Session 204 | Coming to America: How Current Immigration Policies and Proposed Reforms Will Impact AAPIs

This panel features speakers whose current practice and past experience has been informed by the immigration policies of the past decade and half, and they will (1) identify the unique impact of existing immigration policies on the AAPI community and offer targeted practice pointers; (2) outline ideas for the immigration reform that would be able to garner bipartisan support; and (3) based upon their respective experiences in the enforcement agencies, on the Hill, in Democratic and Republican administrations, and in federal court on criminal cases, discuss the likelihood of success of each proposed reform.

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Immigration: U.S. Asylum Policy

February 19, 2019
Summary

Asylum is a complex area of immigration law and policy. While much of the recent debate surrounding asylum has focused on efforts by the Trump Administration to address asylum seekers arriving at the U.S. southern border, U.S. asylum policies have long been a subject of discussion.

The Immigration and Nationality Act (INA) of 1952, as originally enacted, did not contain any language on asylum. Asylum provisions were added and then revised by a series of subsequent laws. Currently, the INA provides for the granting of asylum to an alien who applies for such relief in accordance with applicable requirements and is determined to be a refugee. The INA defines a refugee, in general, as a person who is outside his or her country of nationality and is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Under current law and regulations, aliens who are in the United States or who arrive in the United States, regardless of immigration status, may apply for asylum (with exceptions). An asylum application is affirmative if an alien who is physically present in the United States (and is not in removal proceedings) submits an application to the Department of Homeland Security’s (DHS’s) U.S. Citizenship and Immigration Services (USCIS). An asylum application is defensive when the applicant is in standard removal proceedings with the Department of Justice’s (DOJ’s) Executive Office for Immigration Review (EOIR) and requests asylum as a defense against removal. An asylum applicant may receive employment authorization 180 days after the application filing date.

Special asylum provisions apply to aliens who are subject to a streamlined removal process known as expedited removal. To be considered for asylum, these aliens must first be determined by a USCIS asylum officer to have a credible fear of persecution. Under the INA, credible fear of persecution means that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” Individuals determined to have a credible fear may apply for asylum during standard removal proceedings.

Asylum may be granted by USCIS or EOIR. There are no numerical limitations on asylum grants. If an alien is granted asylum, his or her spouse and children may also be granted asylum, as dependents. A grant of asylum does not expire, but it may be terminated under certain circumstances. After one year of physical presence in the United States as asylees, an alien and his or her spouse and children may be granted lawful permanent resident status, subject to certain requirements.

The Trump Administration has taken a variety of steps that would limit eligibility for asylum. As of the date of this report, legal challenges to these actions are ongoing. For its part, the 115th Congress considered asylum-related legislation, which generally would have tightened the asylum system. Several bills contained provisions that, among other things, would have amended INA provisions on termination of asylum, credible fear of persecution, frivolous asylum applications, and the definition of a refugee.

Key policy considerations about asylum include the asylum application backlog, the grounds for granting asylum, the credible fear of persecution threshold, frivolous asylum applications, employment authorization, variation in immigration judges’ asylum decisions, and safe third country agreements.
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Introduction

Illegal aliens have exploited asylum loopholes at an alarming rate. Over the last five years, DHS has seen a 2000 percent increase in aliens claiming credible fear (the first step to asylum), as many know it will give them an opportunity to stay in our country, even if they do not actually have a valid claim to asylum.

—Department of Homeland Security (DHS) press release, December 20, 2018

The increased number of Central Americans petitioning for asylum in the United States is not because more people are “exploiting” the system via “loopholes,” but because many have credible claims…. There is no recorded evidence by any U.S. federal agency showing that the increased number of people petitioning for asylum in the United States is due to more people lying about the dangers they face back in their country of origin.

—Washington Office on Latin America (WOLA) commentary, March 14, 2018

These statements and the conflicting views about asylum seekers underlying them suggest why the asylum debate has become so heated. Policymakers have faced a perennial challenge to devise a fair and efficient system that approves legitimate asylum claims while deterring and denying illegitimate ones. Changes in U.S. asylum policy and processes over the years can be seen broadly as attempts to strike the appropriate balance between these two goals. Periods marked by increasing levels of asylum-seeking pose particular challenges and may elicit a variety of policy responses. Faced with an influx of Central Americans seeking asylum at the southern U.S. border, the Trump Administration has put forth policies to tighten the asylum system (see, for example, the “2018 Interim Final Rule” and “DHS Migrant Protection Protocols” sections of this report); these policies typically have been met with court challenges. This report explores the landscape of U.S. asylum policy through an analysis of current asylum processes, available data, legislative and regulatory history, recent legislative and presidential proposals, and selected policy questions.

What is Asylum?

In common usage, the word asylum often refers to protection or safety. In the immigration context, however, it has a narrower meaning. The Immigration and Nationality Act (INA) of 1952, as amended, provides for the granting of asylum to an alien who applies for such relief in accordance with applicable requirements and is determined to be a refugee. The INA defines a refugee, in general, as a person who is outside his or her country of nationality and is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution.


5 INA §208 (8 U.S.C. §1158).
based on one of five protected grounds: race, religion, nationality, membership in a particular social
group, or political opinion. Asylum can be granted by the Department of Homeland Security’s (DHS’s)
U.S. Citizenship and Immigration Services (USCIS) or the Department of Justice’s (DOJ’s) Executive
Office for Immigration Review (EOIR), depending on the type of application filed (see “Asylum
Application Process”).

The INA distinguishes between applicants for refugee status and applicants for asylum by their physical
location. Refugee applicants are outside the United States, while applicants for asylum are physically
present in the United States or at a land border or port of entry. After one year as a refugee or asylee (a
person granted asylum), an individual can apply to become a U.S. lawful permanent resident (LPR).

Overview of Current Asylum Provisions

With some exceptions, aliens who are in the United States or who arrive in the United States, regardless
of immigration status, may apply for asylum. This summary describes the asylum process for an adult
applicant.

As discussed in the next section of the report, asylum may be granted by a USCIS asylum officer or an
EOIR immigration judge. There are no numerical limitations on asylum grants. In order to receive
asylum, an alien must establish that he or she meets the INA definition of a refugee, among other
requirements. Certain aliens, such as those who are determined to pose a danger to U.S. security, are
ineligible for asylum. An asylum applicant who is not otherwise eligible to work in the United States may
apply for employment authorization 150 days after filing a completed asylum application and may receive
such authorization 180 days after the application filing date.

An alien who has been granted asylum is authorized to work in the United States and may receive
approval to travel abroad. A grant of asylum does not expire, but it may be terminated under certain
circumstances, such as if an asylee is determined to no longer meet the INA definition of a refugee. After
one year of physical presence in the United States as an asylee, an alien may be granted LPR status,
subject to certain requirements. There are no numerical limitations on the adjustment of status of asylees
to LPR status.

Special asylum provisions apply to certain aliens without proper documentation who are determined to be
subject to a streamlined removal process known as expedited removal. To be considered for asylum, these
aliens must first be determined by a USCIS asylum officer to have a credible fear of persecution. Those
determined to have a credible fear may apply for asylum during standard removal proceedings. (See
“Inspection of Arriving Aliens.”)

Asylum Application Process

Applications for asylum are either defensive or affirmative. A different set of procedures applies to each
type of application.

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6 This report does not address refugee status. For information on the U.S. refugee admissions program, see CRS Report RL31269,
Refugee Admissions and Resettlement Policy.

7 INA §209 (8 U.S.C. §1159). LPRs can live and work permanently in the United States. They can become U.S. citizens through
the naturalization process.

8 The Board of Immigration Appeals (BIA), a component of EOIR, has jurisdiction to hear appeals of certain decisions made by
immigration judges and DHS.
Affirmative Asylum

An asylum application is affirmative if an alien who is physically present in the United States (and not in removal proceedings) submits an application for asylum to DHS’s USCIS. An alien may file an affirmative asylum application regardless of his or her immigration status, subject to applicable restrictions. There is no fee to apply for asylum.9

Figure 1 shows the number of new affirmative asylum applications filed with USCIS since FY1995, the year filings reached their historical high point. The years included in this figure and in the subsequent figures and tables differ due to the availability of data from the relevant agencies. The data displayed in Figure 1 are for applications, not individuals; an application may include a principal applicant and dependents. Figure 1 reflects the impact of various factors. For example, reforms in the mid-1990s, which made the asylum system more restrictive, contributed to the decline in applications in the earlier years shown. A contributing factor to the application increases in the later years depicted in Figure 1 was the influx of unaccompanied alien children from Central America seeking asylum.10 (See Appendix A for underlying data and data on the top 10 nationalities filing affirmative asylum applications.)

Figure 1. New Affirmative Asylum Applications Filed, FY1995-FY2018


Notes: Data represent applications, not individuals. Data are limited to new filings; they do not include applications that were reopened during the relevant fiscal year.

The INA prohibits the granting of asylum until the identity of the asylum applicant has been checked against appropriate records and databases to determine if he or she is inadmissible or deportable, or ineligible for asylum.11 As part of the affirmative asylum process, applicants are scheduled for

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9 The adjudication of asylum applications is funded by fees charged on other applications for immigration benefits. INA §286(m) (8 U.S.C. §1356(m)) provides: “That fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.”

10 The asylum process for unaccompanied alien children is not covered in this report. For further information about this population, see CRS Report R43599, Unaccompanied Alien Children: An Overview.

fingerprinting appointments. The fingerprints are used to confirm the applicant’s identity and perform background and security checks.

Asylum applicants are interviewed by USCIS asylum officers. In scheduling asylum interviews, the USCIS Asylum Division is currently giving priority to applications that have been pending for 21 days or less. According to USCIS, “Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain employment authorization.”

Under DHS regulations, the asylum interview is to be conducted in “a nonadversarial manner.” The applicant may bring counsel or a representative to the interview, present witnesses, and submit other evidence. After the interview, the applicant or the applicant’s representative can make a statement.

**USCIS Decisions on Affirmative Asylum Applications**

An asylum officer’s decision on an application is reviewed by a supervisory asylum officer, who may refer the case for further review. If an asylum officer ultimately determines that an applicant is eligible for asylum, the applicant receives a letter and form documenting the grant of asylum. If the asylum officer determines that an applicant is not eligible for asylum and the applicant has immigrant status, nonimmigrant status, or temporary protected status (TPS), the asylum officer denies the application. If the asylum officer determines than an applicant is not eligible for asylum and the applicant appears to be inadmissible or deportable under the INA, however, DHS regulations direct the officer to refer the case to an immigration judge for adjudication in removal proceedings. In those proceedings, the immigration judge evaluates the asylum claim independently as a defensive application for asylum.

**Figure 2** presents data on affirmative asylum applications considered by USCIS since FY2009. It shows four separate outcome categories. Closures are cases administratively closed for reasons such as abandonment or lack of jurisdiction. A closure in one fiscal year in **Figure 2** could have been refiled or reopened in a subsequent year. **Figure 2** shows that a majority of cases were referred to an immigration judge each year. These referrals included both applicants who were interviewed by USCIS and applicants who were not (e.g., they did not appear for the interview). (See Table B-1 for underlying data and additional detail.)

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16 For information about TPS, see CRS Report RS20844, Temporary Protected Status: Overview and Current Issues.

17 8 C.F.R. §208.14(c).

18 8 C.F.R. §208.14(c)(1).

Figure 2. USCIS Decisions on Affirmative Asylum Applications, FY2009-FY2017


Notes: Data represent applications, not individuals. Closures are cases administratively closed for reasons such as abandonment or lack of jurisdiction.

Defensive Asylum

An asylum application is defensive when the applicant is in standard removal proceedings in immigration court\(^2\) and requests asylum as a defense against removal. Figure 3 provides data on defensive asylum applications filed since FY2009. The data include both cases that originated as defensive cases as well as cases that were first filed as affirmative applications with USCIS, as described in the preceding section. (See Table C-1 for underlying data and additional detail.)

Figure 3. Defensive Asylum Applications Filed, FY2009-FY2018


Notes: Data represent individuals. Data are for applications filed in removal, deportation, exclusion, and asylum-only proceedings.

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\(^{20}\) The standard removal process is described in INA §240 (8 U.S.C. §1229a) and is distinct from the expedited removal process.
There are different ways that an alien can be placed in standard removal proceedings. An alien who is living in the United States can be charged by DHS with violating immigration law. In such a case, DHS initiates removal proceedings when it serves the alien with a Notice to Appear before an immigration judge.

Another way to be placed in standard removal proceedings relates to the statutory expedited removal and credible fear screening provisions discussed more fully below (see “Inspection of Arriving Aliens”). Under the INA, an individual who is determined by DHS to be inadmissible to the United States because he or she lacks proper documentation or has committed fraud or willful misrepresentation of facts to obtain documentation or another immigration benefit (and thus is subject to expedited removal) and expresses the intent to apply for asylum or a fear of persecution is to be interviewed by an asylum officer to determine if he or she has a credible fear of persecution. Credible fear of persecution means that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”

If the alien is found to have a credible fear, the asylum officer is to refer the case to an immigration judge for a full hearing on the asylum request during removal proceedings.

Figure 4 provides data on USCIS credible fear findings since FY1997. For each year, it shows the number of credible fear cases referred to and completed by USCIS and the outcomes of the completed cases. Closed cases are cases in which a credible fear determination was not made. (See Table B-2 and Table B-3 for underlying data and additional detail.)

Figure 4. Credible Fear Referrals and Findings, FY1997-FY2018


Notes: Data represent individuals. Credible fear referrals to USCIS come from DHS’s U.S. Customs and Border Protection or DHS’s Immigration and Customs Enforcement.

EOIR Decisions on Defensive Asylum Applications

During a removal proceeding, an attorney from DHS’s Immigration and Customs Enforcement (ICE) presents the government’s case for removing the alien, the alien or their representative may present evidence on the alien’s behalf and cross examine witnesses, and an immigration judge from EOIR determines whether the alien should be removed. An immigration judge’s removal decision is generally subject to administrative and judicial review.\(^{22}\)

Figure 5 presents data on EOIR decisions in defensive asylum cases since FY2009. (See Appendix D for underlying data and data for defensive cases that began with a credible fear claim.\(^{23}\)) Figure 5 shows a sharp drop in administrative closures since FY2016. Administrative closing “allows the removal of cases from the immigration judge’s calendar in certain circumstances” but “does not result in a final order” in the case;\(^{24}\) cases that are administratively closed can be reopened. Administrative closure has been used, for example, when an alien has a pending application for relief from another agency. In May 2018, Attorney General Jeff Sessions ruled that immigration judges and the BIA do not have general authority to administratively close cases.\(^{25}\)

![Figure 5. Immigration Judge Decisions in Defensive Asylum Cases, FY2009-FY2018](image)

**Source:** CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, “Asylum Decision Rates,” generated October 2018.

**Notes:** Data represent individuals. Data include both initial case completions (in removal, deportation, exclusion, and asylum only proceedings) and subsequent case completions (e.g., in proceedings that begin when an immigration judge

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grants a motion to reopen, reconsider, or recalendar). Administrative Closures are case closures that do not result in a final order. Other Closures include closures in cases that are abandoned, not adjudicated, or withdrawn.

Evolution of U.S. Asylum Policy

The INA, as originally enacted, did not contain refugee or asylum provisions. Language on the conditional entry of refugees was added by the INA Amendments of 1965. The 1965 act authorized the conditional entry of aliens, who were to include those who demonstrated to DOJ’s Immigration and Naturalization Service (INS) that

(i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made.

In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). The Protocol incorporated the 1951 United Nations Convention Relating to the Status of Refugees (Convention), which the United States had not previously been a party to, and expanded the Convention’s definition of a refugee. The Convention had defined a refugee in terms of events occurring before January 1951. The Protocol eliminated that date restriction. It also provided that the refugee definition would apply without geographic limitation, while allowing for some exceptions. With the changes made by the Protocol, a refugee came to be defined as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”

The Protocol retained other elements of the Convention, including the latter’s prohibition on refoulement (or forcible return), a fundamental asylum concept. Specifically, the Convention prohibited states from expelling or returning a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

In the 1970s, INS issued regulations that established procedures for applying for asylum in the United States and for adjudicating asylum applications. For example, a 1974 rule provided that an asylum applicant could include his or her spouse and unmarried minor children on the application and that INS could deny or approve an asylum application as a matter of discretion.

26 P.L. 89-236, §3.
27 INS, an agency of the Department of Justice with primary responsibility for administering and enforcing immigration laws, was abolished in 2003 in accordance with the Homeland Security Act of 2002 (P.L. 107-296). Most INS functions were transferred to the new Department of Homeland Security.
28 P.L. 89-236, §3.
31 1951 Convention on the Status of Refugees, Article 33. Under the Convention, however, this nonrefoulement provision is inapplicable to a refugee who poses a danger to the security or the community of the country in which he or she is living.
Refugee Act of 1980

Despite the U.S. accession to the 1967 U.N. Protocol, the INA did not include a conforming definition of a refugee or a mandatory nonrefoulement provision until the enactment of the Refugee Act of 1980. As noted, the 1965 conditional entry provisions incorporated a refugee definition that was limited by type of government and geography. A 1999 INS report explained a goal of the Refugee Act as being “to establish a politically and geographically neutral adjudication for both asylum status and refugee status, a standard to be applied equally to all applicants regardless of country of origin.”

The definition of a refugee, as added to the INA by the 1980 act, reads, in main part:

(A) any person who is outside any country of such person’s nationality ... and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

(This first part of the definition of a refugee has not changed since enactment of the Refugee Act.)

Asylum Process

As explained by INS Acting Commissioner Doris Meissner at a 1981 Senate hearing, the primary focus of the Refugee Act of 1980 was the refugee process. According to Meissner’s written testimony, “The asylum process was looked upon as a separate and considerably less significant subject.” In keeping with this secondary status, the asylum provisions added by the 1980 act to the INA (as INA §208) comprised three short paragraphs. The first directed the Attorney General to establish asylum application procedures for aliens physically present in the United States or arriving at a land border or port of entry, regardless of immigration status, and gave the Attorney General discretionary authority to grant asylum to aliens who met the newly added INA definition of a refugee. The second paragraph allowed for the termination of asylum status if the Attorney General determined that the alien no longer met the INA definition of a refugee due to “a change in circumstances” in the alien’s home country. The third paragraph provided for the granting of asylum status to the spouse and children of an alien granted asylum.

Adjustment of Status

Separate language in the Refugee Act added a new Section 209 to the INA on refugee and asylee adjustment of status. Adjustment of status is the process of acquiring LPR status in the United States. The asylee provisions granted the Attorney General discretionary authority to adjust the status of an alien who had been physically present in the United States for one year after being granted asylum and met other requirements, subject to an annual numerical limit of 5,000.

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33 P.L. 96-212.
34 U.S. Department of Justice, Immigration and Naturalization Service Asylum Program, History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication, September 1999.
35 INA §101(a)(42)(A), as added by §201(a) of the Refugee Act.
37 The word child, as defined in the INA and as used in this report, refers to an unmarried person under age 21. See INA §101(b)(1) for the current definition of child applicable under the INA asylum provisions.
38 P.L. 96-212, §201(b), adding new INA §208.
39 P.L. 96-212, §201(b), adding new INA §209.
Withholding of Deportation

The Refugee Act amended an INA provision on withholding of deportation, making it consistent with the nonrefoulement language in the Convention. The INA provision in effect prior to the enactment of the Refugee Act “authorized” the Attorney General to withhold the deportation of an alien in the United States (other than an alien involved in Nazi-related activity) to “any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion.” The Refugee Act revised this language to prohibit the Attorney General from deporting or returning any alien to a country where the Attorney General determines the alien’s life or freedom would be threatened because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion. It also added exclusions beyond the one for participation in Nazi-related activity. Specifically, the new provision made an alien ineligible for withholding if the alien had participated in the persecution of another person based on race, religion, nationality, membership in a particular social group, or political opinion; the alien had been convicted of a “particularly serious crime” and thus was a danger to the United States; there existed “serious reasons for considering that the alien had committed a serious nonpolitical crime outside the United States,” or there existed “reasonable grounds” for considering the alien a danger to national security. (For subsequent changes to this provision, see “Withholding of Removal.”)

1980 Interim Regulations

INS published interim regulations in June 1980 to implement the Refugee Act’s provisions on refugee and asylum procedures. The asylum regulations included the following:

- INS district directors had jurisdiction over all requests for asylum except for those made by aliens in exclusion or deportation proceedings.
- An alien whose application for asylum was denied by the district director could renew the asylum request in exclusion or deportation proceedings.
- The applicant had the burden of proof to establish eligibility for asylum.
- The asylum applicant would be examined in person by an immigration officer or an immigration judge.
- The district director (or the immigration judge) would request an advisory opinion on the asylum application from the Department of State’s (DOS’s) Bureau of Human Rights and Humanitarian Affairs (BHRHA).
- The district director could grant work authorization to an asylum applicant who filed a “non-frivolous” application.
- The district director’s decision on an asylum application was discretionary.
- The district director would deny an asylum application for various reasons, including that the alien had been firmly resettled in another country; the alien had participated in the persecution of another person based on race, religion, nationality, membership in a particular social group, or political opinion; the alien had been convicted of a “particularly serious crime” and thus was a danger to the United States; there existed

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40 Section 201(e) of the Refugee Act, amending INA §243(h). This provision, as subsequently revised, now comprises INA §241(b)(3) (8 U.S.C. §1231(b)(3)).
42 Immigration judges had jurisdiction over asylum requests by aliens in exclusion or deportation proceedings. For an explanation of exclusion and deportation, see CRS Report R45314, Expedited Removal of Aliens: Legal Framework.
43 At the time, the immigration judges were part of INS.
“serious reasons for considering that the alien had committed a serious non-political crime outside the United States;” or there existed “reasonable grounds” for considering the alien a danger to national security.

- An initial grant of asylum was for one year and could be extended in one-year increments.
- Asylum status could be terminated for various reasons, including changed conditions in the asylee’s home country.

1990 Final Rule

There was much discussion and debate about asylum in the 1980s, as related legislation and regulations were proposed, court cases were litigated, and the number of applications increased. In addition, in a 1983 internal DOJ reorganization, EOIR was established as a separate DOJ agency to administer the U.S. immigration court system. It combined the Board of Immigration Appeals (BIA) with the INS immigration judge function. With the creation of EOIR, the immigration courts became independent of INS.

It was not until July 1990 that INS published a final rule to revise the 1980 interim regulations on asylum procedures. According to the supplementary information to the 1990 rule, the asylum policy established by the rule reflected two core principles: “A fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process; and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims.”

The 1990 final rule created the position of asylum officer within INS to adjudicate asylum applications. As described in the supplementary information to a predecessor 1988 proposed rule, asylum officers were intended to be “a specially trained corps” that would develop expertise over time, with the expected result of greater uniformity in asylum adjudications. Under the 1990 rule, asylum applications filed with the district director were to be forwarded to the asylum officer with jurisdiction in the district.

Under the 1990 rule, comments on asylum applications by DOS—a standard part of the adjudication process under the 1980 interim regulations—became optional. (In an earlier, related development, DOS announced that as of November 1987 it would no longer be able to provide an advisory opinion on every asylum application due to budget constraints and would focus on those cases where it thought it could provide input not available from other sources.)

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44 The BIA, “the highest administrative body for interpreting and applying immigration laws,” has jurisdiction to hear appeals of certain decisions made by immigration judges and DHS. “Most BIA decisions are subject to judicial review in the federal courts.” See U.S. Department of Justice, Executive Office for Immigration Review, https://www.justice.gov/eoir/board-of-immigration-appeals.


46 Ibid. p. 30675.


49 This change was reported in U.S. Department of Justice, Immigration and Naturalization Service, “Asylum Adjudications Procedure Change,” 53 Federal Register 2893, February 2, 1988. Under current regulations (8 C.F.R. §208.11), USCIS may request, at its discretion, and DOS may provide, at its discretion, comments about asylum cases.
The 1990 rule distinguished between asylum claims based on actual past persecution and on a well-founded fear of future persecution. To establish a well-founded fear of future persecution, the rule required, in part, that an applicant establish that he or she fears persecution in his or her country based on one of the five protected grounds and that “there is a reasonable possibility of actually suffering such persecution” upon return. The rule further detailed the “burden of proof” requirements for asylum applicants. It provided that the applicant’s own testimony alone may be sufficient to prove that he or she meets the definition of a refugee. It also stated that an applicant could show a well-founded fear of persecution on one of the protected grounds without proving that he or she would be persecuted individually, if the applicant could establish “that there is a pattern or practice” of persecution of similarly situated individuals in his or her home country and that he or she is part of such a group.50

The 1990 rule provided that a grant of asylum to a principal applicant would be for an indefinite period. It also provided that the grant of asylum to a principal applicant’s spouse and children would be indefinite, unless the principal’s asylum status was revoked.

Under the 1990 rule, an application for asylum was also to be considered an application for withholding of deportation; in cases of asylum denials, the asylum officer was required to decide whether the applicant was entitled to withholding of deportation. A 1987 proposed rule would have made asylum officers’ decisions on asylum and withholding of deportation applications binding on immigration judges.51 That change was not retained in the 1990 final rule, however, which preserved immigration judges’ role in adjudicating asylum and withholding of deportation claims in exclusion or deportation proceedings. Regarding eligibility for withholding of deportation, the 1990 rule stated, in part, “The applicant’s life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.”52

The 1990 rule directed the asylum officer to grant an undetained asylum applicant employment authorization for up to one year if the officer determined that the application was not frivolous; frivolous was defined as “manifestly unfounded or abusive.”53 The employment authorization could be renewed in increments of up to one year. The asylum officer had to provide an applicant with a written decision on an asylum or withholding of deportation application, and had to provide an explanation in the case of a denial. The 1990 rule also granted specified officials in INS and DOJ the authority to review the decisions of asylum officers but did not grant applicants any right to appeal to these officials.


The Immigration Act of 199054 and the Violent Crime Control and Law Enforcement Act of 199455 made several changes to the asylum-related provisions in the INA. The 1990 act amended INA §209 to increase the annual numerical limitation on asylee adjustment of status from 5,000 to 10,000.56 It also added new language to INA §208, making an alien who had been convicted of a crime categorized as an aggravated felony under the INA ineligible for asylum.57 The 1994 act further amended INA §208 to state that an

50 1990 final rule, p. 30683 (see §208.13).
52 1990 final rule, pp. 30684 (see §208.16(b)(1)).
53 Ibid. pp. 30681-30682 (see §208.7(a)).
54 P.L. 101-649.
55 P.L. 103-322.
56 P.L. 101-649, §104(a).
57 P.L. 101-649, §515(a). See INA §208(b)(2)(B)(i) for the current asylum provision on aggravated felony convictions, and INA §101(a)(43) for the current definition of aggravated felony.
asylum applicant was not entitled to employment authorization except as provided at the discretion of the Attorney General by regulation.\(^{58}\)

### 1994 Final Rule

In March 1994, INS published a proposed rule to streamline its asylum procedures that included a number of controversial provisions. The agency characterized the problem the proposal sought to address as follows: “The existing system for adjudicating asylum claims cannot keep pace with incoming applications and does not permit the expeditious removal from the United States of those persons whose claims fail.”\(^{59}\)

The 1994 final rule, published in December 1994, made fundamental changes to the asylum adjudication process.\(^{60}\) Under the rule, INS asylum officers were no longer to deny asylum applications filed by aliens who appeared to be excludable or deportable,\(^{61}\) or to consider applications for withholding of deportation from such applicants, with limited exceptions. Instead, officers were to either grant such applicants asylum or immediately refer their claims to immigration judges, where the claims would be considered as part of exclusion or deportation proceedings. Asylum officers were to continue to issue approvals and denials in cases of asylum applications filed by aliens with a legal immigration status.

The 1994 rule also made changes to the employment authorization process for asylum applicants that were intended to “discourage applicants from filing meritless claims solely as a means to obtain employment authorization.”\(^{62}\) Under the rule, an alien had to wait 150 days after his or her complete asylum application had been received to apply for employment authorization.\(^{63}\) INS then had 30 days to adjudicate that employment authorization application. (These 150-day and 30-day time frames remain in regulation.)\(^{64}\) According to the supplementary information accompanying the rule, the goal was to make a decision on an asylum application before the end of 150 days: “The Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR) would strive to complete the adjudication of asylum applications, through the decision of an immigration judge, within this 150-day period.”\(^{65}\)

Some of the provisions in the proposed rule were not adopted in the final rule. These included proposals to make asylum interviews discretionary and to charge fees for asylum applications and initial applications for employment authorization.\(^{66}\)

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\(^{58}\) P.L. 103-322, §130005(b).


\(^{61}\) For an explanation of exclusion and deportation, see CRS Report R45314, Expedited Removal of Aliens: Legal Framework.

\(^{62}\) 1994 final rule, p. 62290.

\(^{63}\) As explained in the supplementary information to the 1994 proposed rule, “The Department [DOJ] selected 150 days as the period beyond which it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated.” 1994 proposed rule, p. 14780.

\(^{64}\) See 8 C.F.R. §208.7(a)(1).

\(^{65}\) 1994 final rule, p. 62284.

\(^{66}\) At the time, there was a fee for a renewal application for employment authorization. This fee remained (and still remains) in place.
Illegal Immigration Reform and Immigrant Responsibility Act and Implementing Regulations

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 significantly amended the INA’s asylum provisions and made a number of other changes to the INA relevant to asylum policy. Many of the IIRIRA changes remain in effect.

One set of changes, which had broad implications for the immigration system generally, concerned the INA grounds of exclusion. Applicable to aliens outside the United States, these provisions enumerated classes of aliens who were ineligible for visas and were to be excluded from admission. IIRIRA amended these provisions and replaced the concept of an excludable alien with that of an inadmissible alien—the latter being a person who, whether outside or inside the United States, has not been lawfully admitted to the country. In general, with the enactment of IIRIRA, an alien became ineligible for a visa or admission if he or she was described in the reconfigured grounds of inadmissibility.

Asylum Provisions

IIRIRA added restrictions to the general policy set forth in the 1980 Refugee Act and incorporated into the INA that an alien who is present in the United States or who arrives in the United States, regardless of immigration status, can apply for asylum. In general, under the IIRIRA amendments, which remain in effect, an alien is not eligible to apply for asylum unless the alien can show that he or she filed the application within one year of arriving in the United States. An alien is also generally ineligible to apply if he or she has previously had an asylum application denied. There is an exception to both restrictions if an alien can show “changed circumstances which materially affect the applicant’s eligibility for asylum,” and an additional exception to the time limit requirement if the alien can show “extraordinary circumstances” related to the filing delay. IIRIRA also made an alien ineligible to apply for asylum if the Attorney General determined that the alien could be removed, pursuant to a bilateral or multilateral agreement, to a safe third country where the alien would be considered for asylum or equivalent temporary protection (see “Safe Third Country Agreements”).

IIRIRA amended the INA to authorize, but not require, the Attorney General to impose fees on asylum applications and related applications for employment authorization. Among other new asylum provisions it added to the INA were a requirement to check the identity of applicants against “all appropriate records or databases maintained by the Attorney General and by the Secretary of State” and a permanent bar to receiving any immigration benefits for aliens who knowingly file frivolous asylum applications after being notified of the consequences for doing so. IIRIRA also put asylum processing-related time frames in statute, including a requirement that “in the absence of exceptional circumstances,” administrative adjudication of an asylum application be completed within 180 days after the filing date. All these provisions are still in statute.

IIRIRA modified and codified some existing and prior asylum regulations. It amended an existing INA provision on employment authorization by adding language prohibiting an asylum applicant who is not

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67 IIRIRA is Division C of P.L. 104-208.
68 See INA §212(a).
71 P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(d)(3) (8 U.S.C. §§1158(d)(3)).
otherwise eligible for employment authorization from being granted such authorization earlier than 180 days after filing the asylum application. It further amended the INA asylum provisions to add grounds for denying asylum. Similar to the mandatory denial language in the 1980 interim regulations, these grounds included an applicant’s conviction for a “particularly serious crime,” “serious reasons for believing the alien has committed a serious nonpolitical crime outside the United States,” “reasonable grounds” for considering the alien a danger to national security, and the applicant’s firm resettlement in another country prior to arrival in the United States. IIRIRA also added, as a new asylum denial ground, being inadmissible to the United States on certain terrorist-related grounds. In addition, IIRIRA provided that the Attorney General could establish additional ineligibilities for asylum by regulation that were consistent with the INA asylum provisions. These IIRIRA amendments remain a part of the INA, although the provision on terrorist-related grounds of inadmissibility has been revised.

IIRIRA amended the INA language on termination of asylum to state that the granting of asylum “does not convey a right to remain permanently in the United States.” It also added new termination grounds to the existing ground of no longer meeting the INA definition of a refugee. IIRIRA provided that asylum could be terminated if the Attorney General determined that the asylee met one of the grounds for denying asylum noted in the preceding paragraph. Among IIRIRA’s other new grounds for terminating asylum was a determination by the Attorney General, analogous to the “safe third country” determination described above, that the alien could be removed, pursuant to a bilateral or multilateral agreement, to a safe third country where the alien would be eligible for asylum or equivalent temporary protection. The IIRIRA asylum termination provisions remain part of the INA.

