

PAVING A NEW PATHWAY TO PERMANENT RESIDENCY: A CANADIAN-INSPIRED PROPOSAL FOR INTERNATIONAL STUDENTS, UNDOCUMENTED IMMIGRANTS, AND THE UNITED STATES

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INTRODUCTION

A. A Tale of Five

Tim Chan's and Maggie Tong's plans to return to Hong Kong after graduation from their Canadian universities suddenly halted after the drastic changes in Hong Kong governance.¹ Germaine Hein, an international student living with her husband in Arkansas, was denied the ability to receive in-state tuition despite her husband's permanent residency and her desire to remain in the U.S. long-term.² Yohali and Angel Mendoza's undocumented status forced them to drop out of community college in Baltimore once the COVID-19 pandemic hit.³

These five people living across North America encountered highly different circumstances, but immigration law underlies each of their experiences. As immigrants, their futures are at the mercy of the immigration laws in the country they hope to call home. For international students aspiring to become permanent residents, these problems can be especially complicated when crisis strikes. Luckily for Chan and Tong, Canada implemented a public policy beginning June 1, 2021, allowing international students from Hong Kong to become permanent residents following their graduation in response to the recent political events in Hong Kong.⁴ Hein and the Mendozas, on the other hand, were subject to quite

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1. Winston Szeto, *Canada to Ease Immigration Rules for Hong Kongers. The Move Couldn't Come Fast Enough for These B.C. Students*, CBC NEWS (Dec. 5, 2020, 1:00 AM PT), <https://www.cbc.ca/news/canada/british-columbia/hong-kong-china-students-immigration-canada-1.5821554> [<https://perma.cc/WJ85-DFX7>].

2. *Hein v. Arkansas State Univ.*, 972 F. Supp. 1175, 1177 (E.D. Ark. 1997).

3. Vanessa Sanchez & Danielle Douglas-Gabriel, *The Pandemic Disrupted 'Dreamers.'* *Can Biden's Spending Bill Get Them Back on Track?*, WASH. POST (Dec. 15, 2021, 11:34 PM EST), <https://www.washingtonpost.com/education/2021/12/15/daca-student-aid/> [<https://perma.cc/W382-DJ8A>].

4. Marco E. L. Mendecino, *Temporary Public Policy Creating Two Pathways to Permanent Residence to Facilitate the Immigration of Certain Hong Kong Residents*, GOV'T OF CAN. (June 8, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies/hong-kong-residents-permanent-residence.html>

different conditions in the U.S.. Hein was unable to get resident tuition under U.S. immigration law, and the Mendozas were unable to obtain federal aid to remain in school due to their undocumented immigration status. The question remains whether there is a common solution to the problems faced by both Hein and the Mendozas.

This Note uses a comparative approach to examine the defensive state of current immigration law in the U.S., specifically focused on international students, and offers a proposal based on Canada's recent public policy. First, this Note will compare Canadian immigration law with American immigration law, then analyze policies as they affect international students and undocumented immigrants in the U.S. Finally, this Note will conclude with a proposal that the U.S. adopt a new, Canadian-inspired immigration pathway for international students to more easily attain permanent residency.

HISTORY AND BACKGROUND

A. Canadian Immigration System

Canada does not set a statutory limitation on the number of immigrants accepted each year.⁵ Instead, the government sets target goals for the total number of immigrants wanted per year and subdivides that number into specific categories.⁶ For 2022, the target is 411,000 total permanent residents.⁷ Of that total, approximately 241,500 are economic visas, 103,500 are family visas, 60,500 are visas for “refugees and protected persons,” and 5,500 are humanitarian visas.⁸

Student visas, however, are classified as nonimmigrant visas based on students' temporary residence in the country⁹ and therefore are not included in the above total. Generally, a student visa applicant to Canada must satisfy many criteria to be issued a student visa: enrollment at a designated learning institute, proof of economic support for studies and living, no criminal record, good health, and proof that the person intends to leave Canada upon completion of their studies.¹⁰ The last requirement, proof of intent to depart, hones in on a prominent immigration issue: intent—specifically, whether the visa-recipient intends to

[<https://perma.cc/S3BN-NM29>].

5. See Notice – Supplementary Information for the 2021-2023 Immigration Levels Plan, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/supplementary-immigration-levels-2021-2023.html> [<https://perma.cc/BW8K-8T9Q>] (June 18, 2021).

6. *Id.*

7. *Id.*

8. *Id.*

9. Immigration and Refugee Protection Regulations, SOR/2002-227 §210 (Can.).

10. *Study Permit: Who Can Apply*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/study-permit/eligibility.html> [<https://perma.cc/TD5Z-HHKE>] (Feb. 16, 2022).

leave or stay. However, Canada allows nonimmigrants to have dual intent, which means that international students are permitted to intend for Canada to become their permanent home while simultaneously acknowledging that they must leave at the end of their temporary visa unless they can secure another.¹¹

Canada's international students must be able to prove their ability to finance their education and living expenses for themselves and their families.¹² Education costs vary per program but can be sizeable.¹³ For undergraduate studies in 2021-2022, veterinary medicine is the most expensive at 66,503 Canadian dollars (CAD) (55,684 USD).¹⁴ Even the lowest-costing undergraduate education is still significant, with education studies costing approximately 23,591 CAD (18,584 USD).¹⁵ Costs are lower for graduate studies in some areas for 2021-2022, with veterinary medicine sitting at 9,705 CAD (7,688 USD), but higher in others, with education graduate programs costing approximately 17,583 CAD (13,851 USD).¹⁶

Since a student visa requires an inherent willingness to return home by the visa holder,¹⁷ international students with a desire to make Canada their home must look to other visas for permanent residency. The main three ways to gain permanent residency in Canada are through a family visa, economic visa, or through qualification as a refugee or asylee.

Family visas are issued according to the Immigration and Refugee Protection Act § 12(1), which gives the government discretion to award a visa based on relation to a Canadian citizen or a permanent resident of Canada.¹⁸ In addition to these qualifications, the sponsor of a family visa applicant must be at least eighteen years old and able to support their relatives financially.¹⁹ Family visa applicants must be within one of two groups to qualify for the relationship-based visa.²⁰ The first group is composed of the sponsor's spouse, common law partner, or dependent child.²¹ The second group is composed of the sponsor's parents and grandparents, as well as brothers, sisters, nieces, nephews, and granddaughters or grandsons if they are orphaned and uncoupled.²² The design of the family visa

11. Immigration and Refugee Protection Act, S.C. 2001, c 27 §22(2) (Can.).

12. *Study Permit: Who Can Apply*, *supra* note 10.

13. See *International Undergraduate Tuition Fees by Field of Study (Current Dollars)*, STAT. CAN., <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3710000501> [https://perma.cc/C8XJ-MZD9] (Mar. 4, 2022).

14. *Id.*

15. *Id.*

16. *International Graduate Tuition Fees by Field of Study (Current Dollars)*, STAT. CAN., <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3710000601> [https://perma.cc/43PS-QE5N] (Mar. 4, 2022).

17. Immigration and Refugee Protection Act, S.C. 2001, c 27 § 22(2) (Can.).

18. *Id.* §12(1).

19. 1 DOING BUSINESS IN CANADA § 4.03 (Matthew Bender & Co., 71st ed. 2022).

20. *Id.*

21. *Id.*

22. *Id.*

indicates an emphasis on keeping families, as a whole, together, as demonstrated by its expansion beyond the immediate family.

The economic visas are issued on narrower qualifications to ensure that the immigrant is able “to become economically established in Canada.”²³ Generally, Canada uses a point-based system to decide which applicants for economic visas are issued visas.²⁴ Applicants accrue points based on the number of characteristics a person has that are valuable to Canada.²⁵ The more valuable the characteristics according to the Canadian government, the more points the characteristic is allocated.²⁶ In the end, the total points must meet a certain threshold to be considered.²⁷ Recently, Canada has implemented an express entry program to alleviate the high number of applicants for economic visas.²⁸ The express entry program assists the point-based economic system by putting all applications within a certain timeframe into a pool.²⁹ At the end of the timeframe, the applicants scores are compared with each other rather than the minimum threshold, and only those with the highest scores move forward in the consideration process.³⁰ Thus, an applicant with a low overall score could still potentially be considered for economic immigration if the other applicants within the same timeframe had a lower score.

The third category is refugee and asylum cases, which allows non-citizens of Canada to enter due to Canada’s “humanitarian tradition with respect to the displaced and the persecuted.”³¹ In other words, the visas are available to those who are unsafe within their country for a multitude of reasons, with fear of persecution often a primary factor. Alongside these qualifying factors, a refugee recipient cannot have an offer for protection or resettlement from another country (especially one from which they have citizenship), cannot return to their home country after fleeing, and must have ongoing reasons for refugee status.³²

B. Canada’s New Permanent Residency Pathway(s)

In an intentional turn away from its traditional immigration options, Canada recently implemented a public policy that created two new permanent residency pathways, one specifically for international students.³³ The pathways are only available to nationals of Hong Kong and were created in response to Hong’s

23. Immigration and Refugee Protection Act § 12(2) (Can.).

24. 1 DOING BUSINESS IN CANADA, *supra* note 19.

25. *Id.* at 7-8.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Immigration and Refugee Protection Act S.C. 2001, c 27 § 12(3) (Can.).

32. 1 DOING BUSINESS IN CANADA, *supra* note 19.

33. Mendicino, *supra* note 4.

Kong's current political climate.³⁴ Canada and Hong Kong share some similarities, as both are former British colonies.³⁵ However, the closeness of their relationship is demonstrated by the fact that 300,000 Canadians live in Hong Kong, which is just slightly smaller than the population of Cincinnati, Ohio,³⁶ while there are 1,769,000 people with ethnic Chinese roots living in Canada³⁷ (total Canadian population at time of writing being over 38 million³⁸), larger than the population of Phoenix, Arizona.³⁹ 209,000 Canadian immigrants in 2016 were from Hong Kong.⁴⁰ With many nationals of Hong Kong in Canada and many Canadian nationals in Hong Kong, the events in one country impact the other. The public policy is temporary and is set to expire on August 31, 2026.⁴¹ For the purposes of this Note, only the permanent residency pathway for international students will be examined.

The permanent residency pathway for international students from Hong Kong impliedly requires that Hong Kong nationals have previously received a student visa. The permanent residency pathway becomes available if the international student has (1) graduated from a Canadian post-secondary designated learning institution within the past three years, (2) earned either a degree, diploma, or graduate or post-graduate certificate or credential, and (3) received at least half of their qualifying education while physically in Canada in any field of study.⁴²

C. Reasons for the Implementation of New Permanent Residency Pathways

The Canadian government had to create the two new pathways with specific issues in mind, including the problems with then student-to-permanent residency pathways and the difficulty in pursuing refugee status under the circumstances. Firstly, the government intentionally chose the student-to-resident pathway over the permanent residency pathways already in place in Canada due to perceived inadequacy under the circumstances. Before creating the two new pathways for Hong Kong nationals, "Canadian policy advisors had previously recommended that Hong Kongers seeking refuge in Canada apply through programs like express

34. *Id.*

35. See Canada, Parliament, House of Commons, Standing Comm. on Citizenship and Immigr., *Safe Haven in Canada: Special Immigration and Refugee Measures are Urgently Needed for the People of Hong Kong*, 43rd Parl., 2nd Sess. (June 2021) [hereinafter *Safe Haven*].

36. *The 200 Largest Cities in the United States by Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities> [<https://perma.cc/8WHX-NT7M>].

37. *Safe Haven in Canada: Special Immigration and Refugee Measures are Urgently Needed for the People of Hong Kong*, *supra* note 35.

38. *Canada Population 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/canada-population> [<https://perma.cc/X9LX-SVGQ>].

39. *The 200 Largest Cities in the United States by Population 2022*, *supra* note 36.

40. *Safe Haven in Canada: Special Immigration and Refugee Measures are Urgently Needed for the People of Hong Kong*, *supra* note 35.

