

CLOSING THE BORDERS: REVERSE BRAIN DRAIN AND THE NEED FOR IMMIGRATION REFORM

JANICE D. VILLIERS[†]

Table of Contents

I. INTRODUCTION	1877
II. BRAIN DRAIN – AN EXODUS TO THE DEVELOPED WORLD	1879
III. REVERSE BRAIN DRAIN –THE NEW EXODUS.....	1882
IV. OVERVIEW OF EMPLOYMENT-BASED IMMIGRATION	1885
V. THE CANADIAN IMMIGRATION MODEL	1892
VI. A REFORM PROPOSAL	1893
VII. CONCLUSION	1896

I. INTRODUCTION

What do Google,¹ Intel,² Yahoo,³ e-Bay,⁴ Sun Microsystems,⁵ and Facebook⁶ have in common? Besides being household names and innovative, highly profitable industry leaders, these companies all had immigrant founders or co-founders. Duke and Harvard University's researcher Vivek Wadhwa⁷ revealed that half of Silicon Valley's

[†] Associate Professor of Law, St. John's University School of Law; J.D., 1989, Columbia University School of Law; M.A., 1979, New York University; B.A., 1975, Pace University. Special thanks to my research assistant, Gene Lerner for his invaluable assistance and my heartfelt appreciation to the affiliated faculty of the Ronald H. Brown Center for Civil Rights and Economic Development, especially Leonard Baynes and Cheryl Wade for their support and encouragement.

1. See VIVEK WADHWA ET AL., AMERICA'S LOSS IS THE WORLD'S GAIN: AMERICA'S NEW IMMIGRANT ENTREPRENEURS, PART IV 1, 9 (2009) [hereinafter WADHWA ET AL. AMERICA'S LOSS], available at http://www.economist.com/world/na/displaystory.cfm?story_id=11016270; see also Lexington, *Help Not Wanted: Congress Is Doing Its Best to Lose the Global Talent War*, THE ECONOMIST, Apr. 10, 2008, available at <http://www.vislink.com/files/Economist%20H1B%20Art.pdf>.

2. WADHWA ET AL., AMERICA'S LOSS, *supra* note 1, at 1; Lexington, *supra* note 1.

3. See WADHWA ET AL. AMERICA'S LOSS, *supra* note 1, at 1.

4. *Id.*

5. Lexington, *supra* note 1; see also Matt Richtel, *In Silicon Valley Recruiting Clashes with Immigration Rules*, N. Y. TIMES, Apr. 11, 2009, at A1.

6. See Richtel, *supra* note 5.

7. See WADHWA ET AL., AMERICA'S LOSS, *supra* note 1, at 1, 9 (reporting on a survey of 1,203 highly educated, young professional Indian and Chinese immigrants who worked or received their education in the United States and subsequently returned to their

engineering and technology companies, and a quarter of those started nationwide between 1995 and 2006, had immigrant founders.⁸ In addition, one in every four patents in the World Intellectual Property Organization listed a foreign national residing in the United States as the inventor.⁹ These figures are less surprising if we focus on statistics from the National Science Foundation,¹⁰ reporting that foreign students received nearly sixty percent of all engineering doctorates awarded in the

native countries. Their return spurred a tech boom in those economies and the outsourcing of American jobs. The researchers reported a more than 90% response rate to the survey, conducted on the LinkedIn professional networking website by Duke University students in 2008.); *see also* Lexington, *supra* note 2.

8. Vivek Wadhwa et al., *America's New Immigrant Entrepreneurs, Part I*, DUKE SCI., TECH., & INNOVATION PAPER NO. 23, Jan. 4, 2007, at 5, *available at* <http://ssrn.com/abstract=990152> (stating that the companies make a significant contribution to the economy – 96% of their founders had Bachelor's degrees and 75% had Master's degrees or Ph.D.'s in science, technology, math, and engineering-related disciplines). *See generally* DAVID M. HART, ZOLTAN J. ACS, & SPENCER L. TRACY, JR., *HIGH-TECH IMMIGRANT ENTREPRENEURSHIP IN THE UNITED STATES* (2009) 27 [hereinafter HART ET AL., *HIGH-TECH IMMIGRANT ENTREPRENEURSHIP*] (describing Saxenian's research showing that Indians and Chinese founded start-ups in Silicon Valley "in part because of the "glass ceiling" that blocked their promotion within existing high-tech companies," and further that 24% of those companies started between 1980 and 1988 had CEO's with Chinese or Indian surnames). Hart found that 16% of the 2,668 high-impact companies (defined as "a firm the sales of which have at least doubled over the most recent 4-year period and which has an employment growth quantifier of 2 or greater over the same period") had at least one foreign-born founder. *Id.* at 30, 32-33. The list of foreign born founders is extremely diverse. Although India has the highest representation at 16%, followed by the U.K. at 10%, Canada, Japan and China (if Hong Kong and Taiwan are included) tie for third at 6%, each and Latin America has 13% representation with .8% each from Haiti, Jamaica and the West Indies. *Id.* at 50-51. The founders are described as a veritable United Nations with ample representation from countries that are typically viewed as senders of low-skilled workers rather than entrepreneurs. *See id.* at 50-51.

9. *See* Vivek Wadhwa, *They're Taking Their Brains and Going Home*, THE WASHINGTON POST, Mar. 8, 2009, at B02:

When smart young foreigners leave these shores, they take with them the seeds of tomorrow's innovation. Almost 25 percent of all international patent applications filed from the United States in 2006 named foreign nationals as inventors. Immigrants founded a quarter of all U.S. engineering and technology companies started between 1995 and 2005, including half of those in Silicon Valley. In 2005 alone, immigrants' businesses generated \$52 billion in sales and employed 450,000 workers.

See also WADHWA ET AL., *AMERICA'S LOSS*, *supra* note 1, at 1 (stating that the World Intellectual Property Organization's patent database revealed that the "contribution of foreign nationals residing in the U.S. to global patents increased threefold over an eight-year period").

10. *Science and Engineering Indicators*, National Science Foundation (2008), *available at* <http://www.nsf.gov/statistics/seind08/c2/c2s5.htm> (last visited Apr. 20, 2010).

United States, over fifty percent of all doctorates in engineering, mathematics, computer sciences, physics and economics, and 40 percent of all doctorates in agricultural sciences.¹¹ The Bureau of Citizenship and Immigration Services reports that foreign students in the science, technology, engineering and mathematics (STEM) fields are disproportionately represented.¹²

The question posed by this Paper is whether our immigration laws and policies have closed our borders to highly skilled potential immigrants, resulting in a reverse brain drain that is likely to be detrimental to the economic growth of the nation. If so, what changes are necessary to maintain the United States' competitive economic advantage? Part I will discuss the brain-drain phenomenon and its effect on developing and developed countries. Part II will provide an overview of immigration law, focusing on employment-based immigration and the U.S. attempt to attract highly skilled and entrepreneurial immigrants. Part III will discuss the Canadian approach to attracting similar immigrants, and Part IV will present a modest proposal for immigration reform.

