NISKANEN CENTER

Immigration Reform Catalog: 20 Changes to Improve U.S. Immigration Policy

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Executive Summary

Congress has proven unable to fix our outdated and ineffective immigration system for decades. As the issue of immigration becomes increasingly divisive in this country, it is paramount that Congress prioritizes its repair.

Fixing the immigration system requires bipartisan coalitions dedicated to innovative policy change. Instead of focusing on some of the largest and most controversial aspects of immigration policy—like building a border wall—focusing on narrow, pragmatic, and incremental immigration reforms that transcend partisan politicking is a good first step to reform.

These reforms are not enough to fix our immigration system alone, but enacting them would improve the way our country manages immigration policy. All lawmakers can find at least one reform to champion.

The 20 reforms outlined in this paper provide a blueprint for a productive start to that process. We explore pragmatic fixes to legal immigration processes, simplifications of our humanitarian immigration system, and improving cost effectiveness across various immigration channels.

Capitol Hill should start a robust legislative debate on immigration policy in the 115th Congress. While the most contentious issues loom large, there remains significant work to be done on the margins to improve U.S. immigration policy for both immigrants and American citizens.

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1) Change the 7% per country cap on employment-based visas.

Individual countries are limited to contributing no more than 7% of immigrants to the applicable statutory cap. This limit is ultimately inefficient and ineffective, harming larger countries with big immigration flows to aid smaller countries.

By changing—doubling the cap or abolishing the cap altogether—this restriction, we ensure equal treatment of all applicants and provide qualified applicants to meet the specific demands of U.S. employers. Furthermore, by creating an exception to the cap for countries undergoing times of political, economic, and geographic crisis will allow for flexibility in humanitarian policies that are economically beneficial to the United States.

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2) Ease employment visa backlog by allowing status adjusters to pre-register.

The total number of employment-based immigrants at 140,000, and requires annual re-application, which results in a significant backlog. One option to mitigate the backlog is to expedite applications for specific, status adjusters.

By creating a pre-registration period for those employment-based immigrants with approved I-140s who are waiting to adjust their status, it is possible to diminish the backlog of those waiting for a visa number to be available.

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3) Implement a "Known Occupation Program" to speed up application process.

The employment-based immigrant and nonimmigrant processes require that a foreign national and his or her employer file numerous applications with various government agencies. Each applicant must provide repetitive information required on previously filed applications, like job descriptions. Re-adjudication of these previously established facts causes delays and backlogs; the complexities and time investment of the process discourages employers from seeking to sponsor employees.

Creating a Known Occupation Program as part of the Known Employer Pilot Program would allow employers to upload template job descriptions that they regularly advertise; once approved, job information does not need to be adjudicated again, thereby reducing the amount of paperwork required to be filed.

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4) Provide clarity about how to meet the foreign language skills business necessity threshold on PERM labor certification applications.

Under Program Electronic Review Management (PERM) regulations, Employers must show an absence of U.S. workers willing, qualified, and available for a position by testing the labor market by advertising

job positions to encourage U.S. citizens applications. There are rigid restrictions on how the positions are advertised, what skills are required, and for how long; many job descriptions fail the restrictive tests because they are found too unduly burdensome to attract U.S. applicants, often because it includes a foreign language requirement.

The result is that many employers seeking foreign language skills face extensive administrative roadblocks attempting to prove that the language requirement is not unduly burdensome, and does not unreasonably exclude U.S. workers.

Issuing much-needed guidance on what objective evidence is required to demonstrate a need for foreign language proficiency will help overcome the inefficiencies of this administrative process.

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5) Provide clarity about how employers can successfully utilize extended OPT authorization.

Last spring, the Department of Homeland Security (DHS) issued a rule authorizing e-verify employers to extend an employee's Optional Practical Training (OPT) by 24 months, provided they comply with new guidelines requiring their training programs to meet certain standards. Unfortunately, the new standards governing OPT training programs are unclear, preventing employers from successfully complying with the guidelines, and keeping them from extending additional OPT time to employees.