Definition of a Refugee

IIRIRA amended the INA definition of a refugee to cover individuals subject to “coercive population control.” It provided that for purposes of meeting the definition of a refugee, an individual who had been forced to have an abortion or undergo sterilization or had been persecuted for resistance to a coercive population control program would be considered to have been persecuted on the basis of political opinion. Similarly, an individual with a well-founded fear that he or she would be forced to undergo a procedure or would be persecuted for resistance to a coercive population control program would be considered to have a well-founded fear of persecution on the basis of political opinion. This language remains part of the INA definition of a refugee.

Inspection of Arriving Aliens

IIRIRA amended the INA provisions on the inspection of aliens by immigration officers to establish a new immigration enforcement mechanism known as expedited removal. In general, under expedited removal an alien who is determined by an immigration officer to be inadmissible to the United States because the alien lacks proper documentation or has committed fraud or willful misrepresentation of facts to obtain documentation or another immigration benefit may be removed from the United States without

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74 All of these grounds except the last one concerning firm resettlement were the same ineligibility grounds established by the Refugee Act of 1980 for withholding of deportation (see “Withholding of Deportation”).
75 P.L. 104-208, Div. C, §604(a), amending INA §208. P.L. 104-208, Div. C, §604(a) further specified with respect to these denial grounds that an alien who had been convicted of an aggravated felony would be considered to have been convicted of a particularly serious crime.
76 P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(b)(2)(C) (8 U.S.C. §§1158(b)(2)(C)).
79 See INA §§208(c)(2) (8 U.S.C. §§1158(c)(2)).
any further hearings or review, unless the alien indicates either an intention to apply for asylum or a fear of persecution.\textsuperscript{81}

Under the INA, as amended by IIRIRA, this expedited removal procedure was to be applied to all arriving aliens, a term that includes aliens arriving at a U.S. port of entry.\textsuperscript{82} (An exception for Cuban citizens arriving at U.S. ports of entry by aircraft is no longer in effect.\textsuperscript{83}) It also could be applied to any (or all) aliens in the United States, as designated by the Attorney General at his or her discretion, if an alien has not been admitted or paroled into the United States and “has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.”\textsuperscript{84}

Using this statutory authority, the application of expedited removal has been expanded to classes of aliens beyond arriving aliens (see “Implementing Regulations”).

Under the IIRIRA amendments, an alien who is subject to expedited removal and expresses the intent to apply for asylum or a fear of persecution is to be interviewed by an asylum officer to determine if the alien has a credible fear of persecution.\textsuperscript{85} (Special procedures apply to aliens arriving in the United States at a U.S.–Canada land port of entry in accordance with a U.S.–Canada agreement; see “Safe Third Country Agreements.”) Under the INA, credible fear of persecution means that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”\textsuperscript{86} If an alien is found to have a credible fear, the asylum officer is to refer the case to an immigration judge for full consideration of the asylum request during standard removal proceedings. If an alien is found not to have a credible fear, the alien may request that an immigration judge review the negative finding. To ultimately receive asylum, however, an alien must meet the higher standard of showing past persecution or a well-founded fear of future persecution.

**Withholding of Removal**

As part of a larger set of changes to the INA replacing the concept of deportation with removal, IIRIRA added a withholding of removal provision (INA §241(b)(3)) to replace the existing INA withholding of deportation provision.\textsuperscript{87} The new withholding of removal provision stated, and continues to state, in main part, that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{88} The IIRIRA provision retained language on ineligibility for withholding that had been enacted in 1980. It also included language

\begin{footnotesize}
\begin{enumerate}
\item INA §235(b)(1)(A)(i) (8 U.S.C. §1225(b)(1)(A)(i)). Under 8 C.F.R. §1.2, “Arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.”
\item INA §§235(b)(1)(A)(iii) (8 U.S.C. §1225(b)(1)(A)(iii)).
\item INA §235(b)(1)(B)(i), (ii) (8 U.S.C. §1225(b)(1)(B)(i), (ii)).
\item INA §235(b)(1)(B)(v) (8 U.S.C. §1225(b)(1)(B)(v)).
\item P.L. 104-208, Div. C, §305(a)(3) added a new INA §241 on detention and removal of aliens, which included §241(b)(3) (8 U.S.C. §1231(b)(3)) on withholding of removal. INA §241(b)(3) was further amended by the REAL ID Act of 2005 (P.L. 109-13, Div. B, §101(c)) to add language requiring determinations about burden of proof and credibility.
\item INA §241(b)(3)(A) (8 U.S.C. §1231(b)(3)(A)).
\end{enumerate}
\end{footnotesize}
on treatment of aggravated felonies for purposes of ineligibility for withholding of removal. The IIRIRA amendments on ineligibility for withholding of removal remain in current law.

Some of the same ineligibility grounds apply to applicants for withholding of removal and applicants for asylum. As noted, however, asylum is also subject to a second set of restrictions, under which certain individuals are ineligible to apply for this form of relief. These restrictions include the requirement to apply for asylum within one year after arrival in the United States. Withholding of removal is not subject to an analogous set of restrictions. Another difference between withholding of removal and asylum concerns adjustment to LPR status. The INA provides for the adjustment of status of aliens granted asylum but not those granted withholding of removal (for further comparison of withholding of removal and asylum, see “Implementing Regulations,” below).

Implementing Regulations

In March 1997, DOJ issued an interim rule, effective April 1, 1997, to amend existing regulations to implement the IIRIRA provisions on asylum, withholding of removal, expedited removal, and other immigration procedures. In December 2000, DOJ published a final rule on asylum procedures, which addressed jurisdiction, asylum application procedures, and withholding of removal, among other issues.

The December 2000 rule included language on eligibility for asylum and eligibility for withholding of removal under INA §241(b)(3). Regarding eligibility for asylum based on a well-founded fear of future persecution, the 2000 regulations stated, in part, “An applicant has a well-founded fear of persecution if: (A) The applicant has a fear of persecution in his or her country of nationality … on account of race, religion, nationality, membership in a particular social group, or political opinion; (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country.” This language was similar to that in the 1990 rule. Unlike the earlier rule, however, the 2000 regulations also provided that an applicant would not be considered to have a well-founded fear of persecution if he or she could relocate within his or her home country “if under all the circumstances it would be reasonable to expect the applicant to do so.”

Regarding eligibility for withholding of removal under INA §241(b)(3) based on a future threat to one’s life or freedom, the 2000 regulations, like the earlier 1990 regulations on withholding of deportation, stated that an applicant could demonstrate a future threat “if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country.” As with the regulations on asylum eligibility, the 2000 regulations on eligibility for withholding of removal provided that an applicant could not demonstrate a threat to life or freedom upon a finding that the applicant could avoid the threat by relocating within his or her home country if it were reasonable to expect him or her to do so.

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89 The Immigration Act of 1990 (P.L. 101-649, §515) had previously amended the withholding provision to add language on aggravated felonies. IIRIRA revised this language.

90 See INA §241(b)(3)(B) (8 U.S.C. §1231(b)(3)(B)).


93 Ibid. pp. 76133-76134 (see §208.13(b)(2)(i)).

94 Ibid. (see §208.13(b)(2)(ii)).

95 Ibid. p. 76135 (see §208.16(b)(2)).
The December 2000 regulations on eligibility for asylum and withholding of removal under INA §241(b)(3) remain in effect. Comparing the above-cited standards for providing these two forms of relief in cases involving claims of future persecution, the threshold for granting withholding of removal (more likely than not) is higher than that for granting asylum (reasonable possibility).

Regarding expedited removal, DOJ stated in the supplementary information to the March 1997 interim rule that for the time being, it would only apply the expedited removal provisions to arriving aliens (i.e., aliens arriving at ports of entry and certain others). At the same time, it reserved “the right to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the [INS] Commissioner’s discretion, such action is operationally warranted.”

Beginning in 2002, DOJ and then DHS, which assumed primary responsibility for immigration under the Homeland Security Act, acted to apply the expedited removal procedures to additional classes of aliens. In November 2002, DOJ extended expedited removal to aliens arriving by sea who are not admitted or paroled and who have not been continuously present in the United States for the prior two years. In August 2004, DHS authorized the placing in expedited removal proceedings of aliens who are present in the United States without having been admitted or paroled, and are found inadmissible due to lack of proper documentation or to commission of fraud or willful misrepresentation to obtain documentation or another immigration benefit, in certain circumstances. These circumstances were that the aliens “are encountered by an immigration officer within 100 air miles of the U.S. international land border” and “have not established to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.”

Convention Against Torture Protection and Implementing Regulations

Separate from asylum and withholding of removal under the INA, protection from removal is available to aliens in the United States who are more likely than not to be tortured in the country of removal, in accordance with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, or CAT), which entered into force for the United States in November 1994. Under Article 3 of the CAT, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Under current DHS and DOJ regulations, torture is defined, in part, as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

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96 1997 interim rule, p. 10314.
101 8 C.F.R. §208.18(a)(1), §1208.18(a)(1).
1999, DOJ published an interim rule establishing procedures to implement U.S. obligations under Article 3 of the CAT in the removal process.\textsuperscript{102} These regulations have since been revised.

DHS regulations set forth procedures for handling cases in which an alien subject to expedited removal expresses a fear of torture. In a process analogous to that for aliens subject to expedited removal who express a fear of persecution, DHS regulations provide that such an alien is to be interviewed by an asylum officer to determine if he or she has a credible fear of torture.\textsuperscript{103} To establish a credible fear of torture, an alien must show that “there is a significant possibility that he or she is eligible for” protection under the CAT.\textsuperscript{104} Eligibility for CAT protection, unlike for asylum, does not require the showing of a nexus between the torture claim and a protected ground (such as race). If the asylum officer makes an affirmative credible fear finding, the officer is to refer the case to an immigration judge for full consideration of the CAT application during standard removal proceedings. If the officer makes a negative finding, the alien may request a review of that determination by an immigration judge.\textsuperscript{105} If during removal proceedings the immigration judge determines that “the alien is more likely than not to be tortured in the country of removal,” the alien is entitled to CAT protection.\textsuperscript{106} That protection is to be granted in the form of either withholding of removal or deferral of removal depending on the circumstances of the case.\textsuperscript{107}

The February 1999 CAT rule also established another screening process—for reasonable fear of persecution or torture. Modeled on but separate from the credible fear of persecution or torture screening processes, reasonable fear screening applies to certain aliens who are not eligible for asylum (these are aliens ordered removed under INA §238(b) for the commission of certain criminal offenses or aliens whose deportation, exclusion, or removal is reinstated under INA §241(a)(5)). Under current DHS and DOJ regulations, if an alien in this category expresses a fear of returning to the country of removal, USCIS is to make a reasonable fear determination, subject to review by an immigration judge.\textsuperscript{108} To establish a reasonable fear of persecution, an alien must establish “a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion”; this is the same standard used to establish eligibility for asylum. To establish a reasonable fear of torture, an alien must establish “a reasonable possibility that he or she would be tortured in the country of removal.”\textsuperscript{109}

If the alien receives a positive reasonable fear finding, the case is referred to an immigration judge to determine whether the alien is eligible for withholding of removal under INA §241(b)(3) or withholding of removal or deferral of removal under the CAT.\textsuperscript{110} DHS and DOJ regulations further state, however, that

\textsuperscript{102}U.S. Department of Justice, Immigration and Naturalization Service, “Regulations Concerning the Convention Against Torture,” 64 Federal Register 8478, February 19, 1999 (hereinafter cited as “1999 CAT rule”). The supplementary information to the rule explains the statutory mandate behind the regulations and provides other background information.

\textsuperscript{103}8 C.F.R. §235.3(b)(4), §208.30.

\textsuperscript{104}8 C.F.R. §208.30(c)(3).

\textsuperscript{105}8 C.F.R. §§208.30(f), (g).

\textsuperscript{106}8 C.F.R. §208.31, §1208.31.

\textsuperscript{107}See 8 C.F.R. §208.16, §208.17, §1208.16, §1208.17.

\textsuperscript{108}8 C.F.R. §208.31, §1208.31.

\textsuperscript{109}8 C.F.R. §208.3(c), §1208.31(c). Regarding the standard for establishing reasonable fear (which enables an alien to pursue a claim for withholding or deferral of removal), the supplementary information to the 1999 CAT rule explains: “Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.” 1999 CAT rule, p. 8485.

\textsuperscript{110}8 C.F.R. §208.31, §1208.31.
the granting of such withholding of removal or deferral of removal would not prevent the United States from removing the alien to a third country.\footnote{8}{C.F.R. §208.16, §1208.16.}


While the IIRIRA amendments to the INA asylum provisions remain largely in place, subsequent laws have made further changes to the INA provisions. For example, the Real ID Act of 2005\footnote{112}{The Real ID Act is Division B of P.L. 109-13.} amended the INA language on the conditions for granting asylum to add “burden of proof” provisions, which had previously been in regulations. These burden of proof provisions remain in law. They require an asylum applicant to show that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant” to meet the definition of a refugee.\footnote{113}{P.L. 109-13, Div. B, §101(a)(3), amending INA §208(b)(1).} The provisions further set forth standards for making determinations about an applicant’s credibility and about the need for corroborating evidence to sustain an applicant’s burden of proof.\footnote{114}{P.L. 109-13, Div. B, §101(a)(3), amending INA §208(b)(1).} In addition, among its other asylum-related provisions, the Real ID Act eliminated the annual caps on asylee adjustment of status.\footnote{115}{P.L. 109-13, Div. B, §101(g), amending INA §209(b).} The 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) added language to the INA asylum provisions that addressed asylum applications by unaccompanied alien children in the United States. This new language made certain statutory restrictions on applying for asylum inapplicable to these children and provided that a USCIS asylum officer would have initial jurisdiction over any asylum application filed by an unaccompanied child, even if the child was in removal proceedings.\footnote{116}{P.L. 110-457, §235(d)(7). The asylum process for unaccompanied alien children is not covered in this report. For related information, see CRS Report R43599, Unaccompanied Alien Children: An Overview.}

2018 Interim Final Rule

On November 9, 2018, DHS and DOJ jointly issued an interim final rule to govern “asylum claims in the context of aliens who are subject to, but contravene, a suspension or limitation on entry into the United States through the southern border with Mexico that is imposed by a presidential proclamation or other presidential order.”\footnote{117}{U.S. Department of Homeland Security and U.S. Department of Justice, Executive Office for Immigration Review, “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” 83 Federal Register 55934, November 9, 2018.} That same day, President Donald Trump issued a proclamation to suspend immediately the entry into the United States of aliens who cross the Southwest border between ports of entry (see “Presidential Action”). According to the supplementary information accompanying the interim rule, the rule would serve to “channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner.”\footnote{118}{Ibid. p. 55935.}

The interim rule, which is not in effect due to legal challenges, would bar an alien who enters the United States in contravention of the proclamation from eligibility for asylum. Under the rule, an asylum officer would make a negative credible fear of persecution determination in the case of such an alien. As explained in the supplementary information to the rule, however, aliens who enter the United States at the Southwest border without inspection would continue to be eligible for consideration for forms of protection from removal other than asylum—namely, withholding of removal under INA §241(b)(3) and
protections under the CAT. The interim final rule addresses eligibility for asylum and screening procedures for aliens who enter the United States in contravention of the proclamation. Regarding claims for withholding of removal under the INA or withholding or deferral of removal under the CAT, the rule establishes that such claims would be assessed under the reasonable fear standard (see “Convention Against Torture Protection and Implementing Regulations”). The supplementary information includes the following summary of the two-stage screening protocol the rule would institute:

Aliens determined to be ineligible for asylum by virtue of contravening a proclamation, however, would still be screened, but in a manner that reflects that their only viable claims would be for statutory withholding or CAT protection.... After determining the alien’s ineligibility for asylum under the credible-fear standard, the asylum officer would apply the long-established reasonable-fear standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted.\footnote{119}

This rule is being challenged in federal court. On December 19, 2018, a federal district court judge in California granted a nationwide preliminary injunction against it.\footnote{120}

**DHS Migrant Protection Protocols**

On December 20, 2018, DHS announced the Migrant Protection Protocols (MPP), under which “individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.”\footnote{121} The U.S. government notified the Mexican government about the MPP that same day. The MPP is separate and distinct from a safe third country agreement (see “Safe Third Country Agreements”).

The DHS press release announcing the Migrant Protection Protocols characterized them as “historic measures” to address the “illegal immigration crisis.” In the words of the press release:

Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. ‘Catch and release’ will be replaced with ‘catch and return.’ In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.\footnote{122}

According to DHS, the U.S. government will invoke INA §235(b)(2)(C),\footnote{123} which permits the return of certain aliens arriving in the United States on land from a foreign contiguous territory to that foreign territory pending standard removal proceedings. An alien potentially subject to this return provision under the INA is an applicant for admission who “is not clearly and beyond a doubt entitled to be admitted” and

\footnote{119} Ibid. p. 55943.


\footnote{121} DHS, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration.” For a legal analysis, see CRS Legal Sidebar LSB10251, “Migrant Protection Protocols’; Legal Issues Related to DHS’s Plan to Require Arriving Asylum Seekers to Wait in Mexico.”

\footnote{122} DHS, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration.”

\footnote{123} Ibid.
thus is “detained for a [standard removal] proceeding.”124 INA §235(b)(2)(C) is explicitly inapplicable to aliens who are determined to be subject to expedited removal.125

On January 28, 2019, USCIS and DHS’s Customs and Border Protection (CBP) issued memoranda on MPP implementation.126 The CBP memorandum announced that the agency would begin implementing the MPP that day. According to the memorandum, “MPP implementation will begin at the San Ysidro port of entry [in California], and it is anticipated that it will be expanded in the near future.” Also on January 28, 2019, CBP issued “MPP Guiding Principles,” which included the following: “To implement the MPP, aliens arriving from Mexico who are amenable to the process … and who in an exercise of discretion the officer determines should be subject to the MPP process, will be issued [a] Notice to Appear (NTA) and placed into Section 240 removal proceedings. They will then be transferred to await proceedings in Mexico.” Among the aliens identified as “not amenable to MPP” in the CBP guiding principles document are unaccompanied alien children, citizens or nationals of Mexico, aliens processed for expedited removal, and aliens who are more likely than not to face persecution or torture in Mexico.127 The MPP is in effect as of the date of this report, but it remains unclear how DHS is making decisions about which aliens to process under the protocols. The MPP is being challenged in federal court.128

Recent Legislative and Presidential Action

Legislation in the 115th Congress

Asylum-related legislation was considered in the 115th Congress. Two immigration bills that were the subjects of unsuccessful House floor votes in June 2018—the Securing America’s Future Act of 2018 (H.R. 4760) and the Border Security and Immigration Reform Act of 2018 (H.R. 6136)—contained similar provisions on asylum. A third asylum-related House bill (the Asylum Reform and Border Protection Act of 2017 (H.R. 391)) that included some of the same provisions as the above measures was ordered to be reported by the House Judiciary Committee. In addition, the House and the Senate acted on several other measures containing more limited language on asylum.

H.R. 4760 and H.R. 6136

H.R. 4760 and H.R. 6136, as considered on the House floor, included various provisions related to asylum. Both bills would have amended the INA “safe third country” asylum provision, under which an alien is ineligible to apply for asylum if it is determined that he or she can be removed to a safe country “pursuant to a bilateral or multilateral agreement” (see “Safe Third Country Agreements”). H.R. 4760 and H.R. 6136 would have eliminated the “pursuant to a bilateral or multilateral agreement” language.

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124 INA §235(b)(2)(A).


Both bills would have added a new provision to the INA stating that an alien’s asylum status would be terminated if the alien returned to his or her home country (from which the alien sought refuge in the United States) absent changed country conditions. Both bills would have given DHS discretionary authority to waive this provision in individual cases. H.R. 4760 also included an exception to this provision for certain Cubans.

Both bills would have amended the INA provisions on frivolous asylum applications (see “Frivolous or Fraudulent Asylum Claims”). Current INA provisions make an alien permanently ineligible for immigration benefits if he or she knowingly files a frivolous asylum application after receiving notice of the consequences for doing so. The bills would have changed the notification process. They would have required that a written notice appear on the asylum application advising the applicant of the consequences of filing a frivolous application. The bills would also have added language to the INA explaining that an application is frivolous if “it is so insufficient in substance that it is clear that the applicant knowingly filed the application solely or in part to delay removal from the United States, to seek employment authorization as an applicant for asylum” or “any of the material elements are knowingly fabricated.”

H.R. 4760 and H.R. 6136 also would have changed the INA definition of credible fear of persecution, which an alien in expedited removal has to show to be able to pursue an asylum claim. The bills would have added a new requirement to the definition—that “it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien’s claim are true.” The bills would also have required audio or audio/visual recording of expedited removal and credible fear interviews.

**H.R. 391**

H.R. 391, as ordered to be reported by the House Judiciary Committee, would have amended the INA provisions on safe third country removals, termination of asylum upon return to the home country, frivolous asylum applications, and credible fear similarly to H.R. 4760 and H.R. 6136. In addition, this bill would have made a number of other changes to the asylum-related language in the INA. Among its asylum-related provisions, H.R. 391 would have clarified the INA definition of a refugee (which asylum applicants also have to satisfy), specifically the “membership in a particular social group” ground. It would have defined particular social group, which is not currently defined in statute, to mean a group that is “defined with particularity,” is “socially distinct,” and has members who share “a common immutable characteristic.”

H.R. 391 would have explicitly provided that the “membership in a particular social group” ground would cover individuals who fail or refuse “to comply with any law or regulation that prevents the exercise of the individual right of that person to direct the upbringing and education of a child of that person (including any law or regulation preventing homeschooling).” At the same time, the bill sought to prohibit the application of this ground to asylum cases involving criminal gang membership or activity.

H.R. 391 also included language related to the INA asylum provisions that enumerate certain determinations about an alien that preclude the granting of asylum. One of these determinations is that the alien was “firmly resettled in another country” before coming to the United States and requesting asylum. H.R. 391 would have considered the “firmly resettled” criterion to be satisfied “by evidence that the alien can live in such country (in any legal status) without fear of persecution.”

**Other Bills**

Other bills that saw action in the 115th Congress included more limited language on asylum. For example, the Criminal Alien Gang Member Removal Act (H.R. 3697), as passed by the House, would have added a

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129 Some of the provisions discussed here appear in the committee substitute amendment to H.R. 391 but do not appear in the bill, as introduced. The text of the substitute amendment is available in the CQ markup report, http://www.cq.com/doc/committees-20170726375056?4&search=P45CzBnV.
new item to the INA list of determinations that preclude the granting of asylum. It would have made an alien ineligible for asylum if he or she was inadmissible or deportable based on new INA criminal gang membership or criminal gang-related activity grounds that the bill would have established. Under H.R. 3697, such an alien would also have been exempt from the INA restriction on removing an alien to a country where his or her life or freedom would be threatened based on race, religion, nationality, membership in a particular social group, or political opinion.

Asylum-related provisions similar to those in H.R. 3697 were included in two other measures—the Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act (H.R. 2431), as ordered to be reported by the House Judiciary Committee, and the SECURE and SUCCEED Act (S.Amdt. 1959 to H.R. 2579), which failed on a Senate floor vote in February 2018. In addition, these two measures would have made further changes to the INA’s asylum-related provisions. They would have made aliens ineligible for asylum if they were inadmissible on a broader array of terrorist-related grounds and would have exempted aliens who were inadmissible on this larger set of terrorist grounds from the general INA restriction on removing an alien to a country where his or her life or freedom would be threatened.

H.R. 2431 and S.Amdt. 1959 would also have amended the INA provisions on asylee adjustment of status to LPR status. Current INA provisions generally require that applicants for adjustment be admissible to the United States as immigrants, but they grant the Secretary of Homeland Security or the Attorney General broad authority to waive applicable inadmissibility provisions for humanitarian purposes. While there were significant differences among the asylee adjustment of status amendments in S.Amdt. 1959 and H.R. 2431, both measures would have limited existing DHS/DOJ inadmissibility waiver authority and added new deportability-related requirements to the INA asylee adjustment of status provisions.

**Presidential Action**

Citing constitutional and statutory authority, President Trump issued a presidential proclamation on November 9, 2018, to immediately suspend the entry into the United States of aliens who cross the Southwest border between ports of entry. The proclamation indicates that its entry suspension provisions will expire 90 days after its issuance date or on the date that the United States and Mexico reach a bilateral safe country agreement, whichever is earlier. Also on November 9, 2018, DHS and DOJ jointly issued an interim final rule to bar an alien who enters the United States in contravention of the proclamation from eligibility for asylum. The proclamation and the rule are being challenged in federal court (see “2018 Interim Final Rule”). On February 7, 2019, President Trump renewed the proclamation with the issuance of a new proclamation with the same name.

**Selected Policy Issues**

Asylum is a complex area of immigration law and policy. Much of the recent debate surrounding it has focused on efforts by the Trump Administration to tighten the asylum system. Several key policy considerations about asylum are highlighted below. Some, such as the grounds for granting asylum, have

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131 For further information, see CRS Insight IN10993, *Presidential Proclamation on Unlawful Border Crossers and Asylum*.

been long-standing issues for policymakers, while others, such as safe third country agreements, have been garnering attention more recently.

**Asylum Backlog**

There has been much discussion about an increasing backlog of asylum applications. The term *asylum backlog* may suggest that there is a single queue of pending asylum cases. In fact, as discussed above, USCIS and EOIR separately adjudicate affirmative asylum cases and defensive asylum cases, respectively.133 (*Backlog* as used in this report is synonymous with *pending caseload.*)

The numbers of pending USCIS affirmative asylum applications and EOIR defensive asylum cases have varied over the years, impacted by factors including international developments, changes to U.S. immigration laws, and agency resources. In the case of affirmative applications, there have been significant fluctuations in the size of the backlog over the history of the asylum program. Since FY2009, however, backlogs of both USCIS affirmative asylum applications and EOIR cases have increased annually. At the end of FY2009, there were about 6,000 pending affirmative asylum applications at USCIS134; that number stood at about 320,000 at the end of FY2018.135

During this same period, the number of pending cases before EOIR increased from about 224,000 at the end of FY2009 to about 786,000 at the end of FY2018.136 Not all the EOIR cases necessarily involve an asylum claim, however. According to EOIR, as of June 18, 2018, it had about 720,000 pending cases, and some 325,000 of those (about 45%) included asylum applications.137

A variety of arguments are made for prioritizing the reduction of the asylum backlog. These include the need to preserve the integrity of the asylum process and to provide protection in a timely manner to legitimate asylum seekers. More controversial arguments for addressing the backlog center on the perceived need to eliminate an incentive for unauthorized aliens without valid asylum claims to enter the United States and file frivolous applications (see “Frivolous or Fraudulent Asylum Claims”).

Regarding the affirmative asylum backlog, USCIS described its January 2018 decision to interview more recent asylum applications before older filings as “an attempt to stem the growth of the agency’s asylum backlog.”138 There is debate about whether this is an effective and judicious strategy. While some point to signs that this processing change is reducing the backlog,139 others argue that it is a wrongheaded approach and that USCIS should instead be dedicating more resources to adjudicating asylum cases.

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133 As noted, however, if an alien’s affirmative asylum application is denied by USCIS and the alien is placed in removal proceedings, he or she can be considered for defensive asylum by an EOIR immigration judge during those removal proceedings.


137 Data provided by U.S. Department of Justice, Executive Office for Immigration Review, to CRS by email, June 28, 2018.


139 See, for example, Stephen Dinan, “U.S. Clears More Asylum Cases Than It Receives in May,” *Washington Times*, June 14, 2018.
Those in the latter group argue that individuals with older, valid asylum claims will face even longer waits for relief under the last in-first out system.\(^{140}\)

DHS efforts to reduce the asylum backlog are also impacting other humanitarian admissions programs. According to the report *Proposed Refugee Admissions for Fiscal Year 2019*, “DHS in FY 2017 and FY 2018 shifted a significant proportion of its refugee officers to processing affirmative asylum applications and conducting credible fear and reasonable fear screenings. This reduced the number of refugee interviews that could be conducted abroad in those years.”\(^{141}\) The report also indicates that the Administration plans to “continue to shift some refugee officers to assist the Asylum Division” in FY2019 to address the asylum backlog.\(^{142}\)

Regarding the backlog of immigration court cases, the director of EOIR testified at an April 2018 Senate hearing that the agency was addressing challenges that had contributed to the backlog. In his prepared testimony, he cited the challenges of “declining case completions, protracted hiring times for new immigration judges, and the continued use of paper files.”\(^{143}\)

In June 2018 remarks at EOIR, Attorney General Sessions characterized the large and growing backlog of immigration court cases as unacceptable and outlined steps being taken to reduce it.\(^{144}\) In his prepared remarks, he asked each EOIR judge to complete at least 700 cases annually, which he described as “about the average.” He said, “Setting this expectation is a rational management policy to ensure consistency, accountability, and efficiency in our immigration court system.” He also explained that additional immigration judges were being hired and that DOJ was working with DHS to “deploy judges electronically and by video-teleconference.”

Some question whether the approach being taken by DOJ to reduce the EOIR backlog—particularly the annual case completion goal—is advisable and will succeed. For example, Ashley Tabaddor, president of the National Association of Immigration Judges, has expressed concern about the ability of immigration judges to adjudicate asylum cases within the time frame dictated by that yearly goal.\(^{145}\)

### Grounds for Asylum

The INA definition of a refugee identifies five persecution grounds as the bases for receiving refugee status or asylum: race, religion, nationality, membership in a particular social group, and political opinion. It provides no definitions of these terms. As noted, however, it does state that an individual who has been forced to have an abortion or undergo sterilization or has been persecuted for resistance to a coercive population control program is to be considered to have been persecuted on the basis of political opinion. Legislation considered in the 115th Congress would have further amended the INA refugee definition to


\(^{142}\) Ibid. p. 6.


provide that an individual who has been persecuted for failure to comply with or resistance to any law or regulation that prevents homeschooling is to be considered to have been persecuted on the basis of membership in a particular social group (see “H.R. 391”).

In June 2018, Attorney General Sessions issued a decision regarding the adjudication of asylum claims based on the “membership in a particular social group” ground. In the past, asylum had been granted to certain victims of domestic violence based on a finding of persecution or a well-founded fear of persecution on account of “membership in a particular social group.” Attorney General Sessions vacated a Board of Immigration Appeals’ 2016 decision in one of these cases and remanded the case to the immigration judge for further proceedings, arguing that the appropriate legal standards had not been applied. He reached the following conclusion about asylum cases involving private criminal activity (footnotes excluded):

Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.

The decision further noted that because claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors generally will not qualify for asylum, they would also generally not meet the threshold for a finding of a credible fear of persecution (see “Inspection of Arriving Aliens”).

In July 2018, USCIS issued a policy memorandum to provide guidance to its asylum officers in light of the Attorney General’s decision. Highlighting required findings about the home government in cases involving private violence, the memorandum stated:

Few gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm may merit a grant of asylum or refugee status—or pass the “significant possibility” test in credible fear screenings …—because an applicant must prove, or establish a significant possibility that, his or her government is unable or unwilling to protect him or her…. Again, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution.

Following issuance of the Attorney General’s decision, immigration advocates expressed worry that the decision and the related USCIS policy memorandum could have wide-sweeping consequences, particularly for asylum seekers from Central America. In a letter to the New York Times, a counsel with the Tahirih Justice Center, which advocates for immigrant women and girls fleeing gender-based violence, wrote, “As a result of that ruling, and the subsequent policy guidance, immigration officers may now feel emboldened to deny asylum to women fleeing domestic violence, even under the most life-threatening circumstances.”

147 Ibid. p. 320.
148 For additional discussion, see CRS Legal Sidebar LSB10150, An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border.
On December 19, 2018, a federal district court judge in Washington, DC, ruled on a case challenging the policies regarding credible fear of persecution determinations set forth in former Attorney General Sessions’ decision and the USCIS policy memorandum. The judge permanently enjoined the U.S. government from continuing some of the new policies.151

Some who are concerned about the potential impact of the former Attorney General’s decision on women seeking asylum have discussed the possibility of amending the underlying INA definition of a refugee to explicitly address gender-based asylum claims. Among the legislative options that have been put forward are to add “gender” to the list of persecution grounds or “to define the phrase ‘particular social group’ by amending the law to include a non-exclusive list of (currently) common gender-based asylum claims, including domestic violence.”152

Credible Fear of Persecution Threshold

Separate from the 2018 decision by former Attorney General Sessions and the related USCIS policy memorandum discussed in the preceding section, the credible fear of persecution threshold has been a focus of attention recently as the number of individuals being screened for and found to have a credible fear has grown. Individuals who are found to have a credible fear may remain in the United States while their court case proceeds.

As noted, the INA asylum provisions define credible fear of persecution to mean “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” House bills considered in the 115th Congress would have added a new requirement to this definition—that “it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien’s claim are true.”

