

**TESTIMONY OF LANCE KAPLAN**  
**Hearing before the United States House of Representatives**  
**Committee on the Judiciary, Subcommittee on**  
**Immigration, Citizenship, Refugees, Border Security and International Law**  
**“Use of Point Systems for Selecting Immigrants”**  
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**Introduction**

Madam Chairwoman, members of this distinguished subcommittee, thank you for the opportunity to testify before you today. My name is Lance Kaplan and I am the Managing Partner of the International Practice Group at Fragomen Del Rey Bernsen & Loewy LLP., which is the world's largest immigration law firm with twenty-nine offices in ten countries. My duties include assisting a clientele of multinational businesses with the mobility of their highly skilled employees across international boundaries. I practice both U.S. immigration and am a registered Migration Agent in Australia with experience in the practice of Australian immigration law. My legal career has focused entirely in the area of world-wide immigration since 1988. It is a privilege to share with this subcommittee my professional experience with, and insight into, measures that countries outside the United States are taking to recruit the world's best talent, including the implementation of a point-based selection system in some countries, and how such a system could fit into the U.S. political and economic objectives.

**Policy Considerations for Immigration of Highly-Skilled Professional**

Since other distinguished panelists today are discussing in detail the history of the point-based system and how they have been implemented in other countries, I will simply reiterate that countries such as Australia, Canada, New Zealand and the United Kingdom use the point-based system to favor persons with skill sets that are needed in these respective job markets. If there is a lesson for us as Americans to learn from these countries, it is a realization that other countries are more aggressively harmonizing their immigration policies with their economic needs by focusing often and more heavily on economic considerations over other factors, including family unification. Indeed, the twenty-first century economy provides unparalleled opportunities for collaboration and innovation. In this knowledge-based economy, the key to success of any venture is having the right talent in the right place at the right time.<sup>1</sup> Consequently, the competition for talent continues to intensify.

According to a recent survey, almost half of all British business leaders plan to recruit MBA graduates from China to compensate for a shortfall of skills – notably language skills – needed to work in and trade with China.<sup>2</sup> Declining birthrates have caused some industrialized countries to face an even more acute skills shortage than that which exists in the United States. At the same time, developing countries are increasing efforts to entice their domestic talent to study and work at home. The Chinese, for example, are determined to create a super-league of universities to

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<sup>1</sup> *The Global Economy's Last Barrier: Cross-Border Mobility of Highly Educated Workers*, The Executive Working Group on Global Mobility Policies, Jan. 2002, at 17.

<sup>2</sup> Peter Walker, The Challenge of China: How No Business School Can Ignore the New Giant. CNN.Com (Aug. 14, 2006).

rival the best in the world, and also are offering special financial and professional incentives to returning nationals.<sup>3</sup> A key component of corporate strategic planning is to recruit, hire and retain the best talent available, be it local or foreign. Whether a particular country's political policies foster or impede access to talent is becoming an increasingly important factor in decisions about where to invest and where to conduct research and operations.<sup>4</sup>

Despite the clear need for talented foreign professionals, current U.S. policies often close our doors to such individuals. Obstacles include months-long, and sometimes years-long, visa processing delays, arbitrary quotas limiting the number of professionals who can come to work each year, layers of "red-tape" that drain an employer's resources, and a pervasive perception abroad that the United States no longer welcomes foreign professionals and their families. In fact, at no time in our nation's history has the access to talent been as limited as it is today.

Most illustrative of this fact is that the fiscal year 2008 quota for H-1B visas (used to hire, among others, foreign graduates from U.S. universities) received twice the number of applications on the very first day of filing than spaces available.<sup>5</sup> Even the quota for persons with advanced degrees is close to being exhausted. U.S. employers and employees are anxiously awaiting the results of a lottery where half the applicants who followed all the rules and whose applications were filed the *first day* will have their dreams and career plans shattered. Because the lottery is completely random, there is no way for an employer to choose which of its H-1B applicants wins. Talented foreign professionals are postponing graduation, returning to graduate school and looking for work abroad in the hope of riding out this H-1B disappointment. Employers are considering how they will move projects abroad or postpone client contracts until October 2009 when they will have another shot at hiring H-1B workers. Our foreign competitors have followed this drama as well and are taking advantage of this opportunity to hire talented professionals disillusioned with our system.