By requiring United States Citizenship and Immigration Services (USCIS) to specifically delineate in a guidance memo what requirements training programs must comply with, significant confusion could be mitigated.

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6) Determine which visas allow dual intent.

Whether an immigrant can have an intent to have domicile in the United States and another country—dual intent—is only allowed for specific visa categories and statuses, but is not explicit in the Immigration and Nationality Act (INA). Therefore, there is significant confusion as to what benefits belong to what visa categories.

Providing clarity in statutory amendments and applicable regulations within the INA about which visas statuses allow dual intent, as well as broadening the umbrella to more employment-based categories, will reduce the ambiguity surrounding our visa programs, and ease the burden on consular officers.

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7) Expand refugee protections to include individuals fleeing from gender-based persecution.

Many women who face gender-based persecution like female genital mutilation are unable to seek refugee status in the United States because the definition of refugee only includes those fleeing

persecution based on race, nationality, religion, membership in a particular social group, and political opinion.

In the past, some judges allow persecuted women to receive protection as members of a particular social group category. But social group recognition is highly individualized, making the process unpredictable, and leaving other women unable to enter because their social group is not exactly the same or unwilling to leave for fear they will be turned away.

Adding "gender" as a new nexus into the definition of "refugee," or changing the interpretation of "political opinion" and "particular social group" to include gender-based persecution can alleviate the confusion and uneven protections afforded to women persecuted because of their gender.

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8) Allow asylum applicants the ability to work while they wait for relief.

Those seeking asylum must sometimes wait several years before are granted work authorization. Until then, many are either homeless or survive off of state benefits, rather than working to support their families and contribute to our economy.

The INA requires that asylum applicants must wait at least 150 days after filing their application before they can apply for work authorization, and then they must wait an additional 30 days before authorization is actually granted. That time can be significantly elongated if the applicant does any number of things triggering a "delay" in the asylum adjudication process, which are easy to do by mistake.

The solution is two-fold: first, reduce the time asylum applicants are required to wait before they can acquire work authorization to 60 days; second, eliminate needless actions that count as delays. The sooner applicants can work and support themselves and their families, the less burden they are on U.S. taxpayers.

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9) Keep families together by providing TPS to children whose parents have TPS.

Only individuals already residing in the U.S. when their country is designated for Temporary Protected Status (TPS) are eligible for TPS. Unfortunately, this means that parents living in the U.S. without their children are unable to bring them, because no provision exists for TPS recipients to bring in derivatives.

By creating an independent grant of late registration TPS for children of TPS-holding parents, we can correct this inadvertent, negative policy outcome.

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10) Allow TPS recipients to apply for lawful permanent resident status.

Temporary Protected Status (TPS) exists as a way to allow those from designated countries dealing with violent conflict or national disaster to temporarily live in the United States. However, in some cases, the designation lasts long enough that these individuals establish roots in the U.S. They work, pay taxes, go to school, and buy homes here, and many have no idea how long their status will extend.

No route to Lawful Permanent Resident (LPR) status exists for people with TPS. This means that even if they spent 20 years in the United States and have citizen children, they must leave and return to their original country once their designation ends.

Creating a pathway to Lawful Permanent Resident status for TPS recipients who have been in the United States for at least 10 years and are eligible for an immigrant visa would correct the issue and ensure that families can remain together.

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11) If a child receives asylum, allow parents to apply for asylum derivatively.

When parents have a claim for asylum, their children may apply for derivative asylum on the same application, keeping the family together. However, if the claim for asylum is the child's, as is often the case in instances of female genital mutilation, the parents are not allowed to apply derivatively through the child's application.

Therefore, successful asylum applications separate families who must choose whether to send their child alone to the U.S. in order to prevent persecution, or to try to protect them at home. Simply adding parents as a derivative category can correct this error and allow consular officers more flexibility in reviewing individual cases.