II. BRAIN DRAIN – AN EXODUS TO THE DEVELOPED WORLD

“Brain Drain” is a term used to describe the movement to richer countries of skilled individuals educated in poorer countries. Nelson

11. See VIVEK WADHWA ET AL., *LOSING THE WORLD'S BEST AND BRIGHTEST: AMERICA'S NEW IMMIGRANT ENTREPRENEURS* 1 (2009) [hereinafter WADHWA ET AL., *LOSING THE WORLD'S BEST AND BRIGHTEST*]. See generally Vivek Wadhwa, Una Kim de Vitton & Gary Gereffi, *How the Disciple Became the Guru: Is it Time for the U.S. to Learn Workforce Development from Former Disciple India*, HARV. INT. REV., available at <http://hir.harvard.edu/index.php?page=article&id=1752&p=3> (last visited Apr. 23, 2010) [hereinafter Wadhwa et al., *How the Disciple became the Guru*] (debunking the reports that China and India graduate twelve times as many engineers as the U.S.). “Graduating data we obtained showed that in 2004 the U.S. graduated as many engineers as India and that Chinese Government data were suspect because they included several degree categories not classified as engineering degrees in the U.S.” *Id.* Moreover, “the quality of engineering education at most colleges and universities [in India and China] is highly variable, and the majority of graduates are not employable without significant additional training and education.” *Id.*

12. WADHWA ET AL., *LOSING THE WORLD'S BEST AND BRIGHTEST*, *supra* note 11, at 1; see also U.S. Department of Education, *Students Who Study Science, Technology, Engineering, and Mathematics (STEM) in Postsecondary Education*, STATS IN BRIEF, July 2009, at 7 (finding a higher percentage of foreign students in STEM fields compared to their U.S. counterparts (thirty-four percent v. twenty-two percent) and in the computer sciences, an even greater disparity - sixteen percent foreign students as compared to six percent U.S. students); HART ET AL., *HIGH-TECH IMMIGRANT ENTREPRENEURSHIP*, *supra* note 8, at 21 (reporting National Science Board statistics that foreign students constituted 25% of all science and engineering graduates in 2005 with 45% in engineering and 43% in computer science).

Mandela eloquently describes the phenomena: "To this day we continue to lose the best among ourselves because the lights in the developed world shine brighter."¹³ This paper will not discuss the moral implications of the brain drain but will assume that individuals have the right to choose where they live, and to gravitate to countries they view as best for their economic well-being.

Brain Drain is generally described as a net loss to the developing countries, where the educational investment in the professional is lost, along with the skills and services she could offer to a needy community.¹⁴ The governments of the developing countries view the loss of this "human capital" as undermining their economic performance and enhancing the performance of the receiving country.¹⁵ Although capital in the form of remittances from the U.S. and other developed countries help the developing country, there is still a net loss in human capital.¹⁶

In a study of Indian and Chinese in the United States on non-immigrant visas, including students¹⁷ and H-1B¹⁸ visa holders,

13. Nelson Mandela, President of the Rep. of S. Afr., Address to the Joint Houses of Parliament of the U.K. (July 11, 1996), available at <http://www.anc.org.za/ancdocs/history/mandela/1996/sp960711.html>.

14. See Fernando R. Teson, *Brain Drain*, 45 SAN DIEGO L. REV. 899, 900 (2008).

15. See Patrick Barta & Joel Millman, *The Great U-Turn: Global Migration Reverses for First Time Since Great Depression*, WALL ST. J., June 6, 2009, at A1, available at <http://online.wsj.com/article/SB124424701106590613.html> ("Many countries, including Mexico, the Philippines and Vietnam, rely heavily on money sent home from overseas workers. Such remittances are expected to decline by up to 8% this year, according to World Bank, after rising to \$305 billion in 2008, more than double the level of 2002.").

16. *Id.*

17. Students who wish to study here must show that they have no intention of immigrating to the United States, i.e. that they intend to remain non-immigrants. See 8 U.S.C.A. § 1101(a)(15)(F)(i) (West 2010). Those coming to study at an established college, university, seminary, conservatory, academic high school, elementary school or other academic institution or a language training program will qualify for an F visa if they are accepted by the institution and demonstrate an ability to pay for the first year of tuition and living expenses. *Id.* Vocational students must be coming to study at a community college, a post secondary vocational business, mechanical, flight, cooking or similar school, excluding a language training program. See 8 U.S.C.A. § 1101(a)(15)(M)(i). J visa holders are participants in an approved scholarly exchange program, designated by the Director of the United States Information Agency, who are bona fide students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in a field of specialized knowledge or skill, coming temporarily to the United States to teach, instruct or lecture, study, observe, conduct research, or engage in similar activities. 8 U.S.C. § 1101(a)(15)(J).

18. H-1B visas holders are individuals in "specialty occupations" defined in the statute as "an occupation that requires . . . theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." See 8 U.S.C.A. § 1184(i)(1) (West 2010). Many foreign graduates in

Wadhwa's research supports the view that the brain drain of entrepreneurial individuals, such as the founders of the high-tech companies mentioned above, can have a tangible and measurable effect on the receiving country—generating new jobs and financial prosperity.¹⁹ Another form of brain drain, less easily quantified but equally devastating to the sending country, is the loss of medical professionals and educators. These persons often come from Africa, the Caribbean and Latin America. For example, recent statistics showed that 82.5 percent of Jamaicans with a tertiary education live in developed countries, 20 percent of Ghana's physician workforce (532 doctors) practice medicine

STEM occupations obtain H-1B visas, some of them eventually obtain permanent residence and/or U.S. citizenship. Congress allocates 65,000 H-1B visas each fiscal year. The U.S. Citizenship and Immigration Services (USCIS) recently announced the schedule for FY 2011 petitions. *See USCIS to Accept H-1B Petitions for FY 2011 Beginning April 1, 2010*, 87 No. 11 INTERPRETER RELEASES 601 (March 15, 2010); *see also* Malcolm Goeschl, *An Attack on Entrepreneurialism: A Review of USCIS Adjudication of H-1B Petitions for Startups and Small Companies in 2009*, 87 No. 7 INTERPRETER RELEASES 369 (February 15, 2010) (arguing for a relaxation in the USCIS standard of review of H-1B petitions from startups and small companies in recognition of the significant role of these companies in U.S. job growth over the last couple of decades).