In addition, there are significant backlogs in our permanent or "green card" system. We recently experienced backlogs where even some professionals deemed to have "extraordinary ability" or "exceptional ability" had to wait several years for a visa to become available— and these are the Ph.D. scientists at the cutting-edge of research. Other desperately needed professionals face an even longer backlog. These backlogs are due to politically imposed numerical limits established at a time when our economy was smaller and even less dependent on technology, research and science than it is today. Even where a visa is available, there are months-long delays in processing an application and obtaining a visa interview, which result in significant losses to our businesses and research facilities. Security checks that take years to complete further frustrate employers and employees alike.

Our self-imposed limitations put America at a grave disadvantage. As a nation, we are educating some of the brightest scholars and researchers from around the world, only to send them to our competitors because there are no visas available.<sup>6</sup> Many companies have moved meetings, training and projects, and even in some instances lucrative contracts, abroad to avoid visa

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<sup>3</sup> Oded Shenkar, *Dawn of the Chinese Century*. (Wharton School Publishing, 2005).

<sup>4</sup> *The Global Economy's Last Barrier*, at 11-13.

<sup>5</sup> USCIS Update, *USCIS Updates Count of FY 2008 H-1B Cap Filings* (Apr. 10, 2007).

<sup>6</sup> See, e.g., *Visa Policies Rob U.S. of a Valuable Labor Source*. Dallas Morning News (Aug. 7, 2006).

problems and barriers. The current situation also sends the world a dangerous message that foreign talent is no longer welcome here. In sum, our current immigration system is a tremendous impediment to our ability to compete worldwide.<sup>7</sup>

The reality for American employers is that our education system does not produce a sufficient number of professionals that are able to compete in today's economy. As evidence of our changing economy, job opportunities that require a degree are rising at twice the rate as those requiring only on-the-job training.<sup>8</sup> Some estimate that by 2010, ninety percent of all science and engineering Ph.D.s will come out of Asia.<sup>9</sup> According to the National Science Foundation, in 2000, foreign-born scientists accounted for over fifty percent of U.S. engineers with a Ph.D., and forty-five percent of our life scientists, physical scientists and math and computer scientists holding doctoral degrees.<sup>10</sup> These percentages are only increasing over time as our children pursue other degrees. We already have policies that encourage U.S. youth to pursue these careers, which include the education and training fees we pay with each H-1B visa petition, and we must continue to do more. At the same time, we must recognize the global nature of the economy and market for highly-educated professionals. Experts have warned that with fewer foreign science and engineering workers, fewer U.S. citizens with science degrees, and increased competition from abroad, "the U.S. [science and engineering] work force growth will slow considerably, potentially affecting the relative technological position of the U.S. economy."<sup>11</sup>

The answer to this anticipated skilled labor shortage lies in both our education system as well as in our immigration system. U.S. employers invest billions of dollars each year in education initiatives and they strongly support competitiveness legislation pending before this Congress. However, if we cannot expect to produce a sufficient number of science and technology professionals domestically, then we must remove the obstacles to our ability to recruit and retain international talent. One such obstacle is that our immigration laws have not been significantly updated for almost twenty years. Legislation passed since 1990 has been, at best, reactionary measures that address only narrow and short-term needs. At worst, our lengthy legislative process causes whatever policy we create to be a step behind the marketplace's reality. Fortunately thus far, despite the obstacles to recruiting or retaining the necessary talent for American employers, there remains one advantage that the United States still has over virtually all other countries: we are one of the greatest democracies on the face of the earth and people want to live here. Aside from purely economic considerations, many executives and managers want to stay here for the quality of life and the freedoms upon which this country is based. In addition to some of the finest research and educational institutions in the world, we also have the most robust laws to protect entrepreneurs and businesses. However, even the appeal of living

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<sup>7</sup> See, e.g., Jeffrey Natchigal, *Access Denied, Are Tightening Security Measures Harming Science at Cal*, Berkeley Science Review, Vol. 4, No. 1, at 19-23 (Spring 2004).

<sup>8</sup> Frances Cairncross, The Idea of A University, Global Agenda, at 226-27 (2006).

<sup>9</sup>Mervis, Jeffrey, *Perceptions and Realities of the Workplace*, Science, Vol. 304, Issue 5675, 1285-85 (May 28, 2004).

<sup>10</sup> *Science and Engineering Indicators-2004*, The National Science Board, National Science Foundation, at O-13, O-5 (2004).

<sup>11</sup> *Science Board Warns of Uncertain Future for US Science and Engineering Leadership*, Physics Today, (Jul. 2004).

and working in a place of such opportunity cannot indefinitely compensate for the shortcomings of our immigration system. If our immigration policies and practices continue to deter the recruitment or retention of the best the world can offer, the top talent will go elsewhere and we will find ourselves watching other countries prosper at our expense.

