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Immigration as Business Strategy: Simplifying American Immigration Law in a Global Economy

Peter Choi

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ABSTRACT

Despite immigration law's notorious complexity, public debate on immigration reform has historically ignored basic questions of why and how the current laws should be simplified. Instead, discussion has often focused on substantive proposals—most commonly regarding legalization and border enforcement—without reference to the impact of these proposals on the legal immigration structure. This article emphasizes that any durable immigration reform must take steps to free the immigration system from the intricacies that define it today. The article begins by overviewing the basic features of the modern global economy, their implications for immigration law, and why these implications compel an immigration system based on simple rules. Then, borrowing from the literature on business strategy and organizational design, the article applies to the current immigration system a basic three-step framework for developing simple rules. In the first step—Setting the Objective—the article argues that family reunification, the primary objective of the current system, does not adequately acknowledge the global economy in which the American immigration system operates. As economic conditions affecting the United States have evolved since fifty years ago when family reunification emerged as the cornerstone of American immigration policy, the focus of the American immigration system must be reoriented towards competing in the global economy. In the second step—Identifying a Bottleneck—the article hones in on the second and third categories of the current five-category preference system for admitting employment-based immigrants. Examining the unique obstacles and complexities facing immigration under the EB-2 and EB-3 categories, the article identifies these categories as a focal point on which any effort to simplify American immigration law should take aim at the outset. Finally, in the third step—Formulating the Rules—the article argues that from the perspective of simplicity, a provisional visa program proposed by many commentators offers a legal system that is user-created, repetitively applicable, and easily adaptable—features that are necessary for the effective practical application of simple rules. As such, provisional visas provide a structurally viable replacement for the procedures currently used to admit immigrants who fall under the EB-2 and EB-3 categories. The overarching purpose of this article is to emphasize that sustainable reform of American immigration law must not only make substantive revisions, but also initiate a process of structural simplification. The article offers a conceptual starting point for this process by

applying to the current immigration system a basic business-strategy framework for developing simple rules.

AUTHOR NOTE

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I. INTRODUCTION

Immigration is reputed as one of the most complex areas of American law. It has been described by courts as “certain to accelerate the aging process of judges”;¹ “mollusks of jargon” from which “morsels of comprehension must be pried”;² and a “never-never land . . . where plain words do not always mean what they say.”³ The Ombudsman for the United States Citizenship and Immigration Services reported in 2007 that “[o]ne of the most serious problems facing individuals and employers is the complexity of the immigration process”—the “opaque nature of the immigration rules and the agency administering them.”⁴ Yet, public debate on immigration reform has historically ignored basic questions of why and how the current laws should be simplified. Instead, discussion has often focused on substantive proposals—most commonly regarding legalization and border enforcement—without reference to the impact of these proposals on the legal immigration structure. The need to simplify this structure serves as the focus of this paper.

Part II provides an overview of the basic features of the modern global economy, their implications for immigration law, and why these implications compel an immigration system based on simple rules. Parts III and IV then borrow a basic three-step framework for developing simple rules from the literature on business strategy and organizational design, and applies this framework to the current immigration system. Part III.A—Setting the Objective—argues that family reunification, the primary focus of the current system, does not adequately address the economic conditions that the country faces today. As these conditions were absent fifty years ago when family reunification emerged as the cornerstone of American immigration policy, the focus of the system must be reoriented towards adapting to the global economy. Next, Part III.B—Identifying a Bottleneck—hones in on the second and third categories of the current five-category preference system for admitting employment-based immigrants.

¹ Michele Kim, *The Complexity of Immigration Law*, IMMIGR. L. ON THE WEB, <http://www.ilw.com/articles/2006,1215-kim.shtm> (last visited Mar. 10, 2014) (quoting *Tim Lok v. INS*, 548 F.2d 37 (2d Cir. 1977)).

² *Id.* (quoting *Kwon v. INS*, 646 F.2d 909 (5th Cir. 1981)).

³ *Id.* (quoting *Yuen Sang Low v. Attorney General*, 479 F.2d 820 (9th Cir. 1973)).

⁴ USCIS OMBUDSMAN, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT TO CONGRESS 7 (2007).

Examining the unique obstacles and complexities facing immigration under these two categories, Part III.B identifies EB-2 and EB-3 immigration as a critical area on which any effort to simplify American immigration law should focus at the outset. Finally, Part IV—Formulating Simple Rules—surveys the two main types of systems that today’s advanced economies use to regulate economic immigration—point-based and employer-driven. Part IV argues that proposals to consolidate the best components of each of these two systems into a “provisional visa” program, as proposed by many commentators, offer a set of rules that are user-created, repetitively applicable, and easily adaptable—features that are necessary for the effective practical application of simple rules. As such, provisional visas provide a structurally viable replacement for the procedures currently used to admit the types of immigrants covered by the EB-2 and EB-3 categories. The overarching purpose of this paper is to emphasize that any durable immigration reform must take steps to free the immigration structure from the intricacies that define it today. As a conceptual starting point for this process, this paper applies to the current immigration system a basic business-strategy framework for developing simple rules.

II. IMMIGRATION IN A GLOBAL ECONOMY

A. Globalization and the Need to Simplify

“Globalization” is defined in many ways.⁵ But it can be generally described as the rapid erosion of barriers to exchange which thereby expands and accelerates the international flow of various tangible and intangible things.⁶ In the face of profound innovations in transportation and communication, globalization is the product of a push-pull dynamic—nations are not only affirmatively lowering their barriers, but also losing their ability to sustain them.⁷ Globalization has expanded transnational activity, and continues, with growing intricacy, to interweave the political, social, and economic landscapes of countries around the world. The process is fast, fluid, big and complex,

⁵ See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 *Nw. U. L. REV.* 1277, 1278 n.2 (2008).

⁶ *Id.* at 1278.

⁷ *Id.* at 1286.

and points to “a future that we have created yet cannot fully control.”⁸ However, to thrive within this future, individuals and institutions must adapt to it.

For the United States, one pivotal policy area requiring adaptation is immigration. Globalization has opened up a world market of human capital while also increasing international human mobility.⁹ This has intensified global competition for foreign workers with valuable skills, and expanded the options these workers have, regarding prospective countries to immigrate to.¹⁰ Therefore, to remain viable in a global economy, nations, including the United States, must adopt friendly immigration policies. The burden of complying with tortuous immigration laws constricts the legal inflow of demanded low-skill migrant labor, while also impelling domestic employers to outsource high-skill jobs.¹¹ As such, globalization does not merely call for reform to the American immigration system, but a major simplification of it.

B. Immigration as Business Strategy

Studies on business strategy and organizational design reveal that decisions predicated on simple rules are critical in ever-evolving, high-velocity environments like the global economy.¹² Because opportunities are fleeting and unpredictable in such environments,

⁸ *Id.* at 1279.

⁹ Paschal O. Nwokocha, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 60 (2008).