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12) Do not count spouses and children toward visa category limits.

Derivative spouses and children of a principal immigrant count towards visa category limits, accounting for 10% of family-based visas in FY2013, even though the law was revised to remove the individual calculation. Now, derivatives are arbitrarily counted towards many category limits.

By adding a subsection within INA, § 201 explicitly stating that derivatives will be counted as a single family unit and not individually can clear backlog and ensure visas are available qualified workers.

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13) Decrease the cost of detention by considering alternatives for certain detainees.

DHS's Immigration and Customs Enforcement (ICE) is one of the nation's largest law enforcement agencies, annually detaining over 300,000 foreign nationals in facilities throughout the United States. In recent years, immigration detainees have represented the fastest growing segment of the U.S. incarcerated population, and detention imposes a significant financial burden on the public; the federal government spent $3.3 billion on immigration detention in 2016.

COST PER DAY

Detention: $95
Electronic Monitoring: $12

Detention must be reasonably reflective of the primary reasons for permitting detention in the immigration context, which are to ensure that people appear for all scheduled immigration

hearings,comply with the final order of the immigration judge, and to ensure public safety. However, under the current immigration detention system, immigrants who are not a threat of public safety and may be eligible for release often remain detained only because they cannot afford to post high bonds.

Efficient and effective use of scarce public resources should be directed toward detaining only those who pose a threat to public safety, national security, or present a substantial flight risk. This may be accomplished by providing the least restrictive options and alternatives necessary to ensure that an immigrant appears in court. The cost of detention is approximately $95 per day per person, while alternative programs, like electronic monitoring, can cost as little as $12 per day.

Alternative programs, designed and implemented appropriately, can be extremely effective and better than the present costly detention system.

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14) Prohibit detention transfers if hurts an existing attorney-client relationship.

In many cases, individuals are initially detained in one facility, and later transferred. The current Detainee Transfer Standard (DTS) requires ICE to take into account whether a detainee is represented when deciding whether to transfer him or her, but this standard does not prevent represented detainees from being transferred, severing their access to counsel. This results in missed court dates, case delays, and prolonged detention.

Stronger provisions and regulations are required to ensure that detainees are not transferred to the detriment of their legal rights, deprived of ready access to counsel, access to family members, material witnesses, or evidence that would assist with case preparation or defense. Immigration facilities located in remote areas of the country create serious barriers to detainees who have retained counsel because of travel costs and other logistical difficulties.

DHS/ICE should revise the DTS to prohibit transfer when it would impede an existing attorney-client relationship.

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15) Provide children and vulnerable populations government-appointed counsel.

Legal assistance in immigration proceedings is critical because vulnerable immigrant populations often lack understanding of U.S. laws and procedures due to disabilities, cultural, linguistic, and educational barriers.

There are specific classes of vulnerable persons for whom it is particularly important to ensure appropriate legal representation for the duration of their cases: unaccompanied alien children and mentally ill and disabled persons. These people may lack the capacity to make informed decisions on even the most basic matters impacting their cases and are not in positions to determine whether they might qualify for relief. In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings.

Current law calls for the government to ensure that unaccompanied children have legal representation in immigration proceedings and other matters, but only "to the extent practicable." Additionally, for those who are mentally ill or disabled, the law allows an attorney or other representative to appear on behalf of the respondent, but does not require that legal representation be provided.

By revising existing language and expanding the law to include the mentally ill and disabled, we can ensure that legal representation is provided to unaccompanied children and the mentally ill and disabled in immigration proceedings.

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16) Allow judges to grant discretionary relief on a case by case basis.

In some situations, a lawful permanent resident with deep ties to the United States may be subject to deportation, including for infractions committed many years prior. In many cases, at the time the crime was committed, the crime itself may not have been grounds for deportation or was not considered a conviction under the law of the state where it occurred.