### **Reasons Why Some Countries Have a Point-Based System**

Those who prefer the point-based system say that it provides more clarity, consistency and transparency to an immigration system, and removes subjectivity from the selection process. Moreover, such a system allows policy makers to implement policies that promote the values that country embraces, whether the value is placed on importing skills that are in demand, increasing the highly-educated population, or giving preference to other considerations such as age, language proficiency, family unity or humanitarian need.

The concept of assigning points to intending immigrants first arose as a way for some countries to attract industrious and productive people into their workforce. These were countries whose job markets required an influx of labor, but who also wanted to be sure that those coming into their workforce had the attributes to become successful, and whose presence would likely result in a net benefit to the economy. In essence, a point-based immigration system allows the government to socially engineer its demography.

The world's other major migrant accepting countries--Australia, Canada, New Zealand and the United Kingdom--have, or are in the process of adopting, a point-based selection process for certain elements of their immigration program. Canada was the first to adopt such a system in 1967 after recognizing that a universal, non-discriminatory immigration policy (which it adopted in 1962) posed a problem in the skill level of new arrivals. The system awards points for education, language ability, employment experience, age, arranged employment and adaptability.<sup>12</sup>

From my experience, Australia is generally considered to have the most effective points test system. Indeed both New Zealand and the United Kingdom have modeled their own points tests on the Australian system. I shall therefore specifically address the key elements of the Australian system.

The Australian points test has been in place for more than twenty years, but in the last ten to twelve years there has been a distinct emphasis placed on using the points test as one of the primary mechanisms to sharpen the economic focus of the annual immigration intake. Indeed, about seventy percent of the immigration program is devoted to skilled categories, while the remaining thirty percent is devoted to close family reunion categories.<sup>13</sup> Of this seventy percent allocation to skilled migration, more than half are subject to a points test.<sup>14</sup>

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<sup>12</sup> Queen's University, *Impacts of the Point System and Immigration Policy Levers on Skill Characteristics of Canadian Immigrants*, Queen's Economics Dept. Working Paper No. 1115 (Mar. 2006).

<sup>13</sup> Australian Government, Department of Immigration and Citizenship, *Key Facts in Immigration*.  
<http://www.immi.gov.au/media/fact-sheets/02key.htm>

<sup>14</sup> Australian Government, Department of Immigration and Citizenship, *Overview of Skilled Migration to Australia*.  
[http://www.immi.gov.au/media/fact-sheets/24overview\\_skilled.htm#a2](http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm#a2)

The test allocates points accordingly to the person's age, skill level (which is a combination of formal education and employment experience), English language skills and whether the occupation is in demand. There are other "bonus" point elements in the test which recognize factors such as relatives in Australia, funds available for transfer and spouse skills. These are all considered measurable elements designed to ease a person's migration experience and ensure the program is attracting those most likely to succeed in their new country.

The Australian Government has tried to address one of the main criticisms of a points based selection system - that it is not responsive to changes in the needs of the employment market – by introducing the Migration Occupations in Demand List. This list is reviewed every six months and regularly updated when necessary by the Department of Employment.

So, in summary, the Australian system deliberately targets young, English speaking, highly skilled people in particular occupations considered in demand as part of a program with a strong economic focus. They have coupled this with a robust public education study to show the public the economic benefits of the immigration program, thereby building a better level of broad public support. This was initially achieved through the Bureau of Immigration Research, a Government funded but independent academic research house that researched the various benefits (or otherwise) of a structured immigration program. This research led to a far more informed immigration debate in Australia than had previously occurred.

However, it is fair to say that while these stated ideals are generally admirable, there is no doubt that a point-based system, including one as sophisticated as Australia's or Canada's, can be arbitrary and unforgivingly tough in clearly targeting particular outcomes. What is not measured is who does not succeed at the points test but who would otherwise make an excellent and valuable migrant. It is for this reason that if we contemplate the introduction of a point-based selection system, it must be anchored in broad and comprehensive review of our immigration programs.

### **Issues to Consider When Implementing a Point-Based System in the United States**

While we certainly must be aware of what other countries are doing to attract workers who possess skills that match the needs of their economies, we must consider the particular nature of the U.S. economy and its political system vis-à-vis those of the countries utilizing a point-based systems when deciding *how* to stay competitive through immigration reform. I testified before the Senate Immigration Subcommittee last year that, historically, the world has looked to us for leadership and have emulated *our* policies. My point then was, and still is, that while other countries are looking for ways to attract highly skilled workers, current U.S. immigration laws and procedures actually hinder our ability to do the same. What we need to do is to reform our visa system so that we have better access to needed talent. *How* we reform our system largely depends on what works best for our country given our economy and political system, and we should look at the best of all components of other countries systems, and extract those elements which best suit our country's needs and systems.

