10. See, e.g., THE WHITE HOUSE, *THE BIDEN ADMINISTRATION BLUEPRINT FOR A FAIR, ORDERLY AND HUMANE IMMIGRATION SYSTEM* (2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/> [https://perma.cc/7QBN-BYB2]; Romelia M. Solano, *Biden is pursuing a pathway to citizenship. He will face two key challenges.*, WALL ST. J. (Jan. 29, 2021), <https://www.washingtonpost.com/politics/2021/01/29/biden-is-pursuing-pathway-citizenship-he-will-face-two-key-challenges/> [https://perma.cc/SYK2-9A5W].

11. See, e.g., Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019, 4:45 AM), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/> [https://perma.cc/7HB2-CL96].

12. See, e.g., Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 *FORDHAM L. REV.* 1673, 1675 (2017).

13. Richard T. Middleton IV, *Comprehensive U.S. Immigration Reform: Policy Innovation or Nondecisions*, 38 *SETON HALL LEGIS. J.* 313 (2014) (proposing a six-element characterization of the pathway to citizenship as delineated in the “Bipartisan Framework for Comprehensive Immigration Reform,” drafted by eight United States senators in 2013, while offering a policy innovation-based critique of it).

protection—are what truly make a pathway, as opposed to an unhelpful binary.

Part II suggests that the utility of this working definition is most evident when examining the current system of employment-based immigration in the United States. Policy insight on this tangled web of nonimmigrant and immigrant visa categories has been robust, particularly within the immigration practitioner bar itself.<sup>14</sup> Political sentiment likewise runs hot even for this class of “legal” immigrants, although the concerted advocacy of corporate interests has been an intriguing counterweight to the traditional political divide on immigration.<sup>15</sup> Yet actual legal scholarship on this important niche of immigration law practice is quite scarce. In beginning to remedy that deficit, this Article argues that employment-based immigration—and specifically a critique of its existing ineffective pathways (and non-pathways) for immigrant entrepreneurs, small business owners, and investors—proves the utility of the working definition established by Part I. This Article acknowledges that these immigrants benefit from a significantly higher degree of economic privilege, political privilege, and existing options for legal status than their undocumented counterparts. Yet, it is precisely the employment-based system’s range of tenuous and robust nonimmigrant and immigrant options that makes element-driven critiques of its handling of politically favored immigrants instructive.

Part III adds to this discussion by building on Part I’s earlier identification of private actions as being integral to an immigration pathway. It does so by telling an important story about a specific private pathway that the global entrepreneur and direct investment communities have attempted to build between the disparate nonimmigrant and immigrant categories under United States immigration law. In particular, Part III describes the citizenship-by-investment (“CBI”) bridge route as an antidote to the public (United States immigration) pathway’s failure to allow many immigrant entrepreneurs, small business owners, and investors to begin their path to permanent residence in a lawful, nonimmigrant visa status. Requiring an immigrant from a high-immigration country to first obtain citizenship by individually investing in a third country that has a qualifying treaty of commerce and navigation would allow the immigrant to attain the necessary initial investor visa. At the same time, this practice would allow growth and job creation in both the third country and the United States as a condition of the attainment of permanent residence. This ingenious solution devised by the private sector exploits the comparatively better pathway in a

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14. See JEB BUSH, THOMAS F. McLARTY III & EDWARD ALDEN, COUNCIL ON FOREIGN RELS., U.S. IMMIGRATION POLICY 91–92 (2009), [https://cdn.cfr.org/sites/default/files/report\\_pdfs/Immigration\\_TFR63.pdf](https://cdn.cfr.org/sites/default/files/report_pdfs/Immigration_TFR63.pdf) [<https://perma.cc/XB7A-VWXX>].

15. See, e.g., WILLIAM H. WOODWELL, JR., CARNEGIE CORP. OF N.Y., BUILDING BRIDGES ON IMMIGRATION 3–4 (2021), [https://media.carnegie.org/filer\\_public/7b/b7/7bb79a44-146e-4666-b137-9e021358048b/alliance\\_building\\_report\\_fin.pdf](https://media.carnegie.org/filer_public/7b/b7/7bb79a44-146e-4666-b137-9e021358048b/alliance_building_report_fin.pdf) [<https://perma.cc/68TM-MAVS>].

third country and uses it to remedy the ineffective public one in United States employment-based immigration law. As such, it provides an additional critique of the current pathways for immigrant entrepreneurs, investors, and small business owners, while also providing a model private pathway that could remedy, or perhaps even exist as, a parallel “express” option to the public one broadly envisioned by United States immigration law.

This Article concludes by suggesting the next steps for legislative and executive measures that can build on the element-driven observations in previous sections. It acknowledges how insights gleaned from the proposed working definition of pathway can not only leverage the current political climate and pandemic environment, but also provide a richer understanding of community impact and equitable distribution of immigration benefits. It notes normative considerations as to the desirability of private pathway construction. Lastly, this Article’s conclusion invites further usage of the working definition of immigration pathway established in Part I to critique other federal government programs that appear pathway-like on their face, but may fail the four-element test in various respects.

## I. FROM A BINARY UNDERSTANDING OF IMMIGRATION PATHWAY TO A WORKING DEFINITION

### A. The Problem of a Binary in Immigration Pathways

An immediate logical problem impedes a proper discussion about immigration pathways—the difficulty of adjusting from an initial binary framing as having a non-desirable and desirable pole. The non-desirable end of the pathway most often refers to undocumented individuals in the United States—those without temporary permission to remain, nonimmigrant visa status, permanent residence, or citizenship.<sup>16</sup> The desirable end of the pathway refers to one of these latter two forms of legal status: permanent residence or citizenship.<sup>17</sup> It more commonly refers to the latter, given the protections from the grounds of inadmissibility and deportability that United States citizens enjoy.<sup>18</sup>

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16. See *Why Don't Immigrants Apply for Citizenship?: There Is No Line for Many Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Oct. 7, 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/why\\_dont\\_immigrants\\_apply\\_for\\_citizenship\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/why_dont_immigrants_apply_for_citizenship_0.pdf) [<https://perma.cc/B8YJ-KXWA>] [hereinafter *Why Don't Immigrants Apply for Citizenship?*].

17. *4 Paths to Legal Status for Undocumented Immigrants*, CITIZEN PATH (Oct. 13, 2020), <https://citizenpath.com/paths-to-legal-status-undocumented/> [<https://perma.cc/2RM4-WKQK>].

18. See KATHERINE BRADY & DAN KESSELBRENNER, NAT'L IMMIGR. PROJECT, GROUND OF DEPORTABILITY AND INADMISSIBILITY RELATED TO CRIMES 1–2 (2012),

Framing the immigration pathway as a mere binary is politically inconvenient. Any number of critiques of either comprehensive or piecemeal immigration reform strongly disapprove of immediate movement between the non-desirable and desirable poles.<sup>19</sup> Those who regard amnesty or legalization programs as a giveaway are essentially also critiquing a binary framing of the problem. From the other side of the immigration debate, binary framing of the immigration pathway poses another risk, that immediate movement from undocumented to permanent residence, or citizenship, is a proxy for solving all the challenges that such noncitizens face in the United States community.<sup>20</sup> Such policy experts rightly note that significant challenges as to the support and integration of immigrants cannot be swept under the rug with an instantaneous grant of favorable immigration status, nor will systematic racial or national origin discrimination dissipate upon the conferral of a green card.<sup>21</sup>

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[https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/crim/2012\\_Oct\\_grounds-deport-admiss.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2012_Oct_grounds-deport-admiss.pdf) [<https://perma.cc/BJJ6-S4BZ>].

19. See, e.g., No Amnesty Act, H.R. 2004, 117th Cong. (2021) (proposing to deny all federal funding to enforcement of any executive branch policies reevaluating harms done to undocumented immigrants generally and to applicants for asylum and refugee status specifically); *Stop Amnesty*, NUMBERSUSA, <https://www.numbersusa.com/solutions/stop-amnesty> [<https://perma.cc/YH29-BPKT>] (last visited Dec. 21, 2021) (opposing “any attempt by the federal government to offer legal presence and work permits” to undocumented immigrants); REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016 25–26 (2016), [https://prod-cdn-static.gop.com/docs/Resolution\\_Platform\\_2020.pdf](https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf) [<https://perma.cc/B4AL-AZPQ>] (only “embracing the newcomers legally among us” and opposing “any form of amnesty”). The Republican National Committee declined to adopt a new platform in 2020, effectively leaving the 2016 platform intact.

20. See, e.g., Giovanni Peri & Reem Zaiour, *Citizenship for Undocumented Immigrants Would Boost U.S. Economic Growth*, CTR. FOR AM. PROGRESS (June 14, 2021), <https://www.americanprogress.org/issues/immigration/reports/2021/06/14/500433/citizenship-undocumented-immigrants-boost-u-s-economic-growth> [<https://perma.cc/UME3-KL5C>] (analyzing economic growth as a result of immediate legalization reform while noting important assumptions of post-legalization wage growth for undocumented immigrants).

21. See *id.*; see also Peniel Ibe, *Why we need a pathway to citizenship for all immigrants*, AM. FRIENDS SERV. COMM. (Sept. 2, 2021), <https://www.afsc.org/blogs/news-and-commentary/why-we-need-pathway-to-citizenship-all-immigrants> [<https://perma.cc/7A-GL-6Z7K>] (advocating for a pathway to citizenship, but also ensuring family reunification, full access to public benefits, and respect for human, civil, and labor rights for undocumented immigrants, even after permanent residence and citizenship); Marshall Fitz, *The Promise of a Path to Citizenship: What It Means for Enforcement*, EMERSON COLLECTIVE, <https://www.emersoncollective.com/the-promise-of-a-path-to-citizenship-what-it-means-for-enforcement> [<https://perma.cc/Z4DK-ET43>] (last visited Oct. 6, 2021) (noting a pathway to citizenship would blunt enforcement practices overwhelmingly affecting Black and Brown communities, and characterizing such a development as “interrupting” cycles of inequitable policing systems).



Correspondingly, immigration law scholars are also quite aware of the binary problem.<sup>22</sup> Indeed, scholars have suggested that, in constructing an immigration pathway, we should avoid an all-or-nothing response.<sup>23</sup> In an era in which congressional reforms have stalled, scholars have suggested overcoming the binary conundrum by unbundling the benefits of the desirable end from endpoints that differ from citizenship or full permanent residence.<sup>24</sup> Policy institutes across the political spectrum have echoed the practical importance of incremental and earned approaches to pathways involving legalization.<sup>25</sup>

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22. See, e.g., Villazor, *supra* note 12 (labeling such a binary “woefully incomplete”); Angélica Cházaro, *Beyond Respectability: New Principles for Immigration Reform*, 52 HARV. J. ON LEGIS. 355, 356 (2015) (critiquing comprehensive immigration reform as a mere “across the line” measurement that threatens to exacerbate, rather than ameliorate, harm reduction); Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 374 (2012) (using the notion of immigration as contract to more properly characterize undocumented immigrants working without legal authorization as immigrants in waiting); Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 221 (2007) (warning that focusing solely on a more robust right to reside in the United States undervalues noncitizens’ interests in unimpeded international travel).