In cases like these, immigration judges should have the ability to grant discretionary relief if they believe it is warranted. However, several laws enacted in 1996 removed certain long-standing discretionary waivers of removal and substantially limited the discretion of immigration judges to recognize compelling circumstances in particular cases. Therefore, under the current law system, certain forms of relief such as cancellation of removal, voluntary departure, and prosecutorial decisions are not subject to judicial review.

Restoring the authority of immigration judges to review the grant discretionary relief on a case-by-case basis will expedite certain case through immigration court and provide more just and equitable outcomes.

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17) Allow employers to describe a job beyond O*NET catalog descriptions.

In the PERM process, which allows employers to apply for permanent employment certification, the Department of Labor lists job requirements in the catalog posted on O*NET.

Unfortunately, the catalog of jobs found on O*NET does not adequately take an employer's needs into consideration by allowing for diverse credentials and requirements in their job descriptions. Jobs requiring distinct credentials from those on the O*NET website require significant time and materials to certify.

By diminishing reliance on O*NET and giving employers an opportunity to describe why their positions require different credentials than that of those in online catalog, we can expedite the process and allow employers more control in identifying workers that will satisfy the requirements of their positions.

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18) Notify all parties when an I-140 is revoked.

Current law allows employees to switch employers after their immigrant petition has been pending for 180 days, which provides more professional flexibility during the immigration process that can take years.

Due process issues emerge where a past employer's applications are revoked, yet an employee is not notified because he is not currently employed by the disciplined employer. Without timely notice of an a previous employer's revocation, visa applications can be denied without an opportunity for explanation.

When an I-140 is revoked, requiring that all interested parties are notified, including new employers, will ensure that employees will also be notified of potential harms to their applicable immigration status.

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19) Reinforce whistleblower protections.

Employment-based visa applications for nonimmigrant and immigrant status are intrinsically reliant upon a U.S. employer's willingness and ability to sponsor a foreign-national employee.

Because foreign-national employees rely on their employers for status, they are likely to be hesitant to report their employer's' compliance with legal standards or wary about whistleblowing for fear of affecting their own immigration applications and status.

Reinforcing whistleblowing provisions of the INA to make protections clear and robust to employee applicants would be an important first step. Alternatively, a Whistleblower Visa could be a safe fallback for employees to save their status and continue the immigrant process if their employers are convicted of illegal behavior.

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20) Allow individuals with reinstated removal orders to apply for asylum.

Some individuals who seek asylum are subject to reinstated removal orders, and the current regulations do not allow for them to apply for asylum. Instead, they must try to qualify for withholding of removal or Convention Against Torture relief, both of which are harder to acquire.

Many with reinstated removal orders were not given an opportunity to apply for asylum the first time they were removed. Even if their circumstances change after being removed, they are not allowed to apply for asylum, while those who evaded removal and stayed illegally in the U.S. can apply if their circumstances change.

Changing the reinstatement of removal provision in the INA to allow asylum applications or change the regulations governing that provision to allow asylum applications would make the asylum process consistent for all would-be applicants and better guarantee the safety of asylees.

Conclusion

Targeted reforms of various immigration programs can have substantial impact in improving our immigration system. While there may not be consensus or strong political will to work on larger components of reform, the 20 changes listed above provide lawmakers with bipartisan reforms to begin the difficult work in bringing our immigration system into the 21st century.

The Niskanen Center is dedicated to working with lawmakers and their staff to move the immigration reform conversation forward. Those interested in any of the issues noted above should feel free to reach out to the authors to further discuss legislative opportunities.

For too long the U.S. Congress has pursued immigration reform through an all-or-nothing lens. This paper reviews policy proposals that lack the fervent media attention of a border wall, but play a huge role in the daily operations of American immigration policy.

It's time Congress prioritizes the repair of the immigration system to solidify the rule of law, improve the economy, modernize visas, bring law-abiding undocumented immigrants out of the shadows, and reduce the expansive bureaucracy immigrants must navigate.