19. *See* Moira Herbst, *Skilled Immigrants Fleeing the U.S.: The Brain Drain is Reversing as the Recession Slashes Jobs, Opportunities*, BUS. WK., July 27, 2009, available at http://www.msnbc.msn.com/id/32172403/ns/business-world_business/. Herbst discusses Vivek Wadhwa's study that estimates as many as 200,000 skilled workers from India and China will return home within the next five years. *Id.* Previously, the rate of return was much lower, only approximately 100,000 returned over the past twenty (20) years. *Id.* Wadhwa predicts that "[t]he next Google, Microsoft, or Apple could be launched in Shanghai or Bangalore." *Id.* Wadhwa describes the experiences of a 33-year-old software consultant for IBM from India named Kapil whose permanent residence application was filed in 2004. Under current immigration law, Kapil could anticipate a ten-year wait for his green card and has to remain with his current employer to keep his H-1B visa status. Kapil is eager to found a startup. He has developed the technology for an online job-search engine that taps into social networks such as Twitter, Facebook and LinkedIn. He says he is considering launching it from India. "Most likely, I am heading back," he says. "In a way, I feel cheated. I've contributed, paid taxes, and even picked up a California accent. But it is not enough." *Id.* Another H-1B visa holder, Arun Kumar, who works for a major bank and is helping to develop a startup within the bank, is considering moving to Toronto, despite the fact that his employer applied for a green card for him last year. *Id.* Canadian immigration policies, described in Part III *infra*, would allow him to obtain permanent residence and stability in his immigration status on a timelier basis. *Id.* *See also* Lexington, *supra* note 1 (decrying U.S. immigration policy which is closing off opportunities while the rest of the world is opening up and "[t]he booming economies of the developing world are sucking back talent that was once America's for the asking"). *See also* Goeschl, *supra* note 18, at 369 (describing the potential loss to the American economy of H-1B workers whose petitions were denied because the USCIS suspected fraud because the employer was a startup or small company and calling on Congress to clarify or amend the statutory provision to specifically include start-ups as eligible for H-1B workers).

in the United States,²⁰ and Liberia lost sixty percent of its physicians to the U.S. and Britain.²¹ The immigration rates for skilled workers by region are forty-one percent for the Caribbean region, twenty-seven percent for West Africa, 18.4 percent for Eastern Africa and sixteen percent for Central America.²²

III. REVERSE BRAIN DRAIN –THE NEW EXODUS

Researchers have identified, for the first time in U.S. history, a reverse brain drain.²³ Highly skilled professionals, such as engineers, scientists, doctors, researchers, and their families, who entered the country legally to study or work, are returning to their countries of origin in unprecedented numbers and driving research and development there.²⁴ These people, particularly immigrants from India and China, are returning to their homelands where they find booming economies, welcoming neighborhoods and challenging careers.²⁵ They return for many reasons, but they often articulate difficulties in navigating U.S.

20. Margaret Bomba, Note, *Exploring Legal Frameworks to Mitigate the Negative Effects of International Health-Worker Migration*, 89 B.U. L. REV. 1103, 1108-1109 (2009).

21. *Id.* at n.18.

22. See DEVESH KAPUR & JOHN MCHALE, GIVE US YOUR BEST AND BRIGHTEST: THE GLOBAL HUNT FOR TALENT AND ITS IMPACT ON THE DEVELOPING WORLD 18 (Center for Global Dev. 2005).

23. See Herbst, *The Brain Drain*, *supra* note 19.

24. See WADHWA ET AL., AMERICA'S LOSS, *supra* note 1, at 8 ("In General Electric's Jack Welch Technology Center in Bangalore, where they are designing some of the company's most advanced technologies, 34 percent of the R&D staff are returnees from the United States. So are 50 percent of the PhDs at IBM research in Bangalore. And so are many of the managers of China's top engineering, technology, and biotech companies."); see also Wadhwa et al., *How the Disciple Became the Guru*, *supra* note 11, at 5. India's top five information-technology (IT) companies (TCS, Infosys, Wipro, Satyam and HCL) alone hired approximately 100,000 new workers in 2006 and 120,000 in 2007. IBM India increased its staff size to 53,000 in 2007 from 39,000 in 2006 and 23,000 in 2005. Similarly, Accenture added nearly 14,000 Indian employees in 2007. These seem to be merely the tip of the iceberg in terms of employment opportunities for highly educated workers. Although the majority of these positions are filled with locally educated and trained workers, it seems plausible that returnees are finding employment opportunities in this burgeoning employment market.

25. See WADHWA ET AL., AMERICA'S LOSS, *supra* note 1, at 6, 13. Wadhwa explains: [R]esults confirm anecdotal evidence that immigrants from India and China who return to their home countries do so in part due to perceptions of greater economic and professional opportunities in their home countries. They report significant professional advancement into roles more senior in their home countries than previously held positions in the United States.

Id. at 6.

immigration laws and obtaining permanent residence in the United States.²⁶ Because of visa unavailability and delays,²⁷ many potential immigrants are taking their skills and entrepreneurial spirit back to their own countries and boosting those countries' economic growth, at the United States' expense.²⁸ Anecdotal evidence also suggests that there is a

26. See Wadhwa, *They're Taking Their Brains*, *supra* note 9, at B02 ("As of Sept. 30, 2006, more than a million people were waiting for the 120,000 permanent-resident visas granted each year to skilled workers and their family members."). Due to worldwide limitations, immigrants from populous countries such as India and China may wait for years before they are granted permanent residence. *Id.* Wadhwa also reports that one study entitled the *New Immigrant Survey*, estimated that in 2003, one in three professionals who entered the immigration process either planned to leave the U.S. or were uncertain about remaining. Vivek Wadhwa, *America's Other Immigration Crisis*, J. AM. ENTERPRISE INST., July-Aug. 2008. However, Wadhwa reported that a survey conducted on the LinkedIn website of 1,203 highly educated Indian and Chinese immigrants who returned to their homelands found that although restrictive immigration policies caused some returnees to leave, most reported leaving because of career opportunities, family ties and quality of life. WADHWA ET AL., *AMERICA'S LOSS*, *supra* note 1, at 13-18; see also WADHWA ET AL., *LOSING THE WORLD'S BEST AND BRIGHTEST*, *supra* note 11, at 3 (reporting that based on a survey of 1,224 foreign nationals through the social networking site Facebook that the majority of respondents, 85 percent of Indians and Chinese and 72 percent of Europeans, are concerned about obtaining work visas. In addition, 38 percent of Indian students, 55 percent of Chinese and 53 percent of Europeans were concerned about obtaining United States permanent residency).

27. See HART ET AL., *HIGH-TECH IMMIGRANT ENTREPRENEURSHIP*, *supra* note 8, at 57, stating that:

Unless the aspiring immigrant marries an American citizen and thus becomes eligible for legal permanent residence as a member of a citizen's family, the wait can be quite long and burdened with onerous conditions and uncertainty. The conditions include remaining with the sponsoring employer until the green card has been approved. The wait for an employment-based green card usually lasts several years, and it is often much longer. The July 2009 *Department of State Visa Bulletin*, for instance, shows that green cards are now being processed for applicants who filed their initial forms as far back as 2000. Because green cards are subject to annual per-country limits, applicants from India, China, Mexico, and the Philippines, which are among the largest source countries, must usually wait longer than applicants from other countries.

Id.