¹⁰ *See id.* at 60-61.

¹¹ *See* Vignaswari Saminathan, *An Analysis of the U.S. Employment Immigration System in Attracting and Retaining Skilled Workers and the Effects of its Dichotomous Objectives—Competitiveness versus Protectionism: A Case for Reform?*, 32 PACE L. REV. 149, 171-72 (2012).

¹² *See, e.g.*, Jason P. Davis, Kathleen M. Eisenhardt & Christopher B. Bingham, *Optimal Structure, Market Dynamism, and the Strategy of Simple Rules*, 54 ADMIN. SCI. Q. 413 (2009); Kathleen M. Eisenhardt & Donald N. Sull, *Strategy as Simple Rules*, HARV. BUS. REV., Jan. 2001, at 107 [hereinafter Eisenhardt & Sull, *Strategy as Simple Rules*]; Kathleen M. Eisenhardt & Donald N. Sull, *Simple Rules for a Complex World*, HARV. BUS. REV., Sept. 2012, at 69 [hereinafter Eisenhardt & Sull, *Simple Rules for a Complex World*]. The principle that complexity is best managed by applying simple rules also finds support in areas of study outside of immigration law. *See, e.g.*, RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995); JOHN MAEDA, *THE LAWS OF SIMPLICITY: DESIGN, TECHNOLOGY, BUSINESS, LIFE* (2006).

organizations are best able to seize them through actions based on a small menu of simple and concrete rules.¹³ Dynamic environments are not conducive to a large and intricate legal system because such a system bogs down the decision-making process in a setting in which opportunities must be seized quickly.¹⁴ At the same time, dynamic environments are also not conducive to pure improvisation because a lack of structured guidance leads to confusion about which fleeting opportunities to pursue.¹⁵ Rather, where decisions must be made in a climate of rapid and continuous change, a strategy based on simple rules provides the best tradeoff between structure and flexibility.¹⁶ Application of this principle to American immigration law has the potential to revitalize a presently impotent system.

C. Simplifying by Liberalizing

How might the process of simplification be applied to reform American immigration law? In theory, one way might be to adopt a policy of open borders under which people would be allowed to migrate into the country barring only the most exceptional circumstances, such as when the prospective migrant is a terrorist.¹⁷ Another possible way is to adopt an isolationist policy by prohibiting all immigration subject to exceptions when the government, by its discretion, sees fit.¹⁸ While simplifying the immigration system does not require reaching either of these extremes, standard economic assumptions and observations point generally towards more open borders.¹⁹ For example, the liberalization of the trade of goods after

¹³ Eisenhardt & Sull, *Strategy for Simple Rules*, *supra* note 12, at 108.

¹⁴ *Id.* at 112-13.

¹⁵ *Id.*

¹⁶ *Id.* See also Davis et al., *supra* note 12, at 413-18.

¹⁷ See *Terrorism and Illegal Immigration in the U.S.*, OPEN BORDERS, <http://openborders.info/terrorism-and-illegal-immigration-in-the-united-states/> (last visited Mar. 14, 2014).

¹⁸ For example, North Korea imposes strict entry and exit migration controls. Migration into North Korea mostly involves temporary visits as a result of the country's diplomatic assent to certain integration efforts by South Korea. See Hiroyuki Tanaka, *North Korea: Understanding Migration to and From a Closed Country*, MIGRATION POL'Y INST. (Jan. 7, 2008), <http://www.migrationpolicy.org/article/north-korea-understanding-migration-and-closed-country>.

¹⁹ Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1148-52 (1997).

the Second World War, facilitated by a substantial reduction in tariffs and other trade barriers, induced a dramatic rise in global economic output.²⁰ Analogously, prospects for a similar result are compelled by liberalizing the movement of labor.²¹ Because the complexity of American immigration law is a legal barrier to the free movement of foreign workers into the United States, the system effectively limits American access to a burgeoning global marketplace of talent and skill. This limitation hurts economic prosperity given the relatively large American demand for high-skill workers and the relatively short American supply of low-skill workers.²² As such, simplifying immigration law has the potential to increase economic well-being both domestically and globally.²³ Simplification can help rejuvenate the American immigration system by liberalizing it to conform to a global economy.

III. SETTING THE OBJECTIVE AND IDENTIFYING A BOTTLENECK

A contemporary immigration system must be based on simple rules, but developing such rules is not necessarily a simple task. This is because simplifying immigration law within a dynamic environment entails more than merely unraveling the complexity of the rules currently on the books. For example, the laws must also be concrete, consistent, and guide a few key processes rather than trying to provide

²⁰ See, e.g., *The Case for Open Trade*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm (last visited Mar. 14, 2014).

²¹ See Chang, *supra* note 19, at 1148-52.

²² See GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* 14 (2007). See also Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 297 (2003) (“Immigration restrictions distort the global labor market, producing a misallocation of labor among countries, thereby wasting human resources and creating unnecessary poverty in labor-abundant countries.”).

²³ A recent survey of the literature on labor mobility found that open borders would increase world gross domestic product by 50-150%. *Double World GDP*, OPEN BORDERS, <http://openborders.info/double-world-gdp/> (last visited Mar. 14, 2014) (citing Michael Clemens, *Economics and Emigration: Trillion-Dollar Bills on the Sidewalk*, 25 J. ECON. PERSP. 83 (2011)). The same survey found that even a partial relaxation of migration barriers would produce substantial global gains. *Id.*

guidance wholesale.²⁴ Moreover, they must be amenable to rigorous conformity by the user once adopted, but also be capable of evolution when on the verge of becoming outmoded.²⁵ Most fundamentally, they must promote the ultimate objective for which they were adopted.²⁶ To facilitate the creation of workable simple rules, the literature on business strategy and organizational design offers a basic three-step framework that can be used to begin thinking about how to simplify the current immigration system.²⁷

A. Setting the Objective: Global Economic Compatibility

The first step in the framework is to set the objective. Since the enactment of the 1965 Hart-Cellar amendments to the Immigration and Nationality Act (INA), the primary objective of American immigration law has been family reunification.²⁸ Hart-Cellar placed the national-origins quotas²⁹ with a system under which immigrants—that is, migrants seeking permanent stay³⁰—are admitted primarily based on

²⁴ See Eisenhardt & Sull, *Strategy as Simple Rules*, *supra* note 12, at 108-09, 112-13; Eisenhardt & Sull, *Simple Rules for a Complex World*, *supra* note 12, at 69, 71-74.

²⁵ Eisenhardt & Sull, *Strategy as Simple Rules*, *supra* note 12, at 115; Eisenhardt & Sull, *Simple Rules for a Complex World*, *supra* note 12, at 74.

²⁶ See Eisenhardt & Sull, *Strategy as Simple Rules*, *supra* note 12, at 109; Eisenhardt & Sull, *Simple Rules for a Complex World*, *supra* note 12, at 71.