23. See, e.g., Jeremy L. Neufeld, *Democrats Need to Abandon Their All-Or-Nothing Approach to Immigration Reform*, ROLL CALL (Oct. 22, 2021), <https://www.rollcall.com/2021/10/22/democrats-need-to-abandon-their-all-or-nothing-approach-to-immigration-reform/> [<https://perma.cc/32YC-6EML>].

24. See, e.g., Villazor, *supra* note 12, at 1722–24 (noting that United States nationals of certain United States territories enjoy some, but not all, of the bundle of citizenship rights, and that not all undocumented immigrants want the full bundle of citizenship rights); Morawetz, *supra* note 22, at 235–37 (suggesting the meaningful impact of both judicial interpretation solutions as well as administrative fixes streamlining the process of advance parole for individuals in the middle of the permanent residence process to allow for international travel); see also Howard F. Chang, *The Economics of Immigration Reform*, 52 U.C. DAVIS L. REV. 111, 140 (2018) (observing that comprehensive immigration reform bills focusing on expanded nonimmigrant visa categories rather than quicker pathways to permanent residence or citizenship, may effectively respond to political concerns about a glut of labor supply).

25. *Why Don’t Immigrants Apply for Citizenship?*, *supra* note 16 (acknowledging popular sentiment for a “line” for undocumented immigrants for legal status while critically observing the lack of them for both undocumented and even lawfully present noncitizens alike); T. ALEXANDER ALENIKOFF & DONALD KERWIN, CTR. FOR MIGRATION STUD., IMPROVING THE U.S. IMMIGRATION SYSTEM IN THE FIRST YEAR OF THE BIDEN ADMINISTRATION 11 (2020), [https://cmsny.org/wp-content/uploads/2020/11/Improving-the-US-Immigration-System\\_Proposals\\_FINAL.pdf](https://cmsny.org/wp-content/uploads/2020/11/Improving-the-US-Immigration-System_Proposals_FINAL.pdf) [<https://perma.cc/BU76-RUDU>](advocating more specifically for an immediate expansion of individuals eligible for Deferred Action for Child Arrivals [“DACA”] relief, in addition to advancement of parole and parole-in-place privileges for DACA recipients, while also expressing support for legislation allowing a pathway to citizenship); NOWRASTEH & BIER, *supra* note 4, at 2 (suggesting that a way to break through comprehensive immigration reform gridlock for undocumented immigrants might include pathways that contain various timelines only ending in permanent residence and that bar “chain migration” of immediate family members).

The building blocks of a working definition regarding what exactly an immigration pathway is have emerged from this discussion. For many reasons, that definition is worth constructing. And, as suggested by Part II, *infra*, that provides a better set up for appreciating how the lack of pathways in employment-based immigration contribute to the validity of this working definition.

## **B. Towards A Four-Element Working Definition of Immigration Pathway**

### *1. Element One: Actions*

Actions, the first element in the working definition, refer to those steps the noncitizen must take to obtain the immigration benefit at the desirable end of the pathway. This element admittedly builds upon the popular political notions of meritocracy as applied to immigration pathways, that individuals on such a pathway will receive the desirable benefit by earning it.<sup>26</sup> Providing work skills that a country needs seems to justify the “actions” element for any immigration pathway, even if it is essentially a form of amnesty.<sup>27</sup> That remains the case, despite other scholars’ rightful critique of the normative consequences of an “earned” immigration system, especially with regard to its implication that actions must somehow redeem the past “transgression” of an entry without inspection, an overstay, or other holding of undocumented status.<sup>28</sup> Yet, many concede this element of meritocracy to be a *sine qua non* of practical passage of immigration pathways.<sup>29</sup>

A further useful division of the actions element consists of public actions and private actions. Public actions—those directly supervised by and accounted for by government actors—that satisfy the actions element in reform-minded proposals include paying back and prospective taxes,

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26. See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. §§ 2301–02 (2013) (proposing a merit-based points system for permanent residence); Reforming American Immigration for Strong Employment Act, S.354, 115th Cong. §§ 220(c)–(i) (2017) (proposing a much narrower merit-based points system centered only around significantly fewer qualifying actions); Dream Act of 2021, S.264, 117th Cong. § 3(d) (2021) (requiring college enrollment, a high school diploma, or ongoing secondary education for long-term noncitizen residents of the United States who entered as children, and hold no status under U.S. immigration law, to seek permanent residence).

27. Richard Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV J. ON LEGIS. 175, 176 (2010).

28. See Muneer I. Ahmad, *Beyond Earned Citizenship*, 258 HARV. C.R.-C.L. L. REV. 257, 288 (2017) (finding the notion of unlawful entry as transgression troubling given the “deficit position” from which a noncitizen who is undocumented often starts their immigration pathway); see also Linda Bosniak, *Amnesty in immigration: forgetting, forgiving, freedom*, 16 CRITICAL REV. INT’L. SOC. & POL. PHIL. 344, 346 (2013).

29. See Ahmad, *supra* note 28, at 302–03.

refraining from future crime, joining the military, and avoiding other grounds of inadmissibility and deportability under immigration law.<sup>30</sup> Private actions that satisfy the “actions” element include learning English, attaining certain levels of education, maintaining moral character, doing community service, engaging in entrepreneurial activity, and working in areas of high or essential need.<sup>31</sup>

## 2. *Element Two: Time*

Time, the second element, addresses the waiting or fast-tracking of an individual at the undesired end of the pathway to the desired end. Certainly, the time element has been the subject of a trade-off in comprehensive immigration reform.<sup>32</sup> This trade-off proposes that certain individuals should be allowed pathways to citizenship or permanent residence, but they should be at the “back of the line”—behind other classes of noncitizens—and should wait the longest to reach the desirable end.<sup>33</sup> By contrast, those individuals potentially contributing “more desirable” actions should wait less time. Accordingly, the first two elements can work in mutual exclusivity to one another, as they do in many reforms targeting so-called priority or highly-skilled immigrants. Alternatively, a pathway can bulk up on requirements on both the action and time elements as a reflection of lower priority, as a need for a more politically viable trade-off, or as a way to safeguard a higher priority with many moving parts (and that also could use a more politically viable trade off).

The elemental nature of “time” in a working definition of an immigration pathway becomes more obvious when one considers the mishandling of that element in several existing legal immigration pathways.

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30. See, e.g., *5 Things to Know About Immigrants in the Military*, FWD.US (Jan. 6, 2020), <https://www.fwd.us/news/immigrants-in-the-military/> [<https://perma.cc/8VCX-VDNY>]; Miriam Jordan, *The Reality Behind Biden’s Plan to Legalize 11 Million Immigrants*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/27/us/biden-undocumented-immigrants-citizenship.html> [<https://perma.cc/5UTj-LYQ9>].

31. See Dream Act of 2021, S.264, 117th Cong. (2021); *Chapter 8 - Educational Requirements*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-8> [<https://perma.cc/C5P3-U45X>] (last visited Dec. 21, 2021).

32. See, e.g., CLAIRE BERGERON, MIGRATION POL’Y INST., *GOING TO THE BACK OF THE LINE: A PRIMER ON LINES, VISA CATEGORIES, AND WAIT TIMES* (2013), <https://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-BackofLine.pdf> [<https://perma.cc/8NMD-6PJW>].

33. See, e.g., Secure America and Orderly Immigration Act, H.R. 2330, 109th Cong. §§ 701–02 (2005) (creating a new H-5B nonimmigrant category for undocumented noncitizens but also preventing them from changing their nonimmigrant or immigrant status into any other categories or pathways or attaining permanent residence for six years); Comprehensive Immigration Reform Act of 2007, S.1348, 110th Cong. § 625 (2007) (providing for conditional permanent residence for noncitizen long-term U.S. residents who entered as children, but requiring six years of such conditional status before permitting a petition to remove conditions to obtain lawful permanent residence or permitting an application for naturalization).

Such mishandling includes lengthy processing delays before the immigration agencies.<sup>34</sup> It also includes over three decades of congressional inaction on raising the supply of immigrant visas.<sup>35</sup> This inaction has produced astronomical backlogs for prospective immigrants worldwide, especially for immigrants from certain countries.<sup>36</sup> It is unsurprising that these failures to equitably handle the time element in existing pathways has often spurred calls for new, more efficient pathways, some of which would eliminate backlogs mandated by lack of immigrant visas entirely.<sup>37</sup> Additionally, aside from the more privileged confines of benefits-based immigration practice of family-based and employment-based immigration, the recent lack of formal tracking policies for asylum seekers at the southern border adds, among other frustrations, time to an already arduous immigration pathway.<sup>38</sup>

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34. See Stuart Anderson, *USCIS Immigration Delays Grow Longer and Longer*, FORBES (Jan. 21, 2019, 12:12 AM), <https://www.forbes.com/sites/stuartanderson/2019/01/31/uscis-immigration-delays-grow-longer-and-longer/?sh=17cd16212254> [<https://perma.cc/LC34-WAR5>].

35. The last adjustment to the worldwide limitations on immigrant visas for those categories of permanent residence subject to numerical limitation was in 1990. Immigration Act of 1990, 8 U.S.C. § 1153 (1990). If the worldwide limitation in any family-based or employment-based category subject to such a limit is reached, any immigrant seeking to complete the permanent residence process inside or outside the United States must wait until their priority date—typically the date on which their immigrant visa petition was filed with United States Citizenship and Immigration Services (“USCIS”) or when their application for alien employment certification was filed with the United States Department of Labor for certain employment-based immigrants—becomes current. 8 U.S.C. §§ 1151–52 (2021); 8 C.F.R. § 204.5(d) (2017).

36. U.S. DEP’T OF STATE, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2020 (2020), [https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem\\_2020\\_vF.pdf](https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2020_vF.pdf) [<https://perma.cc/FB33-JBRJ>] (reporting 3,762,891 applicants for immigrant visas were awaiting available priority dates that would enable them to complete the permanent residence process, an increase of 7.7% overall for fiscal year 2019); U.S. DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., APPROVED EMPLOYMENT BASED PETITIONS AWAITING VISA AVAILABILITY BY PREFERENCE CATEGORY AND COUNTRY OF BIRTH (2020), [https://www.uscis.gov/sites/default/files/document/reports/EB\\_I140\\_I360\\_I526\\_performance\\_data\\_fy2020\\_Q3\\_Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/EB_I140_I360_I526_performance_data_fy2020_Q3_Q4.pdf) [<https://perma.cc/6PAP-Y3AJ>] (reporting 500,268 approved immigrant visa petitions awaiting an available priority date); U.S. DEP’T OF STATE, VISA BULLETIN (2021), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_october2021.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_october2021.pdf) [<https://perma.cc/TT32-DN57>] (reporting six to fourteen years of priority date backlogs for various categories of family-based immigrants, up to nineteen years for certain family-based immigrants from countries which utilize more than seven percent of the total amount of these family-based immigrant visas, and up to eleven years for certain employment-based immigrants from countries which utilize more than seven percent of the total amount of these employment-based immigrant visas).

37. See, e.g., U.S. Citizenship Act, H.R. 1177, 117th Cong. § 3402 (2021) (eliminating numerical limitations for any immigrant whose priority date is more than ten years old).