41. Mendicino, *supra* note 4.

42. *Id.*

entry or student visas . . . which primarily cater to the well-educated, financially-established [sic] upper middle [sic] class.”⁴³ As seen above, these pathways often require extensive skills or sufficient resources to support oneself through higher education.⁴⁴

Secondly, the refugee pathway seems like a natural choice for a person in the situation of many Hong Kong nationals. However, Canada recognized that a major problem with the refugee pathway is that “applicants must apply from a country outside their country of nationality or habitual residence and not be able to find protection there,” which can be problematic for Hong Kong nationals unable to leave their country.⁴⁵ To help the Committee on Citizenship and Immigration with their decisions, the committee held multiple hearings where experts could come in and share ideas and opinions regarding the situation in Hong Kong. Former Hong Kong legislator Ted Hui Chi-fung shared concerns that Hong Kong would soon implement restrictions on departures, potentially making it impossible for nationals to leave the country and make a refugee claim.⁴⁶ The forewarned “exit ban” has been in place since August 1, 2021.⁴⁷

Another problem with the refugee system was that some nationals who left may be unable to make a refugee claim due to deficient numbers of offices of the United Nations High Commissioner for Refugees.⁴⁸ The deficient number of offices is problematic because they refer refugees to the Canadian immigration authorities for processing of claims.⁴⁹ Asylum claims cause similar issues as they require claims to be made from within Canada, which is impossible if Hong Kong nationals cannot get to Canada.⁵⁰

D. Practical Implementation of the New Permanent Residency Pathways

To make permanent residency a realistic possibility for nationals leaving Hong Kong, Canada had to address some potential issues they would face in immigration. One large problem was the inadmissibility grounds, which supply specific grounds which a non-national of Canada must overcome regardless of their visa eligibility. One such inadmissibility ground filters out those who “hav[e] been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.”⁵¹ For

43. *Safe Haven*, *supra* note 35.

44. *See Study Permit: Who Can Apply*, *supra* note 10; 1 DOING BUSINESS IN CANADA, *supra* note 19.

45. *Safe Haven*, *supra* note 35.

46. *Id.*

47. *Id.* Immigration (Amendment) Ordinance 2021, No. 7, (2021) O.H.K. (H.K.).

48. *Safe Haven*, *supra* note 35.

49. *Id.*

50. *Id.* at 29 (“If non-Canadian Hong Kong residents are not already in Canada, they cannot legitimately fly here. They also cannot make an inland Canadian asylum claim from within Hong Kong.”).

51. Immigration and Refugee Protection Act, S.C. 2001, c 27 § 36(2)(b) (Can.).

those immigrating from Hong Kong, this inadmissibility ground could be problematic because, according to Ms. Avvy Yao-Yao Go, “[m]ore than 600,000 Hong Kongers participated” in “organiz[ing] unofficial election primaries for Hong Kong” which is a violation of the Hong Kong national security law.⁵² The question then becomes whether this violation of Hong Kong law constitutes an “indictable offense”⁵³ under Canadian law.

Dr. Nicole Giles of the Canadian Department of Citizenship and Immigration addressed this concern by stating that “being part of a mass arrest would not automatically lead an immigration officer to approve or refuse an application,” as each is considered on a case-by-case basis, and immigration officers are aware of the situation in Hong Kong.⁵⁴ Specifically, according to Dr. Giles, “a person who was arrested or charged for peacefully demonstrating or being at a protest would not be inadmissible, as those actions are not considered crimes in Canada.”⁵⁵ Despite the typical role inadmissibility grounds may play, Canada has made clear that, in the situation facing Hong Kong nationals, “Canada supports the right to peaceful protest, freedom of expression and freedom of assembly.”⁵⁶ Therefore, inadmissibility grounds for convictions from a mass arrest do not automatically disqualify potential applicants from Hong Kong.

Besides inadmissibility grounds, Canada has also had to prepare for an increase in applications, which, due to the humanitarian grounds, require the quickest-possible processing speeds. For nationals of Hong Kong able to qualify as refugees, their claims are being processed at the “annualized capacity of 50,000 claimants” according to Deputy Chairperson of the Canadian Refugee Protection Division, Roula Eatrides.⁵⁷ Chairperson Eatrides stated that between January 2020 and February 2021, Canada accepted 85% of refugee claims from Hong nationals.⁵⁸ As for asylum, Canada had processed over 600 political asylum applications from Hong Kong nationals between February and May of 2021, according to Radio Free Asia’s Man Hoi Yan.⁵⁹ Despite Hong Kong nationals being rare recipients of political asylum in Canada, as pointed out by Yan, thirty people received this status in 2020, and twenty-one were already approved by

52. Canada, Parliament, House of Commons, Standing Comm. on Citizenship and Immigr., *Evidence*, 43rd Parl., 2nd Sess., No. 13 (21 Jan. 2021) at 11.

53. Immigration and Refugee Protection Act, S.C. 2001, c 27 § 36(2)(b) (Can.).

54. *Evidence*, *supra* note 51.

55. *Id.*

56. *Measures to Support Hong Kong Residents, Including Youth, to Come to Canada*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/11/measures-to-support-hong-kong-residents-including-youth-to-come-to-canada.html> [<https://perma.cc/Z9PC-8RFG>].

57. *Safe Haven*, *supra* note 35.

58. *Id.*

59. Man Hoi Yan, *Hong Kong Exiles Lobby for Political Asylum Seekers in Canada*, RADIO FREE ASIA (May 5, 2021), <https://www.rfa.org/english/news/china/hongkong-canada-05052021082538.html> [<https://perma.cc/27HT-LNNE>].

June of 2021.⁶⁰

With a pathway designed for Hong Kong nationals, Canada likely expected that many of the 89,000 who left Hong Kong in the beginning of 2021 would use their current permanent residency options, especially since it was designated as one of the desired destination countries.⁶¹ 335,000 moved to Canada in 1997 when Hong Kong became part of China, but permanent residency application numbers have remained relatively stable since the permanent residency pathway was announced according to Tom Blackwell.⁶² Immigration lawyer Sergio Karas clarified that “many Hong Kongers already hold Canadian passports and can come any time they want,” preventing them from using the new pathways.⁶³ The high number of Canadian passports by nationals of Hong Kong is because there are approximately 300,000 dual citizens of Hong Kong and Canada, although governmental forces have recently been forcing mainly imprisoned dual citizens to choose one nationality.⁶⁴ Time will tell whether permanent residency applications will increase for Hong Kong nationals as more have the potential to graduate or gain the work experience necessary to apply for permanent residency under one of the two pathways.

E. Initial Response to New Pathways and Effect on the Labor Market

The labor shortage in Canada has intensified its drive to attract more immigrant workers. Canada’s job openings in the third quarter of 2021 “reached an all-time high of 912,600.”⁶⁵ Statistics Canada indicates that the number is 62.1% higher than the same time in 2019.⁶⁶ Statistics show that jobs in the medical field⁶⁷ as well as technical-skilled work are two areas in need of

60. Tom Blackwell, *Thousands of Hong Kongers Apply for New Canadian Immigration Programs Amid Crackdown*, NAT’L POST (Oct. 21, 2021), <https://nationalpost.com/news/world/thousands-of-hong-kongers-apply-for-new-canadian-immigration-programs-amid-crackdown#:~:text=Regularpercent20applicationspercent20frompercent20Hongpercent20Kong,sevenpercent20monthpercent20ofpercent20thispercent20year> [https://perma.cc/ZVE2-Z74M].

61. *See id.*

62. Blackwell, *supra* note 60.

63. *Id.*

64. John Ivison, *300,000 Dual Citizens in Hong Kong Must Choose Between Canada and China After Policy Change*, NAT’L POST (Jan. 27, 2021), <https://nationalpost.com/news/300000-dual-citizens-in-hong-kong-must-choose-between-canada-and-china-after-policy-change> [https://perma.cc/L259-Q3J3] (“Ottawa is growing increasingly concerned about the rights of 300,000 Canadian citizens in Hong Kong, after the territory’s government declared that dual citizens must choose the nationality they wish to maintain.”).

65. *Job Vacancies, Third Quarter 2021*, STAT. CAN. (Dec. 20, 2021), <https://www150.statcan.gc.ca/n1/daily-quotidien/211220/dq211220a-eng.htm> [https://perma.cc/3RCZ-YN7X].

66. *Id.*

67. *The 10 Occupations with the Largest Two-Year Increases in Job Vacancies and Their Average Offered Hourly Wage, Fourth Quarter of 2021*, STAT. CAN. (Mar. 22, 2022), <https://www150.statcan.gc.ca/n1/daily-quotidien/220322/t001a-eng.htm> [https://perma.cc/8RCV-DVQF]

workers,⁶⁸ areas that often require post-secondary education.

Canada has expressed determination to use immigration to facilitate economic recovery.⁶⁹ Its determination has so far paid off with 405,303 new permanent residents, as pointed out by CIC News, the highest it has been since 1913.⁷⁰ Canada has 450,000 international students at the time of writing, a welcome return after the decrease during the pandemic.⁷¹

The efforts to particularly attract Hong Kongers to facilitate recovery has also been highly successful. In 2021, 2,300 Hong Kongers received permanent residency in Canada, a 50% increase compared to the pre-pandemic total of 1,500.⁷² Outside permanent residency, 18,202 Hong Kongers either extended or applied for a work permit or a study permit in 2021 compared to the 4,542 in 2019.⁷³ As of January 2022, 1,300 Hong Kongers had already applied for a work permit.⁷⁴ While only 660 Hong Kongers used the new pathways to facilitate their Canadian immigration in 2021,⁷⁵ the drastic increase in work and study permits suggest the permanent residency numbers of Hong Kongers in Canada will drastically increase in the next few years through usage of the new pathways.⁷⁶ These statistics are highly appealing to Canada since all three groups can provide a source of employees for the Canadian workforce. This is especially helpful

(117.1% increase of nurse vacancies between 2019 and 2021 and an 81.3% increase of vacancies for nurse aids, orderlies, and patient service associates).

68. *Job Vacancies, Third Quarter 2021*, *supra* note 65 (“Vacancies in the 226 occupations [requiring at least one technical skill] combined were up 56.7% to 242,200 in the third quarter of 2021 compared with the same period two years earlier, and they accounted for 25.1% of the total two-year increase in job vacancies.”).

69. Former immigration minister Marco Mendicino stated, “Immigration is essential to getting us through the pandemic, but also to our short-term economic recovery and our long-term economic growth,” and he set goals of increasing permanent residency by hundreds of thousands from 2021 to 2023. Colin Singer, *Top 10 Source Countries of Immigration to Canada in 2021*, CAN. IMMIGR. NEWS (Dec. 28, 2021), <https://www.cimmigrationnews.com/top-10-source-countries-of-immigration-to-canada-in-2021/> [<https://perma.cc/QHA5-XFB3>].

70. Kareem El-Assal & Shelby Thevenot, *How Canada Landed 405,000 New Immigrants in 2021*, CIC NEWS (Feb. 10, 2022, 12:11 PM EST), <https://www.cicnews.com/2022/02/how-canada-landed-405000-new-immigrants-in-2021-0222072.html#gs.0sl60h> [<https://perma.cc/TBX7-MXD2>].

71. Kareem El-Assal, *Canada Welcomed 450,000 New International Students in 2021, an All-Time Record*, CIC NEWS, <https://www.cicnews.com/2022/03/canada-welcomed-450000-new-international-students-in-2021-an-all-time-record-0323762.html#gs.1k9oeh> [<https://perma.cc/8HCK-9VQU>] (Mar. 27, 2022, 8:06 PM EDT).

72. Kareem El-Assal, *Hong Kong Immigration to Canada is Booming*, CIC NEWS (Mar. 16, 2022, 8:59 PM EDT), <https://www.cicnews.com/2022/03/hong-kong-immigration-to-canada-is-booming-0323362.html#gs.0lt6rm> [<https://perma.cc/FS6X-QB7B>].

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

since these “talented applicants”⁷⁷ can fill some of the needed jobs requiring post-secondary education.

F. American Immigration System

1. Permanent Residency Pathways & Problems

The American immigration system generally has three permanent residency pathways: family-based pathways, employment-based pathways, and diversity. Instead of setting target numbers like Canada, the U.S. sets quotas for the number of visas issued under these three categories.⁷⁸ Asylees and refugees are also able to seek permanent residency after a certain amount of time.⁷⁹

Turning first to family-based permanent residency, the number of family visas available each year is approximately 480,000.⁸⁰ There are four family visa categories subject to quotas.⁸¹ The “immediate relative” pathway is the best option of the family immigration pathways because spouses, parents, and “children” of U.S. citizens are not subject to the quota system.⁸²

Moving on to employment visas, these visas are subject to an annual quota of approximately 140,000.⁸³ For relevance to this Note, only the first three employment visas are important. The first employment visa is for immigrants

77. Shelby Thevenot, *Mendicino Announces 2 New Immigration Programs for Hongkongers*, CIC NEWS (June 8, 2021, 9:53 AM EDT), <https://www.cicnews.com/2021/06/mendicino-announces-2-new-immigration-programs-for-hongkongers-0618318.html#gs.lg4p5s> [<https://perma.cc/UU86-CGSX>] (“Our Hong Kong immigration pathway is a historic initiative, intended to attract talented applicants who will drive our economy forward. Skilled Hong Kongers will have a unique opportunity to both develop their careers and help accelerate our recovery.”).

