

2011

## Retain the Brains: Using a Conditional Residence Requirement to Keep the Best and Brightest Foreign Students in the United States

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### Recommended Citation

Porter, Katherine L. (2011) "Retain the Brains: Using a Conditional Residence Requirement to Keep the Best and Brightest Foreign Students in the United States," *Hofstra Law Review*: Vol. 40: Iss. 2, Article 11.  
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol40/iss2/11>

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## NOTE

# RETAIN THE BRAINS: USING A CONDITIONAL RESIDENCE REQUIREMENT TO KEEP THE BEST AND BRIGHTEST FOREIGN STUDENTS IN THE UNITED STATES

“[L]et’s stop expelling talented, responsible young people, who could be staffing our research labs or starting a new business, who can be further enriching this Nation.”<sup>1</sup>

## I. INTRODUCTION

In the growing global competition for talent and human capital, the United States is losing the race.<sup>2</sup> After the September 11, 2001 terrorist attacks (“9/11”), where some of the hijackers were granted F-1 visas,<sup>3</sup> the government has made it increasingly more difficult for foreign students to study and remain in the United States.<sup>4</sup> Currently, foreign students are facing many obstacles, such as rejections at their consular interviews for dual intent,<sup>5</sup> Visa Mantis delays,<sup>6</sup> denials of status for

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1. President Barack Obama, State of the Union Address (Jan. 25, 2011), in 157 CONG. REC. H457, at H459 (daily ed. Jan. 25, 2011).

2. See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 200 (2006). Professor Ayelet Shachar's article describes how countries, which did not originally recruit foreign talent, such as Germany and the United Kingdom, have changed their immigration laws to attract foreign students and highly-skilled workers. *Id.* at 189, 191-94. These changed policies by various countries could reduce the number of foreign students and highly-skilled workers that immigrate to the United States as they now have more choices. See *id.* at 200.

3. Blair Jackson, Note, *Documentation of International Students in the United States: Forging Alliances or Fostering Alienation?*, 18 GEO. IMMIGR. L.J. 373, 377 (2004) (stating that one of the three 9/11 terrorists who received student visas was a Saudi national named Hani Hassan Hanjour who procured his visa by alleging that he planned to study English in Oakland, California). An F-1 visa authorizes a foreign student to study in the United States. *Students and Employment*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e34c83453d4a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=e34c83453d4a3210VgnVCM100000b92ca60aRCRD> (last updated July 22, 2011).

4. See *infra* Part II.B.

5. See Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. INT'L L. REV. 857, 868-70 (1998) (explaining that student visa applicants must prove that they do

technical violations discovered by the Student and Exchange Visitor Information System (“SEVIS”),<sup>7</sup> and too few opportunities to adjust their status.<sup>8</sup> At this time, H-1B visas are essentially the only visas through which foreign students can stay and work in the United States after graduation.<sup>9</sup> Yet, the demand for these visas has exceeded their availability for over a decade and many foreign students have been forced to take their talent and U.S. educations elsewhere.<sup>10</sup> Recently, the demand for H-1B visas has dropped as the economy has plummeted<sup>11</sup> and anti-immigrant tensions have surfaced.<sup>12</sup> However, this decrease in demand for H-1B visas will most likely prove to be an exception in the short term as employers are beginning to hire more workers<sup>13</sup> and the

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not have the dual intent to both study and remain in the United States after graduation); Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 GEO. IMMIGR. L.J. 473, 476 (2003) (arguing that the dual intent requirement is “unworkable”).

6. Meng Lu, *Not Part of the Family: U.S. Immigration Policy and Foreign Students*, 34 T. MARSHALL L. REV. 343, 361-62 (2009) (explaining that all non-immigrant visa applicants, including students, are subject to additional security scrutiny under the Visa Mantis program).

7. JANINE KEIL, INST. FOR THE STUDY OF DIPLOMACY, GEORGETOWN UNIV., VOICES OF HOPE, VOICES OF FRUSTRATION: DECIPHERING U.S. ADMISSION AND VISA POLICIES FOR INTERNATIONAL STUDENTS 12-13 (2006). See also Lu, *supra* note 6, at 361 (discussing how visa security checks, such as the Visa Mantis, SEVIS, and Visa Condor programs, which were strengthened in response to 9/11, present new obstacles for students attempting to study in the United States).

8. See, e.g., Lu, *supra* note 6, at 365-67 (explaining how foreign students are eligible to work in the United States through the Optional Practical Training (“OPT”) program for a maximum of one year after graduation and can only stay beyond that year if they majored in certain fields, are sponsored with an employment-based application, or secure an H visa).

9. See *id.* at 366 (explaining that H-1B visas are issued to temporary workers in specialty occupations); Joseph Tiger, Note, *Re-Bending the Paperclip: An Examination of America’s Policy Regarding Skilled Workers and Student Visas*, 22 GEO. IMMIGR. L.J. 507, 510 (2008).

10. Lu, *supra* note 6, at 366-67 (describing how the H-1B visa process becomes a lottery due to high demand for work visas and their limited availability); Tiger, *supra* note 9, at 510.

11. See Miriam Jordan, *Slump Sinks Visa Program*, WALL ST. J., Oct. 29, 2009, at A1.

12. *Id.* “[An Arizona] law requires state and local police to determine the status of people if there is ‘reasonable suspicion’ that they are illegal immigrants and to arrest people who are unable to provide documentation proving they are in the country legally.” See Tim Gaynor & David Schwartz, *Arizona Passes Tough Illegal Immigration Law*, REUTERS, Apr. 19, 2010, available at <http://www.reuters.com/article/idUSTRE63I6TU20100419>. Many people thought that the law promoted racial profiling and was passed in response to growing frustration with illegal immigrants. See *id.* But see *U.S. Makes Case Against Alabama’s Immigration Law*, CNN (Nov. 16, 2011, 8:25 AM), <http://www.cnn.com/2011/11/15/us/alabama-immigration-law/index.html> (stating that Alabama’s strict immigration law was “motivated mainly to protect jobs of the state’s citizens and legal residents”).

13. Phyllis Korkki, *Rays of Hope for Job Hunters*, N.Y. TIMES, Apr. 25, 2010, at BU9; Motoko Rich, *Job Gains Reflect Hope a Recovery Is Blooming*, N.Y. TIMES, Feb. 4, 2012, at B1 (“The Labor Department’s latest snapshot of the job market, released on [February 3, 2012], makes clear that employers have been hiring more in recent months, with 243,000 net new jobs in January.”).

number of students entering the United States per year will most likely remain consistent with previous years or even increase.<sup>14</sup>

The United States cannot forget the many contributions foreign students have made to the country as innovators and entrepreneurs.<sup>15</sup> As Susan Hockfield, the President of Massachusetts Institute of Technology (“MIT”), argued in a 2009 *Wall Street Journal* article, we need to create a green card solution for foreign students who have studied and succeeded in the United States.<sup>16</sup> In 2009, at least four of the nine U.S. Nobel Prize recipients in the fields of chemistry, physics, and medicine were former foreign students who studied in the United States and “[f]rom MIT alone, foreign graduates have founded an estimated 2340 active U.S. companies that employ over 100,000 people.”<sup>17</sup>

Yet, despite the many benefits foreign students offer the United States such as spillover economic benefits, increased innovation, and job creation,<sup>18</sup> critics of the immigration of foreign students have advanced arguments against their permanent integration into American society.<sup>19</sup>

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14. See Philip G. Altbach, *Higher Education Crosses Borders: Can the United States Remain the Top Destination for Foreign Students?*, CHANGE: THE MAG. OF HIGHER LEARNING, Mar.–Apr. 2004, at 19, 19, 21 (stating that foreign students are consistently “pulled” to the United States because it “is generally seen as the world’s best academic system”); Tamar Lewin, *China Surges Past India as Top Home of Foreign Students*, N.Y. TIMES, Nov. 15, 2010, at A14; Mary Beth Marklein, *More Foreign Students Studying in USA*, USA TODAY (Nov. 14, 2011, 2:16 PM), available at <http://www.usatoday.com/news/education/story/2011-11-13/foreign-students-boost-usa-economy/51188560/1> (“The number of international students at U.S. colleges and universities rose 4.7% to 723,277 during the 2010–11 academic year . . .”).

15. See Sameer Ahmed, *Targeting Highly-Skilled Immigrant Workers in a Post-9/11 America*, 79 UMKC L. REV. 935, 943 & n.57 (2011); Michael R. Traven, Comment, *Restricting Innovation: How Restrictive U.S. Visa Policies Have the Potential to Deplete Our Innovative Economy*, 34 CAP. U. L. REV. 693, 693–94 (2006) (describing the importance of allowing Sergey Brin to come to the United States as a foreign undergraduate student given that he created and founded Google along with his classmate, Lawrence Page).

16. See Susan Hockfield, *Immigrant Scientists Create Jobs and Win Nobels*, WALL ST. J., Oct. 20, 2009, at A19.

17. *Id.*

18. Gnanaraj Chellaraj et al., *The Contribution of International Graduate Students to US Innovation*, 16 REV. INT’L ECON. 444, 459 (2008); Lu, *supra* note 6, at 346–47.

19. See George J. Borjas, *An Evaluation of the Foreign Student Program*, BACKGROUNDER (Ctr. for Immigration Studies, Washington, D.C.), June 2002, at 1, 1, 4 [hereinafter Borjas, *Foreign Student Program*] (concluding that benefits from foreign students “are greatly exaggerated, and [that] the [foreign student visa] program may well generate a net economic loss for the country”); George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Impact on Native-Born Workers*, BACKGROUNDER (Ctr. for Immigration Studies, Washington, D.C.), May 2004, at 1, 7 [hereinafter Borjas, *Impact on Native-Born Workers*] (“Wages fall when immigrants increase the size of the workforce.”); *Brain Drain*, FED’N FOR AM. IMMIGRATION REFORM, [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenterse514](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenterse514) (last visited Apr. 20, 2012) (stating that the “brain drain” from sending skilled professionals from less developed countries to the United States does “serious damage to the communities left behind”).

Such arguments posit that foreign students take American jobs,<sup>20</sup> reduce wages in particular industries,<sup>21</sup> and cause significant “brain drain” for students’ home countries.<sup>22</sup> Nevertheless, proponents of increased foreign student immigration have refuted these arguments by pointing to the fact that: (1) careful job screening for qualified Americans is conducted by the Department of Labor (the “DOL”) before foreign students can obtain permanent jobs in the United States;<sup>23</sup> (2) foreign students generate growth in the U.S. job market by virtue of their innovation;<sup>24</sup> and (3) “brain drain” is not a major problem as many foreign students are now choosing to return to their home countries.<sup>25</sup>

Unlike the United States, Canada has not overlooked foreign students’ contributions to society. In 2008, the Canadian government carved out a green card provision in its immigration laws entitled the Canadian Experience Class (the “CEC”).<sup>26</sup> This new immigration law allows foreign students with Canadian college or graduate degrees to apply for permanent residence.<sup>27</sup> Thus, Canada, a country that has focused on recruiting highly-skilled workers for years, has set itself on a path to surpass the United States in the global competition for human capital.<sup>28</sup> It is time for the United States to follow Canada’s example and address the issue of foreign students and how they can remain in the United States legally.<sup>29</sup>

20. Thomas J. Espenshade & Katherine Hempstead, *Contemporary American Attitudes Toward U.S. Immigration*, 30 INT’L MIGRATION REV. 535, 539-40 (1996).

21. See Borjas, *Foreign Student Program*, *supra* note 19, at 6.

22. FED’N FOR AM. IMMIGRATION REFORM, *supra* note 19.

23. *Permanent Labor Certification*, U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/perm.cfm> (last updated Feb. 23, 2012).

24. Chellaraj et al., *supra* note 18, at 444-45, 459.

25. See VIVEK WADHWA ET AL., EWING MARION KAUFFMAN FOUND., *LOSING THE WORLD’S BEST AND BRIGHTEST: AMERICA’S NEW IMMIGRANT ENTREPRENEURS*, PART V, at 4-5 (2009), available at [http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/Losing\\_the\\_World's\\_Best\\_and\\_Brightest.pdf](http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/Losing_the_World's_Best_and_Brightest.pdf) (finding that in recent years, many foreign students who studied in the United States have decided to return home to reunite with family and friends and take advantage of better economic opportunities in their home countries).

26. Edward C. Corrigan, *Applying for Permanent Residence under the Canadian Experience Class*, 76 IMMIGR. L. REP. 3d (Carswell) 8, 8 (2009).

27. See *id.* at 8, 10-12 (describing that foreign students applying under the CEC are also required to speak at least one of Canada’s two official languages, English or French, and to have worked in Canada for at least one year).

28. Shachar, *supra* note 2, at 185-86 (discussing Canada’s foreign student recruitment efforts); see *infra* Part III.

29. Cf. Shachar, *supra* note 2, at 191-92 (explaining that Germany entered the global competition for foreign talent by “admitt[ing] that its economy requires more skilled migrants to remain competitive, but also that it had learned from the selective migration programs developed by competing jurisdictions, including traditional immigration-recruiting countries such as Canada” (footnote omitted)).

The Securing Knowledge, Innovation, and Leadership Act of 2010 (the “SKIL Act”),<sup>30</sup> American Innovation and Education Act of 2011 (the “American Innovation and Education Act”),<sup>31</sup> and Immigration Driving Entrepreneurship in America Act of 2011 (the “IDEA Act”)<sup>32</sup> offer potential solutions to keep strong foreign minds in the United States by proposing similar yet slightly different paths to permanent residence for U.S. educated foreign students.<sup>33</sup> This Note argues that none of these bills could single-handedly ensure American competitiveness. Instead, this Note proposes that certain aspects of each bill should be combined into a new piece of legislation in order to achieve a comprehensive and complete foreign student permanent residence solution. Further, this Note proposes that its suggested new legislation incorporate a conditional residence requirement such that Congress could both alleviate protectionist concerns and keep the brightest, safest, and most productive foreign students in the United States.<sup>34</sup>

Part II of this Note describes the evolution of U.S. immigration law and its first overhaul with the Immigration and Nationality Act of 1965 (the “1965 INA”).<sup>35</sup> Significant changes in immigration law embodied in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the “PATRIOT Act”)<sup>36</sup> and the Enhanced Border Security and Visa Entry Reform Act of 2002 (the “Border Security Act”),<sup>37</sup> which were passed in

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30. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658, 111th Cong. (2010).

31. American Innovation and Education Act of 2011, H.R. 3146, 112th Cong. (2011).

32. Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. (2011).

33. American Innovation and Education Act of 2011, H.R. 3146 § 101; Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161 § 101; Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201.

34. See, e.g., Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. §§ 5(a), (c)(1), 6(b), (d) (2010) (rendered moot on Dec. 9, 2010) (proposing that alien students, who were brought to the United States when they were young, should adjust status to permanent residents as long as they are subject to a maximum ten-year conditional residence requirement which will ensure that the students lose status if they become public charges or get convicted of crimes); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1683 (2007) (describing the requirement imposed on foreign spouses to apply to remove conditions on their temporary residence status due to government concern that some marriages are fraudulent).

35. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

36. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of the U.S.C.).

37. Enhanced Border Security and Visa Entry Reform Act of 2002, 8 U.S.C. §§ 1701–1778

response to the terrorist attacks of 9/11, are also explored. This Part then examines how U.S. immigration laws treat foreign students and concludes that the laws deter students from studying and innovating in the United States.