USCIS Director Francis Cissna has endorsed a tightening of the credible fear of persecution standard. In prepared testimony for a May 2018 House hearing on border security, he stated, “The simple reality is that those who wish to gain access to or remain in the United States know they can likely effect that access and then delay their removal by simply saying the ‘magic words’ of ‘fear’ or ‘asylum.’ The standard for credible fear screenings at the border has been set so low that nearly everyone meets it.”153

Others disagree that the credible fear standard should be raised. In a 2018 policy brief, the American Immigration Lawyers Association (AILA) argues that “the lower threshold for credible fear determinations is necessary precisely because asylum seekers arriving at the border are typically detained, traumatized, and have limited access to counsel and documentation to support their claims.”154


Frivolous or Fraudulent Asylum Claims

There have been concerns about frivolous asylum applications since the establishment of the U.S. asylum program. As noted, the 1980 interim regulations made reference to “non-frivolous” applications, and IIRIRA amended the INA to permanently bar an individual who knowingly files a frivolous asylum application from receiving immigration benefits. Under current regulations, an asylum application is considered “frivolous” for purposes of the INA benefit bar “if any of its material elements is deliberately fabricated.” These regulations also provide that for purposes of the bar, “a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.”

The issue of frivolous asylum claims was highlighted by Attorney General Sessions in 2017 remarks, in which he described the asylum system as being “subject to rampant abuse and fraud.” He further said, “And as this system becomes overloaded with fake claims, it cannot deal effectively with just claims.”

Similarly, in his May 2018 House testimony, USCIS Director Cissna stated, “The integrity of our entire immigration system is at risk because frivolous asylum applications impede our ability to help people who really need it.”

Several House bills considered in the 115th Congress sought to tighten language in the INA on frivolous asylum claims. In his May 2018 testimony, USCIS Director Cissna called for legislation to address the problem of frivolous claims that would, among other provisions, “impose[e] and enforce[e] penalties for the filing of frivolous asylum applications.”

A key point of contention in the current debate about frivolous or fraudulent asylum claims is the scope of the problem. According to a researcher at the immigration-restrictionist Center for Immigration Studies, “Most asylum claims nowadays, whether in Europe or the United States, are not genuine. Migrants are more and more using the asylum ticket to gain entry into a country and stay.”

Other experts, such as Law Professor Lindsay M. Harris, reach different conclusions about the prevalence of fraud in recent asylum applications: “One of the humanitarian crises producing refugees happens to be south of our border, in Central America, and this accounts for the exponential increase in asylum claims and individuals seeking protection in the U.S. through the credible fear system, rather than a sudden increase in fraudulent claims.”

Employment Authorization

Under current law, an asylum seeker who is not otherwise eligible for employment authorization cannot be granted such authorization until 180 days after filing an application for asylum. In general, under DHS regulations, an asylum applicant cannot submit an application for employment authorization and an employment authorization document (EAD) until 150 days after a complete asylum application has been filed.

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155 8 C.F.R. §208.20.
157 Cissna 2018 Hearing Testimony, p. 4.
158 Ibid. p. 4.
received. There is no fee for an asylum applicant’s initial application for employment authorization. Renewal applications are subject to standard fees.

Although there seems to be general agreement that asylum seekers should be eligible for employment authorization at some point, aspects of this policy have long been debated. For example, for more than 20 years, some have argued that the availability of employment authorization creates an incentive for individuals to apply for asylum solely to be able to work legally in the United States. In his prepared testimony for the May 2018 House hearing on border issues, USCIS Director Cissna stated, “While the number of mala fide claims is difficult to estimate, experience from the 1990s indicates that a significant amount of the growth in receipts since FY 2014 may be linked to individuals pursuing work authorization and not necessarily asylum status.”\textsuperscript{161}

Others dismiss the idea that asylum seekers act in response to particular U.S. policies, arguing that they are motivated by desperate circumstances. Commenting on Central American asylum seekers, a spokesperson for the U.N. High Commissioner for Refugees said, “People are leaving because they are suffering from high levels of violence from gangs and other organized criminal groups. This flow of families from Central America will not stop because if the root causes are still there these people will keep coming to the U.S. or to other countries.”\textsuperscript{162}

The complex system set up to track when an asylum seeker has reached the 180-day point for employment authorization purposes—known as the asylum EAD clock—has also been controversial. There are various events that stop the asylum EAD clock. USCIS and EOIR characterize these as “delays requested or caused by an applicant while his or her asylum application is pending with USCIS and/or EOIR” (e.g., the applicant’s “failure to appear at an interview or fingerprint appointment” or “the applicant or his or her attorney asks for additional time to prepare the case”).\textsuperscript{163} Over the years, immigration advocacy groups have been critical of clock-related USCIS and EOIR policies and actions.\textsuperscript{164}

**Variation in Immigration Judges’ Asylum Decisions**

In November 2017, the Transactional Records Access Clearinghouse (TRAC) published the report *Asylum Outcome Continues to Depend on the Judge Assigned*, which examined asylum decisions of judges on the same immigration court. It was based on combined data from FY2012 through FY2017 for judges who decided at least 100 asylum cases during this six-year period. Among its findings, the report identified the Newark and San Francisco Immigration Courts as having the greatest judge-to-judge differences in asylum cases decided during that time. For the San Francisco court, for example, it stated that “the odds of denial varied from only 9.4 percent all the way up to 97.1 percent depending upon the judge.” The TRAC analysis assumes that “when individual judges [on the same court] handle a sufficient number of asylum requests, random case assignment will result in each judge being assigned a roughly equivalent mix of ‘worthy’ cases.” It, thus, posits, “any large differences in the denial rates of individual judges are

\textsuperscript{161} Cissna 2018 Hearing Testimony, p. 2.


unlikely to be the result of differences in the nature of the incoming cases. Instead, they are likely to reflect the personal perspective that each judge brings to the bench.”

TRAC first reported on differences in asylum decisions by immigration judges nationwide based on an analysis of asylum cases decided by judges from FY1994 through early FY2005. Published in July 2006, this TRAC report found a “great disparity in the rate at which individual immigration judges declined the applications.” Seemingly taking issue with the TRAC analysis but not mentioning it by name, a November 2007 EOIR fact sheet, “Asylum Variations in Immigration Court,” stated:

> Asylum adjudication does not lend itself well to statistical analysis. Each asylum application is adjudicated on a case-by-case basis, and each has many variables that need to be considered by an adjudicator. It is therefore important that any statistical analysis acknowledge these variables and not draw comparisons between substantially different cases.

The U.S. Government Accountability Office (GAO) examined variations in the outcomes of asylum cases in reports issued in 2008 and 2016. The 2008 report, which was based on an analysis of asylum case data from FY1994 through April 2007, found that “within immigration courts, there were pronounced differences in grant rates across immigration judges.” While acknowledging the limits of its analysis, GAO concluded that “the size of the disparities in asylum grant rates creates a perception of unfairness in the asylum adjudication process within the immigration court system.”

GAO analyzed EOIR data for FY1995 through FY2014 for its 2016 follow-up report. Although it was unable to control for “the underlying facts and merits of individual asylum applications,” GAO maintained that the available data allowed it to compare asylum outcomes across immigration courts and immigration judges. It estimated that for the May 2007-FY2014 period since its 2008 report, “the affirmative and defensive asylum grant rates would vary by 47 and 57 percentage points, respectively, for the same representative applicant whose case was heard by different immigration judges.”

**Safe Third Country Agreements**

Under the INA, an alien is ineligible to apply for asylum in the United States if he or she can be removed, pursuant to a bilateral or multilateral agreement, to a third country where the “alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”

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165 The report is available at http://trac.syr.edu/immigration/reports/490/. It contains data on asylum decisions by individual immigration judges and courts.

166 The report is available at http://trac.syr.edu/immigration/reports/160/.


169 Ibid. p. 60. In the body of the report, GAO noted, “Because data were not available on the facts, evidence, and testimony presented in each asylum case, nor on immigration judges’ rationale for deciding whether to grant or deny a case, we could not measure the effect of case merits on case outcomes.”

170 Ibid.


172 Ibid. “Highlights” page.

173 INA §208(a)(2)(A) (8 U.S.C. §1158(a)(2)(A)).
The United States and Canada signed a safe third country agreement in 2002, which went into effect in 2004. Under the agreement, asylum seekers must request protection in the first of the two countries they arrive in, unless they qualify for an exception. Under DHS regulations, a USCIS asylum officer must determine whether an alien arriving in the United States at a U.S.-Canada land border port of entry seeking asylum is subject to removal to Canada in accordance with the U.S.-Canada safe third country agreement.

The Trump Administration has had preliminary discussions with Mexico about a possible safe third country agreement. According to an unidentified senior DHS official, “We believe the flows [of Central Americans into the United States] would drop dramatically and fairly immediately” if a U.S.-Mexico safe country agreement went into effect.

Human Rights First, an advocacy organization, opposes such an agreement. The group found that Mexico was not a safe third country in 2017 and indicated in a July 2018 press release that that was still the case: “Since [last year], the dangers facing refugees and migrants in Mexico have escalated. Recent reports confirm that Mexican authorities continue to improperly return asylum seekers to their countries of persecution and that the deficiencies in the Mexican asylum system have grown.”

Taking a different approach, House bills considered in the 115th Congress would have amended the INA safe third country asylum provision to eliminate the “pursuant to a bilateral or multilateral agreement” language, presumably to provide for removals to a third country without a bilateral agreement.

**Conclusion**

The asylum provisions in the INA are unusual in providing a standard mechanism for eligible unauthorized aliens in the United States to apply for a legal immigration status. This aspect of asylum also serves to make this form of relief particularly controversial, especially at times when large numbers of asylum seekers are arriving in the United States. The high volume of asylum cases has elicited policy responses from the Trump Administration, as described in this report. In October 2018 remarks at an immigration conference, USCIS Director Cissna offered context for DHS’s and DOJ’s asylum-related actions from the Administration’s perspective when he referenced “challenges associated with surges at the U.S. southern border, where migrants know that they can exploit a broken system to enter the U.S., avoid removal, and remain in the country.” While the Administration maintains that its policies adhere to the INA and are necessary to preserve the integrity of the immigration system, others argue that it is tightening the asylum process in contravention of the law. It remains to be seen whether the Administration will continue to try to reshape U.S. asylum policy and whether Congress will take action, as it has at times in the past, to make legislative changes to the asylum system.

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175 8 C.F.R. §208.30(e)(6).


Appendix A. Affirmative Asylum Applications

Table A-1 provides the underlying data for Figure 1 on new affirmative asylum applications filed annually with USCIS since FY1995.

### Table A-1. New Affirmative Asylum Applications Filed, FY1995-FY2018

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<tr>
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<td>2017</td>
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<tr>
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</table>


**Notes:** Data represent applications, not individuals. Data are limited to new filings; they do not include applications that were reopened during the relevant fiscal year.

Table A-2 expands on the data in Table A-1 to show the top 10 nationalities filing new affirmative asylum applications annually since FY2007. For each of the top 10 nationalities for each year, Table A-2 provides a rank and a percentage of all applications that were filed by applicants of that nationality. The table also includes annual data on the total number of applications filed by all applicants (the latter totals match the data in Table A-1).
As shown in Table A-2, the top four nationalities filing new affirmative asylum applications in FY2007 (China, Haiti, Mexico, and Guatemala) remained in the top 10 throughout the period, with China holding the top spot in all years except FY2017 and FY2018. Between FY2009 and FY2012, Chinese nationals filed one-third of all new affirmative asylum applications each year. In FY2017 and FY2018, however, China’s rank fell to 2nd and 4th, respectively. In each of those two years, Venezuelans filed more new affirmative asylum applications than nationals of any other country, accounting for one-fifth of all applications filed in FY2017 and more than a quarter of the total in FY2018. Since FY2015, nationals of Venezuela and four other Latin American countries (Guatemala, El Salvador, Mexico, and Honduras) have accounted for five of the top six nationalities filing new affirmative asylum applications each year.
Table A-2. Top 10 Nationalities Filing New Affirmative Asylum Applications, FY2007-FY2018

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<tr>
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<tbody>
<tr>
<td></td>
<td>Rank</td>
<td>%</td>
<td>Rank</td>
<td>%</td>
<td>Rank</td>
<td>%</td>
<td>Rank</td>
<td>%</td>
<td>Rank</td>
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<td>Rank</td>
<td>%</td>
</tr>
<tr>
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<td>2%</td>
<td>8</td>
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<td>3%</td>
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<td>3</td>
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<td>2</td>
<td>8%</td>
<td>2</td>
<td>6%</td>
<td>2</td>
<td>8%</td>
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<td>2%</td>
<td>6</td>
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<td>4</td>
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<td>7</td>
<td>2%</td>
<td>6</td>
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<td>5</td>
<td>3%</td>
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<td>10</td>
<td>2%</td>
<td>5</td>
<td>4%</td>
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<td>Russia</td>
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<td>10</td>
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<td>3%</td>
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<td>2%</td>
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<td>3%</td>
<td>4</td>
<td>3%</td>
<td>5</td>
<td>3%</td>
<td>5</td>
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<td>9</td>
<td>2%</td>
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<td></td>
<td></td>
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<tr>
<td>El Salvador</td>
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<td>8</td>
<td>2%</td>
<td>9</td>
<td>2%</td>
<td>9</td>
<td>2%</td>
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<td>3%</td>
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<td>2%</td>
<td>9</td>
<td>3%</td>
<td>6</td>
<td>4%</td>
<td>7</td>
<td>4%</td>
<td>7</td>
<td>3%</td>
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<tr>
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<td>6</td>
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<td></td>
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<td></td>
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<tr>
<td>Honduras</td>
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<td>6</td>
<td>6%</td>
<td>6</td>
<td>5%</td>
<td>6</td>
<td>5%</td>
<td>6</td>
<td>6%</td>
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</tr>
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<td>7</td>
<td>3%</td>
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<td></td>
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<td></td>
<td></td>
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<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Nigeria</td>
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<td></td>
<td></td>
<td></td>
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</tbody>
</table>

**Number of Applications**

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<th></th>
<th></th>
<th></th>
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<td>28,443</td>
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<td>41,880</td>
<td>44,446</td>
<td>56,912</td>
<td>83,251</td>
<td>114,927</td>
<td>141,638</td>
<td>106,147</td>
</tr>
</tbody>
</table>


**Notes:** Data represent applications, not individuals. Data are limited to new filings; they do not include applications that were reopened during the relevant fiscal year. Percentages are of all new filings for relevant fiscal year. Blank spaces indicate nationality was not in top 10 for relevant fiscal year.
Appendix B. USCIS Asylum Decisions and Credible Fear Findings

Table B-1 provides the underlying data for Figure 2 on USCIS decisions on affirmative asylum applications issued annually from FY2009 through FY2017. It also includes an additional small outcome category (Cases Dismissed). These are cases where the applicant did not appear for fingerprinting/biometrics collection. For the cases referred to an immigration judge (which involve applicants without lawful status), Table B-1 distinguishes among three mutually exclusive subcategories: cases that were interviewed by USCIS; cases that were interviewed by USCIS where the applicant did not meet the filing deadline; and cases that were not interviewed by USCIS. (The Referrals “Total” column in Table B-1 matches the Referrals data displayed in Figure 2.)

Table B-1. USCIS Decisions on Affirmative Asylum Applications, FY2009-FY2017

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Cases Granted</th>
<th>Cases Denied</th>
<th>Cases Interviewed</th>
<th>Cases Interviewed/Filing Deadline</th>
<th>Cases Not Interviewed</th>
<th>Total</th>
<th>Cases Closed</th>
<th>Cases Dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>10,071</td>
<td>2,148</td>
<td>9,824</td>
<td>5,705</td>
<td>1,732</td>
<td>17,261</td>
<td>4,108</td>
<td>124</td>
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<tr>
<td>2010</td>
<td>9,174</td>
<td>958</td>
<td>9,084</td>
<td>6,700</td>
<td>1,858</td>
<td>17,642</td>
<td>1,677</td>
<td>28</td>
</tr>
<tr>
<td>2011</td>
<td>10,700</td>
<td>1,064</td>
<td>8,902</td>
<td>8,403</td>
<td>2,803</td>
<td>20,108</td>
<td>1,529</td>
<td>4</td>
</tr>
<tr>
<td>2012</td>
<td>12,991</td>
<td>922</td>
<td>8,920</td>
<td>9,028</td>
<td>3,710</td>
<td>21,658</td>
<td>1,348</td>
<td>4</td>
</tr>
<tr>
<td>2013</td>
<td>10,981</td>
<td>766</td>
<td>6,859</td>
<td>5,449</td>
<td>3,292</td>
<td>15,600</td>
<td>1,000</td>
<td>1</td>
</tr>
<tr>
<td>2014</td>
<td>10,811</td>
<td>582</td>
<td>7,499</td>
<td>4,535</td>
<td>3,503</td>
<td>15,537</td>
<td>2,008</td>
<td>3</td>
</tr>
<tr>
<td>2015</td>
<td>14,344</td>
<td>365</td>
<td>12,912</td>
<td>4,194</td>
<td>2,369</td>
<td>19,475</td>
<td>3,107</td>
<td>11</td>
</tr>
<tr>
<td>2016</td>
<td>9,538</td>
<td>131</td>
<td>9,436</td>
<td>4,328</td>
<td>2,422</td>
<td>16,186</td>
<td>3,830</td>
<td>7</td>
</tr>
<tr>
<td>2017</td>
<td>13,105</td>
<td>116</td>
<td>15,103</td>
<td>10,521</td>
<td>3,304</td>
<td>28,928</td>
<td>5,675</td>
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**Source:** CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on July 30, 2018.

**Notes:** Data represent applications, not individuals. Cases Interviewed are cases USCIS found ineligible for asylum status where the applicant was not in lawful status. Cases Interviewed/Filing Deadline are cases USCIS found ineligible for asylum status where the applicant was not in lawful status and did not meet the one-year filing deadline or qualify for an exception. Cases Not Interviewed are cases where the applicant was not in lawful status and failed to appear for an interview or withdrew the application. Cases Closed are cases administratively closed for reasons such as abandonment or lack of jurisdiction. Cases Dismissed are cases where the applicant did not appear for fingerprinting/biometrics collection.
In addition to deciding affirmative asylum cases, USCIS is tasked with assessing the credible fear of persecution claims made by individuals in expedited removal. Table B-2 and Table B-3 provide the underlying credible fear-related data for Figure 4. Table B-2 contains data on referrals of credible fear claims to USCIS and USCIS completions of these cases.

Table B-2. Credible Fear Cases: Referrals & Completions, FY1997-FY2018

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Referrals to USCIS</th>
<th>Completions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>1,438</td>
<td>1,206</td>
</tr>
<tr>
<td>1998</td>
<td>3,427</td>
<td>3,304</td>
</tr>
<tr>
<td>1999</td>
<td>6,690</td>
<td>6,463</td>
</tr>
<tr>
<td>2000</td>
<td>10,315</td>
<td>9,971</td>
</tr>
<tr>
<td>2001</td>
<td>13,140</td>
<td>13,689</td>
</tr>
<tr>
<td>2002</td>
<td>10,042</td>
<td>9,961</td>
</tr>
<tr>
<td>2003</td>
<td>6,447</td>
<td>6,357</td>
</tr>
<tr>
<td>2004</td>
<td>7,917</td>
<td>7,754</td>
</tr>
<tr>
<td>2005</td>
<td>9,465</td>
<td>9,581</td>
</tr>
<tr>
<td>2006</td>
<td>5,338</td>
<td>5,241</td>
</tr>
<tr>
<td>2007</td>
<td>5,252</td>
<td>5,286</td>
</tr>
<tr>
<td>2008</td>
<td>4,995</td>
<td>4,828</td>
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<tr>
<td>2009</td>
<td>5,369</td>
<td>5,222</td>
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<tr>
<td>2010</td>
<td>8,959</td>
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<td>11,217</td>
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<td>48,415</td>
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<tr>
<td>2016</td>
<td>94,048</td>
<td>92,990</td>
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<tr>
<td>2017</td>
<td>78,564</td>
<td>79,710</td>
</tr>
<tr>
<td>2018</td>
<td>99,035</td>
<td>97,728</td>
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Notes: Data represent individuals. Credible fear referrals come from the Department of Homeland Security’s U.S. Customs and Border Protection or the Department of Homeland Security’s Immigration and Customs Enforcement.
Table B-3 provides breakdowns of the Table B-2 “Completions” data by case outcome. It also provides the percentage of the completed cases in which credible fear was found.

### Table B-3. Outcomes of Completed Credible Fear Cases, FY1997-FY2018

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Positive Credible Fear Findings</th>
<th>Negative Credible Fear Findings</th>
<th>Closures</th>
<th>Total Completions</th>
<th>% Total Completions with Positive Credible Fear Findings</th>
</tr>
</thead>
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<tr>
<td>1997</td>
<td>922</td>
<td>256</td>
<td>28</td>
<td>1,206</td>
<td>76%</td>
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<tr>
<td>1998</td>
<td>2,747</td>
<td>125</td>
<td>432</td>
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<tr>
<td>1999</td>
<td>5,762</td>
<td>144</td>
<td>557</td>
<td>6,463</td>
<td>89%</td>
</tr>
<tr>
<td>2000</td>
<td>9,285</td>
<td>150</td>
<td>536</td>
<td>9,971</td>
<td>93%</td>
</tr>
<tr>
<td>2001</td>
<td>12,932</td>
<td>119</td>
<td>638</td>
<td>13,689</td>
<td>94%</td>
</tr>
<tr>
<td>2002</td>
<td>9,179</td>
<td>84</td>
<td>698</td>
<td>9,961</td>
<td>92%</td>
</tr>
<tr>
<td>2003</td>
<td>5,715</td>
<td>45</td>
<td>597</td>
<td>6,357</td>
<td>90%</td>
</tr>
<tr>
<td>2004</td>
<td>7,282</td>
<td>32</td>
<td>440</td>
<td>7,754</td>
<td>94%</td>
</tr>
<tr>
<td>2005</td>
<td>8,469</td>
<td>144</td>
<td>968</td>
<td>9,581</td>
<td>88%</td>
</tr>
<tr>
<td>2006</td>
<td>3,320</td>
<td>584</td>
<td>1,337</td>
<td>5,241</td>
<td>63%</td>
</tr>
<tr>
<td>2007</td>
<td>3,182</td>
<td>1,062</td>
<td>1,042</td>
<td>5,286</td>
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<tr>
<td>2008</td>
<td>3,097</td>
<td>816</td>
<td>915</td>
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<td>64%</td>
</tr>
<tr>
<td>2009</td>
<td>3,411</td>
<td>1,004</td>
<td>807</td>
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<tr>
<td>2010</td>
<td>6,293</td>
<td>1,404</td>
<td>1,080</td>
<td>8,777</td>
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<td>9,423</td>
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<td>1,052</td>
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<td>82%</td>
</tr>
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<td>2012</td>
<td>10,838</td>
<td>1,187</td>
<td>1,554</td>
<td>13,579</td>
<td>80%</td>
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<td>30,393</td>
<td>2,587</td>
<td>3,194</td>
<td>36,174</td>
<td>84%</td>
</tr>
<tr>
<td>2014</td>
<td>35,456</td>
<td>8,977</td>
<td>4,204</td>
<td>48,637</td>
<td>73%</td>
</tr>
<tr>
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<td>33,988</td>
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<td>6,330</td>
<td>48,415</td>
<td>70%</td>
</tr>
<tr>
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<td>73,081</td>
<td>9,697</td>
<td>10,212</td>
<td>92,990</td>
<td>79%</td>
</tr>
<tr>
<td>2017</td>
<td>60,566</td>
<td>8,245</td>
<td>10,899</td>
<td>79,710</td>
<td>76%</td>
</tr>
<tr>
<td>2018</td>
<td>74,677</td>
<td>9,659</td>
<td>13,392</td>
<td>97,728</td>
<td>76%</td>
</tr>
</tbody>
</table>


**Notes:** Data represent individuals. **Closures** are administratively closed cases; they include cases in which a credible fear determination is not made for reasons such as the individual withdraws the claim or is no longer in expedited removal.
Appendix C. Defensive Asylum Applications

The “Total Applications” column in Table C-1 provides the underlying data for Figure 3 on defensive asylum applications filed annually since FY2008. In addition, Table C-1 provides data on the two components of that total: (1) asylum applications originally filed as affirmative applications with USCIS (column 2), and (2) asylum applications originally filed as defensive applications with EOIR (column 3) (see “Defensive Asylum”). As shown in Table C-1, the growth in the total number of defensive asylum applications filed in recent years prior to FY2018 has been driven mainly by an increase in asylum applications first filed in immigration court.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Applications First Filed With USCIS</th>
<th>Applications First Filed With EOIR</th>
<th>Total Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>23,571</td>
<td>12,119</td>
<td>35,690</td>
</tr>
<tr>
<td>2010</td>
<td>20,133</td>
<td>12,728</td>
<td>32,861</td>
</tr>
<tr>
<td>2011</td>
<td>23,441</td>
<td>17,973</td>
<td>41,414</td>
</tr>
<tr>
<td>2012</td>
<td>24,594</td>
<td>19,903</td>
<td>44,497</td>
</tr>
<tr>
<td>2013</td>
<td>19,926</td>
<td>23,412</td>
<td>43,338</td>
</tr>
<tr>
<td>2014</td>
<td>16,262</td>
<td>31,104</td>
<td>47,366</td>
</tr>
<tr>
<td>2015</td>
<td>17,296</td>
<td>46,070</td>
<td>63,366</td>
</tr>
<tr>
<td>2016</td>
<td>12,722</td>
<td>69,156</td>
<td>81,878</td>
</tr>
<tr>
<td>2017</td>
<td>22,161</td>
<td>120,984</td>
<td>143,145</td>
</tr>
<tr>
<td>2018</td>
<td>48,854</td>
<td>110,736</td>
<td>159,590</td>
</tr>
</tbody>
</table>


Notes: Data are for applications filed in removal, deportation, exclusion, and asylum-only proceedings only.
Appendix D. EOIR Asylum Decisions

EOIR immigration judges decide defensive asylum cases. An asylum application is defensive when the applicant is in standard removal proceedings in immigration court (see “Defensive Asylum”). Table D-1 provides the underlying data for Figure 5 on defensive asylum cases decided annually since FY2009.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Cases Granted</th>
<th>Cases Denied</th>
<th>Cases Closed (Administrative)</th>
<th>Cases Closed (Other)</th>
<th>Total Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Number</td>
<td>Number</td>
<td>Number</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>10,277</td>
<td>11,333</td>
<td>2,260</td>
<td>15,951</td>
<td>39,821</td>
</tr>
<tr>
<td>2010</td>
<td>9,890</td>
<td>9,615</td>
<td>3,368</td>
<td>14,131</td>
<td>37,004</td>
</tr>
<tr>
<td>2011</td>
<td>11,524</td>
<td>10,611</td>
<td>1,463</td>
<td>12,257</td>
<td>35,855</td>
</tr>
<tr>
<td>2012</td>
<td>11,957</td>
<td>9,588</td>
<td>4,977</td>
<td>11,963</td>
<td>38,485</td>
</tr>
<tr>
<td>2013</td>
<td>11,044</td>
<td>9,897</td>
<td>10,003</td>
<td>12,457</td>
<td>43,401</td>
</tr>
<tr>
<td>2014</td>
<td>9,653</td>
<td>10,069</td>
<td>7,244</td>
<td>11,896</td>
<td>38,862</td>
</tr>
<tr>
<td>2015</td>
<td>9,004</td>
<td>9,527</td>
<td>11,954</td>
<td>12,436</td>
<td>42,921</td>
</tr>
<tr>
<td>2016</td>
<td>9,638</td>
<td>12,525</td>
<td>18,227</td>
<td>14,444</td>
<td>54,834</td>
</tr>
<tr>
<td>2017</td>
<td>11,620</td>
<td>18,699</td>
<td>9,224</td>
<td>16,340</td>
<td>55,883</td>
</tr>
<tr>
<td>2018</td>
<td>14,271</td>
<td>28,229</td>
<td>1,703</td>
<td>24,092</td>
<td>68,295</td>
</tr>
</tbody>
</table>


Notes: Data represent individuals. Data include both initial case completions (in removal, deportation, exclusion, and asylum only proceedings) and subsequent case completions (e.g., in proceedings that begin when an immigration judge grants a motion to reopen, reconsider, or recalendal). Cases Closed (Administrative) are cases that are closed without a final order. Cases Closed (Other) includes cases that are abandoned, not adjudicated, or withdrawn. Percentages for each fiscal year may not total due to rounding.

Table D-2 provides data on a subset of EOIR asylum decisions involving credible fear claims. It is limited to decisions in defensive asylum cases that originated with an individual receiving a positive credible fear of persecution finding from USCIS.
### Table D-2. Immigration Judge Decisions in Asylum Cases with Initial Credible Fear Findings, FY2009-FY2018

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Cases Granted</th>
<th>Cases Denied</th>
<th>Cases Closed (Administrative)</th>
<th>Cases Closed (Other)</th>
<th>Total Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Number</td>
<td>Number</td>
<td>Number</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>921</td>
<td>585</td>
<td>4</td>
<td>233</td>
<td>1,743</td>
</tr>
<tr>
<td>2010</td>
<td>929</td>
<td>490</td>
<td>47</td>
<td>198</td>
<td>1,664</td>
</tr>
<tr>
<td>2011</td>
<td>1,367</td>
<td>785</td>
<td>43</td>
<td>314</td>
<td>2,509</td>
</tr>
<tr>
<td>2012</td>
<td>1,508</td>
<td>953</td>
<td>108</td>
<td>461</td>
<td>3,030</td>
</tr>
<tr>
<td>2013</td>
<td>1,399</td>
<td>1,481</td>
<td>140</td>
<td>581</td>
<td>3,601</td>
</tr>
<tr>
<td>2014</td>
<td>1,684</td>
<td>2,722</td>
<td>308</td>
<td>1,231</td>
<td>5,945</td>
</tr>
<tr>
<td>2015</td>
<td>1,958</td>
<td>2,810</td>
<td>1,811</td>
<td>1,327</td>
<td>7,906</td>
</tr>
<tr>
<td>2016</td>
<td>2,491</td>
<td>3,805</td>
<td>3,336</td>
<td>1,697</td>
<td>11,329</td>
</tr>
<tr>
<td>2017</td>
<td>4,009</td>
<td>7,410</td>
<td>1,698</td>
<td>2,655</td>
<td>15,772</td>
</tr>
<tr>
<td>2018</td>
<td>5,653</td>
<td>10,199</td>
<td>273</td>
<td>4,870</td>
<td>20,995</td>
</tr>
</tbody>
</table>

**Source:** CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, generated October 30, 2018.

**Notes:** Data represent individuals. Data include both initial case completions (in removal, deportation, exclusion, and asylum only proceedings) and subsequent case completions (e.g., in proceedings that begin when an immigration judge grants a motion to reopen, reconsider, or recalendar). Cases Closed (Administrative) are cases that are closed without a final order. Cases Closed (Other) includes cases that are abandoned, not adjudicated, or withdrawn. Percentages for each fiscal year may not total due to rounding.

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### Acknowledgments

CRS Visual Information Specialist Amber Hope Wilhelm prepared the figures for this report.
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Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border

Updated July 21, 2020

Before the Coronavirus Disease 2019 (COVID-19) pandemic, the past few years had seen a marked increase in the number of apprehensions of non-U.S. nationals (aliens) at the border seeking to unlawfully enter the country. But entry restrictions at the U.S.-Mexico border in response to the COVID-19 pandemic have significantly reduced the number of alien apprehensions. Border closures and emergency measures in other countries have also restricted the ability of some “migrant caravans” to reach the United States. Even so, there continues to be considerable attention concerning the treatment of aliens without legal immigration status who arrive at or near the U.S.-Mexico border.

This Legal Sidebar briefly examines the laws generally governing the admission and exclusion of aliens at the border, including the procedures for asylum seekers and the circumstances in which arriving aliens may be detained. The Sidebar also addresses special rules for the treatment of unaccompanied alien children (UACs), recent policy changes affecting the processing of aliens at the border, and legislative proposals that would alter the scope of protections for arriving aliens. Table 1 provides an overview of the existing laws governing the detention and removal process for aliens.

General Statutory Framework Governing the Removal of Aliens

The Immigration and Nationality Act (INA) establishes a number of avenues by which aliens can be denied entry or removed from the United States. Typically, when the Department of Homeland Security (DHS) seeks to remove an alien found in the interior of the United States, it institutes removal proceedings under INA §240. These “formal” proceedings are conducted by an immigration judge (IJ) within the Department of Justice’s Executive Office for Immigration Review. Aliens are afforded a number of procedural protections in such proceedings. For example, the alien may be represented by counsel at his or her own expense, potentially apply for relief from removal (such as asylum), present testimony and evidence, and appeal an adverse decision to the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying U.S. immigration laws. Additionally, the alien may, as authorized by statute, seek judicial review of a final order of removal in the judicial circuit in which the removal proceedings were completed. DHS may (but is not required to) detain an alien during the pendency of formal removal proceedings, but may release the alien on bond or

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the alien’s own recognizance. However, detention is mandatory if the alien is removable on certain criminal or terrorist-related grounds except in limited circumstances.

