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The cover of this journal features a painting known as "The Sea" by French artist Jean Désiré Gustave Courbet. A leader of the Realist movement, Courbet is also remembered for his political content and activism. The image is provided courtesy of the Metropolitan Museum of Art under a CC0 1.0 Universal (CC0 1.0) Public Domain Dedication.

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Letter from the Editor-in-Chief

Shoba Sivaprasad Wadhia

The *AILA Law Journal* provides readers with high-quality content on the rapidly changing immigration law landscape. We are very excited to debut the first of many issues.

The inaugural issue of the *AILA Law Journal* features seven articles from legal minds from across the country. Jillian Blake's piece "Americans, But Not Citizens: An Argument for Nationality-Based Asylum Protection," provides an innovative analysis on how individuals who identify as "American" may qualify for asylum because of "nationality," one of the five grounds for seeking asylum protection. Blake's contribution has the potential to reach people currently at risk of losing immigration status, including holders of Deferred Action for Childhood Arrivals and certain Temporary Protected Status recipients. Ted R. Bromund and Sandra A. Grossman's article, "Challenging a Red Notice: What Immigration Attorneys Need to Know About INTERPOL," describes the International Criminal Police Organization, commonly known as "Interpol," and provides tools for attorneys whose clients are faced with Interpol issues. In their piece "How Much Blood to Cross the Northern Border? Reconsidering the Blood Quantum Requirement of INA §289," Taymoor M. Pilehvar and Lory D. Rosenberg examine a section of the immigration statute pertaining to American Indians born in Canada and compare it to a specific section of the Jay Treaty, a treaty between the United States and Great Britain that was intended to stabilize post-war relations between the two countries. Pilehvar and Rosenberg conclude that §289 of the immigration statute is based on racial factors, inconsistent with the Jay Treaty and most likely discriminatory.

Our inaugural issue also includes articles authored by our editorial board. Looking at the employment-based category for those seeking green cards based on "extraordinary ability" Cyrus D. Mehta critiques the government's creation of a new "final merits" standard in his piece "The Curse of *Kazarian v. USCIS* in Extraordinary Ability Adjudications Under the Employment-Based First Preference." In "USCIS's Fraud Detection and National Security Directorate: Less Legitimate Than Inspector Clouseau, But Without the *Savoir Faire,*" Angelo A. Paparelli argues that the Fraud Detection and National Security Directorate within the United States Citizenship and Immigration Services is both unlawful and ineffective. Kehrela Hodkinson examines the history, practical effects, and future trends in expatriation or the renunciation of U.S. citizenship in "Renunciation of U.S. Citizenship: Why Would a Client 'Give It All Up'?" Finally, in "Travel Ban Impact on Visa Issuances: Data Report on Pre- and Post-Travel Ban Visa Issuances to Select Affected Countries," Mahsa Khanbabai showcases the data on visa issuance from the Department of State

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for DOS visa issuance data for five of the seven countries subject to the ban: Iran, Libya, Somalia, Syria, and Yemen.

The *AILA Law Journal* is served by a first-rate editorial board without whom the *AILA Law Journal* would not be possible. I am grateful to executive editor Danielle Polen for editorial excellence and to Morgan Morrissette Wright for her leadership in publishing the first of many issues. I could not be more honored to serve as *AILA Law Journal*'s first Editor-in-Chief. I come to this position with 20 years of experience in the field of immigration—a journey that has included private practice in a boutique immigration law firm, legislative lawyering for a national non-profit, and teaching. I am based in central Pennsylvania, where I teach at Penn State Law, direct an immigration clinic and conduct research on immigration prosecutorial discretion, enforcement, and the intersection of immigration, race, and national security.

The partnership between AILA and Fastcase in the creation of this law journal is itself innovative and one that I hope breaks boundaries in the legal market and showcases some of the best legal thinking.

I hope you enjoy the inaugural issue of the *AILA Law Journal* and am grateful for your support.

Shoba Sivaprasad Wadhia, Esq.
Editor-In-Chief

Americans, But Not Citizens

An Argument for Nationality-Based Asylum Protection

Jillian Blake*

Abstract: Since 2017 the Trump administration has been undoing immigration protections for hundreds of thousands of longtime U.S. residents, including those with Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS). Many of the people affected by these changes have lived in the United States for decades and have become culturally American, even though they are not U.S. citizens. Furthermore, many of the countries these individuals could be removed to are among the most dangerous in the world and Americanized deportees are often targeted for persecution upon return. This article argues that those who are ethnically American and fear persecution on that basis should be able to seek asylum in the United States under the protected ground of "nationality." The article outlines the legal basis for such a claim, including nationality as a ground for asylum, the feared persecution's nexus to the protected ground, and the lack of state protection.

Introduction

During the 1930s President Herbert Hoover carried out a massive deportation campaign against Mexicans and Mexican-Americans in response to nativist resentment and scapegoating of immigrants. The campaign, known as the "Mexican Repatriation," was executed in a brutal, racist, and illegal manner, and led to the expulsion of more than a million people from the United States. Many people who had lived most of their lives in the United States "found themselves in Mexico dealing with process of socialization, of learning the language, [while] they maintained an American identity."[1] Almost a century later, another repatriation crisis is looming in the United States.

Since 2017, President Donald Trump's administration has been systematically undoing legal protections for law-abiding, longtime U.S. residents. The administration announced an end to Temporary Protected Status (TPS)[2] and Deferred Action for Childhood Arrivals (DACA)[3] programs, which will subject more than a million people to removal from the United States in the coming years.[4] Many of the people affected by these changes speak English, were educated in the United States, have lived in the United States for decades, and have U.S. citizen family members. For all intents and purposes these people are Americans yet are now facing forcible removal to places foreign to them.

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In addition to the harm of having to leave behind the lives they built and start again in a place they do not know, many will also face persecution in the countries they are removed to. The top countries of origin for DACA recipients are Mexico, El Salvador, Guatemala, and Honduras,[5] which are among the most dangerous countries in the world.[6] Similarly, the top countries of origin for TPS recipients are El Salvador, Haiti, and Honduras.[7] Violent criminal gangs are prevalent in these countries and "Americanized" deportees are often targeted for persecution soon after they return.[8]

U.S. deportees to Central America are considered "naïve, vulnerable, and particularly wealthy . . ." and are "prime targets for gangs."[9] Their "attachment to America and relative unfamiliarity with their homeland lead to extreme challenges in reintegration in a nation dominated by criminal gangs."[10] In the past five years at least 70 deportees have been murdered in El Salvador alone, 20 of them since 2016.[11]

This article argues that many of the people who will face removal in the coming years are ethnically American (but not U.S. citizens) and will have legitimate asylum claims based on the protected asylum ground of "nationality." In order to qualify for asylum, the applicant will first have to demonstrate that his or her nationality or ethnicity is American[12] even though he or she is not a U.S. citizen. This can be accomplished by presenting evidence of the common elements of nationality and ethnicity, including long-term residence, education, language, culture, political allegiance, and interests.

Next, the applicant must demonstrate that he or she has a well-founded fear of persecution in the proposed country of removal based on his or her nationality. This can be accomplished by presenting credible evidence that those with U.S. nationality characteristics face persecution and are targeted on that basis in the proposed country of removal or that the person has already been threatened or persecuted on that basis. Importantly, the applicant need not show that the nationality characteristic was or will be the sole reason for persecution, but only one central reason. Finally, these asylum applicants will have to show that their birth country will not be able to protect them from the persecution they will face because of ineffective security forces.

American Nationality as a Ground for Asylum

Those who meet the legal definition of "refugee" can be granted asylum in the United States. Under U.S. and international law, a refugee is a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[13] Under United Nations High Commissioner for Refugees (UNHCR) guidelines, the nationality ground for asylum is "not to be understood only as 'citizenship.'"[14] Instead, "[p]ersecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic)

minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution."

"Ethnic group" is defined by sociologists as:

> individuals who consider themselves, or are considered by others, to share common characteristics that differentiate them other collectives in society, and from which they develop distinctive cultural behavior. . . . Members of that ethnic group may be identifiable in terms of racial attributes, but they may also share other cultural characteristics such as religion, occupation, language, or politics. Ethnic groups should also be distinguished from social classes, since membership generally cross-cuts the socio-economic stratification within society, encompassing individuals who share (or are perceived to share) characteristics that supersede class.[15]

Courts in the United States have recognized racial and ethnic minorities as refugees under the nationality ground. In *Stserba v. Holder*,[16] the Sixth Circuit found that an asylum applicant who was a citizen of Estonia but ethnically Russian was persecuted based on her Russian ethnicity because she was stripped of her Estonian citizenship for two years and had her medical degree from Russia invalidated. Similarly, in *Mengstu v. Holder*,[17] the Ninth Circuit found that an asylum applicant who was born in Ethiopia but ethnically Eritrean faced persecution when she was expelled from Ethiopia due to her Eritrean ethnicity. In *Perkovic v. INS*,[18] the Sixth Circuit also found that two asylum applicants were persecuted in the former Yugoslavia because of their Albanian ethnicity. Other examples of ethnicities granted asylum protection in the United States include Mayans from Guatemala,[19] Amhara from Ethiopia,[20] Tibetans from China, and Roma from Bulgaria.[21]

These examples demonstrate that nationality-based asylum protection is not usually linked to the applicant's citizenship but rather his or her ethnic or racial identity. Furthermore, this ethnic identity can be one that has its own nation-state (Russia, Eritrea, Albania) or one that does not have its own nation-state (Mayan, Amhara, Roma, Tibetan).

There is a distinct American nationality rooted in American culture, politics, and history that those who have lived a significant time in the United States share, whether or not they are citizens. Many noncitizens deportees identify as American, and others also perceive them as such through their culture, mannerisms, or accents.

As a Honduran deportee who lived decades in the United States explained, "I feel like I'm more American than I am *Hondureñan* because everything that I do is American, you know. . . . The stuff I buy to eat, the movies I watch, the music I listen to—it's like it's tattooed in me to be an American."[22]

Another deportee from the United States stated, "My whole world was there . . . first language was English."[23] A journalist chronicling the lives of U.S. deportees in El Salvador describes:

> [G]ame-day tailgating is a part of preserving their adopted American traditions in a country where the word *futbol* is universally understood to mean soccer. When the first notes of 'The Star-Spangled Banner' sounded, Reyes and the other deportees rose to their feet. It was the national anthem they knew best.[24]

According to another article based on interviews with more than 200 deportees in Mexico, the U.S. deportees "stand out. They dress differently, they think differently, they speak broken Spanish and they dream in English. They miss everyday American life and its special occasions. They long for American food. . . ." When asked what they missed most about the United States, many responded "everything. . . . I feel American."[25]

Deportees who have lived a long time in the United States have adopted American language, culture, and even political allegiance but are not U.S. citizens. The most common age of arrival for those in the United States who have DACA is eight, and 31 percent of DACA recipients arrived in the United States when they were five years old or younger.[26] Those with TPS from El Salvador and Honduras have resided in the United States since 2001 and 1999, respectively. When these longtime U.S. residents return to their birth countries, many will still identify with the American nationality, and be a distinct and visible minority within the countries they are removed to.

Nexus

The most difficult aspect of a nationality-based asylum claim will be showing nexus—that an American deportee will face persecution *on account* of his or her nationality and not just due to generalized violence. The U.S. Supreme Court has found that direct proof of a persecutor's motives is not required, but that "[the applicant] must provide some evidence of it, direct or circumstantial." Under the REAL ID Act, passed by the U.S. Congress in 2005, an enumerated Convention ground must be "at least one central reason" for the persecution suffered by the applicant, but it need not be the only reason.[27] Explaining the REAL ID Act's "one central reason standard," the Board of Immigration Appeals (BIA) held that "the protected ground . . . cannot be incidental, tangential, superficial, or subordinate to another reason for harm."[28]

In *Matter of Kasinga*, a seminal asylum case that established asylum protection for women who fear female genital mutilation the BIA held that "a subjective 'punitive' or 'malignant' intent [of a persecutor] is not required for harm to constitute persecution."[29] The *Kasinga* nexus holding is important because it establishes that nationality-based asylum applicants need not show that persecutors hate Americans (although this may also be the case), but only that the asylum applicant faces persecution because of his or her nationality traits.

Certain factual scenarios would establish nexus in a clear-cut manner. A common scenario is this one: a family in El Salvador is threatened because a criminal gang knows they have an "American" relative (someone who has lived in the United States for a long period of time who may or may not be a citizen). They target that person in the United States by calling him and extorting him, telling him that he will be killed if he ever returns to El Salvador. This person could claim asylum under nationality grounds, as one of the central reasons he was targeted is that he is American or perceived to be American.

Consider another factual scenario that could establish nexus: a person returns to Honduras after decades in the United States and clearly has American characteristics (dress, language, mannerisms, culture, etc.). She is immediately identified by gang members as American and threatened with kidnapping and insults about her nationality. This person also has no social network in Honduras to provide protection or support in that country, and the police will not protect her because she cannot speak Spanish and they view her as American. This person could also claim asylum based on her nationality.

Both of the scenarios presented above establish past persecution and therefore a presumption of future persecution.[30] Nexus can be more difficult to establish when there has not been past persecution, but these claims are still viable, as an asylum applicant need only establish a "well-founded fear" of persecution.[31] In these situations, the applicant must rely on country conditions and circumstantial evidence to demonstrate the danger he or she will face if removed from the United States.

Country conditions demonstrate that deportees from the United States face discrimination in Mexico and Central America. According to one U.S. deportee to Mexico, "People criticize me because of how I dress, because of how I talk. They look [at me] like I'm not from here. Most think, 'Go back to America.'"[32] In El Salvador "deportees can be branded traitors for daring leave El Salvador to set up home in America—[Many deportees] are given radical makeovers; new haircuts and new clothes along with sunglasses that are rarely removed. Then they learn to talk differently, walk differently. . . ."[33] According to César Ríos, director of the Institute of the Migrant in El Salvador, "[F]or those who have been abroad for more than five years, the situation is [the] worst." These individuals are vulnerable and "condemned by society." Furthermore, according to Ríos, those "over 35 [years old] cannot find jobs."[34]

In addition to facing discrimination and challenges reintegrating into society, deportees are also targeted for extortion, kidnapping, and sexual violence. As explained in one article, "[Deportees from the United States] are often marked upon their return for retribution, shaken down, even kidnapped for ransom, by gang members." In El Salvador, returning to Central America after having lived in the United States for many years is like "having a tattoo on [your] forehead." Deportees "feel like marked men or women, unable to blend in. They often find themselves subject to both extortion and criminal paranoia."[35] According to Salvadoran lawyer Laura Moran, "Deportees from

the U.S. face being killed or sexual violence. Most girls try to hide from the violence. The problem is that most don't have a place to go."[36]

State Protection

The final element of an asylum claim that applicants will have to prove is that the state they are removed to will not protect them from the persecution they will face based on their nationality. Country conditions in Mexico and Central America demonstrate that the police and security forces are largely ineffective due to lack of resources and corruption.[37] In Mexico, many

> don't trust the police, seeing them as, at best inefficient and at worst, corrupt and in the same as league as organised crime... Some do not have working patrol vehicles and many lack training. Despite years of talk of police reform, little has changed, even as the country's violence rises to unprecedented levels.[38]

In Central America "police lack[]equipment, human and other resources to provide sufficient protection, or often [are] in league with the racketeers themselves ... [T]he 'service' provided by protection rackets is sometimes tolerated and even reluctantly welcomed...."[39]

In addition to police forces in Mexico and Central America being generally ineffective and corrupt, those who are ethnically American will have a more difficult time accessing security services due to linguistic, social, and cultural barriers. They may not speak Spanish, which will make access to the police and the judicial system more difficult if not impossible. Furthermore, they may not have the support of a family network in Mexico or Central America, which will make it difficult to secure employment and housing and establish a safe home environment. Additionally, according to the Latin America Working Group:

> [A]n increase in deportations from the United States could exacerbate the existing security situation, drive forced displacement, and overwhelm the Central American governments' and civil society's capacity to protect the rights of and provide basic services to deportees. A lack of programs and job opportunities—combined with threats from gangs, organized crime, and state security forces—**leaves returned migrants between a rock and a hard place: they can either turn around and migrate again or resign to living a life without dignity and safety in their home countries.**[40]

Although persecution "implies some connection to government action or inaction," it can involve the "government's inability or unwillingness to control private conduct,"[41] including harm from gangs and organized criminal organizations. Factors that could determine whether a government is unable or unwilling to control a private actor are evidence:

> that the government condoned or was complicit in the private harm being inflicted; the alien's attempts, if any, to obtain government protection and the government's response to those attempts; government action that is perfunctory; repeated government unresponsiveness; general country conditions; the nature of the government's laws or policies with regard to the complained of harm; and the steps, if any, the government has taken to prevent the infliction of such harm.[42]

Particular Social Group Asylum Claims for U.S. Deportees and Imputed Wealthy Americans

Asylum seekers from Mexico and Central America have advanced particular social group (PSG) asylum claims over the past several years due to the dangers they would face as U.S. deportees or imputed wealthy Americans. Particular social group is another one of the five grounds for asylum listed in the Refugee Convention, distinct from the nationality ground advanced in this article. PSG asylum claims for U.S. deportee groups have been unsuccessful to date, mostly because courts have found that the proposed groups do not meet one of the requirements for the PSG asylum ground—that a proposed social group be "particular," meaning that it not be too "amorphous, overbroad, diffuse, or subjective."[43] The BIA established two other factors in determining whether a PSG exists, including immutability (whether members of the group share common characteristics they cannot, or should not, have to change) and social distinction (whether society views members of the group as separate in a significant way).[44]

The Ninth Circuit considered asylum protection for the proposed particular social groups "returning Mexicans from the United States"[45] and "deportees from the United States to El Salvador"[46] and found that both groups were too broad and not particular enough to be cognizable particular social groups. The court found that "deportees from the United States to El Salvador" was "too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal."[47]

The Ninth Circuit also considered the PSG "imputed wealthy Americans" in cases in which asylum applicants argued that because they were "light-skinned, fit, and have American mannerisms or accents, their family would be perceived as wealthy Americans in Mexico, and thus will become targets for kidnaping or torture." The court held that those who appear to be Americans are not defined with particularity (it would be too hard to tell who was in the group) and the group was also not socially visible in Mexican society. The court also held that applicants in this case did not present evidence that they would be at more risk than any other person who could be subject to generalized violence in Mexico.[48]

In *Lizama v. Holder*, the Fourth Circuit considered the PSG "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs." Like the Ninth Circuit in the cases discussed above, the Fourth Circuit found that the group's characteristics, including wealth, Americanization, opposition to gangs, and criminal histories, were all too amorphous and "not narrow or enduring enough to clearly delineate its membership or readily identify its members."[49]

While the Ninth and Fourth Circuits focused on the lack of particularity in deportee and wealthy American PSG claims, the Seventh Circuit recently focused on the issue of nexus to deny asylum in a similar case. In *Orellana-Arias v. Sessions*, the court considered the group "Salvadorans who have lived in the United States for many years and who are perceived by drug cartels, criminal organizations, gangs, and corrupt government officials to have money upon their return to El Salvador."[50] The court argued that "even if the [group is] cognizable as [a] social group[] under the Immigration and Nationality Act, Orellana-Arias has not provided sufficient evidence establishing that he was targeted on the basis of his membership in [the] social group."[51]

The court reasoned that this was because even though the gang members who threatened him mentioned that he had returned from the United States before extorting him, he "provided no evidence that he was more of a target because he was deported from the United States then he would have been had he returned from, for example, Qatar, Luxembourg, Brunei, or any other country perceived to be wealthy, or had he won the lottery, inherited a large estate, secured a high-paying job, or discovered a diamond mine in his backyard." The court therefore found that it was "Orellana-Arias's perceived wealth alone that made [him] a target for the gang," which is not a protected ground.[52]

Analysis of these PSG asylum claims with factual circumstances similar to potential nationality-based claims demonstrates why the nationality ground could be more successful. By claiming the nationality ground, asylum seekers can avoid having to meet particularity and social distinction requirements for PSG asylum. As long as the asylum applicant can show he or she is ethnically American, just as any other ethnicity would, he or she would satisfy the requirement of belonging to a group protected under the Refugee Convention. Furthermore, bringing nationality-based claims avoids relying on the characteristic of wealth or perceived wealth in a PSG claim, which has been found to be too amorphous by the BIA and courts in numerous cases.