28. See Herbst, *supra* note 19 (pointing out that when well-paid individuals leave the country, in addition to losing the new businesses that these entrepreneurs may have started, state and local governments lose much needed tax revenues); see also Vivek Wadhwa, *Foreign-Born Entrepreneurs: An Underestimated American Resource*, KAUFFMAN THOUGHTBOOK (2009) (describing the plight of his subjects as "Immigration Limbo" he estimates that: "[A]s of September 30, 2006, there were 500,040 individuals in the main employment-based visa categories and an additional 555,044 family members in line for permanent-resident status in the United States. An additional 126,421 with job offers were waiting abroad. In total, there were 1,181,505 educated and skilled professionals waiting to gain legal permanent-resident status. Similar problems exist in obtaining H-1B visas."). See generally Goeschl, *supra* note 18. See also WADHWA ET AL.,

reverse in migration among less skilled workers, even among undocumented workers, who are leaving the U.S. and other developed countries in unprecedented numbers.²⁹ This reverse migration has many unexpected consequences, including impacts on housing and education.³⁰

AMERICA'S LOSS, *supra* note 1, at 4 (stating that 56.6% of Indians and 50.2% of Chinese respondents of the 1,203 LinkedIn subscribers who responded to Wadhwa's survey anticipated starting a business in the next five years and only 19.0% of Indians and 7.3 percent of Chinese believed that entrepreneurial opportunities were better in the U.S.); *see also* WADHWA ET AL., LOSING THE WORLD'S BEST AND BRIGHTEST, *supra* note 11, at 4 (stating that 74 percent of Indian, 35% of European, and 71% of Chinese students surveyed on Facebook indicated that they wished to start a business within the next decade, the majority planning to start that business in their home country); Lexington, *supra* note 1 ("About a third of immigrants how hold high-tech jobs in America are considering returning home.").

29. *See* Barta, *supra* note 15, at A1 (noting a pattern of "reverse migration" described by a World Bank economist and migration expert as "very new" and "unprecedented").

The developed world, which for decades has offered a difficult but promising path to upward mobility, appears to be losing its allure. Unemployment is rising, and backlashes against foreign workers are mounting. The result is potentially the biggest turnaround in migration flows since the Great Depression, economists say. . . . [A]necdotal reports and data from government ministries and outside organizations indicate that the flow of immigrants from poor to wealthier countries is slowing significantly for the first time in decades while more people are returning home. Among the returnees: road builders from Bangladesh, domestic servants from the Philippines, factory workers from Indonesia and Vietnam, construction workers from Mexico, as well as bankers, lawyers and real-estate professionals from around the world who were working in Singapore and Dubai. Emigration from Mexico to the U.S. dropped 13% in the first quarter of this year compared to the same period last year, with more Mexicans leaving the U.S. than coming in. . . . And in the U.K., the number of registered workers coming from new European Union member nations like Poland and the Czech Republic dropped 55% in the first quarter of 2009 compared to the same quarter a year earlier.

Id. The Pew Hispanic Center reports that the number of undocumented workers in the United States from Latin America appears to be declining. As many as 400,000 fewer South Americans are reportedly in the United States from a peak of approximately three million in 2006. The decline is also attributed to fewer high-skilled workers from Colombia, where there are improvements in security, and Brazil, where the economy has grown. *Id.*

30. *See* Barta *supra* note 15, at A1 (explaining that a loss of 200,000 foreigners in Singapore is expected to have "far-reaching implications for the local economy, including a drop in property prices. Enrollment in local international schools has already started to dip, according to local media reports."). "Immigrants make up a significant portion of the home-buying market in communities from Sydney, Australia to Phoenix, Ariz. The loss of foreign workers could lead to inflation when economies recover and some employers are forced to raise wages to attract native-born labor." *Id.*

IV. OVERVIEW OF EMPLOYMENT-BASED IMMIGRATION

The two main immigration pathways in the United States are through family or employment. In the employment area, the law provides for immigrant visas at a worldwide level of 140,000 spread over five employment-based categories enumerated in § 203(b) of the Immigration and Nationality Act.³¹

The first employment-based category is comprised of priority workers (EB1).³² This highly desirable category includes three types of workers: (1) Persons of “extraordinary ability” in the sciences, arts, education, business, or athletics (2) “Outstanding professors and researchers” and (3) “Certain multinational executives and managers.”³³ Congress allots 28.6% of the total number of visas assigned to the employment-based category to this group, approximately 40,000 visas.³⁴

31. 8 U.S.C.A. § 1153 (b) (2009).

32. 8 U.S.C.A. § 1153 (b)(1).

33. Section 1153 defines the categories as:

(A) Aliens with *extraordinary ability* in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation who seek to enter the U.S. to continue work in the area of extraordinary ability and whose entry into the U.S. will substantially benefit prospectively the U.S.

(B) Outstanding professor and researchers who:

(1) are recognized internationally as outstanding in a specific academic area;

(2) have at least 3 years of experience in teaching or research in the academic area, *and*

(3) seek to enter the U.S. –

1. for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area

2. for a comparable position with a university or institution of higher education to conduct research in the area, or

3. for a comparable position to conduct research in the area with a department, division, or institute of private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

Spouse, child of principal alien in the above category.

8 U.S.C.A. § 1153 (b)(1).

34. See THOMAS ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 307 (5th ed. 2007). Between 2000 and 2006 the number of immigrants admitted in this category ranged from a low of 14,453 in 2003 to a high of 64,731 in 2005; Office

Applicants in this “extraordinary ability” category are so highly desired by the United States that they are permitted to “self-sponsor,” meaning that they do not need a job offer from a U.S. employer. They must, however, document through newspapers, magazines or other media they are at the top of their field; for example, Oscar, Emmy or Nobel Prize winners would have tangible support of their accomplishments. EB1 workers do not need to obtain labor certification, a process designed to protect United States workers by testing the labor market to ensure that the granting of a visa will not have an adverse effect on the wages and working conditions of U.S. workers.³⁵ It requires a prospective employer to determine whether U.S. citizens or permanent residents are able, willing, or qualified to fill the advertised position before offering it to a non-citizen.³⁶ The labor certification process is time-consuming, so it is beneficial to apply in this category.³⁷

of Immigration Statistics, U.S. Dep’t of Homeland Security, 2005 Yearbook of Immigration Statistics: Table 6 (2000-2005); Office of Immigration Statistics, U.S. Dep’t of Homeland Security, 2006 Yearbook of Immigration Statistics: Table 6 (for 2006). Aleinikoff, *supra*, at 303 n.3 (reporting that “INA §203(b) states the employment-based preference category totals in terms of percentages of the worldwide ceiling on employment-based admissions (the baseline allocation is 140,000): 28.6 percent each for the first three categories, and 7.1 percent each for the fourth and fifth”). For a more detailed description of the rather complex system of ceilings and floors contained in the Immigration and Nationality Act, see *Id.* at 306 – 13. Section 202 of the Immigration and Nationality Act outlines the per-country visa limitations on individual countries. Each country will receive no more than seven percent of the total annual visas allocated to the preference categories, however, this should not be taken literally, but merely serves as a check on demand—preventing high demand in one country from using up all the available visas. 8 U.S.C.A. § 1152 (West 2010). Office of Immigration Statistics, U.S. Dep’t of Homeland Security, 2008 Yearbook of Immigration Statistics: Table 7 shows that in FY2008, 36,678 visas were issued in the EB1 category (including new arrivals and existing adjustments). See also KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW, at 238 (Lexis Nexis 2009).