**Expedited Removal**

The INA sets forth a separate removal process for certain arriving aliens who have not been admitted into the United States—a process that significantly differs from the formal removal proceedings governed by INA §240. Specifically, INA §235(b)(1) provides that an alien arriving at the U.S. border or a port of entry may be removed from the United States without further hearing or review if the alien lacks valid entry documents or has attempted to procure admission by fraud or misrepresentation. (Aliens found inadmissible on most other grounds, including because of criminal activity, are not subject to expedited removal and instead are placed in formal removal proceedings.) The expedited removal statute also authorizes—but does not require—DHS to apply this process to aliens inadmissible on the same grounds who have not been admitted or paroled into the United States by immigration authorities (i.e., unlawful entrants), and who have been physically present in the United States for less than two years. Based on this authority, DHS has implemented expedited removal with respect to the following categories of aliens:

1. arriving aliens seeking entry into the United States;
2. aliens who entered the United States by sea without being admitted or paroled, and who have been in the country less than two years; and
3. aliens apprehended within 100 miles of the U.S. border within 14 days of entering the country, and who have not been admitted or paroled.

In 2019, DHS exercised authority to employ expedited removal to the full degree authorized by INA §235(b)(1), to include all aliens physically present in the United States without being admitted or paroled, who have been in the country less than two years, when those aliens lack valid entry documents or procured admission through fraud or misrepresentation. A federal district court initially enjoined DHS from implementing this initiative pending the outcome of a lawsuit challenging that expansion, but the U.S. Court of Appeals for the D.C. Circuit overturned that decision, enabling DHS to apply expedited removal in the interior of the United States pending the outcome of the litigation.

An alien in expedited removal has limited procedural protections. Unlike in formal removal proceedings, the alien has no right to counsel during the expedited removal process, no right to a hearing, and no right to appeal an adverse ruling to the BIA. Judicial review of an expedited removal order also is limited in scope. Further, the INA provides that an alien “shall be detained” pending a determination as to whether the alien should be subject to expedited removal. DHS, however, has the discretion to parole an alien undergoing expedited removal in limited circumstances (e.g., because of a medical emergency), allowing the alien to temporarily enter the United States pending a determination on whether the alien will be admitted. As an alternative to expedited removal, DHS may permit the alien to voluntarily return to his or her country if the alien intends, and is able, to depart the United States immediately.

**Aliens Seeking Asylum**

Although an alien subject to expedited removal typically has no right to administrative review, there is an exception if the alien expresses either an intent to apply for asylum or a more generalized fear of persecution if removed to a particular country. In these circumstances, the alien must be referred to an asylum officer within DHS’s U.S. Citizenship and Immigration Services (USCIS) to determine whether the alien has a credible fear of persecution (but this exception does not apply to certain aliens arriving from Canada who could seek protection in that country). Under this “low screening standard,” the alien has to show a “substantial and realistic possibility of success on the merits” of an application for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). A determination that
the alien has shown a credible fear does not mean the alien will be granted relief from removal. Instead, the alien will be placed in formal removal proceedings under INA §240 in lieu of expedited removal, and may pursue an application for asylum and related protections in those proceedings. To be granted such relief, the alien will have to satisfy a higher threshold of proof of eligibility for relief than was required to satisfy the initial credible fear screening (e.g., a “well-founded” fear of persecution to qualify for asylum, or that it is “more likely than” not the alien would face torture to obtain CAT protection).

The INA provides that an alien who establishes a credible fear of persecution “shall be detained” during the pendency of formal removal proceedings, but authorizes DHS to grant parole as a matter of discretion. For many years, immigration authorities had construed the statute and regulations to provide that, when an alien apprehended between points of entry and initially screened for expedited removal was placed in formal removal proceedings following a credible fear determination, that alien could seek review of DHS’s custody decision at a bond hearing and potentially be released from custody during the pendency of those proceedings. In 2019 Attorney General William Barr reversed this position, ruling instead that aliens subject to expedited removal who are placed in formal removal proceedings after a positive credible fear determination may not be released on bond, “whether they are arriving at the border or are apprehended in the United States.” But a federal district court held that this mandatory detention scheme unconstitutionally denies aliens who have entered the United States the opportunity to seek release on bond. The U.S. Court of Appeals for the Ninth Circuit has affirmed that decision. As a result, unlawful entrants transferred to formal removal proceedings for consideration of asylum applications may not be indefinitely detained by immigration authorities without a bond hearing.

If an alien does not establish a credible fear of persecution, the alien may still seek administrative review of the asylum officer’s determination before an IJ (if the alien declines further review, the asylum officer will issue an order of removal). The IJ’s review must be conducted “within 24 hours, but in no case later than 7 days” after the asylum officer’s decision. Unless DHS grants parole, the alien will remain detained pending the IJ’s determination. If the IJ concurs with the asylum officer’s finding, the alien will remain subject to expedited removal; but if the IJ finds that the alien has a credible fear, the alien will be placed in formal removal proceedings, and may pursue asylum and related protections in those proceedings.

Aliens Who Claim to Be U.S. Citizens, Lawful Permanent Residents, Admitted Refugees, or Persons Who Have Been Granted Asylum

The INA also provides for an exception to expedited removal when a person claims to be a U.S. citizen, a lawful permanent resident (LPR), an admitted refugee, or a person granted asylum. The immigration officer must attempt to verify the claim before issuing an expedited removal order. If the immigration officer cannot verify the claim, the claimant may still obtain administrative review before an IJ. The claimant will be detained pending consideration of the claim unless DHS grants parole.

Special Rules Concerning the Treatment and Removal of UACs

Federal law sets forth different rules for the treatment of UACs, defined by statute to include those under 18 without lawful immigration status who either (1) have no parent or legal guardian in the United States, or (2) have no parent or legal guardian in the United States available to provide care and physical custody.

UACs are not subject to expedited removal, and are generally placed in formal removal proceedings under INA §240, regardless of whether found in the United States or at the border. DHS may permit a UAC to voluntarily return to his or her country in lieu of removal proceedings if the UAC is “a national or habitual resident of a country that is contiguous with the United States” (i.e., Mexico or Canada), and the child (1) has not been a victim of human trafficking (or is not at risk of human trafficking upon return to the child’s native country); (2) does not have a credible fear of persecution in his or her country; and (3) is capable of independently withdrawing his or her application for admission to the United States.
A UAC believed to be from Mexico or Canada is required to be screened within 48 hours of apprehension to determine whether he or she meets the criteria for voluntary return. If the UAC does not meet the criteria (e.g., the UAC is from a noncontiguous country or, even though the UAC is from a contiguous country, he or she has a credible fear of persecution), or no determination is made within the 48-hour screening period, the UAC will be placed in the custody of the Department of Health and Human Services’ Office of Refugee Resettlement (ORR) pending formal removal proceedings under INA §240. The UAC typically must be transferred to ORR within 72 hours after DHS determines that the child is a UAC. Following transfer to ORR, the agency generally must place the UAC “in the least restrictive setting that is in the best interest of the child.” In assessing the appropriate setting, ORR may consider the child’s “danger to self, danger to the community, and risk of flight,” and it may place the child with a sponsoring individual or entity after determining that the sponsor is capable of providing for the child’s physical and mental well-being.” In practice, executive officials have told Congress that the majority of UACs are released to individual sponsors, most of whom are parents or close relatives, within 60 days.

Federal law also confers additional protections for UACs who apply for asylum that are generally unavailable to other aliens. The one-year time limitation for most asylum applications does not apply to UACs. A UAC also may apply for asylum even if he or she may be removed, pursuant to a safe third country agreement, to a different country where he or she would not face persecution and could seek asylum-related protections. Further, while aliens seeking asylum generally apply either “affirmatively” with USCIS or “defensively” in removal proceedings before an IJ, USCIS asylum officers have initial jurisdiction over applications filed by UACs. A USCIS asylum officer has initial jurisdiction even if the UAC is in removal proceedings (though if the asylum officer determines that the UAC is not eligible for asylum, the UAC may still pursue the application before the IJ in formal removal proceedings).

Accompanied Alien Children

While UACs are not subject to expedited removal, accompanied alien children arriving with family members may be subject to expedited or formal removal proceedings. Generally, DHS detains children and accompanying parents in family residential facilities for limited periods (typically not exceeding 20 days due to a court settlement agreement) before releasing them for the pendency of removal proceedings. In 2018, DOJ started a “zero tolerance” policy to criminally prosecute aliens who unlawfully enter the United States at the southern border, resulting in the separation of children from parents subject to prosecution (following the parents’ transfer to criminal custody by DOJ, the children were treated by DHS as UACs and transferred to ORR custody). A federal court issued a preliminary injunction barring DHS from detaining parents without their minor children at the border, unless the parents are unfit or present a danger to the child, or have a criminal history or communicable disease. The court also ordered DHS to reunite separated families. Following the injunction, DHS stopped referring parents for unlawful entry prosecution if they had entered the United States as part of a family unit. The agency also allowed the separation of parents from children only if the parent has a criminal history, presents a danger to the child, has a communicable disease, or presents a fraudulent claim of parental relationship. The government, which has made efforts to reunite families that have been separated, is not appealing the injunction.

Recent Policy Changes Affecting the Processing of Aliens at the Border

Since 2019, the Trump Administration has implemented new policies affecting the processing of aliens arriving at the southern border who would normally be subject to expedited removal (e.g., because they lack valid entry documents). These policies, discussed in more detail in other CRS products, include the following:

1. The Migrant Protection Protocols (MPP) (or “Remain in Mexico” policy). Under this 2019 policy, some aliens arriving at the southern border are placed in formal removal
proceedings rather than expedited removal, and returned to Mexico pending the outcome of those proceedings. The MPP does not apply to Mexican nationals, UACs, or those who show that it is more likely than not they will face persecution or torture in Mexico.

2. The **third-country transit asylum bar**. In 2019, DHS and DOJ jointly promulgated a rule that makes aliens arriving at the southern border ineligible for asylum if they traveled through another country without first seeking protection in that country. Such aliens will be found not to have a credible fear of persecution, but may pursue withholding of removal and CAT protection in formal removal proceedings if they show a “reasonable fear” of persecution or torture. The rule potentially applies to UACs, who are placed in formal removal proceedings rather than expedited removal. The rule is currently enjoined from implementation by a federal district court.

3. **Safe third country agreements (STCAs).** In 2019, DHS signed STCAs with Guatemala, Honduras, and El Salvador to enable the transfer of asylum seekers arriving at the U.S. southern border to those countries. So far only the Guatemalan STCA has been implemented, and only Honduran and El Salvadoran nationals have been subject to it. Under the STCA, aliens screened for expedited removal who indicate an intention to apply for asylum or a fear of persecution are sent to the receiving country (e.g., Guatemala) to pursue relief. But if the alien shows that he or she is more likely than not to face persecution in the receiving country, the STCA does not apply and DHS will proceed with the expedited removal process. The STCA does not apply to UACs.

4. **Border entry restrictions.** Responding to the COVID-19 pandemic, DHS limited nonessential travel at land ports of entry at the northern and southern borders. These measures were supplemented by an order from the Centers for Disease Control and Prevention, barring entry for most aliens arriving from Canada or Mexico and requiring their immediate return to the countries they entered from (or their country of origin). DHS has temporarily suspended the inspection and processing of aliens arriving at the border in most cases. Reportedly, UACs have also been subject to these entry restrictions.

### Recent Legislative Activity

Proposals in the 116th Congress would alter procedures for arriving aliens at the border, though none have been enacted. Some address the expedited removal process for arriving aliens, including review of asylum claims raised by such persons. For example, some bills (H.R. 517, H.R. 3360) would heighten the credible fear standard, while others (H.R. 3775, H.R. 3918, H.R. 4202) would clarify which immigration officers may serve as “asylum officers.” Some bills would address the detention of aliens placed in expedited removal, either by barring prolonged detention (S. 1243, H.R. 2415, H.R. 3918); or, conversely, allowing indefinite detention and limiting the availability of parole (S. 1303, S. 1494, H.R. 586, H.R. 2522, H.R. 3360). Proposed legislation would also modify current law governing UACs. Some bills (H.R. 586, H.R. 2522, H.R. 3940, S. 1303, S. 1494) would allow any UAC to qualify for voluntary return in lieu of removal proceedings, even if the UAC is not from a contiguous country; or require the placement of UACs in expedited removal if they engaged in certain criminal activity (S. 1303, H.R. 2522). In addition, some bills would remove DHS’s ability to return arriving aliens to Mexico or Canada pending the outcome of formal removal proceedings (H.R. 5207), or require an alien’s “affirmative consent” before being returned under that process (H.R. 3775). One bill (H.R. 3918) would prohibit the separation of an alien minor from a parent or legal guardian near the border except in certain circumstances.
Table 1. Procedures for Exclusion and Removal of Aliens

<table>
<thead>
<tr>
<th>Category</th>
<th>Removal Process</th>
<th>Procedural Rights and Protections</th>
<th>Detention and Custody</th>
<th>Credible Fear and Asylum</th>
<th>Voluntary Departure/ Voluntary Return in Lieu of Removal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alien within the interior of the United States</td>
<td>Generally placed in formal removal proceedings under INA §240 (unless the alien meets the statutory criteria to be placed in a different type of removal proceeding).</td>
<td>Aliens in formal removal have a right to counsel, to a hearing, to present evidence and apply for relief from removal, to appeal adverse decision to BIA, and (as authorized by statute) to seek judicial review.</td>
<td>DHS may detain alien during the pendency of proceedings, or release the alien on bond or conditional parole. Aliens removable for certain criminal or terrorist activity generally must be detained.</td>
<td>Alien may apply for asylum and other protections during formal removal proceedings; no credible fear assessment is required before applying for asylum.</td>
<td>Alien may apply for voluntary departure under INA §240B prior to or upon completion of proceedings if statutorily eligible.</td>
</tr>
<tr>
<td>(1) Arriving alien (2) Alien found in any part of the United States who has not been admitted or paroled, and who has been in the country less than two years</td>
<td>Generally placed in expedited removal under INA §235(b)(1) if alien lacks valid entry documents or has attempted to procure admission through fraud/misrepresentation (if inadmissible on other grounds, alien is subject to formal removal proceedings under INA §240). DHS may opt to return aliens encountered at or near the U.S.-Mexico border to Mexico pending formal removal proceedings under the MPP instead of expedited removal.</td>
<td>Generally no right to counsel, hearing, or further review in expedited removal. Judicial review of expedited removal order is available only in limited circumstances. But greater procedural protections are afforded if an alien otherwise subject to expedited removal is placed in formal removal proceedings under the MPP.</td>
<td>An alien is normally detained during expedited removal, including while awaiting a credible fear determination, but DHS may parole the alien for &quot;urgent humanitarian reasons&quot; or &quot;significant public benefit.&quot; If an alien screened for expedited removal is placed in formal removal proceedings, detention is mandatory unless parole is granted. The alien generally may not be released on bond. (An injunction now requires bond hearings for unlawful entrants initially screened for expedited removal.)</td>
<td>In expedited removal proceedings, a credible fear determination is required if an alien expresses an intent to apply for asylum or a fear of persecution. If the alien shows a credible fear, asylum and related protections may be pursued in formal removal proceedings under INA §240; if a credible fear claim is rejected by the asylum officer, the alien may seek review from an IJ.</td>
<td>DHS may permit an alien to voluntarily return to his or her country in lieu of expedited removal if he intends, and is able, to depart the United States immediately.</td>
</tr>
</tbody>
</table>

Note: Safe third country agreements and third-country transit bar may preclude consideration of many asylum claims.
<table>
<thead>
<tr>
<th>Category</th>
<th>Procedural Rights and Protections</th>
<th>Detention and Custody</th>
<th>Credible Fear and Asylum</th>
<th>Voluntary Departure/ Voluntary Return in Lieu of Removal</th>
</tr>
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<tr>
<td>Unaccompanied Alien Children</td>
<td>UACs may only be placed in removal proceedings under INA §240, regardless of whether they are found in the interior or arriving at the U.S. border. (UACs are not subject to the MPP.)</td>
<td>Aliens in formal removal have a right to counsel, to a hearing, to present evidence and apply for relief from removal, to appeal adverse decision to BIA, and (as authorized by statute) to seek judicial review.</td>
<td>UACs are placed in the custody of ORR during pendency of removal proceedings. ORR may place a UAC with a sponsor who “is capable of providing for the child’s physical and mental well-being.”</td>
<td>UACs are not categorically exempted from the third-country transit asylum bar. Non-disqualified UACs may apply for asylum during removal proceedings without an initial credible fear assessment. UACs are not subject to one-year limitation for seeking asylum, and may pursue asylum even if they may safely be removed to a third country. USCIS has initial jurisdiction over UACs’ asylum applications even in removal proceedings. But a UAC may still pursue application before an IJ during removal proceedings. A UAC may be permitted to voluntarily return to his or her country in lieu of formal removal proceedings if UAC is “a national or habitual resident” of Mexico or Canada, and the alien (1) lacks a credible fear of persecution; (2) is not a victim or likely victim of trafficking; and (3) is capable of agreeing to return.</td>
</tr>
</tbody>
</table>
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Citizenship and Immigration Statuses of the U.S. Foreign-Born Population

The U.S. foreign-born population consists of individuals living in the United States who were not U.S. citizens at birth. An estimated 44.9 million foreign-born people live in the United States, representing 13.7% of the total U.S. population in 2019 (the most recent data from the American Community Survey [ACS]).

The proportion of foreign-born has changed over time. The 1920 percentage of foreign-born (13.2%) was similar to current levels, then declined over the next five decades, reaching a low of 4.7% in 1970. Over the last five decades, the proportion has increased (Figure 1).

Figure 1. U.S. Foreign-Born: Total and Percentage of Total Population, 1920-2019

![Graph showing the total and percentage of foreign-born population from 1920 to 2019.](https://data.census.gov)


The foreign-born are a heterogeneous population with regard to citizenship and immigration status. Subgroups include:

- **resident nonimmigrants**, a subset of nonimmigrant visa holders admitted for purposes associated with U.S. residence in categories ranging from students to diplomats to workers;
- **lawful permanent residents** (LPRs) granted green cards through family-sponsored and employment-based preference categories, refugee and asylee status, the diversity immigrant visa (DV) program, and other pathways;
- **naturalized U.S. citizens**, who gained U.S. citizenship after fulfilling requirements established by Congress and outlined in the Immigration and Nationality Act; and
- **unauthorized and quasi-legal immigrants**, including those who have entered the United States without inspection or have overstayed their period of lawful admission (overstays), and those who hold a temporary, discretionary status such as Deferred Action for Childhood Arrivals (DACA) or Temporary Protected Status (TPS).

**Resident Nonimmigrants**

Nonimmigrant visas are issued to foreign nationals for specific purposes and on temporary bases. In recent fiscal years, the Department of State (DOS) has issued 9 million to 10 million nonimmigrant visas annually—the majority in categories related to nonresidential purposes. However, some nonimmigrants are admitted for purposes associated with U.S. residence. An estimated 2.3 million nonimmigrant workers, students, exchange visitors, diplomats, and their relatives were residing in the United States in 2016, according to the most recent Department of Homeland Security (DHS) estimate.

The largest category of nonimmigrant visa issuances, excluding tourism and business visitors, is temporary workers, particularly H-2A visas (agricultural workers), H-1B visas (specialty occupation workers), and H-2B visas (nonagricultural workers). In FY2019, DOS issued 204,801 H-2A visas, 188,123 H-1B visas, and 97,623 H-2B visas.

**LPRs**

An estimated 13.6 million LPRs lived in the United States in 2019, according to DHS. Approximately 1 million people become LPRs each year. In FY2019, 45% of individuals who became LPRs were new arrivals to the United States and 55% adjusted to LPR status from temporary (nonimmigrant) status within the United States. The largest number of LPRs are admitted through family-sponsored categories, followed by employment-based categories, refugee and asylee status, and the DV program (Figure 2).
Statutory caps limit the annual number of individuals who can be granted LPR status through the DV program (55,000), employment-based system (140,000), and family-sponsored system (480,000). The latter includes numerically limited (226,000) preference immigrants and numerically unlimited immediate relatives of U.S. citizens. Therefore, the number of persons who acquire LPR status through the family-sponsored system may, and regularly does, exceed its annual permeable limit. LPRs from any single country cannot exceed 7% of the total annual limit of numerically limited family- and employment-based preference immigrants.

DHS estimates that 9.2 million LPRs were eligible to naturalize, or become U.S. citizens, in FY2019 based on meeting the residence requirements (typically five years in LPR status) for application.

Naturalized Citizens

LPRs who meet certain U.S. residence and other legal requirements may choose to naturalize and become U.S. citizens. Approximately 23.2 million foreign-born individuals in the United States are naturalized citizens, representing more than half (52%) of the foreign-born population in 2019. In FY2019, 843,593 individuals naturalized.

The proportion of naturalized citizens relative to the total foreign-born population peaked in 1950 (74.5%) and then declined, reaching its lowest point (40.3%) in 2000, before increasing again to just over half of all foreign-born individuals in 2019 (Figure 3).

Unauthorized and Quasi-legal Population

The unauthorized population is challenging to measure. There are no official counts of unauthorized immigrants living in the United States in administrative data. Government surveys do not collect information on immigration status. However, federal agencies and nongovernmental researchers have produced estimates of the unauthorized population, drawing on survey data using various methodologies.

Recent estimates from the Congressional Budget Office (CBO) and nongovernmental research institutes, including Pew Research Center, the Center for Migration Studies, and the Migration Policy Institute, estimate that there were 10.5 million to 11 million unauthorized individuals living in the United States in 2018 and 2019.

There is generally consensus among researchers that the unauthorized population increased in size starting in the late 1990s until it reached a peak of approximately 12 million in 2007. Some researchers estimate the unauthorized population has declined in recent years while others (including CBO) estimate that the population has plateaued.

Some foreign-born individuals have quasi-legal statuses that grant temporary relief from deportation and the ability to apply for work authorization. These groups include individuals granted TPS (319,465 as of March 2021, according to U.S. Citizenship and Immigration Services [USCIS]), which is a blanket form of humanitarian relief; and DACA (636,390 as of December 31, 2020, according to USCIS), which is granted to certain eligible childhood arrivals, among others.

Researchers find that government surveys tend to undercount certain foreign born individuals, particularly the unauthorized. Because of these undercounts, the sum of the subgroups enumerated in each section of this In Focus exceeds the total foreign born population provided in the introduction (44.9 million).
Additional Sources of Information

- CRS Report R42866, Permanent Legal Immigration to the United States: Policy Overview
- CRS Report R45040, Immigration: Nonimmigrant (Temporary) Admissions to the United States
- CRS Report R43366, U.S. Naturalization Policy
- CRS Report RS20844, Temporary Protected Status: Overview and Current Issues
- CRS Report R45995, Unauthorized Childhood Arrivals, DACA, and Related Legislation

Holly Straut-Eppsteiner, Analyst in Immigration Policy
The Employment-Based Immigration Backlog

March 26, 2020
The Employment-Based Immigration Backlog

Currently in the United States, almost 1 million lawfully present foreign workers and their family members have been approved for, and are waiting to receive, lawful permanent resident (LPR) status (a green card). This employment-based backlog is projected to double by FY2030. It exists because the number of foreign workers whom U.S. employers sponsor for green cards each year exceeds the annual statutory green card allocation. In addition to this numerical limit, a statutory 7% per-country ceiling prevents the monopolization of employment-based green cards by a few countries.

For nationals from large migrant-sending countries—India and China—the numerical limit and per-country ceiling have created inordinately long waits for employment-based green cards. New prospective immigrants entering the backlog (beneficiaries) outnumber available green cards by more than two to one. Many Indian nationals will have to wait decades to receive a green card. The backlog can impose significant hardship on these prospective immigrants, many of whom already reside in the United States. It can also disadvantage U.S. employers, relative to other countries’ employers, for attracting highly trained workers.

Solutions for addressing the employment-based backlog have been introduced in Congress. In July 2019, the House passed H.R. 1044, the Fairness for High-Skilled Immigrants Act. Currently under consideration by the Senate (S. 386, as amended), the bill would eliminate the 7% per-country ceiling. Supporters of the bill argue it would ultimately treat all prospective immigrants more equitably regardless of origin country. Opponents contend it would allow nationals from a few countries, and their U.S. employers, to dominate most employment-based immigration. They argue that S. 386 ignores the fundamental issue of too few employment-based green cards for an economy that has doubled in size since Congress established the current limits in 1990.

This report describes the results of a CRS analysis that projects the 10-year impact of eliminating the 7% per-country ceiling on the first three employment-based immigration categories: EB1, EB2, and EB3. It models outcomes under current law and under the provisions of S. 386, as amended. The bill would phase out the per-country ceiling over three years and reserve green cards for certain foreign workers, but it would not increase the current limit of 120,120 green cards for the three employment-based immigration categories.

The analysis projects similar outcomes for all three employment-based categories: Indian, and to a lesser extent Chinese, nationals in the backlog would experience shorter wait times under S. 386 compared with current law. The bill would eliminate current EB1, EB2, and EB3 backlogs in 3, 17, and 7 years, respectively, with modest differences by country of origin. Subsequently, new prospective immigrants would receive green cards on a first-come, first-served basis with equal wait times within each category, regardless of origin country. By FY2030, EB1, EB2, and EB3 petition holders could expect to wait 7, 37, and 11 years, respectively. Maintaining the 7% per-country ceiling, by contrast would substantially increase the already long wait times for Indian and Chinese nationals, but it would continue to allow those from elsewhere to receive green cards relatively quickly.

S. 386 would not reduce future backlogs compared to current law. Given current trends, the analysis projects that by FY2030, the EB1 backlog would grow from an estimated 119,732 individuals to an estimated 268,246 individuals; the EB2 backlog would grow from 627,448 to 1,471,360 individuals; and the EB3 backlog, from 168,317 to 456,190 individuals. The total backlog for all three categories would increase from an estimated 915,497 to 2,195,795 individuals by FY2030. These outcomes would occur whether or not S. 386 is enacted, because the bill maintains the current limit on number of green cards issued.

Some legislative options include one or more of the following: maintaining current law, removing the per-country ceiling, increasing the number of employment-based green cards, and reducing the number of workers entering the employment-based immigration pipeline. Broadly restructuring the entire employment-based immigration system could involve merit-based or place-based approaches.
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Introduction

The United States currently has a population of almost 1 million lawfully present foreign workers and accompanying family members who have been approved for, but have not yet received, a green card or lawful permanent resident (LPR) status. This queue of prospective immigrants—the employment-based backlog—is dominated by Indian nationals. It has been growing for decades and is projected to double in less than 10 years.

The employment-based immigrant backlog exists because the annual number of foreign workers whom U.S. employers hire and then sponsor to enter the employment-based immigration pipeline has regularly exceeded the annual statutory allocation of green cards. The Immigration and Nationality Act (INA) that governs U.S. immigration policy limits the total annual number of employment-based green cards to 140,000 individuals. This worldwide limit is split among five employment-based categories—the first three of which each receive 40,040 green cards, and the other two receive 9,940 each. (See Appendix A for more detailed category information.)

Apart from these numerical limits, the INA also imposes a 7% per-country cap or ceiling that applies to each of the five categories. The 7% ceiling is not an allocation to individual countries but an upper limit established to prevent the monopolization of employment-based green cards by a small number of countries. This percentage limit is breached frequently for the countries that send the largest number of prospective employment-based immigrants, due to reallocations from other categories and countries.

For nationals from most immigrant-sending countries, the employment-based backlog does not pose a major obstacle to obtaining a green card. Current wait times to receive a green card for those individuals are relatively short, often under a year. This is particularly the case for nationals from countries that send relatively few employment-based immigrants to the United States.

However, for nationals from India, and to a lesser extent China and the Philippines—three countries that send large numbers of foreign workers to the United States—the combination of the numerical limits and the 7% per-country ceiling has created inordinately long waits to receive employment-based green cards and exacerbated the backlog. New prospective immigrants currently entering the backlog (beneficiaries) are double the available number of green cards. Many Indian nationals can expect to wait decades to receive a green card. For some, the waits will exceed their lifetimes.

For these prospective immigrants, many of whom already reside in the United States, the backlog can impose significant hardships. Prospective employment-based immigrants who lack LPR status cannot switch jobs, potentially subjecting them to exploitative work conditions. While waiting in the United States, backlogged workers often develop community ties, purchase homes and have children. Yet with a petition pending approval and no green card, they cannot easily travel overseas to see their families, and their spouses may have difficulty obtaining legal

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1 Lawful permanent residents (LPRs) are foreign nationals who have been approved to live and work permanently in the United States. In this report, the terms LPR, green card holder, and immigrant are used interchangeably.

2 The 7% per-country ceiling also applies to numerically limited, family-based immigration, which is not discussed in this report. For more information, see CRS Report R43145, U.S. Family-Based Immigration Policy.

3 U.S. Citizenship and Immigration Services (USCIS) formally uses the term petition to refer to a request for an immigration benefit that is submitted by one party (e.g., an employer) on behalf of another (e.g., the prospective immigrant) and the term application to refer to an immigration benefit submitted by the individual receiving the benefit. This report uses the two terms interchangeably.
permission to work. Any noncitizen children who reach age 21 before their parents acquire a green card risk aging out of legal status. In effect, a large part of these prospective immigrants’ lives and those of their family members are on hold. If a prospective immigrant in the backlog dies while waiting for a green card, the individual’s spouse and family lose their place in the queue, and in some cases their legal status to reside in the United States.

For some U.S. employers, the backlog can act as a competitive disadvantage for attracting highly trained workers relative to other countries with more accessible systems for acquiring permanent residence. U.S. universities educate a sizable number of foreign-born graduates in science, technology, engineering, and mathematics, among other fields, many of whom may be desirable candidates to U.S. employers. In the face of the substantial wait times for LPR status, however, growing numbers of such workers are reportedly migrating to countries other than the United States for education, employment, or both.

In recent years, some Members of Congress have proposed solutions for addressing the employment-based backlog, ranging from changing the existing system’s numerical limits to restructuring the entire employment-based immigration system. The latter approach is widely viewed as legislatively and politically formidable. On the other hand, legislative proposals to alter the numerical limits—and to remove the per-country ceiling in particular—for employment-based immigrants have been introduced more regularly.

One proposal currently under consideration in the Senate following its passage in the House is the Fairness for High-Skilled Immigrants Act (H.R. 1044; S. 386, as amended), which would eliminate the 7% per-country ceiling for employment-based immigration, among other provisions. Supporters of the bill assert that it would improve the current employment-based immigration system, initially by granting more green cards to Indian nationals who generally have longer wait times under the current system compared with nationals from other countries. Ultimately, the bill would convert the per-country system into what some consider a more equitable first-come, first-served system. Supporters of this approach argue that the existing 7% per-country ceiling unfairly discriminates against foreign workers on the basis of their country of origin. They contend that the current backlog incentivizes some employers to hire and exploit

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4 For more information, see CRS Report R45176, Work Authorization for H-4 Spouses of H-1B Temporary Workers: Frequently Asked Questions.

5 Such children must find alternative immigration pathways to remain legally in the United States or return to their home countries. Often referred to as legal dreamers, many such children have spent most of their lives in the United States and are unfamiliar with their home countries. See, for example, Daniel Block, “The Other Dreamers: They came here legally. Most are college bound. So why is the U.S. kicking them out?” Washington Monthly, November/December 2018.

6 Abigail Hauslohner, “The employment green card backlog tops 800,000, most of them Indian. A solution is elusive,” Washington Post, December 17, 2019.

7 For more information, see CRS In Focus IF11347, Foreign STEM Students in the United States.

8 As of 2018, 1.2 million foreign students on F and M student visas were enrolled in 8,700 U.S. educational institutions that were certified through the U.S. Department of Homeland Security’s (DHS’s) Student and Exchange Visitor Information System (SEVIS). For more information, see Jie Zong and Jeannie Batalova, International Students in the United States, Migration Policy Institute, May 9, 2018.

9 See, for example, Stuart Anderson, “Why Immigrants, Students And U.S. Companies Are Going To Canada,” Forbes, April 22, 2019; Rani Molla, “Foreign tech workers are turning to Canada as US immigration becomes more difficult,” Vox, June 7, 2019; and Shulamit Kahn and Megan MacGarvie, “The Impact of Permanent Residency Delays for STEM PhDs: Who Leaves and Why,” National Bureau of Economic Research, October 2018.
Indian foreign workers, knowing that these workers will be unable to leave their jobs for many years without losing their place in the queue.\textsuperscript{10}

Those opposed to removing the per-country ceiling maintain that it fulfills its original purpose of preventing a few countries from dominating employment-based immigration. They contend that removing the ceiling merely shuffles the deck by changing who receives employment-based green cards, benefiting Indian and Chinese nationals at the expense of immigrants from all other countries. Because Indian employment-based immigrants are employed largely in the information technology sector, such a change may benefit that sector at the expense of other industries that are also critical to the United States.\textsuperscript{11} Opponents argue that legislative proposals such as S. 386 do not address the more fundamental issue of too few employment-based green cards for an economy that has doubled in size since the law establishing their current statutory limits was passed in 1990.\textsuperscript{12}

If the 7% per-country ceiling were eliminated, some observers expect that Indian and Chinese nationals would initially receive most or all employment-based green cards for some years at the expense of nationals from all other countries.\textsuperscript{13} Once current backlogs were eliminated, however, country of origin would no longer directly affect the allocation of employment-based green cards, an outcome that some consider more equitable to Indian and Chinese prospective immigrants, and that others consider disadvantageous to prospective immigrants from all other countries.