The Seventh Circuit's argument in *Orellana-Arias v. Sessions* that perceived wealth, and not nationality, is the true motivation for the persecution in "imputed wealthy American" cases will likely be raised in nationality-related cases as well. Advocates should preempt this argument by demonstrating that any kind of persecution based on nationality will likely involve some additional inference about the group. For example, indigenous Mayans may face persecution in Guatemala because they are viewed as poor and uneducated. While "poor and uneducated Guatemalans" may not be a protected group

under the Refugee Convention, just because the persecutor associates Mayans with those characteristics does not mean they should not receive protection as long as their nationality was one central reason for the persecution they face.

A concurrence in the Seventh Circuit case *Salgado-Gutierrez v. Lynch* also provides support for nationality-based asylum claims. In the case, the majority found the PSG "Mexican nationals who have lived in the United States for many years and who, upon being removed to Mexico, are perceived as having money" was not cognizable.[53] Judge Richard Posner disagreed with the majority's reasoning in the case (although he agreed with its conclusion because he believed the applicant did not show that he could not relocate within Mexico). In his concurrence Judge Posner argues that

> wealth does not often "stand alone" in these cases. In *Tapiero de Orejuela v. Gonzalez*, 423 F.3d 666, 672 (7th Cir. 2005), we said that Colombian cattle farmers were not defined merely by their wealth but also by their land, their profession, and their education. And similarly, Salgado-Gutierrez is defined by his having lived in the United States for twenty years—for being, as a consequence, to a degree American—a fact of his personal history that he can't escape from.[54]

Posner argues that longtime U.S. residents could plausibly establish a claim to asylum because their American identity is an immutable, identifiable characteristic they cannot change, even if it also happens to be associated with wealth. Furthermore, Posner states that relocating within Mexico might be difficult for a U.S. deportee, as "he is bound to be asked questions about his origin, and his 20 years of living in the United States may make him recognizable as an alien and prevent his obtaining employment."[55]

Advocates should also be aware that applicants bringing nationality-based asylum claims will have to show significantly more ties and allegiance to the United States than an applicant would presenting a PSG claim based on being a deportee or perceived wealthy American. For example, a person who lived in the United States for a short time and was then deported to Central America would be a "U.S. deportee" and maybe even a perceived "wealthy American," but would not be ethnically American.

Conclusion

A repatriation crisis is approaching with the Trump administration's announced termination of DACA and TPS programs. Many longtime U.S. residents who have established strong national ties to the country should claim asylum protection if they fear persecution based on their American identity. Asylum applicants will need to demonstrate that they are culturally American, will be at increased risk for persecution because of their nationality, and that they will not receive protection from security forces in the country they are

removed to. While similar PSG claims have been brought in the past, the nationality ground offers a sounder basis to claim asylum and is more likely to be successful. Accepting nationality-based asylum claims may help to mitigate some of the harmful effects of the coming deportation crisis.

Notes

* Jillian Blake (jillian@bw-immigration.com) is an Immigration Attorney at Blake & Wilson Immigration Law, PLLC, Alexandria, Virginia.

1. Alex Wagner, *America's Forgotten History of Illegal Deportations,* The Atlantic (Mar. 6, 2017), www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/.

2. The Trump administration announced the termination of TPS for El Salvador, Haiti, Nepal, Nicaragua, Sudan, and Honduras. On October 3, 2018, a federal district court enjoined the administration from implementing the termination of TPS for Sudan, Nicaragua, El Salvador, and Haiti. *Ramos v. Nielsen*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018).

3. DACA was rescinded on September 5, 2017, by President Trump. However, USCIS is still accepting DACA renewals (but not new applications) due to injunctions issued by federal courts in the Eastern District of New York and the Northern District of California. https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction.

4. Elise Foley, *Trump Promised to Reshape America. He Already Told 1 Million Immigrants Who Had Legal Protections to Get Out,* Huffington Post (May 6, 2018), www.huffingtonpost.com/entry/trump-tps-daca_us_5aecbb97e4b0c4f1932282a0.

5. www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ft_17-09-25_daca_topcountries/.

6. Rocio Cara Labrador & Danielle Renwick, Central America's Violent Northern Triangle (last updated June 26, 2018), www.cfr.org/backgrounder/central-americas-violent-northern-triangle.

7. Jill H. Wilson, Cong. Research Serv., RS20844, Temporary Protected Status: Overview and Current Issues (updates Oct. 10, 2018), https://fas.org/sgp/crs/homesec/RS20844.pdf.

8. Alfredo Corchado, *"We Own This Place": Gangs Prey on Deportees Along the U.S.-Mexico Border,* Dallas Morning News (Aug. 2017), www.dallasnews.com/news/mexico/2017/08/27/willful-blindness-deportees-becoming-easy-prey-gangs-along-us-mexico-border.

9. Nick Paton Walsh, et al., *Torn from Their Families in the U.S., Salvadoran Deportees Return to a Gang-Ravaged Homeland,* CNN (June 7, 2018), www.cnn.com/2018/06/07/americas/el-salvador-deportees-us-intl/index.html.

10. Olivia P. Tallett, *Strangers in Their Own Homelands,* Houston Chron. (Nov. 27, 2017), www.houstonchronicle.com/news/article/Trump-s-deportees-are-often-strangers-to-their-12387247.php.

11. Anna-Catherine Brigida, *Kicked Out of the U.S., Salvadoran Deportees Are Struggling Simply to Stay Alive,* World Politics Rev. (Oct. 9, 2018), www.world

politicsreview.com/articles/26302/kicked-out-of-the-u-s-salvadoran-deportees-are-struggling-simply-to-stay-alive.

12. Within this article the term "American" refers specifically to a person who is a national of the United States of America rather than other North or South American countries.

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Challenging a Red Notice

What Immigration Attorneys Need to Know About INTERPOL

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Abstract: The central challenge facing immigration attorneys in the context of INTERPOL is to understand and make clear that INTERPOL's publications—including its famous "Red Notice"—are the result of an administrative procedure, not a judicial process. They do not prove guilt and they are not based on evidence. Yet INTERPOL publications are used by authoritarian regimes to persecute dissidents and politically active people abroad, including through the U.S. immigration system. This article will provide immigration attorneys with the background and tools they need to effectively advocate for their clients and successfully challenge Department of Homeland Security assertions about INTERPOL.

Introduction

The International Criminal Police Organization—officially ICPO-INTERPOL, commonly known simply as INTERPOL—plays an important role in international law enforcement, and its publications are often used in U.S. immigration and asylum cases. But neither INTERPOL nor its publications, such as its famous "Red Notice," are well understood. This can lead attorneys to fail to appropriately challenge Department of Homeland Security (DHS) or immigration judge (IJ) assertions about INTERPOL that are often incorrect. For example, too often IJs uncritically defer to INTERPOL publications in their decisions, resulting in extended detention time or denials of bonds and other requests for immigration benefits, and in general causing serious damage to an individual's U.S. immigration case.

This article will educate attorneys on the meaning of INTERPOL Red Notices and other INTERPOL publications, give background on INTERPOL as an organization, and provide attorneys with the tools and knowledge they need to effectively advocate for their clients when an INTERPOL issue arises. The existence of an INTERPOL issue in any particular case can provide immigration attorneys with an opportunity for advocacy before an IJ, the DHS, and at an international level before the Commission for the Control of INTERPOL's Files (CCF).

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What INTERPOL Is and What It Isn't

To understand INTERPOL's various publications, attorneys must first understand INTERPOL itself. Contrary to the image fostered by Hollywood, INTERPOL is not an international law enforcement agency. No one who works for INTERPOL has the power to make an arrest as a result of his or her position in INTERPOL. Rather, INTERPOL is an international organization that has the primary aim of advancing international police cooperation. It is based on the sovereignty of its member nations, and therefore respects the independence of their separate judicial and law enforcement systems. It works by holding databases of nation-provided information, by maintaining a communications system for messages between law enforcement agencies in different nations, and by publishing notices—including its Red Notice.

INTERPOL currently has 194 member nations. (North Korea is one of the few well-known nations that is not a member of INTERPOL.) INTERPOL's supreme body is its one-nation, one-vote general assembly. Below the assembly, INTERPOL has a president, a 12-member executive committee chosen on a geographically representative basis, a secretary-general who has operational control of INTERPOL, and, finally, INTERPOL's staff in its General Secretariat. All INTERPOL member nations are required to establish a National Central Bureau (NCB) to manage all liaison with INTERPOL. In the United States, the NCB is co-managed by DHS and the Department of Justice. Many U.S. state and local law enforcement agencies have "read access" to databases maintained by INTERPOL, but only the U.S. NCB can request a Red Notice or other INTERPOL publication or transmit messages on behalf of the United States.

All INTERPOL activity, including all communications over its network, must respect its Constitution and subsidiary rules adopted by the general assembly, including its Rules on the Processing of Data (RPD).[1] All of INTERPOL's foundational documents and other relevant legal documents can be reviewed on INTERPOL's thorough website at www.interpol.int/About-INTERPOL/Overview.

The purpose of the Constitution and the subsidiary rules is to ensure that INTERPOL is used only against "ordinary-law crime,"[2] and is not in any way involved in politics, or for purposes of a political, and therefore illegitimate, persecution. In this way, INTERPOL is supposed to be beholden to a general principle also contained in U.S. asylum law, which establishes that while any country has the right to prosecute its own citizens, it must do so for legitimate purposes.

The Constitution's most-cited portions are its Article 2, which requires that international police cooperation be conducted within the "spirit of the Universal Declaration of Human Rights,"[3] and, in particular, its Article 3, sometimes referred to as the neutrality clause, which states that it is "strictly forbidden for the Organization [INTERPOL] to undertake any intervention

or activities of a political, military, religious, or racial character."[4] INTERPOL cannot stop its sovereign member nations from creating and prosecuting political offenses. All it can and is required to do by its Constitution is ensure that it is used only in connection with genuinely criminal offenses. Unfortunately, as discussed below, INTERPOL's system of publications and other communications is subject to abuse by member nations.

INTERPOL Publications: Introduction to the Red Notice

The value of INTERPOL rests largely in the structured communications system it provides. This system facilitates three kinds of messages. First, there are simple messages between one or more NCBs. A message is analogous to an everyday email and is only seen by the INTERPOL headquarters in Lyon, France, if the sending nation includes it in the recipient list.

Second, there are "diffusions," a more structured email that can be sent to one or more NCBs, and can concern a wide variety of subjects, up to and including identifying an individual as a suspect and requesting his or her arrest.[5] A diffusion is not subject to any prior review by INTERPOL before it is transmitted, but a diffusion is copied automatically to INTERPOL, and can be reviewed by INTERPOL for compliance with its rules after it is received.

Finally, there is INTERPOL's system of colored notices, including its Red Notice. Any NCB can request the publication of a notice, but all requests are subject to review by INTERPOL for administrative compliance with its rules before publication. By rule, all notices must be published to all INTERPOL member nations.[6] Yellow Notices (to alert police to a missing person), Blue Notices (to collect additional information about a person in relation to a crime), and Green Notices (to provide warnings about persons who have committed criminal offenses and are likely to repeat those offenses in other countries) are all relatively common, but by far the most-used notice is the Red Notice, of which 13,048 were published in 2017.

The purpose of a Red Notice, according to INTERPOL, is to "seek the location and arrest of wanted persons with a view to extradition or similar lawful action."[7] The requesting NCB can choose to make public a redacted version of the Red Notice on the INTERPOL website (www.interpol.int), but by default, Red Notices are published and visible only to law enforcement agencies, such as DHS. This means that often an individual who is the subject of a Red Notice may not be aware of it until he or she is confronted by U.S. law enforcement—for example, when crossing an international border into the United States or when appearing for an interview before U.S. Citizenship and Immigration Services (USCIS), such as for an asylum hearing. Other individuals may become aware of a Red Notice, or at least suspect that one exists, if they have a particularly high-profile case or if their home country publicizes its request for or use of a Red Notice in local media.

A Red Notice is often described as an "international arrest warrant." This is incorrect. As INTERPOL itself states, a Red Notice "is not an international arrest warrant."[8] Rather, a Red Notice is "simply to inform all member countries that the person is wanted based on an arrest warrant or equivalent judicial decision issued by a country or an international tribunal."[9] Red Notices must comply with specific conditions, which are set out in RPD Articles 82–87. They must concern serious ordinary-law crimes not related to behavioral or cultural norms, family or private matters, or private disputes that are not serious or are not connected with organized crime, and must meet a penalty threshold.[10]

The requesting NCB must adequately identify the individual sought, must provide judicial data on the facts of the case, the charge, the laws covering the offense, and the maximum penalty possible, and must refer to a valid arrest warrant or comparable judicial decision. While the requesting NCB is asked to provide a copy of the warrant or decision, it is not required to do so. If the NCB meets these requirements, INTERPOL will publish the Red Notice after it completes its review of the request. The conditions relevant to diffusions, or other colored notices, are different, but all communications over the INTERPOL system are equally subject to review for compliance with INTERPOL's Constitution and its RPD.

How INTERPOL Reviews Red Notice Requests

In conducting its review of Red Notice requests, INTERPOL operates on the belief that, as all of its member states are sovereign, they are all equal, and that therefore all of their requests must be presumed to have equal validity. In other words, while INTERPOL is required by RPD Article 86 to review Red Notices for compliance with Articles 2 and 3 of INTERPOL's Constitution, INTERPOL begins with the assumption that a request for a Red Notice is compliant. Its review therefore focuses on ensuring that the requested Red Notice meets the administrative conditions set out in the RPD. If INTERPOL becomes aware—either during or after its review—that a request for a Red Notice might be invalid because it violates the requirements of Article 2 and/or Article 3, it will subject that request to additional scrutiny. But this additional scrutiny is not applied to all requests, and even when it is applied, it has considerable and inherent limits. As explained below, this is exactly where an attorney who understands that her asylum client, for example, is the subject of an illegitimate Red Notice can make all the difference.

Precisely because INTERPOL respects the sovereignty of its member nations, it cannot and does not conduct its own on-the-ground investigation of a purported crime. It must rely on information provided by the requesting NCB, by other NCBs that care to contribute to its review, by its appellate body (the CCF), by attorneys acting on behalf of individuals, or on public source

information. When then-INTERPOL President Meng Hongwei of the People's Republic of China was arrested in China in October 2018, INTERPOL's Secretary-General Jürgen Stock of Germany was asked if INTERPOL would investigate Meng's forced resignation. Stock replied that INTERPOL could not do so, as it is "not an investigative body."[11] If INTERPOL cannot investigate the circumstances surrounding the disappearance of its own president, it certainly cannot and does not investigate other purported offenses. For individuals who are fleeing persecution, including illegitimate and politically motivated prosecutions in their home countries, it is up to their attorneys to challenge an INTERPOL Red Notice both before an IJ and in INTERPOL itself.

Misuse, Misunderstanding, and Abuse of Red Notices

In short, Red Notices are the result of an administrative process, not a judicial procedure. They are not based on any INTERPOL investigation. They are not an arrest warrant. They do not meet the probable cause standard. If they concern an individual accused of a crime, they do not denote any assumption of guilt. They are not based on any evidence other than the unsupported allegation of the NCB that made the request. They have no independent probative value. They can be published without a valid arrest warrant from the requesting nation, and if even if that nation provides an arrest warrant, a Red Notice offers no proof that the arrest warrant is valid, that the purported crime has been committed, or that the crime has not been concocted by the authorities for political purposes.

A Red Notice adds no additional force to an otherwise valid arrest warrant, as it is based on nothing more than the word of the government that procured the arrest warrant in the first place. The only facts a Red Notice proves, are that the requesting nation is a member of INTERPOL, that it has completed the online form requesting the Notice, and that the case did not initially raise political or other improper motives within the internal INTERPOL vetting process. The only fact a diffusion proves is that the transmitting nation is a member of INTERPOL and has successfully sent an email.

The fact that the process for obtaining a Red Notice is straightforward, and the reality that a Red Notice often has substantial direct and indirect effects on the individual named in it has encouraged authoritarian regimes to use Red Notices—and, less frequently, other colored notices or diffusions—to harass dissidents, exiles, or other politically or financially inconvenient opponents abroad. "INTERPOL abuse" occurs when INTERPOL's channels or publications are used by an INTERPOL member nation for political, military, racial, or religious reasons. Governments, international organizations, nongovernmental organizations (NGO), and experts have attested to the reality of INTERPOL abuse. Immigration attorneys also witness firsthand the damage that a Red Notice can do to an innocent client who is processing a visa, a

green card, a naturalization case, or an asylum case, among other applications for immigration benefits.

Challenging INTERPOL Red Notices

Attorneys involved in a matter with an INTERPOL dimension should consult reputable sources, such as Fair Trials International,[12] on the wider phenomena of INTERPOL abuse and on the reputation of the nation that requested the publication of the Red Notice (or other INTERPOL notice or diffusion). While every case must be considered on its merits, Red Notices based on charges of financial crime (which, unlike crimes such as murder, leave little physical evidence) or terrorism (which is how some nations describe non-violent political opposition) are worthy of particular attention, and will carry serious adverse immigration consequences. That said, given the lengthy list of crimes contained in the Immigration and Nationality Act (INA), criminal charges of almost any kind may result in the denial of immigration benefits and the issuance of a charging document. As such, in most cases involving INTERPOL, the stakes are particularly high.

In cases with an INTERPOL dimension, attorneys should explain to the IJ that a Red Notice (or other INTERPOL publication) is not an international arrest warrant, is not based on any evidentiary foundation, is not the result of any INTERPOL investigative process, and, as a result, offers no independent or corroborating reason to believe that the individual named in it has committed a crime or that a foreign arrest warrant is supported by credible evidence. Attorneys should also challenge any claim that a Red Notice (or other INTERPOL publication) offers any proof that an individual poses a danger to the community. As a Red Notice is not based on any judicial process, it should not be used as proof of dangerousness.

Unfortunately, past experience shows that DHS itself does not fully comprehend the meaning and limits of a Red Notice. For example, in a recent case involving an individual accused of attempted embezzlement of funds from the Russian Federation, the client filed for asylum in the United States shortly after discovering that he was the subject of a Red Notice. DHS detained the individual at his asylum interview. The results of a request under the Freedom of Information Act (FOIA) filed with Immigration and Customs Enforcement (ICE) later revealed that ICE immediately categorized the individual as a danger to the community and a flight risk. ICE detained him at his affirmative asylum interview, they issued him a Notice to Appear in Removal proceedings, and the IJ denied a reasonable bond. INTERPOL subsequently deleted the Red Notice, but only after the individual and his family had suffered the serious effects of an abusive INTERPOL publication. Attorneys must take great pains to avoid these outcomes by arming themselves with the necessary information to explain to IJs what a Red Notice is and is not.

The fact that ICE has stated that it uses Red Notices to guide its targeting[13] implies that individuals who are seeking asylum—and who are therefore not U.S. citizens or green card holders—are particularly likely to be selected for arrest, should they be named in a Red Notice. Indeed, if an individual enters the United States on a valid visa that is then cancelled as the result of the publication of a Red Notice, it is possible for the Red Notice to be used by an abusive foreign nation to "manufacture" an immigration violation in the United States—which ICE can then use as the basis for arresting and seeking to deport the individual who is seeking asylum from the abusive nation. This process risks turning ICE, and any IJ who participates in the process, into agents of the abusive nation, a point that attorneys should bring up if it is relevant.

Attorneys should also carefully examine the full, original Red Notice to make sure that it has been correctly translated into English, to ensure that it meets all the conditions and contains all the judicial data required by INTERPOL, and to check if the Notice contains any information or assertions that violate INTERPOL's rules or indicate bias on the part of the requesting authorities. For example, Red Notices may not be published for certain categories of offenses, such as those that might raise "controversial issues relating to behavioral or cultural norms," and for those "relating to family/private matters," among other categories.[14] In theory, INTERPOL is not allowed to publish a Red Notice that does not meet the many conditions established by its Constitution and RPD.

In practice, Red Notices that do not meet these conditions are published nonetheless. In one recent case, a Red Notice from El Salvador specified only that an alleged robbery took place "on the street" in August. This is not sufficient judicial data. By demonstrating that a Red Notice does not meet INTERPOL's requirements, an attorney can substantially reduce any credibility it may possess in the eyes of an IJ. An attorney should not rely on the public version of a Red Notice, as the full Red Notice—visible only to law enforcement agencies, even if a redacted version has been made public—contains information that is essential to assessing the Notice.