35. JOHNSON ET AL., *supra* note 34, at 237; 8 U.S.C.A. §1182(a)(5)(A)(i) (West 2005) (setting out the labor certification requirements for some, including skilled workers, seeking an employment-based immigrant visa and that the alien worker’s employment must not adversely affect wages and working conditions of U.S. workers).

36. JOHNSON ET AL., *supra* note 34, at 237.

37. PERM or Program Electronic Review Management was instituted in 2002 by the Department of Labor. See generally IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 907-50 (11th ed., 2008) (describing the PERM process specifically and the Labor Certification process generally for foreign workers). See also the iCert program recently implemented by the Department of Labor, <http://icert.doleta.gov> (last visited Apr. 28, 2010). The iCERT system enables employers or attorneys to create a master user account, which may be used to file Labor Certifications or work on different employment based visas. *Id.*

The second preference, employment-based visa category (EB2),³⁸ is comprised of advanced degree professionals³⁹ and exceptional ability aliens⁴⁰ in the sciences, arts or business, including physicians working in areas where medical professionals are in short supply.⁴¹ These persons must obtain labor certification unless they qualify for national interest waivers which are limited to applicants in this category.⁴² The applicant can apply for the waiver on her own behalf, if she can show that the prospective employment will have a substantial and national impact.⁴³ The requirement of an employment offer is also waived if the prospective employment is in the national interest.⁴⁴ This category is also allocated 28.6% of the total⁴⁵ plus any unused visas from the EB1 category, which usually amount to approximately 40,000 visas.⁴⁶ It is much easier to meet the standards for this category than the first preference employment-based category.⁴⁷

38. 8 U.S.C.A. § 1153 (b)(2) (2009).

39. U.S. Citizenship and Immigration Services, U.S. Dep't of Homeland Security, <http://www.uscis.gov/portal/site/uscis> (accessed from home page by entering search terms "advanced degree" in search box) (last visited June 10, 2010) (defining "advanced degree professionals as anyone who holds a degree beyond the baccalaureate degree").

40. *Id.* Note the difference in terminology between the U.S. Citizen and Immigration Service definition of eligibility—first preference visa holders must meet the extraordinary ability standard, second preference visa holders have a lower threshold of exceptional ability defined in the regulations as "exceptional ability in the sciences, arts, or businesses; will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States" *Id.*—and the definition of eligibility in 8 U.S.C.A. § 1153(b)(2)(A)(1), which provides that this category is available to:

(a) members of the professions" holding advanced degrees or their equivalent" or (b) "aliens who because of their exceptional ability in the sciences, art, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States and (unless waived by the Attorney General in the "national interest") whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

8 U.S.C.A. § 1153(b)(2)(A)-(B). Spouses and children of "principal alien[s]" in the above category are also given visas. 8 U.S.C.A. § 1153(d).

41. H. Ronald Klasko & Suzanne B. Seltzer, *Post Training Options for International Medical Graduates*, available at <http://www.klaskolaw.com/articles.php?action=view&id=61> (last visited Apr. 28, 2010); see also 8 U.S.C.A. § 1153(b)(2)(B).

42. 8 U.S.C.A. § 1153(b)(2)(B); see also Immigration and Nationality Act § 214(l), 8 U.S.C.A. § 1184(l) (West 2009), as amended, and most extended in 2007 by Pub. L. No. 109-477 (2007); Stanley Mailman and Stephen Yale-Loehr, *New Immigration Law Helps Foreign Doctors*, N.Y.L.J., Dec. 27, 1999 at 3.

43. JOHNSON ET AL., *supra* note 34, at 239.

44. *Id.*

45. See ALEINIKOFF ET AL., *supra* note 34, at 307.

46. *Id.*

47. See *id.*; see also Randall Monger and Nancy Rytina, Office of Immigration Statistics, Dep't of Homeland Security, *Annual Flow Report: U.S. Legal Permanent*

The most popular and easily attainable third preference (EB3)⁴⁸ visa category is designed to attract skilled workers, professionals and other workers.⁴⁹ Congress assigned 28.6 percent of the total employment-based visas to this category plus any unused visas from the EB1 and EB2 categories, which adds approximately 40,000 visas.⁵⁰ Beneficiaries in this category need labor certification, and no waiver is available.⁵¹ Professionals generally require bachelor's degrees,⁵² while skilled workers must have at least two years of training and fill a position that is permanent, not seasonal or temporary.⁵³ Congress allocates only 10,000 visas annually to the "other workers" in this category, which means unskilled workers, so there is usually a backlog.⁵⁴

The fourth preference (EB4),⁵⁵ designed for certain special immigrants and allotted 7.1 percent (approximately 10,000) of the total number of visas.⁵⁶

Residents: 2008, at 3 (Mar. 2009) (reporting that "Employment-based preferences accounted for 15 percent of persons becoming LPRs in 2008. The third preference was historically the leading employment-based category of admission, averaging 55 percent of the annual employment-based LPR flow from 2003 to 2007. However . . . the third preference category of admission decreased by 42 percent from 2007 to 2008 to represent 29 percent of the employment-based flow in 2008. Over the same period . . . the . . . second preference . . . increased by 59 percent from 44,162 in 2007 to 70,046 in 2008.").

48. 8 U.S.C.A. § 1153 (b)(3) (West 2009).

49. The regulations, 8 C.F.R. § 204.5(l)(2) (2008), provide the following definitions:

(i) "*Skilled workers*" "who are capable . . . of performing skilled labor (*requiring at least 2 years training or experience*), not of a temporary or seasonal nature . . ."

(ii) "*Professionals* . . . who hold baccalaureate degrees . . .;" or

(iii) "*Other workers* . . . who are capable . . . of performing unskilled labor, not of a temporary or seasonal nature . . ."

As well as spouses and children of "principal alien[s]" in the above category.

8 U.S.C.A. § 1153(d) (emphasis added)

50. See ALENIKOFF ET AL., *supra* note 34, at 306-13 (explaining the ceilings and floors assigned to each visa category by Congress. In 2005, 129,070 green-card holders entered in this visa category, the highest number of immigrants admitted in this category in the seven-year period spanning 2000-2006. The lowest entrance statistics of 46,415 immigrants for that period occurred in 2003, undoubtedly reflecting implementation of new regulations following the attack on the World Trade Center on Sept. 11, 2001).

51. 8 U.S.C.A. § 1153(b)(3)(C) (West 2009).