38. See, e.g., *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2021 WL 3931890 at \*14 (S.D. Cal. Sept. 2, 2021) (noting that government metering policy turning away immigrants seeking admission at the southern border caused a delay in asylum and

Furthermore, scholars have recognized the elemental nature of time in any immigration pathway in various ways. Some have noted that asking certain noncitizens to wait for advancement along the pathway is logically and normatively incongruent with the contract-based or affiliation-based equities they have created in the United States through the value of their labor, their community, and their family ties.<sup>39</sup> Others have noted that quicker movement along the immigration pathway could produce positive effects in integration, loyalty formation, and economic and non-economic investment.<sup>40</sup>

### 3. *Element Three: Progression*

Progression, the third element of the working definition, is the key distinguisher between a binary immigration system and an immigration pathway. More narrowly, it is an element that envisions incremental progress towards the desired end of the pathway, rather than an instantaneous, one-shot achievement. Indeed, a proposed immigration pathway to permanent residence or citizenship may fall victim to disfavor precisely because the lack of incremental progress threatens a narrative of earned benefits.

Moreover, the immigration system already has at its disposal systems of nonimmigrant visa status and permanent resident status, each with more or less desirable benefits that could reward interim progress.<sup>41</sup> In theory, this is exactly what should help reformers overcome the binary between a noncitizen's undocumented status (or their holding of fragile protections such as deferred action, parole, or temporary protected status) and a pathway endpoint of permanent residence or citizenship.

Scholars have likewise laid the foundation for the concept of an incremental progression toward legal status as an element of the working definition. They note that a lack of progression in United States immigration law is generally responsible for the larger share of undocumented immigrants overall, as well as a notable number of such individuals compelled to seek “necessity entrepreneurship”—motivated by survival and lack of alternative choices—outside the bounds of employer-supervised work that requires elusive legal immigration status.<sup>42</sup> One

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refugee application process, resulting in a violation of the requisite inspection and referral process).

39. Motomura, *supra* note 22, at 373–77.

40. Cristina Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1119–20 (2008).

41. See, e.g., Cecilia Danger, *The H-2A Non-Immigrant Visa Program: Weakening Its Provisions Would Be a Step Backward for America's Farmworkers*, 31 U. MIAMI INTER-AM. L. REV. 419, 420 (2000).

42. Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and Their Lawyers)*, 61 B.C. L. REV. 1323, 1344 (2020) (highlighting the phenomenon of the “necessity entrepreneur” in the undocumented immigrant population resulting from harsh

framework envisions better public pathway progression, noting that both *de minimis* punishments and “interim guestworker” status for noncitizens in proposed legalization pathways could serve that purpose.<sup>43</sup> Likewise, permanent residence could be the final step in the process for individuals present in existing temporary guest worker programs.<sup>44</sup>

An economic approach suggests that incremental progress points along a pathway to citizenship may optimize fiscal impact of each noncitizen in conjunction with sensible restrictions on means-tested benefits.<sup>45</sup> Another framework would evaluate progression for the sake of the pathway in a decidedly private and normative way: greater community integration.<sup>46</sup>

#### 4. *Element Four: Protection*

Protection, the last element, is perhaps the least obvious of the four elements of the working definition. Protection goes hand in hand with progress; it is a set of assurances to the noncitizen of the various benefits that result from the actions and time put toward the immigration pathway. The first assurance is that a noncitizen will not unfairly lose their progress on actions and time already made along the immigration pathway towards permanent residence or citizenship. The second is that a noncitizen will not lose other interim immigration benefits of value. The third is that the noncitizen will not suffer other non-immigration-related harm on the pathway.

There is both broad conceptual support and specific rights-based support for this element in immigration law scholarship.<sup>47</sup> For example, a harm-reduction approach mandates that any immigration pathway avoids making noncitizens worse off.<sup>48</sup> It can also be used to critique the broad strokes of pathway-based immigration reform.<sup>49</sup> Any conventional, politically-expedient pathway’s trade-offs will inevitably worsen protection and increase harm for those left behind.<sup>50</sup> On the other hand, better pathways might make protection, rather than actions grounded in desert, more important.<sup>51</sup>

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working conditions and foreclosure of legal immigration pathways by restrictive immigration reform).

43. Rodríguez, *supra* note 40, at 1115, 1127.

44. *Id.* at 1127.

45. Chang, *supra* note 24, at 127, 142.

46. *Id.* at 142–43.

47. Cházaro, *supra* note 22, at 362, 387–88.

48. *Id.* at 388.

49. *Id.* at 401–03.

50. *Id.* at 389–97.

51. *Id.* at 411.

In addition, scholars have conceptualized the protection of important interim immigration benefits along a pathway.<sup>52</sup> One such benefit is the right to travel internationally in the interim, whether as part of the noncitizen's cyclical, migration-like obligations, or as needed in exigent circumstances.<sup>53</sup> Another important benefit arises from the guarantee of continuing employment authorization beyond the right to remain legally in the United States during the progression along the pathway.<sup>54</sup> This lowers unemployment, raises wages, opens access to healthcare and, by extension, protects against over-work and reduces debt obligations to unpaid bills or mounting household expenses.<sup>55</sup> For all immigrants moving through the pathway, during which administrative agencies must approve interim benefits such as employment authorization,<sup>56</sup> advance parole,<sup>57</sup> classification requests (such as nonimmigrant visa petitions and applications for extensions of stay), applications for alien employment certification, and immigrant visa petitions,<sup>58</sup> there is hope for protection from questionable statutory interpretation,<sup>59</sup> inadequate rulemaking,<sup>60</sup> arbitrary and capricious agency adjudication,<sup>61</sup> processing delays,<sup>62</sup> and

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52. *Id.* at 413–14.

53. Morawetz, *supra* note 22, at 222–23.

54. Shoba S. Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 19 (2016).

55. *Id.* at 19–20 (noting that DACA recipients self-reported economic improvement resulting from employment authorization granted by the program).

56. Certain classes of immigrants must apply for separate authorization to work legally in the United States. 8 C.F.R. § 274a.12 (2012).

57. Certain individuals without a valid nonimmigrant or immigrant visa and who wish to travel internationally during the pendency of certain immigration applications and petitions must obtain advance parole to return to the United States. Certain individuals who are applying for permanent residence and who wish to leave the country while that application is pending must apply for advance parole. Otherwise, the departure constitutes an abandonment of the permanent residence application. 8 C.F.R. § 245.2(a)(4)(ii) (2019). Upon the approval of whatever status the immigrant was seeking to acquire, advance parole ends. 8 C.F.R. § 212.5(e) (2001). *See* Morawetz, *supra* note 22, at 214 (explaining that advance parole is a legal fiction that considers such an immigrant as still seeking admission to the United States and no longer in whatever previous immigration status the immigrant was in before departure).

58. Part II, *infra*, describes in greater detail the basics of the employment-based immigration system.

59. Morawetz, *supra* note 22, at 233.

60. *See* Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 FORDHAM URB. L.J. 183, 204–05 (2010) (drawing a through-line from the lack of agency regulations for the national interest waiver exception that lets certain immigrants in the employment-based second preference classification forego a statutorily required test of the labor market to its ineffectiveness and unpopularity as a measure to attract “deserving” immigrants).

61. *See* Gregory Scott Crespi, *Green Cards for Foreign House Buyers: A Way to Help Stabilize Housing Prices*, 45 TULSA L. REV. 471, 475 (2010) (observing the restrictive agency rulings that plagued immigrant investors seeking permanent residence under the U.S. immigration law’s employment-based fifth preference classification).

unnecessarily onerous procedures.<sup>63</sup> If recent federal court litigation is to be believed, these concerns are well-founded.<sup>64</sup>

Finally, there is some discussion among scholars about protections that go beyond aspects of immigration status and employment authorization.<sup>65</sup> These scholars emphasize the long-overdue need for workplace protections for noncitizens, which exist regardless of any binary between undocumented and documented.<sup>66</sup> Others refer to the importance of workplace mobility during the pendency of the pathway, especially as a preventative measure against both abusive employers and economic downturn.<sup>67</sup> Meanwhile, measures protecting access to other public rights, such as driver's licenses, center harm reduction as a potentially superior version of the protection element in immigration reform proposals, even as it would positively affect compliance in an actions-based pathway.<sup>68</sup>

## II. ENTER THE LESSONS OF PATHWAYS FROM EMPLOYMENT-BASED IMMIGRATION

The world of employment-based immigration seems, at first, an ill-fitting lens through which to tackle the dilemma of a pathway to permanent residence or citizenship. After all, pathway proposals rightfully identify the hardship of undocumented immigrants as warranting the most important reform.<sup>69</sup> Employment-based immigrants largely enjoy an existence of legal immigration status, greater private sector support due to the employer-driven nature of that statutory scheme, and larger amounts of human capital and economic security due to the requirements of, or preferences for, higher degrees of education, work experience, or professional distinction.<sup>70</sup>

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62. See, e.g., *id.* at 476; Chang, *supra* note 24, at 125–26; Wadhia, *supra* note 54, at 25.

63. See Morawetz, *supra* note 22, at 236.

64. See generally Ahmed v. Holder, 12 F. Supp. 3d 747, 761–62 (E.D. Pa. 2014) (holding that a six-year delay in adjustment application violated APA); Succar v. Ashcroft, 394 F.3d 8, 9–10 (1st Cir. 2005) (holding that there was no statutory bar to review).

65. See, e.g., Cházaro, *supra* note 22, at 414–15.

66. See *id.* at 368, 384.

67. See Morawetz, *supra* note 22, at 223, 237.

68. Cházaro, *supra* note 22, at 413–14 (identifying driver's license access as an effective example of a harm reduction measure indicative of more meaningful immigration reform).

69. See *id.* at 356.

70. The employment-based first preference immigrant visa category recognizes individuals of “extraordinary ability,” “outstanding professors or researchers,” and “multinational executives or managers.” 8 U.S.C. § 1153(b)(1) (1991). The employment-based second preference immigrant visa category is reserved for individuals with advanced degrees or exceptional ability. 8 U.S.C. § 1153(b)(2). The employment-based third preference immigrant visa category is largely reserved for individuals with bachelor's degrees. 8 U.S.C. § 1153(b)(3). And the employment-based fifth preference immigrant visa category is for so-called “employment creation” immigrants who contribute either \$800,000



Yet, in interrogating the notion of an immigration pathway, it is still worth taking a closer look at the world of employment-based immigration, a set of nonimmigrant and immigrant visa categories also wholly lacking in pathways despite benefitting from slightly less polarized political sentiment. These categories represent a broad array of immigrant benefits including parole, temporary visas with work authorization and extension privileges, conditional permanent residence, and lawful permanent residence.

The literature, at least in legal academia, on employment-based immigration has been sparse.<sup>71</sup> This Article suggests a benefit to breaking that drought, precisely because the system of employment-based immigration provides a better statutory and regulatory canvas for creating an immigration pathway. After all, unlike many proposed immigration pathways, these offerings in United States immigration law at least purport to offer many benefits that a mere endpoint of permanent residence cannot. Ultimately, the working definition of pathway can be used to critique the specific failures of the United States employment-based immigration system to create good pathways for entrepreneurs, small business owners, and investors, and can provide useful insights for subsequent practical critiques of future immigration pathway proposals.

### **A. An Overview of the Employment-Based Immigration Process**

An immigrant's journey through the employment-based immigration statutes and regulations typically starts with admission in a nonimmigrant, or temporary, visa status.<sup>72</sup> Some nonimmigrant visas have no maximum limit on the amount of overall time an individual can spend in the status so long as extensions are timely filed, while others have strict caps on maximum periods of stay.<sup>73</sup>

Should the immigrant and their employer both agree to pursue permanent residence on behalf of the former, they begin the three-step

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or \$1,050,000, depending on geographic area, to a United States enterprise that creates or saves the jobs of ten full-time United States workers. 8 U.S.C. § 1153(b)(5).