²⁷ See Eisenhardt & Sull, *Simple Rules for a Complex World*, *supra* note 12, at 71-74 (laying out “rules for developing simple rules”).

²⁸ See *Major U.S. Immigration Laws, 1790-Present*, MIGRATION POL’Y INST. (Mar. 2013), <http://www.migrationpolicy.org/research/timeline-1790>; WILLIAM A. KANDEL, CONG. RESEARCH SERV., U.S. FAMILY-BASED IMMIGRATION POLICY 10 (2013).

²⁹ The national-origins quota system introduced numerical limitations to U.S. immigration law. See *Major U.S. Immigration Laws, 1790-Present*, *supra* note 28. Established by the 1924 National Origins Quota Act, and presaged by the Emergency Quota Act of 1921, the system imposed on every nationality of the Eastern Hemisphere an immigration limit equaling a percentage of the nationality’s proportion of the United States foreign-born population. *Id.*

³⁰ The Immigration and Nationality Act effectively defines “immigrant” as an alien who is authorized to take up permanent residence in the United States. See Immigration and Nationality Act (INA) § 101(a)(15), 8 U.S.C. 1101(a)(15) (2012); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 272 (7th ed. 2011). Accordingly, this paper uses the term “immigrant” (as distinguished from the more general term, “immigration”) to refer to a migrant who intends or is authorized to stay in the United States permanently.

their family relationship to an American citizen or lawful permanent resident.³¹ While the INA, as originally enacted in 1952, had already established a hierarchy of family-based preferences,³² and the principle of family reunification had been introduced to the law even earlier,³³ the Hart-Cellar amendments were the last major step in formulating the family-based preference system that dominates immigrant admissions today.³⁴ While the INA—both as originally passed, and as amended in 1965—also provided for employment-based immigration, it placed the highest priority on admissions based on family relationships.³⁵ As such, family reunification emerged as the cornerstone of American immigration policy,³⁶ and has remained so, notwithstanding subsequent efforts to strengthen the employment-based component of the immigration system.³⁷ Over the course of the last decade, family-based immigrants have made up roughly two-thirds of annual immigrant admissions.³⁸

Drastic economic changes since 1965 call for a reassessment of the basic purpose of American immigration law. Hart-Cellar was enacted during a decade of growing prosperity and economic expansion which the nation does not presently enjoy.³⁹ The 1960s marked a period of “unprecedented growth in productivity, shrinking unemployment, and rapidly expanding real GDP per capita,⁴⁰” also during which time

³¹ See *Major U.S. Immigration Laws, 1790-Present*, *supra* note 28.

³² See KANDEL, *supra* note 28, at 2.

³³ *Id.*

³⁴ See *id.*; *Major U.S. Immigration Laws, 1790-Present*, *supra* note 28.

³⁵ See JOYCE VIALET, CONG. RESEARCH SERV., A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 25 (1980).

³⁶ *Id.* at 3, 25.

³⁷ Most notable and comprehensive among these efforts was the Immigration Act of 1990 which almost tripled the number of employment-based visas available from 54,000 to 140,000 per year and divided them among five preference categories. See Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 *FORDHAM INT’L L.J.* 328 (1990); William V. Roebuck, Jr., *The Move to Employment-Based Immigration in the Immigration Act of 1990: Towards a New Definition of ‘Immigrant’*, 16 *N.C. J. INT’L L. & COM. REG.* 523 (1991).

³⁸ KANDEL, *supra* note 28, at 5.

³⁹ See Roebuck, *supra* note 37, at 533-34.

⁴⁰ *Id.*

“Americans believed all these trends would continue indefinitely.”⁴¹ The global market was not as heavily integrated in 1965 as it is today, and developments in areas such as education and technology over the last fifty years have resulted in unprecedented levels of American demand for foreign labor.⁴² Indeed, even the labor movement, historically among the staunchest opponents of increased immigration, reversed its stance in recent years in major part because the forces of globalization had transformed labor demographics.⁴³

Despite these economic trends, the current family-based immigration system has been largely unresponsive. Studies show that the rate of legal immigration has shown little to no sensitivity to the unemployment rate over the last fifty years.⁴⁴ Moreover, since the end of the Bracero program in 1964,⁴⁵ unauthorized immigration has swelled by responding to market forces in ways that immigration law has not.⁴⁶ Accordingly, commentators have often questioned, or ignored altogether, the very concept of legality under the current system because there is little reason to believe that the law in its present state is capable of distinguishing between beneficial and harmful immigration.⁴⁷ Therefore, if the system is to be meaningfully

⁴¹ *Id.*

⁴² *See, e.g.*, HANSON, *supra* note 22, at 14-15 (explaining that increases in U.S. high school completion rates have prompted a shortage of native workers willing to take on important low-skill jobs); RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION OF FOREIGN NATIONALS WITH SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (STEM) DEGREES 24 (2013) (noting the broad consensus among leaders of high-skill industries that U.S. retention of foreign STEM graduates is critical to American competitiveness in the global economy).

⁴³ *See* Don Gonyea, *How the Labor Movement did a 180 on Immigration*, NPR (Feb. 5, 2013), <http://www.npr.org/2013/02/05/171175054/how-the-labor-movement-did-a-180-on-immigration>; Michael Kazin, *How Labor Learned to Love Immigration*, NEW REPUBLIC (May 13, 2013), <http://www.newrepublic.com/article/113203/labor-and-immigration-how-unions-got-board-immigration-reform>.

⁴⁴ HANSON, *supra* note 22, at 16-18.

⁴⁵ The Bracero program was a series of agreements between the United States and Mexico beginning in 1942 that allowed Mexican laborers to come to the United States on a temporary basis to work primarily in agriculture. *See id.* at 9.

⁴⁶ *Id.* at 14-18.

⁴⁷ *See, e.g., id.* at 5 (concluding that there is little evidence to suggest that legal immigration is economically preferable to illegal immigration); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2083

reformed, it must become sensitive to the dynamic trends of the global economy.

This does not mean, however, that economic interest must be American immigration law's *only* policy. Hart-Cellar's shift away from the quota system, which was widely regarded as racist,⁴⁸ reflected the country's evolving political and cultural sentiments during the 1960s.⁴⁹ The concurrent move towards a policy of family reunification⁵⁰ also coincided with humanitarian concerns that in major part informed the expansion of refugee admissions during roughly the same period.⁵¹ In simplifying the current laws, these attitudes and concerns neither need, nor should, be abandoned. Family is a basic human value, and family units provide material and moral support to help immigrants assimilate, achieve success, and contribute to society.⁵² Moreover, dire circumstances may also arise that implicate humanitarian and foreign-relations concerns warranting accommodation by American immigration policy. It would therefore be a mistake to treat immigration as nothing more than a cross-country staffing agency—as a mere mechanism for connecting domestic employers to a foreign labor supply.⁵³ However, commitment to the

(2008) (arguing that unlawful presence is a status that is “merely transitory and relatively inconsequential”); Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 109, 116 (2014) (asserting that the static nature of numerical admission limits suggests little reason to think that the distinction between legal and illegal migration tracks the distinction between good and bad migration, and further noting that most empirical studies on the impact of immigration on receiving countries do not distinguish between legal and illegal immigration).