52. *Id.* § 1153(b)(3)(A)(i).

53. *Id.*

54. JOHNSON ET AL., *supra* note 34, at 239.

55. See 8 U.S.C. § 1153(b)(4) (2009).

56. See 8 U.S.C. § 1101(a)(27) (2009) (defining "special immigrants," which include lawful permanent residents returning from temporary visits abroad, former U.S. citizens and religious workers). Unless precluded by definition, a spouse and child of the "principal alien" in the above category are also included. The number admitted in this

The fifth preference (EB5)⁵⁷ or employment creation/investor visa, though allotted 7.1 percent (approximately 10,000) of the total number of visas, is rarely used because it is so restrictive and is sometimes referred to as the millionaire's visa.⁵⁸ To qualify for an immigrant visa in this category, an intending immigrant must invest \$1,000,000 in a business employing a minimum of ten (10) United States citizens or permanent residents (other than the spouse or sons or daughters of the intending immigrant), or half a million dollars in a high unemployment or "targeted employment areas" defined as rural or high unemployment areas.⁵⁹ The investor is granted conditional permanent residence for two years to ensure that he/she will not close the business immediately after obtaining the green card, and there are criminal provisions designed to discourage fraud.⁶⁰

The number of employment visas is inadequate for skilled professionals who must wait a long time for a green card. Consequently, talented individuals who could contribute to the U.S. economy, experience long delays in changing from non-immigrant categories such as H-1B to permanent residence.⁶¹ Labor certification requirements also

category in the years 2000 - 2006 ranged from a low of 5,389 in 2003 to a high of 10,134 in 2005. See ALEINIKOFF ET AL., *supra* note 34, at 307.

57. See 8 U.S.C.A. § 1153(b)(5) (2009).

58. U.S. Citizenship and Immigration Services, <http://www.uscis.gov/> (follow "topics" hyperlink, then "permanent workers," then "employment-based immigration" then "Fifth Preference EB-5") (last visited Feb. 8, 2010). The regulations provide the following description of this investor visa recipient:

"Qualified immigrants ... seeking to enter the United States for the purpose of engaging in a new commercial enterprise. . . .

(A)(i) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than [generally \$1,000,000, but as low as \$500,000 in 'targeted employment areas' if the attorney general allows, or even more than \$1,000,000 if the attorney general requires], and

(A)(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or [immigrants] (other than the immigrant and the immigrant's spouse, sons, or daughters)."

(iv) which the alien will either manage on a day-to-day basis or manage through formulating business policy by the alien.

8 U.S.C.A. § 1153 (b)(5). During the years 2000-2006 a mere 64 immigrants were admitted in this category in 2003, a high of 749 immigrants were admitted in 2006. See Aleinikoff et al., *supra* note 34.

59. 8 U.S.C.A. § 1153 (b)(5).

60. 8 U.S.C.A. § 1325 (d) (West 2009).

61. See Sumathi Reddy, *Demand for Highly Skilled Worker Wane*, NEWSDAY, Sept. 30, 2009 available at <http://www.newsday.com/long-island/nassau/demand-wanes-for-highly-skilled-worker-temporary-visas-1.1490338> (describing the reduction in demand for H-1B visas and attributing the lower demand to the recession and restriction on U.S.

make the employment-based immigration process extremely difficult.⁶² These limitations were purportedly designed to protect the U.S. worker,

companies that received bailout money). Sumathi also describes the frustration of Anu Boddu, a 37-year-old who moved from India to Hauppauge, Long Island nine years ago and filed a green card application in 2003. "The mounting frustration so severe she's considering relocating her family—including her two American-born children—back to India. 'I can't plan my life,' she said. 'I can't plan my future, my kid's futures.'" *Id.* The H-1B visa category is a means of obtaining foreign skilled workers, especially engineers. However, this category was chronically oversubscribed; typically all 65,000 visas allocated annually for the H-1B category were taken by employers immediately. This year, there were still 20,000 visas available in August 2009. *More Opportunities as World Economy Recovers*, WORKPERMIT.COM, Sept. 2009; see also Tom Walsh, *Microsoft CEO Explains Locating Site in Canada: Corporate Decisions Not Always Simple Economics*, available at <http://www.freep.com> (accessed from homepage by entering article title in search) (last visited Apr. 28, 2009) (discussing Microsoft's announcement of the opening of a research center in Vancouver, British Columbia because of the more lenient immigration policies in Canada. "We opened the lab in Vancouver . . . because we were having trouble getting visas for the best and the brightest to come to Seattle" said Microsoft CEO Steve Ballmer. The Canadian government said, "We're happy to have those people."). *Id.*; see also Darlene Darcy, *H-1B Bailout Restrictions Little Threat to Tech Firms*, WASH. BUS. J., Mar. 6, 2009, available at <http://washington.bizjournals.com/washington/stories/2009/03/09/story14.html> (describing restrictions on firms who receive Troubled Asset Relief Program (TARP) funds, affecting their ability to hire foreign workers). The H-1B program is controversial, prior to the economic downturn, the tech companies perennially complained that there were insufficient visas available in this category. Other studies claim that the visa numbers exceed economic demand and are not related to job growth. See John Miano, *H-1B Visa Numbers No Relationship to Economic Need*, June 2008, available at <http://www.cis.org/H1bVisaNumbers> (last visited Apr. 28, 2010). CIS Fellow John Miano's key findings are:

There is no cause and effect relationship between H-1B visas and job creation. Adding H-1B visas does not create additional jobs for U.S. workers.

Since 1999, the United States has approved enough H-1B visas for computer workers to fill 87 percent of net computer job growth over that period.

Since 1999, the United States has had a net loss of 76,000 engineering jobs. Over the same time period, the United States has approved an average of 16,000 new H-1B visas each year for engineers.

If current employment trends continue and the H-1B quota remains unchanged, the United States will approve enough H-1B visas for computer workers to fill about 79 percent of the computer jobs it creates each year.

Pending legislation would increase the number of H-1B visas for computer workers to above the number of computer jobs created each year.

The data suggest that a large percentage of those who legally enter United States as H-1B visas go into the illegal alien pool.

Id. Mr. Miano suggests using computer job growth as a baseline for the number of future H-1B needed and provides a chart to allow for adjustments in the number of H-1B workers required. *E.g.*, anticipated computer job growth of 25% would justify 39,375 visas. *Id.* at table 3.

62. The U.S. Citizenship and Immigration Services faces a \$118-million revenue shortfall in 2009 because applications for citizenship and skilled worker visas declined so

but arguably, it has the opposite effect in high technology fields, where denial of visas to highly skilled entrepreneurial immigrants can result in fewer jobs for U.S. citizens.