71. This scarcity is in great contrast to the literature generated by policy institutes and the employment-based immigration practitioner community.

72. The most common such nonimmigrant or "work visa" categories are at 8 U.S.C. § 1101(a)(15)(B) (business visitors); § 1101(a)(15)(E) (treaty traders and investors); § 1101(a)(15)(H) (temporary employees in a specialty occupation, agricultural workers, and seasonal workers); § 1101(a)(15)(L) (intracompany transferees from an international company's overseas operations); § 1101(a)(15)(O) (individuals of extraordinary ability in arts, athletics, business, or science); and § 1101(a)(15)(P) (artists, athletes, and entertainers).

73. H-1B nonimmigrants (working in specialty occupations that require a bachelor's degree or their equivalent), subject to exceptions for long-delayed petitions for permanent residence, cannot spend more than six years in H-1B status in the United States. 8 U.S.C. § 1184(g)(4). For L-1A nonimmigrants (intracompany executives or managers), the limit is seven years. 8 U.S.C. § 1184(c)(2)(D)(i). For L-1B nonimmigrants (intracompany specialized knowledge employees), the limit is five years. 8 U.S.C. § 1184(c)(2)(D)(ii).

process of permanent residence at one of two points.<sup>74</sup> The first step is an application for a labor certification made to the Department of Labor after testing the United States labor market to find no qualifying, willing, able, and available United States workers with the position's minimum requirements and affirming that the immigrant's permanent employment will not adversely affect the wages and conditions of United States workers.<sup>75</sup>

The second step is an immigrant visa petition filed with the U.S. Citizenship and Immigration Services ("USCIS"), requesting formal classification under one of five employment-based immigration preference categories. Certain higher-priority or special immigrants are exempt from the full labor certification requirement. They include: (1) the entire first preference, consisting of individuals of extraordinary ability, outstanding professors or researchers, or multinational employees who held executive or managerial roles abroad and will continue to do so in the United States;<sup>76</sup> (2) certain second preference immigrants, who: (a) are individuals of exceptional ability, or (b) are members of two critical shortage occupations: physical therapists and nurses;<sup>77</sup> (3) fourth-preference immigrant religious workers or special immigrants;<sup>78</sup> and (4) fifth-preference employment creation investors whose qualifying investment creates or saves ten United States full-time jobs.<sup>79</sup>

After USCIS approves the immigrant visa petition, the third step in the process requires the individual to "use" the immigrant visa to adjust his or her existing lawful immigration status to that of a lawful permanent resident,<sup>80</sup> or to take the approved petition and apply for an immigrant visa at a United States consulate or embassy abroad that can then be used to enter the United States in permanent resident status.<sup>81</sup> If there is no waiting

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74. *Employment-Based Immigrant Visas*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html> [<https://perma.cc/3U9N-4JT6>] (last visited Dec. 26, 2021).

75. 8 U.S.C. § 1182(a)(5)(A)(i) (2021).

76. These immigrants need not file a labor certification at all, as opposed to third preference immigrants, who are required to apply for one. 8 U.S.C. §§ 1153(b)(1)–(3). Individuals of extraordinary ability do not need a specific job offer from an employer. 8 C.F.R. § 204.5(h)(5) (2021).

77. These immigrants must still file a labor certification application but need not test the U.S. labor market or attest to the lack of adverse effect on U.S. workers, as the Department of Labor has predetermined these occupations do not have sufficient qualified, willing, able, and available U.S. workers and that permanent employment of immigrants in these positions does not adversely affect U.S. workers' wages and working conditions. 20 C.F.R. § 656.5 (2021). Additionally, if an individual of exceptional ability is performing work in the national interest, no employer sponsor is needed. 8 U.S.C. § 1153(b)(2)(B)(i) (2021).

78. 8 U.S.C. § 1153(b)(4).

79. *Id.* § 1153(b)(5).

80. *Id.* § 1255.

81. 8 U.S.C. § 1202(a) (2021); 22 C.F.R. § 42.42 (2021); U.S. DEP'T OF STATE, 9 FOREIGN AFFS. MANUAL § 504.1 [hereinafter 9 Foreign Affs. Manual].

line due to the numerical or per-country limitations in the immigrant visa category, the immigrant can proceed to this step immediately (or, if in the United States, may apply for adjustment of status concurrently).<sup>82</sup> If there is a waiting line due to a priority date backlog in the category, the immigrant must wait until the priority date becomes current to undertake this third step.<sup>83</sup>

## **B. Brief Pathway Observations of Employment-Based Immigration to Annual Renewal Through Congressional Appropriations**

Before shifting attention more directly toward pathway discussions, immigrant entrepreneurs, small business owners, and investors, and ultimately back to reform-minded immigration proposals, it is worthwhile to begin by looking at reauthorization provisions for three existing piecemeal immigration programs that find their way into annual spending bills immunized from anti-immigration reforms. These programs hint at pathways for foreign nationals from either a lack of immigration status or a non-robust status to the more desirable point of permanent residence.<sup>84</sup> These renewals have essentially constituted the entirety of pathway-promoting, employment-based immigration legislation over the past quarter century.<sup>85</sup> These programs—the Conrad 30 Program for J-1 physicians, the fourth preference immigrant non-minister religious worker program, and the fifth preference immigrant investor pilot program—earn mixed reviews when evaluated using the articulated working pathway definition.<sup>86</sup>

The Conrad 30 Program rewards international doctors present in the United States in J-1 nonimmigrant visa status for performing medical services in underserved areas in the United States.<sup>87</sup> Specifically, it creates a

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82. WILLIAM A. KANDEL, CONG. RSCH. SERV., R46291, *THE EMPLOYMENT-BASED IMMIGRATION BACKLOG* (Mar. 26, 2020), <https://crsreports.congress.gov/product/pdf/R/R46291> [<https://perma.cc/NL3D-SMEX>]; *Visa Availability and Priority Dates: Availability of Immigrant Visas*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates> [<https://perma.cc/6U6G-WN2F>] (last visited Dec. 26, 2021).

83. See 9 Foreign Affs. Manual § 504.1-2(c), *supra* note 81.

84. *Green Card Eligibility Categories: Green Card through Employment*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility-categories> [<https://perma.cc/YS5G-VLEJ>] (last visited Dec. 26, 2021).

85. Stuart Anderson, *House Bill Keeps Immigration Measures for High-Skilled Immigrants*, FORBES (Nov. 1, 2021), <https://www.forbes.com/sites/stuartanderson/2021/11/01/house-bill-keeps-immigration-measures-for-high-skilled-immigrants/?sh=6bb352e9168e> [<https://perma.cc/U5LS-XLFM>].

86. The Conrad 30 Program's authorization expired on December 3, 2021. Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43, § 106, 135 Stat. 344 (2021). The non-minister religious worker program expired on September 30, 2021, and the immigrant investor pilot program expired on June 30, 2021. Consolidated Appropriations Act, 2021 Division O, Title I, Pub. L. No. 116-260, 134 Stat. 1182 (2020). As of the writing of this Article, Congress has not reauthorized the latter two programs.

87. 8 U.S.C. § 1184(l) (2021).

rare bridge between the restrictions of that status, which does not allow holders to intend to seek permanent residence and requires holders to return to their previous foreign residence for two years prior to a return to the United States in any other status permitting immigrant intent,<sup>88</sup> and H-1B nonimmigrant status, which allows for immigrant intent.<sup>89</sup> In exchange for entering into a bona fide, full-time employment contract to practice medicine for at least three years at a healthcare facility located in an area designated by the United States Department of Health and Human Services (HHS) as a Health Professional Shortage Area, Medically Underserved Area (MUA), or Medically Underserved Population (MUP), or serving patients who reside in such an area, United States immigration law will waive the foreign residence requirement, subject to a “no objection” statement from the home country.<sup>90</sup>

This oft-renewed piecemeal program comes close to a true pathway, but could better reflect the seeming priority such noncitizens should enjoy in the employment-based immigration ecosystem. By one turn, it avoids the roadblock of time since the corresponding H-1B petition that the employing health care facility must file is not subject to the annual numerical limitation of 65,000 H-1B petitions per year.<sup>91</sup> By another turn, the lack of supply creates an insurmountable time obstacle, as only thirty Conrad waivers can be approved per state per year.<sup>92</sup> Assuming the physician can get around that limit, there is a slight lack of expedited interim progression per the definition’s third element.

Should the noncitizen doctor wish to pursue permanent residence, they may apply for a national interest waiver exempting them from a labor market test and conditions attestation if they: (1) have already worked full-time for five years as a physician in an area or areas designated by the HHS Secretary as having a shortage of healthcare professionals, or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs, and a federal agency or a state public health department has previously determined that the alien physician's work in such an area or at such facility was in the public interest; and (2) they agree to continue to do so pursuant to a job offer.<sup>93</sup> Still, this corresponding application for labor certification and the corresponding immigrant visa petition that the same facility must file for that noncitizen receives no greater priority than other applications or petitions filed by other non-medical employers on behalf of other noncitizens. These doctors do not receive an exemption from the annual

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88. 8 U.S.C. § 1182(e) (2021).

89. 8 C.F.R. § 214.2(h)(16) (2021).

90. 8 U.S.C. § 1182(e).

91. *Id.* § 1184(l)(2)(A).

92. *Id.* § 1184(l)(1)(B).

93. *Id.* § 1153(b)(2)(B)(ii).

numerical limitations on immigrant visas in the employment-based second preference category.<sup>94</sup>

As an aside, noncitizen nurses enjoy equal treatment to noncitizen doctors at the employment-based permanent residence stage, as they are considered second-preference Schedule A occupations also exempt from the labor certification process's labor market test and job attestations.<sup>95</sup> That being said, noncitizen nurses have other pathway problems. In an abject failure to create progression or protection, Congress failed to renew the H-1A and H-1C nonimmigrant visa programs for noncitizen nurses working in health care shortage areas after 1995 and 2009, respectively.<sup>96</sup>

Second, the employment-based fourth ("EB-4") preference category for immigrant non-minister religious workers allows for: (1) noncitizen member of a religious denomination that has a bona fide non-profit religious organization in the United States, (2) seeking to work full-time in the United States as a minister, in a religious vocation, or in a religious capacity, (3) for that bona fide non-profit religious organization or one affiliated with a United States religious documentation, and (4) after two or more years of work experience in one of those religious positions immediately prior to petitioning.<sup>97</sup> It is non-minister positions that have required reauthorizations for eligibility, while minister positions have always remained eligible. This program contemplates both noncitizens directly entering the United States as permanent residents from abroad as well as those already present, such as in R-1 nonimmigrant status, whose requirements almost identically mirror that of the EB-4 criteria, save for the allowance of part-time work.<sup>98</sup> This matching makes it difficult to categorize this as a pathway because the "actions" element is essentially the same.

Third, the employment-based fifth preference ("EB-5") pilot program allows for immigrant investors to contribute funds to a Regional Center ("RC"), rather than directly to an individual enterprise ("Direct EB-5"), which results in the creation or preservation of ten full-time jobs for United States workers.<sup>99</sup> Similar to the minister/non-minister distinctions in the EB-4 category, Direct EB-5 investments are permanent and not subject to annual congressional renewal; only RC ones are. The Regional Center Program, albeit not immune from detractors<sup>100</sup> and controversy,<sup>101</sup> suggests

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94. *Id.*

95. 20 C.F.R. § 656.5(a)(2) (2021).