Finally, attorneys should challenge any claim that a Red Notice increases the flight risk posed by an individual. For example, in a recent case involving a citizen of Armenia, the IJ denied a request to lower the bond amount despite the fact that the respondent appeared eligible for permanent residency and asylum, and though he had considerable family ties in the United States. The sole reason for refusing to lower the bond amount was the existence of an INTERPOL Red Notice. But as INTERPOL itself states, a Red Notice is important in part because "[c]riminals and suspects are flagged to border officials, making travel difficult."[15] As officials routinely consult INTERPOL-maintained databases when controlling a national border, a Red Notice—as it is designed to do—actually decreases flight risk. This point must be made to IJs orally and in filings before the court.

Attorneys should also be aware of, and provide to IJs in filings, the formal U.S. legal position on the value of Red Notices. The U.S. NCB states that:

> The United States does not consider a Red Notice alone to be a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the 4th Amendment to the Constitution. Instead, the United States treats a foreign-issued Red Notice only as a formalized request by the issuing law enforcement authority to "be on the look-out" for the fugitive in question, and to advise if they are located.[16]

The U.S. Department of Justice's *Justice Manual* states that:

> In the United States, national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone. If the subject for a Red Notice is found within the United States, the Criminal Division will make a determination if a valid extradition treaty exists between the United States and the requesting country for the specified crime or crimes. If the subject can be extradited, and after a diplomatic request for provisional arrest is received from the requesting country, the facts are communicated to the U.S. Attorney's Office with jurisdiction which will file a complaint and obtain an arrest warrant requesting extradition.[17]

In short, the fact that INTERPOL has published a Red Notice on an individual should not mystify anyone, including an IJ, or an attorney, into accepting that the named individual is guilty, or that the named individual is the subject of charges that are supported with evidence that is on its face credible and sufficient. A Red Notice is not by itself a sufficient basis for arresting anyone in the United States, much less detaining or deporting anyone, or denying them asylum.

In defending the interests of their clients, attorneys should be aware of the resources they can draw on to assess the validity of an INTERPOL publication, including a Red Notice. An attorney may find it advisable to retain the services of an expert witness on INTERPOL and the wider phenomenon of INTERPOL abuse, and to consult NGOs with an interest in this problem or colleagues with specialized experience in it. At the INTERPOL level, attorneys should review INTERPOL's Constitution and its RPD. Next, they should consult its Repository of Practice on Article 3,[18] which provides guidance on the evolution and application in practice of Article 3 in a variety of circumstances.

Attorneys should also be aware of the status of any extradition treaty between the United States and the requesting nation, as the lack of a valid extradition treaty may imply that the Red Notice—which was purportedly sought "with a view to extradition"—is invalid. Similarly, attorneys should consider whether the location of their client was widely known; if so, the Red Notice—which was purportedly sought to "seek the location" of an individual—may be invalid. Finally, they should consult the Annual Reports and "Decision Excerpts" published by the CCF, which set out the CCF's principles

and precedents. Together, these documents may provide a basis for challenging the use of a Red Notice in U.S. legal proceedings.

Challenging a Red Notice Directly Through the Commission for the Control of INTERPOL's Files

It is also possible to challenge a Red Notice through the CCF. In 2016, the last year for which data is available, the CCF deleted approximately 170 Red Notices. The process is similar to presenting an asylum case, but it is rooted in international human rights law and INTERPOL's foundational documents. While recent reforms have improved the CCF's speed of operation, it will normally take close to a year for the CCF to reach a decision and for the INTERPOL General Secretariat to implement it. It is therefore advisable to begin the process as soon as possible, and to ensure that it includes a request for provisional measures, which can be taken within less than three months. In the asylum or removal process, providing documentary evidence to the IJ or to the DHS that the INTERPOL Red Notice is being challenged as illegitimate may provide critical support to a request for a continuance, or requests for other immigration benefits or a bond.

The Statute of the Commission for the Control of INTERPOL's Files[19] is essential background reading, and an application form to begin the process is available on INTERPOL's public website.[20] Nevertheless, because the CCF has to date published only 14 decision excerpts, the publicly available case law is limited, and attorneys should strongly consider seeking guidance from, or engaging the services of, a colleague with experience in this specialized area.

In rare cases, it may be advisable to submit a "preventative request"—which seeks to prevent INTERPOL from publishing a Red Notice—to the CCF. But in most cases, attorneys will file a post-publication request. Broadly, the process of submitting such a request through the CCF's Requests Chamber has four stages. The applicant—or the applicant's attorney—must submit the application form (or a letter) to the CCF. First, the CCF will acknowledge receipt of the request at the earliest opportunity. Second, within a month of receipt, the CCF will check the admissibility of the request and inform the applicant of its decision. Third, presuming the application is admissible, the CCF will render a decision within nine months unless it determines that exceptional circumstances warrant an extension of that time limit. Finally, the INTERPOL General Secretariat will implement the CCF's decision within no more than two months.

Because a Red Notice cannot be used as the sole basis for detaining an individual in the United States, even successfully requesting the deletion of a Red Notice will not on its own end any legal proceedings that make use of the Red Notice in the United States. But making a request to the CCF does testify to a belief on the part of a client and attorney that the charges that

led to the Red Notice are political (or racial, religious, or military) in nature, and if the CCF recommends the deletion the Red Notice as the result of a successful application, this is powerful evidence that this belief was correct.

In certain cases, the CCF may issue a letter that states that the individual's information was removed from INTERPOL-maintained databases because the request by the member country was a violation of Article 3 of INTERPOL's Constitution. This kind of letter is extremely valuable evidence in the context of an asylum case. Paradoxically, therefore, while the publication of a Red Notice is not proof of an individual's guilt, the cancellation of a Red Notice offers considerable evidence that the purported underlying offense was not a crime in ordinary law.

Conclusion

INTERPOL Red Notices and diffusions are far too often taken as conclusive proof of criminality by the DHS and by IJs. This is due in large part to a lack of understanding of how INTERPOL functions as an organization, as well as a misunderstanding as to the meaning of the organization's various publications. Inclusion in an INTERPOL-maintained database can and does have tremendous negative consequences on an individual's application for U.S. immigration benefits and on his or her life in general. In cases where INTERPOL abuse is perpetrated by authoritarian governments, it is up to immigration attorneys to educate IJs and the DHS to make sure the U.S. government does not become complicit in these tactics.

Notes

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1. INTERPOL's Rules on the Processing of Data (hereinafter RPD), art. 5. The RPD are available on INTERPOL's website at www.interpol.int/en/content/download/5694/file/INTERPOL%20Rules%20on%20the%20Processing%20of%20Data-EN.pdf.

2. *Id.,* art. 1 ("'Ordinary-law crime' means any criminal offenses, with the exception of those that fall within the scope of Application of Article 3 of the Constitution and those for which specific rules have been defined by the General Assembly.").

3. Interpol Const., art. 2, www.interpol.int/en/content/download/590/file/Constitution%20of%20the%20ICPO-INTERPOL-EN.pdf.

4. *Id.,* art. 3.

5. RPD, *supra* note 1, art. 97.

6. RPD, *supra* note 1, art. 79.
7. www.interpol.int/INTERPOL-expertise/Notices.
8. www.interpol.int/INTERPOL-expertise/Notices/Red-Notices.
9. *Id.*
10. RPD, *supra* note 1, art. 83(1)(a)(ii) (noting that if the subject of the Red Notice is sought for prosecution, "the conduct constituting an offense [must be] punishable by a maximum deprivation of liberty of at least two years or a more serious penalty; if the person is sought to serve a sentence, he/she [must be] sentenced to at least six months of imprisonment and/or there is at least six months of the sentence remaining to be served").
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19. www.interpol.int/en/content/download/5695/file/Statute%20of%20the%20CCF-EN.pdf.
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How Much Blood to Cross the Northern Border?

Reconsidering the Blood Quantum Requirement of INA §289

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Abstract: The Jay Treaty of 1795 recognized the right of indigenous populations to cross freely across the U.S.-Canada border. But INA §289, that treaty's implementing statute in the United States, only extends this free passage to those Canadians with "at least 50 per centum of blood of the American Indian race," a requirement absent in the Jay Treaty itself. This article suggests that the statutory blood quantum requirement in INA §289 should be rescinded to bring the statute more in line with the Jay Treaty, antidiscrimination provisions of the INA, as well as modern standards of tribal sovereignty and self-determination as set forth in domestic and international law.

Introduction

Should U.S. immigration law determine indigenous status under racial standards or political standards? At a time when national attention is focused along the U.S. southwest border, disparities in the admission of native American Indians seeking to cross our northern border also warrants scrutiny and a fair and humane resolution. This article posits that determining indigenous status by political standards better represents the intent of the underlying law in question and compels a federal statutory implementation that is more in line with modern standards.

The 1795 Jay Treaty recognized the tribal right of free passage over the U.S.-Canada border, but that treaty presently is being implemented in the United States by a statute that has significantly narrowed access to the benefits of the treaty by restricting the tribal right of free passage to those with "at least 50 per centum of blood of the American Indian race." This race-based definition represents an approach that frustrates the antidiscrimination provisions of the Immigration and Nationality Act (INA) and is disfavored by recent developments in numerous areas of law. The statutory deviation from the original treaty language deprives Canadian-born indigenous peoples with less than 50 percent indigenous blood of their right of free passage across the border—a sovereign right of their political class denied solely because of an insufficiency of racial purity.

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This article examines section 289 of the Immigration and Nationality Act, entitled "American Indians Born in Canada,"[1] and compares it to the specific provision of the 1795 Jay Treaty that it is intended to implement. The current application of INA §289 is that a qualifying person can come to the U.S.-Canada border with evidence that establishes tribal membership and at least 50 percent blood quantum, at which point the border official, without requiring a fee, will create "a record of admission for lawful permanent residence, even if technically inadmissible or previously deported."[2] The *USCIS Adjudicator's Field Manual* clarifies that it is "not adjudicating an application to become a lawful permanent resident, [but rather] verifying a status which the person already has and issuing documentation thereof."[3] The 50 percent blood quantum requirement was not contemplated in the Jay Treaty.

The first section discusses the history of the Jay Treaty and its interpretation, including its modern statutory application pursuant to INA §289. The second section discusses the barriers to a legal challenge based solely on INA §289's deviation from the Jay Treaty. The third section contends that INA §289 is out of line with modern evolutions in U.S. immigration law, federal Indian law, and international human rights law. The article suggests that rescission of the statutory blood quantum requirement contained in INA §289 is an appropriate way to strengthen that statute's compliance with antidiscrimination provisions of the INA and to more closely align U.S. immigration law with modern standards of tribal sovereignty and self-determination found in domestic and international law.

The Jay Treaty Originally was Interpreted Along Political Rather Than Race-Based Lines

In contrast to the current U.S. race-based definition of "American Indian" in regard to free passage, for which immigration law imposes a blood quantum requirement, the Jay Treaty recognized free passage for "Indians" on a political basis. The rules that govern immigration to the United States are derived from a variety of sources, including federal statutes, regulations, treaties, executive orders, and administrative policy. Given the impact of immigration laws on the social and economic character of the United States, consideration of the underlying intent of these laws is warranted to avoid misalignment of existing laws with our progressing social and political values.

The Jay Treaty was Originally Interpreted to Define the Designation "Indian" on a Political Basis

In 1794, shortly after the American Revolution, the United States signed a treaty with Great Britain that was intended to stabilize postwar relations

between the two countries, including relations with the British-owned colony of Canada that shared a border with the United States. That treaty, known informally as the Jay Treaty,[4] included a provision that recognized the right of indigenous peoples on the North American continent to pass freely across the U.S.-Canada border. It reads in pertinent part as follows:

> It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and **also to the Indians dwelling on either side of the said Boundary Line freely to pass and repass by Land, or Inland Navigation**, into the respective Territories and Countries of the Two Parties on the Continent of America.[5] (Emphasis added.)

This two-century-old treaty provision remains alive in U.S. immigration law, though it is not being applied in its original form. In 1928, the U.S. Congress passed legislation codified at 8 USC §226a to implement U.S. obligations under the Jay Treaty.[6] The 1928 legislation had no blood quantum requirement but did restrict the benefit of admission by adding that *adopted* tribal members could not enjoy the benefit of free passage. In the years that followed, the Board of Immigration Appeals (BIA) interpreted §226a along political lines. For example, an early BIA case on the subject is *Matter of S–*, in which a non-native Canadian woman married a native Canadian man, thereby gaining her tribal membership according to the rules of the tribe.[7] Her claim to right of passage was vindicated by the BIA, which determined that, with the exception of the statute's bar against membership by adoption, the Jay Treaty intended to define "American Indian" along political affiliation lines.[8] Also of note in *Matter of S–* is the liberal degree of deference given by the BIA to the tribe's own membership requirements. Nevertheless, this era of construction along political lines would not last.

Interpretation of the Jay Treaty Shifted to a Race-Based Approach in the Mid-Twentieth Century

In 1947 a federal district court in New York considered the case of *United States ex rel. Goodwin v. Karnuth*, which presented facts converse to *Matter of S–*. In *Goodwin*, a Canadian-born native woman had married a non-native man, thereby losing her tribal status under then-standing Canadian law.[9] While present in the United States she was placed in deportation proceedings, which she challenged based on §226a, the predecessor to INA §289. The federal court determined that despite being stripped of her political affiliation from the tribe, she was still entitled to the benefits of §226a because she was of tribal blood, thereby relying on racial connotations to establish her inclusion.

While *Matter of S–* was an administrative decision, *Goodwin* was the result of the same issue being decided by a federal court. This decision was made in a time that the federal government was transitioning into a period

of Indian policy known as the "Termination Era."[10] This period was marked by federal actions intended to dissipate its trust relationship with the natives, curtail tribal sovereignty, and disencumber tribal land for federal government use, often by integrating natives into the American lifestyle and minimizing the importance of tribal membership and decreasing the number of tribal members.[11] This overarching federal goal was consistent with the *Goodwin* decision, which shifted the Jay Treaty interpretation away from the recognition of membership as decided by sovereign tribes and shifted toward a race-based interpretation, which would also result in a more narrow class of indigenous persons who could enjoy free passage.

The *Goodwin* decision ushered in a new era of Jay Treaty interpretation in which "American Indian" was determined along racial lines instead of political ones. In 1952, shortly after this decision, Congress repealed 8 USC §226a and replaced it with INA §289, which is still good law and reads as follows:

> Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but **such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race**. (Emphasis added.)

Thus, the amended U.S. version of its Jay Treaty obligations imposes a significant restriction on the inherent indigenous right of free passage recognized in the treaty.

The statutory blood quantum requirement of INA §289 is a significant restriction on who can exercise their right of free passage compared to those contemplated in the Jay Treaty, and one that deserves reconsideration in light of antidiscrimination provisions in U.S. immigration law, as well as modern trends in federal Indian law and international law. Whether or not Congress's intent in setting the 50 percent threshold of racial purity was motivated by "Termination Era" goals of eradicating tribal sovereignty and society, the blood quantum requirement in INA §289 could rightly be seen as racial discrimination, a trespass to tribal sovereignty, and a failure of U.S. international political obligations regarding indigenous self-determination. The fact that INA §289 deviates significantly from the treaty on which it is based is not a cause of action to litigate the antiquated statute, though other causes of action could be entertained.

INA §289's Deviation from the Jay Treaty Is Not Likely Vulnerable to Legal Challenge

The material deviation of INA §289 from the Jay Treaty on which it is based is not a cause of action in U.S. courts, though they would entertain

other causes of action in litigation over the statute, such as antidiscrimination (*see* the third section). The interplay between international treaties and federal statutes makes a legal challenge *based solely on the deviation* unlikely to succeed in this case due to the non-self-executing nature of the Jay Treaty, Congress's plenary power over immigration, and other caselaw on the subject.

The Jay Treaty Is Not Enforceable in U.S. Courts Because It Is Non-Self-Executing and Must Rely Upon an Implementing Statute to Become Enforceable

International treaties are considered "the law of the land" just like congressional statutes, but they are not automatically enforceable in U.S. courts, as explained by the U.S. Supreme Court in *Medellin v. Texas*.[12] That case made clear that treaty obligations come in two varieties: self-executing and non-self-executing. The Court distinguished "between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."[13]

In *Medellin*, the Court was presented with the question of whether an opinion from the International Court of Justice (ICJ) was binding on U.S. courts by virtue of the United States—at the time—being a party to a treaty in which it agreed to ICJ jurisdiction and certain ICJ protocols. The Court looked at numerous factors to determine whether a treaty is self-executing, or whether only an implementing statute can provide a right of action. In particular, it noted that the language of the relevant treaty obligation did not "indicate that the Senate that ratified the [treaty] intended to vest [it] with immediate legal effect in domestic courts" and that instead the treaty language "[called] upon governments to take certain action."[14] The Court ultimately held that the relevant treaty was not self-executing and therefore no private right of action existed unless and until Congress enacted an implementing statute.

Similar to the treaty in *Medellin*, the Jay Treaty language does not suggest that it was intended to be self-executing. For example, Article III of the Jay Treaty, which deals with the indigenous right of free passage, reads in part: "It is agreed, that the respective Governments will mutually promote this amicable Intercourse, by **causing** speedy and impartial Justice to be done, and **necessary protection to be extended**, to all who may be concerned therein" (emphasis added).[15] This language implies that the Jay Treaty was intended to be non-self-executing and therefore can only be enforced domestically through its implementing statute. As such, a Canadian-born tribal member cannot seek judicial relief in U.S. courts for suspected immigration violations based solely on the treaty.

The Material Deviation of INA §289 From the Jay Treaty Is Not Likely To Be Vindicated in U.S. Courts

The Jay Treaty was not a *grant* of the right of free passage to Canadian-born natives but rather a recognition of the indigenous population's inherent right of free passage. This inherent right has been severely restricted by the addition of a blood quantum requirement in INA §289. But a lateral attack on the statute based on its material and substantive departure from the Jay Treaty is likely to fail for a number of reasons.

Established precedent holds that when statutes and treaties conflict one another, each being "the supreme law of the land," that which is "last in date must prevail in the courts."[16] In regard to indigenous free passage, INA §289 would be considered the governing law because it was enacted more than a century after the Jay Treaty. Accordingly, there is no recourse in U.S. courts based solely on the fact that a statute deviates from the treaty it is intended to implement, no matter how material the deviation.[17] Making litigation more difficult is the fact that Congress has plenary power over immigration laws.

Congress can enact statutes that contradict international treaties. The indigenous right of free passage in the Jay Treaty has been held as above the reproach of immigration laws unless specifically exempted.[18] The addition of the blood quantum requirement in INA §289 would likely be considered a very specific exemption that would be upheld under existing precedent.

The U.S. Supreme Court considered this subject during the *Chinese Exclusion Case*, or *Chae Chan Ping v. United States*.[19] The *Chinese Exclusion Case* involved an 1868 treaty between the United States and China that granted certain immigration benefits to Chinese nationals.[20] Years later, Congress passed the Chinese Exclusion Act of 1882 and the Scott Act of 1888, which collectively curtailed the immigration benefits previously granted to Chinese nationals by treaty.[21] Mr. Chae Chan Ping was in the middle of returning to the United States from a visit to China when Congress changed its policy on Chinese immigration, suddenly rendering defunct his reentry permit.[22] He filed suit after being excluded at the border and his case reached the Supreme Court, which affirmed his exclusion despite the fact that it violated the treaty with China. The Court espoused the plenary nature of Congress's power over immigration, stating the following:

> The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. . . . The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained [to reenter the United States] is held at the will of the government, revocable at any time, at its pleasure.

While federal courts might entertain a lawsuit based on a different cause of cause of action (*see* the third section), they are unlikely to order that the language of a statute be changed solely because it deviates from the treaty on

which it is based. Accordingly, any challenge to INA §289 would need to be based on other causes of action, or Congress could modify the language of INA §289 on its own accord. Numerous evolutions in the legal and social landscapes that touch on this subject matter indicate that social trends are no longer in line with the race-based approach in INA §289, and that the blood quantum requirement is out of line with U.S. immigration law and modern practices regarding the concepts of tribal sovereignty and self-determination.