Whether we adopt a point-based system requires careful consideration and meticulous planning. At a minimum, we must address the following threshold issues:

First and foremost, we live in a dynamic and global economy. The needs of our job market change continually while Congress has historically only revamped our immigration laws every

fifteen to twenty years, with minor adjustments in the intervening years. If we were to have a point-based system that gives preference to one set of skills over another, then that system must be flexible, and the bureaucracy and politics must not get in the way of that flexibility.

A characteristic of the Westminster, or Parliamentary political structures in Australia, Canada, New Zealand and the United Kingdom is that there is far less separation of executive power than exists in the U.S. democratic system. As a result the government of the day establishes and implements policy, including immigration policy, in a far more expedient manner. That is not to say their systems do not contain the same checks and balances but the time taken to implement changes is significantly less. This is a practical issue which makes a significant difference in accomplishing much needed change. For example, in the Australian system, the power to establish the precise criteria for the points test rests with the Minister for Immigration, with some oversight by the Cabinet. The Migration Act determines that there should be a points test within the migration program and changes to the Act require approval of both houses of Parliament. However, the Act delegates authority to determine key elements of the points test, such as the “pass-mark” and the Occupations in Demand to the Minister, who implements it through Government Regulation or Gazette Notice. The opposition does not generally have the opportunity to directly influence policy unless the change requires a parliamentary vote.

A points test requires the ability to quickly change elements of the test to address changes in the labor market or shifting government priorities. The more direct executive powers of the Westminster system allows for this flexibility but equally removes the power of oversight and review by Congress we enjoy in the United States. The only way a point-based system could operate effectively in the United States is if upon enactment a practical procedure were included to allow for the necessary adjustments to take place at a meaningful level.

Given that in the United States the lawmakers and law enforcers are in two different branches of the government, and Congress has plenary authority to make immigration policy, how much authority is Congress willing to cede to the Executive Branch? Recently Congress has taken exception when the Executive Branch raised immigration issues as part of trade negotiations. If Congress were to retain its plenary authority in this area, then how expedient would it be to have to go through the legislative process every time the needs of the market changes and we need to adjust point allocation?

While I believe there are a number of benefits in a points test selection system, it would be necessary to define what decision making power would be ceded to which agencies, whether there would be role for an independent advisory group (as some have recommended) and what oversight role Congress would retain. Otherwise, a point-based system could become unwieldy.

Second, even if Congress were to enable this element of policy making in this limited area to the appropriate Executive branch office or agency, is the rulemaking process necessarily more nimble or responsive to market demands? It is not clear that the Department of Labor currently has the infrastructure in place to readily determine market shortages to the same extent that agencies in other countries do. One example is the creation of the “Schedule A” for shortage occupations.<sup>15</sup> In 1990, Congress conferred authority on the Department of Labor to designate certain occupations as exempt from the normal labor market tests due to the great demand for workers. For the past seventeen years, even though the structure of our economy has gone

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<sup>15</sup> 20 CFR 656.10,

through many changes and we have been through several business cycles, Schedule A has remained static and includes only physical therapists, nurses and certain persons of exceptional ability in the sciences and arts. Efforts to amend Schedule A to account for demand during the “dot.com” boom were fraught with controversy. Determining shortages in an economy as large, diverse and dynamic as the United States is not easy. However, if we are to move to a system where a government bureaucracy would assign point values to each occupation, we need to be able to revisit these point values more frequently than once every seventeen years.

Third, what outcome do we as a nation wish to achieve with a point-based system that is not accomplished with the current system? As I mentioned earlier, a point-based system is one way to socially engineer a demographic when an influx of immigrants are needed to boost the country’s workforce. The United States is not in that situation. What we need are qualified people to fill skill or labor gaps, throughout all sectors of the economy. As such, a point-based system must be sufficiently sophisticated to identify particular traits, and not just generalized credentials. Our current immigration already has mechanisms in place which are meant to address this. For example, foreign nationals deemed to possess “extraordinary ability” or whose presence is deemed to be in our “national interest” may petition for an immigrant visa without the sponsorship of an employer. This is reserved for the very few in this world whose presence is presumed to be beneficial, regardless of actual demands. For the rest of the employment-based immigrant population, the United States admits them based upon the most reliable indicator of true market needs – requests from employers who are willing to devote the extra time and resources required to hire a foreign national. A point-based system might be appropriate for certain segments of the job market, as addressed in Senator Chuck Hagel’s “Immigrant Accountability Act of 2007,” which he just introduced last Thursday. However, we do not yet have a model for a point-based system that would apply throughout all sectors of our economy. The point being that to just implement a point-based system in and of itself is not the sole solution here. We must adapt current programs to be more facilitative and efficient. All that effort, if correctly implemented, will not be lost if Congress then determines that a point-based system is warranted, because the same issues which need to be fixed will be required to be put in place if a viable points system is to be established. Therefore no effort will be wasted in fixing elements of the current system as they will serve any type of new points system to be introduced. Both can be worked on simultaneously if Congress is serious about immigration reform.