96. Immigration Nursing Relief Act of 1989, Pub. L. No. 101-238, 103 Stat. 2099 (1989); Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat. 1312 (1999).

97. 8 U.S.C. § 1101(a)(27)(C)(ii)(II)–(III) (2021).

98. *Id.* § 1101(a)(15)(R); 8 C.F.R. § 214(r) (2021).

99. 8 C.F.R. § 204.6(m).

100. Steven Malanga, *Passport to Fraud*, CITY J., <https://www.city-journal.org/federal-visa-program-plagued-by-fraud> [<https://perma.cc/JFL5-CHPW>] (last visited Dec. 22, 2021).

progression and protection. Under this program, an immigrant entrepreneur or investor can obtain the stable immigration status position of conditional permanent residence, skipping over a nonimmigrant visa altogether, even before the enterprise develops individual initiatives or the foreign national arrives in the United States. However, it is the Regional Center Program whose annual authorization was allowed to lapse on June 30, 2021, in the absence of congressional action.<sup>102</sup> Fortunately, Congress reauthorized the Regional Center Program as part of appropriations legislation for fiscal year 2022.<sup>103</sup> This reauthorization is valid for five years, running through September 30, 2027, and provides retroactive protection for those pending EB-5 cases stalled by the gap in the Program's validity.<sup>104</sup> Yet the lack of congressional willingness to make the Regional Center Program permanent is the ultimate lack of protection or progression for a program which, if not reauthorized, could jeopardize over 32,000 principal immigrant investors and their dependents, as well as over 486,000 United States jobs.<sup>105</sup> A larger discussion of the EB-5 pathway failures is explored in Part II(B), *supra*.

### **C. Pathway Failures for Immigrant Entrepreneurs, Small Business Owners, and Investors**

The pathway problem becomes even more salient when attention is directed towards United States immigration options for immigrant entrepreneurs, small business owners, and investors. One would think the pathway problems should be minimal to non-existent given the great degree of fanfare and zeal in many circles about specifically encouraging such highly skilled immigrants. However, an application of the working definition clearly proves that the reality is far from that.

#### *1. Pathway Failures for Nonimmigrant Student Visa Holders and H-1B Nonimmigrant Workers*

Immigrants may attend a United States institution of higher education as a student or exchange visitor in the F-1, J-1, or M-1

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101. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-696, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRANT INVESTOR PROGRAM: ADDITIONAL ACTIONS NEEDED TO BETTER ASSESS FRAUD RISKS AND REPORT ECONOMIC BENEFITS (2015).

102. Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43, § 106, 135 Stat. 344 (2021); Consolidated Appropriations Act, 2021 Division O, Title I, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

103. Consolidated Appropriations Act, 2022 Division BB, Pub. L. No. 117-103, \_\_ Stat. \_\_ (2022).

104. *Id.* at §§ 103(b)(1), 105.

105. LEE Y. LI, IMPACT OF THE LAPSE OF THE EB-5 REGIONAL CENTER PROGRAM ON INVESTORS, INVESTMENTS, AND JOB CREATION 1 (2021), <https://iiosa.org/wp-content/uploads/2021/08/IIUSA-Analysis-Impact-of-the-Lapse-on-Investors-Investment-and-Jobs-8.27.pdf> [<https://perma.cc/38KV-RLFS>].

nonimmigrant visa categories.<sup>106</sup> Indeed, policy reports identify these students as an important source of future economic growth and a breeding ground for entrepreneurs and small business owners.<sup>107</sup>

Still, there is no set of actions that a student, who is a potential entrepreneur or investor, may take to automatically progress along an immigration pathway.<sup>108</sup> Granted, there is a limited fourteen-month window for post-degree optional practical training with an employer in a field related to the degree.<sup>109</sup> This grant is longer (up to twenty-nine months) if the individual is working in a science, technology, engineering, or math (“STEM”) field.<sup>110</sup> This latter grant option would qualify both as a private action, finding an employer willing to oversee the training, and as a progression from a nonimmigrant status that largely forbids employment to a condition in which one can apply for employment authorization.

However, the H-1B visa remains the most common work visa for which nonimmigrant students aim. The H-1B visa is available to those seeking work from employers in positions that require a bachelor’s degree or the equivalent.<sup>111</sup> The private action required of the nonimmigrant is to find an employer willing to hire them.<sup>112</sup> That is no small feat given the prohibitive government filing fees,<sup>113</sup> inter-agency jurisdiction over the H-1B petition approval and visa issuance process,<sup>114</sup> and, as discussed in the next paragraph, the low chance of H-1B petition selection for processing in the first place.<sup>115</sup>

Indeed, a potential progression from student to H-1B nonimmigrant is anything but assured for two reasons. First, only 65,000 new H-1B visa petitions may be approved every year, with an additional 20,000 reserved for nonimmigrants holding an advanced degree from a United States institution.<sup>116</sup> This creates an onerous time burden, since nonimmigrants whose H-1B petitions are not selected for processing must wait until the

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106. 8 U.S.C. §§ 1101(a)(15)(F), (J), (M) (2021).

107. ANTHONY LUPPINO, JOHN NORTON & MALIKA SIMMONS, KAUFFMAN FOUND., REFORMING IMMIGRATION LAW TO ALLOW MORE FOREIGN STUDENT ENTREPRENEURS TO LAUNCH JOB-CREATING VENTURES IN THE UNITED STATES 6 (2012), <https://www.immigrationresearch.org/system/files/kauffmanimmigrationreform.pdf> [<https://perma.cc/LE3Q-R5JZ>].

108. *Id.* at 2–3.

109. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3) (2021).

110. *Id.* § 214.2(f)(10)(ii)(C).

111. AM. IMMIGR. COUNCIL, THE H-1B VISA PROGRAM: A PRIMER ON THE PROGRAM AND ITS IMPACT ON JOBS, WAGES, AND THE ECONOMY 1–2 (2021), <https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet> [<https://perma.cc/3S6X-3S77>].

112. *Id.*

113. 8 C.F.R. §§ 106.2(a)(3)(i), (c)(4), (c)(5)(i), (c)(7) (2021) (totaling from \$555 to \$4,000, depending on the employer).

114. 8 U.S.C. § 1182(n) (2021) (requiring a certified labor condition application from the Department of Labor); 22 C.F.R. § 41.12 (2021) (detailing nonimmigrant visa stamps the Department of State issues to enable lawful entry into the United States).

115. *See* 8 U.S.C. §§ 1184(g)(1)(A), (g)(5)(C) (2021).

116. *Id.*

next fiscal year to try again.<sup>117</sup> This also means that some must leave the country, an important loss of the protection of the right to remain lawfully in the United States. Second, and most troublingly, is the effect that an agency interpretation of who qualifies as entrepreneurs, small business owners, and investors has on progression: H-1Bs are not available for those who are self-employed.<sup>118</sup> USCIS has taken a strict interpretation of the regulatory requirement that an employer must petition for the employee, and that there must be an employer-employee relationship.<sup>119</sup> That means that the employer must be a separate entity with the ability to control, supervise, hire, and fire the employee.<sup>120</sup> How, then, are such immigrants to be encouraged to pursue independent endeavors when the next progression point post-education is antithetical to the entrepreneurial spirit?

## 2. *Pathway Failures for E-2 Treaty Investor Nonimmigrants*

This section explores the employment-based immigration field more directly aimed at immigrant entrepreneurs, small business owners, and investors. As a general matter, these nonimmigrant and immigrant visa options fit the first working definitional element, requiring a combination of public actions, such as incorporation and registration of the business entity, and private ones, such as possessing or raising funding, hiring others, acquiring property, and hitting certain financial thresholds.

At first glance, the E-2 nonimmigrant visa category appears to be an excellent model pathway candidate for immigrant entrepreneurs, small business owners, and investors. It provides nonimmigrant status for individuals who will develop, direct, or invest in a United States investment enterprise.<sup>121</sup> The private action requested can also be self-initiated, as the nonimmigrant can build their own business plan and start their own enterprise as well as join an existing one.<sup>122</sup> The United States immigration law extends flexibility to the nature of this private action. It requires only that the investment made by the nonimmigrant or the enterprise (if separate from the nonimmigrant) be substantial and non-marginal, as considered based on the nature of the business.<sup>123</sup>

For individuals outside the United States, the time and progression elements of the pathway are greatly reduced because an initial

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117. *Id.*

118. *Id.* § 1101(a)(15)(H)(i)(b).

119. 8 C.F.R. § 214.2(h)(4)(ii) (2021).

120. U.S. CITIZENSHIP AND IMMIGR. SERVS., AD 10-24, MEMORANDUM: DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP FOR ADJUDICATION OF H-1B PETITIONS, INCLUDING THIRD-PARTY SITE PLACEMENTS (2010) (illustrating that a self-employment scenario would not constitute a required employer-employee relationship).

121. 8 U.S.C. § 1101(a)(15)(E)(ii) (2021).

122. *Id.*

123. 8 C.F.R. § 214.2(e)(2)(i) (2021).



nonimmigrant visa petition filing with USCIS is not required.<sup>124</sup> That is, a United States consulate or embassy can unilaterally decide E-2 status eligibility.<sup>125</sup> Applicants for E-2 status typically must register their E-2 company with the consulate or embassy, which saves time for subsequent E-2 visa applications and provides a potential protection against the duplicative efforts of resubmitting unchanged information about the enterprise.<sup>126</sup>

Many high-volume E-2 consulates have their own dedicated E visa units and procedures, helping to manage client expectations.<sup>127</sup> From both a progression and protection end, after a usual one-year E nonimmigrant visa stamp issuance, subsequent E nonimmigrant visa stamps can be issued for up to five-year increments with no maximum time limit.<sup>128</sup> Entries on a valid E visa are generally granted for two years at a time, and the nonimmigrant has the option to extend a period of authorized stay via a USCIS application, or to re-enter the United States anew on a still-valid E stamp and receive a fresh two-year stay.<sup>129</sup>

Yet a pathway that begins with E-2 status may not even start for many nonimmigrants. A core threshold eligibility requirement for E-2 status is that the nonimmigrant is a citizen of a country that has a qualifying treaty of commerce and navigation with the United States, and that a majority of the United States enterprise is owned by persons or entities that are citizens of that same country.<sup>130</sup> Only eighty countries have such treaties.<sup>131</sup> Most tellingly, citizens of countries with high amounts of would-be immigrant entrepreneurs, small business owners, and investors like China, India, and Vietnam, lack eligibility.<sup>132</sup> In Part III, *infra*, this Article will address a private action that such citizens have begun to circumvent this lack of progression.

A further progression deficit of the E-2 visa is that it does not logically flow into a corresponding immigrant visa category for permanent

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124. 22 C.F.R. § 41.51 (2021).

125. *Id.* §§ 41.51(a)(12), (b)(13).

126. *See, e.g., How to Apply*, U.S. EMBASSY & CONSULATES IN THE U.K., <https://uk.us-embassy.gov/visas/treaty-trader-or-treaty-investor/how-to-apply/> [<https://perma.cc/7BMB-K2X4>] (last visited Dec. 23, 2021).