Modern Legal Trends Are Not Ideologically Aligned with the Blood Quantum Requirement of INA §289

Despite the difficulty of a legal challenge to the INA's current blood quantum requirement for Canadian-born indigenous persons who wish to cross the U.S.-Canada border, a number of legal developments have occurred since the 1952 passage of INA §289 that are ideologically incongruent with the statute as it now stands. This article proposes that current legal trends in federal Indian law and international human rights law would be in line with a congressional reconsideration of the blood quantum requirement in INA §289. Doing so would bolster that statute's compliance with antidiscrimination provisions of the INA and reaffirm modern U.S. commitments to tribal sovereignty as well as the related concept of self-determination.

The Current Language of INA §289 Is Out of Line With the Antidiscrimination Provisions of the Immigration and Nationality Act

INA §289 acknowledges the tribal right of free-passage as memorialized in the Jay Treaty, but refuses that right to tribal members born in Canada who lack the sufficient quantum of "blood of the American Indian race."[23] This requirement, absent in the treaty itself, is tantamount to discrimination based on racial impurity, depriving tribal members of their treaty-protected right of free passage, and in effect, punishing tribal members because of the miscegenation of their ancestors.

The blood quantum requirement of INA §289 could be interpreted as a violation of the antidiscrimination provision of the INA, which provides at 8 USC §1152(a)(1)(A) that "no person shall receive any preference or priority or be discriminated against in the **issuance of an immigrant visa because of the person's race**, sex, nationality, place of birth, or place of residence" (emphasis added). The Jay Treaty was originally interpreted according to an individual's political affiliation with tribes rather than the current race-based interpretation of INA §289 (*see* the first section). A return to the political

interpretation of "Indian" would insulate INA §289 against any claim of race-based discrimination.

The issue of discrimination in U.S. immigration law recently was in the world spotlight when President Trump issued an executive order suspending the entry of nationals from certain countries, known informally as the "travel ban."[24] Although the executive order purported to disqualify or preclude the admissibility of persons from certain countries, critics of the executive order contended that in practice it essentially banned the admission of persons based on race and religion. Nationals of banned countries challenged the constitutionality of the travel ban in *Trump v. Hawaii*.[25] In that litigation, the State of Hawaii and the aggrieved non-U.S. citizen plaintiffs claimed that the president's executive order was discriminatory due to, *inter alia,* pre- and post-inauguration statements by the president that would lead a "reasonable observer [to] conclude that the Proclamation was motivated by anti-Muslim animus."[26]

The president's first two attempts at imposing the travel ban were judicially estopped before his third attempt was affirmed by the Supreme Court after the addition of specific national-security concerns, the addition of some non-Muslim countries, and other procedural changes.[27] The Court looked at the facial language of the president's order, ruling that "The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion."[28] The Court upheld the executive order.

Unlike the travel ban, the statutory language of INA §289 is facially race-based, requiring at least 50 percent "blood of the American Indian race." Further distinguishing the travel ban from INA §289 is the fact that the former was based on and judicially upheld because of presidential powers during exigent circumstances, while the latter is a congressional creation that is not based on any national security interest or other exigency. These distinctions would support a lawsuit against the U.S. government for the race-based discrimination of INA §289, as would other precedent regarding the INA's antidiscrimination provisions.

The antidiscrimination aspect of the INA was also discussed in the *LAVAS* case (filed by the group named Legal Assistance for Vietnamese Asylum Seekers).[29] In that case, Vietnamese refugees who had escaped their war-torn country into Hong Kong were refused consular processing by U.S. officials in the Hong Kong consulate because of a new policy issued in reaction to the high number of Vietnamese refugees.[30] They filed suit, claiming that the consulate's refusal to serve them was a violation of the INA's antidiscrimination law in 8 USC §1152(a).[31]

The government argued that it must merely demonstrate a rational basis for the discriminatory action being taken, which it stated was "the goal of encouraging voluntary repatriation" of Vietnamese nationals to Vietnam.[32] But the D.C. Circuit Court of Appeals reversed and remanded the case, stating that

the government's actions should be judged with a higher scrutiny than mere rational basis. It said, "While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most **compelling—perhaps a national emergency**" (emphasis added).[33]

The dicta in the *LAVAS* case indicates that discriminatory immigration laws are held to a strict scrutiny standard: *i.e.,* the discriminatory action must be in furtherance of a compelling government interest and must be narrowly tailored to achieve that interest—the highest level of judicial scrutiny. Even without explicitly specifying that this matter was held to strict scrutiny, the court was clear that discriminatory actions by Congress would only be approved in response to the "most compelling" circumstances. That court even cited another case that stated that "under 8 U.S.C. Sec. 1152(a), INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency."[34] Just like for the cessation of consular processing for Vietnamese nationals in the *LAVAS* case, the government has not espoused any exigent reasons to discriminate against those Canadian-born indigenous persons whose racial composition is below 50 percent blood quantum.

The above cases demonstrate that 8 USC §1152(a) prohibits immigration laws from discriminating on the basis of race, religion, or nationality in the absence of a national exigency. Accordingly, these cases support the proposition that the blood quantum requirement in INA §289 is a violation of—or at least offends the thrust of—the INA's antidiscrimination provision in 8 USC §1152(a) because it treats Canadian-born indigenous persons differently on the basis of their racial composition. Among the Canadian-born indigenous persons whose free passage was recognized in the Jay Treaty, INA §289 treats the tribal member having at least 50 percent "blood of the American Indian race" differently from a person with a lower blood quantum.

The language of the Jay Treaty, especially as it was originally interpreted, would not be considered racially discriminatory because it treated the term "Indian" as a political designation instead of a racial one. Congress can cure the facially discriminatory nature of INA §289 by rescinding its blood quantum requirement and determining qualification based on political affiliation with recognized indigenous groups. This modification would not only bolster INA §289's compliance with antidiscrimination provisions of the INA, but it would also bring the government's approach to that statute more in line with progressive legal trends relating to tribal sovereignty and self-determination.

The Principle of Tribal Sovereignty Is Offended By the Blood Quantum Requirement of INA §289

The United States' relationship with its "domestic dependent" tribes is a unique one in which federally recognized tribes are considered sovereign

entities, but are nonetheless under the protection and plenary power of Congress.[35] Of utmost importance in this ward-guardian relationship is the preservation of tribal sovereignty to the fullest extent permissible under the U.S. Constitution. Although this government responsibility does not extend to tribes or tribal members in Canada, the principle of indigenous sovereignty compels the United States to treat indigenous populations on both sides of the border in an ideologically and practically consistent manner.

A key component of tribal sovereignty is the question of "who": who gets to become a member, who gets to make the rules of membership, who gets to make membership decisions. The U.S. government ultimately leaves this question to each tribe, stating on the official Department of Interior website that "Tribal enrollment criteria are set forth in tribal constitutions, articles of incorporation or ordinances. The criterion varies from tribe to tribe, so uniform membership requirements do not exist."[36] Some situations may seem like exceptions, but they are not. For example, some tribes' membership decisions are reviewed by U.S. federal agencies, but this is because those tribes drafted constitutions in which they expressly ceded certain membership decisions to the U.S. Bureau of Indian Affairs.[37] The tribal sovereignty wasn't destroyed but rather was affirmatively exercised in a way that invited U.S. involvement.

A more pertinent example of tribal sovereignty involving the United States is the Cherokee Freedmen controversy, recently settled in *Cherokee Nation v. Nash*, in which a tribal scheme to disenroll lineal members of their former slaves was barred based on a treaty between the United States and the tribe.[38] The *Nash* controversy arose in the 1990s when the Cherokee Nation began rejecting qualified membership applicants and eventually disenrolled members whose claims were based on lineal descendancy from the "freedmen" tribal members, former black slaves of the Cherokee who became members of the tribe according to an 1866 treaty with the United States after the Civil War.[39] In 2007 the Cherokee Nation modified its constitution to eject the freedmen descendants by limiting citizenship "to only those persons who were Cherokee, Shawnee, or Delaware by blood."[40] The aggrieved descendants of the freedmen filed suit. A decade of litigation culminated in the 2017 decision by the D.C. federal district court, which held that because the Cherokee nation endowed the freedmen and their descendants with membership, they were to be treated on equal-footing to native-blooded members of the tribe, thereby barring the disenrollment of the freedmen descendants.[41]

The *Nash* case is relevant because of its bearing on the modern approach to tribal sovereignty, membership decisions, and the definition of "American Indian." The Cherokee Nation had ultimate sovereignty over its membership decisions, which it modified by treaty to include the freedmen, and only triggered U.S. involvement when the Cherokee violated a treaty they signed with the United States decades ago.[42] Even though the U.S. government held the tribes to the terms of the 1866 treaty, it was merely enforcing a decades-old membership decision that the tribe made by treaty in its sovereign capacity.

In this sense, the government's action reflects respect for the tribe's sovereignty by enforcing the tribe's own treaty obligations regarding membership.

The statute at INA §289 is a unique U.S. immigration law that deals with indigenous status, and it should ideally be consistent with U.S. federal Indian laws. Although they are distinct legal subject matters, they both deal with U.S. policy toward indigenous peoples. Accordingly, they should be guided by consistent principles. To demonstrate the current inconsistency in the two, imagine if the Cherokee Nation's ancestral territory straddled the U.S.-Canada border. How would the U.S. government apply the ruling in *Nash*? To only recognize the citizenship of freedmen descendants on one side of the border would be an absurd application of the decision, but the blood quantum requirement of INA §289 would not give a Canadian-born freedman descendant the same rights as the members of his tribe with "blood of the American Indian race," as *Nash* requires. The *Nash* opinion states that the freedmen descendants "have a right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees."[43]

The race-based interpretation of "American Indian" being applied in the immigration context under INA §289 is ideologically incongruent with the government's position in *Nash*. In *Nash*, the U.S. government enforced a treaty that was clearly based on political status, and not race. In light of the recent landmark decision in *Nash*, it is time for Congress to reexamine the issue and increase respect for tribal sovereignty by removing the blood quantum requirements from INA §289.

International Obligations to Respect Self-Determination Will Be Advanced By the Removal of Blood Quantum Requirements From INA §289

In addition to its self-imposed ward-guardian obligations to its domestic dependent tribes, the United States also has made international commitments to respect the self-determination of such tribes under the recent United Nations Declaration on the Rights of Indigenous Peoples (U.N. DRIP).[44] Self-determination, closely related to tribal sovereignty, is the idea that a group of affiliated peoples can "freely determine their political status and freely pursue their economic, social and cultural development."[45] The United States expressed its support for the U.N. DRIP in 2010,[46] agreeing to adhere to international law obligations to treat the provisions therein as the "**minimum standards** for the survival, dignity and well-being of the indigenous peoples of the world" (emphasis added).[47]

Like many international human-rights instruments, the U.N. DRIP is not strictly binding, and it is not a self-executing treaty. Nonetheless, the United States has willfully expressed support for it, and therefore assented to a number of provisions having a direct bearing on the application of INA

§289, including provisions on border crossings and membership determinations. For example, Article 36 of the U.N. DRIP is directly on point regarding this subject, providing:

> Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with **their own members** as well as other peoples across borders.
>
> States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right. (Emphasis added.)

The language of Article 36 makes clear that the U.S. commitment to allow free passage for indigenous peoples is to be based on their membership, and the U.N. DRIP does not qualify this obligation with race-related requirements such as blood-quantum. Notably, the U.N. DRIP does not provide a definition for indigenous peoples. Rather, it places membership decisions squarely with the tribes themselves, stating in Article 33:

> Indigenous peoples have the **right to determine their own identity or membership** in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. (Emphasis added.)

The concept that tribes should choose and apply their own membership rules is one that touches on both sovereignty and self-determination. This is the foundation of the "political" approach to defining "American Indian." Indigenous tribes should have the right to decide in a sovereign capacity whether or not to require a blood quantum for membership, if one is to exist for any purpose. In the absence of such a requirement by the tribe itself, any denial of benefits (such as free passage under INA §289) based on insufficient blood quantum is an infringement of indigenous rights, placing the United States in contravention to its political obligations under the U.N. DRIP. Accordingly, U.S. political commitments in the U.N. DRIP would be greatly advanced by a congressional rescission of the blood quantum requirement from INA §289.

Conclusion

The blood quantum requirement in INA §289 does not exist in the Jay Treaty. The U.S. definition of "American Indian" at the time that INA §289 was enacted was based on racial factors, an approach that this article suggests is antiquated and most likely in violation of the spirit, if not the letter, of the antidiscrimination provisions in immigration law.

Precedent shows that immigration laws that distinguish classes based on race or nationality must pass strict scrutiny, and the blood quantum requirement in INA §289 is susceptible to failing even the laxer rational-basis test. Further, there have been major shifts in federal Indian law and international law since 1952, when that statute was enacted. The 2010 U.S. accession to the U.N. Declaration of the Rights of Indigenous Peoples introduced an international political commitment to respect tribal free-passage as well as tribal membership decisions. The 2017 decision in *Cherokee Nation v. Nash* was a watermark decision upholding a definition of membership based on political connotations.

These important developments indicate a progressive new approach to the relationship between the rights of indigenous peoples and the territories they may occupy, both foreign and abroad. These evolutions in indigenous relations should demonstrate to Congress that the United States is committed to fully respecting tribal sovereignty and membership on a political basis instead of perpetuating the current enforcement of vestigial race-based requirements. Elimination of the blood quantum requirement of INA §289 would bring U.S. immigration laws in line with immigration antidiscrimination provisions, modern federal Indian law principles, and U.S. international obligations under the U.N. DRIP. As such, this article urges Congress to rescind the blood quantum requirement of INA §289 and fully implement the Jay Treaty by defining "American Indian" for immigration purposes along political lines according to the membership decisions of recognized indigenous groups.

Notes

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1. Immigration and Nationality Act (INA) §289 is codified at 8 USC §1359.

2. Department of Homeland Security, United States Citizenship and Immigration Services, *Adjudicator's Field Manual,* Redacted Public Version, 23.8 ("Section 289 Cases"), www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-8624/0-0-0-10065.html.

3. *Id.*

4. Treaty of Amity, Commerce, and Navigation, Between His Britannick Majesty;—and the United States of America, By Their President, with the Advice and Consent of Their Senate, Nov. 19, 1794, U.S.-U.K., T.S. No. 105 (hereinafter Jay Treaty).

5. *Id.* art. III (emphasis added).

6. An Act To Exempt American Indians born in Canada from operation of the Immigration Act of 1924, Pub. L. No. 234, ch. 308, 45 Stat. 401 (Apr. 2, 1928) (formerly codified at 8 USC §226a, reading: "*Be it enacted* [that the Immigration Act of 1924] shall not be construed to apply to the right of American Indians born in Canada

to pass the borders of the United States: *Provided,* That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption."

7. *In the Matter of S–*, 1 I&N Dec. 309 (BIA 1942).
8. *Id.*
9. *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660 (W.D.N.Y. 1947).
10. Charles F. Wilkinson and Eric R. Biggs, *The Evolution of the Termination Policy,* 5 Am. Indian L. Rev. 139, 145 (1977).
11. *Id.* at 145–50.
12. 552 U.S. 491 (2008).
13. *Id.* at 504.
14. *Id.* at 508.
15. Jay Treaty, *supra* note 4, at art. III.
16. *J. Ribas y Hijo v. United States*, 194 U.S. 315, 324 (1904).
17. For example, U.S. immigration laws on refugees deviate from international laws on refugees in conventions to which the United States is a party. *See generally,* Note: *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis,* 131 Harv. L. Rev. 1399 (2018).
18. *See, e.g., United States v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), stating, "The turning point of the cause is [whether] the Indians are included among the members of the alien nations whose admission to our country is controlled and regulated by the existing immigration laws. The answer, it seems to us, is a negative one. From the Indian viewpoint, he crosses no boundary line. For him this does not exist."
19. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
20. *Id.* at 590.
21. *Id.* at 592–99.
22. *Id.* at 582.
23. INA §289.
24. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), *expanded by* Proclamation No. 9,645 (Sept. 24, 2017), suspending the entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen.
25. *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392 (2018).
26. *Id.* (Sotomayor, dissenting).
27. *Id.,* slip op. at 2–8.
28. *Id.* slip op. at 34.
29. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995).
30. *Id.* at 470–71.
31. *Id.* at 472–73.
32. *Id.* at 473.
33. *Id.*
34. *Id.*
35. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
36. Dep't of the Interior, Tribal Enrollment Process, www.doi.gov/tribes/enrollment (last visited Jan. 24, 2019).
37. *E.g., Miranda v. Jewell*, No. 15-55245, ¶ 6 (9th Cir. Dec. 9, 2016), https://cdn.ca9.uscourts.gov/datastore/memoranda/2016/12/19/15-55245.pdf. *See also* 25 CFR §§62.2, 62.10.

38. Cherokee Nation v. Nash, No. 13-01313 (D.D.C. Aug. 30, 2017), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv1313-248.

39. *Id.* at 2.

40. *Id.* at 34.

41. *Id.* at 76–78.

42. *Id.* at 77.

43. *Id.* at 78.

44. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), art.46 I.L.M. 1013 (2007) (hereinafter U.N. DRIP).

45. U.N. DRIP, art. 3.

46. *See* Remarks at the White House Tribal Nations Conference, 2010 Daily Comp. Pres. Doc. 201001076 (Dec. 16, 2010), https://www.govinfo.gov/content/pkg/DCPD-201001076/pdf/DCPD-201001076.pdf. *See also* Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (2010), https://2009-2017.state.gov/documents/organization/154782.pdf (offering review of U.S. position on the Declaration).

47. U.N. DRIP, art. 43.

The Curse of *Kazarian v. USCIS* in Extraordinary Ability Adjudications Under the Employment-Based First Preference[1]

Cyrus D. Mehta*

Abstract: When *Kazarian v. USCIS* was first decided, it was received with much jubilation as it was thought that the standards for establishing extraordinary ability would be more straightforward and streamlined. *Kazarian* essentially holds that a petitioner claiming extraordinary ability need not submit extraordinary evidence to prove that he or she is a person of extraordinary ability. If one of the evidentiary criteria requires a showing of scholarly publications, the petitioner need not establish that the scholarly publications themselves are also extraordinary in order to qualify as a person of extraordinary ability. This is a circular argument, which *Kazarian* appropriately shot down. If *Kazarian* just stopped there, it would have been a wonderful outcome. Unfortunately, USCIS has interpreted *Kazarian* to require a new and vague second-step analysis known as the "final merits determination," which can stump even the most extraordinary. Whether we like it or not, *Kazarian* is here to stay with us, and it is important to ensure that the USCIS adheres to the two-step analysis. The USCIS must accept evidence under the three criteria, and then under step 2 make a final merits determination. If the USCIS fails to accept evidence under the three criteria under step one, the game is over. If that were to happen, one remedy is to challenge the denial under the Administrative Procedures Act in federal court to ensure that the USCIS complies with the two-step analysis.

When *Kazarian v. USCIS* was first decided by the Ninth Circuit Court of Appeals in 2010,[2] it was received with much jubilation, as it was thought that the standards for establishing extraordinary ability would be more straightforward and streamlined. *Kazarian* essentially holds that a petitioner claiming extraordinary ability need not submit extraordinary evidence to prove that he or she is a person of extraordinary ability. If one of the evidentiary criteria requires a showing of scholarly publications, the petitioner need not establish that the scholarly publications themselves are also extraordinary in order to qualify as a person of extraordinary ability. This is a circular argument, which *Kazarian* appropriately shot down. If *Kazarian* just stopped there, it would have been a wonderful outcome. Unfortunately, U.S. Citizenship and Immigration Services (USCIS) has interpreted *Kazarian* to require a new and vague

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second-step analysis known as the "final merits determination," which can stump even the most extraordinary.

As background, an individual can obtain permanent residence in the United States under the employment-based first preference (EB-1) by establishing extraordinary ability in the sciences, arts, education, business, or athletics. The extraordinary ability must have been demonstrated by sustained national or international acclaim and the individual's achievements must have been recognized in the field through extensive documentation.[3] The individual must also demonstrate an intent to continue working in his or her area of extraordinary ability and prove that his or her entry will "substantially benefit prospectively the United States."[4] Unlike most other petitions, the EB-1 may be a self-petition, and no job offer or tests of the labor market are required. Evidence to demonstrate "sustained national or international acclaim" could be a one-time achievement such as a major international award (for example, a Nobel Prize, Oscar, or GRAMMY).[5] If the petitioner is not the recipient of such an award, documentation of any three of the following is sufficient:[6]

- Receipt of lesser nationally or internationally recognized prizes or awards;
- Membership in an association in the field for which classification is sought, which requires outstanding achievement of its members, as judged by recognized national or international experts;
- Published material about the person in professional or major trade publications or other major media;
- Participation as a judge of the work of others;
- Evidence of original scientific, scholastic, artistic, athletic, or business-related contributions of major significance;
- Authorship of scholarly articles in the field, in professional or major trade publications or other media;
- Artistic exhibitions or showcases;
- Performance in a leading or cultural role for organizations or establishments that have a distinguished reputation;
- High salary or remuneration in relation to others in the field; or
- Commercial success in the performing arts.