This report analyzes how removing the per-country ceiling would impact the employment-based immigrant backlog over the next decade, using the provisions of S. 386, as amended, as a case study. While certain provisions analyzed are specific to only this bill, the broader objective of eliminating the per-country ceiling has appeared in numerous legislative proposals in past Congresses. The report reviews the employment-based immigration system, discusses the key provisions of S. 386 affecting the backlog, and presents results from a Congressional Research Service (CRS) analysis that projects, under current conditions, how the backlog would change over the decade following enactment. The report ends with concluding observations and some potential legislative options.

\textsuperscript{10}See, for example, Sarah Emerson, “Exclusive Survey Reveals Discrimination Against Visa Workers at Tech’s Biggest Companies,” OneZero, February 24, 2020. A foreign national who seeks an employment-based green card must be sponsored by a U.S. employer. The employer who files an immigration petition on behalf of the employee, can withdraw that petition if no longer employing the foreign national. See “Overview of the Permanent Employment-Based Immigration System” section, below.

\textsuperscript{11}In FY2018, the most recent year for which data are available, USCIS reported that of the 332,358 petitions submitted by employers for H-1B workers (the primary pathway to enter the employment-based backlog), 243,994 (73%) were for individuals born in India. Similarly, 220,310 (66%) were for workers in computer-related occupations. Data in the report do not indicate the degree of overlap between Indian nationals and computer workers, but anecdotal evidence suggests that they are highly correlated. USCIS, \textit{Characteristics of H-1B Specialty Occupation Workers, Fiscal year 2018 Annual Report to Congress}, April 4, 2019.

\textsuperscript{12}P.L. 101-649. For citations and a more extensive discussion of the arguments favoring and opposing the elimination of the 7% per-country ceiling, see CRS Report R45447, \textit{Permanent Employment-Based Immigration and the Per-Country Ceiling}.

\textsuperscript{13}See, for example, David J. Bier, \textit{Immigration Wait Times from Quotas Have Doubled}, Cato Institute, June 18, 2019; and Stuart Anderson, “Bill Aims to End Decades-Long Waits for High-Skilled Immigrants,” \textit{Forbes}, February 15, 2019.
Overview of the Permanent Employment-Based Immigration System

Each year, the United States grants LPR status to roughly 1 million foreign nationals, which allows them to live and work permanently in this country. The provisions that mandate LPR eligibility criteria—the pathways by which foreign nationals may acquire LPR status—and their annual numerical limits are established in the INA, found in Title 8 of the U.S. Code.

Among those granted LPR status are employment-based immigrants who serve the national interest by providing needed skills to the U.S. labor force. The INA specifies five preference categories of employment-based immigrants:

1. persons of extraordinary ability;
2. professionals with advanced degrees;
3. skilled and unskilled “shortage” workers for in-demand occupations (e.g., nursing);
4. assorted categories of “special immigrants”; and
5. immigrant investors (see Appendix A for more detail).

Each category has specific eligibility criteria, numerical limits, and, in some cases, application processes. The INA allocates 140,000 green cards annually for employment-based LPRs. In FY2018, employment-based LPRs accounted for about 13% of the almost 1.1 million LPRs admitted. The INA further limits each immigrant-sending country to an annual maximum of 7% of all employment-based LPR admissions, known as the 7% per-country ceiling. The ceiling serves as an upper limit for all countries, not a quota set aside for individual countries. As noted earlier, this percentage limit is breached frequently for the highest immigrant-sending countries, due to reallocations from other categories and countries.

The INA also contains provisions that allow countries to exceed the numerical limits set for each preference category and the per-country ceiling. First, unused green cards for each of the preference categories can roll down to be utilized in the next preference category. Second, in any given quarter, if the number of available green cards exceeds the number of applicants, the per-country ceiling does not apply for the remainder of green cards for that quarter. Third, any unused green cards for employment-based preference categories 1, 2, and 3 roll down to the next category. Unused green cards for categories 4 and 5 categories roll up to category 1. Unused green cards for employment-based immigrants to be surpassed for individual countries that are oversubscribed as long as green cards are available within the 140,000 annual worldwide limit for employment-based preference immigrants.

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14 The term foreign national in this report refers to anyone who is not a U.S. citizen.
15 For more information on permanent admissions, see CRS Report R42866, Permanent Legal Immigration to the United States: Policy Overview.
16 For more information on employment-based immigration more generally, see CRS Report R45447, Permanent Employment-Based Immigration and the Per-country Ceiling.
17 Immigration and Nationality Act (INA) §202(a)(2); 8 U.S.C. §1152. The 7% per-country ceiling also applies to the five family preference categories for family-based immigration. Currently, high-immigrant-sending countries such as India, China, and the Philippines sometimes do not use their full 7% family-based allotment. In those years, the unused portion of that allotment can be borrowed or applied toward employment-based petitions. Were the 7% ceiling eliminated for employment-based immigrants, this borrowing would cease.
18 Unused green cards for employment-based preference categories 1, 2, and 3 roll down to the next category. Unused green cards for categories 4 and 5 categories roll up to category 1. INA §203(b); 8 U.S.C. §1153.
19 The American Competitiveness in the Twenty-First Century Act of 2000 (P.L. 106-313) enabled the per-country ceiling for employment-based immigrants to be surpassed for individual countries that are oversubscribed as long as green cards are available within the 140,000 annual worldwide limit for employment-based preference immigrants. INA 202(a)(5)(A), 8 U.S.C. 1152(a)(5)(A).
unused family-based preference immigrant green cards can be used for employment-based green cards in the next fiscal year.\textsuperscript{20}

Such provisions regularly permit individuals from certain countries to receive far more employment-based green cards than the limits would imply. For example, the numerical limit for each of the first three employment-based categories is 40,040, which combined with the 7% per-country ceiling, would limit the annual number of green cards issued to Indian nationals to 2,803 per category. However, in FY2019, Indian nationals received 9,008 category 1 (EB1), 2,908 category 2 (EB2), and 5,083 category 3 (EB3) green cards.\textsuperscript{21}

Among prospective immigrants, the INA distinguishes between principal prospective immigrants (principal beneficiaries), who meet the qualifications of the employment-based preference category, and derivative prospective immigrants (derivative beneficiaries), who include the principals’ spouses and minor children. Derivatives appear on the same petition as principals and are entitled to the same status and order of consideration as long as they are accompanying or following to join principal immigrants.\textsuperscript{22} Both principals and derivatives count against the annual numerical limits, and currently less than half of employment-based green cards issued in any given year go to the principals.\textsuperscript{23}

While some prospective employment-based immigrants can self-petition, most require U.S. employers to petition on their behalf. How prospective immigrants apply for employment-based LPR status depends on where they reside. If they live abroad, they may apply as new immigrant arrivals. If they reside in the United States, they may apply to adjust status from a temporary (nonimmigrant) status (e.g., H-1B skilled temporary worker, F-1 student) to LPR status.\textsuperscript{24}

Employment-based immigration involves multiple steps and federal agencies. The Department of Labor (DOL) must initially provide labor certification for most preference category 2 and 3 immigrants.\textsuperscript{25} U.S. Citizenship and Immigration Services (USCIS) within the Department of

\textsuperscript{20}INA §201(d)(2)(C); 8 U.S.C. §1151(d)(2)(C). In recent years, the number of unused family preference green cards has been relatively insignificant.

\textsuperscript{21}U.S. Department of State (DOS), “Report of the Visa Office 2019,” Table V. These figures include persons adjusting status and those arriving as new immigrants from overseas.

\textsuperscript{22}Accompanying is a term of art applied to family members who are in the personal company of the principal beneficiary when entering the United States or who are issued an immigrant visa within four months of the principal immigrant’s immigrant visa issuance or adjustment of status. Following to join applies to a spouse or child who derives immigration status from a principal beneficiary spouse or parent. Those who follow to join face no time limit for obtaining a visa and seeking admission to the United States.

\textsuperscript{23}In 2018, principal immigrants comprised 46% of the EB1, EB2, and EB3 green cards issued; derivative family members comprised the other 54%. See DHS, FY2018 Yearbook of Immigration Statistics, Table 7.

\textsuperscript{24}Nonimmigrants are admitted for a specific purpose and a temporary period of time—such as tourists, foreign students, diplomats, temporary agricultural workers, exchange visitors, or intracompany business personnel. Nonimmigrants are often referred to by the letter that denotes their specific provision in the statute, such as H-2A agricultural workers, F-1 foreign students, or J-1 cultural exchange visitors. Temporary visas for professional, managerial, and skilled foreign workers have become an important gateway for high-skilled permanent immigration to the United States. Over the past two decades, the number of visas issued for all temporary employment-based admissions at all skill levels, and including cultural exchange visitors and intracompany transferees, has increased almost 60%, from 845,982 in FY2009 to 1,344,877 in FY2019. Most numerous among the skilled worker visas are specialty occupation workers with H-1B visas, and intracompany transferees with L visas. For more information, see CRS Report R45040, Immigration: Nonimmigrant (Temporary) Admissions to the United States.

\textsuperscript{25}The U.S. Department of Labor (DOL) must determine through its foreign labor certification program that (1) there are insufficient able, willing, qualified, and available U.S. workers to perform the work in question; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. INA §212(a)(5); 8 U.S.C. §1182(a)(5). For more information on employment-based immigration processing,
Homeland Security (DHS) processes and adjudicates petitions for employment-based immigrants. USCIS assigns to each principal beneficiary and any derivative beneficiaries a priority date (the earlier of the labor certification or immigrant petition filing date), representing the prospective immigrant’s place in the backlog. USCIS sends processed and approved immigrant petitions to the Department of State’s (DOS’s) National Visa Center, which allocates visa numbers or immigrant slots according to the INA’s numerical limits and per-country ceilings. Individuals must wait for their priority date to become current before they can continue the process to receive a green card.26

Key Provisions of S. 386

The discussion below of S. 386, as amended, and the subsequent analysis are focused solely on the first three employment-based immigrant preference categories. These categories account for 120,120 or 86% of the 140,000 total employment-based green cards available annually. The EB4 category, which comprises special immigrants, and the EB5 category, which comprises immigrant investors, are statutorily included within the employment-based immigration system. Those categories, however, represent distinct types of immigrants that fall outside of much of the debate over the per-country ceiling.

The Fairness for High-Skilled Immigrants Act (currently S. 386, as amended) has been introduced in Congress in different versions since 2011. In the 116th Congress, the bill was introduced in the House as H.R. 1044 by Representative Zoe Lofgren in February 2019 and was passed by the House on July 10, 2019, by a vote of 365 to 65. The bill was introduced in the Senate as S. 386 by Senator Mike Lee in February 2019. There have been negotiated proposed amendments since then, and the bill’s provisions may change further.

In its current proposed form, S. 38627 contains the following provisions found in prior versions of the Fairness for High-Skilled Immigrants Act:

1. Eliminating the per-country ceiling for employment-based immigrants;
2. Raising the per-country ceiling for family-based preference category immigrants from 7% to 15%; and
3. Allowing a three-year transition period for phasing out the employment-based per-country ceiling.

Eliminating the per-country ceiling for employment-based immigrants would convert the current system into a first-come, first-served system, with the earliest approved petitions receiving green cards before those filed subsequently, regardless of country of origin.

S. 386, as amended, also contains the following additional provisions intended to address issues and concerns raised by stakeholders:

see CRS Report R45447, Permanent Employment-Based Immigration and the Per-country Ceiling.

26 Individuals can use DOS’s monthly online Visa Bulletin to check whether their priority date is current.

27 S. 386, Fairness for High Skilled Immigrants Act (H.R. 1044), amendment in the nature of a substitute intended to be proposed by Senator Lee, MCC19E22. As of this writing, this version of S. 386, as amended, has not been filed with the Senate Clerk and is not yet available on Congress.gov. It is available to congressional clients from CRS upon request.
4. A Hold Harmless provision that would ensure no person with a petition approved before enactment would have to wait longer for their visa as the result of the bill’s passage;

5. Allocating up to 5.75% of the 40,040 EB2 and EB3 categories (2,302 per category) for derivative and principal immigrants applying from overseas, who otherwise would wait in the backlog much longer once the per-country ceiling was removed, either to reunite with their principal immigrant parents/spouses or to be employed in the United States; and

6. Within the EB3 category, allocating up to 4,400 of the 40,040 slots for Schedule A occupations (professional nurses and physical therapists). It would also allocate slots for these immigrants’ accompanying family members.

Analysis of the Employment-Based Backlog

The following analysis projects what the employment-based backlog would look like in 10 years under current law and compares that outcome with the projected outcome if S. 386 were passed. As noted above, the analysis is limited to the EB1, EB2, and EB3 categories, which together account for 120,120 (86%) of the 140,000 employment-based green cards permitted annually under the INA.

Analytical Approach

The projection of the impact of S. 386 assumes the bill is passed in FY2020, and its provisions take effect in FY2021. As such, the analysis begins with the FY2020 employment-based backlog for the EB1, EB2, and EB3 categories and projects how the bill’s provisions alter these backlogs over the 10 years from FY2021 through FY2030. For each category, the analysis estimates the number of new prospective immigrants whose petitions would be approved each year (thereby added to the backlog), as well as the number of backlogged approved petition holders who would receive a green card each year (thereby removed from the backlog). Within each category, the analysis projects the resulting backlog for India, China, the Philippines (for EB3 only), and all other countries or the “rest of the world” (RoW).

Projected annual additions to the employment-based backlog in the analysis are based on FY2018 USCIS data on approved employment-based immigrant petitions. The analysis holds that number constant through the 10-year period examined.

Projected annual reductions to the employment-based backlog are based on green card issuances to approved petitioners and their derivatives. Because S. 386 does not increase the INA’s annual worldwide limit of 140,000 green cards issued each year, annual green card issuances in the EB1, EB2, and EB3 categories sum to 40,040 under both scenarios. Projected issuances are based on current DOS data on the number of individuals, by country, who receive EB1, EB2, and EB3 green cards.

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28 This 5.75% set-aside would be available to prospective immigrants from all countries except India and China, and it would last for nine years following enactment.

29 The Schedule A occupations cited in the bill can be found in 20 C.F.R. §656.5(a).

30 See Appendix B for more detailed information on each provision.
Under S. 386, issuances occur from overseas petitioners (the 5.75% set-aside), Schedule A petitioners (nursing and physical therapy occupations), and the remaining individuals with approved petitions according to their priority date or place in the queue. In the analysis, the Hold Harmless provisions alter issuances for FY2021 only, and the three-year Transition Year provisions impact issuances for FY2022 and FY2023. The 5.75% set-aside expires in nine years (FY2029), and the Schedule A set-aside expires in six years (FY2026). (For more detailed methodology information, see Appendix B.)

As such, the analysis that follows is an arithmetic exercise beginning with the current EB1, EB2, and EB3 approved petition backlogs, each broken out for India, China, the Philippines (only for EB3), and RoW. For each subsequent year, new petition approvals for prospective employment-based immigrants increase the backlog, and green card issuances to those individuals and their family members reduce the backlog. Because the INA treats derivative immigrants and principal immigrants equally for reaching the annual worldwide limit and maintaining the per-country ceiling, the analysis necessarily includes dependent family members of principal immigrants. Each year’s ending backlog balance equals the following year’s starting balance. The following sections describe the results of the analysis.

First Employment-Based Category (EB1)

Table 1 presents the projected change in the current EB1 backlog after 10 years, as well as current and projected green card wait times. All figures are estimates. Status quo projections are compared to those that model the impact of S. 386. All figures are estimates.

<table>
<thead>
<tr>
<th></th>
<th>Under Current Law</th>
<th></th>
<th>Under S. 386, as Amended</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>India</td>
<td>China</td>
<td>RoW</td>
<td>Total</td>
</tr>
<tr>
<td>Projected Backlogs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY2020</td>
<td>73,482</td>
<td>24,825</td>
<td>21,425</td>
<td>119,732</td>
</tr>
<tr>
<td>FY2030</td>
<td>160,324</td>
<td>78,267</td>
<td>29,655</td>
<td>268,246</td>
</tr>
<tr>
<td>% Change</td>
<td>118%</td>
<td>215%</td>
<td>38%</td>
<td>124%</td>
</tr>
</tbody>
</table>

Projected Waiting Times to Receive a Green Card For Newly Approved Petition Holder (Years)

<table>
<thead>
<tr>
<th></th>
<th>FY2020</th>
<th>FY2030</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>8</td>
<td>18</td>
</tr>
<tr>
<td>China</td>
<td>5</td>
<td>15</td>
</tr>
<tr>
<td>RoW</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
<td>7</td>
</tr>
</tbody>
</table>

Source: Figures computed by CRS; see Appendix A for sources and methodology.

Notes: FY2020 refers specifically to the start of the fiscal year on October 1, 2019, and FY2030 refers to the start of the fiscal year on October 1, 2029. Wait times for a green card can also be interpreted as the number of years required for the EB1 backlog in FY2020 or FY2030 to be eliminated, either under current conditions or those that would be imposed by S. 386. RoW = rest of the world; EB1 = first employment-based category.

In both scenarios, total annual EB1 green cards issued and total new beneficiaries entering the EB1 queue are assumed to remain the same—a conservative assumption (see Figure 1, below).

31 The current version of S. 386 mandates that the Hold Harmless and Transition Year provisions both occur in the first year. Because they represent two different methods of allocating green cards, this analysis applies the Hold Harmless provision to Year 1 and the Transition Year provisions to Years 2 and 3.
Since the number of new beneficiaries exceeds the number of green cards issued each year, the total backlog under both scenarios is projected to more than double from 119,732 in FY2020 to 268,246 in FY2030. S. 386 would alter how the backlog grows by country of origin over this period. For Indian nationals, the backlog would increase by only 21% under the bill’s provisions, instead of 118% under current law. Chinese nationals would experience a 115% backlog increase, instead of a 215% increase. Nationals from all other countries would bear the impact of these reductions. Their backlog would increase by more than five times over this period, from 21,425 to 125,852.

Projected years to receive a green card for those waiting in the EB1 backlog reflect these shifts. Currently, backlogged EB1 Indian nationals can expect to wait up to eight years before receiving a green card. This also means that the current queue of 73,482 Indian nationals would require eight years to disappear. Under S. 386, this time would decrease to three years, and the number of years required to eliminate the backlog for Chinese nationals would decrease from five to three years. The backlog for RoW nationals would benefit from the Hold Harmless provisions in S. 386 and thus would disappear after one year under both scenarios. In FY2030, however, RoW nationals would experience projected wait times of seven years for a green card under S. 386, instead of one year under current law. In contrast, by FY2030, projected wait times for Indian and Chinese nationals would decline from 18 and 15 years, respectively, under current law, to seven years for each group.

Although rates of backlog increase and wait times diverge among country-of-origin groups, the common theme illustrated in Table 1 is the sizeable increase in the number of foreign workers and their dependents, largely residing in the United States, who would wait extended periods to obtain LPR status. Under this projection, the annual number of foreign workers sponsored for EB1 petitions continues to exceed (by an amount fixed at the FY2018 level) the number of statutorily mandated EB1 green cards.

Table 1 shows all EB1 foreign nationals in FY2030 facing the same seven-year wait to receive a green card. This demonstrates how eliminating the per-country ceiling under the provisions of S. 386 would convert the current employment-based system from one constrained by country-of-origin limits into one that functions on a first-come, first-served basis.

Second Employment-Based Category (EB2)

Table 2 presents projected changes to the current EB2 backlog after 10 years, as well as current and projected wait times for a green card. All figures are estimates. Projections are conducted for the status quo under current law and for if the current version of S. 386 were enacted. All figures are estimates.

Outcomes for the EB2 petition backlog would diverge considerably from those of the projected EB1 backlog because of the sizable difference between the current EB1 and EB2 backlogs. At 627,448 petitions, the current EB2 backlog is more than five times the size of the EB1 backlog (119,732 petitions) and is dominated overwhelmingly (91%) by Indian nationals. Chinese nationals make up the remaining 9% of the EB2 backlog. No EB2 backlog currently exists for nationals from any other country.

Total annual new beneficiaries entering the EB2 backlog and total EB2 green cards issued each year are the same under both scenarios. Since new entering beneficiaries always exceed green cards issued, the total backlog under either scenario is projected to more than double from 627,448 in FY2020 to 1,471,360 in FY2030. As with EB1 petitions, S. 386 would alter how the backlog grows by country of origin over this period. For Indian nationals, the backlog would increase by a smaller percentage—77% under the bill’s provisions compared with 123% under...
current law. Chinese nationals, in contrast, would see their backlog increase by a greater percentage under the bill’s provisions—217% versus 194% under current law. Nationals from all other countries, however, would experience the most notable difference in FY2030. Instead of a relatively small backlog of 30,051 that would disappear after a year under current law, RoW nationals would face a backlog nine times its current size (278,333).

Table 2. Estimated Backlogs and Green Card Wait Times, EB2 Petition Holders
(Impacts under current law compared to S. 386, as of FY2020 and FY2030)

<table>
<thead>
<tr>
<th></th>
<th>Under Current Law</th>
<th>Under S. 386, as Amended</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>India</td>
<td>China</td>
</tr>
<tr>
<td><strong>Projected Backlogs</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY2020</td>
<td>568,414</td>
<td>59,034</td>
</tr>
<tr>
<td>FY2030</td>
<td>1,267,948</td>
<td>173,361</td>
</tr>
<tr>
<td><strong>% Change</strong></td>
<td>123%</td>
<td>194%</td>
</tr>
<tr>
<td><strong>Projected Waiting Times to Receive a Green Card For Newly Approved Petition Holder (Years)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY2020</td>
<td>195</td>
<td>18</td>
</tr>
<tr>
<td>FY2030</td>
<td>436</td>
<td>51</td>
</tr>
</tbody>
</table>

Source: Figures computed by CRS; see Appendix A for sources and methodology.

Notes: FY2020 refers specifically to the start of the fiscal year on October 1, 2019, and FY2030 refers to the start of the fiscal year on October 1, 2029. Wait times for a green card can also be interpreted as the number of years required for the EB2 backlog in FY2020 or FY2030 to be eliminated, either under current conditions or those imposed by S. 386. n/a = not applicable; RoW = rest of the world; EB2 = second employment-based category.

The differential outcomes that S. 386 provides to Indian and Chinese nationals is also seen in the number of years they would have to wait for a green card by FY2030. Table 2 shows that under either scenario, green card wait times would increase for all groups in FY2030 compared to FY2020. Under current law, and owing to a limited number of green card issuances, the current backlog of 568,414 Indian nationals would require an estimated 195 years to disappear.32 By FY2030, this estimated wait time would more than double. Under S. 386, the estimated wait time for newly approved EB2 petition holders would shrink to 17 years, and in FY2030, the wait time would be 37 years, the same as for all other foreign nationals.

The significant drop in FY2030 green card wait times for Indian and Chinese nationals under S. 386 would come at the expense of nationals from all other countries. RoW nationals would see their EB2 backlog and wait times increase substantially. Currently, no backlog exists for persons with approved EB2 petitions from RoW countries. Under the current system, EB2 petition approval for anyone from other than India or China generally leads to a green card with no wait time.33 By removing the per-country ceiling, however, S. 386 would create a new RoW backlog by FY2030 that would be nine times its projected size under current conditions.

32 DOS data show that Indian nationals received 2,908 EB2 immigrant green cards in FY2019. As a basis for comparison, they received 4,096 in FY2018, 2,879 in FY2017, and 3,930 in FY2016.

33 On occasion, nationals from some countries that send sizeable numbers of immigrants to the United States, such as South Korea or Brazil, will have to wait because their numbers exceed the 7% per-country limit of 2,803 green cards for the EB2 category.
Third Employment-Based Category (EB3)

Table 3 presents projected changes to the current EB3 backlog and green card wait times for both current law and following the potential enactment of S. 386. All figures are estimates. The EB3 analysis also includes projections for Filipino nationals, who represent relatively large numbers of foreign-trained nurses. As with the EB1 and EB2 categories, Indian nationals dominate the backlog, with 81% (137,161) of the total queue of 168,317 approved petitions. Chinese nationals represent 12% and Filipino nationals the remaining 7%. No backlog currently exists for nationals from all other countries.

The annual number of new beneficiaries entering the EB3 backlog and total EB3 green cards issued are the same each year under both scenarios, increasing almost all backlogs between FY2020 and FY2030. As with EB1 and EB2 petitions, S. 386 would alter how the backlog grows by country of origin over this period. For Indian nationals, the backlog is projected to decline by 8% under the bill’s provisions compared with a 79% increase under current law. Chinese nationals, in contrast, would see almost no change in their backlog under the bill’s provisions compared to current law. Filipino nationals would see a 25% increase in their relatively small backlog. RoW nationals would experience the most notable difference in FY2030, with the backlog increasing to roughly double the size under S. 386 (251,171) compared to the projected backlog under current law (136,783).

Table 3. Estimated Backlogs and Green Card Wait Times, EB3 Petition Holders
(impacts under current law compared to S. 386, as of FY2020 and FY2030)

<table>
<thead>
<tr>
<th></th>
<th>Under Current Law</th>
<th></th>
<th>Under S. 386, as Amended</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>India</td>
<td>China</td>
<td>Philippines</td>
</tr>
<tr>
<td>Projected Backlogs</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY2020</td>
<td>137,161</td>
<td>19,657</td>
<td>11,499</td>
</tr>
<tr>
<td>FY2030</td>
<td>244,907</td>
<td>64,387</td>
<td>10,113</td>
</tr>
<tr>
<td>% Change</td>
<td>79%</td>
<td>228%</td>
<td>-12%</td>
</tr>
<tr>
<td>Projected Waiting Times to Receive a Green Card For Newly Approved Petition Holder (Years)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY2020</td>
<td>27</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>FY2030</td>
<td>48</td>
<td>17</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: Figures computed by CRS; see Appendix A for sources and methodology.

Notes: FY2020 refers specifically to the start of the fiscal year on October 1, 2019, and FY2030 refers to the start of the fiscal year on October 1, 2029. Wait times for a green card can also be interpreted as the number of years required for the EB3 backlog in FY2020 or FY2030 to be eliminated, either under current conditions or those imposed by S. 386. n/a = not applicable; RoW = rest of the world; EB3 = third employment-based category.

Projected years to receive a green card for those waiting in the EB3 queue reflect these changes in backlog size. Currently, new Indian beneficiaries entering the EB3 backlog can expect to wait 27 years before receiving a green card. Under S. 386, this wait time would shorten to seven years, and the wait time for Chinese nationals would increase from five to seven years. For Filipino and RoW nationals, FY2020 wait times would not change. By FY2030, however, wait times under S. 386 would equalize the substantial differences in green card wait times under current law, with RoW nationals waiting an estimated 11 years to receive a green card.
Concluding Observations

This analysis projects the impact of eliminating the 7% per-country ceiling on the first three employment-based immigration categories over a 10-year period. It models outcomes under current law, as well as under the provisions of S. 386, as amended. The bill would phase out the per-country ceiling over three years and reserve green cards for certain foreign workers, among other provisions. S. 386 would not increase the total number of employment-based green cards, which equals 120,120 for the first three employment-based categories under current law.

The analyses of the EB1, EB2, and EB3 categories all project similar outcomes: Indian nationals, and to a lesser extent Chinese nationals, who are currently in the employment-based backlog would benefit from shorter waiting times under S. 386 compared with current law. The bill would eliminate all current EB1, EB2, and EB3 backlogs in 3, 17, and 7 years, respectively, with some modest differences by country of origin. Once current backlogs are eliminated under the Hold Harmless provision of S. 386, persons with approved employment-based petitions would receive green cards on a first-come, first-served basis, with equal wait times within each category, regardless of country of origin. In FY2030, foreign nationals with approved EB1, EB2, and EB3 petitions could expect to wait 7, 37, and 11 years, respectively, regardless of country of origin. By contrast, maintaining the 7% per-country ceiling would, over 10 years, substantially increase the long wait times to receive a green card for Indian and Chinese nationals, but it would also continue to allow nationals from all other countries to receive their green cards relatively quickly.

S. 386 would not alter the growth of future backlogs compared to current law. This analysis projects that, by FY2030, the EB1 backlog would grow from an estimated 119,732 individuals to an estimated 268,246 individuals; the EB2 backlog, from 627,448 individuals to 1,471,360 individuals; and the EB3 backlog, from 168,317 individuals to 456,190 individuals. In sum, the total backlog for all three employment-based categories would increase from an estimated 915,497 individuals currently to an estimated 2,195,795 by FY2030. If the current number of new beneficiaries each year continues, these outcomes would occur whether or not S. 386 is enacted, as the bill contains no provisions to change the number of green cards issued.

As noted throughout this report, all figures from this analysis are estimates. They are based largely on the assumption that current immigration flows—of newly approved employment-based immigrant petitions added to the backlog and of employment-based green card issuances by country of origin removed from the backlog—remain constant over 10 years. As such, results from the analysis are subject to change, depending on how numbers of future petition approvals and green card issuances deviate from current levels.

In one respect, the analysis yields conservative estimates—it assumes that the number of new beneficiaries entering the employment-based immigration system will remain at their FY2018 levels. USCIS data for the past decade, however, show a consistent upward trend in the number of approved I-140 employment-based immigrant petitions (Figure 1).34 Regarding green card issuances, the analysis is not subject to future variation because under current law or the provisions of S. 386, the number of employment-based green cards issued each year remains fixed by statute. In FY2018, the former exceeded 262,000, while the latter remained at 120,120.

The number of employment-based immigrants who are sponsored by U.S. employers and who enter the immigration pipeline with the aspiration of acquiring U.S. lawful permanent residence far exceeds the number of LPR slots available to them. Removing the 7% per-country ceiling

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34 These figures represent petitions of principal immigrants and do not include derivative family members who must also be included. Derivative estimation is described further in Appendix B.
would initially reduce wait times considerably for Indian and Chinese nationals in the years following enactment of S. 386, but it would do so at the expense of nationals from all other countries, as well as of the enterprises in which the latter are employed. In a decade, wait times would equalize among all nationals within each category, regardless of country of origin. This outcome may appear more equitable to some because prospective immigrants from all countries would have to wait the same period to receive a green card. However, it may appear less equitable to others because it would make backlog-related waiting times apply to nationals from all countries rather than just nationals from a few prominent immigrant-sending countries. S. 386 would not address the imbalance between the number of foreign nationals who enter the employment-based pipeline and the number who emerge with LPR status.

Figure 1. Immigrant Petitions Approved, by EB Category, FY2009-FY2018
(Includes dependent family members)

Source: U.S. Citizenship and Immigration Services, “Form I-140, Immigrant Petition for Alien Worker, Number of Petitions and Approval Status for All Countries, By Fiscal Year Received and Approval Status, Fiscal Years 2009 to 2019,” unpublished data provided to CRS, November 2019.

Notes: Dependent immigrants were computed using the “derivative multipliers” described in Appendix A.

Legislative Options

Four options Congress could consider related to the current employment-based immigration backlog include maintaining current law by leaving the 7% per-country cap as is; removing the 7% per-country cap for employment-based immigrants as is proposed under S. 386; increasing the number of employment-based LPRs permitted under the current system; or reducing the number of prospective immigrants entering the employment-based pipeline. These options are not necessarily mutually exclusive and could be considered in combination with others. Some Members of Congress have also introduced legislation that would offer more substantial structural changes to the employment-based system.

Maintain Current Law. Supporters of the per-country ceiling cite the current law’s original purpose of this provision: to prevent nationals from a few countries from monopolizing the
limited number of employment-based green cards. This 7% threshold allows prospective immigrants from other countries to acquire LPR status in a relatively short time, diversifying the skilled pool of workers from which U.S. employers may draw. To the extent that prospective immigrants from high immigrant-sending countries such as India and China concentrate in particular industrial sectors, the per-country ceiling imposes constraints on some industries and allows others to access that worker pool.35 Because Indian nationals, in particular, have entered the employment-based backlog in relatively large numbers over the past two decades, they experience the most pronounced impact of the per-country ceiling. Some Indian nationals currently wait for decades to receive green cards—and in the case of new EB2 petition holders, centuries. Some Indian nationals consider this provision of the law discriminatory and unfair.36

**Remove Annual Per-Country Ceiling for Employment-Based Immigrants.** Supporters of removing the per-country ceiling emphasize the inordinately long wait times which, as shown above, require Indian nationals who enter the employment-based backlog to wait an estimated 8, 195, and 27 years, respectively, for green cards in the EB1, EB2, and EB3 categories. This analysis estimates that, holding current conditions constant, these wait times could increase to 18, 436, and 48 years, respectively, by FY2030. Long wait times call into question the legitimate functioning of the employment-based pathway to lawful permanent residence when large numbers of current and prospective backlogged workers remain in temporary status most, if not all, of their working lives. Opponents of removing the per-country ceiling maintain that it currently functions as intended. They point to the concentration of Indian and Chinese nationals in the U.S. information technology sector and argue that prospective employment-based immigrants from other countries benefit far more segments of the U.S. economy.