127. *Id.*

128. 8 C.F.R. § 214.2(e)(20) (2021).

129. The Department of State's Visa Reciprocity Table determines the length of time for which the E nonimmigrant visa stamp is valid. *U.S. Visa: Reciprocity and Civil Documents by Country*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html> [<https://perma.cc/B675-EB6L>] (last visited Dec. 23, 2021); *see also* 8 C.F.R. §§ 214.2(e)(19)–(20) (2021) (governing extensions of E nonimmigrant status for individuals already in the United States).

130. 8 U.S.C. § 1101(a)(15)(E)(ii) (2021).

131. *See Treaty Countries*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html> [<https://perma.cc/3CRV-F7FT>] (last visited Dec. 23, 2021).

132. *Id.*

residence. In the same way that ownership of an enterprise is fatal to H-1B status, ownership is fatal to employer sponsorship in employment-based second and third preference immigration.<sup>133</sup> Specifically, the required test of the labor market prior to the application for labor certification necessitates separation from the employer and the employee.<sup>134</sup> Put simply, an employee-owner cannot be trusted to declare the lack of qualifying willing, able, and available United States workers at the expense of their own progression along the permanent residence pathway. This makes these immigrant visa categories largely non-starters for entrepreneurs and, in particular, small business owners.

Moreover, even pathways in the first three employment-based preference categories that do not require a test of the labor market lack progression. Sustained national or international acclaim or recognition of outstanding accomplishment are required of first preference classification as an individual of extraordinary ability or an outstanding researcher, respectively.<sup>135</sup> A demonstration that the work is in the national interest is required of second preference classification under the national interest waiver exception.<sup>136</sup> These are difficult criteria towards which to progress for an early-stage entrepreneurial business. They are likewise ill-fitting for small business owners seeking stable returns in predictable industries and locations.

Finally, a passive immigrant investor—one who does not envision an active role in the daily management of the enterprise—does not fare well in the first, second, and third preference categories. With few exceptions, they require a job offer from an employer,<sup>137</sup> in addition to education and experience.<sup>138</sup>

It is possible that the E-2 nonimmigrants could develop their enterprise into one that creates or saves the required ten full-time jobs for employment-based fifth preference classification as an employment creator. However, the progression is all but elusive given that job creation is not the only requirement for that classification, and that the immigrant must personally invest either \$800,000 or \$1,050,000 in the enterprise.<sup>139</sup> Admittedly, that is less of a problem for a passive immigrant investor. But not so for an entrepreneur or a small business owner whose stake in the business may largely consist of sweat equity, or if the goal of the immigrant is acquisition of the enterprise.

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133. 8 U.S.C. §§ 1153(b)(2)–(3) (2021).

134. 20 C.F.R. § 656.17(l) (2021).

135. 8 U.S.C. §§ 1153(b)(1)(A)–(B) (2021).

136. *Id.* § 1153(b)(2)(B)(i).

137. *Id.* §§ 1153(b)(1)–(3).

138. *Id.*

139. *Id.* § 1153(b)(5)(C), as amended by Consolidated Appropriations Act, 2022 Division BB, § 102(a)(3), Pub. L. No. 117-103, \_\_ Stat. \_\_ (2022).

### 3. *Pathway Failures for L-1A Nonimmigrants and First Preference Multinational Managers or Executives*

Another category of visa, the L-1A nonimmigrant visa, is available to individuals who have worked for a multinational entity during one of the past three years, and who wish to work for a United States owner, subsidiary, branch, or joint venture of that entity in an executive or managerial capacity.<sup>140</sup> The L-1A visa program is largely responsive to the needs of large, multinational conglomerates. However, an immigrant entrepreneur, small business owner, or active investor can take the private action of establishing an international entity and working for it for a year. Moreover, the L-1A provisions allow for a grant of one year of L-1A status for individuals coming to open a new United States office of the multinational entity.<sup>141</sup> That appears to be an excellent progression point for an early-stage entrepreneur. USCIS can grant multi-year extensions of L-1A status, with a maximum total stay of seven years, as stated earlier.<sup>142</sup>

Yet agency regulations and adjudication trends provide a thorny minefield for progression. For the new office entrepreneur, agency guidance anticipates a reduction in the amount of day-to-day employment by the end of the one year.<sup>143</sup> That is certainly in opposition to the hands-on approach most entrepreneurs must take, especially in the early stages of their enterprises.

Second, while the L-1A standards contemplate that a nonimmigrant may qualify for L-1A classification by managing important company functions, agency adjudication trends clearly show a preference for personnel management and a demonstration of an organizational chart-friendly hierarchy.<sup>144</sup> Those progression expectations are quite unrealistic for early-stage enterprises that lack the financial resources for additional personnel. Moreover, the regulations require that most of the nonimmigrant's direct reports must be professionals.<sup>145</sup> This requirement forecloses progression of entire entrepreneurial and small business ventures where employees perform functions that do not require post-secondary education.

Third, a slight progression problem also occurs if an L-1A nonimmigrant seeks employment-based first preference classification as a multinational executive or manager. While the L-1A criteria and the

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140. *Id.* § 1101(a)(15)(L).

141. 8 C.F.R. § 214.2(l)(7)(i)(A)(3) (2021).

142. *Id.* § 214.2(l)(12)(i).

143. U.S. CITIZENSHIP AND IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL (Chapter 32.6(d)) (2021).

144. See Jacob T. Muklewicz, *Recent trends involving the L-1 visa category for intracompany transferees*, KIRTON MCCONKIE (July 17, 2015) <https://www.kmclaw.com/publication-Intracompany-transferees-L1-Visa> [<https://perma.cc/2DVL-ASCW>].

145. 8 C.F.R. § 214.2(l)(1)(ii)(B)(4) (2021).

multinational executive and manager criteria are largely identical, the latter requires that the immigrant's initial experience abroad have been managerial or executive in nature, while the former does not.<sup>146</sup> As such, this pathway can punish the immigrant for an action not taken in the early stages of the enterprise: to be an active manager or executive in their entrepreneurial or ownership capacity. Similar to the employment-based fourth preference category for religious workers, the multinational executive/manager category has significant overlap with its nonimmigrant visa counterpart but does not embody gradual progression. Rather, it is a quick, priority date-backlog skipping pathway for immigrants who are fortunate enough to be able to create, and to sustain, a multinational endeavor.

#### *4. Pathway Failures for Fifth Preference Employment Creation Immigrants*

As mentioned earlier, the employment-based fifth preference immigration category is reserved for job-creating immigrants who intend to invest a certain sum of money into a United States enterprise that creates or saves ten full-time jobs.<sup>147</sup> If the immigrant invests into a targeted employment area—one designed by a state as particularly needing job growth—the investment requirement drops to \$800,000.<sup>148</sup> Also, as referenced in Part II(B), *supra*, if the immigrant invests in a Regional Center, the burden of choosing a single line of business is relieved, as Regional Centers can represent any economic unit involved with the promotion of economic growth.<sup>149</sup> In addition, Regional Center-based immigrant visa petitions can show indirect creation of ten full-time jobs, whereas a traditional direct investment under this category requires direct creation of ten full-time jobs.<sup>150</sup>

The permanent residence granted via the fifth-preference immigration classification is conditional in nature.<sup>151</sup> An immigrant may petition to remove the conditions two years after initial classification and will receive full lawful permanent residence if they can show that they have invested, or are actively in the process of investing, the required capital and have sustained the investment throughout the period of their residence in the United States.<sup>152</sup> Additionally, the immigrant must show that the new commercial enterprise either: (1) created, or can be expected to create, within a reasonable time, at least ten full-time positions for qualifying

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146. 8 U.S.C. § 1153(b)(1)(C) (2021); *id.* § 1101(a)(15)(L).

147. *Id.* § 1153(b)(5)(A)(ii).

148. *Id.* § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2) (2021).

149. 8 C.F.R. § 204.6(e).

150. *Id.* §§ 204.6(e), (j)(4)(iii).

151. *Id.* § 216.6.

152. *Id.*

United States employees; or (2) maintained an existing United States employee headcount during the two-year conditional period, if the investment was in a troubled business to save ten qualifying full-time positions.<sup>153</sup>

Entry from nonimmigrant visa status to fifth preference immigrant classification is, as noted in the earlier E-2 discussion, nonexistent.<sup>154</sup> This raises immediate progression concerns since, absent the unrelated accumulation of the necessary investment funds, there is no way for a nonimmigrant already present in the United States to work up to fifth preference classification.<sup>155</sup> It is an ill-suited progression pathway for an early-stage entrepreneur.

Admittedly, that does not appear to be the pathway envisioned by most immigrant investors seeking permanent residence in this fashion. Rather, they see this route as a progression to citizenship, for which they can apply after five years of permanent residence in the United States (which can include the two years of conditional permanent residence).<sup>156</sup> These investors have three important protection-directed interests in pursuing this pathway. The first is the attainment of a widely accepted passport for international travel.<sup>157</sup> The second is the ability to invest in a stable enterprise that will be able to successfully create jobs, promote economic growth, and ultimately repay their EB-5 capital investment.<sup>158</sup> The third is the ability to relocate their families and, particularly, their children to the United States, providing them with greater access to education.<sup>159</sup>

Yet, the immigrant investor pathway still falls short of the working definition in several respects. A grand total of 10,000 immigrant visas may be allocated each year to this category.<sup>160</sup> This causes time-based deficits for countries with high usage of the program.<sup>161</sup> That the single biggest country for fifth preference permanent residence is China certainly cuts

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153. *Id.* §§ 216.6(a)(4)(ii)–(iv).

154. *Id.* § 204.6.

155. *See id.*

156. *Id.* § 316.2(a)(3).

157. Matthew Galati, *STEP 9: Naturalization: The U.S. Passport at the End of the Road*, EB5 INVS., <https://www.eb5investors.com/eb5-guide/eb-5-us-passport> [<https://perma.cc/F7M6-9XA2>] (last visited Dec. 23, 2021).

158. Kriston Capps, *Another Reason to Hate Hudson Yards*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/hudson-yards.html> [<https://perma.cc/A5X6-EB4W>].

159. Javier C. Hernández, *Wealthy Chinese Scramble for Imperiled Commodity: U.S. 'Golden Visa'*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/world/asia/china-eb-5-golden-visa.html> [<https://perma.cc/N3HC-USS6>].

160. 8 U.S.C. § 1153(b)(5) (2021).

161. Andy J. Semotiuk, *U.S. EB-5 Investor Immigration Needs Renewal and Overhaul*, FORBES, (Feb. 28, 2021, 8:04 AM), <https://www.forbes.com/sites/andyjsemotiuk/2021/02/28/us-eb-5-investor-immigration-needs-renewal-and-overhaul/?sh=5928878f1c4b> [<https://perma.cc/6TW5-8SWB>].

against what should be a desire to encourage an outflow of financial and human capital from that country, as opposed to an outsourcing of the same from the United States.