⁴⁸ See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 854 (2007).

⁴⁹ See VIALET, *supra* note 35, at 24.

⁵⁰ To be sure, there is some evidence that Congressional support for the family-based system was motivated in part by an expectation that the system, like the national-origins quotas, would preserve racial homogeneity in the United States. See Cox & Posner, *supra* note 48, at 854. Nevertheless, a prevailing concern for keeping families intact was the emphasis of Congress' enactment of the INA and its policy of family reunification. See *id.* at 853.

⁵¹ See *id.* at 19, 22-24.

⁵² KANDEL, *supra* note 28, at 25-26.

⁵³ See Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 869-70 (2007) (pointing out how European immigration policy in the 1960s and 1970s, which treated the recruitment of foreign workers as simply

fundamental ideas underlying the family-based system must also not obscure the global economic challenges confronting the nation today—challenges which were absent fifty years ago. Simplification does not demand singularity but it does require focus. In the case of American immigration law, focus must be reoriented towards building a legal system that is more responsive to economic forces.

B. Identifying a Bottleneck: EB-2 and EB-3

Having determined the objective, the next step in developing simple rules is to identify a bottleneck—an area in which opportunities consistent with the objective exceed the resources available to seize them.⁵⁴ To accommodate rules that are specific and concrete, it is important for simplification efforts to concentrate on a particular area where opportunities most exceed the resources available—where simple rules will likely have the greatest impact.⁵⁵ Within the current immigration system, that area is comprised of two of the five preference categories for employment-based immigration⁵⁶—EB-2 and EB-3.⁵⁷

As seen in the table below, these two categories account for seventy percent of all employment-based immigrant admissions, and are comprised of professionals with “advanced degrees,” aliens of “exceptional ability,” professionals with bachelor’s degrees or other

employers picking employees, resulted in incomplete integration of immigrant communities).

⁵⁴ Eisenhardt & Sull, *Simple Rules for a Complex World*, *supra* note 12, at 71.

⁵⁵ *Id.*

⁵⁶ See Anton F. Mertens, *Build a Better Mousetrap and the World will Beat a Path to your Door: Can the Employment-Based Immigration Process be Improved?*, 5 J. MARSHALL L. J. 513, 530-36 (2012).

⁵⁷ See *supra* note 37 and accompanying text. EB-2 and EB-3 immigrants are comprised of professionals with “advanced degrees,” aliens of “exceptional ability,” professionals with bachelor’s degrees, and low-skill workers. See INA § 203(b)(2)-(3), 8 U.S.C. § 1153(b)(2)-(3) (2012). Put differently, the only foreign workers for which labor certification is *not* required are those who are somehow especially unusual—those of “extraordinary ability,” certain “special” immigrants, immigrant investors, and select EB-2 immigrants for whom waiving certification requirements serves the “national interest.” See INA § 203(b)(1), (2)(B), (4)-(5), 8 U.S.C. § 1153(b)(1), (2)(B), (4)-(5). As such, labor certification constricts the core economic channels through which the vast majority of foreign workers seek permanent admission into to the U.S.

skilled workers, and low-skill workers.⁵⁸ Put differently, the vast majority of employment-based immigrants who are *not* covered by these categories are somehow especially unusual—“priority workers”⁵⁹ including those of “extraordinary ability,”⁶⁰ certain “special” immigrants,⁶¹ immigrant investors, and select EB-2s for whom waiving certification requirements serves the “national interest.”⁶² Indeed, admission under many of these latter categories does not even require sponsorship by an employer.⁶³ As such, the complexities affecting the EB-2 and EB-3 categories constrict the primary channels through which employment-based immigrants are admitted into the United States.⁶⁴ Simplifying these complexities can help facilitate the inflow of foreign workers from the global labor market.

⁵⁸ See INA § 203(b)(2)-(3), 8 U.S.C. § 1153(b)(2)-(3) (2012).

⁵⁹ See *id.* at (b)(1).

⁶⁰ See *id.* at (b)(1)(A).

⁶¹ See *id.* at (b)(4)-(5).

⁶² See *id.* at (b)(2)(B)(i).

⁶³ See ALEINIKOFF ET AL., *supra* note 30, at 281.

⁶⁴ See RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS, (2012).

EB-2 and EB-3 Admissions, FYs 2006–2012*

	FY '06	FY '07	FY '08	FY '09	FY '10	FY '11	FY '12	Total
EB-2	21,911	44,162	70,046	45,552	53,946	66,831	50,959	353,407
EB-3	89,922	85,030	48,903	40,398	39,762	37,216	39,229	380,460
EB2+ EB-3	111,833	129,192	118,949	85,950	93,708	104,407	90,188	733,867
EB total (Categories 1-5)	159,075	161,733	164,741	140,903	148,343	139,339	143,998	1,058,132
(EB- 2+EB-3) /EB total	.703	.799	.722	.61	.632	.747	.626	.694

*Sources: ALEINIKOFF ET AL., *supra* note 30, at 285 (for FYs 2006-2010); Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Annual Flow Report, U.S. Legal Permanent Residents: 2012, Table 2, at 3 (2013) (for FYs 2011-2012).

1. Labor Certification

A problem uniquely affecting immigration under the EB-2 and EB-3 categories is the labor certification process. The basic purpose of labor certification is twofold: to ensure that foreign workers do not “take jobs away” from competing American workers, and to ensure that foreign workers do not drive down United States working conditions and wages.⁶⁵ Conventionally, labor certification requires employers to place a job order with, and receive a prevailing wage determination from a state workforce agency in the area where the job is located.⁶⁶ They are then required to go through a recruitment phase in which they advertise the job to American workers pursuant to an elaborate regulatory framework.⁶⁷ Employers are also required to keep

⁶⁵ INA §212(a)(5)(A)(i).

⁶⁶ ALEINIKOFF ET AL., *supra* note 30, at 352-53.

⁶⁷ *Id.*

a detailed report of their recruitment activities for randomly selected auditing.⁶⁸

Labor certification is problematic for at least three basic reasons. First, the process is a labyrinth. Regulations set forth along set of recruitment procedures, the intricacy of which can be sampled by just glancing at some introductory requirements such as “placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment”⁶⁹ and selecting three additional recruitment steps from a statutory list, “only one of [which] may consist solely of activity that took place within 30 days of the filing of the application [and] [n]one of [which] may have taken place more than 180 days prior to filing the application.”⁷⁰ Specific requirements for preparing the recruitment report are also complicated, demanding that employers “describ[e] the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of American workers rejected, categorized by the lawful job related reasons for such rejections.”⁷¹ Employers must additionally take care, pursuant to a detailed list of constraints, that the job description is not unduly restrictive,⁷² a task which can often be quite precarious.⁷³ Because of such complexities, several months, and sometimes years, are required for these pre-filing procedures alone, followed by additional months or years waiting for a backlogged Department of Labor to review the application.⁷⁴ The toil of the certification process imposes heavy costs on American employers and foreign workers seeking mutual gains, and by consequence, burdens the economy as a whole.