78. LEGOMSKY & THRONSON, *IMMIGRATION AND REFUGEE LAW AND POLICY* 328-29 (7th ed. 2019) (“[T]he INA limits the number who may come in during any one fiscal year.”) (“Each of these three broad programs has its own worldwide ceiling.”).

79. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42).

80. This number can fluctuate based on the number of unused employment visas from the previous year and the number of immediate relatives and permanent residents gained in the previous year. *Id.* § 1151(c)(1)(A).

81. The F1 category applies to unmarried sons and daughters of United States citizens and is limited to approximately 23,400 visas per year. *Id.* § 1153(a)(1). The F2 category is further divided into F2A and F2B and has approximately 114,200 visas per year; F2A exists for spouses and children of lawful permanent residents, and the F2B exists for unmarried sons and daughters of lawful permanent residents. *Id.* § 1153(a)(2)(A)-(B). The F3 visa is for married sons and daughters of US citizens and is subject to a quota of approximately 23,400. *Id.* § 1153(a)(3). The F4 visa is for brothers and sisters of a United States citizen over the age of 21 and is subject to a quota of approximately 65,000. *Id.* § 1153(a)(4).

82. § 1151(b)(2)(A)(i).

83. *Employment-Based Immigrant Visas*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html> [<https://perma.cc/Y5U9-8AJL>].

with “extraordinary ability in the sciences, arts, education, business or athletics,” “outstanding professors and researchers,” and some “multinational executives and managers” get 28.6% of the 140,000 employment visas.⁸⁴ The second-preference category is for immigrants “members of the professions holding advanced degrees” and “[noncitizens] of exceptional ability” get 28.6% of employment visas.⁸⁵ The third preference category, which also gets 28.6% of visas,⁸⁶ includes “skilled workers,” “professionals,” and other people whose work is needed within the U.S. with the “other workers” category limited to 10%.

The last of the three prominent permanent residency pathways is the diversity visa. The diversity visa employs a complex formula in order to ensure that immigrants from low-admission countries are selected, and therefore increases the diversity of incoming immigrants.⁸⁷ The diversity visa is not pertinent to the discussion of this Note. An additional, but indirect, pathway to permanent residency is through refugee and asylum visas. Refugee and asylum visas are two sides of the same coin, both using the same standard that the applicant must have a “well-founded fear of persecution based on race, religion, membership in a particular social group, political opinion or national origin”⁸⁸ but differ in where the applicant must be located.⁸⁹

While the current immigration pathways offer a multitude of options for lawful admission, the design of the immigration system can create serious barriers for those hoping to make the United States their permanent home. Firstly, immigrant-hopefuls are often restricted by the quota system, which as discussed previously, only allows a set number of immigrants in each category per year.⁹⁰ While the overall quota limits the number of immigrants per year, even more concerning for applicants is the per-country limitation, which limits each country

84. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1).

85. *Id.* § 1153(b)(2).

86. *Id.* § 1153(b)(3)(A).

87. *Id.* § 1153(c)(1).

88. *Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Oct. 7, 2021), <https://www.americanimmigrationcouncil.org/research/why-don%E2%80%99t-they-just-get-line> [<https://perma.cc/34Y6-BYHY>]; § 1101(a)(42).

89. Refugees apply from outside the United States while asylees apply from inside the United States. Both can receive lawful permanent residency after one year. *See Refugees*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> [<https://perma.cc/JU32-9S9Y>] (Sept. 23, 2021) (“ . . . located outside of the United States”); *Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, *supra* note 88; *Green Card for Refugees*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-refugees> [<https://perma.cc/9ASY-UXM5>] (June 26, 2017); *Green Card for Asylees*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-asylees> [<https://perma.cc/BLB9-3XWF>] (July 10, 2017).

90. LEGOMSKY & THRONSON, *supra* note 78, at 328-29 (“[T]he INA limits the number who may come in during any one fiscal year.”) (“Each of these three broad programs has its own worldwide ceiling.”).

to 7% of the overall visas per category.⁹¹ The combination of overall quotas, per country limitations, and applicant numbers contribute heavily to backlogs in certain countries. For example, the priority date of Mexican nationals who applied for the F2B visa on September 1, 2000, is active as of March 2022, meaning that these applicants waited over twenty-one years for the administrative processing of their visas to begin.⁹² The visa bulletin also supplies a somewhat hazy crystal ball for predicting the wait time of current F3 applicants, allowing Mexican nationals to estimate twenty-four years based on the priority date at the time of writing.⁹³

Another issue amongst applicants is aging-out, which is specifically concerning for applicants who apply while they still qualify as a “child” under immigration law.⁹⁴ Since immigration law has a very specific definition of “child,” a backlogged F2A visa may turn the applicant into a F2B applicant once they reach the age of twenty-one or marry.⁹⁵ While the formerly “child” applicant will maintain their priority date, the applicant must now wait for that priority date to become active in the F2B category. To put this in perspective, the F2A category for Mexican nationals is current, and the F2B category has an approximate twenty-one-year wait, meaning that a “child” applicant who ages out of the F2A goes from automatic administrative processing to a two-decade wait time.⁹⁶

2. The F-1 Student Visa

Student visas, as opposed to permanent residency options, are considered nonimmigrant visas. While there are multiple student visas including the J-1,⁹⁷ M-1,⁹⁸ and F-1,⁹⁹ this Note will focus primarily on the F-1 student visa. Commonly used for international students in higher education, the F-1 student visa can also be used for international students in high school, private elementary schools, seminary, conservatory, and language training programs.¹⁰⁰ Since the visa is a nonimmigrant visa, it requires that the applicant “hav[e] residence in a foreign country which he has **no intention of abandoning**” and be a “bona fide student qualified to pursue a full course of study . . . who seeks to enter the United States

91. See LEGOMSKY & THRONSON, *supra* note 78, at 330.

92. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., VISA BULLETIN FOR MARCH 2022 (Mar. 2022), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-march-2022.html>.

93. *Id.*

94. See Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1).

95. § 1101(b)(1).

96. See *generally* Visa Bulletin for March 2022, *supra* note 92.

97. 8 U.S.C. § 1101(a)(15)(J).

98. *Id.* § 1101(a)(15)(M)(i).

99. *Id.* § 1101(a)(15)(F)(i).

100. *Student Visa*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html> [<https://perma.cc/B4DB-4QKC>].

temporarily and solely for the purpose of pursuing such a course of study consistent” with the aforementioned criteria.¹⁰¹

With this in mind, F-1 visa recipients who decide to stay in the U.S. after arrival must look to immigrant-visa alternatives to legally remain. Optional Practical Training is a common way international students can extend their stay, as it allows them to work in a job related to their degree in the U.S. for one year after the conclusion of their education, with a possible twenty-four-month extension for STEM students.¹⁰² Afterwards, or instead of the Optional Practical Training, international students may look to the H-1B visa—a nonimmigrant work visa that allows for dual intent.¹⁰³ As Stephen Legomsky and David Thronson point out, dual intent gives students the opportunity to work in the U.S. temporarily while they work to secure a permanent residency visa.¹⁰⁴

*G. The Loss of International Students and Other Issues
Currently Striking the U.S.*

International students make many contributions to the U.S. such as diversifying the population, promoting international camaraderie, and economic benefits; while all are significant contributions, the economic benefits will be the primary focus of this Note. From 2019 to 2020, there were approximately 1,100,000 international students in the U.S.¹⁰⁵ The top areas of study for international students were (1) engineering, (2) math and computer science, and (3) business and management.¹⁰⁶ As of 2009, the U.S. was estimated to have the second-highest tuition in the world,¹⁰⁷ and international students commonly pay full tuition, as opposed to in-state tuition.¹⁰⁸ To fund their education, Emma Israel and Jenna Batalova indicate that “60 percent of international students received most of their education funding from sources outside the United States,” while

101. § 1101 (a)(15)(F)(i) (emphasis added).

102. *Optional Practical Training (OPT) for F-1 Students*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students> [https://perma.cc/M5MX-TEKZ] (Nov. 12, 2021).

103. LEGOMSKY & THRONSON, *supra* note 78, at 457 (“[E]ntering and beginning work on an H-1B visa is now a standard, and perfectly legal, way to begin the process of acquiring LPR status.”); Meng Lu, *Article: Not Part of the Family: U.S. Immigration Policy and Foreign Students*, 34 T. MARSHALL L. REV. 343 (2009).

104. LEGOMSKY & THRONSON, *supra* note 78, at 457 (“[E]ntering and beginning work on an H-1B visa is now a standard, and perfectly legal, way to begin the process of acquiring LPR status.”). Lu, *supra* note 103.

105. Emma Israel & Jeanne Batalova, *International Students in the United States*, MIGRATION POL’Y INST. (Jan. 14, 2021), <https://www.migrationpolicy.org/article/international-students-united-states-2020> [https://perma.cc/DJC7-793P].

106. *Id.*

107. Lu, *supra* note 103.

108. Sean Ashoff, *F-1 Student Visas and the Student Debt Crisis*, 39 J.L. & COM. 95 (2020).

the other “40 percent financed their education primarily through current employment, U.S. university aid, or other sources.”¹⁰⁹

The already-present enrollment decline intensified during the COVID-19 pandemic, creating a significant economic impact on the U.S. In a letter to Congress, the American Council on Education predicted early in the pandemic that enrollment of international students would decrease by 25%, which—when combined with decreased enrollment of American students—would “result[] in a revenue loss for institutions of \$23 billion.”¹¹⁰ The decreased enrollment actualized in a 17.86 percent decrease of enrollment for F-1 and M-1 international student visa holders combined in 2020.¹¹¹ Moreover, the Optional Training Program (OPT) saw a nearly 12% decrease between 2019 and 2020.¹¹² Even after graduating, “[i]nternational students contributed nearly \$39 billion to the U.S. economy and created or supported 416,000 jobs.”¹¹³ To put their monetary contribution into perspective, international students contributed approximately \$118 per person in the U.S..¹¹⁴

Higher education has also experienced turbulence in areas outside of international students. Besides the direct budgetary impact facing universities,¹¹⁵ the pandemic may have worsened other problems concerning institutions, like the population decrease. The idea of a decreased population is extremely concerning to American higher education because, according to Mark Vasselkiv, “[s]tarting in 2025, incoming classes nationwide are going to get smaller and smaller . . . which could be a rude awakening for smaller colleges already struggling with finances.”¹¹⁶ This concern is realistic according to experts, as the decline in births has been active since 2014,¹¹⁷ and experts predict that each cohort of women since

109. Israel & Batalova, *supra* note 105.

110. *Higher Education Community Requests \$46.6 Billion for Students and Institutions in Fourth Supplemental Package, Proposes Tax Changes*, AM. COUNCIL ON EDUC. (Apr. 10, 2020), [https://www.acenet.edu/News-Room/Pages/Higher-Education-Community-Requests-\\$47-Billion-for-Students-and-Institutions-Proposes-Tax-Changes.aspx](https://www.acenet.edu/News-Room/Pages/Higher-Education-Community-Requests-$47-Billion-for-Students-and-Institutions-Proposes-Tax-Changes.aspx) [<https://perma.cc/WFU4-T77C>].

111. U.S. IMMIGR. AND CUSTOMS ENF'T, *SEVIS BY THE NUMBERS 2* (2020), <https://www.ice.gov/doclib/sevis/pdf/sevisBTN2020.pdf> [<https://perma.cc/JV9Y-PCB5>].

112. *Id.*

113. Israel & Batalova, *supra* note 105.

114. *Id.* (The monetary contributions of international students were determined by taking the amount of contributions divided by the approximate population of the United States).

115. See Michael T. Nietzel, *Pandemic's Impact on Higher Education Grows Larger; Now Estimated to Exceed \$120 Billion*, FORBES (Sept. 29, 2020, 8:59 AM EDT), <https://www.forbes.com/sites/michaelt Nietzel/2020/09/29/pandemics-impact-on-higher-education-grows-larger-now-estimated-to-exceed-120-billion/?sh=40ce0fdd22bd> [<https://perma.cc/874Z-A48S>].

116. Johanna Alonso, *GBC Economic Outlook Highlights: Worker Shortage a 'Defining Issue'*, THE DAILY REC. (Oct. 22, 2021), <https://thedailyrecord.com/2021/10/22/gbc-economic-outlook-highlights-worker-shortage-a-defining-issue/> [<https://perma.cc/YST6-QU2A>].