Likewise, the protection element of the immigrant investor pathway is weak. Unforgiving agency practices scrutinize the source of funding, disproportionately impacting immigrants without easy access to Western-style records of their accumulated capital.<sup>162</sup> The agency has long been skeptical of so-called “material changes” to the nature of investment, even as such modifications may be financially necessary to protect the viability of the investment.<sup>163</sup> Processing time for fifth preference immigrant visa petitions is infamously long.<sup>164</sup> As noted in Part II(A), the tenuous year-to-year reauthorization limbo for Regional Center-based petitions causes unwelcome uncertainty for investors. As critics are quick to point out, there is always the risk that a Regional Center in which they have little personal involvement fails, or worse, has been defrauding investors the entire time.<sup>165</sup>

In addition, the targeted employment area—an important alternative progression route that is likewise intended to optimize job creation—suffers from its own elemental critiques. Previously a creature of state designation, it is now decided by the federal government based on evidence the immigrant provides.<sup>166</sup> From an equity perspective, it is not as granular as it should be. Rather, determinations are not made at the local, or neighborhood level, preventing promotion of the kinds of private actions that matter to these immigrants (such as schooling and enclave support) and the kind of protections that matter to advocates (such as community integration).<sup>167</sup> Throughout the majority of its history, the EB-5 program did not borrow industry-targeting components from other immigration programs like the previously discussed labor-certification exempt second

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162. Dillon Colucci & Matthew Galati, *Kate's Corner: Recent Developments in Chinese Source of Funds RFEs* (Aug. 21, 2015), <https://www.eb5investors.com/magazine/article/chinese-source-of-funds-rfe> [<https://perma.cc/T6PM-T9NZ>] (last visited Feb. 6, 2022).

163. H. Ronald Klasko, *What You May Have Missed in the New EB-5 Regulation*, KLASKO IMMIGR.L. PARTNERS, LLP, (Aug. 12, 2019), <https://www.klaskolaw.com/hot-questions/eb-5-regulation-what-you-may-have-missed> [<https://perma.cc/X7QA-GVWA>].

164. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF SERVICEWIDE FORMS BY QUARTER, FORM STATUS, AND PROCESSING TIME, FISCAL YEAR 2021, QUARTER 3 (2021), [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q3.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q3.pdf) [<https://perma.cc/6JA3-KYXH>] (reporting a thirty-two-month processing time for EB-5 petitions and a thirty-six-month processing time for petitions to remove conditional EB-5 permanent residence).

165. See, e.g., Katharine Q. Seelye, *Fraud Charges Mar a Plan to Aid a Struggling Vermont Region*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/11/us/fraud-charges-mar-a-plan-to-aid-a-struggling-vermont-region.html> [<https://perma.cc/2KVM-3XP8>].

166. 8 C.F.R. § 204.6(j)(6) (2021).

167. See *id.*

preference occupations (physical therapists and nurses) and Conrad 30 program for certain immigrant doctors.<sup>168</sup>

Still, the recently enacted EB-5 Regional Center reauthorization purports to incorporate industry targeting in two ways. First, it reserves twenty percent of the annual 10,000 EB-5 visas for investments in rural areas; ten percent for investment in high unemployment areas; and two percent for qualifying infrastructure projects that are administered by a federal, state or local government entity.<sup>169</sup> The new infrastructure investment category does alleviate some concern raised by federal-only determination of targeted unemployment areas and does allow for a broader range of public actions that likewise promote an immigrant investor interest in community impact. Second, it directs USCIS to prioritize the processing of petitions for investment in rural areas, an admirable perk of the alternative progression route that targeted investment provides.<sup>170</sup>

Moreover, the reauthorization includes a few important safeguards emblematic of pathway protection. First, it allows for concurrent filing of the I-526 petition and the final I-485 adjustment of status application for individuals for whom there is not a priority date backlog.<sup>171</sup> This addition yields time savings in movement towards conditional performance residence and the important interim protective benefits of work authorization (to ensure regular income) and advance parole (to facilitate international travel). Second, it allows for good-faith investors to maintain their eligibility for permanent residence if USCIS terminates or debar the Regional Center in which they invested, or if USCIS decides to let the Regional Center program expire.<sup>172</sup> Yet the increase of the qualifying investment in a targeted unemployment area or infrastructure project to \$800,000—albeit with further corrections to this amount (and the \$1,050,000 conventional investment figure) every five years based on the unadjusted consumer price index—does cut against these progressions.

##### 5. *Pathway Failures of the Recently Revised Entrepreneur Parole Rule*

An initial regulation under President Obama's administration, in a maneuver clearly intended to circumvent congressional gridlock on immigration reform, used the executive branch's power of parole to create an entrepreneur parole category.<sup>173</sup> This use greatly differs from other uses

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168. *See id.*

169. 8 U.S.C. § 1153(b)(5)(B), as modified by Consolidated Appropriations Act, 2022 Division BB, § 102(a)(2), Pub. L. No. 117-103, \_\_ Stat. \_\_ (2022).

170. 8 U.S.C. § 1153(b)(5)(E)(ii)(I), as added by Consolidated Appropriations Act, 2022 Division BB, § 103(b)(1), Pub. L. No. 117-103, \_\_ Stat. \_\_ (2022).

171. 8 U.S.C. § 1255(n), as added by Consolidated Appropriations Act, 2022 Division BB, § 102(d), Pub. L. No. 117-103, \_\_ Stat. \_\_ (2022).

172. 8 U.S.C. §§ 1153(b)(5)(M); 1153(b)(5)(S), as added by Consolidated Appropriations Act, 2022 Division BB, § 102(d), Pub. L. No. 117-103, \_\_ Stat. \_\_ (2022).

173. International Entrepreneur Rule, 82 Fed. Reg. 5238 (Jan. 17, 2017).

of parole, often reserved outright for general humanitarian reasons or directly targeted towards immigrant populations with compelling public interests.<sup>174</sup> President Trump's administration initially tried to delay the rule's effective date,<sup>175</sup> but federal litigation overturned the delay for failing to follow notice-and-comment procedures.<sup>176</sup> The Trump administration issued a new notice of proposed rulemaking that would have eliminated the international entrepreneur parole rule but never finalized it.<sup>177</sup> As such, the rule has gone into effect, with a further revision to adjust the required investment and revenue amounts according to the Consumer Price Index.<sup>178</sup>

The entrepreneur parole rule requires the immigrant to possess a substantial ownership interest in a start-up entity created within the past five years in the United States that has substantial potential for rapid growth and job creation.<sup>179</sup> The immigrant must have a central and active role in the start-up entity such that they is well-positioned to substantially assist with the growth and success of the business. Furthermore, the immigrant must prove that they will provide a significant public benefit to the United States based on their entrepreneurial role in the start-up entity by showing that: (1) the start-up entity has received a significant investment of capital from certain qualified United States investors with established records of successful investments; (2) the start-up entity has received significant awards or grants for economic development, research and development, job creation, or other types of grants or awards typically given to start-up entities from federal, state, or local government entities that regularly provide such awards or grants to start-up entities; or (3) the immigrant partially meets either or both of the previous two requirements and provides additional reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.<sup>180</sup>

At first glance, the rule seems to solve some of the working definition's critiques of the other pathways. Specifically, it seems to be a better starting point immediately after the non-desirable end of the binary. It is available both to individuals currently in the United States, as well as to those outside of it.<sup>181</sup> It does not contain a cap on admissions or degree requirements. Its initial grant is valid for thirty months.<sup>182</sup> It permits

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174. *See, e.g.*, 8 C.F.R. §§ 212.5(b) (humanitarian parole generally), 212.5(h) (Cuban and Haitian nationals), 212.12 (Mariel Cubans), 212.14 (immigrant witnesses and informants).

175. International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,887 (July 11, 2017).

176. Nat'l Venture Cap. Assoc. v. Duke, 291 F. Supp. 3d 5, 20–21 (D.D.C. 2017).

177. Removal of International Entrepreneur Parole Program, 83 Fed. Reg. 24,415 (May 29, 2018).

178. International Entrepreneur Program: Automatic Increase of Investment and Revenue Amount Requirements, 86 Fed. Reg. 50,839 (Sep. 13, 2021).

179. 8 C.F.R. § 212.19 (2021).

180. *Id.*

181. *Id.* §§ 212.19(a)(5), (b)(1).

182. *Id.* § 212.19(d)(2).



minimal individual ownership common to startups, just ten percent at the initial parole stage and just five percent at the reauthorization of the parole stage.<sup>183</sup> It has lower fixed and target funding thresholds—\$105,659 from government awards or grants, or \$264,147 for more qualified investors.<sup>184</sup> These thresholds jump to an aggregate requirement of \$528,293 in funding from both of these categories for reauthorization, although creation of five jobs, \$500,000 in annual revenue, or average annual growth of 20% throughout the initial parole grant can substitute for eligibility.<sup>185</sup> These outside funding criteria are more permissive of outside investment in a way that the E-2 visa, which requires majority ownership from citizens of the same country, and the fifth-preference immigrant visa, which requires the individual to put their own funds at risk, are not.

Yet the working definition reveals the entrepreneur parole pathway's deficits. From a protection perspective, parole is a fragile status. As described earlier, it is permission to be in the United States without being considered admitted.<sup>186</sup> As such, a nonimmigrant physically present in the United States on parole cannot change status to another immigration status or, absent an exception, adjust status to permanent residence.<sup>187</sup> The nonimmigrant parolee only gets one additional reauthorization for parole beyond the initial grant.<sup>188</sup> A recipient of entrepreneur parole must maintain a household income that is greater than 400% of the federal poverty line for his or her household size.<sup>189</sup> That may not be the business reality of a startup only funded at the six-figure level, or who may forgo compensation until acquisition and to ensure appropriate compensation of initial employees and independent contractors. Unsurprisingly, expert practitioners in the immigrant entrepreneur, small business owner, and investor space have their doubts about recommending the current entrepreneur parole route as an entry point onto a pathway to permanent residence and citizenship.<sup>190</sup> The great degree of economic privilege that these noncitizens carry would understandably make them more risk-averse to holding a tenuous status in United States immigration law.

On the progression element, there is also no natural pathway to fifth preference immigrant visa classification. Personal at-risk investment of that degree is at cross purposes to an entrepreneur or small business owner's

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183. *Id.* § 212.19(a)(1).

184. *Id.* § 212.19(b)(2)(ii)(B).

185. *Id.* § 212.19(c)(2)(ii)(B).

186. *See supra* note 72 and accompanying text; International Entrepreneur Rule, 82 Fed. Reg. 5238, 5243 (Jan. 17, 2017).

187. International Entrepreneur Rule, 82 Fed. Reg. 5238, 5240 (Jan. 17, 2017).

188. 8 C.F.R. § 212.19(d)(3) (2021).

189. *Id.* § 212.19(l)

190. Joseph Barnett, *Top Five Changes Needed to the International Entrepreneur Parole Rule*, WR IMMIGR. (July 21, 2021), <https://wolfsdorf.com/top-five-changes-needed-to-the-international-entrepreneur-parole-rule/> [<https://perma.cc/4JMM-C6G7>] (last visited Dec. 23, 2021).

frequent normative aspiration to be acquired. That means a potential loss of protected immigrant benefits even as they may be gained economically. For entrepreneurs or small business investors on the other side of that normative spectrum, the desire to retain control is, as noted earlier, subverted by the requirement of employer independence in the labor certification process. Indeed, progression to permanent residence appears not to be contemplated at all by the rule, as the implementing regulations envision the termination of parole upon complete acquisition of the immigrant's qualifying ownership interest in the startup.<sup>191</sup>

### III. A PRIVATE PATHWAY EXAMPLE IN EMPLOYMENT-BASED IMMIGRATION

This Article previously discussed the notion that in the actions element of the working definition of pathway, some required actions were private in nature. Yet, a curious innovation from the employment-based immigration practitioner bar goes further than a mere private action: it provides a “private” pathway that subverts a wholly “public” pathway under United States immigration law. This is the so-called citizenship-by-investment or “CBI bridge,” allowing an immigrant entrepreneur, small business owner, or investor to progress towards E-2 nonimmigrant status and then achieve fifth preference-based permanent residence. Accordingly, its features warrant closer study and its characterization as a “private” pathway may be quite apt.