Part III discusses the history and development of Canadian immigration law and its highly-skilled worker immigrant recruitment regime. This Part also examines Canada's recent creation of a new immigrant category, the CEC, which allows foreign students who graduate from Canadian colleges or graduate schools to stay and work in Canada permanently. This Part then argues that the CEC gives Canada a competitive advantage over the United States when recruiting foreign highly-skilled talent and as such the United States must rethink its immigration policy in at least the foreign student context.

Part IV proposes that the United States should acknowledge the benefits of the CEC model and should adopt a foreign student permanent residence solution based on provisions found in the SKIL Act, American Innovation and Education Act, and IDEA Act with one amendment—a conditional residence requirement to ensure that only applicants who will contribute positively to the United States will be granted permanent residence. This Part argues that the conditional residence requirement should be built upon traditional U.S. immigration law frameworks. As such, it should incorporate aspects of the labor certification process, and the marriage-based, investor-based, and the Development, Relief and Education for Alien Minors Act of 2010 (the “DREAM Act”)<sup>38</sup> conditional residence requirements. In addition, this Part grapples with arguments against the immigration of foreign students and determines that the potential drawbacks of allowing foreign students to remain in the United States will be offset by their potential for innovation and job creation. Finally, Part V concludes that the United States needs to retain its foreign students in order to spur economic growth and stay competitive.

## II. U.S. IMMIGRATION LAW AND FOREIGN STUDENTS

The presence of foreign students in the United States yields large benefits to the country as they pay high tuitions,<sup>39</sup> increase the number of

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(2006 & Supp. IV 2011).

38. Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010) (rendered moot on Dec. 9, 2010).

39. Altbach, *supra* note 14, at 20 (“Foreign students contribute more than \$12 billion to the U.S. economy each year . . . . In the current environment of financial constraint, these students are increasingly attractive to universities.”). See also Marklein, *supra* note 14 (referencing the findings of a U.S. Commerce Department report, which stated that “international students contribute more

highly-skilled immigrants in key disciplines such as the sciences, mathematics, and engineering,<sup>40</sup> and contribute to job growth in the domestic economy.<sup>41</sup> Additionally, foreign students add diversity to the student body at various schools and are considered invaluable to institutional research.<sup>42</sup> Thus, the inclusion of foreign students in U.S. schools is linked to increases in the country's innovation.<sup>43</sup> Nevertheless, 9/11 changed the country's mood towards immigration and placed a negative spotlight on foreign students, as some of the terrorists who perpetrated the attacks were granted student visas to study in the United States.<sup>44</sup> Therefore, despite U.S. immigration policy that has evolved from initially being racially discriminatory to liberalizing and welcoming of families and highly-skilled immigrants, immigration laws of the past ten years have become increasingly restrictive.<sup>45</sup> These restrictive laws discourage foreign students from studying and remaining in the United States, and thereby threaten the competitiveness of the country in the global economy.<sup>46</sup>

Yet, not all hope is lost. After the reforms of the past fifty years, U.S. immigration law has retained its basic structure, which has only been further defined and expanded by legislation such as the Immigration Act of 1990 (the "IMMACT90").<sup>47</sup> As such, U.S. immigration law continues to offer both family-based and employment-based immigration options for intending immigrants.<sup>48</sup> Because the fundamentals of U.S. immigration law have generally stayed the same,<sup>49</sup> the potential to shape the law to provide a permanent residence solution

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than \$21 billion to the U.S. economy through tuition and living expenses, which include room and board, supplies, transportation and health insurance and support for dependents").

40. See Altbach, *supra* note 14, at 20.

41. See, e.g., Chellaraj et al., *supra* note 18, at 445 (finding that foreign students in the United States increase innovation and contribute to the "growing number of patents awarded to US industries and universities").

42. NAFSA, IN AMERICA'S INTEREST: WELCOMING INTERNATIONAL STUDENTS 6 (2003), available at [http://www.nafsa.org/uploadedFiles/NAFSA\\_Home/Resource\\_Library\\_Assets/Public\\_Policy/in\\_america\\_s\\_interest.pdf](http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/in_america_s_interest.pdf); Jackson, *supra* note 3, at 376.

43. See, e.g., Chellaraj et al., *supra* note 18, at 445.

44. Susan Martin & Philip Martin, *International Migration and Terrorism: Prevention, Prosecution and Protection*, 18 GEO. IMMIGR. L.J. 329, 329-30 (2004); Jackson, *supra* note 3, at 377.

45. See RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 5-7, 10, 15-16, 18-19 (Stephanie L. Browning ed., 2006).

46. Chellaraj et al., *supra* note 18, at 444.

47. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.). See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 297 (6th ed. 2008); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 2-4 (10th ed. 2006).

48. ALEINIKOFF ET AL., *supra* note 47, at 297-98.

49. See KURZBAN, *supra* note 47, at 2.



for foreign students is possible, necessary, and feasible through passage of legislation based upon the SKIL Act, American Innovation and Education Act, and IDEA Act with the amendments proposed herein.

### A. U.S. Immigration Law: A Brief History

Although U.S. immigration law currently focuses on ensuring the nation's security through increased scrutiny of visa applicants and increased law enforcement, U.S. immigration law has been based upon different policies in the past.<sup>50</sup> Initially, U.S. immigration law was a topic governed by both state and federal law until the late 1800s, when it became primarily a federal matter.<sup>51</sup> The first "comprehensive" federal immigration law, which established the first immigration agency in charge of recruiting immigrants to meet the demands of the Civil War, was passed in 1864.<sup>52</sup> When this legislation was repealed in 1868, the federal government began imposing restrictions on the types of immigrants who could enter the United States.<sup>53</sup> New restrictive laws prohibited "idiots, lunatics," persons with certain criminal convictions, and individuals likely to become public charges from immigrating to the United States.<sup>54</sup> Subsequent racially discriminatory laws followed, such as the Chinese Exclusion Act,<sup>55</sup> as well as laws that limited the admission of foreign workers to those that had contracted with U.S. businesses.<sup>56</sup> In 1924, Congress passed the Immigration Act of 1924 (the "National Origins Act"),<sup>57</sup> which upheld the 1917 restrictions on foreign immigration<sup>58</sup> and reduced the number of immigrants per year to two percent of each nationality group that had been living in the United

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50. See, e.g., BOSWELL, *supra* note 45, at 8, 10-11, 14.

51. See Kitty Calavita, *U.S. Immigration and Policy Responses: The Limits of Legislation*, in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 57 (Wayne A. Cornelius et al. eds., 1994).

52. *Id.* (stating that this law was repealed in 1868 which resulted in the creation of a series of labor agencies to recruit immigrants from Europe).

53. *Id.*

54. BOSWELL, *supra* note 45, at 5 (stating that this period "has been described as the 'first restrictionist period'" in U.S. immigration law). See also Philip L. Martin, *The United States: The Continuing Immigration Debate*, in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 51, 64 (Wayne A. Cornelius et al. eds., 2d ed. 2004) (stating that the Immigration Act of 1882 also prohibited the immigration of "mental defectives" and Chinese to the United States).

55. Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943) (providing for the exclusion of Chinese immigration); BOSWELL, *supra* note 45, at 5.

56. BOSWELL, *supra* note 45, at 5-6 (stating that a foreign worker would be denied admission to the United States if employment of the worker would depress the U.S. economy).

57. Immigration Act of 1924, ch. 190, 43 Stat. 153; see BOSWELL, *supra* note 45, at 7 n.31.

58. BOSWELL, *supra* note 45, at 6-7 (stating that the 1917 restrictive laws barred Asians from immigrating to the United States with the establishment of the "Asiatic Barred Zone").

States.<sup>59</sup> Thus, the National Origins Act represented the culmination of an era of restrictive and discriminatory U.S. immigration policy.<sup>60</sup>

The next significant immigration law, the Immigration and Nationality Act (the “1952 INA”),<sup>61</sup> was passed in 1952 over the veto of President Harry Truman.<sup>62</sup> The 1952 INA retained the 1924 national origin quotas, established a preference category system that prioritized certain family-based immigrants and economic immigrants over others, enumerated a distinct list of deportable immigrants, and instituted a system of relief from deportation for individuals with family ties to U.S. citizens or U.S. permanent residents.<sup>63</sup> The 1952 INA also established the F-1 student visa category that is still used in the current immigration system.<sup>64</sup> In sum, because many of its provisions remain in force today, the 1952 INA set the basic foundation for modern immigration law.<sup>65</sup>

In 1965, the 1952 INA liberalized and abandoned the discriminatory national origin quotas with its first amendment.<sup>66</sup> Passed during the Civil Rights Movement, the 1965 INA increased the number of immigrants allowed to enter the United States annually to 120,000 from the Western hemisphere and 170,000 from outside of the Western hemisphere.<sup>67</sup> The 1965 INA also altered the preference categories that were created by the 1952 INA.<sup>68</sup> In addition, the 1965 INA provided for the removal of spouses, minor children, and parents of U.S. citizens from the quota system, thereby consolidating a U.S. immigration system that to this day still prioritizes family-based immigration over employment-based immigration.<sup>69</sup>

Further, the 1965 INA carved out a visa preference category for immigrants with “exceptional ability” and “essential skills” regardless of

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59. *Id.* at 7.

60. *See id.* at 5-7.

61. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

62. BOSWELL, *supra* note 45, at 8-9.

63. *Id.*; Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 5 (1994).

64. *See* Lu, *supra* note 6, at 353 (“The category of foreign students was first recognized under the Immigration Act of 1924.”).

65. *See* KURZBAN, *supra* note 47, at 2; Charles Morrow, Comment, *The Plight of the Highly Educated: Immigration Reform in the United States Post-September 11th*, 39 ARIZ. ST. L.J. 993, 997-98 (2007).

66. *See* BOSWELL, *supra* note 45, at 9-10; Morrow, *supra* note 65, at 998.

67. BOSWELL, *supra* note 45, at 10.

68. Calavita, *supra* note 51, at 62 (stating that the 1952 INA “established the preference system for immigrant workers and close relatives of U.S. citizens and residents, the basic structure of which remains intact today”); Morrow, *supra* note 65, at 998.

69. *See* ALEINIKOFF ET AL., *supra* note 47, at 300-01; BOSWELL, *supra* note 45, at 10; Calavita, *supra* note 51, at 62.

the immigrants' country of origin.<sup>70</sup> Finally, the 1965 INA allowed for growth in the number of students that could travel and study in the United States, which resulted in the near doubling of the number of foreign students present in the country since the 1950s.<sup>71</sup> The 1965 INA therefore represented the first significant step that the country took in creating an immigrant recruitment regime for highly-skilled workers.<sup>72</sup>

As concern for the flow of illegal immigration grew in response to the liberal policies embodied in the 1965 INA, Congress refocused its attention on passing immigration legislation to control the flow of undocumented immigrants.<sup>73</sup> Accordingly, in 1986, Congress passed the Immigration Reform and Control Act (the "IRCA"),<sup>74</sup> which imposed penalties on employers who employed undocumented immigrants.<sup>75</sup> IRCA also implemented substantial reforms as it provided a permanent residence amnesty for undocumented immigrants who had resided in the United States continuously since before January 1, 1982.<sup>76</sup> IMMACT90 expanded on IRCA's reforms<sup>77</sup> by creating the O<sup>78</sup> and P<sup>79</sup> visa categories, increasing the annual quota for worldwide immigration from 290,000 to 700,000 people,<sup>80</sup> and by creating the investor visa<sup>81</sup> and

70. Shachar, *supra* note 2, at 170; Morrow, *supra* note 65, at 998 (internal quotation marks omitted).

71. Lu, *supra* note 6, at 353.

72. See Shachar, *supra* note 2, at 170 (quoting President Lyndon Johnson as stating that "from this day forth, those wishing to emigrate into America shall be admitted on the basis of their skills" in response to the 1965 INA (internal quotation marks omitted)).

73. See Calavita, *supra* note 51, at 62-65.

74. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered titles of the U.S.C.).

75. Martin, *supra* note 54, at 66.

76. Calavita, *supra* note 51, at 65.

77. BOSWELL, *supra* note 45, at 14.

78. *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b9930b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=b9930b89284a3210VgnVCM100000b92ca60aRCRD> (last updated Mar. 16, 2011) ("The O-1 nonimmigrant visa is for the individual who possesses extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements.").

79. *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=13ad2f8b69583210VgnVCM100000082ca60aRCRD&vgnnextchannel=13ad2f8b69583210VgnVCM100000082ca60aRCRD> (last updated Sept. 7, 2011) (describing the four P visa categories pertaining to: "[i]nternationally recognized athletes," "[i]nternationally recognized entertainers or members of internationally recognized entertainment groups," an "[i]ndividual performer or part of a group entering to perform under a reciprocal exchange program," and "[a]rtists or entertainers, either an individual or group, to perform, teach, or coach under a program that is culturally unique").

80. See BOSWELL, *supra* note 45, at 10, 14.

81. *Green Card Through Investment*, U.S. CITIZENSHIP & IMMIGRATION SERVS.,

temporary protected status.<sup>82</sup> However, because IMMACT90 did little to reduce the large influx of undocumented workers into the United States in the 1990s,<sup>83</sup> Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the “IIRAIRA”).<sup>84</sup> The IIRAIRA increased the penalties for immigration violations of status, redefined the factors for immigrants’ removal, and prohibited foreign students from attending publicly funded education programs.<sup>85</sup> The IIRAIRA also created the SEVIS, a subset of the Student and Exchange Visitor Program, which tracks the movements of foreign students on F-1 visas in the United States.<sup>86</sup> Thus, through the IIRAIRA, Congress attempted to tighten the reigns on immigration by increasing enforcement mechanisms and enacting restrictive legislation.<sup>87</sup>

Further, in response to the 9/11 terrorist attacks and mounting public frustration with immigration and its security risks, Congress passed the PATRIOT Act and the Border Security Act. Both laws represent a restrictive shift in U.S. immigration law that is more focused upon ensuring security.<sup>88</sup> The PATRIOT Act expanded the definition of terrorism, authorized the detention of non-citizens, and increased the scrutiny involved in background checks and security clearances for all

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<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=cf54a6c515083210VgnVCM100000082ca60aRCRD&vgnextoid=cf54a6c515083210VgnVCM100000082ca60aRCRD> (last updated Mar. 30, 2011) (stating that entrepreneurs who make either a \$1,000,000 or \$500,000 commercial investment, depending on the area, in the U.S. economy that results in the permanent employment of ten or more U.S. citizens may be eligible to apply for a green card).

82. BOSWELL, *supra* note 45, at 14; *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD> (last updated Jan. 12, 2012) (describing Temporary Protected Status as an immigration exception allowing for citizens of countries, that are designated by the Secretary of Homeland Security as unable to handle the return of their nationals, to temporarily live in the United States until circumstances improve in their home countries).

83. See JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601, 612 (2002); Morrow, *supra* note 65, at 999.

84. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

85. BOSWELL, *supra* note 45, at 16; Lu, *supra* note 6, at 354.

86. Lu, *supra* note 6, at 354-56 (discussing how IIRAIRA’s creation of SEVIS “required the former INS to collect information electronically ‘where practical’”); Martin & Martin, *supra* note 44, at 333-34.