117. Joyce A. Martin, Bradley E. Hamilton, Michelle J.K. Osterman, & Anne K. Driscoll, *Births: Final Data for 2019*, NAT'L VITAL STATS. REPS., Mar. 23, 2021, at 1, 3, <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf> [<https://perma.cc/93MY-FMBH>].

1985 is “predicted to fall short of replacement fertility.”¹¹⁸ The replacement fertility rate prediction is bearing true because, as pointed out by Janet Adamy and Anthony Debarros, “[i]n half of all states [in 2020], more people died than were born.”¹¹⁹ Institutions of higher education that face a decreased student pool will be forced to compete more vigorously in order to survive.

Moreover, the crisis in higher education compounds with labor shortage problems across the U.S. The U.S. Bureau of Labor Statistics reported that the job openings were at a “series high of 11.5 million,” the highest it has been since December 2000.¹²⁰ There were 6.7 million hires, but 6.3 million terminations of employment relationships.¹²¹ Out of those 6.3 million, 4.5 million were voluntary quits by the employees.¹²² Although there may be a net increase, the U.S. is still in desperate need of employment. CNBC predicts that the most in-demand jobs for the next five years will be largely in the medical sector, some requiring certification or a degree to be eligible.¹²³

Besides the academic and economic crises, the U.S. also faces an ongoing immigration crisis, colloquially referred to as the southern “border crisis.” Undocumented immigration is not a new problem.¹²⁴ According to experts, many undocumented immigrants currently in the U.S. have been present for more than ten years and either overstayed their visa or crossed the border unauthorized.¹²⁵ Of the latter group, the majority of persons encountered originate from Mexico, El Salvador, Guatemala, and Honduras.¹²⁶ Out of those encountered at the border in July 2021, John Gramlich indicates that 53 percent were single adults, trailed

118. Melissa S. Kearney & Phillip Levine, *Will Births in the US Rebound? Probably Not.*, BROOKINGS (May 24, 2021), <https://www.brookings.edu/blog/up-front/2021/05/24/will-births-in-the-us-rebound-probably-not/> [<https://perma.cc/G2XA-375A>].

119. Janet Adamy & Anthony Debarros, *U.S. Population Growth, an Economic Driver, Grinds to a Halt*, WALL ST. J. (July 25, 2021, 12:49 PM ET), <https://www.wsj.com/articles/u-s-population-growth-slows-birth-rate-decline-economic-risk-11627231536> [<https://perma.cc/8KB5-7DW4>].

120. *Job Openings and Labor Turnover Summary*, U.S. BUREAU OF LAB. STAT. (May 3, 2022, 10:00 AM), <https://www.bls.gov/news.release/jolts.nr0.htm> [<https://perma.cc/L5JY-AL36>].

121. *Id.*

122. *Id.*

123. Gili Malinsky, *These 15 Jobs Will be in High Demand over the Next 5 Years—Some with Salaries Topping \$80,000*, CNBC NEWS (Jul. 21, 2020, 11:24 AM EDT), <https://www.cnbc.com/2020/07/20/jobs-growing-in-high-demand-over-next-5-years-some-pay-more-than-80000-in-salary.html> [<https://perma.cc/UGY8-LB88>].

124. See Mark Hugo Lopez, Jeffrey S. Passel, & D’Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/> [<https://perma.cc/BAT8-QEPA>].

125. *Id.*

126. John Gramlich, *Migrant Encounters at U.S.-Mexico Border Are at a 21-year High*, PEW RSCH. CTR. (Aug. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/08/13/migrant-encounters-at-u-s-mexico-border-are-at-a-21-year-high/> [<https://perma.cc/G9JF-RTK7>].

by families at 38%, and unaccompanied minors at 9 percent.¹²⁷

The motivation of undocumented immigrants cannot be generalized into a specific reason, as the group is made up of people from various political regimes and socio-economic backgrounds. However, one commonality amongst many undocumented immigrants is their difficulty in using the current immigration system.¹²⁸ Firstly, poor economic conditions in the country of origin alone do not satisfy the requirements for either refugee or asylee status according to the American Immigration Council.¹²⁹ Statistics from the Department of Homeland Security reflect that in 2019, most refugees were from the Democratic Republic of the Congo, Burma, and Ukraine, while most asylees came from China, Venezuela, and El Salvador.¹³⁰ Of those countries listed, only El Salvador is prominently involved in the border crisis.¹³¹ Secondly, due to the high denial of asylum claims,¹³² immigrants may forego raising the asylum claim altogether for fear of removal if unsuccessful. TRAC reports show that asylum seekers from Honduras, Mexico, El Salvador, and Guatemala had high denial rates, with Honduras topping the charts at an 87.3 percent denial rate.¹³³ Thirdly, the long wait-times for some countries in some permanent residency categories may prevent immigrants from following proper protocol.¹³⁴ Moreover, some undocumented immigrants may not have the family sponsor required for family-based pathways, may have low odds of being selected for a diversity visa, and may not have the adequate education or experience needed for many employment visas.

The educational status of undocumented immigrants varies considerably. According to estimates by Steven Camarota, almost half of undocumented immigrants have less than high school education, approximately 27% have only high school education, 10 percent have some college, and 15 percent have a

127. *Id.*

128. See *Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, *supra* note 88.

129. *Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, *supra* note 88.

130. Ryan Baugh, *Refugees and Asylees: 2019*, ANN. FLOW REP. (DEP'T OF HOMELAND SEC. OFF. IMMIGR. STAT.), Sept. 2020, at 1, https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf [<https://perma.cc/3AGP-PXTH>].

131. See generally Gramlich, *supra* note 126.

132. *Asylum Grant Rates Climb Under Biden*, TRAC REPS. (Nov. 10, 2021), <https://trac.syr.edu/immigration/reports/667/> [<https://perma.cc/4XXB-KVMR>] (“While asylum denial rates had grown ever higher during the Trump years to a peak of 71 percent in FY 2020, they fell to 63 percent in FY 2021.”).

133. *Asylum Denial Rates Continue to Climb*, TRAC REPS. (Oct. 28, 2020), <https://trac.syr.edu/immigration/reports/630/> [<https://perma.cc/MK3L-EQTB>].

134. See generally *Visa Bulletin for November 2021*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS. (Sept. 7, 2021), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-november-2021.html> [<https://perma.cc/3NA4-D2FP>].

bachelor's degree or higher.¹³⁵ Education strongly influences economic impact, as 74 percent of undocumented immigrants with a high school education or lower create a net fiscal drain on the U.S. economy.¹³⁶

Notwithstanding the individual motivation for unauthorized residence within the U.S., undocumented immigrants who hope to gain legal status face serious difficulties. Adjustment of status requires that one has previously gained lawful admission into the U.S..¹³⁷ Those who cross the border unauthorized lack the lawful admission requirement. Therefore, generally speaking, such a noncitizen would be required to leave the U.S. and lawfully re-enter. Re-entry is problematic as immigration law prevents those who have been out of status for 180 days to one year from re-entering the U.S..¹³⁸ For those out of status for a year or more, the noncitizen may not re-enter the U.S. for 10 years.¹³⁹ While a waiver does exist,¹⁴⁰ it may not always be successful and is based on highly individual circumstances.¹⁴¹

I. ANALYSIS

A. Reliability, Intent, and the International Student Visa: Canadian and American Viewed Compared

The design of the U.S. immigration system discourages international students and undocumented immigrants from pursuing legal permanent residency in the U.S. while Canada's immigration system encourages international students from Hong Kong to remain in Canada long-term. In the U.S. from 1971 to 1991, George Borjas shows that only 13 percent of international students were able to obtain permanent residency after graduation.¹⁴² While not every international student desires to remain in the U.S. permanently, it is unrealistic to assume that all students who have enough interest in the U.S. to make it their place of study desire to leave. Rachel Banks from the Association of International Educators

135. Steven A. Camarota, *The Cost of a Border Wall vs. The Cost of Illegal Immigration*, *CTR. FOR IMMIGR. STUD.* 2 (Feb. 2017), <https://truthnewsnet.org/wp-content/uploads/2018/07/camarota-wall-costs.pdf> [<https://perma.cc/2T2V-5T3R>].

136. *Id.*

137. *See* 8 U.S.C. § 1255(a).

138. 8 U.S.C. § 1182(a)(9)(B)(i)(I).

139. *Id.* § 1182(a)(9)(B)(i)(II).

140. *I-601A, Application for Provisional Unlawful Presence Waiver*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/i-601a> [<https://perma.cc/SE3Y-H7HR>] (May 9, 2022).

141. The officer making the decision on an I-601A is looking for "extreme hardship." *See Chapter 5 - Extreme Hardship Considerations and Factors*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-5> [<https://perma.cc/W5EV-JJZZ>] (May 6, 2022).

142. *See* George J. Borjas, *An Evaluation of the Foreign Student Program*, 4 (Harv. U. John F. Kennedy Sch. of Gov., Working Paper No. 02-026, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=320248 [<https://perma.cc/GG7S-C4GM>].

(NAFSA) shows that the U.S. is losing international students to countries like China, the United Kingdom, and Canada whose recruitment efforts have increased.¹⁴³

Also, international students have concerns about the U.S. including the difficulty in obtaining visas to the U.S., their fear of safety as gun violence in the U.S. is broadcast internationally, and the politics of the Trump administration, according to Evelina Nedlund,¹⁴⁴ some of which have only recently changed and some of which still exist.

For example, Title 42, invoked under the Trump administration as a response to the pandemic, was an emergency health measure that prevented asylum seekers from entering the southern border of the U.S. to claim asylum and resulted in many expulsions from the U.S..¹⁴⁵ The measure remained in place until May 23, 2022,¹⁴⁶ despite public health expert agreement that Title 42 did little to protect the U.S. from the ongoing health crisis.¹⁴⁷ Additionally, Jasmine Aguilera points out that the Migrant Protection Program, a Trump administration policy that required immigrants at the southern border to remain in Mexico while awaiting immigration status updates, remains in place at the time of writing despite the Biden Administration's efforts to change or repeal it.¹⁴⁸

143. Evelina Nedlund, *The US Economy is Losing Billions of Dollars Because Foreign Students Aren't Enrolling*, CNN (Nov. 19, 2019, 9:47 AM EST), <https://www.cnn.com/2019/11/19/business/international-students-decline/index.html> [<https://perma.cc/KK7B-BH8P>].

144. *Id.* See Jasmine Aguilera, *Why the Biden Administration is Relaunching Trump's Controversial 'Remain in Mexico' Immigration Policy*, TIME (Dec. 6, 2021, 11:32 AM EST), <https://time.com/6125562/joe-biden-remain-in-mexico-donald-trump/> [<https://perma.cc/N3GM-6BUJ>] (“Migrant advocates and NGOs, who spent many years helping migrants enrolled in [Migrant Protection Program] say they are skeptical that Biden’s iteration of the program will be meaningfully different than Trump’s.”).

145. *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/M84Y-V9C9>] (“The Biden administration has continued using [Title 42], and over 1.2 million expulsions have been carried out since the pandemic began, even though ports of entry remain open with nearly 11 million people crossing the southern border every month and thousands flying into the US every day.”). See also Aguilera, *supra* note 144.

146. *CDC Public Health Determination and Termination of Title 42 Order*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Apr. 1, 2022), <https://www.cdc.gov/media/releases/2022/s0401-title-42.html#:~:text=In%20consultation%20with%20the%20Department, resumption%20of%20regular%20migration%20under> [<https://perma.cc/6N5G-6CZZ>].

147. *A Guide to Title 42 Expulsions at the Border*, *supra* note 145 at 1. (“CDC scientists expressed opposition to this invocation of Title 42. . .”) (“Ever since then, public health experts outside the CDC have continued to agree, arguing that while international borders remain largely open to other travelers, there is no need to turn away refugees and expel them to their home countries or Mexico.”).

148. Aguilera, *supra* note 144 (“Migrant advocates and NGOs, who spent many years helping migrants enrolled in [Migrant Protection Program] say they are skeptical that Biden’s iteration of the program will be meaningfully different than Trump’s.”).

Canada, in contrast, had a slightly higher stay rate of international students becoming permanent residents at 19 percent between 1990 and 2014.¹⁴⁹ This number may increase, as 60 percent of international students included in a Canadian study indicated an interest in becoming permanent residents in 2018,¹⁵⁰ and Canada has been increasing efforts to attract permanent residents from its international students since the early 2000s.¹⁵¹ Also, unlike the U.S. where reputation may impede students from coming, international students are attracted to “the reputation of Canadian education, Canada’s offering of a tolerant and non-discriminatory society, and Canada’s reputation as a safe country.”¹⁵² In order to gain some of its international students back, the U.S. must identify reasons for the “difficulty in obtaining visas to the United States”¹⁵³ and other immigration issues.