**Increase Number of Employment-Based LPRs under Current System.** The number of green cards for employment-based immigrants could be increased by altering current numerical limits for specific categories or the total worldwide limit. Some have proposed exempting accompanying family members to achieve this goal. Other proposals would increase employment-based immigrants in exchange for reducing the number of other immigrant types, such as family-based preference or diversity immigrants.37 Such legislation would alleviate current and future employment-based backlogs more expeditiously than under the current system.

Supporters of expanding the number of green cards point out that the current limit of 140,000 for all five employment-based preference categories (120,120 for the first three) was established 30 years ago when the U.S. economy was half its current size.38 They contend that the larger U.S. economy and the shifting economic importance of technological innovation reinforces the need to find the “best and brightest” workers, including from overseas, who can contribute to U.S. economic growth. Opponents of increasing the number of employment-based green cards point to the lack of evidence indicating labor shortages in technology sectors.39 They contend that the

35 See, for example, Chris Musillo, “The Fairness for High-Skilled Immigrants Act will Decimate Nurse Immigration,” ILW Immigration Daily, March 12, 2019.
37 Diversity immigrant visas are given to nationals from countries that send relatively few immigrants to the United States. For more information, see CRS Report R45973, *The Diversity Immigrant Visa Program*.
39 See, for example, Heidi Shierholz, *Is There Really a Shortage of Skilled Workers?*, Economic Policy Institute, January 23, 2014; and Eric A. Ruark and Mathew Graham, *Jobs Americans Can’t Do? The Myth of a Skilled Worker Shortage*, Federation of Americans for Immigration Reform, November 2011.
green card backlog harms U.S. workers by forcing them to compete in some industries with foreign workers who may accept more onerous working conditions and lower wages in exchange for LPR status. Some also argue that current immigration levels are too high. Legislation increasing the number of green cards may face resistance from the Trump Administration and some Members of Congress who oppose increasing immigration levels.

**Reduce Number of Prospective Immigrants Entering Employment-Based Pipeline.** A primary pathway to acquire an employment-based green card is by working in the United States on an H-1B visa for specialty occupation workers, getting sponsored for a green card by a U.S. employer, and then adjusting status when a green card becomes available. When first established in 1990, the H-1B program was limited to 65,000 visas per year. Current limits have since been expanded by excluding H-1B visa renewals and H-1B visa holders employed by nonprofit organizations and institutions of higher education, as well as 20,000 aliens holding a master’s or higher degree (from a U.S. institution of higher education). In FY2019, for example, 188,123 individuals received or renewed an H-1B visa, far more than the original 65,000 annual limit. Although some other nonimmigrant visas allow foreign nationals to work in the United States, the INA permits only H-1B and L visa holders to be “intending immigrants” who can then renew their status indefinitely while waiting to adjust to LPR status. Eliminating this “dual intent” classification or otherwise reducing the number of prospective immigrants entering the employment-based backlog would reduce the growth of the backlog and shorten wait times. Arguments against reducing skilled migration emphasize the impacts on economic growth in certain industrial sectors.

**Reform Structure of Employment-Based Immigration System.** Some recent legislative proposals have taken broader approaches toward restructuring the employment-based immigration system. The Trump Administration and some Members of Congress have proposed changing the current system from one that relies on employer sponsorship to a merit-based system that would rank and admit potential immigrants based on labor market attributes and expected contributions to the U.S. economy. Other Members of Congress have introduced

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42 These figures do not include accompanying family members who enter the United States with an H-4 visa. In FY2019, DOS data indicate that 188,123 individuals received H-1B visas. They represented 38% of persons receiving H-1B, H-B1, H-2A, H-2B, and H-3 visas. Family members of H visa principals received 125,999 H-4 visas, which, if applied proportionately, would include 48,050 family members of H-1B visa holders, for a total of 236,173 H-1B visa holders and their dependents. DOS, “Report of the Visa Office 2019,” Table V.

43 L visas are used for international intracompany transferees who work in an executive or managerial capacity or have specialized knowledge. Technically, foreign nationals who receive V visas (for accompanying family members) and K-1 visas (for fiancees of U.S. citizens) are also permitted the same immigrant “dual intent,” although the labor market impact is relatively insignificant for both groups of visa holders. For more information, see CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.


45 Such attributes include age, educational attainment, an employment offer, and English language ability, among others. A recent example of a merit-based approach is S. 1103, the Reforming American Immigration for a Strong Economy (RAISE) Act introduced by Senators Tom Cotton, David Perdue, and Josh Hawley in the 116th Congress.
proposals establishing *place-based* immigration systems that would let each state determine the number and type of temporary workers it needs.\(^{46}\) All of these approaches exceed the scope of the more narrow discussion of the numerical and per-country limits addressed in this analysis.

\(^{46}\) An example of a place-based approach is the State Sponsored Visa Pilot Program Act of 2017 (S. 1040), introduced by Senator Ron Johnson in the 115\(^{th}\) Congress. This bill was reintroduced in the 116\(^{th}\) Congress by Representative John Curtis as H.R. 5174.
Appendix A. Employment-Based Preference Categories

Within permanent employment-based immigration, the Immigration and Nationality Act (INA) outlines five distinct employment-based preference categories. Each of the five categories is constrained by its own eligibility requirements and numerical limit (Table A-1).

Table A-1. Employment-Based Immigration Preference System
(total worldwide level of 140,000)

<table>
<thead>
<tr>
<th>Preference Category</th>
<th>Eligibility Criteria</th>
<th>Numerical Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1: “Priority workers”</td>
<td>Priority workers: persons of extraordinary ability in the sciences, arts, education, business, or athletics; outstanding professors and researchers; and certain multinational executives and managers</td>
<td>28.6% of worldwide limit (40,040), plus unused fourth and fifth preferences</td>
</tr>
<tr>
<td>2: “Members of the professions holding advanced degrees or aliens of exceptional ability”</td>
<td>Members of the professions holding advanced degrees or persons of exceptional abilities in the sciences, arts, or business</td>
<td>28.6% of worldwide limit (40,040), plus unused first preference</td>
</tr>
<tr>
<td>3: “Skilled workers, professionals, and other workers”</td>
<td>Skilled shortage workers with at least two years training or experience; professionals with baccalaureate degrees; and unskilled shortage workers</td>
<td>28.6% of worldwide limit (40,040), plus unused first or second preference; unskilled “other workers” limited to 10,000</td>
</tr>
<tr>
<td>4: “Certain special immigrants”</td>
<td>“Special immigrants” including ministers of religion, religious workers, certain employees of the U.S. government abroad, and others</td>
<td>7.1% of worldwide limit (9,940); religious workers limited to 5,000</td>
</tr>
<tr>
<td>5: “Employment creation”</td>
<td>Immigrant investors who invest at least $1.8 million ($900,000 in rural areas or areas of high unemployment) in a new commercial enterprise that creates at least 10 new jobs</td>
<td>7.1% of worldwide limit (9,940); 3,000 minimum reserved for investors in rural or high unemployment areas</td>
</tr>
</tbody>
</table>

Source: CRS summary of Immigration and Nationality Act §203(b); 8 U.S.C. §1153(b).

Note: Employment-based allocations are further affected by the Nicaraguan and Central American Relief Act (NACARA; Title II of P.L. 105-100), as amended by §1(e) of P.L. 105-139. NACARA provides immigration benefits and relief from deportation to certain Nicaraguans, Cubans, Salvadorans, Guatemalans, and nationals of former Soviet bloc countries, as well as their dependents who arrived in the United States seeking asylum. Employment-based allocations also are affected by the Chinese Student Protection Act (P.L. 102-404), which requires that the annual limit for China be reduced by 1,000 until such accumulated allotment equals the number of aliens (roughly 54,000) acquiring immigration relief under the act. Consequently, each year, 300 immigrant visa numbers are deducted from the third preference category and 700 from the fifth preference category for China. See U.S. Department of State, Visa Office, Annual Numerical Limits for Fiscal Year 2018.
Appendix B. Methodological Notes

The results presented in this report are based on an arithmetic projection of the employment-based backlog under current law and under the provisions of S. 386, as amended. Each element of the projection is described below.

**Current Backlog Balance.** The current backlog balance consists of individuals who possess approved employment-based petitions and who are waiting for a statutorily limited green card. For this analysis, CRS obtained unpublished data from U.S. Citizenship and Immigration Services (USCIS) indicating, for each of the countries within the three employment-based categories analyzed herein, the number of people with approved I-140 petitions. The USCIS data are further broken down by year of priority date, indicating the numerical order in which approved petitions in the backlog are to receive green cards.

**New Petition Approvals.** To estimate newly approved petitions of prospective employment-based immigrants, the analysis relies on unpublished USCIS figures of EB1, EB2, and EB3 petitions approved in FY2018. The figures are further divided by country, for India and China only. These figures include only principal immigrants and do not account for derivative immigrant family members who accompany or follow to join the principal immigrants and who are included within the same statutory numerical limits. Derivative immigrants are estimated by multiplying the number of principal immigrants by the average derivative-to-principal immigrant ratios (derivative multipliers).

**Hold Harmless Issuances.** As noted above, S. 386 contains a provision ensuring that no one holding an approved petition waits additional time in the backlog as the result of the bill’s passage. This provision applies to EB1, EB2, and EB3 categories. To approximate the Hold Harmless provision’s impact, this analysis assumes that requirements for this provision would be

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47 The petition is referred to formally as USCIS Form I-140 (Immigrant Petition for Alien Workers). For more information, see U.S. Citizenship and Immigration Services (USCIS), “I-140, Immigrant Petition for Alien Workers,” https://www.uscis.gov/i-140.

48 This report uses the term green card for ease, but the U.S. Department of State (DOS), which monitors the backlog, issues visa numbers that allow someone in the backlog to either receive a visa to come to the United States if they live abroad or to adjust status if they already reside in the United States. A visa number becomes available when the Visa Bulletin, published online each month by DOS, lists a final action date that is on or later than the petition holder’s priority date. The priority date is when an immigration petition is filed with USCIS on behalf of a prospective immigrant for whom a labor certification is not required, or (2) a labor certification application is filed with the U.S. Department of Labor on behalf of a prospective immigrant for whom a labor certification is required. Priority dates are not established until USCIS approves the immigrant petition. The priority date determines an individual’s place in the queue.


50 USCIS, “Form I-140, Immigrant Petition for Alien Worker, Number of Petitions and Approval Status for All Countries, By Fiscal Year Received and Approval Status, Fiscal Years 2009 to 2019,” unpublished data provided to CRS, November 2019. Although data for FY2019 were included in the USCIS report, this report relies on FY2018 data because of the relatively low proportion of pending (unresolved) petitions compared with those for FY2019.

51 The derivative multiplier is based on a ratio of counts of primary and derivative immigrants who were granted lawful permanent resident (LPR) status, as recorded in the U.S. Department of Homeland Security, Yearbook of Immigration Statistics FY2018, Table 7. The derivative multipliers for EB1, EB2, and EB3 categories are 1.48, 1.00, and 1.06, respectively. Thus, for example, each approved EB1 petition actually represents an average of 2.48 persons seeking LPR status: 1 principal immigrant and 1.48 derivative immigrants.
met with one year’s worth of issuances under current law, or current issuances, as recorded by the most recent FY2019 U.S. Department of State (DOS) annual visa report.\textsuperscript{52}

**Overseas Petitioner Issuances.** As noted above, S. 386 contains a provision that would reserve up to 5.75% (2,302) of the 40,040 EB2 and EB3 green cards for foreign nationals petitioning from overseas. Most prospective employment-based immigrants in the backlog already reside in the United States. When notified by DOS that a visa number is available for them, they can apply with USCIS to adjust status from a nonimmigrant status (e.g., possessing an H-1B visa) to LPR status. However, some backlogged prospective immigrants reside abroad in their home countries. Employers seeking to hire these individuals face a competitive disadvantage because they are not already employing them. Individuals based overseas who face long wait times are likely to advance their careers elsewhere rather than wait abroad for years to receive an employment-based green card in the United States. This analysis assumes that green cards reserved under this provision would be used mostly by RoW country nationals who currently face no wait times.

**Schedule A Issuances.** S. 386 contains a provision that would reserve up to 4,400 green cards for Schedule A occupations (professional nurses and physical therapists).\textsuperscript{53} Under the most recent version of the bill, this set-aside would last for six years following enactment. The set-aside includes 4,400 principal immigrants, as well as their family members, effectively doubling the provision’s impact. To estimate the number of family members, the analysis assumes that Schedule A principal immigrants brought with them an average of 1.06 derivative immigrants. As such, the total set-aside under this provision is 4,400 principal immigrants plus 4,664 derivative immigrants, for a total set-aside of 9,064 immigrants. Because of the Hold Harmless provisions, Schedule A issuances are projected to start in Year 2 of the analysis (FY2022). Issuances are distributed between nationals from the Philippines, which send the majority of foreign-trained immigrant nurses to the United States, and nationals from all other countries.\textsuperscript{54}

**Transition Year Issuances.** S. 386 contains provisions that would allow a transition from the current 7% per-country ceiling to its elimination in the first three years following enactment. The transition would affect issuances in the first three years following enactment.

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\textsuperscript{52} DOS, Report of the Visa Office 2019, Table V, “Immigrant Visas Issued and Adjustments of Status Subject to Numerical Limitations (by Foreign State of Chargeability): Fiscal Year 2019.”

\textsuperscript{53} Schedule A occupations are defined in 20 C.F.R. §656.5(a). The derivative multiplier is based on a ratio of counts of primary and derivative immigrants who were granted LPR status, as recorded in the DHS, *Yearbook of Immigration Statistics FY2018*, Table 7.

\textsuperscript{54} Data on green cards received by persons employed in Schedule A occupations, by country of origin, are not publicly available. To estimate the proportion of Filipino nationals receiving this set-aside, CRS relies on the results of the NCLEX nurse licensure exams for foreign nurses administered by the National Council of State Boards of Nursing (NCSBN). The most recent available results from 2018 indicate that nurses from the Philippines accounted for 63% of all individuals who successfully passed the exam that year. See NCSBN, *2018 NCLEX Examination Statistics*, June 2019, Table 9. Accordingly, in the analysis, for Years 2-7 (FY2022 through FY2027), Schedule A issuances in the EB3 category totaled 5,710 (63% of 9,064) for Filipino nationals and the remaining 3,354 (37% of 9,064) for all other countries.
Table B-1. Transition Year Green Card Issuances Under S. 386
(eliminating the 7% per-country ceiling over the first three years)

<table>
<thead>
<tr>
<th>Year</th>
<th>Major Immigrant-Sending Countries</th>
<th>Rest of the World (RoW) Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY2021</td>
<td>85% of total annual green card issuances (34,034) are split between the two countries with the most employment-based (EB) immigrants; of these, not more than 85% (28,929) can go to the first country. The remainder, at least 15% (5,105), go to the second country.</td>
<td>15% of total annual green card issuances (6,006) are reserved for RoW countries; among these, not more than 25% can go to a single state.</td>
</tr>
<tr>
<td>FY2022</td>
<td>90% of total annual green card issuances (36,036) are split between the two countries with the most EB immigrants; of these, not more than 85% (30,631) can go to the first country. The remainder, at least 15% (5,405), go to the second country.</td>
<td>10% of total annual green card issuances (4,004) are reserved for RoW countries; among these, not more than 25% can go to a single state.</td>
</tr>
<tr>
<td>FY2023</td>
<td>90% of total annual green card issuances (36,036) are split between the two countries with the most EB immigrants; of these, not more than 85% (30,631) can go to the first country. The remainder, at least 15% (5,405), go to the second country.</td>
<td>10% of total annual green card issuances (4,004) are reserved for RoW countries; among these, not more than 25% can go to a single state.</td>
</tr>
</tbody>
</table>

Source: Section 2(c) of S. 386, as amended.

Note: The Transition Year provisions apply only to the EB2 and EB3 preference categories. First country refers to Indian nationals who currently make up the largest number of employment-based prospective immigrants in the EB1, EB2, and EB3 backlogs, and second country refers to Chinese nationals who make up the second largest number.

Because all of the issuance provisions described above overlap during the first few years, this analysis gives precedence to the Hold Harmless, Overseas Petition, and Schedule A issuances over the Transition Year issuances. Consequently the 40,040 green cards allocated by S. 386 to the EB1, EB2, and EB3 categories according to Table B-1 are first reduced by the Overseas Petition and Schedule A issuances before being allocated according to the Transition Year provisions. In addition, Year 1 (FY2021) Transition Year issuance limits are preempted by the higher priority Hold Harmless issuances for that year.

Backlog Reduction Methodology. Backlogged employment-based petition holders are issued green cards in the analysis according to the year in which they entered the backlog. Although the issuance limits described above quantify the number of issuances for each country in each of the three employment-based preference categories, the elimination of the current existing backlog is based on how many backlogged petitions can be processed within annual green card limits and on which country’s nationals have the oldest petitions.

In FY2018, USCIS approved 22,799 EB1, 66,904 EB2, and 34,964 EB3 petitions, per the November 2019 report cited above. Factoring in family members using the derivative multipliers for each EB category described above—1.48 for EB1, 1.00 for EB2, and 1.06 for EB3—yields an estimated 56,542 new additions to the EB1 backlog, 133,808 new additions to the EB2 backlog, and 72,026 new additions to the EB3 backlog. Given that 40,040 statutorily mandated green cards can reduce these backlogs each year, the net result is an estimated increase in the EB1, EB2, and EB3 backlogs each year by 16,502, 93,768, and 31,986 petitions, respectively (i.e., approved principal immigrant green card petitions, increased by their dependents and reduced by green card issuances).
As a result, the estimated total EB1 backlog at the start of FY2020 of 119,732 (Table 1) increases by a projected 148,518 individuals over nine years (16,502 x 9), resulting in an estimated EB1 backlog at the start of FY2030 of 268,260.\textsuperscript{55} The estimated total EB2 backlog at the start of FY2020 of 627,448 (Table 2) increases by a projected 843,912 individuals over nine years (93,768 x 9), resulting in an estimated EB2 backlog at the start of FY2030 of 1,471,360. The estimated total EB3 backlog at the start of FY2020 of 168,317 (Table 3) increases by a projected 287,874 individuals over nine years (31,986 x 9), resulting in an estimated EB3 backlog at the start of FY2030 of 456,191.\textsuperscript{56}

These totals are further broken down in the analysis by the provisions of S. 386 that allocate the 40,040 annual green card issuances according to the provisions described above. Those provisions alter the number of green cards that nationals from individual countries would otherwise receive under current law. The overall projected impact on the total backlog remains the same whether or not S. 386 is enacted.

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\textsuperscript{55} Note that the analysis extends nine fiscal years in order to correspond to 10 calendar years. The USCIS data are as of November 2019, which is roughly the start of FY2020. To arrive 10 years later at the start of FY2030 requires extending the analysis to the end of FY2029. Extending the fiscal analysis an additional year slightly exacerbates the ending numbers but changes none of the broad findings or conclusions.

\textsuperscript{56} Slight differences between these figures and those of the report tables cited are due to rounding.
## Summary

The parole provision in the Immigration and Nationality Act (INA) gives the Secretary of the Department of Homeland Security (DHS) discretionary authority to “parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.”

Immigration parole is official permission to enter and remain temporarily in the United States. It does not constitute formal admission under the U.S. immigration system. An individual granted parole (a parolee) is still considered an applicant for admission. A parolee is permitted to remain in the United States for the duration of the grant of parole, and may be granted work authorization.

The DHS Secretary’s parole authority has been delegated to three agencies within the department: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). Parole can be requested by foreign nationals inside or outside the United States in a range of circumstances. Major parole categories include port-of-entry parole, advance parole, humanitarian parole, and parole-in-place.

Over the years, U.S. Administrations have used parole authority to bring in various groups of foreign nationals seeking long-term admission to the country, including Indochinese refugees, Cuban nationals, and Central American minors found ineligible for refugee status. Although created in response to specific circumstances, there are certain commonalities among these special parole programs. Many can be grouped under at least one of three headings: refugee-related parole programs, family reunification parole programs, and Cuban parole programs. Data on grants of parole under some of these programs are available from DHS.

The use of parole authority to enable designated populations abroad to enter the United States has been particularly controversial. Some policymakers have argued that such programs are an appropriate use of the DHS Secretary’s statutory authority, while others see them as violations of the “case-by-case basis” requirement of the parole provision. Reflecting the latter view, President Donald Trump’s Executive Order 13767 on Border Security and Immigration Enforcement Improvements directs the DHS Secretary to “take appropriate action to ensure that parole authority … is exercised only on a case-by-case basis in accordance with the plain language of the statute.”

Parole does not grant, nor entitle beneficiaries to later obtain, a lawful permanent resident (LPR) status. Beginning in the mid-1950s, Congress passed measures (separate from the INA) that established processes to grant LPR status to specified groups of parolees. Since the enactment of a 1960 law, persons with parole in the United States have been able to apply for and be granted LPR status, but to do so they must be eligible to receive an immigrant visa and meet other requirements.

Bills introduced in recent Congresses illustrate differing views on the appropriate use of immigration parole authority. On the one hand, various measures have proposed utilizing parole authority as a mechanism to grant temporary immigration relief to specified populations. On the other hand, multiple bills have sought to restrict the use of parole authority; some of these bills have included language specifically to prohibit the use of parole for entire classes of people.
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Introduction

Executive Order 13767 on Border Security and Immigration Enforcement Improvements, issued by President Donald Trump on January 25, 2017, is perhaps best known for its call for construction of a wall on the Southwest border. It includes a number of other provisions, however, including one on immigration parole. Section 11(d) directs the Secretary of the Department of Homeland Security (DHS) to “take appropriate action to ensure that parole authority … is exercised only on a case-by-case basis in accordance with the plain language of the statute.”

Immigration parole permits a foreign national to be present temporarily in the United States for humanitarian or public benefit reasons. A parole provision was included in the original Immigration and Nationality Act (INA) of 1952 and was subsequently amended. It currently reads, in part:

(A) The Attorney General [now the Secretary of Homeland Security] may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled.

While seemingly limited and technical, INA parole authority has been the subject of considerable debate. It gives the DHS Secretary broad, discretionary authority to allow persons who may not otherwise be admissible to the country under the immigration laws to enter and remain in the United States temporarily. Persons granted parole (parolees) can apply for work authorization. Parole is one of several authorities that allow foreign nationals to live and work in the United States without being formally admitted to the country and without having a set pathway to a permanent immigration status.

Over the years, parole authority has been used to bring in various groups of foreign nationals seeking long-term admission, including Indochinese refugees, Cuban nationals, and Central American minors found ineligible for refugee status. Parole also has been granted to individuals within the United States, including certain unauthorized family members of U.S. military servicemembers and veterans.

This report provides a brief legislative history of the INA parole provision, describes categories of parole and the application process, explores the exercise of parole authority for groups outside the United States and related debates, discusses regulations on employment authorization, explains how parolees can obtain U.S. lawful permanent resident (LPR) status, and considers recent legislative efforts to delineate appropriate uses of parole.


3 An alien is defined in the INA as a person who is not a U.S. citizen or a U.S. national; it is synonymous with foreign national.
INA Parole Authority

Immigration parole is official permission to remain temporarily in the United States. In the case of individuals outside the United States, it also permits entry into the country. Parole does not constitute formal admission under the U.S. immigration system. A parolee is still considered an applicant for admission and is required to leave the United States before the period of parole expires.4

The original INA parole provision authorized the Attorney General, head of the Department of Justice (DOJ), to grant parole “for emergent reasons or for reasons deemed strictly in the public interest.”5 The INA, as initially enacted, did not contain distinct provisions for the admission of refugees; beginning in the 1950s, U.S. Administrations used the parole provision to bring in refugees.6

As part of the 1965 INA Amendments,7 a “conditional entry” provision for the admission of refugees was added to the INA. House Judiciary Committee and Senate Judiciary Committee reports on the 1965 legislation stated, in identical language, that with this addition the INA parole authority should thereafter be limited to certain situations:

Inasmuch as definite provision has now been made for refugees, it is the express intent of the committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.8

The conditional entry provision, however, was limited to the Eastern Hemisphere and was subject to other restrictions. As a consequence, the executive branch continued to use parole authority to address refugee situations. During the 1960s and 1970s, large numbers of individuals from Cuba, Indochina, and other areas, who the United States considered to be refugees, were paroled into the country.9

The Refugee Act of 198010 added language to the INA defining the term refugee and establishing a refugee admissions process.11 Among its other provisions, the 1980 act amended the INA

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4 A parolee, however, may apply for re-parole.
5 See the Appendix for the full original 1952 parole provision.
7 P.L. 89-236, §3.
9 For additional information, see 1980 committee print, pp. 12-15.
10 P.L. 96-212.
11 The refugee definition is set forth in INA Section 101(a)(42), and the refugee admissions process in INA Section 207. For additional information about the U.S. refugee admissions program, see CRS Report RL31269, Refugee Admissions and Resettlement Policy.
section on parole to restrict its use for bringing in refugees. It added a second paragraph to the parole provision as INA Section 212(d)(5)(B). This paragraph, which remains in law, reads:

(B) The Attorney General [now the Secretary of Homeland Security] may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 further amended the parole provision to replace the original 1952 language, “for emergent reasons or for reasons deemed strictly in the public interest,” with the current language specifying “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” IIRIRA also included language to amend the INA provisions on the worldwide level of family-sponsored immigrants to require that long-term parolees be counted against those limits.

The Homeland Security Act of 2002 abolished DOJ’s Immigration and Naturalization Service (INS) and transferred most of its immigration functions to the new DHS as of March 1, 2003. Since then, the DHS Secretary has exercised immigration parole authority.

Parole can be compared to other statutory and non-statutory mechanisms that provide foreign nationals with temporary authorization to be in the United States. Like recipients of statutory Temporary Protected Status (TPS) and executive branch-established Deferred Action for Childhood Arrivals (DACA), for example, parolees can live and work in the United States for a specified period. Among the key differences, however, is that parole is subject to fewer eligibility requirements than TPS or DACA. It also can be granted to persons inside or outside the country, while both TPS and DACA are limited to persons within the United States. Parole, though, is subject to at least one restriction that does not apply under TPS or DACA. A person is not eligible for parole-in-place, which, as described below, is a term for the authorization of parole for someone inside the United States, if that person was lawfully admitted, even if his or her authorized period of stay has expired.

**DHS Exercise of Parole Authority**

The DHS Secretary’s parole authority has been delegated to three agencies within the Department: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). In 2008, the three agencies

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12 P.L. 96-212, §203(f).
13 See the Appendix for the full current INA parole provision.
14 P.L. 104-208, Division C, §602(a).
15 P.L. 104-208, §603. For information on family-based immigration and related numerical limits, see CRS Report R43145, *U.S. Family-Based Immigration Policy*.
16 P.L. 107-296.
17 For further discussion, see Geoffrey Heeren, “The Status of Nonstatus,” American University Law Review, vol. 64, issue 5 (June 2015).
18 For information about TPS, see CRS Report RS20844, *Temporary Protected Status: Overview and Current Issues*; for information about DACA, see CRS Report R45995, *Unauthorized Childhood Arrivals, DACA, and Related Legislation*. 
entered into a memorandum of agreement (MOA) regarding the exercise of parole with respect to aliens outside the United States and at ports of entry. As discussed in the MOA, the phrases “humanitarian reasons” and “significant public benefit” in the current parole provision have taken on particular meanings:

As practice has evolved, DHS bureaus have generally construed “humanitarian” paroles (HPs) as relating to urgent medical, family, and related needs and “significant public benefit” paroles (SPBPs) as limited to persons of law enforcement interest such as witnesses to judicial proceedings.

Regarding the length of a parole grant, the INA provision generally states, “when the purposes of such parole shall … have been served the alien shall forthwith return or be returned.” USCIS has addressed the length of its grants of humanitarian or significant public benefit parole for individuals outside the United States (these parole categories are further discussed below). As explained by the agency, it grants parole “for a temporary period of time to accomplish the purpose of the parole,” which typically is no longer than one year.

In addition, according to USCIS, “Parole ends on the date the parole period expires or when the beneficiary departs the United States or acquires an immigration status, whichever occurs first. In some cases, we may place conditions on parole, such as reporting requirements.” The agency also notes that it “may revoke parole at any time and without notice” upon a determination that it “is no longer warranted or the beneficiary fails to comply with any conditions of parole.” A parolee in the United States who needs to remain beyond his or her authorized parole period can request re-parole.

**Categories of Parole**

Parole can be requested by foreign nationals inside or outside the United States in a range of circumstances. Selected major parole categories are described below. As late as the early 2000s, annual reports of immigration statistics published by the former Immigration and Naturalization Service (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) for the Purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary’s Parole Authority Under INA § 212(d)(A) With Respect to Certain Aliens Located Outside the United States, https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf (hereinafter cited as DHS, MOA on parole). With respect to CBP, the MOA notes: “To the extent that this MOA largely assists ICE and USCIS apportion its parole caseloads, omission of specific reference to CBP should not be construed to detract from CBP’s inherent authority to issue paroles. CBP does and will continue to exercise parole authority for both urgent humanitarian reasons and significant public benefit.”

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19 U.S. Department of Homeland Security, Memorandum of Agreement between U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) for the Purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary’s Parole Authority Under INA § 212(d)(s)(A) With Respect to Certain Aliens Located Outside the United States, https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf (hereinafter cited as DHS, MOA on parole). With respect to CBP, the MOA notes: “To the extent that this MOA largely assists ICE and USCIS apportion its parole caseloads, omission of specific reference to CBP should not be construed to detract from CBP’s inherent authority to issue paroles. CBP does and will continue to exercise parole authority for both urgent humanitarian reasons and significant public benefit.” (p. 3).

20 DHS, MOA on parole, p. 2.


22 USCIS, parole.

23 For additional information, see USCIS, parole (under the “Re-Parole” tab).

24 The categories, as described here, are mutually exclusive but are not exhaustive. For example, the DHS MOA lists others, such as parole related to national intelligence, parole for participants in events held by U.S.-based international organizations, and parole under 50 U.S.C. Section 403(h), which provides for the “entry of a particular alien into the United States for permanent residence” when it “is in the interest of national security or essential to the furtherance of the national intelligence mission. DHS, MOA on parole, pp. 2-3.
Immigration Parole

Service (INS) and then DHS contained data on parole grants. DHS’s 2003 Yearbook of Immigration Statistics, the last to include such data, contained annual data for FY1998 through FY2003 on six categories of parolees, including port-of-entry parolees, deferred inspection parolees, advance parolees, and humanitarian parolees (see descriptions below). During this six-year period, the annual total number of parolees ranged from about 235,000 to about 300,000, with port-of-entry parolees accounting for more than half of each annual total. While comparable cross-category data on parole are no longer available from DHS, there are some available USCIS statistics on particular parole programs, which are presented in the relevant sections below.

Port-of-Entry Parole

Port-of-entry parole is authorized at the port of arrival and can be provided in a variety of situations. These include permitting the entry of an LPR returning to the United States who is not carrying proper documents. Port-of-entry parole also can be used to allow foreign nationals to enter for short stays, such as to attend a family funeral or assist in a natural disaster.

Deferred Inspection Parole

Deferred inspection is a form of parole that is used when an alien appears at a port of entry with documentation but questions remain about his or her admissibility to the United States. In such cases, parole can be granted to enable the individual to appear at another immigration office to resolve the issue.

Advance Parole

As suggested by its name, advance parole is authorized prior to an individual’s arrival at a U.S. port of entry. The term is most commonly used to describe the issuance of a document to a foreign national (other than an LPR) residing in the United States who needs to depart and wants to return, and whose conditions of stay do not otherwise allow for re-entry into the country.

An advance parole document authorizes such an alien to appear at a U.S. port of entry to seek parole after travelling abroad. However, it does not entitle the bearer to be paroled into the United States. That remains a discretionary decision to be made when the person arrives at the port of entry. Among the categories of individuals in the United States that need to request advance parole to be able to return to the country after traveling abroad are most applicants for LPR status, holders of and applicants for TPS, and individuals with parole.

Humanitarian Parole for Persons Outside the United States

This category of parole takes its name from the text of the INA provision and reflects the underlying reason for the grant of parole. Although all parole authorizations are required to be for urgent humanitarian reasons or significant public benefit, humanitarian parole is often used to describe a narrower category of parole grants. These are grants to persons residing outside the

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27 DHS, 2003 Yearbook.
United States who apply for parole from abroad to enter the United States temporarily for urgent humanitarian reasons, such as to receive medical treatment.

**Significant Public Benefit Parole for Persons Outside the United States**

A counterpart to the humanitarian parole category, this category similarly takes its name from the text of the INA provision and reflects the underlying reason for the grant of parole. As used here, it includes parole grants to persons residing outside the United States who apply for parole from abroad to enter the country temporarily for significant public benefit, such as to participate in a legal proceeding.

**Parole-in-Place**

Parole-in-place authorizes individuals who are physically present in the United States but have not been lawfully admitted to remain in the country. In accordance with a 2013 USCIS policy memorandum, parole-in-place has been granted to certain family members (spouses, children, and parents) of active duty members and former members of the U.S. Armed Forces and the Selected Reserve of the Ready Reserve. That memorandum specified that such grants of parole “should be authorized in one-year increments, with re-parole as appropriate.”