87. See BOSWELL, *supra* note 45, at 16.

88. See Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA PATRIOT Act and Other Measures*, 63 U. PITT. L. REV. 873, 875-76 (2002); Morrow, *supra* note 65, at 1002, 1004.

visas, including student visas.<sup>89</sup> The Border Security Act picked up where the PATRIOT Act left off and, among other security enhancing measures, focused on improving the SEVIS tracking system for foreign students studying in the United States.<sup>90</sup> The Border Security Act also prohibits the issuance of nonimmigrant visas, including student visas, to any national of a country that is designated as a state that sponsors terrorism.<sup>91</sup> Finally, the most recent restrictive immigration law constructed in response to 9/11 was the Homeland Security Act of 2002,<sup>92</sup> which abolished the Immigration and Naturalization Service and consolidated control over immigration matters in the Department of Homeland Security ("DHS").<sup>93</sup>

In sum, immigration post-9/11 has become increasingly restrictive and therefore has had a significant impact on foreign students studying in the United States.<sup>94</sup> However, because the U.S. immigration framework set out in the 1952 INA remains fundamentally the same,<sup>95</sup> there is a potential to build on current law and craft a solution to these new restrictive policies for foreign students.

#### B. *Why U.S. Immigration Laws Discourage Foreign Students from Studying and Remaining in the United States*

As previously discussed, U.S. immigration law has taken a more restrictive approach given IIRAIRA and post-9/11 immigration legislation.<sup>96</sup> Foreign students now must face possible visa denials at consular interviews for dual intent, Visa Mantis delays, SEVIS tracking system complications, and limited options for permanent immigration to the United States after their studies.<sup>97</sup> This triggers an important question: Do our immigration laws discourage foreign students from coming to the United States?

A U.S. immigration specialist, Scott F. Cooper, answered this question at a conference on the Comparative Aspects of Innovation in Canada and the United States and concluded that the combination of "certain security restrictions, visa processing delays, and restrictive

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89. See Lebowitz & Podheiser, *supra* note 88, at 875-76; Morrow, *supra* note 65, at 1002-03.

90. See Lebowitz & Podheiser, *supra* note 88, at 885-86; Morrow, *supra* note 65, at 1004.

91. See Lebowitz & Podheiser, *supra* note 88, at 886; Morrow, *supra* note 65, at 1004.

92. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. §§ 101-596 (2006 & Supp. IV 2011)).

93. See *supra* text accompanying notes 84-94.

94. See *supra* text accompanying notes 84-94; Morrow, *supra* note 65, at 1003-06.

95. KURZBAN, *supra* note 47, at 2; Morrow, *supra* note 65, at 998.

96. BOSWELL, *supra* note 45, at 15-16, 18.

97. See Lu, *supra* note 6, at 356-57, 361-62, 365.

interpretations by DHS officials and border officials have started to discourage foreign students from coming to the United States, so that the actual number of applicants has dropped very significantly.”<sup>98</sup> Yet, a November 14, 2011 article in *USA Today* reported that the number of foreign students in the United States in fact increased from 690,923 foreign students in 2009–2010<sup>99</sup> to 723,277 students in 2010–2011.<sup>100</sup> This is a dramatic shift when compared to the steady decline of U.S. foreign student enrollments from 2002 through 2005.<sup>101</sup>

Many U.S. competitors for foreign students, such as the United Kingdom and Canada, who have focused on exploiting the weakness of restrictive U.S. immigration laws since 9/11,<sup>102</sup> have also experienced increases in their 2009 foreign student enrollments.<sup>103</sup> Some of these competitors, namely Canada, have also created paths to permanent residence for foreign students,<sup>104</sup> thereby making the prospect of studying in those countries much more attractive. Accordingly, if the recent growth in the number of U.S. foreign students proves to be more than just an exception, the country will need to address some of the obstacles to continued foreign student enrollment and rethink its limited

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98. Daniel D. Ujcz et al., *Educational and Immigration Aspects of Innovation: Educating the Innovators and Shaping Immigration Policy for High Tech Workers*, 32 CAN.-U.S. L.J. 165, 175, 177 (2006).

99. Lewin, *supra* note 14, at A14.

100. Marklein, *supra* note 14. See also Karin Fischer, *Students Flooded into U.S. in 2008*, CHRON. HIGHER EDUC., Nov. 16, 2009, at A1 (stating that in the 2008–2009 academic year, 671,616 foreign students came to the United States to study).

101. Nick Clark & Robert Sedgwick, *International Students: It's a Buyer's Market*, WORLD EDUC. NEWS & REVIEWS (Aug. 2005), <http://www.wes.org/ewenr/05july/feature.htm>.

102. See Ujcz et al., *supra* note 98, at 177.

103. See *Overseas Students Reach Record Numbers in the UK*, BBC, [http://news.bbc.co.uk/2/hi/uk\\_news/education/8588779.stm](http://news.bbc.co.uk/2/hi/uk_news/education/8588779.stm) (last updated Mar. 26, 2010) (stating that United Kingdom foreign student enrollment grew by nearly five percent for European students and 9.4 percent for non-European students in 2008–2009); *Supporting Canada's Economy, Government of Canada Maintains Historically High Rate of Immigration in 2009*, CAN. NEWS CENTRE (May 13, 2010), <http://news.gc.ca/web/article-eng.do?m=/index&nid=531649> [hereinafter *Supporting Canada's Economy*] (describing how foreign student enrollment in Canada increased by seven percent in 2009 which represents “the highest number of foreign students ever admitted to Canada”). But see Geoffrey Rogow, *Australian Education Test: How to Stem Foreign-Student Dropouts*, WALL ST. J. (Feb. 2, 2011), <http://online.wsj.com/article/SB10001424052748704721104576106871978311958.html> (explaining that Australia's status as an “education hub for Asia” may be compromised in the future due to the rising costs of education there).

104. See *Supporting Canada's Economy*, *supra* note 103 (describing that Canada accepted 2544 CEC applicants in 2009); see also *Migrating to Australia*, STUD. AUSTRALIA: INT'L STUDENTS GUIDE, <http://www.studiesinaustralia.com/studying-in-australia/student-visas/migrating-to-australia> (last visited Apr. 20, 2012) (stating that foreign students who have completed at least two years of full-time studies in Australia can apply for permanent residency under the “Skilled Independent Visa”).

options for permanent residence if it still desires to be the top destination for foreign minds.<sup>105</sup>

### 1. Dual Intent

In order to study in the United States, foreign students must meet the definition of a student in 8 U.S.C. § 1101(a)(15)(F)(i)<sup>106</sup> and satisfy all of the criteria in 8 C.F.R. § 214.2(f)(i).<sup>107</sup> As such, before receiving a student visa, foreign students must demonstrate to a consular officer that they do not have any dual intent to both study and remain in the United States after graduation.<sup>108</sup> Because U.S. immigration law prohibits dual intent for non-immigrant visas, with the exception of H-1, L, and unofficially E, O-1, and P visas,<sup>109</sup> consular officers will only grant foreign students visas if they prove that they have no intention of staying in the United States past their studies.<sup>110</sup> There is no set of documents that will systematically refute foreign students' dual intent, but evidence of close "ties abroad that would compel them to leave the U.S. at the end of their temporary stay" is material.<sup>111</sup> However, if applicants are perceived to have "weak" ties to their home countries—for example, if they have relatives in the United States and few employment prospects in their home countries—the consular officer will likely deny those foreign students' F-1 visa applications.<sup>112</sup>

As the requirements to refute dual intent are not specifically defined and afford the consular officer significant discretion, F-1 student visas

105. See Clark & Sedgwick, *supra* note 101.

106. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(F)(i) (2006) (declaring that student status in the United States is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study").

107. Nonimmigrant Classes, 8 C.F.R. § 214.2(f) (2011) (setting out the legal provisions for F-1 status and the requirements and procedures for admission as a student, maintenance of status, transfer, duration of status, practical training, and reinstatement of F-1 status).

108. See Immigration and Nationality Act, 8 U.S.C. § 1184(b).

109. *Id.*; Henry J. Chang, *Immigrant Intent and the Dual Intent Doctrine*, CHANG & BOOS' CAN.-U.S. IMMIGR. L. CENTER, <http://www.americanlaw.com/dintent.html> (last visited Apr. 20, 2012).

110. Lu, *supra* note 6, at 357-58 (arguing that this legal requirement is perceived as "hostile and difficult" by foreign students because their educations and futures ride on the subjective determination of a consular officer).

111. *Visa Denials*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/frvi/denials/denials\\_1361.html](http://travel.state.gov/visa/frvi/denials/denials_1361.html) (last visited Apr. 20, 2012) (defining ties as "the various aspects of your life that bind you to your country of residence: your possessions, employment, social and family relationships").

112. See Lu, *supra* note 6, at 357; Walfish, *supra* note 5, at 490 ("[W]hen visa officers deny visas, they often justify their decisions by saying that they are not convinced that this particular applicant will return home. That is, the State Department is substituting actual likelihood of returning for intent to return . . ." (footnote omitted)).

are among the visas that are rejected the most at consulates.<sup>113</sup> The burden of proof falls on the applicant, however, students have observed that “one submits the same information, goes through the same interview and gets different outcomes. People are not told why they are rejected.”<sup>114</sup> Thus, the arbitrariness of the application process has made foreign students fearful and increasingly reluctant to put their important future plans in the hands of a consular officer.<sup>115</sup> This is especially true because the visa interview “normally lasts for five to six minutes,” which is not a lot of time for a student to make a strong case to a consular officer.<sup>116</sup> Further, it is only natural for a student to want to keep his or her plans open after graduation and to manifest some level of dual intent, as it is not uncommon for foreign students to want to stay in the country where they have studied for years.<sup>117</sup>

The dual intent requirement was originally incorporated into the law to prevent illegal immigration through visa overstays and to prevent admitting public charges into the United States.<sup>118</sup> Yet other non-immigrant visas, such as H-1 and L visas, allow for visa applicants to manifest dual intent at their consular interviews.<sup>119</sup> In August of 2010, the Barack Obama Administration leaked a memorandum intended for Alejandro N. Mayorkas, the director of U.S. Citizenship and Immigration Services (“USCIS”), which contained suggested immigration reforms that USCIS could implement without waiting for Congress to pass new immigration legislation.<sup>120</sup> The memorandum

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113. See, e.g., U.S. DEP’T. OF STATE, REPORT OF THE VISA OFFICE 2005, at tbl.XX (2005), available at <http://travel.state.gov/pdf/FY05tableXX.pdf>; Walfish, *supra* note 5, at 479-80 (stating that B visas for tourism and pleasure are also often denied at consulates for dual intent concerns).

114. Lu, *supra* note 6, at 357 (quoting B. LINDSAY LOWELL ET AL., INST. FOR THE STUDY OF INT’L MIGRATION, GEORGETOWN UNIV., FOREIGN STUDENTS COMING TO AMERICA: THE IMPACT OF POLICY, PROCEDURE, AND ECONOMIC COMPETITION 39 (2007), available at [http://isim.georgetown.edu/publications/20070201\\_Foreign\\_Students\\_Coming.pdf](http://isim.georgetown.edu/publications/20070201_Foreign_Students_Coming.pdf)) (internal quotation marks omitted).

115. See *id.*

116. *Id.* at 358.

117. See Walfish, *supra* note 5, at 482.

118. See *id.* at 482-83.

119. See Lu, *supra* note 6, at 366; Maggio et al., *supra* note 5, at 896. See also Chang, *supra* note 109 (“While IMMACT 90 statutorily recognized only the H-1 and L categories, the INS effectively recognizes the concept of dual intent for E nonimmigrants as well. . . . The doctrine of dual intent appears to be recognized for O-1 aliens [and P aliens,] at least under the INS regulations.”); Kellie N. Lego, *Dual Intent—What Does it Mean in the Immigration Context?*, H1B VISA LAWYER BLOG (July 8, 2008), [http://www.h1bvisalawyerblog.com/2008/07/dual\\_intent\\_what\\_does\\_it\\_mean.html](http://www.h1bvisalawyerblog.com/2008/07/dual_intent_what_does_it_mean.html) (stating that “E-1, E-2, E-3, H-1, H-4, L-1, O-1, O-2, P-1, P-2, or P-3 status, may apply to adjust their status to that of a permanent resident”).

120. *Breaking News: USCIS Leaked Memo Presents Alternatives to Immigration Reform*, IMMIGRATION COMPLIANCE GRP., <http://www.immigration-solution.net/immigration-solutions-blog/?p=784> (last visited Apr. 20, 2012).



proposed the expansion of dual intent to TN and F-1 visa applicants.<sup>121</sup> Only time will tell if these suggested reforms will be implemented. But as of now, the inability of foreign students to manifest dual intent at their consular interviews is as much an obstacle to their continued enrollment at U.S. undergraduate and graduate schools as it is unnatural and arbitrary.<sup>122</sup>

## 2. Visa Mantis Delays

Visa Mantis delays are an additional obstacle foreign students face when applying for student visas in the United States.<sup>123</sup> Visa Mantis security checks became routine in 1998 and are applied to all non-immigrant visa applicants who present potential security risks to the United States.<sup>124</sup> Consular officers make the threshold determination as to whether a particular applicant presents a security risk and in doing so consult 8 U.S.C. § 1182(a)(3)(A) to see if any applicants are “principally” or “incidentally” involved in exporting “goods, technology or sensitive information” from the United States.<sup>125</sup> If so, the visa applicant will be subjected to additional security checks and the consular officer will order a security advisory opinion, which requires various U.S. agencies to investigate and voice any concerns that they may have regarding the applicant.<sup>126</sup>

In the foreign student context, some students, such as those who intended to come to the United States to study and research in the fields listed on the “Technology Alert List,” have been deemed potential security risks.<sup>127</sup> The list of such fields is extensive and includes disciplines from nuclear technology to marine technology and urban planning.<sup>128</sup> Thus, although Visa Mantis checks may be important to preserve the security of the United States in some situations, they often result in long delays, sometimes up to twelve months,<sup>129</sup> and may force

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121. Memorandum from Denise A. Vanison et al. on Administrative Alternatives to Comprehensive Immigration Reform to Alejandro N. Mayorkas, Dir. of U.S. Citizenship & Immigration Services 6, available at <http://s3.documentcloud.org/documents/6800/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>.

122. Lu, *supra* note 6, at 357-58.

123. *Id.* at 361-62.

124. *Id.* at 361.

125. See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(A) (2006).

126. See Jim Endrizzi et al., *Visas Mantis Security Advisory Opinions*, NAFSA (Mar. 25, 2009), <http://www.nafsa.org/resource/library/default.aspx?id=8645>.

127. Lu, *supra* note 6, at 361.

128. Tien-Li Loke Walsh, *The Technology Alert List, Visas Mantis and Export Control: Frequently Asked Questions*, WOLFSBORO L. GROUP (2003), <http://www.wolfsdorf.com/articles/TAL2.pdf>.