⁶⁸ *Id.* at 352-54.

⁶⁹ 20C.F.R. § 656.17(e)(1)(i)(B)(1) (2013).

⁷⁰ *See id.* at (e)(1)(ii).

⁷¹ *Id.* at (g)(1).

⁷² *See id.* at (h).

⁷³ *See Ethical Considerations in Immigration Cases*, 4 IMMIGR. L. REP. 169 (1985) (discussing the ethical challenges that immigration attorneys face in translating an employer’s qualitative preferences into the quantifiable job requirements demanded by the labor certification process).

⁷⁴ For example, as of March 2014, the Department was processing applications filed in July of the previous year, as well as audits of recruitment records for applications filed in December of 2012. PERM Processing Times, U.S. DEP’T OF LABOR. (Mar. 4, 2014), <https://icert.doleta.gov/>. *See also* Mertens, *supra* note 56, at 535-40.

Second, labor certification grounds permanent employment-based admission determinations solely in the labor market's immediate, short-term needs.⁷⁵ By conditioning the decision of whether to admit a permanent addition to the labor force on nothing more than the basis of a particular job opening, labor certification ignores additional considerations, such as whether the prospective immigrant is likely to integrate, succeed, and contribute to society in the long run.⁷⁶ Instead, the process readily offers permanent admission to an applicant to perform a specific function without assessment of whether that function will generate any long-term benefit.⁷⁷ The result is a miscalibrated system that uses a set of criteria to make decisions with significant implications which those criteria fail to take into account.⁷⁸

Third, and perhaps most fundamentally, labor certification institutionalizes misguided protectionist notions by requiring employers to search for a qualified American worker, ultimately to no avail, before tapping into the foreign labor market.⁷⁹ In effect, the process presumes that the national economy does not need more foreign workers.⁸⁰ This, however, is a fallacious presumption. Among foreign workers for whom labor certification is granted, virtually all of them are already in the United States at the time the application is filed, with the vast majority working for the filing employer either without authorization or under a temporary visa.⁸¹ In other words,

⁷⁵ DEMETRIOS PAPADAMETRIOU & STEPHEN YALE-LOEHR, INT'L MIGRATION POLICY PROGRAM, CARNEGIE ENDOWMENT FOR INT'L PEACE, BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS 145 (1996).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ ALEINIKOFF ET AL., *supra* note 30, at 379.

⁸⁰ *Id.* at 351.

⁸¹ See U.S. DEP'T OF LABOR, OFFICE OF THE INSPECTOR GEN., THE DEPARTMENT OF LABOR'S FOREIGN LABOR CERTIFICATION PROGRAMS: THE SYSTEM IS BROKEN AND NEEDS TO BE FIXED 2 (1996) (finding that out of the 24,150 aliens for whom labor certification applications were filed in the 1993 fiscal year, 99 percent were present in the U.S. at the time of filing, and 74 percent were working for the filing employer). See also Susan Martin, B. Lindsay Lowell & Philip Martin, *U.S. Immigration Policy: Admission of High-Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 633 (2002) (estimating that one-half to two-thirds of foreign high-skill workers admitted on a temporary H-1B visa intend, and are expected by their employers, to stay in the U.S. permanently); JEB BUSH, THOMAS F. MCLARTY III & EDWARD ALDEN, COUNCIL ON FOREIGN RELATIONS,

most workers seeking admission under the EB-2 and EB-3 categories are not overseas as the design of labor certification presumes, but are already here working, and merely seeking adjustment to permanent status. Moreover, family-based immigrants, who comprise roughly two-thirds of all permanent admissions each year,⁸² are also likely to work and compete with natives for jobs, yet are not subject to any pre-admission labor certification requirements.⁸³ These observations indicate a sharp dichotomy between labor certification and economic reality.

2. Statutory Ceilings

Labor certification is not the only complex governmental constraint inhibiting EB-2 and EB-3 immigration. Congressionally mandated immigration ceilings also contribute to the bottleneck by limiting the number of admissions under each of these categories to 40,000 per year,⁸⁴ with low-skill workers further limited by a paltry annual cap of 5,000.⁸⁵ The inadequacy of these numbers is indicated by the significantly higher number of actual EB-2 and EB-3 admissions each year due to the law's "spill-down" provisions⁸⁶ (see table above), and the 300,000—chiefly low-skill—unauthorized immigrants entering the American labor force each year.⁸⁷

Category ceilings are additionally subject to per-country caps that limit annual immigrant admissions to roughly 25,600 per sending country.⁸⁸ The purpose of these per-country caps is to provide for a

INDEPENDENT TASK FORCE, U.S. IMMIGRATION POLICY 58 (2009) (finding that more than 60 percent of annual green card seekers are already in the U.S., and that the corresponding figure for employment-based immigrants is 90 percent).

⁸² See KANDEL, *supra* note 28, at 5.

⁸³ ALEINIKOFF ET AL., *supra* note 30, at 352.

⁸⁴ *Id.* at 280.

⁸⁵ *Id.*

⁸⁶ Annual admission spaces that go unused in the preference categories are recycled according to a system set forth in the INA. For example, spaces that are often left over in the EB-5 immigrant investor category rotate back up to the EB-1 priority worker category, from which they, and any additional unused EB-1 spaces, "spill down" to the second and third categories. As can be seen in Table 1, this recycling system often results in a higher number of annual EB-2 and EB-3 admissions than the 40,000 that are formally allotted. See *id.* at 286-88.

⁸⁷ See DEBORAH MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER 35 (2006).

⁸⁸ ALEINIKOFF ET AL., *supra* note 30, at 288.

level of diversity among admitted immigrants by ensuring that no single country receives a number of annual admissions exceeding the per-country limit.⁸⁹ However, these caps, and the highly complex formulas that go into precisely calculating them each year, have resulted in prolonged delays.⁹⁰ For example, EB-2 and EB-3 applicants from India may have to wait as much as ten to eleven years to obtain a permanent visa,⁹¹ while applicants from other countries can also have wait times amounting to several years.⁹² The upshot of these shortcomings is a legal economic immigration system that fails to reflect economic needs. Therefore, it is no surprise that employers in high-skill industries have turned to “temporary” work visas as their primary method for retaining foreign workers, while low-skill workers have made use of illegal entry as their main migratory channel.⁹³ Accordingly, EB-2 and EB-3 admissions, along with periodic legalizations, have largely become devices that merely formalize what has already occurred in the market long ago.⁹⁴

Moreover, the rigidity of statutory ceilings has prevented the permanent employment-based immigration system from responding to changes in supply and demand, and from avoiding or mitigating the aforementioned delays.⁹⁵ Grounded in the same protectionist rationale as labor certification, statutory ceilings have long been a politically dicey issue and have therefore been difficult to change.⁹⁶ As one commentator put it, “[i]t would be nothing short of a miracle if statutory limits . . . were to correspond to the levels and kind of immigration that would best advance the aims that justify immigration.”⁹⁷ Because numerical caps are set by statutes that are reassessed, on average, less than once per decade,⁹⁸ the caps’ shortcomings have unfortunately become an unremarkable fact of life within the current system.