A petitioner may also submit comparable evidence if the above standards do not readily apply to the individual's field of extraordinary ability.[7]

In *Kazarian*, the main bone of contention was what constitutes "authorship of scholarly articles in the field, in professional or major trade publications or other media." In the original 2009 decision known as *Kazarian I*,[8] the Ninth Circuit agreed with USCIS's Administrative Appeals Office (AAO) that "publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles."

The court in *Kazarian I* acknowledged that this reasoning "may be circular, because publication, on its own, indicates approval within the community."[9] However, the court went on to justify the AAO's circular reasoning, probably unmindful of the adverse effect that it would have for future EB-1 petitioners. It stated, "Because postdoctoral candidates are expected to publish, however, the agency's conclusion that the articles must be considered in light of the community's reaction is not contrary to the statutory mandate that the alien have achieved 'sustained national or international acclaim.'"[10]

The 2010 *Kazarian v. USCIS* decision (*Kazarian II*) reversed precisely this reasoning, on the ground that it was inconsistent with the governing regulation, 8 CFR §204.5(h)(3)(vi), which simply states that the petitioner must produce "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." The regulation does not require consideration of the research community's reaction to those articles, which was essentially an invention of USCIS.

Unfortunately, after the initial victory, *Kazarian II*, as interpreted by USCIS, has resulted in a new and burdensome two-part test. In the first part of the test, USCIS must determine whether the individual has met three of the ten criteria to establish extraordinary ability. However, that alone is not sufficient and does not result in an approval. Even after meeting the first part of the test, the individual has to establish through a vague and undefined "final merits determination" that he or she is extraordinary.

Although without statutory basis, the two-part test, based on USCIS's interpretation of *Kazarian II*, is here to stay—at least for now—and the focus of this article is to suggest ways to confront and overcome it, producing successful results for clients.

In a December 22, 2010, policy memorandum,[11] USCIS implemented a "two-part adjudicative approach" for extraordinary ability, outstanding researcher and professor, and exceptional-ability immigrant visa petitions. The Service cites *Kazarian II* as the basis for modifying its *Adjudicator's Field Manual* to include a second step in the adjudication process, the "final merits determination." Although *Kazarian II* did not actually create a "final merits determination," and objected essentially to the AAO's imposition of extra requirements under the evidentiary criteria in 8 CFR §204.5(h)(3)(iv) and (vi), the Service seized on the following dicta in *Kazarian II* as a basis for justifying a "final merits determination" analysis:

> While other authors' citations (or lack thereof) might be relevant to the *final merits determination* of whether a petitioner is at the very top of his or her field of endeavor, they are not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence.
>
> …
>
> [W]hile the AAO's analysis might be relevant to a *final merits determination,* the AAO may not unilaterally impose a novel evidentiary requirement.[12]

Under the new two-part test, USCIS must essentially accept the evidence of extraordinary ability under the 10 criteria set forth in 8 CFR §204.5(h)(3)(i)-(x). USCIS cannot disregard the foreign national's "scholarly articles in the field, in professional or major trade publications or other major media" under section 204.5(h)(3)(vi) just because there is no consideration of the research community's reaction to those articles, as it did erroneously in *Kazarian II*. Still, USCIS may take into consideration this extra evidentiary factor, namely, the lack of reaction in the research community, during the "final merits determination" analysis. It is readily apparent that the analysis under the second step defeats the very essence of the holding in *Kazarian II* that USCIS cannot impose extra requirements under the evidentiary criteria. What it cannot do under the first step, USCIS has found a way to do under the "final merits determination."

Post-*Kazarian* decisions have generally affirmed the two-part test and final merits determination analysis notwithstanding the holding in a prior decision, *Buletini v. INS*,[13] which held that "[o]nce it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 CFR §204.5(h)(3), the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien does not meet extraordinary ability."[14] Under the burden-shifting approach in *Buletini*, the petitioner should be deemed qualified, and the burden then shifts onto the Service to reject the evidence that meets the criteria, if, for instance, it finds that the evidence was fraudulent or too dated and stale.[15] Moreover, even while courts have upheld the *Kazarian* two-part test, as discussed below, they also seem to be upholding USCIS's conflation of the step-one analysis with the step-two analysis.

Rijal v. USCIS[16] is a decision that follows the December 22, 2010, policy memorandum, ignores the burden-shifting approach as set forth in *Buletini*, and conflates the two-step process. Although the petitioner in *Rijal*, a Nepali documentary filmmaker, submitted a UNICEF prize, USCIS concluded that it did not meet the evidentiary criterion of "lesser nationally or internationally recognized prizes or awards of excellence," as it was awarded more than four years prior and did not evidence the foreign national's sustained acclaim. While the court criticized USCIS for failing to consider this evidence under 8 CFR §204.5(h)(3)(i) and for similar errors under other evidentiary criteria, it nevertheless held that the petitioner did not suffer prejudice from these errors, as USCIS "made those errors with an eye toward the ultimate merits determination."[17] Based on a holistic analysis of the petitioner's evidence, the court held that USCIS appropriately found that the petitioner did not demonstrate sustained national or international acclaim. It is clear that the court in *Rijal* affirmed the two-step test set forth in the policy memorandum even though the suggestion of a "final merits determination" was mere dicta in *Kazarian II*. Instead of remanding the case because of USCIS's faulty

step-one analysis in rejecting the evidence, the *Rijal* court held these errors to be harmless under the step-two final merits determination.

Noroozi and Assadi v. Napolitano,[18] from the Southern District of New York, is another decision that has agreed with the *Kazarian* two-step analysis, but also seemed to affirm USCIS's conflation of the two steps. Petitioner Noroozi represented Iran in table tennis at the 2008 Olympics in Beijing. USCIS initially approved the EB-1 petition, even though neither Noroozi nor the Iranian table tennis team won any medal at the Olympics, but then subsequently revoked it. Noroozi filed a second EB-1 petition, which USCIS denied on the ground that Noroozi met two of the criteria, but not three. The court agreed with USCIS that there was no evidence to substantiate that he played a "leading or critical role" for his team, nor did the "published material" about him pass muster, since it focused more on the team and only briefly mentioned Noroozi. Although the failure to meet the evidentiary criteria could have ended the analysis, the court also discussed how Noroozi did not merit a favorable judgment under the "final merits determination." Since Noroozi ranked two hundred eighty-fourth in the world in table tennis, and finished in sixty-fifth place in table tennis in the 2008 Olympics, the court noted that approving Noroozi's petition would oblige USCIS hypothetically to grant EB-1 petitions to the 283 higher-ranked table tennis players, and also to the top 283 players in other sports, assuming they were non-U.S. citizens, as well as to the 64 table tennis players who outperformed Noroozi in the 2008 Olympics.

The court's "final merits determination" in *Noroozi* is troubling, as the EB-1 category was never intended only for the number-one player in a sporting field. This decision should be contrasted with *Muni v. INS*,[19] a pre-*Kazarian* decision involving an ice hockey player in the National Hockey League (NHL) whose team won the Stanley Cup. The individual player was not an All-Star or one of the highest-paid players but was still found to be qualified under EB-1. The "final merits determination" permits USCIS to set subjective baselines with respect to rankings of players in sports even if they would potentially qualify under the 10 evidentiary criteria as Muni did after he sought reversal of the denial of his EB-1 petition in federal court. Interestingly, in *Noroozi*, the attorney also became a plaintiff along with the petitioner on the ground that USCIS denied the EB-1 petition based on the petitioner's association with the attorney, who had been unfairly singled out in a Department of State cable. That strategy, too, failed, because the court rejected the assertion that there was any bad faith on the part of USCIS in denying Noroozi's EB-1 petition.

Various unpublished AAO decisions[20] have indicated that USCIS, in its final merits determination, will consider whether the petitioner has demonstrated (1) a "level of expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor"[21]; and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise."[22] While it

makes sense to preserve the argument in the record that the final merits determination is inapplicable and to propose the burden-shifting approach under *Buletini* instead, it also behooves an attorney to argue in the alternative that his or her client merits a favorable adjudication under the final merits determination given that this analysis has been blessed in post-*Kazarian* decisions. The amorphous nature of the standard applied in the final merits determination allows the petitioner's attorney flexibility to make a broad argument just as it gives the USCIS examiner flexibility to approve or not approve a case even after the petitioner has submitted evidence under the evidentiary criteria. For instance, if a petitioner has met three out of 10 evidentiary criteria, the agile practitioner may be able to argue that the foreign national is among the small percentage who has risen to the top of the field, achieved sustained national or international acclaim, and attained recognition of achievements, by highlighting only the strongest evidence rather than evidence submitted under all three criteria. If the scholarly articles are very impressive, but the awards are not and the petitioner may have judged the work of only one Ph.D. student, then the focus could be on the impressive scholarly articles when qualifying the foreign national under the final merits determination. Moreover, under the final merits determination, a petitioner may be able to point to other evidence that may not categorically fall under the 10 evidentiary criteria, such as testimonials from eminent authorities in the field, as well as the foreign national's stellar academic background. Of course, if the evidence submitted under the evidentiary criteria is all qualitatively superior and extensive, then the practitioner must not rest on these laurels and must take pains to highlight this for the final merits determination. Finally, the practitioner must always remind USCIS that the preponderance of evidence standard, which requires only 51 percent certainty, governs the final merits determination, as suggested in the December 22, 2010, policy memorandum.[23]

In more recent cases, USCIS has continued to conflate the step-one with the step-two analysis by finding that the petitioner has not met the evidentiary criteria, thus bypassing the step-two final merits determination altogether. A petitioner may seek review under the Administrative Procedure Act, asking a federal court to find that the USCIS decision was arbitrary and capricious by conflating the two steps. Therefore, if we in any event have to accept *Kazarian*, one strategy is to force USCIS to adopt the two steps if it erroneously denied the case under step one by conflating the two. Thus, in *Eguchi v. Kelly*, an unpublished decision from the Northern District of Texas,[24] USCIS had denied an EB-1 petition of a Brazilian bullfighter. Petitioner Eguchi submitted evidence that he won Brazil's Professional Bull Riders (PBR) Rookie of the Year in 2008. USCIS rejected the award on the ground that "such an award by its very nature is limited to neophytes, excluding more experienced bull riders. And therefore, such an honor does not measure your standing or selection from among those who are well established in the field *or show*

your extraordinary ability under this criterion."[25] The court disagreed, because USCIS analyzed this award under the step-two "final merits determination" when the regulation only required Eguchi to submit evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor, which he did. Eguchi also submitted articles from various publications, including Yahoo! Sports, ESPN, and PBR's website. The articles acknowledged Eguchi's high rankings, victories, and earnings in PBR events. USCIS concluded that Eguchi submitted no evidence that PBR's website is a major trade publication. The court held that it was self-evident that the website of the world's premier professional bull riding association is a major publication for professional bull riding. The court also cited *Muni v. INS*, which concluded that the petitioner did not need to show that the NHL's own magazine was a major trade publication.[26] Eguchi submitted evidence that he had earned over $700,000 in PBR events and ranked forty-fourth on the association's all-time money list—a ranking of the top earners in PBR history. He also submitted a history of PBR, which states that "[m]ore than 1,200 bull riders from the U.S., Australia, Brazil, Canada, and Mexico hold PBR memberships."[27] But USCIS disputed this evidence on the ground that Eguchi's earnings did not compare with the top three earners, who had grossed between $3.9 and $5.15 million, thus failing to establish that he was one of that small percentage who have risen to the very top of their endeavor. The court again smacked down USCIS, saying that it impermissibly conflated step one with step two. At step one, according to the court, Eguchi was not obligated to prove that his salary illustrated that he is one of a small percentage who have risen to the very top of the field of endeavor and that he enjoyed sustained national or international acclaim. Rather, for the step-one analysis Eguchi needed only to provide documentation showing that he commanded a high salary or other significantly high remuneration for services in relation to others in the field. According to the court, USCIS only focused on the top two or three earners in the sport but ignored the earnings of the other 1,200 PBR members.

The court in *Eguchi v. Kelly* found USCIS's denial to be arbitrary and capricious, and remanded. The author has been informed by the attorney who represented Eguchi that the I-140 was approved and that Eguchi adjusted his status to permanent residence.[28] While this was the best possible outcome for Eguchi, it remains to be seen whether USCIS in similar cases will find a way to deny the petition again under the step-two final merits determination after a court has remanded based on the faulty analysis under step one. However, it still behooves the practitioner to have a court hold USCIS to the two-step analysis rather than let USCIS conveniently deny the petition under step one. This is precisely what happened in *Visinscaia v. Beers*,[29] involving an EB-1 petition for a ballroom dancer from Moldova. The court agreed with USCIS that the petitioner failed to provide evidence that she influenced the field with her

dance techniques, although it seemed that USCIS again conflated step two with step one. The court also agreed with USCIS that the petitioner had not played a leading role in a dance club in Moldova with a distinguished reputation in that country, despite the petitioner's claim to the contrary and, further, that the club's reknown did not extend beyond the borders of Moldova. Here too, USCIS conflated step two with step one, and the court endorsed its faulty analysis. Finally, USCIS interpreted the artistic exhibitions criterion as only including "visual arts," where "tangible pieces of art . . . were on display" and not dance performances. This was a strained interpretation of the regulation, but the court still gave deference to the agency's interpretation. Finally, the court agreed with USCIS's strained interpretation that "lesser national and international awards" must involve winning more than one such award. The petitioner had only won one world championship in the World Dance Sport Federation Junior II Ten category.

Petitioners must first persuade USCIS that the petitioner meets three out of the ten criteria, and then fight USCIS under the step-two final merits determination. If USCIS can knock out the petitioner under step one, the game is over. The author highly recommends the reader to *Recent Trends in EB 1 Extraordinary Ability and Outstanding Professor/Researcher Green Card Petitions* by Dan Berger, Emma Binder, Philip Katz, David Wilks, and Stephen Yale-Loehr.[30] This insightful article surveys recent decisions of the AAO in the EB-1 extraordinary ability and outstanding professor/researcher arena. It provides useful guidance regarding what kinds of evidence will be accepted under the ten evidentiary criteria. With regard to the evidentiary criterion of outstanding contributions of major significance, the authors point to AAO decisions suggesting that the contribution must have "measurably" expanded the scholarship, such as in the case of an insect researcher whose discovery of 96 new species of jumping spiders represented "10% of the overall documented information regarding certain spider families."[31] With respect to the authorship-of-scholarly-articles prong, the authors analyzed decisions where the "AAO is critical of inconsistent and declining publication records. According to the AAO, a publication rate that has declined in the past five years or so may indicate a lack of sustained acclaim, even if the individual published prolifically in prior years."[32]

Still, this begs the question that *Kazarian* sought to clarify: Must the evidence submitted by the petitioner inherently be extraordinary under step one? That has to be determined in the step-two final merits determination. But, unfortunately, the *Kazarian* two-step analysis is fundamentally flawed. It will continue to confuse and confound USCIS adjudicators and courts, who often will make the merits determination under step one, or if they don't, will discredit the evidence under the step-two final merits determination. Unless one can convince a federal court to adopt the clearer standard in *Buletini v. INS*, the two-step analysis under *Kazarian* will continue to roil EB-1 extraordinary ability adjudications.

Notes

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1. This article is partly based on Cyrus Mehta et al., *Demystifying the Final Merits Analysis of Extraordinary Ability,* Immigration Practice Pointers 278 (American Immigration Lawyers Association, 2013–14 Ed.). A prior version of this article appeared on The Insightful Immigration Blog, "The Curse of *Kazarian v. USCIS* in Extraordinary Ability Adjudication Under the Employment-Based First Preference," http://blog.cyrusmehta.com/2018/12/the-curse-of-kazarian-v-uscis-in-extraordinary-ability-adjudications-under-the-employment-based-first-preference.html. The author thanks Sophia Genovese, a former associate at Cyrus D. Mehta & Partners PLLC and a Staff Attorney at the Southern Poverty Law Center, for her invaluable assistance in editing the article.
2. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).
3. *See* INA §203(b)(1)(A)(i).
4. *See* INA §203(b)(1)(A)(ii), (iii).
5. *See* 8 CFR §204.5(h)(3).
6. *Id.*
7. *See id.*
8. *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009).
9. *Id.* at 1036.
10. *Id.* (citation omitted).
11. USCIS Policy Memorandum, "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual (AFM)* Chapter 22.2, *AFM* Update AD11-14" (Dec. 22, 2010), AILA Doc No. 11020231.
12. *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (emphasis added).
13. 860 F. Supp. 1222 (E.D. Mich. 1994).
14. *Id.* at 1234.
15. The burden-shifting approach is also adopted in other areas of immigration law. The author credits his partner David Isaacson for pointing out that in the asylum context, an applicant who demonstrates that he or she has suffered past persecution on account of a protected ground is rebuttably presumed to have a reasonable fear of future persecution on that same ground. 8 CFR §§208.13(b)(1), 1208.13(b)(1). In such cases, by regulation, "the Service shall bear the burden of establishing by a preponderance of the evidence" that a change in circumstances, or the reasonable possibility of relocating within the country of persecution, should lead to a denial of asylum. 8 CFR §§208.13(b)(1)(ii), 1208.13(b)(1).
16. 772 F. Supp. 2d 1339 (W.D. Wash. 2011), *aff'd,* 683 F.3d 1030 (9th Cir. 2012).
17. 772 F. Supp. 2d at 1347.
18. 905 F. Supp. 2d 535 (S.D.N.Y. 2012).
19. 891 F. Supp. 440 (N.D. Ill. 1995).
20. *See, e.g.,* AILA Doc Nos. 12062752, 12062753.
21. 8 CFR §204.5(h)(2).
22. INA §203(b)(1)(A); 8 CFR §204.5(h)(3). *See also Kazarian v. USCIS*, 596 F.3d 1115, 1119–20 (9th Cir. 2010).
23. *See Matter of Chawathe*, 25 I&N Dec. 369, 375–76 (AAO 2010). Similarly, the *Adjudicator's Field Manual* states that "even if the director has some doubt as to the

truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'probably true' or 'more likely than not,' the … petitioner has satisfied the standard of proof." USCIS, *Adjudicator's Field Manual* §11.1(c).

24. No. 3:16-CV-1286-D, 2017 WL 2902667 (N.D. Tex. June 23, 2017).

25. *Id.* at 7-8 (emphasis in original).

26. 891 F. Supp at 444.

27. No. 3:16-CV-1286-D (N.D. Tex. June 23, 2017), at 10.

28. Email exchange between attorney David Swaim and the author dated January 3, 2019 (on file with the author).

29. 4 F. Supp. 3d 126 (D.D.C. 2013).

30. https://millermayer.com/2018/recent-trends-in-eb-1-extraordinary-ability-and-outstanding-professor-researcher-green-card-petitions/.

31. *Matter of J–Z–*, ID# 879949 (AAO Feb. 13, 2018), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2018/FEB132018_01B2203.pdf.

32. *Supra* note 30.

USCIS's Fraud Detection and National Security Directorate

Less Legitimate Than Inspector Clouseau, But Without the *Savoir Faire*

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Abstract: The Homeland Security Act of 2002 (HSA) contains an express prohibition limiting the legal authority of U.S. Citizenship and Immigration Services (USCIS), a component agency of the Secretary of Department of Homeland Security (DHS), to certain prescribed immigration-related functions. Under the HSA, USCIS may only engage in the adjudication of requests for immigration benefits such as work and travel permission, lawful permanent residency and naturalization, whereas the HSA authorizes other DHS agencies, U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection, to engage in immigration-related investigation and enforcement activities. In 2003, however, the then-Secretary of DHS delegated authority to engage in investigative activities to USCIS, even though the HSA expressly prohibits such a reallocation of immigration duties. In 2004, USCIS created the Fraud Detection and National Security (FDNS) Directorate and tasked it with investigative and law enforcement responsibilities. Since 2004, FDNS has conducted thousands of site visits at business establishments and religious institutions in the United States, and uncovered comparatively few instances of suspected immigration-benefits fraud. Given the ban in the HSA on USCIS's performance of investigative duties, FDNS is an unlawfully constituted subcomponent of USCIS and its site-visit program violates the HSA.