129. Karen Kaplan, *Waiting Game*, 461 NATURE 131, 132 (2009) (“After congressional

some qualified and safe foreign students to abandon their plans to come and study in the United States.<sup>130</sup>

### 3. SEVIS

SEVIS, a foreign student tracking system, presents another obstacle to foreign students studying and remaining in the United States.<sup>131</sup> SEVIS is a web-based student tracking system that was created by IIRAIRA and enhanced by the PATRIOT Act and Border Security Act.<sup>132</sup> SEVIS imposes requirements such that academic institutions must collect and report information to DHS regarding:

[a student's] failure to register, falling below a full course of study, any changes in the student's name or address, disciplinary action taken by the school against the student as a result of a crime, and "any other notification request made by SEVIS with respect to the current status of the student."<sup>133</sup>

Information regarding the foreign student's date of birth, place of birth, citizenship, major in school, and port/date of entry must also be recorded in the system.<sup>134</sup>

Although SEVIS provides the government with better access to foreign students' whereabouts and personal information, it is criticized for its technical and operational problems most likely attributable to its rushed implementation by the U.S. government because of 9/11.<sup>135</sup> These technical and operational problems such as the "printing of student records at universities or colleges where the student is not enrolled" and very slow information processing are critical as they may complicate foreign students' immigration status and/or lead to the potential deportation of foreign students due to misinformation.<sup>136</sup> Harsh consequences for student violations of status with SEVIS may also occur given the rapid rate at which SEVIS requires academic institutions to

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pressure, the waiting time for Visa Mantis applicants was cut to about 15 days by the end of 2004. But in the past year, delays on Mantis applications lengthened again to between 4 and 12 months.").

130. Traven, *supra* note 15, at 722-24.

131. *Id.* at 717-18 (discussing how the program "has directly affected the creative class because the slow and ineffective implementation of the tracking program has led to unnecessary and costly visa delays").

132. *Id.* at 717-18, 720 (describing the SEVIS system, the government's first tracking system for foreign students).

133. Morrow, *supra* note 65, at 1004.

134. Jackson, *supra* note 3, at 380-81.

135. *Id.* at 381.

136. *Id.* at 381-82. *See also* Kavasji v. INS, 675 F.2d 236, 236-39 (7th Cir. 1982) (holding that the court did not have jurisdiction over the foreign student's case and affirming the Immigration Court's finding that even though a foreign student tried to comply with the transfer requirements for F-1 students and his application was lost in the mail, he was deportable for his violation).

input students' information.<sup>137</sup> Accordingly, the combination of questionable technology and mandatory fast inputs by academic institutions makes it possible that some foreign students' information is incorrectly reported and could lead to visa and green card complications down the road.<sup>138</sup>

Thus, although DHS has acknowledged the drawbacks of the SEVIS system and has made some reforms, its imperfections have yet to be eliminated in order to avoid potential status complications and roadblocks for foreign students intending to remain in the United States after graduation.<sup>139</sup>

#### 4. Current Permanent Residence Options for Foreign Students

Finally, with the current body of immigration law, there are few options available for foreign students to adjust their status and become permanent residents in the United States.<sup>140</sup> Currently, only 140,000 employment-based green cards are processed every year ("employment-based green card cap") in the United States and are made available to a variety of immigrants in employment-based categories, not just categories through which foreign students may apply.<sup>141</sup> Yet, upon graduation each foreign student that studies in the United States is eligible to remain and work in the country for a period of one year in a field related to their major.<sup>142</sup> This one year employment opportunity is known as the Optional Protocol Training ("OPT") and has been extended

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137. Jackson, *supra* note 3, at 383; Flávia R. da Silva-Benson, Note, *New United States Immigration Policies and How the Curtailment of Student Visas Will Affect the Interests of Diversity in American Society*, 38 NEW ENG. L. REV. 807, 816 (2004).

138. See Jackson, *supra* note 3, at 381-83.

139. See *id.* at 381, 385 (describing how DHS has performed "stress testing" on SEVIS using a dummy system so that it could test the system for accuracy and make the requisite improvements).

140. Lu, *supra* note 6, at 365.

141. Immigration and Nationality Act, 8 U.S.C. §§ 1151(d)(1)(A), 1153(b)(1)-(5) (2006) (laying out the five different employment-based categories applicants can fit into under the employment-based green card cap: EB(1): "Priority workers"; EB(2): "Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability"; EB(3): "Skilled workers, professionals, and other workers"; EB(4): "Certain special immigrants"; and EB(5): "Employment creation"). See *Employment-Based Immigrant Visas*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/immigrants/types/types\\_1323.html](http://travel.state.gov/visa/immigrants/types/types_1323.html) (last visited Apr. 20, 2012). Note that the 140,000 visas are also available to a qualifying immigrant's spouse and children. *Id.* As such, the number of immigrant visas actually available for foreign students through H-1B visas is much smaller than it initially appears. See *id.* See also *Visa Availability & Priority Dates*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=aa290a5659083210VgnVCM100000082ca60aRCRD&vgnextoid=aa290a5659083210VgnVCM100000082ca60aRCRD> (last updated June 15, 2011) (stating that the employment-based visas are limited to 140,000 per year and that there are per country cap limitations).

142. Lu, *supra* note 6, at 365.

to twenty-nine months for students that major in science, technology, engineering, or mathematics (“STEM”) fields.<sup>143</sup>

However, the OPT is inherently temporary and does not on its own lead to permanent residence in the United States.<sup>144</sup> Thus, the immigration options for foreign students who wish to obtain U.S. green cards are currently limited to investor visas<sup>145</sup> and sponsorships by U.S. employers<sup>146</sup> through H-1B visas.<sup>147</sup> It is uncommon and often impractical for foreign students to pursue investor visas as they require an investment of \$500,000 or \$1,000,000, depending on the location of the investment.<sup>148</sup> Thus, this leaves H-1B visas as the most common non-immigrant visa that may offer foreign students an avenue through which they can apply for U.S. permanent residence.<sup>149</sup> Nevertheless, procuring permanent residence after having H-1B visas is still difficult for foreign students as significant obstacles prevent many foreign students from acquiring them in the first instance.<sup>150</sup>

To be eligible for one of the H-1B visas subject to the annual 65,000 visa cap,<sup>151</sup> a foreign student must have an offer from a U.S. employer in a specialty occupation and have a bachelor’s degree or “experience in the specialty equivalent to the completion of such

143. *Id.* See *Questions and Answers: Extension of Optional Practical Training Program for Qualified Students*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=9a3d3dd87aa19110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (last updated Apr. 10, 2008).

144. See Lu, *supra* note 6, at 365-66. Note that the F-1 visa does not allow for dual intent and as such foreign students must change status to some other visa category that allows for dual intent in order to apply for permanent residence. See Walfish, *supra* note 5, at 485-86.

145. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)(A); *Green Card Through Investment*, *supra* note 81.

146. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)-(5); *Visa Availability & Priority Dates*, *supra* note 141.

147. See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H); Walfish, *supra* note 5, at 485; *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=73566811264a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD> (last updated Sept. 6, 2011) [hereinafter *H-1B Specialty Occupations*].

148. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)(A)-(C); *Green Card Through Investment*, *supra* note 81.

149. See Walfish, *supra* note 5, at 485.

150. Lu, *supra* note 6, at 366-67.

151. Immigration and Nationality Act, 8 U.S.C. § 1184(g)(1)(A)(i); *H-1B Specialty Occupations*, *supra* note 147 (listing the available visas as 65,000 for the “H-1B Regular Cap” and 20,000 for the “H-1B Master’s Exception”). See also Traven, *supra* note 15, at 715 (describing how Congress increased the annual quota of H-1B visas from 65,000 to 195,000 in 2000 pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 until 2003 when the legislation expired).

degree.”<sup>152</sup> Examples of specialty occupations include “computer systems analysts and programmers, physicians, professors, engineers, and accountants.”<sup>153</sup> Further, H-1B student applicants must also have impeccable immigration status histories in order to be eligible for H-1B visas.<sup>154</sup> Finally, each H-1B visa is valid for up to three years with a possible three-year renewal.<sup>155</sup>

After obtaining H-1B visas, foreign students may file employment-based permanent residence applications as long as they are sponsored by U.S. employers.<sup>156</sup> This green card process requires a U.S. employer to provide a permanent job offer to a foreign student; to pay the foreign student’s immigration filing fees; and to file a labor certification using the Program Electronic Review Management (“PERM”) system with the DOL to ensure that no Americans will lose jobs to the foreign student.<sup>157</sup> By filing a labor certification through PERM, employers make a series of attestations under the penalty of perjury that “a shortage of available and qualified workers exists in the noncitizen’s field at the place of intended employment, and that her hiring on the offered terms would not adversely affect the wages or working conditions of other [U.S.] workers.”<sup>158</sup> Yet, even obtaining an H-1B visa for most foreign students is akin to gambling in a lottery as the visa cap has been filled on the first day petitions are accepted almost every year.<sup>159</sup> Further, H-1B visas are distributed among the many applicants each year according to a “computer-generated random selection of cap-subject petitions.”<sup>160</sup>

152. Immigration and Nationality Act, 8 U.S.C. § 1184(i)(2)(B)–(C)(i).

153. Traven, *supra* note 15, at 714 (quoting OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2003, at 3 (2004)) (internal quotation marks omitted).

154. See Morrow, *supra* note 65, at 1004. Glitches in SEVIS could lead USCIS to view certain foreign students as “noncompliant,” and, therefore, out of status before applying for an H-1B visa. See Jackson, *supra* note 3, at 383.

155. See Immigration and Nationality Act, 8 U.S.C. § 1184(g)(4); *H-1B Specialty Occupations*, *supra* note 147.

156. See Immigration and Nationality Act, 8 U.S.C. § 1184(b) (stating that foreign nationals on H-1B visas can have dual intent and, therefore, can apply for permanent residence); Lu, *supra* note 6, at 368.

157. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)(i)–(ii); Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. §§ 656.10(c)(8)–(10), 656.12(b), 656.17(a) (2011); U.S. DEP’T OF LABOR, *supra* note 23.

158. Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. §§ 656.1(a)(1)–(2); ALEINIKOFF ET AL., *supra* note 47, at 363, 366 (stating that, by filing PERM applications, employers attest that: (1) the position was open to any U.S. worker without discrimination, (2) “the job opportunity did not become available as the result of a strike or lockout,” and (3) “the employer has the financial ability to pay the stated compensation”).

159. See Lu, *supra* note 6, at 367. But see Jordan, *supra* note 11, at A1 (stating that in 2010 the H-1B visa cap was not filled until months after the first day the visas became available).

160. Lu, *supra* note 6, at 367.

For example, in 2008, 163,000 H-1B petitions were filed during the first five days H-1B petitions were accepted for the 65,000 available visas.<sup>161</sup> Thus, the lucky recipients of the 65,000 coveted visas were randomly selected by the computer system.<sup>162</sup> This large influx of H-1B petitions did not occur in 2009 most likely due to the economic downturn in the United States and rising anti-immigrant sentiment.<sup>163</sup> However, as the economy is slowly starting to improve and foreign students continue to flock to the United States, the past trend of quick H-1B visa depletion will most likely resume in the future.<sup>164</sup> Moreover, not all H-1B visas go to foreign students as even a non-student applicant with a bachelor's degree or its equivalent from a country other than the United States may apply for one of the 65,000 visas.<sup>165</sup> In sum, the United States will continue to lose valuable foreign minds if foreign students' only feasible avenue to permanent residence is through the H-1B process, because students will either be randomly selected for H-1B visas or forced to return to their home countries.<sup>166</sup>

Critics of the H-1B system and permanent foreign student immigration argue that the OPT is sufficient to give foreign students the opportunity to live and work in the United States without depriving Americans of potential job opportunities in the long run.<sup>167</sup> Yet, proponents of foreign student immigration fear that the combination of limited H-1B visas and too few opportunities for foreign students to adjust their status in the United States to permanent residents is detrimental to the country as "it would be foolish to educate these talented young people only to make them leave to work for foreign competitors."<sup>168</sup> Thus, as the options for foreign students to work and remain in the United States are inadequate, a better solution is necessary.<sup>169</sup>

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161. *Id.*

162. *Id.*

163. See Jordan, *supra* note 11, at A1 & fig.1, A4 (displaying a diagram showing that the cap for H-1B visas was filled after the second day petitions were filed in 2008 and reporting that "[c]ompanies that use H-1B visas argue the market, rather than Congress, should dictate the number of visas issued").

164. See Korkki, *supra* note 13, at BU9; Rich, *supra* note 13, at B1; Marklein, *supra* note 14.

165. See *H-1B Specialty Occupations*, *supra* note 147.

166. See Lu, *supra* note 6, at 367-68.

167. See *id.* at 368.

168. *Id.* at 367-68 (quoting Memorandum from Ruth Ellen Wasem, Specialist, Cong. Research Serv., on H-1B Visas: Legislative History, Trends Over Time, and Pathways to Permanent Residence 5 (Mar. 20, 2006), available at <http://www.aila.org/content/default.aspx?docid=18974>); see President Barack Obama, State of the Union Address (Jan. 25, 2011), in 157 CONG. REC. H457, at H459 (daily ed. Jan. 25, 2011).

169. See VICTOR C. JOHNSON, NAFSA, A VISA AND IMMIGRATION POLICY FOR THE BRAIN-CIRCULATION ERA: ADJUSTING TO WHAT HAPPENED IN THE WORLD WHILE WE WERE MAKING

In sum, if the United States leaves its immigration laws regarding foreign students unchanged, we will continue to turn away talented students and make it virtually impossible for them to stay in the United States and help grow the economy.<sup>170</sup>

### III. CANADIAN IMMIGRATION LAW AND FOREIGN STUDENTS

United States and Canadian immigration laws have evolved in a similar fashion over the years from regimes with discriminatory laws to regimes focused on attracting highly-skilled immigrants.<sup>171</sup> Yet, Canada has surpassed the United States in establishing an immigrant recruitment regime for the highly-skilled and highly-educated with its implementation of a point system and creation of the CEC.<sup>172</sup> Given foreign students' ability to manifest dual intent, the relatively long post-graduation work opportunities, and the various permanent immigration options available to foreign students, foreign student immigration to Canada "has more than doubled since 1998."<sup>173</sup> Students are thus pulled to study in Canada because its immigration system caters to foreign students' desires to have the option of remaining in the country where they study.<sup>174</sup> Therefore, the CEC is a model that proponents of foreign student immigration in the United States should cite to as both a motivation and an inspiration for passage of legislation based on the SKIL Act and American Innovation and Education Act.

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OTHER PLANS 9 (2009), available at [http://www.nafsa.org/uploadedFiles/NAFSA\\_Home/Resource\\_Library\\_Assets/Public\\_Policy/visa\\_immigration\\_for\\_brain\\_circulation.pdf](http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/visa_immigration_for_brain_circulation.pdf) ("Congress must provide sufficient green card relief to ensure that America can attract and employ the talent it requires to maintain its cutting-edge universities and to fuel its high-tech economy.").

170. See *id.* at 6-7; Ujcz et al., *supra* note 98, at 177. But see Clark & Sedgwick, *supra* note 101 (describing how attempts at removing restrictions on student visas have been made in the past as shown by DHS's initiative to reduce Visa Mantis delays, the sole requirement that STEM students to renew their security checks every four years, and bills that have been proposed in Congress which would alleviate other restrictions placed on foreign students).

171. See Monica Boyd, *Immigration Policies and Trends: A Comparison of Canada and the United States*, 13 DEMOGRAPHY 83, 83 (1976).

172. See *id.* at 84; Corrigan, *supra* note 26, at 8; Alan G. Green & David A. Green, *Canadian Immigration Policy: The Effectiveness of the Point System and Other Instruments*, 28 CANADIAN J. ECON. 1006, 1007 (1995).

173. *International Students Contribute over \$6.5 Billion to Canadian Economy*, FOREIGN AFFAIRS & INT'L TRADE CAN. (Oct. 28, 2009, 11:10 AM EDT), [http://www.international.gc.ca/media\\_commerce/comm/news-communiques/2009/319.aspx?view=d](http://www.international.gc.ca/media_commerce/comm/news-communiques/2009/319.aspx?view=d) [hereinafter *Students Contribute over \$6.5 Billion*]. See *infra* Part III.B.