#### A. The Mechanics of the CBI-E-2-Immigrant Investor Bridge

As noted earlier, if a potential immigrant entrepreneur, small business owner, or investor is not of the nationality of a country with a qualifying treaty of commerce and navigation with the United States, they are not eligible for E-2 status.<sup>192</sup> To remedy this lack of qualifying citizenship, an employment-based immigration practitioner specializing in investor immigration may work with the immigrant to acquire a citizenship that does.<sup>193</sup> This is done in a country that allows for expedited citizenship, as opposed to permanent residence, predicated on a certain threshold of investment. Grenada, for example, is a popular destination, providing

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191. 8 C.F.R. § 212.19(k)(2) (2021).

192. See *supra* Section II.B, Section II.C.2.

193. Phuong Le & Eric Dominguez, *The Rise of Citizenship by Investment, E-2, & EB-5 Programs as a Hybrid Immigration & Investment Vehicle to the U.S.*, INV. IN THE USA REG'L CTR. BUS. J., Vol. 10, No. 1, 7 (May 2021), <https://iiusa.org/wp-content/uploads/2021/06/RCEB-Rise-of-CBI-EB5-E2-Hybrid-Immigration-Approach.pdf> [<https://perma.cc/2QGH-59KX>].

citizenship upon an investment of \$150,000 into a National Transformation Fund project or at least \$300,000 into a qualifying purchase of real estate.<sup>194</sup>

Once citizenship is approved, the immigrant can then apply for E-2 visa status, already armed with a more robust enterprise that has established a business plan, legal and corporate bona fides, and foreign assets.<sup>195</sup> This reduces the laundry list of private actions and time that would otherwise be required to prepare for initial E-2 registration, and E-2 visa issuance then enables much easier international travel both in service of monitoring the now multi-locational investment and attending to personal necessity, important benefits in the protection column.

Next, given that progression towards substantial assets and investment will have already occurred to a certain degree in the foreign aspect of the enterprise, the E-2 nonimmigrant will build up investment funding sufficient to meet the \$800,000 or \$1,050,000 requirement for fifth preference immigrant visa status.<sup>196</sup> Again, the presence of astute immigration counsel as well as well-chosen ancillary legal, corporate, and financial partners from the moment of the original CBI initiative will make this less onerous than finding a direct investment vehicle or shopping for a regional center-based enterprise not in harmony with the immigrant's aspirations or tolerance for risk.

The CBI bridge is not without its limitations. It is a strategy for individuals with the existing financial capital needed for the original acquisition of citizenship by investment. Three sets of government filing fees, immigration counsel fees, other legal counsel fees, financial provider fees, and business creation expert fees can add tens of thousands of dollars to the cost of this private pathway.<sup>197</sup> It relies on global mobility, failing to lend both progression and protection to individuals already in the United States hoping to jump onto a promising entrepreneurial or small business owner track. The time window for the CBI, E-2, and permanent residence pathway is potentially five to seven years in length.<sup>198</sup> Extensive discussions about the immigrant's long-term goals will test an investor's resolve to engage in a myriad of private pathway actions, such as expert

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194. Grenada Citizenship by Investment Act, 2013 (Act No. 15 § 10/2013); Grenada Citizenship by Investment (Amendment) Regulations, 2019 (No. 3/2019) (immigrant investors bringing immediate relatives require additional investment amounts for National Transformation Fund investments, ranging from \$25,000 to \$50,000 per additional dependent); *Cost and Fees*, GRENADA CITIZENSHIP BY INV., GOVERNMENT OF GRENADA, <https://www.cbi.gov.gd/index.php/routes-to-citizenship/cost-and-fees> (last visited Dec. 23, 2021) [<https://perma.cc/SU8C-VGJ5>].

195. See generally Le & Dominguez, *supra* note 193.

196. See LI, *supra* note 105, at 3.

197. 8 C.F.R. § 212.19(b)(1) (2021); *International Entrepreneur Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/humanitarian-parole/international-entrepreneur-parole#:~:text=You%20must%20file%20Form%20I,biometric%20services%20fee%20is%20%202485> [<https://perma.cc/A2D3-FTMC>] (last visited Dec. 23, 2021); see also Le & Dominguez, *supra* note 193, at 8.

198. See Le & Dominguez, *supra* note 193, at 8.

business plan construction that meets both immigration agency criteria and sound business practices to inventory, advisory on deal terms, multi-locational management, organization structure development, financing, and document standardization, among others.<sup>199</sup>

In addition, once an immigrant is back on the United States immigration public pathway after CBI acquisition, the immigrant is still at the whim of priority date backlogs for immigrant visas, as well as the continuing viability of the Regional Center program.<sup>200</sup> In some respects, CBI acquisition is just an accelerated binary, as the ideal situation is that the immigrant has the capacity to meet the required investment level both for the original citizenship by immigration and fifth preference classification, with an E-2 visa giving the immigrant the important protection of entering the United States legally before immigrant petition approval.<sup>201</sup>

Regardless, the CBI bridge conceptually resembles a private pathway, one whose major immigration-related step is done entirely outside the public pathway of United States immigration law and with the extensive assistance of both the private sector and another country's government. It is telling that the employment-based immigration practitioner bar has resorted to this level of private pathway innovation to balance a desire for easier initial entry in nonimmigrant status with an immigrant investor's long-term goals for stability, return, family resettlement, and future ease of international travel.

Yet, this private pathway enables progression along the deficient public pathway in United States immigration law. It uses the lower threshold for the desirable binary (citizenship) in another country's public pathway to compensate for this country's higher threshold.<sup>202</sup> In addition, the assistance of another country's government in the CBI process can give the immigrant's enterprise regulatory benefits in the form of access to other sources of financial and human capital.<sup>203</sup> It can also, perhaps much to our country's chagrin, result in loss of federal, state, and local business taxes and licensing revenue during the enterprise's early stages.<sup>204</sup> Additionally, any job creation or wage savings in the CBI country is not happening in United States-based operations during the CBI enterprise's early stages either.<sup>205</sup> On that final note, the CBI bridge serves as a potential spark for creativity in the form of increased thought to the list of requested, or desired, private actions or involvement when reforming the United States' immigration public pathway.

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199. *Id.* at 8–9.

200. *See id.*

201. *See id.* at 7.

202. *See id.* at 8.

203. *See id.* at 7–8.

204. *See id.*

205. *See id.* at 7 (observing that some CBI countries directly compete with the United States for high-net-worth immigrant investors).

## CONCLUSION

Next steps for legislative and executive measures aimed at either comprehensive or piecemeal immigration reform can hopefully use the working definition of pathway derived from immigration law scholarship. In so doing, such measures can build on this Article's element-driven critiques of the potential pathways for immigrant entrepreneurs, small business owners, and investors.

The mere presence of a range of nonimmigrant visa and immigrant visa classifications options in the United States has not optimized pathways for these immigrants. In some cases, the standards for these options as written are incompatible with the realities of startups, small business, or investment enterprises.<sup>206</sup> By other measures, the standards as applied threaten the progression and protection essential to an immigration pathway.<sup>207</sup>

Element-driven solutions to reforms for these pathways abound. Action-based reforms suggest making the entry point into the immigration pathway more robust. Time and progression-based reforms suggest that elusive legislative efforts to increase the available immigrant visas in common categories for immigrant entrepreneurs, small business owners, and investors are critical. They also suggest a potential new paradigm of rewarding years of presence in a community and promoting gradual progression rather than a sharp, sudden increase in investment amount of job creation. They further suggest defining progression more inclusively, by focusing at the local levels through business improvement districts, opportunity zones, and by creating private-public partnerships aimed at remedying past exclusion from entrepreneurial or business owner progression of communities of color.

Direct investment in public works and infrastructure, parallel to approaches taken by popular CBI countries, should also be considered. Protection-based reforms should ensure that gain in business success does not mean loss of immigrant eligibility. Changes in visa practices to make international travel requirements more flexible, like the lengthy validity of the E visa, as well as registration processes for employers or entities as guards against agency error or inefficiency, would likewise ensure that the accumulation of records does not go for naught and subsequent filings instead focus on changes in circumstances.

The CBI example also suggests the potential benefits of greater private sector integration in immigration pathways. Many progression points already rely on private sector certification of sorts—everything from mere attainment of degrees to accredited investor status by banks to acceptance into a Regional Center investment vehicle.<sup>208</sup> Admittedly, large-

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206. *See id.* at 8.

207. *See id.* at 9.

208. *See generally id.*; 17 C.F.R. § 230.501(a) (2020).

scale private sector involvement can be dangerous, as fraud concerns in the L-1A and fifth preference options illustrate in the employment-based immigration world and as large-scale human rights crises, like immigrant detention in private prisons, illustrate in the larger immigration scheme. However, the employment-based immigration bar's private, optional creativity should provide encouragement. Further requirements can be implemented to seek the involvement of local economic development groups and entrepreneur incubators in an employment-based immigration world. The opportunity may even arise to take the persuasive lead of Canadian private citizens who can individually sponsor refugees for immigration status.

Lastly, the working definition of an immigration pathway could have other applications outside of the immigration context. It could provide a worthy lens to critique other federal programs that also fancy themselves as public pathways. For example, the Small Business Administration's ("SBA") three flagship loan programs purport to meet fledgling enterprises' financial needs at several stages.<sup>209</sup> The microloan program offers SBA guarantees of loans up to \$50,000.<sup>210</sup> The 7(a) loan anticipates loan amounts sufficient to purchase commercial real estate.<sup>211</sup> The 401 loan anticipates a one-time purchase of large, expensive pieces of capital equipment.<sup>212</sup> Its public-private partnership, in which the individual applies to private entities for funding while the SBA guarantees a loan to ensure a favorable term, can be understood as a private pathway not unlike the CBI, albeit with potential progression concerns regarding how effective the private sector network of advisors is for the average SBA loan applicant.

In critically studying the lessons of employment-based immigration's many attempts to create them for entrepreneurs, small business owners, and investors; legal scholars, reformers, and immigrant advocates alike can learn to keep the good and to discard the bad from the complex system of nonimmigrant and immigrant status—a range of options that theoretically could expand the binary thinking that still hinders immigration pathway policy. An understanding of the potential for creative, CBI-level private pathways can uniquely expose the progression deficits of public ones.

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209. See generally 15 U.S.C. § 631 (2010); see also *id.* 17 C.F.R. § 633 (2017).

210. 17 C.F.R. § § 636(m).

211. *Id.* § 636(a).

212. See generally *id.* § 695 (2010); see also Robert Jay Dilger, *Small Business Administration 504/CDC Guaranty Program*, CONG. RSCH. SERV., 7–8 (Updated Oct. 14, 2021), <https://crsreports.congress.gov/search/#/?termsToSearch=R41184&orderBy=Relevance> [https://perma.cc/D67S-AGRJ].