The international student visa is designed as a nonimmigrant visa in Canada and the U.S. Both countries share a desire to prevent visa misuse, but Canada’s intent provision realistically recognizes that international students may want to stay in Canada following graduation. An applicant in Canada must show to the officer that “they will leave Canada by the end of the period authorized by their stay.”¹⁵⁴ An applicant in the U.S. must instead show that they have “residence in a foreign country which he has no intention of abandoning” and “enter the United States temporarily and solely for the purpose of pursuing such a course of study.”¹⁵⁵ The Canadian standard is much friendlier and more practical in recognizing the hopes of the foreign applicant.

To demonstrate the difference, an international applicant may share her dream of living permanently in Canada with the immigration officer so long as she recognizes that her student visa is temporary, while an international applicant for studies in the U.S. must develop her dream to stay lifelong in the U.S. while she studies there to avoid fraudulent misrepresentation. In other words, the intent provision for international students under American law assumes that an international student will misuse their visa if they want to stay permanently while the Canadian intent provision believes that an international student can realistically hope to settle in Canada and simultaneously acknowledge legal constraints.

The implementation of Canada’s new public policy encouraging Hong Kong nationals to remain in the U.S. upon graduation proves Canada’s recognition of the value in keeping international students after graduation. The policy also aids nationals of Hong Kong in planning for the future, knowing that they can gain

149. Yuqian Lu & Feng Hou, *International Students Who Become Permanent Residents in Canada*, STAT. CAN. (Dec. 10, 2015), <https://www150.statcan.gc.ca/n1/pub/75-006-x/2015001/article/14299-eng.htm> [<https://perma.cc/G5D3-KUZ4>].

150. Ashoff, *supra* note 108, at 104.

151. Lu & Hou, *supra* note 149.

152. Ashoff, *supra* note 108, at 104.

153. Nedlund, *supra* note 143.

154. Immigration and Refugee Protection Act §22(2), (S.C. 2001, c. 27) (Can.).

155. 8 U.S.C. §1101 (a)(15)(F)(i).

permanent residency in Canada after graduation by following the requirements laid out in the public policy. This heightened security in permanent residency acquisition may draw more international students to Canada who are wishing to make the location of their education their permanent home.

B. International Students and Employment-Based Preference Visas

Unlike Hong Kong nationals who can set a plan from the beginning of their education in Canada to secure permanent residency, international students in the U.S. must employ a multi-step plan for the possibility to obtain permanent residency after graduation. The current, best path for international students is the F-1 visa, to Optional Practical Training, to the H-1B temporary employment visa, to an employment permanent residency pathway.¹⁵⁶ Unfortunately for international students, problems can, and often do, arise at multiple points along the way.

Optional Practical Training is a relatively straightforward way for international students to extend their stay in the U.S. because it is an extension of the F-1 visa they currently have.¹⁵⁷ However, the permanent residency plan can fall apart quickly after Optional Practical Training. There are approximately 200,000 applicants every year for the H-1B visa,¹⁵⁸ which “barely meets the needs of foreign students,” according to Meng Lu, since only 65,000 applications are accepted.¹⁵⁹ The great discrepancy between supply and demand means that many student applicants may be forced to wait until the following year when they can apply again, giving them the alternatives of finding another way to stay in the U.S. or returning home in the meantime.

Students may also be eligible for the cap-gap extension.¹⁶⁰ Cap-gap extensions allow for the potential employer of an F-1 student visa holder to apply for an H-1B visa on March 9th with a proposed start date of October 1st of the same year.¹⁶¹ Students whose H-1B visas are accepted can legally remain in the U.S. between the expiration of their F-1 visa between April and September of that year and the October 1st commencement of their H-1B visa if approved for the cap-gap extension.¹⁶² The cap gap extension’s helpfulness is limited in scope to only those who are able to secure an H-1B visa, which as previously noted, is insubstantial.

156. See generally LEGOMSKY & THRONSON, *supra* note 78, at 457 (“[E]ntering and beginning work on an H-1B visa is now a standard, and perfectly legal, way to begin the process of acquiring LPR status.”). Lu, *supra* note 103.

157. *Optional Practical Training (OPT) for F-1 Students*, *supra* note 102.

158. Ashoff, *supra* note 108.

159. Lu, *supra* note 103.

160. 8 C.F.R. § 214.2 (f)(5)(vi)(A) (2021).

161. *F-1 Cap Gap Extension*, DEP’T OF HOMELAND SEC. (Mar. 29, 2021), <https://studyinthestates.dhs.gov/sevis-help-hub/student-records/fm-status/f-1-cap-gap-extension> [<https://perma.cc/JEH2-RNR4>]; see 8 C.F.R. § 214.2 (f)(5)(vi)(A) (2021).

162. *Id.*

Students who can secure the H-1B visa must then clear the second hurdle of the permanent residency visa. The second-preference employment visa suits people who are “members of professions holding advanced degrees,” which requires a minimum of a bachelor’s degree and five years’ experience,¹⁶³ and “[noncitizens] of exceptional ability”, which must be in arts, science or business¹⁶⁴, and “significantly above that ordinarily encountered.”¹⁶⁵ The third-preference category includes visas for “professionals”¹⁶⁶, which includes those with the type of bachelor’s degree typically required for that type of employment.¹⁶⁷ The H-1B visa similarly requires that the applicant have a bachelor’s degree or its equivalent typically required for the line of work,¹⁶⁸ meaning that H-1B applicants likely satisfy the educational component of the second-preference employment visa. Additionally, the combined time from Optional Practical Training and H-1B visa may satisfy the five-year experience required for “members of professions holding advanced degrees” in the second-preference employment category.

For example, an international student who studied computer information science would be eligible for three years of work experience under the Optional Practical Training program.¹⁶⁹ When combined with the three-year H-1B visa, the international student gains a total of six years of experience, theoretically enough to satisfy the five-year requirement for the second-preference employment visa. A somewhat simple scenario becomes more complex when a student has studied a non-STEM subject like humanities. A humanities student must rely upon their ability to renew the H-1B visa for the maximum six years since they are only eligible for one year of Optional Practical Training following graduation.¹⁷⁰

Besides the qualifications provided by each employment-preference pathway individually, applicants for the second and third preference categories must also obtain a labor certification. Inherent in the labor certification is an employer’s

163. *Employment Based-Immigration: Second Preference EB-2*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> [https://perma.cc/9KL3-DM3E] (Apr. 20, 2020).

164. 8 U.S.C. § 1153(b)(2)(A).

165. 8 C.F.R. § 204.5(k)(2) (2021).

166. § 1153(b)(3)(A)(ii).

167. *Employment-Based Immigration: Third Preference EB-3*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3> [https://perma.cc/Q376-CRM7] (last updated Dec. 2, 2020).

168. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations> [https://perma.cc/7ZNB-5Q26] (July 21, 2022).

169. See generally *Optional Practical Training (OPT) for F-1 Students*, *supra* note 102.

170. See generally *id.* See also *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, *supra* note 168.

attestation that “there are not sufficient workers who are able, willing, qualified. . .and available at the time of the application for a visa and admission to the United States.”¹⁷¹ The labor certification requires employers to focus first on candidates already located within the U.S. and then expand their view outwards when unsuccessful. The structure of the labor certification requirement creates competition between American citizens and international students applying for work rather than viewing international students as future members of American society, and ideally, future citizens.

C. International Students and Family-Based Preference Visas

Despite the logical outgrowth from academia to the workforce, most international students do not obtain permanent residency through an employment visa.¹⁷² Out of the permanent residency visas awarded to international students, “employment-related visas account for only 28 percent of the permanent residence visas awarded to foreign students.”¹⁷³ Perhaps surprisingly, international students are more likely to obtain a family permanent residency visa than an employment permanent residency visa. More than half of international students who obtain permanent residency do so through marriage.¹⁷⁴ Another ten percent of international students are able to obtain permanent residency through an eligible family-sponsor for permanent residency.¹⁷⁵ Therefore, students gain permanent residency not based upon the valuable skills and knowledge developed in American higher education but rather based on familial relationships separate from their academic achievement.¹⁷⁶

A large concern with international student reliance on family-based permanent residency is the severe backlog for many countries. An international student applying as a spouse or unmarried child of a U.S. citizen qualifies as an “immediate relative” under immigration law and can bypass both quotas and backlogs. However, international students applying under any other category are subject to quotas and potential backlogs, depending on their country of origin. For example, as of the date this was written, citizens of China, India, Mexico, and The Philippines were subject to backlogs in every family preference-based category except the F-2A visa, for spouses and unmarried sons and daughters of lawful permanent residents (LPRs).¹⁷⁷ The most recent priority date in the F-2B for citizens of Mexico is September 1, 2000, creating a 21-year wait period for an unmarried son or daughter of an LPR over age 21.¹⁷⁸ A vicious cycle is created

171. 8 U.S.C. §1182(5)(A)(i).

172. *See generally* Borjas, *supra* note 142.

173. Borjas, *supra* note 142.

174. *Id.*

175. *Id.*

176. *See id.* (“In short, almost two-thirds of all permanent resident visas granted to foreign students have nothing to do with ‘exceptional skills’ or ‘high-job demand.’”).

177. *See Visa Bulletin for March 2022*, *supra* note 92.

178. *Id.*

when international students rely on the family-based immigration pathways: Backlogs hinder the quickness in which international students can contribute to American society as permanent residents, while international students' reliance on these pathways contributes to the backlog.

D. International Students, Undocumented Immigrants, and the Refugee or Asylum Visas

Refugee and asylum visas are not a reliable source of permanent residency for most international students nor many undocumented immigrants. Applicants for either category must satisfy a “well-founded fear of persecution based on race, religion, membership in a particular social group, political opinion or national origin” standard.¹⁷⁹ This standard can be difficult to meet, and many may find it unsuccessful. Asylum comes in two forms: affirmative, meaning that the applicant applies within one year of entering the U.S. of their own volition, or defensive, meaning the applicant raises it during removal proceedings. In 2019, there were 4,588 Mexican applicants for affirmative asylum and 30,357 for defensive asylum, creating a cumulative total of 34,945 asylum applicants.¹⁸⁰ Of the cumulative 34,945, only 1,593 applicants were granted asylum¹⁸¹ for an approximate 4.6 percent success rate. Since refugees use the same standard, there is unlikely to be success applying from Mexico. While an inaccurate depiction of the scenario for all asylum applicants, these statistics demonstrate the reality facing international students or undocumented immigrants from Mexico.

E. Undocumented Immigrants and Inadmissibility

Several barriers stand in the way of undocumented immigrants wishing to either gain legal status or adjust status. The inadmissibility grounds create significant problems difficult for many to overcome whether one is applying for a new visa or adjusting status. Due to the vast number of inadmissibility grounds, this Note will focus on important inadmissibility grounds that may apply to an undocumented immigrant based solely on their undocumented status.

For example, the Immigration and Nationality Act (INA) § 212(a)(6)(a)(i) makes inadmissible a person who entered the U.S. unauthorized or was not admitted or paroled.¹⁸² This inadmissibility ground is quite problematic for undocumented immigrants who crossed the border unbeknownst to the authorities. Another problematic provision is INA § 212(a)(9)(B)(i).¹⁸³ While not making unlawful presence itself an inadmissibility ground, the person becomes inadmissible for a certain time if they leave the U.S. and seek re-entry after being

179. *Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, *supra* note 88; 8 U.S.C. § 1101(a)(42).

180. Baugh, *supra* note 128.

181. *Id.*

182. 8 U.S.C. § 1182(a)(6)(a)(i).

183. *Id.* § 1182(a)(9)(B)(i).

without legal status for over 180 days.¹⁸⁴ Most immigrant and nonimmigrant visas require applicants to apply at a foreign consulate or American embassy and do an in-person interview.¹⁸⁵ The “departure” for such an interview then makes the person inadmissible.