174. See Corrigan, *supra* note 26, at 8; *Students Contribute over \$6.5 Billion*, *supra* note 173.

### A. *Canadian Immigration Law: A Brief History*

Canada's immigration laws have evolved from racially discriminatory laws to laws that recruit the best and brightest skilled workers from around the world.<sup>175</sup> Beginning in 1868, under the new direction of the liberal immigration minister, Clifford Sifton, immigration numbers in Canada grew from a meager 12,765 immigrants to up to 141,326 immigrants in 1905 as the government recruited people from Europe and other non-European countries to work in the growing agricultural sector.<sup>176</sup> Following almost forty years of Sifton's liberal immigration policies, in 1905, the Canadian government began to discriminate against non-British immigrants and craft laws to deter their immigration.<sup>177</sup> Shortly thereafter, in the 1920s, much like the United States with its Chinese Exclusion Act, the Canadian government passed the Chinese Immigration Act, which dramatically slowed Chinese immigration to Canada.<sup>178</sup> However, the enactment of discriminatory immigration legislation slowed in the mid-1920s when the Canadian government once again opened its doors to increased immigration per the Canadian National Railway's need for more workers to build the transcontinental railway.<sup>179</sup> Nevertheless, as unemployment rose in the 1930s with an economic depression, the government slowed immigration drastically and increased the number of deportations such that 28,000 deportations occurred between 1930 and 1935.<sup>180</sup>

In 1952, given desires to grow the economy after Canada's experience with the depression of the 1930s, the federal government enacted the Immigration Act which increased immigration quotas in order "to attract a continuing stream of immigrants without casting too wide an ethnic or racial net."<sup>181</sup> Thus, the 1952 law discriminated against

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175. See Peter Reikai, *US and Canadian Immigration Policies: Marching Together to Different Tunes*, in C.D. HOWE INST., *THE BORDER PAPERS*, at 3 (2002), available at <http://www.cdhowe.org/pdf/reikai.pdf>; Harold Troper, *Canada's Immigration Policy Since 1945*, 48 INT'L J. 255, 255-56 (1993).

176. REG WHITAKER, *CANADIAN IMMIGRATION POLICY SINCE CONFEDERATION* 2, 6-7 (1991).

177. *Id.* at 7-8, 10 (stating that "anti-foreign agitation" developed against farmer immigrants from central and eastern Europe—as well as "Oriental" immigrants—because "a quarter of the British Columbia labour force was of Asian origin").

178. See *id.* at 12; *supra* notes 55-60 and accompanying text.

179. See WHITAKER, *supra* note 176, at 12 (discussing how this lobbying effort by the Canadian National Railway marked the high point of private industry's participation in federal immigration matters).

180. *Id.* at 13 ("This number was equivalent to those deported for the entire 20-year period preceding 1930.").

181. Troper, *supra* note 175, at 261-62 (discussing how the policy behind the 1952 legislation was probably Prime Minister King's caution in 1947 "against immigration undermining the social structure of Canadian society" such that "[a]t the discretion of the minister, individuals or groups



“social undesirables,” much like the immigration laws of the early 1920s, in an effort to preserve the homogeneity of Canadian society.<sup>182</sup> However, in 1966, when the Department of Citizenship and Immigration joined with the DOL and National Employment to form the Department of Manpower and Immigration,<sup>183</sup> the federal government became serious about growing the economy through immigration and eliminated the ethnic and racial immigration restrictions of the 1952 legislation for employment-based immigrants.<sup>184</sup> Accordingly, employment-based immigrants were selected for visas and permanent residence on account of their “skills and means of support, without regard to national origins.”<sup>185</sup>

Further, in 1967, the Canadian government responded to a 1966 white paper’s critique of Canadian immigration policy and to the needs of an expanding economy with the creation of an immigration point system.<sup>186</sup> The point system “calibrate[d] the desirability of each independent applicant” by awarding intending immigrants points based on age, education, training, language proficiency, Canadian links, and occupational demand.<sup>187</sup> Per the 1967 law, three immigrant classifications were created for the point system: “(1) [s]ponsored dependants, (2) nominated relatives, and (3) independent applicants.”<sup>188</sup> As Canada still adheres to the point system, both nominated relatives and independent applicants have to satisfy the point system’s requirements to be eligible to immigrate to Canada.<sup>189</sup> The highest points are awarded to applicants with master’s or Ph.D. degrees, language proficiency in English and/or French, many years of full-time employment, younger applicants (“in the ‘productive’ age group of twenty-one to forty-nine”), and to applicants who have already secured employment in Canada.<sup>190</sup>

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might be rejected on account of nationality, geographic origin, peculiarity of custom, and unsuitability to the climate or under the omnibus provision of an individual or group demonstrating an inability ‘to become assimilated’”); see *Immigration Acts (1866–2001)*, CANADA IN THE MAKING, [http://www.canadiana.ca/citm/specifique/immigration\\_e.pdf](http://www.canadiana.ca/citm/specifique/immigration_e.pdf) (last visited Apr. 20, 2012).

182. See Manuel García y Griego, *Canada: Flexibility and Control in Immigration and Refugee Policy*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 119, 122 (Wayne A. Cornelius et al. eds., 1994); WHITAKER, *supra* note 176, at 12.

183. Boyd, *supra* note 171, at 84.

184. See *id.* at 85–86; Troper, *supra* note 175, at 265–67 (stating that this shift to non-discriminatory policies was probably motivated by the need “to improve Canada’s international image and bring immigration legislation into line with domestic human rights policy more generally”).

185. See WHITAKER, *supra* note 176, at 18.

186. See Troper, *supra* note 175, at 268, 270.

187. *Id.* at 270–71.

188. Green & Green, *supra* note 172, at 1013.

189. See *id.*

190. See Shachar, *supra* note 2, at 171–72, 172 tbl.1 (displaying Canada’s “Skilled Migrant

Based upon the total points each intending immigrant earns, he or she will be awarded a visa to travel, work, and adjust his or her status to permanent residence in Canada.<sup>191</sup>

In 1990, the 1967 point system was amended to prioritize the immigration of highly-skilled workers<sup>192</sup> over some family-based applicants.<sup>193</sup> Thus, the 1990 immigration law made a fundamental shift from a larger availability of visas for family-based immigrants to employment-based immigrants and created a new set of points for employment-based immigrants with unique occupational skills.<sup>194</sup> Further, in 2002, the Immigration and Refugee Protection Act (the “IRPA”) increased the eligibility standards for immigrant selection and elevated the number of points required for skilled workers.<sup>195</sup> The IRPA, pursuant to recommendations by Canada’s Human Resources and Skills Development Canada (“HRSDC”), created the Federal Skilled Workers program and designated certain skilled occupations as employment areas where foreign skilled workers without pre-arranged job offers could work to meet labor market demands.<sup>196</sup> Such occupations fall within

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Category Selection Factors and Pass Mark” chart).

191. Green & Green, *supra* note 172, at 1009, 1013. *See also* Shachar, *supra* note 2, at 174-76 (stating that the possible points to be earned is 100 and the required number to pass under the point system is sixty-seven). Interestingly enough, as a result of the point system, the primary immigrant populations in Canada are now from Asia and numerous Third World countries rather than Europe. *See* WHITAKER, *supra* note 176, at 19. As such, it is clear that the racially discriminatory policies of Canada’s past immigration laws were completely eliminated by the point system. *See id.*

192. *Frequently Asked Questions: Skilled Workers and Professionals*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/information/faq/immigrate/skilled/index.asp#skilled> (last updated Jan. 10, 2012) (“Skilled workers are selected as permanent residents based on their education, work experience, knowledge of English and/or French, and other criteria that have been shown to help them become economically established in Canada.”).

193. Green & Green, *supra* note 172, at 1009 (“Points for occupational skill, experience, and demand plus special points for designated occupations make up 43 out of the 100 possible points. Applicants who exceed the threshold are admitted on a first-come first-served basis.”). *See also* Rekai, *supra* note 175, at 3 (alluding to the point system and how Canada now focuses on recruiting highly-skilled immigrants such that “[r]oughly 60 percent of those arriving annually in Canada now fall in the category of economic immigrants”).

194. Rekai, *supra* note 175, at 3-4. *See also* Patricia M. Iribarren, *Canada’s New Immigration Policy: Family Reunification Versus Skilled Workers*, 9 GEO. IMMIGR. L.J. 227, 228 (1995) (discussing how a 1995 immigration law would decrease the percentage of family-based immigration from fifty-one percent to forty-four percent by 2000 and would increase “independent” economic-based immigration to fifty-three percent).

195. Rekai, *supra* note 175, at 4-5 (discussing the 2002 immigration law and how critics of the law saw it as favoring university degrees). The Canadian federal government also transferred some decisions regarding skills-specific recruitment to the provinces per “Provincial Nominee Programs” whereby “a province or territory chooses its own skilled immigrants based on its own list of priorities.” *Id.* at 5. Nevertheless, the federal government continues to make the majority of the decisions regarding highly-skilled worker recruitment. *See id.* at 6.

196. *See Eligibility Criteria for Federal Skilled Worker Applications as of July 1, 2011*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp>

Skill Type O (managerial occupations), A (professional occupations), or B (technical occupations and skilled trades) and include restaurant managers, architects, psychologists, social workers, electricians, biologists, and related scientists to only name a few.<sup>197</sup> Accordingly, if a skilled worker has “one year of continuous full-time or equivalent part-time paid work experience” in a Skill O, A, or B occupation, the applicant is eligible to apply for permanent residence in Canada with or without a pre-arranged job offer.<sup>198</sup>

In July 2011, the federal government placed a cap on the Federal Skilled Worker program, and now only grants 10,000 green cards under the program each year for applicants without pre-arranged job offers.<sup>199</sup> In contrast, if instead a foreign worker applies for permanent residence with a pre-arranged job offer, the application is not subject to the 10,000 Federal Skilled Worker visa cap.<sup>200</sup> Pursuing that course of immigration, the Canadian employer may file a labor market opinion (“LMO”) and must file an arranged employment opinion (“AEO”) with HRSDC for the intending immigrant.<sup>201</sup> An LMO is similar to the United States’s labor certification,<sup>202</sup> although it only is for temporary employment, as it evaluates the applicant’s proposed occupation, “the wages and working conditions offered[,] the employer’s advertisement efforts” to recruit native Canadian workers, “labor market benefits related to the entry of the foreign worker,” and any consultations with related unions.<sup>203</sup>

A positive LMO provides the applicant with a working permit before the applicant’s permanent residency application is considered and strengthens the worker’s application for permanent residence in

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(last updated Jan. 19, 2012).

197. *Id.*

198. *See id.*

199. *Id.* (explaining that “a maximum of 500 federal skilled worker applications per eligible occupation will be considered for processing each year”).

200. *Id.* (“These limits do not apply to applications with an offer of arranged employment.”).

201. *Hiring Skilled Workers and Supporting Their Permanent Immigration*, HUMAN RES. & SKILLS DEV. CAN., [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/supperimm.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/supperimm.shtml) (last updated Feb. 28, 2012) [hereinafter *Hiring Skilled Workers*] (explaining that “a positive LMO is one requirement that Citizenship and Immigration Canada (CIC) considers when deciding to issue a work permit *allowing the person to work in Canada*” and that “a positive AEO supports the immigration of a Skilled Worker to Canada and is one factor that CIC considers when reviewing an application for permanent residency”).

202. U.S. DEP’T OF LABOR, *supra* note 23 (explaining that per the U.S. foreign labor certification the “DOL must certify to the USCIS that there are not sufficient U.S. workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers”).

203. *Temporary Foreign Worker Program: Labour Market Opinion Assessment Criteria*, HUMAN RES. & SKILLS DEV. CAN., [http://www.rhdcc-hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/temp\\_assessment.shtml](http://www.rhdcc-hrsdc.gc.ca/eng/workplaceskills/foreign_workers/temp_assessment.shtml) (last updated Aug. 26, 2011).

Canada.<sup>204</sup> A positive AEO, on the other hand, supports an applicant's permanent residence application and therefore, as with the U.S. labor certification, HRSDC must evaluate the occupation, wages and working conditions, genuineness of the offer, the employer's business history, and whether offers are permanent and full-time when issuing an opinion.<sup>205</sup> Nonetheless, all applicants, whether they are applying with pre-arranged employment offers or not, must satisfy a language proficiency test and score high marks with the point system to be granted permanent residence in Canada.<sup>206</sup>

Per IRPA's reforms, in 2002, Canadian employment-based immigration comprised sixty percent of all Canadian immigration, whereas, family-based immigration only totaled twenty-five percent.<sup>207</sup> These numbers stand in stark contrast to the 2002 immigration percentages in the United States where family-based immigration totaled approximately sixty-four percent of U.S. immigration and employment-based immigration maxed out at only seventeen percent.<sup>208</sup> Thus, Canada's 2002 immigration system, which is still in place today, is known as the "Human Capital" model for its emphasis on the recruitment of highly-skilled foreign workers.<sup>209</sup>

Canada's immigration system has earned this Human Capital model reputation not only for its Federal Skilled Worker program but also for its Quebec-Selected Skilled Workers program, the CEC, investors, entrepreneurs, and self-employed people class, and provincial nominees class.<sup>210</sup> These Canadian permanent residence programs allow Quebec to

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204. See *Hiring Skilled Workers*, *supra* note 201.

205. *Human Resources and Skills Development Canada (HRSDC)/Service Canada Assessment for Arranged Employment Opinions*, HUMAN RES. & SKILLS DEV. CAN., [http://www.rhdc-hrsc.gc.ca/eng/workplaceskills/foreign\\_workers/poarrempt.shtml](http://www.rhdc-hrsc.gc.ca/eng/workplaceskills/foreign_workers/poarrempt.shtml) (last updated Feb. 9, 2012).

206. See *Skilled Workers and Professionals—Who Can Apply*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp> (last updated Jan. 19, 2012) (stating that international students who are enrolled in Ph.D. programs in Canada or who graduated from a Canadian Ph.D. program within the last twelve months can apply for permanent residence through this category).

207. See Reikai, *supra* note 175, at 3-4. See also Mario D. Bellissimo, *New Immigration Rules in a Devastated Economy! Have We Learned from the Last Recession Twenty Years Ago?*, 76 *Immigr. L. Rep.* 3d (Carswell) 183, 185 (2009) ("In 2009, up to 156,000 immigrants are to be accepted under the economic category, 71,000 are to be accepted under the family category, and 37,400 are to be accepted in the humanitarian category.").

208. Reikai, *supra* note 175, at 4, 5 fig.1.

209. *U.S. Visa Policy: Competition for International Scholars, Scientists, and Skilled Workers: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the Comm. on the Judiciary*, 109th Cong. 46, 53 (2006) [hereinafter *U.S. Visa Policy Hearing*] (statement of Lance Kaplan, American Council on International Personnel) (discussing how immigration has been seen as a "cornerstone" of Canada's nation building).