In a 2008 survey that Wadhwa et al. conducted on Facebook of science and engineering foreign students, the vast majority—85 percent of Indians and Chinese and 72 percent of Europeans, expressed concern about obtaining work visas.⁶³ 83.9 percent of Indians, 76 percent of Chinese, and 68.9 percent of Europeans surveyed are also worried about obtaining jobs in their fields after graduation.⁶⁴

Jobs in the high-tech industry fueled economic prosperity in the latter half of the twentieth century,⁶⁵ and David Hart's July 2009 research on high-tech entrepreneurs revealed that "[a] vigorous high-technology sector is vital to sustain U.S. prosperity in the 21st century. The new products, services and business models that the high-tech sector generates differentiate this nation's output from that of the rest of the world and enable capital accumulation, wage gains, and productivity growth."⁶⁶

Even before the current economic downturn, some opposed immigration reform, advocated closing the borders, and scapegoated immigrants for our economic woes.⁶⁷ Many of these anti-immigration

precipitously. The agency has to be self-supporting, so they are considering increasing fees once again, which is likely to result in further decreases in applications, especially citizenship applications. Teresa Watanabe & Anna Gorman, *Immigration Officials Consider More Fee Increases*, L.A. TIMES, Sept. 24, 2009, available at <http://articles.latimes.com/2009/sep/24/local/me-immig24>; see also Editorial, *A Commitment to Citizenship*, N.Y. TIMES, Sept. 25, 2009 at A22, available at <http://www.nytimes.com> (accessed from homepage by entering article title in search).

63. WADHWA ET AL., *LOSING THE WORLD'S BEST AND BRIGHTEST*, *supra* note 11, at 3, 7.

64. *Id.* at 7, 9.

65. See HART ET AL., *supra* note 8, at 10. Hart noted:

The post-World War II period heralded not only the expansion of large U.S. based multinational companies but also the invention of whole new institutional forms, such as the venture capital firm and the high-tech start-up, which would eventually blossom into a unique entrepreneurial ecology in places like California's Silicon Valley and Boston's Route 128 [citations omitted]. Indeed, the environment in the United States for high-growth, high-tech companies grew more hospitable over time, culminating in the entrepreneurial frenzy of the dot-com boom at the end of the twentieth century.

Id.

66. *Id.* at 7.

67. See *id.* at 15, (pointing out scholars' disagreement about the impact of immigration on the economy, whether it is positive or negative); see also Michael A. Fletcher, *Bush Immigration Plan Meets GOP Opposition*, THE WASH. POST, Jan. 2, 2005, at A06, available at <http://www.washingtonpost.com/wp-dyn/articles/A41340-2005Jan1.html>; see also the Southern Poverty Law Center's list of anti-immigration

advocates made no distinction between documented and undocumented, skilled and unskilled labor and the effects of each of these on the economy. Research on “reverse brain drain” suggests that maintaining or reducing current employment-based visa levels is likely to have a negative impact on our economy.⁶⁸

V. THE CANADIAN IMMIGRATION MODEL

The Canadian system awards points to intending immigrants for factors such as education, experience, age, and permanent job offer.⁶⁹ A maximum of one hundred points can be awarded, with a passing mark of sixty-seven.⁷⁰ The economic/skilled immigrant category in Canada accounted for at least fifty percent of the new immigrants since 1995.⁷¹ Canada is not the only country aggressively seeking new immigrants. Denmark, Australia and Ireland are among the countries offering attractive alternatives to individuals seeking to migrate because their policies are much more welcoming.⁷²

organizations who oppose immigration reform and blame immigrants for various ills of American society such as crime, poverty and the economic slowdown. Southern Poverty Law Center—Intelligence Report, Anti-Immigration Groups, 2001 <http://www.splcenter.org/-intel/intelreport/article.jsp?sid=175> (last visited Apr. 28, 2010).

68. See WADHWA ET AL., *AMERICA'S LOSS*, *supra* note 1, at 7 (“if the U.S. Government and the business community could find better ways to offer good jobs in tandem with less restrictiveness in visa policies for talented immigrants, the U.S. might be able to recapture many of these immigrants and their potential to serve as a much needed growth engine for the U.S. economy.”).

69. Workpermit.com, Points Calculator, http://www.workpermit.com/canada/points_calculator.htm (last visited May 6, 2010); *see also* See Citizenship and Immigration Canada, Skilled Workers and Professionals Who Can Apply (2010), <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp> (last visited May 6, 2009).

70. *Id.*

71. Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. Rev. 148, 175 (2006).

72. WORKPERMIT.COM, *supra* note 61 (stating that Denmark allows individuals to immigrate without a job offer). “The Danish Green Card allows foreign nationals to live in Denmark for a temporary period during which time they are expected to find work, and apply for a residence permit.” *Id.* “Australia is still promoting its point-based General Skilled Migration program, arguable [sic] one of the best opportunities for working abroad for skilled immigrants. If someone has the right skills and/or experience, getting a permanent residence permit without a specific job offer is a reality.” *Id.*; *see also* Lexington, *supra* note 1 (discussing Canadian and Australian immigration point system. “New Zealand allows some companies to hand out work visas along with job offers. Britain gives graduates of the world’s top 50 business schools an automatic right to work in the country for a year. The European Union is contemplating introducing a system of ‘blue cards’ that will talented people a fast track to EU citizenship.”); *see also* HART ET AL., *High-tech Immigrant Entrepreneurship* *supra* note 8, at 18 (discussing efforts not only in Canada and Australia, but in countries like Germany and Japan that are usually

VI. A REFORM PROPOSAL

I have two modest proposals to stem the reverse brain drain. The first is a change in the employment-based visa category to incorporate a point system based on the Canadian model, while maintaining some aspects of our present system. Although during the immigration debate in 2007 there were proposals in Congress for the adoption of a point system, the proponents were not successful.⁷³ Congress has proposed H-IB reform to address the brain drain and these proposals are likely to return when immigration reform is taken up in Congress in 2010.⁷⁴

Unlike the Canadian system, the point system in my proposal would only be a threshold to identify and attract the individuals who meet U.S. economic needs. If a potential immigrant scores 60 or more points, for example, she would be placed on an accelerated track for permanent residence. Moving to a point system would simplify the U.S. process and encourage immigration of highly skilled individuals.

Currently the first employment-based category has a very high threshold; “with *extraordinary ability*” “in the sciences, arts, education, business, or athletics . . . demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.”⁷⁵ Currently this category is reserved for high achievers who circumvent the wait for permanent residence by self-sponsoring; that is, they do not need an employer or labor certification. My proposal would combine this category with the second preference category—“members of the professions holding advanced degrees or their equivalent” or “aliens who because of their exceptional ability in the sciences, art, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.”⁷⁶ These persons would now be able to circumvent the

not hospitable to immigration and Taiwan, Ireland and Israel’s efforts to attract expatriates residing in Silicon Valley to return).