Adjustment of status supplies a more amenable process to undocumented immigrants by allowing them to remain in the U.S. while gaining a new status. The first adjustment of status requirement mandates that the applicant has been previously inspected, admitted, or paroled.¹⁸⁶ Immigrants who crossed the border unauthorized are unlikely to satisfy this condition, preventing them from adjusting status. Immigrants who overstayed their visa clear the first hurdle and possibly the second, while potentially failing the third and fourth. The second requires that the applicant be “eligible and admissible.”¹⁸⁷ INA § 212(a)(6)(A)(i) and the first prong of adjustment of status presents no problem as the applicant was admitted under their once valid visa.¹⁸⁸ INA § 212(a)(9)(B)(i) is likewise inapplicable as applicants are not required to leave to adjust status.¹⁸⁹ The third requirement—that there be a visa immediately available¹⁹⁰—may be problematic based on many backlogs in the current visa bulletin.¹⁹¹ A fourth requirement creates problems for undocumented immigrants who overstayed their visas because it requires that the applicant has “maintain[ed] continuously a lawful status since entry into the United States.”¹⁹² Exceptions exist, so an immediate relative, for example, may be undocumented and able to enter under the exceptions, but others to which the exceptions do not apply, are still stuck.

F. International Students as the Future of the United States

With the knowledge and skill sets obtained during their education, international students are an asset to the U.S. American institutions of higher education rely on their international students for tuition. According to Tanza Loudenback, institutions receive “28% of annual tuition revenue . . . from foreign students, who make up an average of just 12% of the student population.”¹⁹³ Since most international students pay full tuition,¹⁹⁴ and 60% fund

184. *See id.*

185. *What is a U.S. Visa?*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS. (last visited Jan. 18, 2022) <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html> [<https://perma.cc/VHJ5-RGBF>] (“a consular officer at a U.S. Embassy or Consulate abroad has determined you are eligible . . .”).

186. 8 U.S.C. § 1255(a).

187. *Id.* § 1255(a)(2).

188. *See id.* § 1182(a)(6)(a)(i).

189. *Id.* 8 U.S.C. § 1182(a)(9)(B)(i).

190. 8 U.S.C. § 1255(a)(3).

191. *Visa Bulletin for March 2022*, *supra* note 92.

192. 8 U.S.C. § 1255(c)(2).

193. Tanza Loudenback, *International Students Are Now ‘Subsidizing’ Public American Universities to the Tune of \$9 Billion a Year*, BUS. INSIDER (Sept. 16, 2016, 12:02 PM),

their education using non-US resources,¹⁹⁵ it is unsurprising that institutions rely heavily on their support.¹⁹⁶

International students contribute greatly to the American economy and especially to American higher education. According to NAFSA, the economy received \$38.7 million USD from international students in 2019-2020 as well as created 415,996 jobs.¹⁹⁷ International students also focus largely on professional occupations in which the U.S. seemingly desires more workers.¹⁹⁸ For example, “[b]y 1990, 25 percent of the total Silicon Valley workforce was foreign-born, with most of the workers concentrated in professional occupations.”¹⁹⁹ Even today international students concentrate largely on professional areas with the majority studying engineering, math and computer science, and business management according to the Migration Policy Institute.²⁰⁰ By receiving an education in the U.S., learning the language and culture, and contributing positively to the American economy, the U.S. should find a way to retain these students permanently as residents or citizens for the sake of the future of its economy and higher education.

RECOMMENDATION

The U.S. should create a new immigration pathway to fast-track international students into permanent residency inspired by the Canadian pathway for nationals of Hong Kong by funneling international students into employment visas. To do so, major problems such as financing, labor certification, and inadmissibility must be addressed. In creating such a pathway, the U.S. will enable immigrants to succeed in the U.S. by encouraging educational attainment and providing an easier way for nonimmigrant students to become permanent residents.

The current version of student visa to permanent residency is muddled and

<https://www.businessinsider.com/foreign-students-pay-up-to-three-times-as-much-for-tuition-at-us-public-colleges-2016-9> [<https://perma.cc/EX5P-DNAH>].

194. Ashoff, *supra* note 106.

195. Israel & Batalova, *supra* note 104.

196. See Loudonback, *supra* note 193.

197. *The United States of America Benefits from International Students*, NAFSA <https://www.nafsa.org/sites/default/files/media/document/isev-2020.pdf> [<https://perma.cc/V7FR-4PU4>] (last accessed Nov. 6, 2021).

198. The visa bulletin is current for higher-educated employment. See *Visa Bulletin for March 2022*, *supra* note 92. The Biden administration’s expansion of OPD extensions for STEM students indicate a desire for more people in these areas. Michelle Hackman, *Biden Administration Makes Visa Changes to Retain Foreign STEM Students*, WALL ST. J. (Jan. 21, 2022, 5:27 PM ET), <https://www.wsj.com/articles/biden-administration-makes-visa-tweaks-to-retain-foreign-stem-students-11642770006> [<https://perma.cc/95AU-JPBS>].

199. *Why America Needs High-Skilled Immigrants*, KENAN INSIGHT (Jul. 22, 2020), <https://kenaninstitute.unc.edu/kenan-insight/why-america-needs-high-skilled-immigrants/> [<https://perma.cc/3NM5-U8UW>].

200. Israel & Batalova, *supra* note 105.

confusing for legal onlookers, let alone an international student whose experience with the U.S. legal system is limited to their studies. The U.S. should create a pathway from the F-1 visa with, or without, Optional Practical Training to the second-preference employment visa. The second-preference employment visa requirements correspond well with the achievement of F-1 student visa holders. A bachelor's degree qualifies as the "advanced degree" for the second-preference visa with five years of experience.²⁰¹

The five-year experience requirement stands in the way of many students. STEM students can achieve a maximum of three years of practical experience through Optional Practical Training, while non-STEM visa students may gain only one. Instead of reaching for the H-1B visa where applicants exceed the number of visas available each year, the new pathway should create an alternative set of requirements for second-preference employment visa applicants who received their education in the U.S. and completed Optional Practical Training.

Otherwise, students can typically satisfy the academic requirement by having a degree above a bachelor's degree. For those who do not satisfy the academic requirement, the second-preference employment visa offers an alternative for those with "exceptional ability." Exceptional ability is described as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."²⁰² The immigrant must satisfy three factors to demonstrate their exceptional ability.²⁰³ The exceptional ability alternative offers someone who has been unable to obtain higher education or obtained their knowledge outside of the typical higher education route to be eligible, opening the door to technical as well as academic workers.

Presently, the second-preference employment visa is current for all countries but two, namely China and India. F-1 student visa graduates are currently delayed in using the available visas due to the five-year work experience requirement. Allowing F-1 student visa holders to go straight from graduation to the workforce immediately recognizes their contributions to the U.S. by awarding permanent residency. Only 67.3 percent of American higher-graduation counterparts are entering the workforce immediately after graduation,²⁰⁴ while large numbers of international students already enter directly into the workforce upon graduation through Optional Practical Training, the H-1B visa, or a permanent-residency employment visa.²⁰⁵ The current status of the second-preference employment visa indicates a need, or at least a willingness, of the U.S. to include more immigrants in the workforce. By creating a direct pathway from the F-1 visa, the U.S. ensures

201. See 8 U.S.C. §1153(b)(2); *Employment Based-Immigration: Second Preference EB-2*, *supra* note 163.

202. *Employment Based-Immigration: Second Preference EB-2*, *supra* note 163.

203. *Id.*

204. *College Enrollment and Work Activity of Recent High School and College Graduates Summary*, U.S. BUREAU OF LAB. STAT. (Apr. 27, 2021, 10:00 AM EST), <https://www.bls.gov/news.release/hsgcc.nr0.htm> [<https://perma.cc/3EUG-8BYR>].

205. See Ashoff, *supra* note 108 at 100 ("The H-1B lottery is drawn in early April every year, with around 200,000 individuals applying each year.").

that many applicants have already achieved satisfactory English, are accustomed to American culture, and have an American education likely to satisfy job requirements.

Using the second-preference employment visa is favorable to having international students pursue permanent residency through most family-based preference visas according to the current visa bulletin.²⁰⁶ Most preference-based family visas are currently subject to a wait time of varying lengths.²⁰⁷ While F2A visas are current for applicants of all countries, F2B visas for Mexican applicants are subject to an approximate 21 year wait time at the time of writing.²⁰⁸ The employment visas are more friendly towards immigrants in general and specific nations, with immediate processing available for most categories and most countries.²⁰⁹ Moreover, providing international students with a reasonable pathway to permanent residency reduces international student reliance on the family-based preference categories, therefore, offering themselves and others quicker attainment of permanent residency.

Like Canada, the U.S. should utilize immigration to stimulate economic recovery and recruit workers for its labor market. In the next five years, the U.S. needs more workers in the medical sector, many of which require a level of post-secondary education.²¹⁰ The U.S. can use its labor certification process to determine what areas of workers are most in demand and therefore, increase the number of students utilizing the new pathway pursuing these areas of study.

Labor certification is typically required for immigrants under the second-preference employment visa, there are exceptions. To specifically manipulate the areas of study and thereafter jobs an immigrant pursues, the U.S. can use the Schedule A Blanket Labor Certification. Schedule A occupations are those for which there are not enough U.S. workers, and the U.S. Department of Labor requires less of a showing by an employer desiring to hire an immigrant in these lines of work.²¹¹ Physical therapists, nurses, and those with “exceptional ability in the Sciences or Arts” currently comprise Schedule A.²¹² But since Schedule A is dependent on what is needed in the U.S.,²¹³ it should be capable of change as the needs of the U.S. change. For example, the U.S. could arguably adjust Schedule A to include the other medical-related occupations needed in the near future.²¹⁴

206. See *Visa Bulletin for March 2022*, *supra* note 92.

207. *Id.*

208. *Id.*

209. *Id.*

210. Malinsky, *supra* note 123.

211. *Chapter 7 - Schedule A Designation Petitions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (May 6, 2022), <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-7> [<https://perma.cc/Y53V-HVGX>].

212. *Id.*

213. *Id.*

214. Malinsky, *supra* note 123.

Additionally, the U.S. has a national interest waiver of labor certification.²¹⁵ The Schedule A labor certification exception focuses primarily on the labor market, while the national interest waiver is arguably more flexible in application.²¹⁶ The factors for determining whether the national interest waiver applies are: (1) “substantial merit and national importance,” (2) whether the applicant is “well positioned to advance the proposed endeavor,” and (3) if, “[o]n balance, it would be beneficial to the U.S. to waive the requirements of the job offer, and thus the labor certification.”²¹⁷ The need in the labor market, higher education, and future population arguably meet these three factors. The U.S. could use this national interest waiver to allow for students who use this new permanent residency pathway to be allowed to stay in the U.S. post-graduation when the area of employment is not included in Schedule A.

The F-1 student visa is also a helpful way to acclimate international students and undocumented immigrants who have not yet mastered English. The F-1 visa allows itself to be used for language acquisition,²¹⁸ meaning that those wanting to strengthen their English skills could first study English and then pursue their degree while staying on the pathway to residency. There is also an exception to the full-time learning requirement under the F-1 visa for those struggling with English acquisition.²¹⁹

Adding a new method of achieving permanent residency with a shorter timeline also reduces the number of undocumented immigrants entering the U.S. by giving them a new, legal alternative to permanent residency. For example, an undocumented immigrant who chose undocumented residency may have done so because they knew that getting married would result in the F3’s approximate twenty-one-year wait time rather than the less-than-one-year wait time for the F2A. Other undocumented immigrants have no basis for immigration, for example, a hopeful immigrant from The Philippines whose closest relative in the U.S. is a cousin and does not qualify for employment-based immigration. In other words, supplying a new pathway reduces the number of would-be undocumented immigrants who find the current visas unattainable or unreasonable.

By increasing their education, undocumented immigrants reduce their fiscal burden on the U.S.’ economy. As described above, approximately half of undocumented immigrants have less than a high school education (47%), and another 27% have only a high school education.²²⁰ In total, those two groups add to about 74% and create a net fiscal drain.²²¹ By minimally helping the group with a high school education achieve a college education, the fiscal impact of this 27% becomes a gain rather than a drain.²²² The 10% that already has some college

215. *Employment-Based Immigration: Second Preference EB-2*, *supra* note 163.

216. *See id.*

217. *See id.*

218. 8 U.S.C. §1101 (a)(15)(F)(i) (“at . . . an accredited language training program”).

219. 8 C.F.R. § 214.2(f)(6)(iii) (2022).

220. Camarota, *supra* note 133.

221. *Id.*

222. *See* Camarota, *supra* note 133.

education has a positive fiscal impact and can potentially increase it by finishing their education.²²³ When combined with the 15% of undocumented immigrants that already have a bachelor's degree, this creates a total of 52% of undocumented immigrants contributing positively to the American economy.²²⁴ Additionally, and importantly, it provides undocumented immigrants a legal pathway to permanent residency that may be otherwise unobtainable.