210. *Immigrating to Canada*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/immigrate/index.asp> (last updated Dec. 24, 2010).

select applicants to settle and work there, for applicants with Canadian work experience or who were educated in Canada to apply for permanent residence, for people who want to start new businesses in Canada to settle there, and for Canada's provinces to select certain applicants to gain permanent residence through their programs.<sup>211</sup> The United States also has specialty employment-based visas for particular applicants such as individuals with extraordinary ability<sup>212</sup> and foreign investors.<sup>213</sup> However, Canada's highly-skilled worker immigration recruitment regime is much more ambitious than the United States's immigration regime as it maintains multiple pathways to permanent residence specifically for "skilled workers" and the highly educated.<sup>214</sup> Accordingly, Professor Ayelet Shachar concluded:

[T]he Canadian point system offers one of the most illuminating examples of the talent-for-citizenship exchange. It represents an almost ideal example of how a smaller-economy jurisdiction can use immigration policy to establish a significant share of the overall worldwide intake of highly skilled migrants, even when it must directly compete with a neighboring economic giant like the United States.<sup>215</sup>

*B. Why Canada's Immigration Laws Attract Foreign Students and Give the Country a Competitive Advantage in the Race for Talent*

Canada has not only made it a priority to recruit highly-skilled workers from abroad, but has also created a new immigrant category for Canadian-educated foreign students so that they may stay and use their educations and skills to contribute to the country's economy.<sup>216</sup> Jason Kenney, Canada's minister of citizenship, immigration, and multiculturalism, recently stated that:

The number of foreign students who came to Canada grew by seven percent last year . . . . To be a more innovative society able to compete and prosper in a global, knowledge-based economy, Canada needs

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211. *Id.*

212. *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, *supra* note 78. Examples of potential applicants for O-1 visas would be distinguished scientists, filmmakers, or athletes. *See id.*

213. *Temporary (Nonimmigrant) Workers*, *supra* note 79.

214. *See* Reikai, *supra* note 175, at 3.

215. Shachar, *supra* note 2, at 176. The prospect of immigrating to Canada is much more welcoming for highly-skilled workers than immigration to the United States as they will not be "subject to the constant threat of changing visa regulations, or the insecurity of temporary employment status." *Id.* at 175.

216. Corrigan, *supra* note 26, at 8.

people with an international outlook, skills and experience. Attracting more international students is a priority for our government.<sup>217</sup>

As such, the Canadian government incorporated the CEC into its immigration laws on September 17, 2008.<sup>218</sup>

### 1. Permanent Residence Extended to Foreign Students

The CEC allows foreign student graduates of Canadian undergraduate and graduate schools to apply for permanent residence provided they have at least one year of work experience in Canada in a skilled profession.<sup>219</sup> The two most important components considered under the CEC are the foreign students' work experience and education.<sup>220</sup> To qualify as valid work experience, the student's work must be in a Skill O (managerial occupations), A (professional occupations), or B (technical occupations and skilled trades) occupation and be gained within two years before the student applies for permanent residence through the CEC.<sup>221</sup> Yet, unlike the United States, Canada does not require foreign students to file AEOs—Canada's version of labor certification—most likely because of its Skill O, A, or B work experience requirement prior to applying for the CEC.<sup>222</sup> Also, students' education must have been acquired at a full-time<sup>223</sup> Canadian college or graduate school, which automatically excludes all second-language education programs.<sup>224</sup> Students eligible for the CEC must also speak either English and/or French and pass a language proficiency exam.<sup>225</sup> Accordingly, if a student has the requisite education and work

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217. *Supporting Canada's Economy*, *supra* note 103.

218. Corrigan, *supra* note 26, at 8.

219. *Id.* at 9 (stating that the CEC also applies to temporary workers who have some Canadian work experience).

220. *See id.* at 10.

221. *Id.* at 10, 13 (describing how students can gain work experience in Canada by applying for a Post-Graduation Work Permit after graduation); *Canadian Experience Class Now Open for Business*, CITIZENSHIP & IMMIGRATION CAN. (Sept. 5, 2008), <http://www.cic.gc.ca/english/department/media/releases/2008/2008-09-05c.asp>.

222. *See* U.B.C. LAW STUDENTS' LEGAL ADVICE MANUAL 18-7 (34th ed. 2010) [hereinafter U.B.C. LEGAL ADVICE MANUAL], *available at* [http://www.lslap.bc.ca/main/?Manual\\_download](http://www.lslap.bc.ca/main/?Manual_download) ("The analysis [for the CEC] is not as rigid as the points-based inquiry used for the Skilled Worker class.").

223. *See* CITIZENSHIP & IMMIGRATION CAN., OP 25: CANADIAN EXPERIENCE CLASS 18-19 (2011) [hereinafter OP 25: CANADIAN EXPERIENCE CLASS], *available at* <http://www.cic.gc.ca/english/resources/manuals/op/op25-eng.pdf> (stating that full-time schooling is considered to be any program of two or more years).

224. *Id.*

225. *Id.* at 6.

experience, the student may apply for permanent residence in Canada through the CEC.<sup>226</sup>

Currently the suggested, but not mandatory, annual cap on the number of permanent resident applications for the CEC is 7000.<sup>227</sup> Despite the fact that the number of applicants fell below projected targets in 2010, Citizenship and Immigration Canada ("CIC") granted permanent residence to 3917 CEC applicants.<sup>228</sup> CIC predicts that applications under the CEC will increase after it engages in heightened publicity of the program.<sup>229</sup> Thus, unlike the United States, Canada's immigration laws do provide a direct avenue for foreign students to adjust their status in Canada after graduation.<sup>230</sup>

## 2. Dual Intent Allowed with Fewer Security Checks

Further, unlike the United States, Canada allows its foreign students to study in the country with dual intent.<sup>231</sup> Per Section 22(2) of the IRPA, "having both intents—one for temporary residence through the study permit, and one for permanent residency—is legitimate" for foreign students.<sup>232</sup> Thus, foreign students' applications to study in Canada will not be automatically denied at their consular interviews provided they display intent to "respect the requirement that study permit holders leave

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226. *Id.* (explaining that applicants can get permanent residence through the CEC as long as they do not intend to live in Quebec).

227. See CITIZENSHIP & IMMIGRATION CAN., ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION 17 tbl.2 (2011), available at <http://www.cic.gc.ca/english/pdf/pub/annual-report-2011.pdf>.

228. See *id.*; CITIZENSHIP & IMMIGRATION CAN., ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION 12, 13 tbl.2 (2010) [hereinafter 2010 ANNUAL REPORT TO PARLIAMENT], available at [http://www.cic.gc.ca/english/pdf/pub/immigration2010\\_e.pdf](http://www.cic.gc.ca/english/pdf/pub/immigration2010_e.pdf) (showing that in 2009, 2544 applicants procured Canadian permanent residence through the CEC).

229. See 2010 ANNUAL REPORT TO PARLIAMENT, *supra* note 228, at 12 (explaining that application numbers under the CEC did not reach their "planned targets" and that the "Department is taking steps to promote awareness of this class to potential applicants").

230. See CITIZENSHIP & IMMIGRATION CAN., STUDY IN CANADA: VISAS, WORK AND IMMIGRATION FOR INTERNATIONAL STUDENTS 8-9 (2011) [hereinafter STUDY IN CANADA], available at <http://www.cic.gc.ca/english/pdf/pub/study.pdf> ("If you want to make Canada your permanent home, there are a number of ways to apply. In most cases, you will not need to leave Canada.").

231. Compare *Dual Intent*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/study/institutions/intent.asp> (last updated July 17, 2008) (stating that foreign students can manifest dual intent to both study and remain after their studies in Canada at their consular interview), with Walfish, *supra* note 5, at 479 (discussing how INA § 214(b) requires that foreign students show no intent at their consular interview to stay in the United States after completion of their studies and how this no dual intent legal requirement leads to the United States turning away international talent).

232. *Dual Intent*, *supra* note 231 (referring to the Immigration & Refugee Protection Act, S.C. 2001, c. 27 § 22(2) (Can.)).

Canada by the end of the period authorized for their stay.”<sup>233</sup> Given the fact that Canada provides many possibilities for foreign student immigration after studying there, the government encourages students to “indicate a desire to remain in Canada after the completion of studies” on their applications for student visas.<sup>234</sup> As such, dual intent allows foreign students in Canada to apply for permanent residence based upon their student status instead of requiring students to change their visa status from nonimmigrant to immigrant as is mandated by U.S. immigration law.<sup>235</sup>

Moreover, Canada does not have all of the prolonged security clearances that have plagued the United States since 9/11.<sup>236</sup> Visa applicants must submit a police clearance certificate and undergo background checks such that they can be cleared for any “espionage, subversion or terrorism.”<sup>237</sup> Nevertheless, the Canadian government does not require foreign students to undergo Visa Mantis checks, as occurs in the United States, a fact that is exploited by Canada when recruiting foreign students from abroad.<sup>238</sup> Therefore, Canada’s dual intent provision and limited visa security checks makes studying and remaining in the country a much more attractive option for prospective foreign students.<sup>239</sup>

### 3. Post-Graduate Work Permit Program

Also, much like the United States, Canada allows foreign students to work after graduation in Canada for a limited period of time.<sup>240</sup> The Post-Graduation Work Permit Program allows students to work in Canada in any occupation and to change employers without repercussions.<sup>241</sup> Under the program, the length of students’ work permits corresponds with the length of foreign students’ education programs but imposes a three-year maximum time limit on the permit.<sup>242</sup> For example, foreign students that study at Canadian four-year colleges

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233. *Id.*

234. *Id.*

235. *Id.* See Lu, *supra* note 6, at 366; Walfish, *supra* note 5, at 479.

236. See Clark & Sedgwick, *supra* note 101 (discussing how global immigration competitors such as Canada, the United Kingdom, and Australia have taken advantage of the complicated visa situation in the United States post 9/11 by “emphasizing their less complicated visa processes and their shorter and less expensive degree programs”).

237. *Security Clearance*, CANADAVISA.COM, <http://www.canadavisa.com/immigration-security-clearance.html> (last visited Apr. 20, 2012).

238. See Clark & Sedgwick, *supra* note 101.

239. See *id.*; *Dual Intent*, *supra* note 231.

240. STUDY IN CANADA, *supra* note 230, at 7-8.

241. *Id.* at 8.

242. *Id.*



and universities may apply for three-year post-graduation work permits under the program.<sup>243</sup> Accordingly, foreign undergraduate students studying for a bachelor's degree may work in Canada for more than twice the time permitted under the U.S. OPT work permit program.<sup>244</sup> Moreover, in May of 2005, Canadian immigration authorities promulgated a rule allowing foreign students with Canadian post-secondary degrees to stay and work in the country for up to two years, regardless of the length of their study program, as long as they worked in cities other than Montreal, Vancouver, and Toronto.<sup>245</sup> Thus, Canada's extensive working opportunities for foreign students after graduation are very appealing when compared to the limited one-year U.S. OPT.

In sum, with the establishment of the CEC, the Canadian government can actively recruit bright foreign students with its attractive option of permanent residence.<sup>246</sup> Further, allowing students to manifest dual intent and work longer after graduation only enhances the appeal of studying in Canada.<sup>247</sup> As such, the United States should take notice of the CEC and use it as an impetus to pass foreign student immigration legislation in Congress.

#### IV. POLICY CONSIDERATIONS AND POTENTIAL SOLUTIONS

In order to stay competitive, the United States needs to carve out a permanent residence track for foreign students in its immigration laws. Many other countries are engaged in the immigration "race for talent" and have created paths for highly-skilled immigrants and foreign students to attain permanent residence after working and studying in their countries.<sup>248</sup> In his January 2012 State of the Union Address, President Barack Obama stated:

Let's . . . remember that hundreds of thousands of talented, hardworking students in this country face another challenge: the fact that they aren't yet American citizens. Many were brought here as small children, are American through and through, yet they live every day with the threat of deportation. Others came more recently, to study

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243. *Id.*

244. *See id.*; Lu, *supra* note 6, at 365. Yet, as noted earlier, students who study in STEM fields are allowed to apply for a twenty-nine month work permit in the United States. *Id.*

245. *U.S. Visa Policy Hearing*, *supra* note 209, at 53.

246. *STUDY IN CANADA*, *supra* note 230, at 9 ("The Canadian Experience Class *makes it easier and more convenient* for international students to apply for permanent resident status in Canada." (emphasis added)); Lu, *supra* note 6, at 368-69.

247. *See STUDY IN CANADA*, *supra* note 230, at 7-8; *Dual Intent*, *supra* note 231.

248. Shachar, *supra* note 2, at 164-65 (describing a "talent-for-citizenship exchange" and the fact that membership opportunities such as permanent residence are factors students and highly-skilled immigrants consider important when deciding where to immigrate).

business and science and engineering, but as soon as they get their degree, we send them home to invent new products and create new jobs somewhere else. *That doesn't make sense.*<sup>249</sup>

This is not the first cry for foreign student immigration reform in the United States.<sup>250</sup> The SKIL Act, introduced in the House of Representatives by Representative John Shandegg on July 1, 2010, proposed many employment-based reforms including reforms to U.S. foreign student immigration laws.<sup>251</sup>

#### A. *The SKIL Act: A Magnet for Minds*

The SKIL Act, among other measures, would increase the annual cap on H-1B visas from 65,000 to 115,000 visas and exempt all applicants with U.S. master's or graduate degrees from the new annual H-1B cap.<sup>252</sup> Given this large increase in the number of H-1B visas, more students would be able to secure H-1Bs and work in the United States past the current OPT.<sup>253</sup> The SKIL Act would also reduce the employment-based green card backlog by raising the annual cap on such green cards from 140,000 to 290,000 green cards.<sup>254</sup> Further, the SKIL Act would extend foreign students' OPT from one year to two years for all students regardless of their field of study.<sup>255</sup> This extended OPT would present foreign students with the opportunity to build strong employer relationships and foundations from which they could apply for

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249. President Barack Obama, State of the Union Address (Jan. 24, 2012), in 158 CONG. REC. S68, at S69 (daily ed. Jan. 24, 2012) (emphasis added). See also President Barack Obama, State of the Union Address (Jan. 25, 2011), in 157 CONG. REC. H457, at H459 (daily ed. Jan. 25, 2011). President Obama said:

Today, there are hundreds of thousands of students excelling in our schools who are not American citizens. Some are the children of undocumented workers, who had nothing to do with the actions of their parents. . . . Others come here from abroad to study in our colleges and universities. But as soon as they obtain advanced degrees, we send them back home to compete against us. It makes no sense.

*Id.*

250. See Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658, 111th Cong. (2010).

251. *Id.*; *Bill Summary & Status, 111th Congress (2009–2010) H.R. 5658*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.5658>: (last visited Apr. 20, 2012) [hereinafter *H.R. 5658: Bill Summary & Status*].

252. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 §§ 101–102.

253. See Lu, *supra* note 6, at 365–66.

254. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 202. See *Visa Availability & Priority Dates*, *supra* note 141 (stating with regard to the 140,000 current employment-based green card cap that “[b]ecause the demand is higher than the supply of visas for a given year for some categories, a visa queue (waiting list) forms”).

255. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 203; see *supra* Part II.B.4.

permanent residence.<sup>256</sup> Finally, the SKIL Act would also permit foreign students to manifest dual intent and as such would allow foreign students to apply for permanent residence through their F-1 status.<sup>257</sup>

Based upon the extension of dual intent to foreign students, the SKIL Act would carve out two distinct paths to permanent residence for graduate and undergraduate foreign students.<sup>258</sup> The graduate track to permanent residence would allow foreign students with master's or other graduate degrees to apply for permanent residence under an employment-based ("EB") category, likely the EB(2) "professions holding advanced degrees" category,<sup>259</sup> but would exclude them from the new 290,000 employment-based green card cap.<sup>260</sup> In order to be considered for permanent residence with an employment-based visa, these foreign students would be required to secure permanent job offers from U.S. employers and file labor certifications using PERM.<sup>261</sup> Therefore, the Secretary of Labor would have to certify that:

[T]here are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of the application . . . to perform such skilled or unskilled labor, and . . . [that] the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.<sup>262</sup>

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256. Lu, *supra* note 6, at 365-66.

257. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 203; *see* Walfish, *supra* note 5, at 485.

258. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 §§ 201-03.

259. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A) (2006); Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201. The SKIL Act is not explicit about what employment-based category foreign students, either graduate or undergraduate, should use to apply for permanent residence given its proposed legal changes. *See id.* This is probably due to the fact that 8 U.S.C. § 1153(b), already lays out two categories that would fit most foreign students because they would either be considered "professions holding advanced degrees" or "professionals" with baccalaureate degrees. *See* Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A), (3)(A)(ii). Note that because 8 U.S.C. § 1153(b) creates the employment-based categories specifically to allot the limited number of employment-based visas among applicants and the SKIL Act would exempt foreign students with graduate degrees from the immigrant visa cap, an employment-based category would likely only be used to label and conceptually categorize these foreign students. *See* Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201.

260. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201 (stating that the Act would amend 8 U.S.C. § 1151(b)(1), which exempts certain classes of immigrants from the family-based and employment-based green card cap, to include a category for "Aliens who have earned a master's or higher degree from an accredited United States university").

261. *See* Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)(i)-(ii); Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201.

262. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)(i). *See* Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201 (proposing that students with master's degrees be awarded the "special rule" in 8 U.S.C. § 1182(a)(5)(A)(i) such that students' labor

If the PERM application is approved, the foreign graduate student must also have a spotless immigration status history, no criminal record, and not be considered a security risk in order to pass muster for permanent residence.<sup>263</sup>

Alternatively, the undergraduate foreign student track to permanent residence would allow foreign students to file for employment-based green cards, likely through the EB(2) category of “professionals,” subject to the 290,000 annual cap during their OPT or from the readily available stock of H-1B visas.<sup>264</sup> Given that students in this category would also be filing for permanent residence under an employment-based category, their receipt of green cards would be contingent upon permanent job offers from U.S. employers and satisfaction of all the labor certification and permanent residence requirements previously described.<sup>265</sup> In sum, the SKIL Act presents the United States with a unique opportunity to finally keep the talent it grooms through its top-notch colleges and universities. Nevertheless, to be passed, the SKIL Act would need to be reintroduced into the House as it was pending before the House Judiciary Committee when Congress adjourned its 111th session.<sup>266</sup> Since the 112th session began, related legislation on the subject, the American Innovation and Education Act and the IDEA Act, have been introduced into the House.<sup>267</sup>

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certifications would be evaluated according to an “equally qualified” standard instead of a “qualified” standard).

263. See Immigration and Nationality Act, 8 U.S.C. §§ 1181(a), 1182(a); *Green Card Eligibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=80f63a4107083210VgnVCM100000082ca60aRCRD&vgnnextchannel=80f63a4107083210VgnVCM100000082ca60aRCRD> (last updated Mar. 30, 2011).

264. See Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii) (allowing “[q]ualified immigrants who hold baccalaureate degrees and who are members of the professions” to apply for permanent residence); Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 §§ 102, 202–203 (proposing to amend 8 U.S.C. § 1184(g)(1) to raise the number of H-1B visas from 65,000 per year to 115,000). The prospect of an increase from 140,000 green cards per year in the employment-based category to 290,000 per the SKIL Act, suggests that there will be enough green cards for interested foreign students who graduate with U.S. bachelor’s degrees to apply under the third employment-based green card category for “Skilled Workers, Professionals, and Unskilled Workers (Other Workers).” See *Employment-Based Immigrant Visas*, *supra* note 141.

265. See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)(i); Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 §§ 201, 203.

266. See Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658; *H.R. 5658: Bill Summary & Status*, *supra* note 251.

267. American Innovation and Education Act of 2011, H.R. 3146, 112th Cong. (2011); Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. (2011).

### B. Pending Legislation Aimed at Retaining Foreign Students

The American Innovation and Education Act, introduced on October 11, 2011, would also amend the INA to allow foreign students who graduate from U.S. undergraduate and graduate programs to apply for permanent residence.<sup>268</sup> The American Innovation and Education Act's clear articulation of dual intent would give all foreign students who travel to the United States to obtain their bachelor's or higher degree, the opportunity to adjust their status in the United States after graduation.<sup>269</sup> Also, foreign student graduates with U.S. master's or higher degrees would be able to apply for green cards, through the EB(1) "priority workers" category, without being subject to the worldwide numerical cap on employment-based visas as long as they graduate with STEM degrees and have U.S. employment offers.<sup>270</sup> This exception to the cap is much more rigid than the exception found in the SKIL Act, as here only foreign students with graduate degrees in STEM fields would be exempt from the cap rather than students with other types of U.S. graduate degrees such as master's degrees in Public Policy and Business Management.<sup>271</sup>

Moreover, like the SKIL Act, foreign students with U.S. bachelor's degrees would be able to apply for permanent residence subject to the employment-based green card cap.<sup>272</sup> The American Innovation and Education Act would also speed up the rate at which labor certifications are processed to a maximum period of thirty days by allowing premium processing of PERM applications.<sup>273</sup> Finally, the American Innovation and Education Act would create a treasury in a "STEM Education and Training Account" whereby it would set aside a percentage of all filing

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268. American Innovation and Education Act of 2011, H.R. 3146 § 101 (proposing to add a sub-category of "Advanced Graduates in Science, Technology, Engineering and Mathematics" to 8 U.S.C. § 1153(b)(1)).

269. *Id.*

270. *Id.*

271. *Id.*; Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201; *STEM-Designated Degree Program List*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (2011), <http://www.ice.gov/doclib/sevis/pdf/stem-list-2011.pdf> (listing all the fields that qualify as STEM fields such as Soil Microbiology, Computer Science, Zoology, Nuclear Physics, Cognitive Psychology, and Drug Design).

272. *See* American Innovation and Education Act of 2011, H.R. 3146 § 101. Like the SKIL Act, here the drafters did not specifically state which employment-based category foreign students with U.S. bachelor's degrees should use to adjust their status. *See id.* As such, students will likely be able to adjust their status under the EB(3) category of "Professionals." *See* Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii).

273. American Innovation and Education Act of 2011, H.R. 3146 § 301 (proposing to amend the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) to allow for premium processing of labor certifications such that a decision will be made on each PERM application within thirty days as long as the petitioning employer pays an additional \$1000 filing fee).

fees collected from processing foreign student visas for U.S. citizen and legal resident STEM-based education initiatives.<sup>274</sup> These initiatives would include a STEM scholarship program for low-income U.S. citizen or legal resident students and a grant program to improve K-12 science and technology education in the United States.<sup>275</sup> This last provision makes the American Innovation and Education Act quite attractive as it advances foreign student visa reform while at the same time addressing concerns that the United States is not investing enough resources in educating its native population in STEM fields.<sup>276</sup>

The IDEA Act, introduced into the House of Representatives on June 14, 2011, proposes many of the same reforms advanced by the American Innovation and Education Act.<sup>277</sup> However, the IDEA Act also attempts to address the status of undocumented students in higher education by allowing certain undocumented higher education students who first entered the United States when they were fifteen years old or younger to adjust to nonimmigrant student status.<sup>278</sup> Given that the Act would allow students with F-1 visas to maintain dual intent, the once “illegal” students may be able to eventually obtain green cards.<sup>279</sup> This last proposed reform, is reminiscent of some of the reforms proposed in the controversial DREAM Act, which was voted down in the Senate on December 9, 2010.<sup>280</sup> As such, this last IDEA Act provision diminishes

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274. *Id.* § 202 (proposing to add a STEM treasury account into the Immigration and Nationality Act, 8 U.S.C. § 1356(s), which has a similar treasury fund for profits from H-1B visas).

275. *Id.*

276. *See id.* §§ 101, 202; Steve Case et al., *America Needs a 21st Century Immigration Policy*, REUTERS, May 19, 2011, <http://blogs.reuters.com/great-debate/2011/05/19/america-needs-a-21st-century-immigration-policy/>. Commentators write:

[W]e need to invest in homegrown talent that is educated and trained in the critical science, technology, engineering and math fields. The U.S. education system must be improved, top to bottom, so that our most precious resource—our children—can compete in the increasingly global world economy. Statistically our K-12 students are falling farther behind students in Korea, China and elsewhere in the physical sciences. We can and must do better.

*Id.*

277. *See* Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. §§ 101, 202, 301 (2011) (proposing to allow foreign student STEM graduates to adjust their status in the United States, to extend dual intent to all foreign students, to create a STEM Education and Training Account, and to allow employers to pay for premium processing of their labor certifications).

278. *Id.* § 203.

279. *See id.* §§ 101, 203.

280. Development, Relief, and Education for Alien Minors Act of 2010, S. 3992 § 4, 111th Cong. (2010) (proposing to extend conditional nonimmigrant status to aliens who have been physically present in the United States for a continuous period of five years prior to the enactment of the Act and who began living in the United States prior to turning sixteen years old as long as they have good moral character and no criminal history); *Bill Summary & Status, 111th Congress (2009–2010)* S. 3992, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S3992>: (last visited Apr. 20,

the probability that this bill will be passed given that any bill with “amnesty provisions” will likely face a tough battle in Congress.<sup>281</sup>

### C. *Solution: A Revised SKIL Act (“SKIL Act II”)*

The aforementioned bills represent legislative steps in the right direction for foreign student immigration reform in the United States. However, as previously discussed, because each bill has unique strengths and weaknesses, only a combination of some of their proposed reforms would more likely result in the potential passage of comprehensive foreign student immigration reform in Congress. For the purpose of this Note, this new legislation will be referred to as the SKIL Act II. First, this new legislation would use the SKIL Act’s proposed reforms as a foundation for its reforms given that the SKIL Act contains the most progressive amendments to the INA such as a one-year extension to the OPT, a raise in the number of annual H-1B visas, and an increase in the number of worldwide employment-based immigration visas up to 290,000 visas per year.<sup>282</sup> Second, the SKIL Act II would exempt foreign students with graduate degrees *in any field* from the worldwide cap on employment-based immigration, unlike the American Innovation and Education Act.<sup>283</sup>

Third, the American Innovation and Education Act’s clear dual intent provision entitled “Removing Visa Hurdles for Foreign Students . . . Providing Dual Intent” should be incorporated into this new legislation to give a clear and precise definition for dual intent such that only students who plan on attending U.S. colleges and graduate schools to obtain bachelor’s, master’s, or higher degrees could potentially apply for permanent residence in the United States.<sup>284</sup> Finally, incorporating the American Innovation and Education Act’s treasury proposal for the STEM Education and Training Account would benefit U.S. schools and U.S. children, and in turn would further increase the United States’

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2012) [hereinafter *S. 3992: Bill Summary & Status*].

281. See Development, Relief, and Education for Alien Minors Act of 2010, S. 3992 § 4; *S. 3992: Bill Summary & Status*, *supra* note 280.

282. Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658, 111th Cong. §§ 101–102, 202–203 (2010); see *supra* Part IV.A.

283. See Securing Knowledge, Innovation, and Leadership Act of 2010, H.R. 5658 § 201 (explicitly providing for permanent residence for “(F) Aliens who have earned a master’s or higher degree from an accredited United States university”).

284. American Innovation and Education Act of 2011, H.R. 3146 § 101. This would limit the pool of foreign students eligible to apply for permanent residence by excluding two-year language programs and associate programs. See *id.*

competitive edge in the race for talent.<sup>285</sup> In sum, the SKIL Act II, based upon a fusion of the SKIL Act and the American Innovation and Education Act, may have the best chance of passing in Congress as it would advance foreign student immigration reforms while still investing in the country's domestic educational system.

Although the SKIL Act II is inspired by the CEC, its immigration reforms differ to a degree from Canada's CEC given that education and work experience would not be the principle factors considered by USCIS when assessing students' green card applications.<sup>286</sup> Further, the CEC does not require Canadian-educated foreign students to file AEOs, Canada's version of a labor certification, with their permanent residence applications.<sup>287</sup> Nevertheless, the SKIL Act II would allow for longer work permit times, dual intent, an increase in employment-based green cards, and would carve out paths for permanent residence for U.S. educated undergraduate and graduate foreign students.<sup>288</sup> Thus, the SKIL Act II could radically change U.S. immigration laws regarding foreign students for the better and incorporate many of the attractive provisions of Canada's foreign student immigration laws.<sup>289</sup>

#### *D. Potential Arguments Against the SKIL Act II*

In light of the current environment of high unemployment and slow economic recovery,<sup>290</sup> the SKIL Act II and its related legislation will most likely not be Congress's top priority, despite the legislations' potential for job creation.<sup>291</sup> Moreover, arguments against facilitating the permanent immigration of foreign students—that we should hire Americans first,<sup>292</sup> that foreign students reduce American workers' wages,<sup>293</sup> and that hiring of foreign students creates a brain drain in their native countries<sup>294</sup>—present significant challenges to the SKIL Act II's

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285. *Id.* § 202.

286. See Corrigan, *supra* note 26, at 10; *Green Card Eligibility*, *supra* note 263; *supra* Part IV.A–B.

287. See U.B.C. LEGAL ADVICE MANUAL, *supra* note 222, at 18-6 to 18-7.

288. See *supra* Part IV.A–C.

289. See *supra* Parts III.B, IV.A–C.

290. See Lucia Mutikani, *WRAPUP 4—US Jobless Claims Data Boosts Labor Market Outlook*, REUTERS, Feb. 10, 2011, available at <http://www.reuters.com/article/2011/02/10/usa-economy-idUSN1027452620110210> (stating that “[i]nitial [unemployment] claims fell to 383,000, lowest in 2-1/2 years”).

291. See Chellaraj et al., *supra* note 18, at 445; Hockfield, *supra* note 16.

292. HIRE AMERICANS FIRST, <http://www.hireamericansfirst.org/> (last visited Apr. 20, 2012) (alleging that H-1B, L, and PERM create a system where “America’s highest-skilled workers are being displaced from their professions by employment-based visas”).

293. Borjas, *Impact on Native-Born Workers*, *supra* note 19, at 1, 5 & fig.3.

294. FED’N FOR AM. IMMIGRATION REFORM, *supra* note 19.



enactment. First, the argument that foreign students take Americans' jobs rests on the premise that the labor certification does not effectively screen whether there are any U.S. workers able, willing, qualified, and available to accept the job.<sup>295</sup> Opponents of the SKIL Act II may also argue that the large supply of foreign students increases the amount of lower-wage laborers and therefore reduces wages in the sectors where the foreign students work.<sup>296</sup> Finally, other critics of foreign student immigration may argue that American retention of foreign students causes brain drain and deprives developing countries of the intellectuals and leaders they require to further develop.<sup>297</sup>

However, these potential arguments against the SKIL Act II and related legislation can be overcome. The "Americans First" argument ignores the fact that labor certification rules mandate that employers engage in an extensive screening process, which requires newspaper and online job database postings, interviews of potentially qualified American applicants, and detailed explanations of why each American worker was not hired.<sup>298</sup> If the explanations offered by the employer appear inadequate, the DOL may choose to audit and penalize the employer for not complying with the labor certification's requirements.<sup>299</sup> Accordingly, the labor certification process provides the most effective check on the system without stunting important employment-based immigration and ensures that Americans are "first" and considered before foreign students for U.S. jobs.<sup>300</sup> Further, the labor certification process also requires employers to request prevailing wages from the DOL for jobs offered in the United States to foreign students and mandates that employers pay at least the prevailing wage to future

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295. See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)(i) (2006); Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656.1(a)(1) (2011); HIRE AMERICANS FIRST, *supra* note 292 ("Congress has authorized employers to sponsor foreign workers for green cards by simply running a few classified ads and then to find any reason possible to disqualify all American applicants.").