Introduction

Despite the last two years of our nation's history, the constitutional principle of separation of powers remains the hallmark of the American legal system. Its key feature, the system of checks and balances, was enshrined by the "Framers of our Constitution [who] were not inexperienced doctrinaires [but] long-headed statesmen [under] no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power."

As the author of these words, Justice Felix Frankfurter, observed, the "accretion of dangerous power does not come in a [day, rather it comes], however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[1]

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Justice Frankfurter's wisdom and the Founders' foresight still resonate today. As this article will show, since 2004,[2] U.S. Citizenship and Immigration Services (USCIS)—a component agency within the Department of Homeland Security (DHS)—has maintained an unlawfully constituted "directorate" known as Fraud Detection and National Security (FDNS).

FDNS has consistently flouted a foundational proscription in the Homeland Security Act of 2002 (HSA)[3] mandating that the enforcement of the immigration laws remain separate and distinct from the adjudication of requests for immigration benefits (*e.g.,* work permits, visa-status grants, lawful permanent residence, and naturalization). In short, FDNS—although sited in USCIS, an agency that should solely be engaged in adjudicating requests for immigration benefits—plays a key (albeit unlawful) role in everyday civil and criminal investigation and enforcement of U.S. immigration laws.

The Good and Bad Old Days of the Immigration and Naturalization Service

Before DHS and its component immigration agencies (USCIS, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement) came to be, there was the legacy agency, Immigration and Naturalization Service (INS). Birthed by Section 14 of Executive Order 6166 (June 10, 1933), INS started out within the Department of Labor (DOL), but later was transferred to the Department of Justice (DOJ).[4] During its history, the agency was roundly criticized for what many viewed as schizophrenic behavior because it was forced by statute to fulfill two seemingly contradictory missions—on the one hand, investigating and enforcing the immigration laws, and on the other, deciding (adjudicating) whether to approve or deny petitions and applications for immigration and naturalization benefits.[5]

In 1994, then-INS Commissioner Doris Meissner disputed the claim of contradictory missions in prepared testimony before Congress. She identified "control with compassion" as one of her tenure's three overarching goals:

> As long as I have been working with immigration issues there has been a debate over the compatibility of INS' service and enforcement missions. Many have said that these two forces are contradictory and incompatible within a single agency. I strongly disagree with this view.
>
> Anyone familiar with immigration issues can attest that such issues generally defy categorization as strictly "service" or "enforcement." I see the service and enforcement components as mutually supportive parts of effective regulation of immigration processes. It is the responsibility of every INS employee to take this attitude in the accomplishment of his or her work. We must remember that behind every case is a human being, and that ultimately our customer is also the American public and the good of the nation.[6]

Despite efforts at internal restructuring, INS's fate was sealed, however, with media reports that the agency, a half-year after September 11, 2001, mailed its posthumous approval of an application for change of nonimmigrant status from B-2 business visitor to F-1 student for two September 11 hijackers, including the operational ringleader, Mohammed Atta, to engage in flight training within the United States.[7]

The Homeland Security Act of 2002

Predictable outrage ensued. Soon Congress passed, and President George W. Bush signed the HSA, and on March 1, 2003, the INS was dismantled.

Given the ongoing policy debate, it came as no surprise that the Senate, in its June 24, 2002, Report of the Committee on Governmental Affairs on S. 2452,[8] a bill that would ultimately be meshed into the HSA, acknowledged that S. 2452's proposed statutory "division of INS programs into 'enforcement' and 'service' components tracks an administrative reorganization plan that is already underway."

In enacting the HSA, however, Congress deviated from S. 2452 by creating a new Department of Homeland Security to house the enforcement and service components of the former INS rather than follow the plan contemplated in the Senate bill, which envisioned that "the law enforcement pieces transferred from INS . . . would necessarily need to maintain close coordination with the service programs that would remain in the Justice Department."

As a result, the HSA maintains this clear separation of immigration enforcement and benefits functions.[9] A review of the HSA reveals the express intention of Congress to separate into distinct agencies the inconsistent and too-often contradictory demands that had been placed on INS.

Specifically, HSA §451(b) ("Transfer of Functions from [INS] Commissioner") "transferred from the [INS] Commissioner to the Director of the Bureau of Citizenship and Immigration Services [now known as USCIS] the following functions . . .

> "(1) **Adjudications** of immigrant visa petitions.
> "(2) **Adjudications** of naturalization petitions.
> "(3) **Adjudications** of asylum and refugee applications.
> "(4) **Adjudications** performed at service centers.
> "(5) All other **adjudications** performed by the [INS] immediately before the effective date specified in [the HSA]." (Emphasis added.)

Another provision in the HSA, §441, created two new DHS law enforcement agencies—now known as U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP)—and transferred to them the former INS authority over:

"(1) The Border Patrol program.
"(2) The detention and removal program.
"(3) The intelligence program.
"(4) **The investigations program**.
"(5) The inspections program." (Emphasis added.)

Although HSA §1502 granted the President the authority to reorganize the new DHS by submitting to Congress a plan of reorganization that "shall contain, **consistent with this Act**, such elements as the President deems appropriate (emphasis added)," another provision, HSA §471, now codified at 6 U.S.C. §291(b), expressly limited the President's power to restructure DHS. Section 471 thus contains the following "PROHIBITION [capitalization in original] [:]"

> The authority provided by [HSA §]1502 [codified at 6 USC §542] may be used to reorganize functions or organizational units within the Bureau of Border Security or the Bureau of Citizenship and Immigration Services, but **may not be used to recombine the two bureaus into a single agency or otherwise to combine, join, or consolidate functions or organizational units of the two bureaus with each other**. (Emphasis added.)

Despite the allocation of exclusive authority conferred on ICE and CBP over "investigations" in HSA §441(1), and the prohibition in HSA §471 against combining, joining, or consolidating organizational units or functions of the former INS, the first Secretary of DHS, Thomas Ridge, soon violated this prohibition.

On June 5, 2003, he issued Department of Homeland Security Delegation Number: 0150.1,[10] "Delegation to The Bureau of Citizenship and Immigration Services [BCIS], (Delegation)" in which he delegated to BCIS (now USCIS) the following power:

> Authority to **investigate alleged civil and criminal violations of the immigration laws**, including but not limited to alleged fraud with respect to applications or determinations within the BCIS **and make recommendations for prosecutions**, or other appropriate action when deemed advisable. (Delegation §II-I; emphasis added).

A December 16, 2014, DHS "Privacy Impact Assessment" (PIA) for FDNS[11] seems to reflect conscious awareness of this HSA violation. The author of the PIA apparently tried to paper over the statutorily prohibited authority over investigations, wordsmithing a hair-splitting distinction ("USCIS [through FDNS] conducts administrative inquiries, ICE conducts criminal investigations").[12]

USCIS, however, is more candid and forthright in its job-recruiting announcements, which clearly place emphasis on the duties of investigation,

prosecution, and law enforcement in this FDNS job description,[13] Fraud Detection and National Security Directorate, District 13:

> **Responsibilities**
>
> - . . .
> - Identify, articulate, and **pursue suspected immigration benefit fraud**, public safety, and national security concerns.
> - Conduct administrative **investigations** and site visits to obtain documents, conduct interviews, perform system checks, and make determinations regarding potential administrative and/or criminal violations.
> - Serve as a **liaison to law enforcement** and intelligence agencies and **participate in inter-agency task forces and partner-agency investigations** to combat fraud and deter and detect national security and public safety threats. . . .
> - **Serve as an expert witness** and represent USCIS **in related court proceedings**. (Emphasis added.)

USCIS obviously understands the difference between investigations and its normal bread-and-butter work of adjudications. Just compare the foregoing FDNS job announcement with a contemporaneous USCIS Immigration Services Officer[14] job description, District 33:

> **Responsibilities**
>
> - . . .
> - **Grant or deny** complex and highly sensitive applications and petitions for immigration benefits based on electronic or paper applications/petitions.
> - Research, interpret and apply appropriate statutes, regulations, and precedent decisions to **make adjudicative decisions**.
> - Interview applicants and petitioners to elicit statements, assess credibility, and analyze information to **identify facts that form the basis for a decision concerning eligibility for immigration benefits**.
> - Conduct security checks and provide assistance to Federal law enforcement agencies to identify individuals who are ineligible for immigration benefits due to national security, public safety, or other legal grounds.
> - Use electronic systems to provide verification of any number of established data points to **make adjudicative decisions**, determine appropriate level of adjudicative review, and update databases with appropriate information and decisions. (Emphasis added.)

Common dictionary definitions also make plain the distinction between investigations and adjudications:

The Cambridge Dictionary:

investigate[15]

to examine a crime, problem, statement, etc., carefully, especially to discover the truth:

Police are investigating allegations of corruption involving senior executives.

We are of course investigating how an error like this could have occurred.

The Merriam-Webster Dictionary:

investigate[16]

to observe or study by close examination and systematic inquiry

to make a systematic examination; especially: to conduct an official inquiry

The Cambridge Dictionary:

adjudicate[17] . . .

to act as judge in a competition or argument, or to make a formal decision about something:

He was asked to adjudicate on the dispute.

He was called in to adjudicate a local land dispute.

The game was adjudicated a win for Black.

The Merriam-Webster Dictionary:

adjudicate[18] . . .

to make an official decision about who is right in (a dispute): to settle judicially.

The school board will adjudicate claims made against teachers.

. . .

to act as judge

The court can adjudicate on this dispute.

Despite the dictionary consensus, some observers have suggested that this obvious HSA violation has been remedied by later congressional action. They point to a Conference Report accompanying H.R. 4567 [Report 108-774], "Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005,"[19] which states:

> BENEFIT FRAUD The conferees have agreed to the Administration's request to increase the resources available for benefit fraud **enforcement by decreasing the funds available to Immigration and Customs Enforcement (ICE)** from the examinations fee account, and leaving those resources available to

> [USCIS], as proposed in the House report. **These resources are to fund the Office of Fraud Detection and National Security (FDNS) Unit**, as called for by the Government Accountability Office. The **FDNS unit is responsible for developing, implementing, directing, and overseeing the joint [USCIS]-ICE antifraud initiative**, and conducting **law enforcement**/background **checks** on every applicant, beneficiary, and petitioner prior to granting any immigration benefits. [USCIS] is to report by July 1, 2005, to the House and Senate Committees on Appropriations on the progress in implementing the joint anti-fraud initiative. (Emphasis added.)

The simple retort to their argument is that no subsequent Congress can appropriate funds to a federal agency or component (here, FDNS) that has not been lawfully constituted by pre-existing or contemporaneous legislation, and whose very existence expressly contravenes the agency's foundational enabling statute.[20]

Moreover, if FDNS already duly existed through authorizing legislation, there would be no apparent reason why Rep. Bob Goodlatte (R-VA), Chair of the House Judiciary, Homeland Security Education and the Workforce Committee in the 115th Congress—a former immigration lawyer before his election—would have any need to propose a bill, H.R. 2407, dubbed the "United States Citizenship and Immigration Services Authorization Act,"[21] containing a seemingly superfluous §2 that would have amended the HSA to include a new provision, HSA §451(g) ("[there] is established within United States Citizenship and Immigration Services a Fraud Detection and National Security Directorate"). One can only infer that the chairman belatedly realized that FDNS had never been duly authorized.

Where's the Harm if FDNS Conducts Immigration Investigations?

Aside from the obvious illegality involved in the creation and ongoing investigative activities of FDNS, in clear violation of HSA §471, pragmatists may argue essentially, "no harm, no foul." The nation, they might assert, needs to be assured that its immigration benefits-adjudication program maintains integrity and protection from fraudsters. After all, their argument might continue, no one could be better than USCIS with its perceived expertise in benefits adjudication to ferret out the perpetrators of fraud and the sponsors of legally ineligible beneficiaries in the submission of immigration petitions and applications.

This argument ultimately proves unpersuasive. Despite the best intentions of former Commissioner Meissner that "compassion" and "control" could peacefully coexist within a single immigration agency, history taught us otherwise, and events at the U.S. border with Mexico in 2018 involving

family separation and the incarceration of children by ICE have further belied the proposition.

The same irreconcilable conflict that plagued INS is visible today in FDNS's "boots on the ground" program of unannounced "site visits" at the business premises of petitioning H-1B and L-1 employers and EB-5 immigrant investors and regional centers.[22]

As reported elsewhere,[23] FDNS visits to employer facilities are often disruptive because they are unscheduled. Unlike virtually all other immigration enforcement and investigations proceedings by DHS, DOJ, and DOL, site visits by FDNS involve no advance written notice and request for documents, and thus, no opportunity for employers to collect relevant documents, consult with counsel, or prepare for an immigration audit or inspection. DHS investigators in ICE's Homeland Security Investigations unit serve a written three-day notice of a Form I-9 (Employment Eligibility Verification) investigation. DOJ's Immigrant and Employee Rights Section likewise provide employers with written notice and a request or subpoena of documents and information when investigating claims of unfair or discriminatory immigration-related employment practices. Similarly, DOL's Wage and Hour Division, in its investigations of suspected employment-based nonimmigrant H-1B and H-2 visa program violations, routinely accords employers the opportunity in advance to prepare for formal inspections, and refrains from conducting unannounced investigations, except in circumstances involving serious criminal violations of law.

All of these actions occur under the aegis of regulations. There is no provision in the Immigration and Nationality Act or USCIS regulations authorizing or permitting an FDNS site visit, without forewarning to the employer or outside counsel, except as expressly addressed in provisions governing F-1 academic students, H-2A agricultural workers, and R-1 religious workers, and even then, only under certain specified conditions.[24]

Moreover, USCIS regulations do not provide a mechanism for the employer or counsel to receive the FDNS officer's report concerning his or her findings from the site visit. Although 8 CFR §103.2(b)(16)(i) requires that, if USCIS intends to issue an adverse decision, the agency must provide a petitioner with "derogatory information considered by the Service and of which the applicant or petitioner is unaware," USCIS in virtually all instances never provides the FDNS officer's report of a site visit, but instead merely characterizes what the officer reported, thereby allowing little opportunity for an informed and detailed rebuttal.

Unfortunately, recent evidence suggests that FDNS site visits have uncovered precious little evidence of fraud or the mistaken approval of unworthy immigration benefits requests. As *Bloomberg Law*'s Laura D. Francis has reported:

> Rooting out fraud in the immigration system has been one of the key missions of U.S. Citizenship and Immigration Services under the Trump administration. So far, not much has surfaced. . . .

Table 1. Number of Completed Administrative Site Visit and Verification Program Compliance Reviews: Fiscal Year 2018

Type	Number
Total	9,718
Benefit Fraud-Employment H Series Visa	6,300
Benefit Fraud-Employment L Series Visa	1,781
Benefit Fraud-Religious Worker Visa	1,605
Employment Based, 5th Preference	32

Source: FDNS-Data Systems.

Table 2. Targeted Site Visit and Verification Program Referrals Complete in Fiscal Year 2018

	TSVVP Completed in FY2018			
CME Substatus	**H-1B**	**L-1B Pilot**	**I-751**	**E-2 Pilot**
Grand Total	556	101	474	117

Source: FDNS-Data Systems.

Table 3. For Cause Site Visits Conducted: Fiscal Year 2018

For Cause Site Visits	12,724

Note: Excludes ASVVP and TSVVP pilot visits.

Source: FDNS-Data Systems.

Table 4. Number of Referrals to Immigration and Customs Enforcement by Type: Fiscal Year 2018

Referrals to ICE	Number
Total	13,003
Benefit Fraud	1,117
Public Safety	11,886

Source: FDNS-Data Systems.

> Of more than 23,000 site visits conducted in fiscal year 2018, the USCIS only referred 1,117 cases to Immigration and Customs Enforcement for benefit fraud, according to data provided exclusively to *Bloomberg Law.* Another 11,886 cases were referred for public safety concerns.[25]

Her reporting is backed up by USCIS's own data, as Tables 1-4 reveal. Beyond the proliferation of unlawful FDNS site visits (and despite the surprisingly modest number of benefit-fraud referrals directed to ICE), the perpetuation of this program is pernicious on additional grounds. These

investigations occur before or after USCIS adjudicates a petition or application requesting immigration benefits. If the agency has already approved the request, the FDNS site visitor's investigative report often leads to the issuance by USCIS of a notice of intention to revoke (NITR) the approved petition. In such situations, the sponsored employee will already have begun working for the petitioner. Hence, with only 30 days' notice afforded in the NITR, the parties must respond and try to dissuade USCIS from revoking the approved petition and thereby requiring the employer to terminate the employment relationship immediately. At that point, resort to federal district court and a request for emergency injunctive relief may be the only viable way to avoid business disruption, the loss of employment, and the potential for triggering status violations and unlawful-presence penalties.

What Should Happen Now?

Abolishing FDNS and restricting DHS and USCIS from ever again instituting an unlawful investigations program within an immigration-benefits adjudication agency would pay appropriate obeisance to the rule of law, the separation of powers, and the system of checks and balances. Ironically, the need for abolition comes at a time when many immigration stakeholders and members of the public have clamored to "abolish ICE," or at least, to reform it dramatically. Congressional hearings or judicial correction at the request of litigants may also be necessary corrective actions to prevent USCIS and FDNS from venturing further into the prohibited breach of immigration investigations and enforcement.

The Framers of the Constitution never embraced the inquisitorial French or continental criminal-justice models. We employ no *procureurs de la Republique* who serve under one house as investigators, prosecutors, and judges. Ours is a system that maintains distance and separation between investigators and adjudicators. We tolerate no actual or fictional Inspectors Clouseau. The Congress in 2002 made the right call in HSA §471 when it prohibited the President and subordinate executive officers from recombining into a single agency or otherwise combining, joining, or consolidating functions or organizational units that discharge distinct, immigration-related, investigative, and adjudicative responsibilities. As George Santayana wisely noted, "Those who cannot remember the past are condemned to repeat it."

Notes

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1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593–94 (1952) (J. Frankfurter, concurring).

2. *See* USCIS website page, "Fraud Detection and National Security Directorate," https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/fraud-detection-and-national-security-directorate, and "Privacy Impact Assessment for the Fraud Detection and National Security Directorate, DHS/USCIS/PIA-013-01, Dec. 16, 2014," https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdns-november2016_0.pdf.

3. The Homeland Security Act (HSA) of 2002, Pub. L. No. 107–296, 116 Stat. 2135, enacted Nov. 25, 2002, https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf.

4. *See generally* "Overview of INS History," USCIS History Office and Library (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf.

5. *See, e.g.,* contemporary criticisms of INS before HSA's enactment, Demetrios G. Papademetriou, T. Alexander Aleinikoff, and Deborah Waller Meyers, "Reorganizing the U.S. Immigration Function: Toward a New Framework for Accountability" (1998) (describing the need for a demarcation between immigration enforcement and immigration services) (https://www.brookings.edu/book/reorganizing-the-u-s-immigration-function/), and Demetrios G. Papademetriou and Deborah Waller Meyers, "Reconcilable Differences? An Evaluation of Current INS Restructuring Proposals," Policy Brief, Migration Policy Institute, (June 2002) (analyzing two legislative and two Executive Branch INS-restructuring proposals) (https://www.migrationpolicy.org/sites/default/files/publications/200206_PB.pdf).

6. Proposals to Reform United States Immigration Policy: Hearing before the S. Jud. Comm., 103rd Cong., 2d Sess. (S. HRG. 103-1076) (1994) (statement of Doris Meissner, INS Commissioner), https://www.loc.gov/law/find/hearings/pdf/00141273383.pdf.

7. Mark Potter and Rich Phillips, "Six months after Sept. 11, hijackers' visa approval letters received," CNN Miami Bureau (Mar. 13, 2002), http://www.cnn.com/2002/US/03/12/inv.flight.school.visas/.

8. ftp://ftp.loc.gov/pub/thomas/cp107/sr175.txt.

9. For a discussion of the further administrative restructuring that occurred after the HSA's enactment, including the formation of USCIS, ICE, and CBP, see David A. Martin, "Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements," *Insight,* Migration Policy Institute (Apr. 2003), https://www.migrationpolicy.org/research/immigration-policy-and-homeland-security-act-reorganization-early-agenda-practical.