However, for this new pathway to be a successful choice for the undocumented immigrant population, it must also be made available to undocumented immigrants who are already present. As noted previously, most undocumented immigrants have been here for ten years or more,²²⁵ so transforming the economic impact of undocumented immigrations into a fiscal gain requires specific attention to the ten-plus-year population. Even if a new immigration pathway were established based on education, undocumented immigrants may find it inaccessible due to inadmissibility grounds. Some of the grounds demonstrate the U.S.' current stance towards the presence of many undocumented immigrants, like INA §212(a)(6)(A)(i), which specifically addresses unauthorized border crossings.²²⁶

A. The First Alternative for Undocumented Immigrants

One option is for parole-in-place to be offered to undocumented immigrants pursuing this permanent residency pathway since both INA §212(a)(6)(A)(i) and INA adjustment of status pay specific attention to those who are paroled.²²⁷ According to INA §212(d)(5)(A), a noncitizen may be granted “parole into the United States temporarily under such conditions as [the Department of Homeland Security] may prescribe on a case-by-case basis for urgent humanitarian reasons or significant public benefit. . .”²²⁸ The Department of Homeland Security should offer parole-in-place to undocumented immigrants who seek an F-1 visa in pursuit of the student-to-permanent resident pathway. As noted by Stephen Legomsky and David Thronson, although parole-in-place is currently used only for “military and former military members, there is nothing to prevent DHS, in its discretion, from extending it in the future to other classes of undocumented immigrants.”²²⁹

The Department of Homeland Security should extend parole-in-place to undocumented immigrants based on “urgent humanitarian reasons” and “significant public benefit.”²³⁰ To decide whether parole-in-place could be reasonably extended beyond military families, it is important to understand the

223. *Id.*

224. *Id.*

225. Lopez, Passel, & Cohn, *supra* note 124.

226. 8 U.S.C. §1182(a)(6)(a)(i).

227. *See id.* § 1182(a)(6)(a)(i); *id.* § 1255(a).

228. 8 U.S.C. § 1182(d)(5)(A).

229. LEGOMSKY & THRONSON, *supra* note 77, at 527.

230. §1182(d)(5)(A) (the language in quotation marks is derived from this statute.).

motivation for granting it to this particular group. According to the statute, parole-in-place is granted to military families to “reinforce[] the objective of military family unity.”²³¹ The motivation of this familial unity is that it provides the military member with the ability to “focus on the faithful execution of their military missions and objectives” rather than concern themselves with the well-being of their family members.²³²

According to the U.S. Citizenship and Immigration Services (USCIS), there is no statutory requirement or definition for what qualifies as a humanitarian basis for humanitarian parole.²³³ Despite the lack of statutory requirements, USCIS provided a list of factors it may consider including (1) “whether or not the circumstances are pressing,” (2) “[t]he effect of the circumstances on the individual’s welfare and wellbeing,” and (3) “[t]he degree of suffering that may result if parole is not authorized.”²³⁴ However, USCIS notes that they will consider “all of the circumstances” presented by the applicant.²³⁵

Therefore, undocumented immigrant applicants could attempt a similar argument to that made for families of military members. For instance, Pew Research Center indicates that “[m]ost of the nation’s 10.7 million unauthorized immigrants live with members of their families.”²³⁶ Based on the center’s research, undocumented immigrants live in 5.2 million households, comprising 20.2 million people in the U.S. (over double the population of New York City²³⁷), and the majority of those living with undocumented immigrants are the immigrants’ children.²³⁸ In 2010, there were approximately 1.4 million active duty military members;²³⁹ those members had approximately 1.9 million family members.²⁴⁰ The 1.4 million active duty members of the military are likely to be affected by a loved one’s uncertain immigration status just as family members of those 10.7 million undocumented immigrants will be affected by their loved one’s uncertain immigration status. If immigration law is concerned with the effects that its laws may indirectly have on the well-being of its citizens, residents, and servants, as shown by the parole-in-place policy for military families, then the

231. National Defense Authorization Act, Pub. L. No. 116-92, §1758, 113 Stat. 1198 (2019).

232. *Id.*

233. *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states> [https://perma.cc/6TJY-SCY9] (Nov. 12, 2021).

234. *Id.*

235. *Id.*

236. Jeffrey Passel & D’Vera Cohn, *Most Unauthorized Immigrants Live with Family Members*, PEW RSCH. CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/most-unauthorized-immigrants-live-with-family-members/> [https://perma.cc/7B4Z-FR7B].

237. *The 200 Largest Cities in the United States by Population 2022*, *supra* note 36.

238. Passel & Cohn, *supra* note 236.

239. *U.S. Military Demographics*, AM.’S PROMISE ALL. (2010), <https://www.americaspromise.org/us-military-demographics> [https://perma.cc/LS97-D8RX].

240. *Id.*

well-being of the considerable number of undocumented immigrants on their family members must be considered.

For those 625,000 who live alone,²⁴¹ they may be forced to construct a more creative argument based on humanitarian principles. For example, the U.S. has long treasured Emma Lazarus' poem, *The New Colossus*. However, immigration law has yet to match the humanitarian concepts embodied in Lazarus' words. The Statue of Liberty in the poem is renamed the "Mother of Exiles" which uses its light to beckon those approaching its shores.²⁴² Despite the statue's words in the poem "[g]ive me your tired" and "your poor"²⁴³, the U.S.' humanitarian-based refugee and asylum laws do not recognize economic hardship as a qualifying factor.²⁴⁴ The U.S. so broadcasts the words' humanitarian ideals by engraving them into a plaque at Ellis Island²⁴⁵ (a historic landmark for immigration into the U.S.), yet does not codify the same principles into law. As pointed out by columnist Walt Hunter, the Chinese Exclusion Act was enacted one year before Lazarus released her poem and the statute was not taken off the books until 1943.²⁴⁶ The discretion given to the Department of Homeland Security for parole-in-place is an opportunity for the U.S.' immigration law to fulfill Lazarus' humanitarian ideals.

Turning then to the "significant public benefit" basis of parole-in-place, there is likewise no statutory definition or list of requirements describing what constitutes a "significant public benefit."²⁴⁷ According to USCIS, a non-exhaustive list of factors that may be considered include "law enforcement and national security reasons or foreign or domestic policy considerations."²⁴⁸ Therefore, undocumented immigrants should apply for parole-in-place based on the significant economic benefit they could provide the country upon their approval.

Canada made a cost-benefit analysis when deciding whether to implement two new permanent residency pathways for nationals of Canada, and the humanitarian and economic motivations prevailed.²⁴⁹ The COVID-19 pandemic is one such reason Canada seeks economic assurance, and the virus similarly

241. See Passel & Cohn, *supra* note 236.

242. EMMA LAZARUS, *The New Colossus*, in EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS (Gregory Edelstein ed., 2002) (1883).

243. *Id.*

244. *Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, *supra* note 88.

245. Walt Hunter, *The Story Behind the Poem on the Statue of Liberty*, THE ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-story-behind-the-poem-on-the-statue-of-liberty/550553/> [<https://perma.cc/RP88-H9QJ>].

246. *Id.*

247. *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, *supra* note 233.

248. *Id.*

249. See Immigration and Refugee Protection Act §36(2)(b), current through Oct. 20, 2021 (S.C. 2001, c. 27) (Can.).

plagues the U.S. Immigration Minister Marco Mendicino believes that Hong Kong nationals who become citizens will “accelerate [Canadian] recovery” from the COVID-19 pandemic,²⁵⁰ and the undocumented immigrant population in the U.S. could do the same given a similar opportunity. By allowing undocumented immigrants to increase their education, undocumented immigrants could become a fiscal gain for the U.S. economy.²⁵¹ Undocumented immigrants given an opportunity to pursue permanent residency through their education can therefore become an asset to economic recovery for the U.S. While time will tell whether this plan will work, harnessing immigration as a resource rather than viewing it as a burden, has historically been successful for the U.S..²⁵²

However, Canada has received much criticism for its new permanent residency policies as an alleged economic plan with a humanitarian-based front.²⁵³ In order to avoid the same backlash, the U.S. must make its humanitarian and economic concerns equally recognizable in its immigration policy. Would-be applicants in Canada have expressed frustration that the new permanent residency options are not available to those who graduated in 2016 or earlier.²⁵⁴ To prevent the motivation of the U.S. from being likewise criticized, the new student-to-permanent residency pathway should be made available to immigrants who received their American higher education in the not-so-recent past, so long as it satisfies the academic criteria needed for the workforce.

B. The Second Alternative for Undocumented Immigrants

A second possibility is to create an inadmissibility exception for undocumented immigrants who find themselves inadmissible only under the aforementioned grounds and are applying for the student-to-permanent residency pathway. Exceptions and waivers for inadmissibility grounds are often given

250. *Canada Opens 2 New Permanent Residency Pathways for Hong Kong Residents*, THE CANADIAN PRESS (Jun. 8, 2021, 2:11 PM ET), <https://www.cbc.ca/news/politics/hong-kong-permanent-resident-pathways-1.6057799> [<https://perma.cc/FM9T-SB8M>].

251. *See supra* Section G.

252. *See Immigration to the United States, 1851-1900*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/immigration-to-united-states-1851-1900/> [<https://perma.cc/B38M-8PPB>] (“The newcomers helped transform American society and culture, demonstrating that diversity, as well as unity, is a source of national strength.”).

253. *See* Winston Szeto, *For Many Hong Kong Graduates, Canada’s New Routes to Immigration Have Turned into a Dead End*, CBC NEWS (June 21, 2021, 4:00 AM PT), <https://www.cbc.ca/news/canada/british-columbia/hong-kong-class-2016-immigration-pathway-permanent-residency-1.6068925> [<https://perma.cc/HS43-K66T>] (“Unfortunately, the humanitarian component is not part of the package-the government is only thinking about what economic benefit can we get from the people of Hong Kong.”).

254. *Id.* (“It’s really sad for me’ said Pang, who graduated from City University of Hong Kong in 2016, about the new challenges on his road to permanent residency. He had planned to come to Vancouver next January to look for career opportunities in robotics engineering.”).

when favorable to an American citizen or permanent resident or when the circumstances of the applicant are especially compelling.

For example, under INA §212(a)(6)(A)(ii), which makes inadmissible a person who enters the U.S. without authorization,²⁵⁵ an exception exists for immigrants or their children who have applied for immigration status under the Violence Against Women Act (VAWA) and “[have] been battered or subjected to extreme cruelty” by someone within their household.²⁵⁶

Adjustment of status under INA §245(a) likewise makes exceptions for certain categories of immigrants who cannot satisfy its conditions.²⁵⁷ Like parole-in-place, members of the U.S. military or their families may be granted an exception,²⁵⁸ and like INA §212(a)(1)(6)(A)(i), there is an exception for VAWA petitioners.²⁵⁹ Also included in the exceptions are immediate relatives of U.S. citizens,²⁶⁰ employment-based applicants who satisfy §245(k),²⁶¹ and more.²⁶²

The employment-based exception under §245(k) is of special interest to this Note, as it corresponds to the motivations for creating a student-to-employment-based permanent residency pathway. §245(k) requires first and foremost that the applicant be eligible for an employment-based permanent residency visa under subsection one, two, or three of the Immigration and Nationality Act §203(b).²⁶³ Subsection two is the employment-based permanent residency recommended by this author for the new pathway. Next, § 245(k) requires that the applicant be currently present in the U.S. under a lawful admission, and for this lawful admission to have not fallen out of continuous, lawful status, worked unpermitted, or violated the terms of this admission.²⁶⁴ This section is helpful to immigrant-hopefuls who have already violated terms of a former status,²⁶⁵ but it is still not helpful to those who are currently in the U.S. without lawful admission or have violated the current terms of their lawful admission. Looking at the

255. 8 U.S.C. § 1182 (a)(6)(A)(i).

256. *Id.* § 1182 (a)(6)(A)(ii).

257. *See id.* § 1255.

258. 8 U.S.C. § 1255(c)(2) (“a special immigrant described in section 101(a)(27)(H), (I), (J), or (K).”).

259. *Id.* § 1255 (a) (“or the status of any other alien having an approved petition for classification as a VAWA self-petitioner. . .”).

260. *See id.* § 1255(c)(2) (“an immediate relative a defined in section 201(b)”).

261. *Id.* § 1255(k).

262. *Id.* § 1255.

263. 8 U.S.C. § 1153(b)(2), 1255(k).

264. *Id.* § 1255(k)(1-2).