⁸⁹ *Id.*

⁹⁰ *See* MEISSNER ET AL., *supra* note 87, at 22-24.

⁹¹ U.S. DEP’T OF STATE VISA BULLETIN, Vol. IX, No. 68 (May 2014).

⁹² *See id.*

⁹³ *See* MEISSNER ET AL., *supra* note 87, at 21.

⁹⁴ *See id.* at 24.

⁹⁵ *See id.* at 22-23.

⁹⁶ *See* WASEM, U.S. IMMIGRATION POLICY, *supra* note 64, at 16-17.

⁹⁷ Treyger, *supra* note 47, at 116.

⁹⁸ MEISSNER ET AL., *supra* note 87, at 41-42.

In sum, the deficiencies of labor certification and statutory numerical limits introduce numerous complexities, encumbrances, and pretenses to the vast majority of prospective employment-based immigrants and their employers. The bottleneck this creates in the American immigration system, especially in the EB-2 and EB-3 categories, is a critical reason why the system is economically unfit. To render the system more responsive to the global labor market, the primary legal channels through which the country admits employment-based immigrants must be based on simplified rules. As such, American immigration policy must move towards both eliminating labor certification and significantly increasing statutory caps if the current system is to be meaningfully reformed.

IV. FORMULATING THE RULES

Having set the objective and identified a bottleneck, the final step of the business-strategy framework for simplifying the immigration system is formulating the rules. If the law is to be capable of effectively governing immigration, discarding both labor certification requirements and increasing numerical caps in determining which, and how many, prospective employment-based immigrants should be admitted, do not alone give rise to the simple rules necessary to guide this determination. Functional, simple rules, are created not by simply undoing complexity, but by formulating a set of requirements that are user-friendly, rigorously applicable, and adaptable to changing conditions.⁹⁹ Among today's advanced industrialized economies, there are two general types of systems that are used to regulate economic immigration—point-based and employer-driven.¹⁰⁰ Extracting the best components of each of these systems and consolidating them into a provisional visa program, as some commentators have suggested, provides a path towards formulating workable, simple rules to regulate the admission of immigrants who currently fall under the EB-2 and EB-3 categories.

⁹⁹ See *supra* notes 24-27 and accompanying text.

¹⁰⁰ DEMETRIOS PAPADAMETRIOU & MADELEINE SUMPTION, *MIGRATION POLICY INST., RETHINKING POINTS SYS.& EMPLOYER-SELECTED IMMIGRATION 1* (2011) [hereinafter *RETHINKING POINTS SYS.& EMPLOYER-SELECTED IMMIGRATION*].

A. Point-Based Systems

Across the world's most developed countries, one of the most commonly used systems for regulating economic immigration is the point-based system.¹⁰¹ This system guides admission determinations by awarding points to foreign workers based on the extent to which they satisfy a government-set list of qualifications.¹⁰² As the policy goal of point-based systems is to maximize the country's human capital,¹⁰³ the most valued qualifications are typically language skills, work experience, education, and age.¹⁰⁴ Other attributes which are usually awarded fewer points include job offer (especially in a high-demand industry), previous earnings, family ties, and spousal education and work experience.¹⁰⁵ Clarity and flexibility are the primary advantages of point-based systems.¹⁰⁶ The government establishes explicit, quantifiable criteria that foreign workers must meet to be admitted into the country, resulting in a transparent, easily understandable system.¹⁰⁷ Such clarity and simplicity also facilitates the adjustment of admissions criteria to meet changing policy needs down the line.¹⁰⁸

Despite these attractive features, point-based systems have the drawback of detaching employers from the migrant selection process.¹⁰⁹ Because point systems are established by the government and do not necessarily predicate admission on a job offer, they often

¹⁰¹ *Id.*

¹⁰² *Id.* at 2.

¹⁰³ DEMETRIOS PAPADEMETRIOU, WILL SOMERVILLE & HIROYUKI TANAKA, MIGRATION POLICY INST., HYBRID IMMIGRANT-SELECTION SYS.: THE NEXT GENERATION OF ECON. MIGRATION SCHEMES 9 (2008) [hereinafter HYBRID IMMIGRANT-SELECTION SYS.].

¹⁰⁴ RETHINKING POINTS SYS.& EMPLOYER-SELECTED IMMIGRATION, *supra* note 100, at 2.

¹⁰⁵ *Id.*; HYBRID IMMIGRANT-SELECTION SYS., *supra* note 103, at 16-18.

¹⁰⁶ WASEM, U.S. IMMIGRATION POLICY, *supra* note 64 at 18.

¹⁰⁷ RETHINKING POINTS SYS.& EMPLOYER-SELECTED IMMIGRATION, *supra* note 100, at 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Indeed, the 2007 Senate immigration reform bill, despite substantially increasing the availability of employment-based green cards, and significantly reducing family-based admissions, received severe backlash from the business industry because it introduced a point-based system to U.S. immigration law. See BUSH ET AL., *supra* note 81, at 53-54.

lead to admission of foreign workers whose qualifications, while sufficient to pass the points test, are not demanded by employers in the host country.¹¹⁰ The potential result is high levels of underemployment among admitted foreign workers,¹¹¹ thereby posing a threat to social integration.¹¹²

B. Employer-Driven Systems

In contrast to point-based systems, employer-driven systems, such as EB-2 and EB-3 immigration, allow employers to directly select foreign workers within the (sometimes very strict) confines of government regulations.¹¹³ Employer-driven systems have two main advantages over point-based systems. First, employer-driven systems closely trace supply and demand by using individualized employer preferences to screen prospective migrants.¹¹⁴ By allowing employers to directly choose workers from the global labor supply who meet their particular needs, employer-driven systems optimize the ability of immigration to produce economic growth.¹¹⁵ Second, employer-driven systems ensure a minimum level of integration.¹¹⁶ Because foreign workers are admitted under this system by virtue of employer sponsorship, admission indicates that the worker possesses certain qualities that are demonstrably valuable to the labor market.¹¹⁷ Certainly, although the qualities necessary for a single job do not guarantee assimilation in the long run,¹¹⁸ they show that the foreign worker will be admitted with a market-validated threshold capacity to contribute to society—something which point-based systems cannot guarantee. Moreover, to better ensure long-term benefits under employer-driven systems, government regulations can supplement

¹¹⁰ RETHINKING POINTS SYS. & EMPLOYER-SELECTED IMMIGRATION, *supra* note 100, at 3.