10. https://www.hsdl.org/?view&did=234775.

11. *Supra* note 2.

12. *Supra* note 2, PIA, footnote 3.

13. This job announcement closed on Oct. 8, 2018. It is accessible at https://nationofimmigrators.lexblogplatformthree.com/wp-content/uploads/sites/224/2018/08/APPENDIX-1-FDNS-job-description.pdf.

14. This job announcement also closed on Oct. 8, 2018. It is accessible at https://nationofimmigrators.lexblogplatformthree.com/wp-content/uploads/sites/224/2018/08/APPENDIX-2-USCIS-Immigration-Services-Officer-job-description.pdf.

15. https://dictionary.cambridge.org/dictionary/english/investigate.

16. https://www.merriam-webster.com/dictionary/investigate.

17. https://dictionary.cambridge.org/dictionary/english/adjudicate.

18. https://www.merriam-webster.com/dictionary/adjudicate.

19. The conference report is accessible at http://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf.

20. See *Congressional Research Service* reports, "Overview of the Authorization [/] Appropriations Process," by Bill Heniff, Jr., Analyst on Congress and the Legislative Process, November 26, 2012 (No. RS20371) ("Authorizing legislation … authorizes, implicitly or explicitly, the enactment of appropriations for an agency or program.… An appropriations measure provides budget authority to an agency for specified purposes."), https://www.senate.gov/CRSpubs/d2b1dc6f-4ed2-46ae-83ae-1e13b3e24150.pdf. See also "Authorization of Appropriations: Procedural and Legal Issues," by James V. Saturno, Specialist on Congress and the Legislative Process, and Brian T. Yeh, Legislative Attorney, November 30, 2016 (No. R42098) ("Under congressional rules, when making decisions about the funding of individual items or programs, … Congress **may be constrained by the terms of previously enacted legislation**" [emphasis added]), https://fas.org/sgp/crs/misc/R42098.pdf.

21. The bill is accessible at https://www.congress.gov/bill/115th-congress/house-bill/2407/.

22. For example, FDNS conducted 14,433 site visits to the business premises of employers of H-1B specialty-occupation workers in Fiscal Year 2010. *See* "USCIS Fraud Detection & National Security (FDNS) Director Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions" (June 7, 2011), available to American Immigration Lawyers Association (AILA) members at AILA Doc. No. 11062243. FDNS apparently had begun site visits for workers in L-1 intracompany-transferee visa status the same year. *See* DHS Office of Inspector General (OIG) Report 13-107, "Implementation of L-1 Visa Regulations," (Aug. 9, 2013), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-107_Aug13.pdf. The EB-5 Immigrant Investor visa category contemplates an option for a foreign investor to make a qualifying investment through a USCIS-designated regional center. The purpose of the regional center is to "stimulate economic growth in a specified geographic area [and] offer an immigrant investor already defined investment opportunities, thereby reducing the immigrant investor's responsibility to identify acceptable investment vehicles." *See* USCIS Policy Manual, Vol. 6, Chap. 3, "Guidance," https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter3.html. USCIS reportedly began performing site visits to the offices of "EB-5 petitioners" "starting in [Fiscal Year] 2016." *See* USCIS, Fiscal Year 2017 Report to Congress, "H-1B and L-1A Compliance Review Site Visits, Fraud Detection and National Security, Compliance Review Data (October 1, 2012, to September 30, 2016)," p. ii (Jan. 17, 2018), https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf.

23. *See* "Practice Pointer: USCIS' FDNS Commences Audit of H-1B Program, Including Unannounced Site Visits to H-1B Employers and Their Clients," AILA Doc. No. 09100123 (Oct. 1, 2009).

24. *See* 8 CFR §214.2(f)(11) ("DHS will provide notice to the employer 48 hours in advance of any site visit, except notice may not be provided if the visit is triggered by a complaint or other evidence of noncompliance with the [F-1 optional practical training] regulations, 8 CFR §214.2(h)(5)(vi)(A) ("In filing an H-2A petition, a petitioner and each employer consents to allow access to the site by DHS officers where the labor is

being performed for the purpose of determining compliance with H-2A requirements"), 8 CFR §214.2(r)(16) ("The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, or satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition").

25. *See* Laura D. Francis, "Trump Immigration Fraud Focus Yields Limited Results," *Bloomberg Law,* Nov. 6, 2018, https://news.bloomberglaw.com/daily-labor-report/trump-immigration-fraud-focus-yields-limited-results (subscription required).

Renunciation of U.S. Citizenship

Why Would a Client "Give It All Up"?

Kehrela Hodkinson*

Abstract: This article provides a summary of the expatriation laws of the United States. It then discusses current policies and procedures for expatriation, with a focus on renunciation. It concludes by posing questions regarding future trends related to loss of U.S. citizenship through renunciation.

Introduction

In 1999, the U.S. Department of State estimated that there were between three and six million U.S. citizens who resided outside the United States. In 2016, the agency estimated that the figure had increased to approximately nine million. Along with this increase in the number of U.S. expatriates, there has been a significant increase in the number of those individuals who have decided to renounce their U.S. citizenship. While most U.S. immigration lawyers assist their clients to obtain nonimmigrant visas, lawful permanent resident status, and ultimately, U.S. citizenship, many lawyers never consider the fact that some U.S. citizens living abroad are making the decision to give up their U.S. citizenship and are going through the process of renunciation. In light of this phenomenon, this article examines the history of renunciation and the changes in the laws of expatriation from the formation of the United States from the original 13 colonies to the present. It will also raise issues regarding the future of the laws of expatriation and how trends in renunciation result from other legislation.

This article deals with renunciation as a matter of citizenship law. Intentionally missing from this article is an analysis of the relevant tax laws and implications. It must be understood that, although separate, tax and renunciation go hand in glove, and compliance with the set of regulations governing one but not the other does not make for a complete exit from U.S. regulatory requirements.

A Brief History of Expatriation

The terms "expatriate" and "expatriation" have a long and complex history. Their use ranges from simple residence abroad "for a considerable period of

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time" to the more definitive legal renunciation or destitution of allegiance, "denationalization" or "decitizenization."[1]

The United States was founded by the act of expatriation of citizens from England, but ironically, the United States did not grant its own citizens the right to renounce citizenship. There is no right to expatriation in the Declaration of Independence, the Constitution, or the early federal laws.

Until the mid-nineteenth century, the United States implicitly followed the English common-law tradition of "perpetual allegiance," a feudal concept in which all natural-born citizens are considered to inherit, upon birth, a debt of obligation to the country in which they are born in exchange for the state protection they receive. Because this feudal debt of obligation can never be cancelled, the citizen can never relinquish his or her citizenship. It was quite ironic that the United States followed a system of "perpetual allegiance." On the one hand, the United States welcomed and protected immigrants who expatriated from their countries, while on the other hand, it continued to follow the medieval concept prohibiting expatriation.

From the mid-nineteenth century, with the massive influx of immigrants from Northern Europe, legal thinking about expatriation began to be seen as a corollary to immigration policy, reassuring newcomers that their naturalization in the United States was secure against competing claims from the countries of their birth. In 1868, Congress passed the Expatriation Act,[2] which recognized "the right of expatriation" by individuals, but it was directed to affirming the right of foreign nationals to expatriate themselves and to become naturalized U.S. citizens. It did not explicitly create any procedure by which a U.S. citizen might exercise his or her right to give up citizenship.

It was not until the Expatriation Act of 1907[3] that Congress legislated actions that constituted expatriation. The three principal acts that incurred citizenship loss were naturalization or an oath of allegiance pledged to a foreign state, extended residence abroad (of naturalized American citizens), and marriage of women to foreign citizens. Naturalized American citizens were still protected under the law wherever they travelled, but they were at risk of losing their new citizenship if they resided for two years in their country of origin or for five years in any other foreign state. The presumption of loss of American citizenship due to extended residence abroad could be overcome only if the individual provided satisfactory evidence that there had been no intent to relinquish American citizenship.

Between 1907 and the Married Women's Independent Citizenship Act (Cable Act) of 1922,[4] American women who married foreign nationals were subject to involuntary expatriation. Section 3 of the Expatriation Act of 1907 specified that any American woman who married a foreigner would take the nationality of her husband. This resulted in the forced expatriation without emigration of U.S. citizen women who resided in the United States.

By clearly delineating the acts that could lead to loss of citizenship, the Expatriation Act of 1907 marked a political shift from inclusion to exclusion

in response to anti-immigrant protagonists in Congress. With the Nationality Act of 1940,[5] Congress designed laws to strip U.S. citizenship from persons who committed treason or deserted the armed forces in wartime. The law was further expanded to include leaving the United States to evade the draft as an expatriating act.[6] Subsequently, attempting to overthrow the government by force or violence was added as an expatriating act.[7]

Section 349 of the Immigration and Nationality Act of 1952 (INA)[8] expanded the list of acts for which loss of citizenship was prescribed to include obtaining naturalization in a foreign state, taking an oath of allegiance to a foreign state, and serving in the armed forces of a foreign state without authorization and with consequent acquisition of foreign nationality. Acts that resulted in loss of citizenship also included assuming public office under the government of a foreign state for which only nationals of that state are eligible, voting in an election in a foreign state, formally renouncing citizenship before a U.S. foreign service officer abroad, formally renouncing citizenship within the United States in time of war, being convicted and discharged from the armed services for desertion in wartime, being convicted of treason or an attempt to forcibly overthrow the government of the United States, and fleeing or remaining outside the United States in wartime or during a proclaimed emergency in order to evade military service. A naturalized U.S. citizen could also lose U.S. citizenship by residing abroad for either three years in his or her country of birth or former nationality or five years in any other country. A number of these expatriating acts have been judicially challenged and have been found unconstitutional.[9]

In *Afroyim v. Rusk*,[10] the U.S. Supreme Court overruled a 1958 decision that permitted expatriation for voting in a foreign election and announced a constitutional rule against all but purely voluntary renunciation of U.S. citizenship. The majority ruled that the first sentence of Section 1 of the Fourteenth Amendment constitutionally vested citizenship in every person "born or naturalized in the United States" and that Congress was powerless to take that citizenship away.[11]

A later Supreme Court ruling in 1980, *Vance v. Terrazas*,[12] established that a U.S. citizen cannot have his or her U.S. citizenship taken away unless he or she has acted with an intent to give up that citizenship.

Under current law, a person who commits any of the acts enumerated in INA §349 is presumed to have done so voluntarily.[13] That person must also do so with the *specific* and *contemporaneous* intent to renounce his or her U.S. citizenship. Until 1990, a person who committed any of the acts listed in INA §349 was also presumed to have done so with the intent to renounce U.S. citizenship.[14] In fact, consular officers routinely advised U.S. citizens abroad that committing any of these expatriating acts would result in loss of U.S. citizenship. Foreign government officials also frequently advised U.S. citizens who sought employment with a foreign government or to become a member of a professional organization licensed by a foreign government that

swearing a required oath of foreign allegiance would relinquish any claims to U.S. citizenship. Many foreign governments also require that a person renounce his or her U.S. citizenship when swearing an oath of allegiance, as dual citizenship is not permitted in their countries.

In 1990, the Bureau of Consular Affairs adopted an alternate presumption for three of the expatriating acts detailed in the INA. It is now presumed that a U.S. citizen intends to retain U.S. nationality even if he or she naturalizes in a foreign country, takes a routine oath of allegiance to another country, or accepts non-policy-level employment with a foreign government.[15] For any of these acts to be considered an "expatriating act," the individual must "affirmatively assert to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship."[16]

Renunciation of U.S. Citizenship—A Practical Perspective

Because most expatiations occur through renunciation, it is worthwhile to explore the current procedures and presumptions for those who decide to renounce their U.S. citizenship.

Renunciation of U.S. citizenship can only take place outside of the United States, by swearing an oath of renunciation in the presence of a consular officer.[17] The U.S. Department of State (DOS) provides a historical perspective of the laws and policies pertaining to loss of nationality in its *Foreign Affairs Manual (FAM).*[18] In its instructions to consular officers, DOS states that four elements must be established before a finding of loss may be made:

1. The person is in fact a U.S. citizen;
2. The person committed an act that is potentially expatriating under INA §349(a);
3. The person committed the act voluntarily. A person who commits a potentially expatriating act is presumed to have done so voluntarily, but the presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily; and
4. The person intended to relinquish the rights and privileges of U.S. citizenship. If the would-be renunciant/person relinquishing U.S. citizenship demonstrates a clear intention to resume his or her residency in the United States without applying for a U.S. visa, the intention to relinquish U.S. citizenship has not been established satisfactorily and a finding of non-loss should be made.[19]

Procedurally, for an individual to renounce U.S. citizenship, he or she must appear before a U.S. consular officer and swear or affirm an oath of

renunciation. 7 FAM 1260 provides detailed instructions to consular officers regarding how to conduct the renunciation interview. The consular officers must make a determination related to whether the individual is acting voluntarily, of his or her own free will, and without duress, coercion, or undue influence from others.[20] The officer must make a judgment as to whether the individual fully understands the consequences of renunciation,[21] verify that the individual has another nationality so that he or she is not left stateless upon renunciation,[22] and ensure that the individual understands that the act of renunciation is irrevocable.[23]

Prior to the renunciation interview, the individual is provided with information regarding the consequences of renunciation and with advice regarding possible loss of U.S. nationality and dual nationality. If the individual decides to proceed with the renunciation, the consular officer, prior to administering the Oath of Renunciation and recommending loss of nationality, must exercise his or her judgment to determine that the individual is acting voluntarily and with the intent to lose U.S. citizenship.[24] Prior to taking the Oath of Renunciation, the individual must acknowledge that he or she has been provided with the Statement of Understanding Concerning the Consequences and Ramifications of Relinquishment or Renunciation of U.S. Citizenship[25] and indicate that he or she comprehends it. The individual is then asked to sign the statement. Then the individual is asked to raise his or her right hand while taking the Oath of Renunciation, prior to signing the oath form[26] and the Certificate of Loss of Nationality.[27] This formality underscores that the individual is severing all ties of allegiance to the United States and, in doing so, loses the protections that the U.S. government provides to citizens and noncitizen nationals.[28] The individual then pays the $2,350 processing fee. The consular officer, in most circumstances, transmits the loss of nationality packet to DOS for final approval based on the consular officer's recommendation.[29] The Certificate of Loss of Nationality is then forwarded to the renunciant as evidence of the fact that he or she has lost U.S. citizenship.

Potential clients frequently ask if they require the services of a lawyer to process their renunciation. While in most consular jurisdictions, lawyers may no longer attend the renunciation interview with their clients, the lawyer's role is nonetheless often critical to ensure that the process proceeds as smoothly as possible.

Often the lawyer must make a preliminary determination whether, in fact, the client is a U.S. citizen. There are numerous children who are born outside the United States who consider their place of birth as their exclusive country of nationality. Providing advice regarding the transmission of U.S. citizenship by a U.S. parent often leads to a client's shock as he or she comes to grips with the fact that he or she is an "accidental U.S. citizen."

The second shock comes when the client is told of the need to seek U.S. tax advice, because an individual must be tax compliant prior to renouncing U.S. citizenship and must gain an understanding as to whether the "exit tax"

may apply if renunciation is successful. Having a ready reference to U.S. tax advisors is critical for any lawyer who handles renunciation matters.

Once the client is tax compliant and is ready to proceed with renunciation, the lawyer's role includes explaining the statutory requirements for renunciation, assisting with the completion of all forms, and compiling the required supporting documentation. Most clients are extremely anxious prior to their renunciation interview, expecting an interrogation by the consular officer. Explaining what takes place during the interview and taking the client through a sample interview often puts the client more at ease and eliminates the anxiety caused by "fear of the unknown."

Future Trends in Renunciation

The number of renunciations has increased steadily for the past several years. A total of 5,133 people renounced their U.S. citizenship in 2017—only 300 less than the total number of individuals who renounced during the entire period between 1997 and 2007! Will this trend continue?

As more and more high-profile individuals become aware and acknowledge that they are U.S. citizens (like Boris Johnson, former mayor of London) and more publicity is generated regarding the issues of dual nationality, individuals who were born outside the United States and never considered themselves American are starting to inquire about their U.S. nationality. Due to obligations of U.S. citizenship, such as tax reporting requirements, some individuals are choosing to "stick their head in the sand" and ignore their U.S. nationality. However, as information technology continues to advance and more sharing of informational databases occurs between U.S. government agencies, it is only a matter of time until some "accidental U.S. citizens" will be forced either to acknowledge their U.S. citizenship and assume the corresponding obligations or renounce their citizenship.

An interesting observation is the number of U.S. citizens who are living outside the United States who incorrectly assume that, because they live outside the United States, they are not liable for payment of U.S. taxes or subject to Internal Revenue Service (IRS) reporting requirements. It is only recently that the U.S. Passport Office is beginning to determine whether a U.S. citizen residing abroad who is applying to renew a U.S. passport has been filing U.S. tax returns. Will the increase in data sharing result in an increase in renunciations?

In 2015, the processing fee for renunciations was raised from $400 to $2,350. While many individuals claim that this increase is punitive in nature, the U.S. government has indicated that the increased fee reflected the "true cost" of processing. Will there be further increases in the processing fees? How will these be justified?

Will the government become more punitive toward individuals who have renounced their U.S. citizenship? Some individuals who have renounced and subsequently travel to the United States using the passport of their country of nationality are questioned by U.S. Customs and Border Protection officers regarding why they renounced their U.S. citizenship. This occurrence is more common for individuals whose place of birth was in the United States, because this information is readily evident in their current passport.

What will happen to the interplay between U.S. tax and renunciation? There is a dichotomy between the IRS wanting everyone to be a U.S. citizen (and therefore potentially liable for payment of U.S. taxes) and DOS taking a more restrictive stance on whether a person is a U.S. citizen, such as by asking a person born outside the United States to a U.S. citizen parent to prove that he or she acquired or derived U.S. citizenship from the parent in accordance with the applicable law.

Will legislation be promulgated that negatively affects former U.S. citizens who have renounced? Will they be prevented from applying for certain classes of admission? Could they be prevented from applying for immigrant visas in the future if they become eligible for another immigrant visa classification, such as immediate relative if they were to marry a U.S. citizen? Although it is extremely unlikely that we would regress to perpetual citizenship, it will be interesting to follow the trends to see if the relatively straightforward, though costly, process of renunciation changes and becomes more restrictive and/or punitive.

Will there be an increase in renunciations of individuals who are not happy with the current U.S. government and its policies and choose to leave the United States to live abroad? Will those individuals eventually acquire another nationality and choose to relinquish their U.S. citizenship? It will be interesting to observe the emigration trends in the United States over the next several years. What effect will this have on the countries in which these former U.S. citizens settle?

Unfortunately, no crystal ball exists to assist with the answers to these questions. We are certainly living in a changing world, and it will be interesting to follow the trends to see what effect the global changes will have on U.S. policies toward its citizens who make the decision to abandon their U.S. citizenship.

Notes

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1. *See* Ernest Earnest, Expatriates and Patriots: American Artists, Scholars and Writers in Europe viii. (1968); T. Alexander Aleinikoff, *Theories of Loss of Citizenship,* 84 Mich. L. Rev. 1471, 1473 (June 1986); Richard W. Flournoy, Jr., *Naturalization and Expatriation,* 31 Yale L. J. 848, 866–68 (1922).

2. Act of July 27, 1868, 15 Stat. 223.
3. 34 Stat. 1228.
4. 42 Stat. 1021.
5. Pub. L. No. 76-853; 54 Stat. 1137.
6. Act of Sept. 27, 1944, 58 Stat. 746.
7. Act of Sept. 3, 1954, 68 Stat. 1146.
8. Codified at 8 USC §1481.
9. *Perez v. Brownell*, 356 U.S. 44 (1958); *Trop v. Dulles*, 356 U.S. 86 (1958); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Schneider v. Rusk*, 377 U.S. 163 (1964).
10. 387 U.S. 253 (1967).
11. *Id.* at 268.
12. 444 U.S. 252 (1980).
13. INA §349(b).
14. 61 Fed. Reg. 29651 (June 12, 1996).
15. 22 CFR §50.30(a).
16. 22 CFR §50.40(a).
17. INA §349(a)(5).
18. 7 FAM 1210–1216.
19. 7 FAM 1211(f).
20. 7 FAM 1261(d).
21. *Id.*
22. 7 FAM 1261(g).
23. 7 FAM 1261(i).
24. 7 FAM 1262.3(b).
25. DOS Form DS-4081.
26. DOS Form DS-4080.
27. DOS Form DS-4083.
28. 7 FAM 1262.3(e).
29. 7 FAM 1264.