265. *See* Angela Paparelli & John Valdez, *Never Say “i” (Unless You Must): Employment-Based Options for Adjustment of Status That Avoid INA §245(i)*, SEYFARTH SHAW LLP 1, 9 (2001) https://www.seyfarth.com/dir_docs/publications/AttorneyPubs/Never%20say%20i%20-%20article%20on%20245k.pdf [https://perma.cc/2N46-ELYX] (“[I]f applicable, § 245(k) permits applicants to become permanent residents even if they have accepted unauthorized employment, failed to maintain continuously a lawful status, failed to be in lawful nonimmigrant status when applying for permanent residence, or violated the terms of a nonimmigrant visa.”).

rationale behind the addition of INA §245(k) therefore may illuminate Congress' potential willingness to adopt a new exception as suggested by this author.

As noted by Angela Paparelli and John Valdez, INA §245(k) was adopted as a compromise between lawmakers,²⁶⁶ some of whom were averse to another adjustment of status exception, INA §245(i),²⁶⁷ which allows immigrants unlawfully within the U.S. to pay to adjust to legal status under certain conditions.²⁶⁸ One cited concern by former California legislator Dana Rohrabacher was the encouragement of undocumented immigration,²⁶⁹ as paying \$1,000 to adjust to legal status is simpler than navigating the legal immigration avenues. Therefore, to ensure similar criticism for the new pathway, the exception should state that the new permanent residency pathway is available only to those who were undocumented in the U.S. prior to the new pathway's enactment. This limitation prevents a new influx of undocumented immigration to use the pathway while still offering those currently undocumented to gain legal status.

Despite legislative history not illuminating the specific rationale for INA §245(k) as it stands, its existence does show special congressional interest in those who qualify for employment-based permanent residency.²⁷⁰ This provision reflects a preference for those immigrants who qualify under the top three preference categories for employment-based permanent residency.²⁷¹ Since this author's suggested exception funnels international students towards the second preference-based immigration pathway, Congress' apparent preference for immigrants within this category increases this suggested exception's propensity for success.

C. Third Alternative for Undocumented Immigrants

A third possibility for undocumented immigrants is for Congress to pass a law enabling undocumented immigrants to gain lawful status if pursuing the new permanent residency pathway. The general language of the statute may qualify

266. *Id.* (“[I]f applicable, § 245(k) permits applicants to become permanent residents even if they have accepted unauthorized employment, failed to maintain continuously a lawful status, failed to be in lawful nonimmigrant status when applying for permanent residence, or violated the terms of a nonimmigrant visa.”); *INS Discusses Status of INA §245(I), Other Adjustment Provisions*, 74 No. 46 INTERPRETER RELEASES 1841, 1841-1842 (Dec. 8, 1997).

267. 143 CONG. REC. H26531 (1997) (“In addition to illegal aliens who are already here, this grace period sends a message to prospective illegal aliens around the world that the U.S. borders are wide open for the next couple of months. All that is required is a sponsor and \$1,000.”).

268. 8 U.S.C. § 1255 (i).

269. 143 CONG. REC. H26531 (1997) (“In addition to illegal aliens who are already here, this grace period sends a message to prospective illegal aliens around the world that the U.S. borders are wide open for the next couple of months. All that is required is a sponsor and \$1,000.”).

270. *See generally* § 1255(k).

271. *Id.*

as a new entry category under INA §101(a)(1)²⁷² and look as follows: “a noncitizen having citizenship in another country who is a bona fide student qualified to pursue a full course of study and who pursues their scholarship with the purpose of becoming a permanent resident of the United States.”

However, acknowledging the unique situation of undocumented immigrants who often have inadmissibility barriers, the statute would also need to include the following:

“Noncitizens who satisfy the eligibility requirements set forth in the aforementioned qualifications but are subject to inadmissibility pursuant to their undocumented status in the U.S. may qualify under the following conditions:

- (A) the noncitizen satisfies the inadmissibility requirements in INA §212(a)(1),²⁷³ INA §212(a)(2),²⁷⁴ INA §212(a)(3),²⁷⁵ and INA §212(a)(4).²⁷⁶
- (B) Under INA §212(a)(6),²⁷⁷ the only inadmissibility violations may include INA §212(a)(6)(A),²⁷⁸ INA §212(a)(6)(E).²⁷⁹
- (C) If the noncitizen was present in the U.S. prior to the date of enactment, they must not prove themselves admissible under INA §212(a)(7)²⁸⁰ or INA §212(a)(9).²⁸¹

Another significant problem the new law must seek to correct in order to allow undocumented students the ability to make use of the new permanent residency pathway is to provide a lawful basis for adjustment of status. Adjustment of status requires inspection and admission or parole, typically lacking for undocumented immigrants. Congress can easily fix this problem by adapting legislation such as the following: “The Secretary’s acceptance of a noncitizen’s visa application for status under INA §245(a)²⁸² qualifies as a lawful admission under INA §245(a).” This provision would allow for undocumented noncitizens under this pathway to transition from the non-immigrant international student to a permanent resident from within the U.S., since the U.S. is already home to them.

Under the current administration, immigration laws have a higher opportunity for success. President Biden’s U.S. Citizenship Act was introduced into the House of Representatives in February 2021 and was referred to the Subcommittee on Immigration and Citizenship in April 2021.²⁸³ Similar to the proposed

272. *See* 8 U.S.C. § 1101(a)(1)(F)(i).

273. *Id.* § 1182 (a)(1).

274. *Id.* § 1182 (a)(2).

275. *Id.* § 1182 (a)(3).

276. *Id.* § 1182 (a)(4).

277. *Id.* § 1182 (a)(6).

278. *Id.* § 1182 (a)(6)(A).

279. *Id.* § 1182 (a)(6)(E).

280. *Id.* § 1182 (a)(7).

281. *Id.* § 1182 (a)(9).

282. *Id.* § 1255(a).

283. U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021).

legislation in this Note, President Biden's bill suggests an opportunity for undocumented immigrants to gain legal status.²⁸⁴ However, given the bill's tenure in the House of Representatives,²⁸⁵ it seems unlikely that Congress will take additional action without extra incentive. Two other bills were better received and have passed the House: (1) The American Dream and Promises Act of 2021²⁸⁶ and (2) The Farm Workhouse Modernization Act.²⁸⁷ However, Congress' inability to provide bipartisan support for the U.S. Citizenship Act suggests that the large recommendation provided in this Note may have higher administrative success than congressional.

D. Practical Implementation

Realistically, undocumented immigrants may need financial support in obtaining post-secondary education. As the United States has been listed among countries with the highest tuition costs,²⁸⁸ and many U.S. nationals have difficulty obtaining postsecondary education without financial support through loans and scholarships, these means should be made available to undocumented immigrants trying to ameliorate their negative fiscal impact on the U.S. through education. Canadian education, like American education, is expensive,²⁸⁹ especially for international students who often pay high tuition costs.²⁹⁰ Professor Paul Evans suggested in a committee meeting discussing the new Canadian public policy that scholarships be offered, specifically pointing out that some people may need more time in school to study English.²⁹¹ A similar idea should be adopted for international students coming to the U.S., especially those undocumented immigrants already within the U.S. who pursue American higher education. Otherwise, undocumented immigrants may be subject to the unfortunate feeling of being "lost, confused, depressed and even angry when they

284. *See id.*

285. H.R. 1177.

286. American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021).

287. Farm Workforce Modernization Act of 2021, H.R. 1603, 117th Cong. (2021).

288. Lu, *supra* note 103 at 360 ("Compared with other OECD countries with regard to the average cost of tuition at public institutions, it was estimated that the United States has the second most costly tuition, the United Kingdom has the most expensive tuition, and Australia ranks third.").

289. *See* STAT. CAN., *supra* note 13; STAT. CAN., *supra* note 16.

290. Ashoff, *supra* note 108 at 95 ("International students typically pay full tuition and provide universities with opportunities to access global sources of revenue."); *Do international students get what they pay for?*, BBC (May 20, 2019), <https://www.bbc.com/news/world-us-canada-48288733#:~:text=On%20average%2C%20international%20students%20in,formulas%20apply%20in%20other%20countries.&text=At%20a%20time%20when%20many,of%20revenue%20for%20many%20institutions> [<https://perma.cc/WC6Q-YMBG>] ("On average, international students in Canada can expect to pay four times more tuition than domestic students.").

291. Canada, Parliament, House of Commons, Standing Comm. on Citizenship and Immigr. 43rd Parl., 2nd Sess., No. 17 (22 Feb. 2021) at 8.

find out they cannot . . . apply for financial aid to four-year colleges or universities because . . . they are not citizens.”²⁹²

Already, “[m]any foreign students work as teaching assistants to support their graduate school study,”²⁹³ but due to the finite resource of graduate assistantships, other means must also be available to make this idea realistic. If the estimates are true, the average cost of an undocumented immigrant with only a high school education is \$70,000 while those with a college education or above produce an average benefit of \$183,000 and \$424,000 respectively.²⁹⁴ Preventing access to higher education based on undocumented status encourages undocumented residents to refrain from reaching their full potential and using it to make great contributions to American society. By fronting money for scholarships and loans for this population to obtain an education, their education is a current investment that would have a great payoff in the future.

Moreover, Congress should alter the ability of international students to work during their studies. Currently international students in the U.S. may work on-campus subject to a few particular allowances of off-campus employment.²⁹⁵ For international students, the U.S. should allow employment of up to 20 hours per week.²⁹⁶ The ability of international students to work under this pathway increases the number of workers immediately available to the American workforce while enabling more people to participate in the program by having means to support themselves.

CONCLUSION

This Note recommended a new permanent residency pathway that encourages international students to gain employment-based permanent residency inspired by a recent Canadian public policy. In recommending this pathway, this author explained why the U.S. should consider adding a new immigration pathway by highlighting current problems striking the U.S. and suggesting immigration law to be used as a resource in creating solutions.

By creating a smoother pathway for international students to obtain permanent residency post-graduation, the U.S. may be able to obtain a higher stay-rate of international students. These international students can create various

292. Valerie Ooka Pang, Tamiko Stratton, Cynthia D. Park, Marcelina Madueño, Miriam Atlas, Cindy Page, & Jennifer Olinger, *The American DREAM and Immigrant Students*, 17 RACE, GENDER & CLASS 180, 188 (2010).

293. Lu, *supra* note 103.

294. Camarota, *supra* note 133.

295. After their first year, international students can work off campus for Current Practical Training, Optional Practical Training, or the STEM Optional Practical Training Extension. *See Students and Employment*, USCIS (Aug. 13, 2020), <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment> [<https://perma.cc/JR3V-L8SC>].

296. *See Work off Campus as an International Student*, GOV'T. OF CAN. (May 17, 2022), <https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/work-off-campus.html> [<https://perma.cc/KFG5-F8RZ>].

benefits for the U.S. economy, higher education, and diversity. To ensure maximum benefit from the new pathway, lawmakers are encouraged to make it accessible as a way for undocumented immigrants to also obtain legal status, thus lowering the influx of undocumented immigrants by supplying a practical method of obtaining legal status. In so doing, this author addressed some reasons that undocumented immigrants may be unable to use the current immigration system and acknowledged the various adjustments that must be made for undocumented immigrants to obtain legal status.

In conclusion, the U.S. should use its immigration law to the maximum benefit of itself and the immigrants who seek to make the U.S. their permanent home. Despite the many benefits international students provide the U.S., international students are declining in the U.S., and it may continue to lose students to countries like Canada unless legal changes are made.²⁹⁷ The realistic desire of international students to reside in the country of their alma mater²⁹⁸ must be recognized by American immigration law. Moreover, as more than 90 percent of Americans support a way of allowing undocumented immigrants to obtain legal status under certain circumstances,²⁹⁹ this permanent residency pathway should be adapted to fit the needs of the undocumented population already within the U.S.. By using immigration law to its benefit, the U.S. can increase the likelihood of a better, more certain future for its economy and its international students.

297. See Ashoff, *supra* note 108 at 103 (“In 2018, the United States issued 362,929 F-1 foreign student visas, marking a 44% decrease in issuing new F-1 student visas since 2015’s 644,233. Because foreign students are an important source of income for United States universities, Administrations may be asking, ‘where are they going?’ In short, they are going to Canada.”).

298. *Id.* at 104 (“60% of the [foreign student] participants in the study showed interest in becoming future Canadian citizens.”).

299. Tal Kopan & Jennifer Agiesta, *CNN/ORC Poll: Americans Break with Trump on Immigration Policy*, CNN (Mar. 17, 2017, 8:05 AM ET), <https://www.cnn.com/2017/03/17/politics/poll-oppose-trump-deportation-immigration-policy/> [<https://perma.cc/243M-XYV6>] (“Offering citizenship to those immigrants who are living in the US illegally but hold a job, speak English and are willing to pay back taxes is immensely popular, with 90% behind such a plan.”).