**Removal-Related Parole**

This category of parole applies to aliens in removal proceedings or aliens who have final orders of removal, as well as aliens granted deferred action by ICE at any point after the commencement of removal proceedings.

**Special Parole Programs for Persons Outside the United States**

Over the years, INS and DHS established special parole programs for particular populations abroad in response to specific circumstances; these are sometimes referred to as “categorical parole” programs. Among these are parole programs—such as the Cuban lottery (described below)—established in connection with international agreements. These special parole programs are the subject of a separate section below.

**Parole Application Process**

Generally, individuals applying for parole in advance, whether they are inside or outside the United States, submit USCIS Form I-131, Application for Travel Document. Depending on their location, parole applicants use this form to apply for either an advance parole document for

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individuals who are currently in the United States or an advance parole document for individuals outside the United States. USCIS and ICE can authorize issuance of advance parole documents, in accordance with the 2008 MOA referenced above.

The advance parole document for individuals in the United States is referenced in the “Advance Parole” section above. As noted, this document authorizes an alien to appear at a U.S. port of entry after travelling abroad to seek parole into the United States. Applicants for parole-in-place also need to submit Form I-131.

Applicants for humanitarian parole or significant public benefit parole, as described above, and applicants under some of the special parole programs described below use Form I-131 to apply for an advance parole document for individuals outside the United States. Applicants for re-parole also apply for this type of advance parole document (despite being physically present in the United States).

There are exceptions to the Form I-131 application process. For example, principal applicants under the International Entrepreneur Parole program described below must submit a different application form. Applicants in removal proceedings seeking release from ICE custody must contact their local ICE office. ICE is responsible for handling such parole requests.

Selected Immigration Parole Programs for Persons Outside the United States

A number of parole programs have been established over the years to enable members of designated populations abroad to enter the United States. Although created in response to specific circumstances, there are certain commonalities among these special parole programs. Many of them can be grouped under one (or more) of three headings: refugee-related parole programs, family reunification parole programs, and Cuban parole programs.

There is at least one recently established special parole program, however, that does not fall under any of the three headings: the International Entrepreneur Parole (IEP) program. The subject of a final rule issued at the end of the Obama Administration in January 2017, this program reflects a novel use of parole. Supplementary information to the rule described the purpose of the IEP program as being “to increase and enhance entrepreneurship, innovation, and job creation in the United States.” The supplementary information further stated

Under this final rule, an applicant would need to demonstrate that his or her parole would provide a significant public benefit because he or she is the entrepreneur of a new start-up entity in the United States that has significant potential for rapid growth and job creation.
The international entrepreneur final rule had an original effective date of July 17, 2017. Due to efforts by the Trump Administration to delay this effective date and related legal action, however, DHS did not begin accepting applications under the rule until December 2017.34 In May 2018, DHS published a proposed rule to remove the IEP regulations.35 According to DHS, it proposed to eliminate the final rule “because the department believes that it represents an overly broad interpretation of parole authority,” among other reasons.36 As of February 10, 2020, USCIS had received a total of 28 IEP applications. Of these, 1 was approved, 22 were denied, 3 were withdrawn, and 2 were pending.37

Refugee-Related Parole Programs

Since the end of World War II, the United States has established various immigration programs for the admission of foreign nationals fleeing persecution.38 Prior to enactment of the 1980 Refugee Act, immigration parole was the chief means used to bring in aliens considered to be refugees. From the late 1950s through the 1970s, hundreds of thousands of individuals from Cuba, Indochina, Eastern Europe, and other areas were paroled into the United States.

Parole continued to be granted to some individuals considered by the United States to be refugees after enactment of the Refugee Act. In a notable 1980 example, the Attorney General paroled in tens of thousands of Cubans and Haitians who arrived in the United States by boat in what is known as the Mariel Boatlift. Until 2017, Cuban nationals were routinely granted parole under the “wet foot/dry foot” policy. As described in a 2017 DHS fact sheet, “‘wet-foot/dry-foot’ generally refers to an understanding under which Cuban migrants traveling to the United States who are intercepted at sea (‘wet foot’) are returned to Cuba or resettled in a third country, while those who make it to U.S. soil (‘dry foot’) are able to request parole.”39

In the late 1980s, denial rates for Soviet refugee applicants were increasing because of changes in U.S. refugee processing and other factors. In response, in 1989, Congress passed the Lautenberg Amendment. As subsequently amended to correct references to the Soviet Union following its dissolution, it required the Attorney General (now the Secretary of DHS) to designate categories of former Soviet and Indochinese nationals—including specified categories of religious minorities from an independent state of the former Soviet Union, or of Estonia, Latvia, or Lithuania—for whom less evidence would be needed to prove refugee status. It also provided for adjustment to permanent resident status of certain Soviet and Indochinese nationals granted parole after being denied refugee status.40 In connection with this legislation, INS and then

35 See DHS, proposed rule to eliminate IEP program.
37 Data provided by USCIS to CRS by email, September 30, 2020.
38 For additional information, see 1980 committee print.
39 U.S. Department of Homeland Security, Fact Sheet: Changes to Parole and Expedited Removal policies affecting Cuban Nationals, January 12, 2017. According to the fact sheet: “Considering the reestablishment of full diplomatic relations, Cuba’s signing of a Joint Statement obligating it to accept the repatriation of its nationals who arrive in the United States after the date of the agreement, and other factors, the Secretary concluded that … the parole policies discussed above [including the “wet foot/dry foot” policy] are no longer warranted.”
40 The Lautenberg Amendment was first enacted as part of the FY1990 Foreign Operations, Export Financing, and Related Programs Appropriations Act (P.L. 101-167, §599D, 599E). It has been regularly extended since, although
USCIS offered parole to certain religious minorities from the former Soviet Union who were denied refugee status. This parole program continued until 2011, when, according to USCIS, the agency decided to stop it “as a matter of policy.”

Another parole program (for unsuccessful refugee applicants) was established in 2014. It was part of the Central American Minors (CAM) program for certain minor children in El Salvador, Guatemala, and Honduras. Under the now-terminated refugee part of the CAM program, a qualifying parent in the United States could file an application for a qualifying child living in one of the three countries to be considered for admission to the United States as a refugee, along with certain accompanying family members. If the child was found ineligible for refugee status, the CAM program provided for the child and his/her accompanying family members to be considered for immigration parole. In written testimony prepared for a 2015 Senate hearing on the CAM program, a USCIS official explained, “[T]o grant parole under this program, USCIS must find that the individual is at risk of harm in his or her country and that the applicant merits a favorable exercise of discretion.” According to the official, grants of parole generally would be for an initial period of two years. According to USCIS data, there were a total of 1,464 CAM parole approvals in FY2016 and FY2017 combined. The breakdown by applicant country of citizenship was El Salvador (1,108), Honduras (325), and Guatemala (31).

In August 2017, DHS announced that it was terminating the parole part of the CAM program. As a result of related litigation and a court settlement, however, DHS agreed in 2019 to process cases that had been conditionally approved for parole at the time of the termination announcement. This processing has resulted in the approval of 342 CAM parole cases in FY2020, as of June 2020. The breakdown by applicant country of citizenship is El Salvador (328), Guatemala (13), and Honduras (1). Parole also figured into the CAM program in another way. A qualifying parent, for purposes of the program, was an individual who was at least age 18 and was lawfully present in a specified immigration category. The specified categories included parole (provided the parent had been issued parole for at least one year).

**Family Reunification Parole Programs**

Family reunification is an underlying principle of the U.S. immigration system. The INA provides for U.S. citizens and LPRs to file immigrant visa petitions on behalf of certain family members. The family-based immigration system is subject to statutory preferences and numerical limits that there have been some lapses between extensions.

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44 Data provided by USCIS to CRS by email, June 17, 2020.

45 USCIS, CAM.

46 Data provided by USCIS to CRS by email, June 17, 2020.

47 USCIS, CAM.
may result in years-long waits for visas for some prospective immigrants after their petitions are approved.\(^{48}\) The principle of family reunification is also reflected in various immigration parole programs.\(^{49}\)

The Cuban Family Reunification Parole (CFRP) program was established in 2007, a peak year for U.S. Coast Guard interdictions of Cubans. It was seen as way to both discourage Cubans from undertaking dangerous maritime crossings and meet the U.S. commitment on legal Cuban migration levels under the 1994 U.S.-Cuban Migration Agreement (see the “Other Parole Programs for Cuban Nationals” section). The CFRP program is available to Cuban nationals who are the beneficiaries of family-based immigrant visa petitions filed by certain eligible family members in the United States. Under the program, certain U.S. citizens and LPRs who have filed immigrant visa petitions on behalf of family members in Cuba that have been approved are invited by the State Department to apply to USCIS for parole for their Cuban relatives. If parole is granted, the Cuban relatives may enter and live in the United States without having to wait for their immigrant visas to become available. Grants of parole under the CFRP program are for two years.\(^{50}\) After one year of physical presence in the United States, a Cuban parolee can apply to become an LPR under the terms of the Cuban Adjustment Act (see the “Parole and Permanent Immigration Status” section). According to USCIS, the CFRP program remains in effect but all CFRP processing in Havana has been suspended for security reasons.\(^{51}\)

The similar Haitian Family Reunification Parole (HFRP) program was implemented in 2015 to “provide[ ] the opportunity for certain eligible Haitians to safely and legally immigrate sooner to the United States.”\(^{52}\) Like the Cuban program, the HFRP program is available to Haitian nationals who are the beneficiaries of family-based immigrant visa petitions filed by certain eligible family members in the United States. To be invited to apply for the HFRP program, the immigrant visa petition must have been approved by December 18, 2014, and the expected wait for an immigrant visa must be between about 18 and 42 months. If parole is granted, the Haitian relatives may enter and live in the United States while they wait for visa numbers to become available so they can apply for LPR status. Grants of parole under the HFRP program are for three years.\(^{53}\)

In August 2019, USCIS announced its intention to terminate the HFRP program in accordance with Executive Order 13767.\(^{54}\) Between the program’s inception and December 31, 2019, the

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48 See CRS Report R43145, \textit{U.S. Family-Based Immigration Policy}.

49 Family reunification is also a feature of some refugee-related parole programs, including the CAM program and the Lautenberg Amendment (as discussed in the preceding section). To be considered for U.S. admission under the Lautenberg Amendment, a prospective refugee must have family in the United States.


51 Email from USCIS to CRS, February 20, 2020. According to USCIS: “In light of the significant drawdown in U.S. government personnel from the U.S. Embassy in Cuba for security reasons and the subsequent decision to close the USCIS field office in Cuba on December 10, 2018, all CFRP processing in Havana has been suspended. The Department of Homeland Security is working with our colleagues at the Department of State to evaluate options for interviewing and processing CFRP beneficiaries in alternative locations.”


agency issued 12,534 invitations (covering 23,993 beneficiaries) to petitioner to submit applications on behalf of their beneficiary relatives and accepted 10,534 applications. As of December 31, 2019, 8,313 of these applications had been approved, 2,209 had been denied, and 12 remained pending.\textsuperscript{55}

The Filipino World War II Veterans Parole Program, implemented in 2016, makes eligible for parole certain beneficiaries of approved family-based immigrant visa petitions that were filed by Filipino veterans or their surviving spouses. If parole is granted, according to USCIS, the beneficiaries could “provide support and care to their aging veteran family members” in the United States while waiting for their visas to become available.\textsuperscript{56} Under the family-based immigration system and its per country limits, visa waiting times for nationals of the Philippines can be particularly long. In specified circumstances, this program permits beneficiaries to seek parole on their own behalf based on an approved petition filed by an eligible veteran or surviving spouse. Grants of parole under the Filipino World War II Veterans Parole Program are for three years.\textsuperscript{57}

In August 2019, USCIS announced its intention to terminate this parole program in accordance with Executive Order 13767.\textsuperscript{58} Between the program’s inception and December 31, 2019, the agency accepted 664 applications. As of December 31, 2019, 301 of these applications had been approved, 266 had been denied, and 97 were pending.\textsuperscript{59}

**Other Parole Programs for Cuban Nationals**

Cuban nationals have been the beneficiaries of several special parole programs over the years. In addition to refugee-related grants of parole and the CFRP program, Cubans have been granted parole under programs that include the Special Program for Cuban Migration and the Cuban Medical Professional Parole (CMPP) program.

The Special Program for Cuban Migration, also known as the Cuban lottery, grew out of the 1994 U.S.-Cuban Migration Agreement. Under that accord, the United States agreed, among other things, to allow at least 20,000 Cubans to migrate legally to the United States each year, excluding immediate relatives of U.S. citizens. The Cuban lottery, which was established to help meet that target of 20,000, has been restricted to Cuban adults who meet certain basic qualifications. Interested Cubans have applied during an open season, and winners have been randomly chosen. Lottery winners have then been interviewed for consideration for parole.

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\textsuperscript{58} USCIS, August 2019 news release.

Successful applicants could bring their spouses and minor children with them to the United States. There have been three Cuban lottery open seasons to date (in FY1994, FY1996, and FY1998). According to USCIS, “since 1998, the Cuban Government has not permitted a new registration for the Special Program for Cuban Migration.”

The CMPP program, which was established in 2006, allowed Cuban health-care providers who were conscripted by the Cuban government to study or work in another country to apply to enter the United States on parole. Their accompanying spouses and any minor children could also be considered for parole. The program was terminated in 2017 as “part of the ongoing normalization of relations between the governments of the United States and Cuba.” USCIS approved 9,693 applications under the CMPP program between January 1, 2006, and December 31, 2017.

**Debate Over Parole Programs for Specified Populations**

Over the years, the executive branch’s use of its discretionary parole authority for specified classes of foreign nationals has been controversial. Objections were voiced in a 1996 House Judiciary Committee report on a predecessor bill to IIRIRA that proposed more restrictive changes to the parole provision than were ultimately enacted (see the “INA Parole Authority” section):

The text of section 212(d)(5) is clear that the parole authority was intended to be used on a case-by-case basis to meet specific needs, and not as a supplement to Congressionally-established immigration policy. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law, with the intent that they will remain permanently in the United States.

Some House Judiciary Committee members at the time opposed the committee-approved changes to the parole provision. In a “dissenting views” section of the report, they argued against revising the language of INA Section 212(d)(5): “The current law provides the Attorney General with

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60 For additional information, see archived CRS Report R40566, *Cuban Migration to the United States: Policy and Trends.*

61 U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Notice of Changes to Application Procedures for the Cuban Family Reunification Parole Program,” 79 Federal Register 75579, 75580, December 18, 2014. In this notice, USCIS cited Cuba’s failure to permit a new lottery registration as a reason for the establishment of the CFRP program: “Without this pool of individuals, there was a deficiency in the number of Cubans potentially eligible for travel to the United States.”


appropriate flexibility to deal with compelling immigration situations.”

Almost 20 years later, during the Obama Administration, then-DHS Secretary Jeh Johnson directed USCIS to issue new policies on the use of parole-in-place for individuals in the United States who had U.S. citizen and LPR family members seeking to enlist in the U.S. Armed Forces. He provided the following rationale for using parole authority for a class of individuals:

Although parole determinations must be made on an individualized basis, the authority has long been interpreted to allow for designation of specific classes of aliens for whom parole should be favorably considered, so long as the parole of each alien within the class is considered on a discretionary, case-by-case basis.

In FY2019 and FY2020 (as of June 18, 2020) combined, USCIS approved 8,952 military parole-in-place applications and denied 2,040. As of June 18, 2020, 4,943 applications were pending.

The Trump Administration has acted to end some parole programs in accordance with Executive Order 13767. Citing the executive order, USCIS announced the termination of the CAM parole program in August 2017, although some cases continue to be processed (see the “Refugee-Related Parole Programs” section).

In August 2019, USCIS announced its intention to end the Haitian Family Reunification Parole program and the Filipino World War II Veterans Parole program (see the “Family Reunification Parole Programs” section). The news release quoted then-USCIS Acting Director Ken Cuccinelli as saying, “Under these categorical parole programs, individuals have been able to skip the line and bypass the proper channels established by Congress.” It further explained that USCIS continues to review the remaining categorical parole programs but will not terminate any program until it completes “required administrative changes to Form I-131, Application for Travel Document, and the form is approved for public use.”

Work Authorization for Parolees

Immigration regulations providing that parolees are eligible for employment authorization date to the 1980s. In May 1981, INS amended its regulations to add new provisions on employment authorization. These provisions enumerated two classes of aliens eligible to work: (1) aliens

68 Data provided by USCIS to CRS by email, September 30, 2020.
70 USCIS, August 2019 news release.
71 USCIS, August 2019 news release. The news release describes categorical parole as “programs designed to consider parole for entire groups of individuals based on pre-set criteria.”
72 USCIS, August 2019 news release.
73 U.S. Department of Justice, Immigration and Naturalization Service, “Employment Authorization to Aliens in the United States,” 46 Federal Register 25079, May 5, 1981. According to the rule summary, “The new rules are necessary to codify the various Service Operations Instructions and policy statements in one place in the regulations so that the
who were authorized for employment incident to their status, and (2) aliens who had to apply for work authorization. The first class included aliens who were paroled into the United States as refugees, as described in INA Section 212(d)(5)(B) and discussed above in the “INA Parole Authority” section. Other aliens granted parole in accordance with INA Section 212(d)(5) were not listed as part of either class.

In November 1981, INS published a final rule to add INA Section 212(d)(5) parolees to the class of aliens who had to apply for work authorization, describing them as follows: “Any alien paroled into the United States temporarily for emergent reasons or for reasons deemed strictly in the public interest: Provided, The alien establishes an economic need to work.”74 The rule also added a new provision on criteria to establish economic necessity. The supplementary information to the rule discussed the rationale for adding the new paragraph on parolees: “Although section 212(d)(5)(A) of the Act authorizes the exercise of discretion regarding the conditions of parole for such alien, and which implies work authorization, this new class of aliens is added to Part 109 of 8 CFR to avoid any uncertainty.”75

Current DHS regulations on employment authorization describe three classes of employment-authorized aliens: (1) “Aliens authorized employment incident to status,” (2) “Aliens authorized for employment with a specific employer incident to status or parole,” and (3) “Aliens who must apply for employment authorization.”76 Different parolees fall within each of these classes. As under the 1981 regulations, the first class includes aliens who are paroled in as refugees.77 The second class includes aliens who are paroled in as entrepreneurs under the International Entrepreneur Parole program78 (see the “Selected Immigration Parole Programs for Persons Outside the United States” section). The third class includes aliens granted parole under INA Section 212(d)(5), with some exceptions. The relevant paragraph of the regulation describing this third class reads, in part, “an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.”79 (It does not include any language on economic necessity.) Also included in the third class, in a separate paragraph, are spouses of entrepreneur parolees.80

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76 8 C.F.R. §274a.12.

77 8 C.F.R. §274a.12(a)(4).

78 8 C.F.R. §274a.12(b)(37).

79 8 C.F.R. §274a.12(c)(11). Among the exceptions, this provision excludes asylum seekers and others requesting humanitarian relief who are paroled from custody after establishing a credible fear or reasonable fear of persecution or torture. For information about credible fear and reasonable fear, see CRS Report R45539, Immigration: U.S. Asylum Policy

80 8 C.F.R. §274a.12(c)(34).
Parole and Permanent Immigration Status

A parolee is permitted to remain in the United States for the duration of the grant of parole, and may be granted work authorization. A parole grant, however, does not provide a set pathway to a permanent immigration status.

The INA, as originally enacted in 1952, did not allow a parolee to apply for adjustment of status, which is the standard process of obtaining LPR status while in the United States. The main adjustment of status provision in the 1952 act (INA §245(a)) provided only for the adjustment of status of an alien lawfully admitted to the United States as a nonimmigrant if the alien had an immigrant visa immediately available and met other requirements.

INA Section 245(a) was amended in 1960 to provide for the adjustment of status of an alien who had been inspected and admitted or paroled into the United States. This provision thus gives parolees a potential pathway to LPR status, but it is subject to a number of requirements and restrictions. Among the requirements, an individual must be eligible to receive an immigrant visa and must have an immigrant visa immediately available in order to adjust status. This, in turn, typically requires the individual to have either a family member or employer who can sponsor him or her under the existing family-based or employer-based permanent immigration system. To be eligible for adjustment of status, an individual also must be admissible to the United States for permanent residence. The INA enumerates grounds of inadmissibility, which are grounds upon which aliens are ineligible to receive visas or to be admitted to the United States. These include health, criminal, and security grounds, among others. Some grounds of inadmissibility include exceptions, and some can be waived. In addition, adjustment of status under INA Section 245(a) is not applicable to individuals who, for example, have engaged in unauthorized employment or have failed to maintain lawful status continuously since U.S. entry, although there are exceptions to these ineligibilities for certain persons, including certain relatives of U.S. citizens.

Adjustment of Status Legislation

As noted, prior to the enactment of the Refugee Act of 1980, parole authority was one of the mechanisms used to bring refugees into the United States. Laws enacted between the mid-1950s and the late 1970s provided for the adjustment of status of specified groups of parolees, including paroled refugees from World War II, the Hungarian Revolution of 1956, and the Vietnam War. Also enacted during this period, in the aftermath of the Cuban Revolution, was the Cuban Adjustment Act. Unlike the other adjustment of status measures, the Cuban Adjustment Act was not limited to a finite group of Cuban parolees and did not include an end date. In its current form, it provides for the adjustment of status “of any alien who is a native or citizen of Cuba and

81 A nonimmigrant is a foreign national who is legally admitted to the United States for a temporary period of time and a specific purpose (e.g., tourists, students, diplomats).
82 P.L. 86-648, §10.
83 INA §212(a), 8 U.S.C. §1182(a).
84 An exception applies to immediate relatives of U.S. citizens. INA Section 201(b)(2) (8 U.S.C. §1151(b)(2)) defines this term to mean the unmarried children under age 21, spouses, and parents of a U.S. citizen, with the U.S. citizen required to be at least age 21 in the case of parents.
who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year.\textsuperscript{86}

After 1980, parole continued to be granted to particular groups of foreign nationals seeking permanent admission to the United States, and legislative provisions continued to be enacted to enable members of these groups to adjust to LPR status. One of these adjustment provisions was enacted as part of the Lautenberg Amendment, which, as amended, provided for the adjustment of status of nationals of an independent state of the former Soviet Union, Estonia, Latvia, Lithuania, Vietnam, Laos, or Cambodia who were granted parole after being denied refugee status (see the “Refugee-Related Parole” section).\textsuperscript{87}

Most beneficiaries of the current special parole programs have an existing avenue to obtain LPR status. In the case of the Cuban programs, parolees can adjust status under the Cuban Adjustment Act. In the case of the family reunification programs, parolees can adjust status under the standard INA adjustment of status provisions once their immigrant visas become available. Individuals granted parole under the CAM program or the IEP program, however, would not necessarily have an existing pathway to LPR status and would likely require special adjustment of status legislation.

**Advance Parole and Adjustment of Status**

The potential use of advance parole as a mechanism to gain access to adjustment of status has received attention in recent years. While this issue has been raised mainly in connection with the DACA initiative (and is discussed in that context here), it has broader relevance. It is also applicable to others present in the United States in a capacity that makes them eligible for advance parole but who did not enter the country lawfully—such as certain holders of TPS.\textsuperscript{88}

DACA provides temporary protection from removal to individuals who have met a set of requirements. Among these, the individual must have been in unlawful status on June 15, 2012. It does not matter if the individual initially entered the United States legally as long as he or she no longer had lawful status on June 15, 2012. DACA recipients who entered the United States unlawfully are not eligible to adjust to LPR status (because they were never inspected and admitted or paroled into the country), even if they meet the other eligibility requirements discussed earlier in this section of the report.

During the Obama Administration, DACA recipients who initially entered the United States unlawfully could become eligible for adjustment of status if they were granted advance parole and were permitted to re-enter the country after travelling abroad. Now-archived USCIS DACA FAQs enumerated the following bases for granting advance parole: “humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative; educational purposes, such as semester-abroad programs and academic research[; or] employment purposes.”\textsuperscript{89} When DACA recipients who were granted advance parole

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\textsuperscript{86} P.L. 89-732, as amended, 8 U.S.C. §1255 note.


\textsuperscript{88} For additional information about this form of relief, see CRS Report RS20844, *Temporary Protected Status: Overview and Current Issues*.

returned to the United States, they could be paroled in. They would therefore meet the threshold “inspected and admitted or paroled” requirement for adjustment of status, which could enable them to become LPRs. To do so, however, such individuals would need to meet the other applicable requirements for adjustment of status, including being eligible to receive an immigrant visa, being admissible to the United States, having an immigrant visa immediately available, and being covered by an exception that shielded the individuals from any applicable ineligibilities.90

According to preliminary data provided to Congress by DHS, 45,447 DACA recipients had been approved for advance parole as of August 21, 2017.91 It is not known how many of these individuals subsequently applied for or were granted adjustment to LPR status.

When the Trump Administration acted to rescind DACA in 2017, it announced that it would no longer grant advance parole under the DACA program. As stated in the September 2017 DHS DACA rescission memorandum, DHS “will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole.”92

In response to the June 2020 Supreme Court decision vacating the DACA rescission, acting DHS Secretary Wolf issued a memorandum in July 2020 “making certain immediate changes to the DACA policy to facilitate my thorough consideration of how to address DACA.” Regarding advance parole, the memorandum stated that it “should be granted to current DACA beneficiaries only in exceptional circumstances.”93 An August 2020 USCIS memorandum providing implementing guidance included some examples of such circumstances, among them travel in furtherance of U.S. law enforcement interests and travel for life-sustaining medical treatment not available to the individual in the United States. The USCIS memorandum further stated that “in most instances, traveling abroad for educational purposes, employment related purposes, or to visit family members living abroad will not warrant advance parole.”94


91 These data were made publicly available by the Office of Senator Chuck Grassley in a September 2017 news release; see https://www.grassley.senate.gov/news/news-releases/data-indicate-unauthorized-immigrants-exploited-loophole-gain-legal-status.


Some bills introduced and considered in recent Congresses directly addressed the advance parole-adjustment of status issue. The Security, Enforcement, and Compassion United in Reform Efforts (SECURE) Act of 2017 (S. 2192), as introduced in the 115th Congress, proposed to rewrite the INA parole provision. Among other changes, it would have added a definition of advance parole to the provision and would have stipulated that “a grant of parole into the United States based on an approved application for advance parole shall not be considered a parole for purposes of qualifying for adjustment of status to lawful permanent resident status in the United States.” Similar language was included in the Solution for Undocumented Children through Careers, Employment, Education, and Defending Our Nation (SUCCEED) Act (S. 1852), as introduced in the 115th Congress, and in S.Amdt. 1959, the SECURE and SUCCEED Act, as considered on the Senate floor in February 2018.95

### Legislation in Recent Congresses

Bills introduced in recent Congresses illustrate differing views about the appropriate use of immigration parole authority. One key area of debate is the use of parole for designated groups.

On the one hand, various legislative proposals have sought to utilize parole authority as a mechanism to grant temporary immigration relief to specified populations. For example, the Healthcare Opportunities for Patriots in Exile Act (HOPE) Act, as introduced in 116th Congress and earlier Congresses,96 would give DHS the discretion to parole into the United States certain veterans for purposes of receiving healthcare from the Department of Veterans Affairs.

The 116th Congress has also seen the introduction of a variety of bills to grant parole to designated groups. The Families Belong Together Act (H.R. 883/S. 271) would require DHS to grant parole to certain parents and children separated by the department. The Syrian Allies Protection Act (S. 2625), which would establish a special immigrant program for certain Syrians, would direct the executive branch to “develop and implement a framework” to grant parole to applicants for special immigrant status who are at risk in their current locations.97 In addition, at least one bill, the Cuban Family Reunification Act (H.R. 4884), seeks to resuscitate a currently inactive parole program of the same name.

On the other hand, multiple bills introduced in recent Congresses have sought to restrict the use of parole authority. Among these are similar bills ordered to be reported by the House Judiciary Committee in the 114th (H.R. 1153) and 115th (H.R. 391) Congresses, both entitled the Asylum Reform and Border Protection Act. These bills proposed to amend the text of the INA parole provision to limit the use of parole to an enumerated “urgent humanitarian reason” or “reason deemed strictly in the public interest.” These bills also would have prohibited DHS from granting immigration parole to a foreign national who had applied for and been denied refugee status.

Some other recent bills that would have permitted the use of parole only for enumerated reasons also included language specifically to prohibit the use of parole for classes of people. For example, S. 2192, as introduced in the 115th Congress, would have prohibited the use of parole authority for “generalized categories of aliens or classes of aliens based solely on nationality, presence, or residence in the United States, family relationships, or any other criteria that would

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95 S.Amdt. 1959 was considered as a floor amendment to the unrelated Broader Options for Americans Act (H.R. 2579)). The Senate rejected a motion to invoke cloture on it.

96 S. 1042 in the 116th Congress; H.R. 2761 and S. 1703 in the 115th Congress; H.R. 6092 in the 114th Congress.

97 For information about special immigrants, see CRS Report R43725, *Iraqi and Afghan Special Immigrant Visa Programs.*
cover a broad group of foreign nationals either inside or outside of the United States.”

In the 116th Congress, the Secure and Protect Act of 2019 (S. 1494), as reported by the Senate Judiciary Committee, would amend the INA parole provision to make it unlawful for DHS to grant parole “according to eligibility criteria describing an entire class of potential parole recipients.” It also would add new language to the INA provision to prohibit DHS from using parole authority “to supplement established immigration categories without an Act of Congress.”

Conclusion

Parole authority, as currently defined in the INA, is potentially applicable to a variety of persons and circumstances. For example, the Immigrant Legal Resource Center, an immigrant advocacy organization, views it as a useful tool: “With the right advocacy, parole has the potential to become a more robust strategy to defend against deportation for those within the United States and to become a more accepted method to allow immigrants to enter the United States who do not have other means to do so.”

On the other hand, groups that advocate for restrictions on immigration, such as the Center for Immigration Studies (CIS), see some recent uses of parole—as for immigrant entrepreneurs—as overbroad. A 2018 CIS article characterized the IEP rule as “just one more way of wedging in an ever-increasing group of aliens who couldn’t fit within the scope of the INA as enacted into law.”

Bills in the 116th Congress can be seen as efforts to further these competing points of view on parole—by alternatively legislating the use of parole for particular groups or adding new statutory restrictions to prohibit such use. If Congress opts to enact one or more of these measures, it may in the process further define the appropriate use of parole.

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98 Similar language was included in S. 1852, as introduced in the 115th Congress, and in S.Amdt. 1959 to H.R. 2579, as considered on the Senate floor in February 2018.


Appendix. INA Parole Provision (§212(d)(5))

Current Provision

(A) The Attorney General may, except as provided in subparagraph (B) or in section 214(f), in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

As Originally Enacted

The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

101 INA Section 214(f)(2) places restrictions on the granting of parole to crewmembers in certain circumstances.
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FACT SHEET: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System

JULY 27, 2021 • STATEMENTS AND RELEASES

The United States can have an orderly, secure, and well-managed border while treating people fairly and humanely.

In January, the Biden-Harris Administration launched a broad, whole of government effort to reform our immigration system, including sending to Congress legislation that creates a new system to responsibly manage and secure our border, provide a pathway to citizenship, and better manage migration across the Hemisphere.

In the six months since, the Administration has made considerable progress to build a fair, orderly, and humane immigration system while continuing to call on Congress to make long overdue reforms to U.S. immigration laws. We successfully processed over 12,500 people who had been returned to Mexico under the Migrant Protection Protocols. We expanded lawful pathways for protection and opportunity, including the Central American Minors (CAM) program to reunite children with their parents in the United States. We strengthened collaborative migration management with regional partners, including through a new Human Smuggling and Trafficking Task Force to disrupt and prevent migrant smuggling and human trafficking operations. And we continue to deter irregular migration at our Southern border.

The Biden-Harris Administration has accomplished this and more while reckoning with the prior Administration’s cruel and reckless immigration policies, which exacerbated long-standing challenges and failed to securely manage our border. Case in point: the total number of unique encounters at the Southern border to date this fiscal year remains below the total number of unique encounters to date during fiscal year 2019 under the Trump Administration.

Today the Administration is releasing a blueprint that outlines the next steps Federal agencies will be taking to continue implementing the President’s transformative vision for a 21st century immigration system that secures the border, fairly and efficiently considers asylum claims, strengthens regional migration management efforts in North and Central America, and addresses the root causes of migration from Central America. Success in building this fair, orderly, and humane immigration system won’t be achieved overnight, especially after the
prior Administration’s irrational and inhumane policies, but this Administration has a blueprint to get there and is making real progress.

We will always be a nation of borders, and we will enforce our immigration laws in a way that is fair and just. We will continue to work to fortify an orderly immigration system.

ENSURING A SECURE, HUMANE AND WELL-MANAGED BORDER

The United States can allow people to exercise their legal right to apply for asylum while also reducing irregular migration and maintaining an orderly, secure, and well-managed border.