73. HART ET AL., *supra* note 8, at 15.

74. In 2009, Congressman Jeff Flake (R-Ariz.) introduced H.R. 1791 “[t]o amend the Immigration and Nationality Act to authorize certain aliens who have earned a Ph.D. degree from a United States institution of higher education in a field of science, technology, engineering, or mathematics to be admitted for permanent residence and to be exempted from the numerical limitations on H-1B non-immigrants.” The STAPLE Act, H.R. 1791, 111th Cong. (2009). This is an attempt to rectify the brain-drain problem which in my opinion does not go far enough.

75. 8 U.S.C.A. § 1153(b)(1)(A) (West 2009).

76. *Id.* § 1153(b)(2)(A).

long and tedious process of labor certification, and based on a score of, for example, 60 out of 100 on factors such as a graduate degree and work experience in a high tech field, teaching, nursing, physical therapy or other area of shortage in the United States, more of these immigrants would be able to self-sponsor and obtain a green card expeditiously.⁷⁷

The second proposal is a revision of the requirements of the fifth preference employment creation or “millionaires” visa. This visa currently requires an investment by the intending-immigrant of \$1,000,000 and the employment of ten U.S. citizens or permanent residents for a minimum of two years.⁷⁸ Investors who begin businesses in “targeted employment areas” rural or areas of high unemployment can invest \$500,000 instead of a million.⁷⁹ This category never uses the total number of visas assigned by Congress.⁸⁰

My proposal would reduce the investment amount and remove the requirement that the intending immigrant must be a millionaire. This change would be to attract entrepreneurial immigrants.⁸¹ I would change the requirement to \$500,000 of investor funds—not necessarily the

77. WADHWA ET AL., AMERICA’S LOSS, *supra* note 1, at 6. Wadhwa concluded that their findings:

[C]learly indicate that retaining highly skilled immigrant workers will require more than expanding the numbers of permanent visas in the skilled-worker categories. To retain these highly skilled workers and stay competitive, the United States will need to develop a new approach that entails coordinated efforts to address immigration policies, professional-development opportunities, and talented immigrants’ concerns over family welfare and quality of life. It is also possible that extended family-immigration programs would prove to be a critical benefit, by helping talented immigrants bring their families to them and reduce loneliness and cultural isolation, which may too have been a root cause for concern about children’s emotional growth).

Id.

78. 8 U.S.C.A. § 1153(b)(5)(C)(i).

79. *Id.* § 1153 (b)(5)(C)(ii).

80. *See supra* note 58; *see also* Monger and Rytina, *supra* note 47, at 3 (reporting that in 2006 – 2008 the investor category has consistently equaled 0.1 percent of the total legal permanent resident flow with 749 entrants in 2006, 806 in 2007 and 1,306 in 2008).

81. *See generally* HART ET AL., *supra* note 8, at 20-21. It discusses the psychological characteristics of entrepreneurs:

The most commonly accepted distillation of the psychological element of entrepreneurial opportunity recognition is ‘alertness’. Some people are on the lookout for opportunities, while others are not. . . . Those who come to the United States for education or employment, for instance, have, at a minimum, recognized opportunities for personal achievement outside the borders of their native land. This group is the end product of a self-selection process that separates them from those in their home countries who do not migrate, in part on the basis of the capacity to recognize opportunities.

Id. (internal citations omitted).

immigrant's funds, while the hiring requirement of ten U.S. citizens or permanent residents would be retained. It is well known that the U.S. loses out to Canada in the investor category because the investment required to obtain a green card in Canada is only CAN \$400,000.⁸² The use of venture capital funds would stimulate lending and have a positive impact on the U.S. economy.⁸³

The immigrant and investor under my proposal would be required to keep the business for a minimum of five years, or the immigrant would lose the visa.⁸⁴ This proposal would create small businesses, hire U.S. citizens and open our closed borders, and prevent talented potential immigrants from being lost to their country of origin, Canada or other countries with more lenient immigration laws. It would also stimulate the economy with the creation of new small businesses hiring U.S. citizens and lawful permanent residents. States can play a role by working with the federal government to establish high-skill immigration zones in high-

82. To qualify as an investor, a potential Canadian immigrant must meet the following criteria: Show that you have business experience; have a minimum net worth of CAN \$800,000 that was obtained legally; make a CAN \$400,000 investment and obtain a minimum number of selection points based on five criteria. Citizenship and Immigration Canada, INVESTORS: WHO CAN APPLY, <http://www.cic.gc.ca/english/immigrate/business/investors/apply-who.asp> (last visited May 6, 2010).

83. See HART ET AL., *supra* note 8, at 24-25. Hart discusses research indicating that networks provide:

[A]ccess to venture capital, seem to be composed of 'bonding' social capital, created through ties of age, gender, and ethnicity. . . . shows that female entrepreneurs tend to be excluded from these networks, and the foreign-born may suffer from a similar process of discrimination in seeking financial support.... [but] foreign-born high-tech entrepreneurs take effective advantage of their own 'bonding' social capital in the form of networks of co-ethnics and linkages to their countries of origin. Ethnic professional associations and alumni clubs, for instance, provide access to potential new hires and funders.

Id. (internal citations omitted).

84. The statute currently provides that, like an immigrant who is sponsored through marriage, the investor obtains a two-year conditional green card that becomes a ten-year green card after the business has been in operation for two years. U.S. Citizenship and Immigration Services, *supra* note 58. The five-year conditional requirement, although more stringent, should have a positive effect on the economy. See *generally* HART ET AL. *supra* note 8, at 11 (discussing research demonstrating the important role of young start-up companies in economic growth "sustained economic benefits from entrepreneurship at the regional level derive mainly from young [two to five years old], medium-sized [20 to 499 employees] enterprises and not from small business in general or the establishment of branch plants of large firms." Hart also cites research indicating that "companies that are less than five years old account for nearly all net job creation in the United States . . . 1-10% of new firms generate 40-75% of new jobs Competition from new entrants, even if they fail, forces their older rivals to adapt or die and thus drives productivity growth across the broader economy").

unemployment and/or rural or urban areas where job growth is desired.⁸⁵ Unemployed workers can then be trained for specific high-tech jobs, a model which India has employed with great success.⁸⁶

VII. CONCLUSION

Comprehensive immigration reform is needed, and this modest proposal, by simplifying our immigration laws and bestowing immediate and long-term benefit on our economy, seeks to modify a small portion of the current dysfunctional system. It is intended to address the problem of the reverse brain drain, or entrepreneurial immigrants moving to their countries of origin or Canada, or other countries with more welcoming laws for highly educated immigrants, because of unnecessary systemic delays. Further study is needed to determine if other highly productive immigrants who are not in the STEM fields are also fleeing America and whether comprehensive immigration reform can also encourage them to stay and contribute to the growth of the U.S. economy.

85. See generally HART ET AL., *supra* note 8, at 57-58 (discussing Greater Cleveland Partnership's call for the federal government to establish such centers in distressed metropolitan areas).

86. See generally Wadhwa et al., *How the Disciple Became the Guru*, *supra* note 11 (discussing the training of workers for the high-tech industry in India and the success in luring American and other countries to outsource their jobs to these highly skilled, cheap labor force).