Fourth, to the extent that any subjectivity remains in a point-based system that the United States implements, it begs the question whether employers, who know exactly what qualities they want in an employee, or bureaucrats would be in the best position to determine who has the best attributes to serve America’s economic interest. For example, in some point-based system bureaucrats award extra points for characteristics such as “adaptability” or “ability to learn” as determined during an interview. The American system of employer-sponsorship has been enormously successful over the years in attracting and identifying individuals with the skills needed to thrive in our society. Employment-sponsorship also provides a path toward assimilation and integration at no cost to the public.

It is important to note that having a point system does not necessarily mean a complete abandonment of employer sponsorship. As stated above, of all the skilled immigrants to Australia, more than half received status by passing a points test. The remainder gained entry through employer sponsorship. Furthermore, two years ago, Australia announced a new point-based system that would increase the visa numbers for skilled professionals and for those who

have corporate sponsorship. The United Kingdom's system also has an employer sponsorship and labor market test component. What we in the United States must decide is whether we want to transition completely to a point-based system where all immigrants must pass a points test, or should we retain some of the existing programs. If we want to retain some of the programs, then we must determine what a point-based system would add to our current statutory scheme.

Finally, we in the United States hold certain values to be paramount, such as family and other moral values. A point-based system, if skewed a certain way, could become an acceptable way to discriminate against the old or less educated, and policy makers must decide to what degree we want to consider value other than economic.

### **A More Immediate Solution to a Crisis**

As mentioned above, the ability of the United States to recruit and retain talent is hindered by our politically imposed quotas and processing inefficiencies. This is not to say whether the United States should or should not move to a point-based system eventually. However, the longstanding point-based programs, such as the ones in Canada and Australia, have taken over twenty years to develop and refine. The United Kingdom also has been working on its current program for several years. As such, any drastic change in policy in this country also merits careful consideration and development.

In the meantime, I respectfully suggest that immediate relief is needed and available in the form of Title V of Congressmen Gutierrez and Flake's bill, the Security through Regularized Immigration and a Vibrant Economy Act, or STRIVE Act of 2007 (H.R. 1645), which would create a system that is much more market-based than the current scheme and remove the processing hurdles. Likewise, the Securing Knowledge, Innovation, and Leadership (SKIL) Act, which Congressman John Shadegg introduced in the House and Senator John Cornyn introduced in the Senate, would do the same.

### **Conclusion: The Necessary Components to a Point-Based System**

The point system's merits in the United States require further study. At this time, I hope all will agree that the last thing we want is a system which adds to and does not reduce the level of bureaucracy in our system. We further should agree that any point-based system must be nimble and responsive to market demands. I respectfully submit that, at a minimum, the following components are necessary for a point-based system to work in the United States:

1. The system must be designed to take into account occupational needs based on actual labor shortages in all sectors – this could include a range of occupations ranging from tradespersons to PhD candidates in specific areas of science technology or mathematics.
2. Where subjectivity is inserted in any part of the process, the needs of the market as communicated by employers, not arbitrary or capricious preferences of bureaucrats, should dictate the exercise of discretion.
3. The system must have a way of responding quickly to changing economic trends, and should not depend entirely on governmental agencies to make arbitrary determinations as to point allocation. Having to go through legislative or agency

rulemaking processes each time the market shifts would cause undue delay and be detrimental to innovation.

I firmly believe we need to sharpen the economic focus of our immigration program to improve our ability to compete for skilled workers and continue to reap the benefits of immigration, but I believe a point-based system would require a major shift in the way immigration policy is determined and administered in this country. A broadening of the economic categories within our existing system, combined with targeted review of existing programs, may achieve everything we hope for from a points system but retain the checks and balances we currently enjoy. In other words, the key to a successful point-based system is flexibility and nimbleness in reacting to market changes without political or bureaucratic hindrance. As we contemplate the merits of the points system, we must first redefine policy to be more facilitative even using the categories we have, and as we effectuate this policy change, we may then find that with those changes a points system may then be more likely to succeed.

Thank you, Madam Chair and members of this subcommittee. I look forward to answering your questions.