- **Making better use of existing enforcement resources.** Since fiscal year 2011, U.S. Customs and Border Protection’s (CBP) discretionary budget has grown from $9.9 billion to $15 billion in FY 2021. The President’s Budget redirects resources from a needless border wall to make robust investments in smarter border security measures, like border technology and modernization of land ports of entry, that are proven to be more effective at improving safety and security at the border. These investments will serve as a force multiplier to the over 19,500 Border Patrol Agents currently helping secure our Nation’s borders and the over 25,500 CBP Officers working at our land, air, and sea ports. The investments will also facilitate more robust and effective security screening to combat human smuggling and trafficking and the entry of undocumented migrants.

- **Improving the expedited removal process for those who arrive at the border.** The Administration is working to improve the expedited removal process at the border to fairly and efficiently determine which individuals have legitimate claims for asylum and other forms of protection. Asylum and other legal migration pathways should remain available to those seeking protection. Those not seeking protection or who don’t qualify will be promptly removed to their countries of origin.

- **Facilitating secure management of borders in the region** by providing training and technical assistance, supporting the improvement of border infrastructure and technology, and promoting collaborative migration and border management approaches.

- ** Strengthening anti-smuggling and anti-trafficking operations** by working with regional governments to investigate and prosecute individuals involved in migrant smuggling, human trafficking, and other crimes against migrants. In April 2021, DHS announced Operation Sentinel, a new operation targeting organizations involved in criminal smuggling.

- **Bolstering public messaging on migration** by ensuring consistent messages to discourage irregular migration and promote safe, legal, and orderly migration.
IMPLEMENTING ORDERLY AND FAIR PROCESSING OF ASYLUM APPLICATIONS

The Administration is committed to fairly and efficiently considering asylum claims. Asylum and other legal migration pathways should remain available to those seeking protection. But those not seeking protection or who don’t qualify will be returned to their country of origin.

- **Establishing a dedicated docket to consider asylum claims.** The Administration has set up a special immigration court docket to promptly and fairly consider the protection claims of certain recent arrivals.

- **Further improving the efficiency and fairness of the U.S. asylum system** by authorizing asylum officers to adjudicate asylum claims for those arriving at the border and establishing clear and just eligibility standards that harmonize the U.S. approach with international standards. The Administration has already begun to rescind Trump administration policies and decisions that unjustly prevent individuals from obtaining asylum. On June 16, the Department of Justice reversed two of the former administration’s rulings severely restricting asylum protections for victims of domestic and gang violence.

- **Maximizing legal representation** and legal orientation programs by working closely with pro bono legal service providers. The President’s FY 2022 Budget requests $15 million to provide representation to families and vulnerable individuals, as well as $23 million to support DOJ legal orientation programs.

- **Reducing immigration court backlogs** by ensuring priority cases are considered in a timely manner and hiring more immigration judges. The FY 2022 Budget requests an additional 100 immigration judges and provides support for additional court staff to ensure the efficient and fair processing of cases. The Department of Justice also restored the discretion of immigration judges to administratively close cases in another step to ensure priority cases are considered in a timely manner.

STRENGTHENING COLLABORATIVE MIGRATION MANAGEMENT WITH REGIONAL PARTNERS

The United States seeks to expand U.S. and multilateral efforts to address the dire humanitarian situation in Central America and strengthen regional collaborative migration management. The United States believes that all individuals should be able to have a safe, stable and dignified life within their own countries, while ensuring that asylum and other legal migration pathways remain available to those who need them.

- **Providing humanitarian support to address the acute needs that pressure individuals to abandon their homes.** U.S. efforts will address food insecurity and malnutrition,
mitigate the impacts of successive droughts and food shortages, promote protection for vulnerable individuals, and provide materials to support rebuilding of homes and schools damaged by the hurricanes. The United States will also work with the United Nations to mobilize international support for the deteriorating situation in the Northern Triangle. As part of these efforts, the United States in April provided $255 million in assistance to meet immediate and urgent humanitarian needs for people in El Salvador, Guatemala, and Honduras, refugees, other displaced people, and vulnerable migrants in the region.

- **Expanding access to international protection** to provide safety to individuals closer to their homes by building and improving national asylum systems, enhancing efforts to resettle refugees, and scaling up protection efforts for at-risk groups.

- **Establishing Migration Resource Centers** in the Northern Triangle countries with the support of international organizations and in coordination with governments in Central America to provide referrals to services for people seeking lawful pathways for migration and protection. The centers also provide referrals to reintegration support for migrants returned from the United States and other countries.

- **Restarting and expanding the Central American Minors (CAM) program** to provide children the opportunity to receive protection and reunite with parents in the United States. In March 2021, the United States reopened the CAM program and, in June 2021, expanded it to additional categories of eligible U.S.-based relatives who can petition for their children.

- **Expanding refugee processing in the region**, including in-country processing in Northern Triangle countries, and helping international organizations and local non-governmental organizations to identify and refer individuals with urgent protection needs to the U.S. Refugee Admissions Program and other resettlement countries. The U.S. Department of State and Department of Homeland Security have resumed interviewing individuals via the Protection Transfer Arrangement (PTA) to expand protection for vulnerable nationals of El Salvador, Guatemala, and Honduras.

- **Expanding access to temporary work visas in the region**. DHS announced a supplemental increase of 6,000 H-2B visas for temporary non-agricultural workers from Honduras, Guatemala and El Salvador in FY 2021. The Administration is also exploring ways to enhance access to H-2A visas for temporary agricultural workers when there are insufficient qualified U.S. workers to fill these jobs, while ensuring strong labor protections for all workers. The Administration will also encourage other governments to develop and expand regional labor migration programs that protect workers’ rights and allow access for individuals to find meaningful, temporary work.
• **Reducing immigrant visa backlogs.** The United States aims to reduce the backlog of immigrant visa applications for Northern Triangle nationals as quickly as possible.

**INVESTING IN CENTRAL AMERICA TO ADDRESS THE ROOT CAUSES OF MIGRATION**

We cannot solve the challenge at our border without addressing the lack of economic opportunity, weak governance and corruption, and violence and insecurity that compel people to flee their homes in the first place. The impact of two major hurricanes in late 2020, a prolonged drought, and COVID-19 have aggravated these long-standing challenges. The FY 2022 Budget requests $861 million to address the root causes of migration.

• **Addressing economic insecurity and inequality** by investing in programs that foster a business-enabling environment for inclusive economic growth; enhancing workforce development, health, and education; and building resilience to climate change and food insecurity so individuals can find economic opportunity at home. The U.S. will also work with stakeholders to increase trade and diversify industry, as well as with the private sector to build on the *Call to Action* to catalyze investments in the region and support economic development.

• **Combatting corruption and strengthening democratic governance** by working with governments, civil society, and independent media to improve government services, increase transparency, promote accountability and respect for human rights, sanction corrupt actors, and provide protection to at-risk youth, victims of violence, and other marginalized populations.

• **Promoting respect for human rights, labor rights and a free press** by working with governments and civil society to strengthen legal frameworks and build institutional capacity, hold perpetrators accountable, promote labor rights compliance, and ensure citizens have access to information from independent sources to inform their choices.

• **Countering and preventing violence, extortion, and other crimes** by strengthening accountable law enforcement, focusing on crime prevention, and encouraging regional cooperation to address shared criminal threats.

• **Combatting sexual, gender-based and domestic violence** by working with governments and civil society to prevent and prosecute violence and support victims.

While President Biden can implement significant parts of this strategy within his executive authority, **Congress must also act.** Millions of noncitizens call our country home. Immigrants are key a key part of our communities and make significant contributions to our economy.
Over the past year, millions of immigrants have risked their health to work side by side with other Americans to perform jobs that are essential to the functioning of the country. They are Americans in every way but on paper. The American public supports a path to citizenship and a fair and efficient legal immigration system that welcomes talent from around the globe and allows families to reunite and make a life in our country.

**Congress should pass** through reconciliation or other means:

- **The U.S. Citizenship Act (H.R. 1177/S. 348)** that reunites families, gives businesses access to a workforce with full labor rights, and creates a path to citizenship for those already living and working in the United States. These critical reforms, coupled with measures to address the root causes of migration from Central America, will relieve pressure at the border by dissuading irregular migration.

- **The Dream and Promise Act (H.R. 6) and Farm Workforce Modernization Act (H.R. 1603)** to create a path to citizenship for Dreamers, TPS recipients, and farmworkers. Both bills passed the House with bipartisan support. They will protect millions of families, children, and essential workers who live, work, study, and worship in our communities.

FACT SHEET: Strategy to Address the Root Causes of Migration in Central America

FACT SHEET: The Collaborative Migration Management Strategy
On his very first day in office the new President Biden sent a comprehensive immigration bill to Congress to fulfill one of his major campaign promises. Will it work this time? A short look back at history shows just how difficult immigration reform can be. There have been two attempts at comprehensive immigration reform in the 21st century: one in 2007 and one in 2013. In both instances the political environment started out looking promising, and in both instances the legislation failed.

In 2006 there was every reason to be optimistic about the prospects for immigration reform. President George W. Bush was in his second term and thus had nothing to fear from a far-right challenge for his party’s nomination. In addition, as a former governor of Texas, he had great familiarity with the issue and wanted very much to do something about it. He had bipartisan support in the Senate from two of its most revered members: Sen. John McCain (R-AZ) and Sen. Ted Kennedy (D-MA). In the 2006 elections, Democrats took control and Rep. Nancy Pelosi (CA) became the first woman speaker of the House. There was reason to assume that a strong, bipartisan coalition could be put together in favor of a comprehensive bill.

But that coalition never happened.

In the winter and spring of 2006 pro-immigration reform groups, many of them Mexican-American political action organizations, decided that they could help the prospect of the Comprehensive Immigration Reform Act by organizing a series of high-profile national marches. Not content with the fact that President George W. Bush and most of the liberals
in the Senate, including Senator Ted Kennedy, were planning to work together on a bipartisan bill, organizers assumed that bringing the fight out of Washington and to the country would help their cause.

All through the spring of 2006 organizers put together mega-events. A march in Chicago drew 100,000 marchers. It was followed by demonstrations in Tampa, Houston, Dallas and even Salt Lake City. The biggest demonstration of all took place in Los Angeles on March 25, 2006, when more than 500,000 people marched and attended rallies at the Civic Center and in MacArthur Park. Even more marches took place on May Day (May 1) a day otherwise known as International Workers’ Day—a traditional time of demonstrations for trade unions and other left-wing political causes.

The marches were widely covered by a mostly favorable media. Marchers waved American flags (some upside down—which can be a sign of distress or of disrespect) and Mexican flags. Signs were in Spanish and English—“Si se puede” was a popular one, as was “Today we march, tomorrow we vote.” In both breadth and enthusiasm, these marches evoked the large civil rights demonstrations of the 1960s.

However, the consensus immediately after the fact was that the demonstrations backfired. Even though organizers had tried to get marchers to leave the Mexican flags at home, their argument was only partially successful against arguments about ethnic pride. The Federation for American Immigration Reform, an anti-immigration group, saw its membership increase. Members of Congress felt the backlash. Republican lawmakers saw their offices flooded with phone calls as a result of the marches. Senator Trent Lott (R-MS) said “They lost me, when I saw so many Mexican flags.”[1] “The size and magnitude of the demonstrations had some kind of backfire effect,” said John McLoughlin, a Republican pollster working for House members and Senators seeking re-election.

With a large chunk of the Republican Party energized by their nativist base to oppose the 2007 bill, President Bush needed solid Democratic support. But the Democrats had their own factional problems. In April 2006 the Chairman of the Democratic National Committee, Howard Dean, referred to the guest worker provisions in the bill as “indentured servitude.” And AFL-CIO President John Sweeney openly opposed the guest worker provisions as well. Opposition came from Black lawmakers too. Speaking on
National Public Radio, political scientist Ron Walters pointed “to the response of the Congressional Black Caucus to a liberal immigration bill produced by one of its own members, Sheila Jackson Lee of Texas. Only 9 of the 43 caucus members supported it.”

The factional divides among House Democrats were present among Democratic voters as well. A 2005 Pew poll asked Democrats questions about immigration and divided them into liberals, conservatives and disadvantaged democrats (referring to economic disadvantage). Note the stark differences between liberals and both disadvantaged Democrats and conservatives.

Table 1: “Other Fissures in the Democratic Coalition” (Source: Pew Research Center)

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<thead>
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<th></th>
<th>Liberals</th>
<th>Disadvantaged Democrats</th>
<th>Conservative Democrats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threatens traditional American customs and values</td>
<td>9%</td>
<td>53%</td>
<td>53%</td>
</tr>
<tr>
<td>Strengthens American society</td>
<td>87%</td>
<td>34%</td>
<td>35%</td>
</tr>
<tr>
<td>Neither/Both/Don’t Know</td>
<td>4%</td>
<td>13%</td>
<td>12%</td>
</tr>
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The immigration bill died in the summer of 2007 when proponents failed to garner the 60 votes in the Senate required to move the bill forward. And in the House, Speaker Pelosi needed 50 to 70 Republican votes to move forward but a resolution in the Republican conference opposing the Senate bill passed by 114 to 21. She decided not to bring it to the floor.
It took six years before a second comprehensive immigration bill was introduced into Congress. As in 2007, many political experts thought that this time the stars were aligned. Democrats had picked up seats in the Senate in the 2012 elections that gave them a comfortable majority. And Democratic President Barack Obama had won a second term in office with a strong backing from Hispanic voters, leading national Republicans to discuss the need to deal with immigration in the face of the growing Hispanic vote. While Republicans still controlled the House, Democrats had picked up seats. On June 27, 2013, Senate bill 744, a second comprehensive immigration bill, passed the Senate on a 68 to 32 vote. The bill had been created by a bipartisan “gang of 8” – four Democratic senators and four Republican senators—and its passage created the expectation that there would be quick action in the House as well.[2]

Contributing to this optimism was the fact that this time around the Democratic coalition was less divided. In the six years since failure of the 2007 legislation, the labor movement had changed and included many more Hispanics in its membership. Rick Trumka, President of the AFL-CIO had this to say about the new legislation:

“**Our role is to make sure that road map leads to citizenship achievable not only in theory but in fact. Workers care for the elderly, mow our lawns or drive our taxis, work hard and deserve a reliable road map to citizenship. And so the labor movement’s entire grassroots structure will be mobilized throughout this process and across this country to make sure the road map is inclusive.**”

The Congressional Black Caucus was a bit less enthusiastic but still expressed support for the effort while complaining that the Diversity Visa Program had been eliminated.[3] And the U.S. Chamber of Commerce and the agricultural lobby were on board as well.
Meanwhile, the Obama administration had continued efforts begun during the Bush administration to prove that the United States could police the borders. In 2013 federal prosecutions for immigration crimes reached an all-time high.

But Obama’s get-tough actions at the border infuriated Hispanic activists and failed to convince some Republicans that the border was under control.

If the factions of the Democratic Party had softened in the years between 2007 and 2013, the factions in the Republican Party had hardened. In 2013, Speaker John Boehner was facing significant intra-party infighting, largely due to the growing voice of the Tea Party activists in his conference—a group that would contribute to his historic resignation just two years later. To please the hard-liners in his party he rejected the Senate bill in favor of a series of smaller bills and then, when suspicion was that these smaller bills would go to conference with the hated Senate bill, he had to promise not to compromise.

And then, as is so often the case in politics, something happened that on the face of it had nothing to do with immigration reform but that killed it nonetheless. Majority Leader Eric Cantor, widely expected to succeed Boehner as speaker, lost his Republican primary to a right-wing tea party supporter who among other things campaigned on opposition to immigration reform. Republicans were spooked by Cantor’s loss. If a member of the leadership could lose to an unknown Tea Party challenger, they could too. Boehner never brought the legislation to the floor, in spite of the fact that it probably could have passed with a united Democratic caucus and some more moderate business-oriented Republicans.

What will happen this time around is anyone’s guess. Immigration reform has always had a way of eluding the best-laid plans of powerful people. The Republican Party is still in limbo, with many members clearly anti-immigrant and others fearful of an anti-immigrant primary electorate. While Democrats are less divided than Republicans, their margins are so small that they can’t afford to lose anyone.

Immigration reform may be as difficult in the third decade of the 21st century as it was in the first and second. This is in part because of a fundamental paradox. On the one hand, the United States is a country of immigrants; on the other hand, it is a country that has
always been worried about being overrun by immigrants. And this makes reform especially difficult.


[2] The Democrats were: Michael Bennett (CO) Dick Durbin (ILL) Bob Menendez (NJ) and Chuck Schumer (NY). The Republicans were: Lindsey Graham (South Carolina), Jeff Flake (AZ) John McCain (AZ) and Marco Rubio (FLA)

[3] The Diversity Visa Program is a lottery for obtaining a green card to work in the United States.
Democrats hope to pass immigration reform through budget reconciliation, but it's unclear if the rules will permit them to do that.

ARI SHAPIRO, HOST:

Congressional Democrats are pinning their chances for immigration reform on an ambitious $3.5 trillion spending bill. They unveiled plans today to include permanent residency for qualified immigrants in the bill through a process called budget reconciliation. First, they'll need to get past a major hurdle in the upper chamber - the Senate parliamentarian. NPR congressional reporter Claudia Grisales explains.

CLAUDIA GRISALES, BYLINE: Immigration reform advocates are brimming with optimism that this is their year.

FRANK SHARRY: We think that this year is our best chance in decades.
GRISALES: That's Frank Sharry, who heads up immigration advocacy group America's Voice. Sharry and others are taking their cues from top Democrats who see the $3.5 trillion reconciliation bill as the vehicle to get it done.

(SOUNDBITE OF MONTAGE)

PRESIDENT JOE BIDEN: I think we should include in the reconciliation bill the immigration proposal.

NANCY PELOSI: I do believe that immigration should be in the reconciliation.

DICK DURBIN: The only viable option at this time for passing a path to citizenship is through reconciliation.

GRISALES: That's President Joe Biden, House Speaker Nancy Pelosi and Senate Majority Whip Dick Durbin. But Democrats first need to convince the Senate parliamentarian that legislation to create new pathways to citizenship for millions will have an impact on the budget. That's because provisions in the budget reconciliation bill must directly raise revenues or the deficit. Democrats must also hope Republicans stay out of the way.

(SOUNDBITE OF ARCHIVED RECORDING)

LINDSEY GRAHAM: But you wouldn't do it through reconciliation because no Republicans are going to vote for a $3.5 trillion socialist document.

GRISALES: That's South Carolina Senator Lindsey Graham. The Senate parliamentarian Elizabeth MacDonough would decide based on arguments from both sides. For now, MacDonough is not sharing her thinking. But her predecessor, Alan Frumin, says the odds may be in the GOP's favor.

ALAN FRUMIN: On its face, that appears to me to be problematic.

GRISALES: Many Democrats say a precedent was set in 2005 under Frumin's watch as Senate parliamentarian. That year, a reconciliation bill that included provisions for immigrant visas was passed by a Republican-led Senate with bipartisan support. But
Frumin says the chamber did not test whether the immigration reform language could be allowed.

FRUMIN: It's an issue that has not been litigated, was not litigated in 2005 and would have to be litigated as a new question.

GRISALES: Frumin says it appears immigration only has an indirect budgetary effect.

FRUMIN: But if the only thing people have to say was, it was good in 2005, therefore it's good now, I would say that's not enough.

GRISALES: The debate has put Democrats in a tricky position. Some, such as Illinois Congressman Chuy Garcia, have gone as far as to say they won't support reconciliation without immigration reform.

CHUY GARCIA: This is the moment that we haven't seen in 35 years.

GRISALES: But if the parliamentarian rules against Democrats, Garcia is not saying he will back out of reconciliation altogether.

GARCIA: If the parliamentarian rules against including immigration in this spending package, we must look ahead. We must use any opportunity available to provide a pathway to citizenship for all.

GRISALES: Democrats will have to go back to the drawing board if the effort fails. But reform advocates warn the ultimate test on their progress will be delivered at ballot boxes next year.


(SOUNDBITE OF CHARLESTHEFIRST'S "THE DESCENT")
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NPR's Michel Martin discusses the Biden administration's handling of immigration with Theresa Cardinal Brown of the Bipartisan Policy Center, and Democratic political strategist Chuck Rocha.

MICHEL MARTIN, HOST:

We're going to go back to the story that captured so much of our attention last week, the situation in Del Rio, Texas. Or rather, we're going to go back to one of the issues at the heart of it, which is immigration. You'll remember that thousands of people were camped out under a bridge near the Texas-Mexico border hoping to request asylum in the U.S. The encampment has since been cleared by authorities, but not before some ugly scenes. And the Biden administration's handling of the whole situation has been heavily criticized by all sides - local officials, conservatives, progressives, advocates for migrants and for law enforcement tasked with controlling the situation. On the broader issue of addressing immigration, the president did put forward ambitious plans soon after taking office. But nine months into his term, his administration seems to be struggling both to get traction on a reform plan and to find a better way than his
predecessor to address the steady stream of migrants that continue to arrive at the U.S. border.

To discuss all this, we've called two guests we've turn to before to talk about immigration. Theresa Cardinal Brown worked on immigration policy under two presidents - George W. Bush and Barack Obama. She's now director of immigration and cross-border policy at the Bipartisan Policy Center. Theresa Cardinal Brown, welcome back.

THERESA CARDINAL BROWN: I'm glad to be here.

MARTIN: We're also joined again by Chuck Rocha, who is a former senior adviser to the Bernie Sanders presidential campaign and a political strategist. Chuck Rocha, welcome back to you as well.

CHUCK ROCHA: Thanks for having me, Michel.

MARTIN: And I'm going to start with you because many people called what happened at the border outrageous and - including now the president, who said the same. And he said that there will be consequences. But when you take a step back, can I ask you, how do you look at this whole episode? What does it say to you?

ROCHA: It just puts such a lens on a failed immigration policy, failed immigration rhetoric that we've just been seeing over and over and over. I've been doing campaigns for 31 years. And this issue of immigration has been at the center of the left, of the right, in the middle. We talk about immigration. We talk about it some more. Nothing ever seems to happen.

And then this week, again, much like it was under Donald Trump but in a different way, the blanket was pulled back. And you got to see the failed system, the failed system that doesn't allow, somehow, a timely process for folks who want to come to our country for a better life, to pay taxes, to be part of the fabric of our country, a way to do that seamlessly, where it doesn't put everybody at risk and where things don't go to hell in a handbasket to - for other terms and you see this disgraceful thing that happened on the border.
MARTIN: Well, Theresa Cardinal Brown, I’m going to go to you. Same question - when you take a step back and look at this whole episode, what strikes you?

CARDINAL BROWN: Sequential administrations have failed to recognize, essentially, the change in migration at the U.S.-Mexico border. We are still trying to manage migration that is basically of people who are so desperate, fleeing for their lives, seeking protection. And no level of deterrence that the United States is frankly willing to do is going to really affect that. And yet we're still trying to manage that the way we did when it was Mexicans who were trying to come in and work for a while, for a few dollars more and send money home and then go back and forth.

This is a completely different set of circumstances, and we're still trying to address it the same way through deterrence. But as we've seen from President Obama, through President Trump and now through President Biden, deterrence has decreasing value the more desperate the people are that are trying to come. And each president has seen the limits of what deterrence can do. President Obama had his kids-in-cages moment. President Trump had his moment when he was separating families and kids. And now President Biden has Border Patrol on horseback. We need to change the process at the border. We need to recognize this is different.

MARTIN: You know, Chuck just said this, that when it comes to immigration and the border, it just seems that this government lurches from crisis to crisis. The Biden administration has pointed out that despite his tough talk about the border, roughly the same numbers of people were crossing during the Trump administration. And now Biden's critics are saying, despite his very different talk, his administration is using some of the same tactics. They deported about 2,000 people to Haiti, for example, who, from what we can tell, didn't really get a chance to make their asylum claim. So, Theresa, I'm going to ask you, in the near term, you know, is there something - you're saying that these methods just don't work. They don't change anything. So is there something right now that the administration could be doing different?

CARDINAL BROWN: Well, there are a few things that they need to be doing different. First and foremost is they need to understand that continuing to tell people not to come and that the border is closed is just not working. And it sounds tone deaf because it just sounds like they're shouting into the wind, frankly. Migrants are coming
because they're desperate. And regardless of what they're - the government is saying, that's not what they're hearing. It's like a long game of telephone tag. By the time the news reaches the migrants' ears of what's happening at the border, they may be halfway to the border already.

And the Biden administration is trying to have it both ways by saying we want a safe, orderly and humane process, and just a month ago, by extending TPS for Haitians already in the country, indicated they understand how bad it is in Haiti. And at the same time, now they're saying, you can't come. The border's closed. That just doesn't - I mean, even to me, that doesn't resonate as, you know, being consistent.

And then lastly, Biden really does need to speed up trying to fix the asylum system here in the United States. When people arrive, they have a right to claim asylum. They may not get it, but they have a right to ask for it and be heard. And if he really wants to change the situation at the border, he's got to invest in that process right away. Until that changes, it's going to continue to draw people here.

MARTIN: Chuck, final thought for you. We're a little more than a year away from midterm elections. Do you see immigration being a factor that changes this dynamic that we keep talking about here, that the same thing over and over and over again, crisis to crisis to crisis, nothing changing?

ROCHA: The Democratic majority in the House and the Senate flows through, runs through districts with large portions of Latinos. Recent polling shows that 68% of all Latinos know somebody that's undocumented. So it may not be the most important issue to a Latino voter, but it's an emotional connection that we make with Latino voters to remind them of where they came from.

And in House districts and Senate districts all across the country - Florida, Colorado, Texas, Arizona, Nevada - all of these places have elections that are going to determine who's going to control the House and the Senate. And guess what? There's lots of Latinos, like me.

There's been turmoil for a long time that's - drove people from country to country. My great-grandfather in Mexico, during the time of Pancho Villa, escaped from Mexico,
got into Texas, started a family. Many generations later, his great-grandson sits in Washington, D.C. And I pay hundreds of thousands of dollars in federal and state taxes every single year because that's what happens with immigration. You immigrate here. You become part of the society. You pay your taxes. You become part of the community. And that's all, really, Latinos want, to Theresa's point, a legal path to come to a country that they are dying to get into.

MARTIN: That was Chuck Rocha. He's a policy consultant, a former senior adviser to the Bernie Sanders presidential campaign. You also heard from Theresa Cardinal Brown. She is the director of immigration and cross-border policy at the Bipartisan Policy Center. Thank you both so much for talking to us once again.

CARDINAL BROWN: Thank you.

ROCHA: Thank you.
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Dems bet their political chips on party-line immigration reform

Democrats are awaiting a ruling on their bid to add immigration to their social spending bill — which they see as their last chance for progress this term.
Democrats’ best and likely last chance this Congress to deliver immigration reform now rests on an arcane argument: that giving undocumented immigrants legal residency would affect the federal budget.

With bipartisan immigration talks stalled, the White House and congressional Democrats are pushing to add a path to legal residency for 8 million immigrants to their sprawling social spending plan this fall. In order to steer that help for Dreamers, essential workers and those with Temporary Protected Status past a filibuster, though, the party has to win over the Senate parliamentarian, the chamber's non-partisan rules arbiter.

In order to gain the parliamentarian's approval and get immigration attached to the party-line spending plan, Democrats essentially need to demonstrate that their proposal would have a significant effect on federal spending, revenues or debt. Democrats assert that offering a pathway to legal status would make those included eligible for certain federal benefits — and thus impact the budget. They also claim precedent is on their side, highlighting a 2005 GOP-led bill that addressed immigration as part of the so-called budget
reconciliation process, the same path they’re using this year to avoid the need for Republican votes.

Reaching a deal with Republicans on immigration is “at the best elusive and doesn’t seem to me that we can really get there,” said Sen. Bob Menendez (D-N.J.), who introduced President Joe Biden’s immigration reform bill earlier this year. “Reconciliation is our best chance: one because it’s must-pass, and two, because obviously we can do it with a majority vote.”

The Democratic plea to the parliamentarian — which could be decided as early as this week — is narrow and tries to use a longstanding talking point of immigration reform opponents against them: Extending legal status to new populations would cost the federal government billions. It’s also the party’s strongest remaining chance at progress before the midterms.

Democrats haven’t seen this promising an opportunity for major immigration reform, the sort that hasn’t passed Congress in 25 years, since the Senate’s "Gang of Eight" discussions in 2013. And they feel a new sense of urgency after a federal court ruled in July that the Obama-era Deferred Action for Childhood Arrivals program is unlawful and blocked the Biden administration from approving new applications. While the ruling didn’t immediately end the program, immigration lawyers and advocacy groups say it’s clear that DACA — and its protections for Dreamers, thousands of young immigrants brought to the U.S. as children — isn’t safe.
“We’ve always known that that was a temporary program, that was a temporary solution and what we need is a permanent solution,” said Marielena Hincapié, executive director of the National Immigration Law Center. “The Texas decision against DACA ... even more so raises the urgency of why Congress must act right now.”

People participate in a demonstration in support of a pathway to citizenship outside of the U.S. District Courthouse in Houston, Texas on July 19, 2021. | Brandon Bell/Getty Images

The Senate parliamentarian, a former immigration lawyer, heard arguments Friday from Republican and Democratic staff on the Judiciary and Budget Committees, as well as staffers from Senate leadership. Meanwhile, the House Judiciary Committee is holding a markup on the issue Monday.
Democrats’ central argument to the parliamentarian is that offering green cards to certain undocumented immigrants would unlock federal benefits for them, causing effects on the budget that they say are a substantial, direct and intended result. The Congressional Budget Office's preliminary estimate is that the immigration language in the party’s forthcoming social spending bill would increase budget deficits by $139.6 billion over a 10-year period, Democratic aides said.

Republicans on the Senate Judiciary and Budget Committees did not provide specifics about their arguments, though the GOP is broadly countering that the immigration reform planks of the bill are extraneous and shouldn’t proceed with a simple-majority Senate vote. Sen. John Cornyn (R-Texas), a member of the Judiciary Committee, tweeted Friday that Democrats "never fail to fail when it comes to immigration reform" and "persist in pursuing partisan bills rather than bipartisan immigration reform."

But Democrats point to the GOP’s success with a 2005 reconciliation measure that included immigration provisions, such as addressing a visa backlog, though the immigration provisions were ultimately stripped in the conference process.

With respect to the deficit increases their proposal would bring, Senate Democrats often cite a report from the liberal Center for American Progress...
that found that offering undocumented immigrants a pathway to citizenship would boost the U.S. GDP by $1.5 trillion, create 400,000 jobs and raise wages over 10 years. In addition, they say that offering green cards would raise recipients' current tax contributions and lead to more processing fees.

“There’s a lot of applications, there's a lot of fees coming into the federal government to be processed by federal employees ... so we think it’s more than appropriate,” said Sen. Alex Padilla (D-Calif.), who added that without contributions from immigrants, “California would not be the fifth-largest economy in the world.”

If approved by the parliamentarian, the immigration provisions being discussed would apply to Dreamers, Temporary Protected Status holders, farmworkers and essential workers during the pandemic.

Democratic aides have also sought to clarify that their efforts involve providing a pathway to legal status — not to citizenship. But under existing U.S. immigration law, those who end up qualifying to apply for green cards would be able to apply for citizenship after five years if they meet certain requirements.

A ruling in Democrats' favor is no guarantee. Earlier this year, the parliamentarian rejected the party's proposal to raise the minimum wage to $15 an hour using the reconciliation process. However, Democrats and immigrant advocates argue the circumstances are different this time, given that
minimum wage is not solely tied to the federal government while immigration law is.

In interviews, Democratic lawmakers declined to specify what their back-up plan would be if the parliamentarian rules against them on immigration, or whether they’d support voting to overrule her. But lawmakers involved in the discussions have already made clear they intend to contest the parliamentarian’s decision if she offers guidance that Democrats have not met the standards to include a path to legal status in the package.

“We have a strategy to go back to the parliamentarian repeatedly if there are any disagreements in the first proposal,” said Rep. Raul Ruiz (D-Calif.), chair of the Congressional Hispanic Caucus, who underscored that Democrats see this as “possibly the only viable way this Congress [has] to get it done.”

Democrats have been plotting their reconciliation strategy for months. Senate Majority Leader Chuck Schumer told members of the Hispanic Caucus back in February that Democrats would explore the option and he met with them again recently to discuss the game plan, lawmakers and aides familiar with the meeting said.

Biden and White House officials are publicly backing the effort. Biden first expressed a willingness in April to make a more proactive case for the economic benefits of immigration.
Outside groups, like the Service Employees International Union, have also been coordinating with the Hill on their strategy.

The union’s president, Mary Kay Henry, said that senators “are more clear about the need to create this pathway to citizenship than I’ve heard in any time in my life” and projected optimism that "the parliamentarian is going to be armed with the arguments that she needs to allow the pathways to be reconciled."

And after months of discussions with the White House and Democratic leadership on the Hill, immigrant advocates are feeling confident that the coordination and united message will prevail.

“This really feels like our big moment and our best moment because of all the work we’ve done. ... It’s long overdue,” said Alida Garcia, a former senior migration adviser to Biden and vice president of advocacy at FWD.us. “Right now, it’s full-steam ahead.”

Laura Barrón-López contributed to this report.