¹¹¹ *Id.* at 4.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ RETHINKING POINTS SYSTEMS AND EMPLOYER-SELECTED IMMIGRATION, *supra* note 100, at 4.

¹¹⁷ *Id.*

¹¹⁸ See *supra* notes 75-77 and accompanying text discussing labor certification's misguided focus on short-term employment needs as a condition for admitting long-term (immigrant) workers.

employer preferences with conditions that are not already a part of the job requirements.¹¹⁹

On the other hand, employer-driven systems can effectively bind foreign workers to the specific job through which they gained admission.¹²⁰ Because justification for the worker's admission is largely predicated on that specific job, employer-driven systems often impose limitations on "portability"—that is, the ability of workers to move to a different employer.¹²¹ These limitations can restrict the system's responsiveness to changing labor demands, and can also incentivize employers to exploit migrant labor.¹²² The advantages of employer-driven systems can also be diluted by rigorous government constraints such as inadequate numerical ceilings or labor certification.

C. Towards a "Hybrid" System: The Provisional Visa Program

To minimize the disadvantages of each of the foregoing systems, commentators have proposed a "hybrid" approach to economic immigration that combines the best elements of both.¹²³ While the hybrid approach may take many forms,¹²⁴ one that has garnered increasing attention in recent years is "temporary-to-permanent pathways"—sometimes called "provisional visas."¹²⁵ Such a system initially admits employer-selected foreign workers on a temporary basis, but allows for adjustment to permanent status through a point-based system after a probationary period.¹²⁶ In Australia, for example, a Skilled Regional Sponsor Visa grants provisional admission based on a job offer with the option to apply for permanent status—granted through a point system—after two years of residence and one year of full-time work in a specified region.¹²⁷ Similarly, in the United

¹¹⁹ RETHINKING POINTS SYSTEMS AND EMPLOYER-SELECTED IMMIGRATION, *supra* note 100, at 4.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See, e.g.*, HYBRID IMMIGRANT-SELECTION SYS., *supra* note 103.

¹²⁴ *See* RETHINKING POINTS SYSTEMS AND EMPLOYER-SELECTED IMMIGRATION, *supra* note 100, at 5.

¹²⁵ *See* MEISSNER ET AL., *supra* note 87, at 38-39.

¹²⁶ *Id.*

¹²⁷ HYBRID IMMIGRANT-SELECTION SYS., *supra* note 103, at 7.

Kingdom, foreign workers can obtain renewable three-year temporary visas through employer sponsorship with authorization to apply for point-based permanent residence five years after entry.¹²⁸ Such provisional visa programs account for market forces by allowing initial entry based on employer selection, while also reducing the risk of worker exploitation by allowing for permanent residence or portability after a certain period of time. They ensure a minimum capacity to integrate upon initial entry, but apply additional information about the migrant—conveyed during the probationary period—to the flexible, more multidimensional criteria of a point system to better ensure that the country’s long-term interests are served.¹²⁹

To address the issue of numerical limits on immigration, there has been at least one proposal advocating the establishment of a new independent federal agency to supplement a provisional visa system.¹³⁰ According to the proposal, the agency’s mission would be “to propose changes that support economic growth while maintaining low unemployment and preventing wage depression.”¹³¹ Pursuant to this authorization, it would conduct ongoing analysis of labor market conditions and make periodic recommendations to the President, policymakers, and other agencies regarding appropriate levels of immigration.¹³² The proposal is beneficial because it both substantially increases the initial cap, and removes from the treacherous political process subsequent decisions to adjust it.

In offering the foregoing advantages, provisional visa programs do not merely offer improvements to the current immigration system, but advance the interests of simplicity within the dynamism of the world labor market. By largely allowing the market to dictate initial entry decisions, and then later utilizing a list of straightforward, government-structured priorities to grant or deny permanent status, a provisional visa program offers an immigration system with the balance of flexibility and constraint that simple rules demand in dynamic environments. Specifically, given the fact that “simple”

¹²⁸ *Id.* at 8.

¹²⁹ See Cox & Posner, *supra* note 48, at 826-27 (discussing the advantages of an “ex-post” immigration system which utilizes post-entry information gathered during a probationary period in deciding whether to grant permanent residence).

¹³⁰ See MEISSNER ET AL., *supra* note 87, at 35-36, 41-43.

¹³¹ *Id.* at 42.

¹³² *Id.* at 42-43.

means more than just “unembellished,”¹³³ provisional visa rules have three particular qualities that help them balance structure and flexibility to guide admission determinations within the global economy. These qualities are, (1) user-creation, or “endogeneity,” (2) repetitive capacity, and (3) adaptability.¹³⁴

1. Endogeneity

Viable, simple rules are best formulated “from within”—that is, by the entities that will actually apply them—rather than externally.¹³⁵ Because these entities directly and actively use the rules in real time, they are the most affected by them, and are in the best position to evaluate their efficacy.¹³⁶ As such, simple rules generally work best when they are created directly by the user.

Under provisional visa programs, there are essentially two users, each at a different point in time in the immigration process. At the initial point of entry, the primary user is the employer since temporary admission is awarded to the prospective immigrant based chiefly on a job offer.¹³⁷ Because trends in the global labor market provide employers with the best “rules” regarding hiring decisions, conditioning initial entry primarily on employer sponsorship gives employers the ability to develop the rules by formulating job requirements according to business needs and market trends.¹³⁸ As such, the provisional visa program employs endogenous rules at step one of the program’s immigration process.

At step two, where the worker, having passed through the requisite probationary period, applies for permanent status, the main user of the provisional visa system is the government.¹³⁹ As permanent residence implicates a scope of concerns that includes, but is ultimately broader than, work performance and labor market needs,¹⁴⁰ a point system

¹³³ See *supra* notes 24-27 and accompanying text.

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See MEISSNER ET AL., *supra* note 87, at 38-39.

¹³⁸ Cf. HANSON, *supra* note 22, at 29 (discussing the importance to any successful reform of temporary work visas of involving the active participation of employers in the selection process).

¹³⁹ See MEISSNER ET AL., *supra* note 87, at 38-39.