296. See Borjas, *Foreign Student Program*, *supra* note 19, at 8-9 ("[T]he influx of large numbers of foreign students into particular programs probably altered the educational plans of generations of native-born Americans. And it is far from clear whether such a distortion in the career choices of our brightest students is in the national interest."); Borjas, *Impact on Native-Born Workers*, *supra* note 19, at 1, 7 ("The study of trends in the earnings of native workers over the 1960-2000 period indicates that immigration has indeed harmed their economic opportunities.").

297. FED'N FOR AM. IMMIGRATION REFORM, *supra* note 19.

298. Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656; U.S. DEP'T OF LABOR, *supra* note 23.

299. Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. §§ 656.20, 656.31 (noting that "certain applications may be selected randomly for audit and quality control purposes").

300. See *id.* § 656.1.

employees in those positions.<sup>301</sup> As such, the prevailing wage requirement should guarantee that wages will not fall because of employment-based immigration given that the DOL will only grant a labor certification if it can be shown that “the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>302</sup>

Finally, recent studies show that foreign students are choosing to return to their home countries rather than stay in the United States and jump through the complicated visa hoops.<sup>303</sup> Accordingly, brain drain is overcome by foreign students’ desires to reunite with friends and family and take advantage of what foreign students perceive as better job opportunities in their home countries.<sup>304</sup> Also, even if the SKIL Act II or related legislation is passed and more foreign students decide to stay in the United States, immigration advocates argue that foreign brain drain would still be offset by new arrivals of skilled workers in students’ home countries, advances in domestic students’ education spurred by students’ migration, and spill-over effects in their home countries such as remittances, technology transfers, and increased trade flows.<sup>305</sup> Thus, the United States should be focused on ensuring foreign student brain gain and brain retention.<sup>306</sup>

As previously discussed, retaining foreign students and permitting them to adjust status to permanent residence in the United States will increase the country’s potential for innovation and its position as a global economic leader.<sup>307</sup> The fact that “more than one-third of Nobel laureates from the United States are immigrants, and [that] there are 62 patent applications for every 100 foreign PhD graduates in science and

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301. *Id.* § 656.40.

302. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)(i)(II) (2006).

303. See WADHWA ET AL., *supra* note 25, at 1-2, 4-5 (reporting that a significant number of foreign nationals who planned on leaving the United States after their studies stated that “they intend[ed] to open businesses in the future”).

304. *Id.* at 4.

305. Dhananjayan Sriskandarajah, *Reassessing the Impacts of Brain Drain on Developing Countries*, MIGRATION POLICY INST. (Aug. 2005), <http://www.migrationinformation.org/Feature/display.cfm?ID=324>. See also Walfish, *supra* note 5, at 487. Walfish stated that even if foreign students stay in the United States for a period of time or apply for permanent residence, there is a:

possibility that an émigré who came to the U.S. as a student and stayed on for the opportunity will return later in life when conditions in the home country have improved. Individuals who return after many years serve as a sort of bridge that benefits both the home and the adopted countries.

*Id.*

306. See Jeanne Batalova, *The “Brain Gain” Race Begins with Foreign Students*, MIGRATION POLICY INST. (Jan. 2007), <http://www.migrationinformation.org/Feature/display.cfm?ID=571>.

307. Chellaraj et al., *supra* note 18, at 445.

engineering (S&E) programs” only proves that increased foreign student immigration in the United States would be truly beneficial.<sup>308</sup> Further, from 2010 to 2011, foreign students contributed more than \$21 billion to the U.S. economy.<sup>309</sup> If more foreign students are allowed to stay in the United States per the SKIL Act II, these contributions to the economy will only continue and grow as foreign students pay more taxes and permanently settle here.<sup>310</sup>

Also, because “[m]ore than 25 percent of today’s scientists and engineers [in the United States] are in their fifties, and many will retire by 2010,” foreign students, who largely major in these disciplines, will be in high demand.<sup>311</sup> Thus, foreign students’ presence in the U.S. labor market will make up for the fact that many Americans currently chose to study in areas other than the science, mathematics, and engineering.<sup>312</sup> Permanent immigration of foreign students, especially those that specialize in STEM fields, is therefore necessary as they are “essential to creating new, well-paid jobs in our economy” and spearheading technological and scientific innovation.<sup>313</sup> As such, the SKIL Act II, or similar legislation, should be passed as soon as possible and not put on hold in hopes of long-promised comprehensive immigration reform.

#### *E. Conditional Residence Requirement: A Necessary Evil*

Finally, in order to enhance the attractiveness of the SKIL Act II, or related legislation, and temper “Americans First” arguments, it may be important to incorporate a conditional residence requirement into both the foreign graduate and undergraduate student paths to permanent residence. A conditional residence requirement is not new to U.S. immigration law as it is incorporated into the permanent residence schemes of marriage-based green cards,<sup>314</sup> investor-based green cards,<sup>315</sup>

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308. Batalova, *supra* note 306.

309. Marklein, *supra* note 14.

310. *See id.*

311. T.J. Becker, *Wake-Up Call for Innovation: Other Countries Make Strides in Science and Technology, Threatening U.S. Competitive Edge*, RES. HORIZONS (Spring/Summer 2005), <http://gtresearchnews.gatech.edu/newsrelease/innovation.htm> (“Knowledge economies depend on skilled scientists and engineers, and in the United States that workforce is aging.”).

312. *Id.* (“In the last three decades, the United States has fallen from No. 3 to No. 17 in global rankings of countries with college students earning science and engineering degrees.”). *See also* Chellaraj et al., *supra* note 18, at 447 (“[T]he native US student pool for [science and engineering] programs is limited due to lower math and science achievement. This suggests that student populations are not readily substitutable.” (footnote omitted)).

313. Hockfield, *supra* note 16 (“Of the 35 young innovators recognized this year by Technology Review magazine for their exceptional new ideas, only six went to high school in the United States.”).

314. Immigration and Nationality Act, 8 U.S.C. § 1186a (2006); *Conditional Permanent*

and the failed green card solution for undocumented children under the DREAM Act.<sup>316</sup> Conditional residence green cards are usually valid for two years at which time they must be renewed in order to obtain permanent residence.<sup>317</sup>

In the marriage-based context, conditional residents must re-file applications for permanent residence after two years with a conditional green card and include marital bona fides or a waiver to establish that the original marriage was not fraudulent.<sup>318</sup> Investor-based conditional green cards must also be renewed after two years and submitted to USCIS along with invoices, bank statements, payroll records, taxes, and contracts to prove the applicant's business is not a front for illegal activity.<sup>319</sup> Further, the DREAM Act, if it had been passed by Congress, also would have incorporated a conditional residence requirement such that during a ten year period applicants for permanent residence would only be awarded permanent green cards if they could prove they had not become public charges, had not accrued criminal histories, and had either graduated with a degree from a U.S. institution of higher education, had enrolled in school and were in good academic standing, or served in the U.S. Armed Forces for at least two years.<sup>320</sup> Thus, incorporating conditional residence requirements into various paths to permanent residence has successfully served different policy goals in the past and would be useful here, as it would ensure that American workers are not displaced by the SKIL Act II's reforms.

In the foreign student context, if a conditional residence requirement were incorporated into the SKIL Act II, it would calm protectionist concerns by mandating that applicants re-file their labor certification using PERM two years after they obtain conditional residence.<sup>321</sup> Thus, employers and the DOL would once again be required to certify that no American workers are similarly qualified and

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*Residence*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=4ca43a4107083210VgnVCM10000082ca60aRCD&vgnextoid=4ca43a4107083210VgnVCM100000082ca60aRCD> (last updated Jan. 14, 2011).

315. Immigration and Nationality Act, 8 U.S.C. § 1186b; *Conditional Permanent Residence*, *supra* note 314.

316. Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

317. *Conditional Permanent Residence*, *supra* note 314. *But see* Development, Relief, and Education for Alien Minors Act of 2010, S. 3992 § 5 (proposing to establish a conditional residence requirement that would be valid for up to ten years).

318. *See* Immigration and Nationality Act, 8 U.S.C. § 1186a(b)-(d)(1).

319. *See id.* § 1186b(b)-(d)(1).

320. Development, Relief, and Education for Alien Minors Act of 2010, S. 3992 §§ 5-6.

321. *See* Immigration and Nationality Act, 8 U.S.C. §§ 1186a(b)(1), 1186b(a)-(b).

willing to work at the prevailing wage offered.<sup>322</sup> Instituting this second PERM requirement would be feasible under the SKIL Act II, especially if it incorporates the American Innovation and Education Act's proposal to allow employers to pay a premium to have PERM applications processed within thirty days.<sup>323</sup> In addition, borrowing from the DREAM Act, students applying to obtain permanent resident status would also have to prove that they have not become public charges and that they have maintained spotless criminal records.<sup>324</sup> Other requirements such as evaluating the students' standing in their U.S. undergraduate or graduate program, the history and quality of the students' U.S. employment, and the students' payment of taxes, could also be added as conditional residence factors.<sup>325</sup>

Therefore, this conditional residence element would represent a stronger check on the system advanced by this Note's SKIL Act II and would thereby justify the increase in the number of employment-based green cards available to foreign students and the removal of U.S. educated foreign graduate students from the employment-based green card cap.<sup>326</sup> Moreover, incorporating a conditional residence requirement

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322. See *id.* § 1182(a)(5)(A)(i). Given that this Note's proposed conditional resident requirement would mirror other immigration law conditional residence requirements, it would similarly require employers to pay the labor certification filing fees a second time. See *I-751, Petition to Remove the Conditions of Residence*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f858d59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last updated Feb. 27, 2012) (requiring applicants to pay a \$590 fee to remove conditions on their residence); *I-829, Petition by Entrepreneur to Remove Conditions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d4f63591ec04d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last updated Aug. 5, 2011) (requiring applicants to pay \$3835 to remove conditions on their residence). Some readers may view this second filing fee requirement as a disincentive to hire foreign students if this proposal were adopted by Congress. However, when this second payment requirement is compared to the transactional costs associated with the employer petitioning for a foreign student living abroad, the benefits of this second requirement may outweigh its costs. See Doris Meissner et al., *Immigration and America's Future: A New Chapter*, 5 GEO. J.L. & PUB. POL'Y 473, 484-86 (2007) (describing the long waits and procedural impediments associated with procuring employment-based permanent residence visas for beneficiaries who live abroad). For example, if according to this Note's proposal a foreign student were able to remain in the United States conditionally for two years before the filing of the second labor certification, the student could work for his or her employer and generate revenue and value for that employer for over two years. See *id.* at 485. As such, while a student's green card fate is determined by the U.S. government, he or she would be able to work for the employer in the United States and generate value rather than simply wait for a decision in their country of origin, which often is a lengthy and costly process. *Id.*

323. American Innovation and Education Act of 2011, H.R. 3146, 112th Cong. § 301 (2011).

324. See Development, Relief, and Education for Alien Minors Act of 2010, S. 3992 §§ 5-6.

325. See *id.*

326. See *supra* Part IV.C.

into the SKIL Act II would be relatively easy and comprehensive as it is widely used in other permanent immigration contexts.<sup>327</sup> A conditional residence requirement would also make the passage of the SKIL Act II more probable as the bill would not be viewed as a hand out to foreign students but rather as a structured program whereby only the best, brightest, and safest students would be integrated into American society.

In sum, it is clear that as countries are restructuring their immigration laws to attract more and more foreign students with the goal of retaining their skills and increasing their countries' competitiveness,<sup>328</sup> the United States needs to adopt the SKIL Act II, or similar legislation, and incorporate a conditional residence requirement as a necessary evil to ensure passage of any of the bills through Congress.

## V. CONCLUSION

By drafting and proposing the SKIL Act, American Innovation and Education Act, and IDEA Act in Congress, U.S. lawmakers clearly recognize that current U.S. immigration laws are not working to the country's benefit. Although, the number of foreign student enrollments in the United States increased in 2009, the retention rate is still low given that foreign students cannot manifest dual intent and have extremely limited options for U.S. permanent residence.<sup>329</sup> These legal barriers to foreign student immigration are detrimental to the United States as foreign students both contribute to the U.S. economy and have a high potential to innovate and create U.S. jobs.<sup>330</sup> Thus, a U.S. permanent residence solution for foreign students is necessary as the U.S. economy needs to be rebuilt and many of the country's scientists and engineers are starting to retire with few native Americans to fill their positions.<sup>331</sup>

This need for U.S. immigration law reform is compounded by the fact that other countries, such as Canada, are actively recruiting foreign students with the prospect of permanent residence.<sup>332</sup> As such, Canada created the CEC and has seen continuous growth in its foreign student enrollments and retention rates.<sup>333</sup> This Note's SKIL Act II would adopt many of the favorable foreign student immigration laws that Canada currently enforces and would push the United States towards increased

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327. See *supra* text accompanying notes 318-20.

328. Shachar, *supra* note 2, at 152-53.

329. See *supra* Part II.B.

330. See *supra* text accompanying notes 307-13.

331. See *supra* text accompanying notes 307-13.

332. See *supra* Part III.B.

333. See *supra* Part III.B.

innovation and a more comprehensive highly-skilled immigration system.<sup>334</sup> However, as the current U.S. mood appears to be increasingly anti-immigrant, passage of the SKIL Act II or similar legislation may be difficult.<sup>335</sup>

Nevertheless, by incorporating a conditional residence PERM-based requirement into the green card processes for U.S. undergraduate and graduate foreign students, the SKIL Act II could potentially have a strong chance in Congress as this new requirement would calm protectionist concerns.<sup>336</sup> In sum, passage of the SKIL Act II, or similar legislation, is both imperative and feasible if the conditional residence requirement proposed herein is incorporated into the pending legislation.

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334. See *supra* text accompanying notes 286-89.

335. See *supra* note 12; Part IV.D.

336. See *supra* Part IV.E.

\* J.D. candidate, 2012; Hofstra University School of Law. I would like to start by thanking my foreign student friends, especially Sonia, who inspired me to write this Note. I truly hope that one day it will be more feasible for intelligent and imaginative students like them to stay and contribute to this country. I would also like to give special thanks to Professor Rose Cuisson Villazor who has acted as an invaluable mentor to me throughout law school and whose guidance and advice made it possible to write this Note. Also, thank you to my Notes & Comments Editor, Bethany Adler, and to the current editors of the *Hofstra Law Review* for their friendship and support, especially Simone Hicks, Katelyn Jerchau, Dave Gerardi, and Allana Grinshteyn, who spent hours digging through statutes and polishing this Note. Thank you to David, for being a constant positive force in my life and for all of your love and support over the past four years. Also, to my friends only forty minutes away, thank you for putting up with my long absences and for making me laugh and let loose whenever we are able to get together. Finally, last but certainly not least, thank you to my parents, Glen and Jean, who have kept me afloat throughout law school with their love, support, and positive attitudes. I could not have done this without you both!