¹⁴⁰ See *supra* notes 103-104 and accompanying text.

structured pursuant to national policy goals accommodates user-creation of simple rules in deciding whether to admit the worker permanently. The government can also utilize additional information about the worker accumulated during the probationary period in making its determination.¹⁴¹

Immigrant selection under the current EB-2 and EB-3 categories is uniquely well-suited to the dual-endogeneity of rule development offered by the provisional visa program. Because these categories form such a large majority of employment-based immigrants, and are predominantly comprised of a garden variety of workers, the subjective and qualitative nuances that set these workers apart from each other will be important to individual employers for job purposes, but less relevant to the country as a whole for purposes of permanent residence. This stands in contrast to foreign workers who currently are not required to be sponsored by an employer to gain permanent admission—for example, workers of “extraordinary ability,”¹⁴² many “special immigrants,”¹⁴³ and workers who “serve the national interest” in some eminent way.¹⁴⁴ The rarity, distinction, or otherwise special value of these workers’ skills to the country are such that they patently convey sufficient and distinctive information about the workers at the point of initial entry to warrant their immediate admission as permanent residents. In these cases, the extra time and resources involved in requiring a probationary period are outweighed by the special value the prospective immigrant offers. But where credentials, at a general level, are more commonplace such as those that are found among EB-2 and EB-3 workers, a probationary period allows the government to accumulate more and better information relevant to permanent residence that is not conveyed at the initial entry point. At the period’s end, the government can then apply its self-generated point system to make more well-rounded decisions about which of

¹⁴¹ See Cox & Posner, *supra* note 48, at 826-27.

¹⁴² See INA § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A) (2012); 8 C.F.R. § 204.5(c) (2013).

¹⁴³ See INA § 203(b)(4), 8 U.S.C. § 1153(b)(4); 8 C.F.R. § 204.5(c).

¹⁴⁴ See INA § 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i). See also Matter of New York State Dep’t of Transportation, 22 I&N 215, 218 n.5 (Comm’r 1998) (explaining that a self-petitioning alien under the national interest waiver must show that he or she “will serve the national interest to a substantially greater degree than do others in the same field”).

these workers are suited to become permanent members of American society.

2. Repetitive Capacity

A second important aspect of the provisional visa program is the capacity of its rules to be applied with high repetition.¹⁴⁵ Because the global labor market is fast and fluid and can give rise, often suddenly, to high-volume migration inflows, a lack of tools for efficiently and consistently making a large number of admission decisions induces backlogs, diverts workers to illegal migration routes or other countries altogether, and ultimately hurts the national economy. In high-velocity environments, rules incapable of being applied with a high level of repetition will either be too complex on one end, or too informal on the other. Put differently, in dynamic settings, repetitive capacity reflects an optimal structure to those rules.

The provisional visa program instills repetitive capacity in the selection process at both the initial entry point and the point of application for permanent status. Repetition is inherent in the initial entry determination to the extent that employers have efficient hiring practices. Driven by market trends and subjective preferences within marketplace constraints, employers normally construct a list of job requirements that they repetitively apply to numerous applicants to hire the ones who meet their needs. Because, under the provisional visa program, initial entry decisions trace employer hiring decisions, effective mechanisms for managing job applicant streams and screening individual candidates simultaneously provide effective rules for screening the initial inflow of immigrants. The transparency and quantitative nature of the point system also provide rules of high repetitive capacity at the time of application for permanent status.

The repetitive capacity of provisional visa rules can benefit the immigration process of foreign workers who currently fall under the EB-2 and EB-3 categories by providing a firm, but limited, set of criteria to manage a heavy demand for visas. Because the large number of conventional foreign workers who seek admission under these categories gives rise to high information costs during the selection process, an effective mechanism for screening them will be simple and technical, and therefore capable of rigorous application. Moreover, concerns that such a mechanism may overlook important qualitative

¹⁴⁵ See Eisenhardt & Sull, *Strategy as Simple Rules*, *supra* note 12, at 115.

attributes of prospective immigrants are mitigated by the endogeneity of provisional visa rules. The high cost of detecting valuable personal characteristics among numerous, mostly garden-variety EB-2 and EB-3 workers, can be reduced by allowing employers and the government to each craft the rules themselves at the point in the immigration process when each is the primary user. Employers can, and often do, incorporate subjective preferences into their hiring practices, while the government can customize quantifiable point-system criteria according to national values and contemporary policy objectives. Therefore, vesting rulemaking authority in employers at the initial entry point, and in the government at the time of permanent admission, reduces information costs at each of these selection points. This can provide rules of high repetitive capacity that are also informed by nuanced, qualitative considerations.

3. Adaptability

Finally, although simple rules must be rigorously applied, they must also be amenable to change. Labor markets, national policy, and the composition of prospective immigrants all evolve. To adapt to these evolutions, immigration law must be capable of modification. To be sure, changes to particular provisions and processes within the constraints of the current immigration system occur constantly. But just as a company's basic strategy may go stale such that altering the rules within it is no longer helpful,¹⁴⁶ laws may become inadequate to the point that change to the laws' fundamental architecture is necessary rather than simply new laws.¹⁴⁷ If problems are deep, as they are with the current immigration system, structural change is necessary to facilitate meaningful adaptation in the future.¹⁴⁸

The provisional visa program offers this kind of systemic revision by instituting a market-tracing selection process at initial entry and a straightforward point system at the time of adjustment to permanent status. By responding directly to labor market trends, the employer-driven system that is applied at the point of initial entry is unmatched in terms of adaptive capability. By limiting the number of rules to a palpable amount, so as to promote ongoing reevaluation and

¹⁴⁶ *See id.*

¹⁴⁷ *See BUSH ET AL., supra note 81, at 45.*

¹⁴⁸ *See Eisenhardt & Sull, Strategy as Simple Rules, supra note 12, at 115.*

refinement,¹⁴⁹ a point system offers flexibility at the transition point from temporary to permanent status where labor market trends may not be as authoritative in the selection process. Moreover, the supplemental proposal put forth by some commentators to establish a new federal commission that makes periodic recommendations on immigration levels introduces a much needed flexibility to historically uncompromising numerical limitations.¹⁵⁰ The need for such flexibility is especially urgent in the EB-2 and EB-3 categories in which applicants who comprise the core of all employment-based immigration must nevertheless wait several years for a permanent visa.¹⁵¹ By issuing periodic recommendations on the basis of ongoing market analysis, the commission regularizes checkpoints for updating appropriate immigration levels that are sensitive to marketplace needs.¹⁵² The agility of such an approach could provide an improvement over the political embroilments that have historically thwarted the ability of numerical ceilings to adapt to marketplace realities.

V. CONCLUSION

For comprehensive immigration reform to work, “comprehensiveness” must encompass not only substantive changes, but also structural ones. Patchwork reform efforts over the years have merely “layered additional burdens on an already inadequate law,”¹⁵³ further complicating an already disarrayed system. As such, the thrust of any durable contemporary reform effort must be systemic simplification so that the country can better compete in the global economy. The basic three-step business-strategy model that this paper applies to the current immigration system can serve as a conceptual starting point.

¹⁴⁹ See Eisenhardt & Sull, *Simple Rules for a Complex World*, *supra* note 12, at 74.

¹⁵⁰ See *supra* notes 130-131 and accompanying text.

¹⁵¹ See *supra* Part III.B.2.

¹⁵² See WASEM, U.S. IMMIGRATION POLICY, *supra* note 64, at 19.

¹⁵³ BUSH ET AL., *supra* note 81, at 56.