Travel Ban Impact on Visa Issuances

Data Report on Pre- and Post-Travel Ban Visa Issuances to Select Affected Countries

Mahsa Khanbabai*

Abstract: Presidential Proclamation 9645, also known as the Muslim Travel Ban, was upheld by the U.S. Supreme Court majority decision in *Trump v. Hawaii* in large part due to the ability to apply for a "waiver" of the travel restrictions. However, visa data from the State Department indicates that the waiver process is indeed "window dressing," as the dissent had opined. This article intends to equip attorneys with visa data points, and highlight areas where critical data is missing, to assist in advising clients and advocating for more transparent waiver processing.

Background

On September 24, 2017, President Trump signed Presidential Proclamation 9645, the administration's third attempt at imposing travel restrictions on Muslim-majority nations. This iteration of the travel ban imposed blanket restrictions on immigrant visas and varying types of nonimmigrant visas for nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen, while also restricting B visas to certain Venezuelan government officials and their families.

As with the previous iterations, the ban was immediately contested by states and outside advocacy groups. On October 17, 2017, the U.S. District Court for the District of Hawaii temporarily blocked the order while litigation proceeded. The Trump administration appealed to the Supreme Court to allow the ban to take full effect while the case was litigated. On December 4, 2017, the Supreme Court granted the request, and the travel ban was fully implemented. The Supreme Court eventually upheld the ban's constitutionality in a 5-4 ruling on June 26, 2018, in *Trump v. Hawaii*, No. 17-965, 585 U.S. __, 138 S. Ct. 2392 (2018). Before the ruling, the administration removed the travel restrictions on Chad on April 10, 2018; the restrictions on the rest of the countries remain unmodified.

Table 1, from the Department of State (DOS), breaks down the restrictions by country. Of the seven countries, only two face complete bans on visa issuance: North Korea and Syria. While the rest have visa classes that aren't technically subject to the ban (for example, F and J visas for Iranians), the proclamation specifies that applications for these allowed visa classes should still be subject to enhanced vetting procedures.

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Table 1

Country	Nonimmigrant Visas	Immigration and Diversity Visas
Iran	No nonimmigrant visas except F, M, and J visas	No immigrant or diversity visas
Libya	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
North Korea	No nonimmigrant visas	No immigrant or diversity visas
Somalia		No immigrant or diversity visas
Syria	No nonimmigrant visas	No immigrant or diversity visas
Venezuela	No B-1, B-2, or B-1/B-2 visas of any kind for officials of the following government agencies: Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal; the Bolivarian Intelligence Service; and the People's Power Ministry of Foreign Affairs, and their immediate family members.	
Yemen	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas

Source: https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation9645.html.

Overview

This report presents a collection of DOS visa issuance data for five of the seven countries subject to the ban: Iran, Libya, Somalia, Syria, and Yemen. North Korea is excluded because it already had a limited number of visas each year due to internal restrictions on travel, meaning the travel ban has had an indiscernible effect. Venezuela is excluded because the ban applies to only a very small and specific group of government officials and their families.

The data for this report comes from https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html. More specifically:

- Report of the Visa Office, 2008–2017 (above link):
  - Table XIV: Immigrant Visas Issued by Foreign State of Chargeability (All Categories)
  - Table XVII: Nonimmigrant Visas Issued by Classification and Nationality (Including Border Crossing Cards)

    - Table XVIII: Nonimmigrant Visas Issued by Nationality (Including Border Crossing Cards)
- Monthly Immigrant Visa Issuance Statistics: IV Issuances by FSC or Place of Birth and Visa Class, March 2017–August 2018 (https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/immigrant-visa-statistics/monthly-immigrant-visa-issuances.html)
- Monthly Nonimmigrant Visa Issuance Statistics: NIV Issuances by Nationality and Visa Class, March 2017–August 2018 (https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html)

This report provides aggregate data on all five countries before providing separate sections for each individual country's visa data. As Iran, Libya, and Yemen have restrictions on some nonimmigrant visa types but not others, their sections will go into more detail in order to display the different trends in the banned and non-banned visas. The visa reports do not contain information on travel ban waiver and exemption numbers, so the numbers for banned visa categories do not differentiate between the two and do not serve as effective data for either. Note that the U.S. Citizenship and Immigration Services' fiscal year runs from October 1 of the year before through September 30 of the label year; thus, FY 2018 ran from October 1, 2017, through September 30, 2018.

Data Limitations

The visa issuance data posted by DOS allows for analysis of the impact of the travel ban on broad visa issuance trends. Unfortunately, the data is not specific enough to enable a complete analysis of the ban's effects on immigration from the targeted countries. The visa issuance data does not include, for example, the number of visa applications from the affected countries, the number of visas issued in the banned categories because the applicant qualified for an exemption, the number of visas issued to banned categories because the applicant was granted a waiver, etc.

As an example of why these shortcomings are significant: DOS data shows that 753 nonimmigrant visas (NIVs) were issued to Iranians in August 2018 compared to 1,776 in August 2017. It cannot be determined from these numbers alone if this decrease is solely due to the travel ban or if there are other additional explanatory factors, such as fewer applications received.

DOS has made only nominal efforts to address these shortcomings and provide specific data to legislators and the public regarding visa applications and issuances affected by the travel ban. The data disclosed by DOS to legislators generally includes the following categories:

1. Number of NIV and immigrant visa (IV) applications from affected nationalities who applied for visas in the Presidential Proclamation 9645 (P.P. 9645) covered categories.
2. Number of applicants found ineligible for reasons other than those covered in P.P. 9645, so a review for eligibility was not required.
3. Number of applicants who received a visa under an exception from P.P. 9645.
4. Number of applicants "cleared for waivers."
5. Number of applicants interviewed but still awaiting a determination on a waiver.

While these numbers provide some useful information, they leave a great deal of ambiguity about the effect of the travel ban and its procedural application. For example, DOS disclosed that as of December 31, 2018, it had cleared 2,535 applicants for a waiver, but it does not define the phrase "cleared for a waiver." Additionally, "number of applicants cleared for waivers" is not the same as "number of applicants granted waivers," and does not tell us how many of those applicants have actually received their visas. Most importantly, we do not know how many applications are still pending or how many were denied for failure to meet the waiver criteria.

Further, the numbers provided are aggregated from December 8, 2017, through the end of the most recent month, meaning they are not in parallel time units (months, fiscal years) to other visa issuance data and can therefore not be compared. If DOS released the travel ban data by month, it would be possible to compare "number of applicants cleared for waivers" in a given month and "number of applicants who received a visa under an exemption" for that month to the already published visa issuances that month, giving a clearer idea of how many applicants subject to the ban receive visas.

The lack of transparency from DOS regarding travel ban waivers has made it difficult for immigration attorneys to offer precise and effective guidance to clients from targeted countries. As it stands, it is difficult to answer even some of the most basic questions regarding the process, such as "how long will it take?" and "what are my chances of success?" The confusion is part of the administration's broader strategy to not only deny more cases from the targeted countries, but to discourage individuals from even applying. Thus, it becomes difficult to establish and manage client expectations, even when attorneys are reasonably confident that they can successfully pursue a travel ban waiver.

Conclusion

For the purposes of increased transparency and more robust data, we recommend that DOS make the following improvements to their P.P. 9645 visa data releases:

1. Provide monthly numbers; break down the current aggregated numbers by month, and release future data in a monthly format parallel to DOS's other visa issuance reports.
2. Provide country-specific numbers; break down the current numbers by country, and continue doing so for future releases parallel to DOS's other visa issuance reports.
3. Provide visa-category-specific numbers; break down the current numbers by visa category, and continue doing so for future releases parallel to DOS's other visa issuance reports.

Such improvements would provide clearer data for legislators, attorneys, visa applicants, and all other stakeholders, allowing them to make informed decisions based on the travel ban's current implementation.

In the interim, although the published data is far from comprehensive, attorneys can use it to draw useful conclusions that will better help them advise clients seeking waivers. For example, the data shows that immigrant visas are still being consistently issued to applicants from countries that are banned, but at significantly lower rates. Thus, an attorney might use this knowledge to advise an Iranian seeking an immigrant visa that it is not impossible to obtain a waiver, but it will require a high standard of evidence and will likely take a very long time. The data is useful for non-waiver cases as well, as it demonstrates that even visa categories not covered by the ban, such as F or J visas for Iranians, have faced significant declines in issuance rates. Attorneys can advise clients who fall into these categories that their cases will likely face additional delays.

The overall objective of the administration is to reduce immigration from the travel ban countries through delays, denials, and discouragement. Even after a full year of travel restrictions, there are still far more questions than answers. One of the most direct ways attorneys can combat the unreasonable adjudication of travel ban waiver requests is to arm oneself with as much knowledge as is available to demand proper adjudication and to help clients make informed and effective decisions regarding the travel restrictions. Furthermore, by preparing and submitting strong travel ban waiver requests, attorneys can ensure that the government continues to adjudicate cases and be held responsible for a fair and appropriate decision-making process. The data gathered as more travel ban waiver requests are processed will help build our base of knowledge and will hopefully become more expansive and detailed over time, allowing us to challenge the failure to adjudicate cases as required by law.

Note

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Appendix

General—All Countries

Table 1.1. Yearly Nonimmigrant Visas by Country, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Iran	12,635	17,518	19,822	23,864	25,446	26,091	33,961	35,363	29,404	19,801	6,105
Libya	5,735	3,806	5,922	2,494	3,226	4,593	4,766	3,303	2,307	1,552	924
Syria	6,421	7,408	8,427	8,366	9,408	15,130	12,671	10,061	9,096	5,411	2,130
Somalia	227	237	177	144	202	210	352	331	451	276	207
Yemen	1,573	2,091	2,329	2,345	3,497	4,079	5,842	4,525	5,203	2,919	1,120
Total	26,591	31,060	36,677	37,213	41,779	50,103	57,592	53,583	46,461	29,959	10,396

Sources: Report of the Visa Office, 2017, Table XVIII; Monthly Nonimmigrant Visa Issuance Statistics

Table 1.2. Yearly Immigrant Visas by Country, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Iran	6,414	6,316	8,057	7,323	8,126	8,057	7,049	7,179	7,727	6,643	1,446
Libya	141	155	172	198	134	163	189	272	383	458	139
Syria	1,260	1,436	1,478	1,641	1,926	2,179	1,984	1,901	2,633	2,551	821
Somalia	510	619	690	698	921	1,047	1,705	1,078	1,797	1,791	546
Yemen	1,270	3,052	2,416	2,761	2,681	3,158	2,939	3,143	12,998	5,419	1,195
Total	9,595	11,578	12,813	12,621	13,788	14,604	13,866	13,573	25,538	16,862	4,147

Sources: Report of the Visa Office, 2017, Table XIV; Monthly Immigrant Visa Issuance Statistics

Table 1.3. Yearly Total Visas by Country, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Iran	19,049	23,834	27,879	31,187	33,572	34,148	41,010	42,542	37,131	26,444	7,461
Libya	5,876	3,961	6,094	2,692	3,360	4,756	4,955	3,575	2,690	2,010	1,063
Syria	7,681	8,844	9,905	10,007	11,334	17,309	14,655	11,962	11,729	7,962	2,951
Somalia	737	856	867	842	1,123	1,257	2,057	1,409	2,248	2,067	753
Yemen	2,843	5,143	4,745	5,106	6,178	7,237	8,781	7,668	18,201	8,338	2,315
Total	36,186	42,638	49,490	49,834	55,567	64,707	71,458	67,156	71,999	46,821	14,543

Sources: Reports of the Visa Office, 2017, Tables XIV and XVIII; Monthly Immigrant & Nonimmigrant Visa Issuance Statistics

Table 2.1. Monthly Nonimmigrant Visas by Country, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Iran	1,572	1,186	1,513	1,883	1,276	1,776	1,316	1,808	926	404	210
Libya	128	88	104	95	119	93	138	117	139	52	57
Syria	260	265	320	390	269	371	314	570	388	170	79
Somalia	27	12	19	30	24	21	22	23	14	6	13
Yemen	191	122	187	239	161	194	104	176	114	85	57
Total	2,178	1,673	2,143	2,637	1,849	2,455	1,894	2,704	1,581	717	416
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Iran	217	181	213	305	270	311	753	407	262	303	
Libya	34	70	108	52	87	73	64	71	56	95	
Syria	62	138	157	141	116	118	114	77	182	116	
Somalia	11	16	24	8	16	24	32	20	11	6	
Yemen	66	54	75	112	80	97	131	73	62	83	
Total	390	459	577	618	569	623	1,094	648	573	603	

Sources: Monthly Nonimmigrant Visa Issuance Statistics

Table 2.2. Monthly Immigrant Visas by Country, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Iran	393	282	595	551	471	904	487	544	364	137	34
Libya	41	11	54	26	33	19	20	39	22	14	5
Syria	120	268	293	168	146	133	113	197	118	55	22
Somalia	171	73	112	107	153	111	88	209	119	31	3
Yemen	455	210	533	255	335	574	505	430	261	46	5
Total	1,180	844	1,587	1,107	1,137	1,741	1,213	1,419	884	283	69
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Iran	43	33	48	58	41	22	31	91	43	45	
Libya	10	7	1	4	5	8	17	7	10	9	
Syria	29	75	27	82	31	70	56	59	41	34	
Somalia	6	51	22	25	16	25	23	16	25	17	
Yemen	4	17	36	38	49	43	134	132	141	154	
Total	92	183	134	207	142	168	261	305	260	259	

Sources: Monthly Immigrant Visa Issuance Statistics

Table 2.3. Monthly Total Visas by Country, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Iran	1,965	1,468	2,108	2,434	1,747	2,680	1,803	2,362	1,290	541	244
Libya	169	99	158	121	152	112	158	156	161	66	62
Syria	380	533	613	558	415	504	427	767	506	225	101
Somalia	198	85	131	137	176	132	110	232	133	37	16
Yemen	646	332	720	494	496	768	609	606	375	131	61
Total	3,358	2,517	3,730	3,744	2,986	4,196	3,107	4,123	2,465	1,000	485
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Iran	260	214	261	363	311	333	784	498	305	348	
Libya	44	77	109	56	92	81	81	78	66	104	
Syria	91	213	184	223	147	188	170	136	223	150	
Somalia	17	67	46	33	32	49	55	36	36	23	
Yemen	70	71	111	150	129	140	265	205	203	237	
Total	482	642	711	825	711	791	1,355	953	833	862	

Sources: Monthly Immigrant & Nonimmigrant Visa Issuance Statistics

Figure 1.1. Yearly Nonimmigrant Visas by Country, FY08–FY18

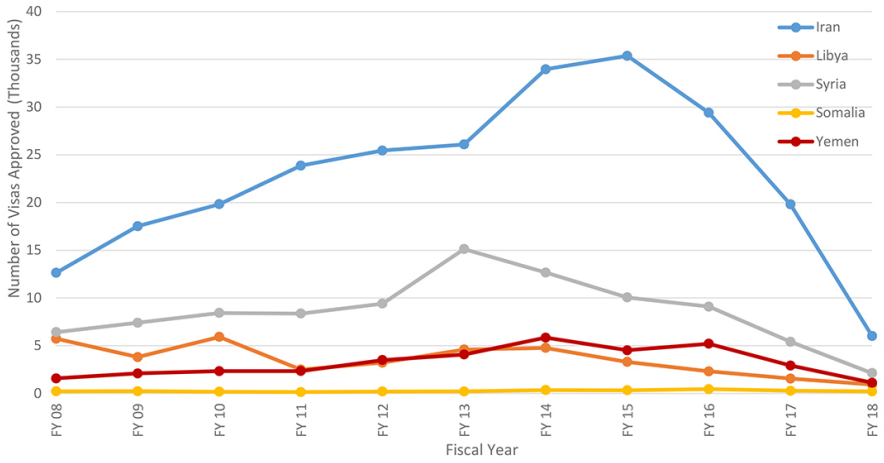


Figure 1.2. Yearly Immigrant Visas by Country, FY08–FY18

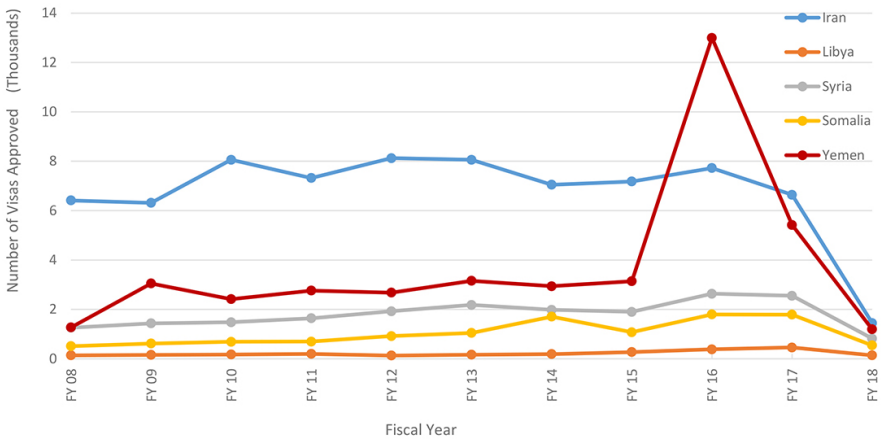


Figure 1.3. Yearly Total Visas by Country, FY08–FY18

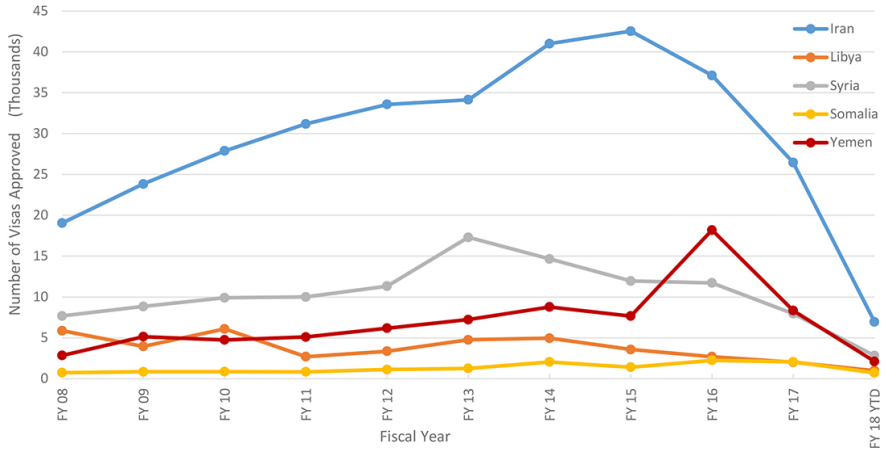


Figure 1.4. Yearly Visas to All Five Countries, FY08–FY18

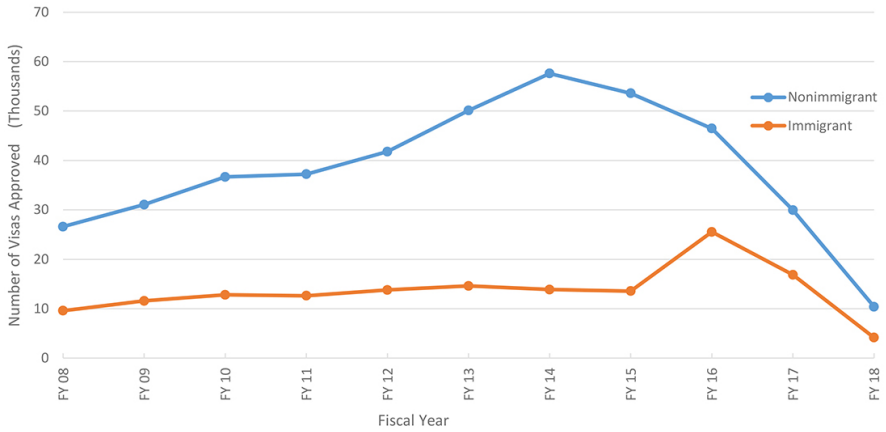


Figure 2.1. Monthly Nonimmigrant Visas by Country, March 2017–November 2018

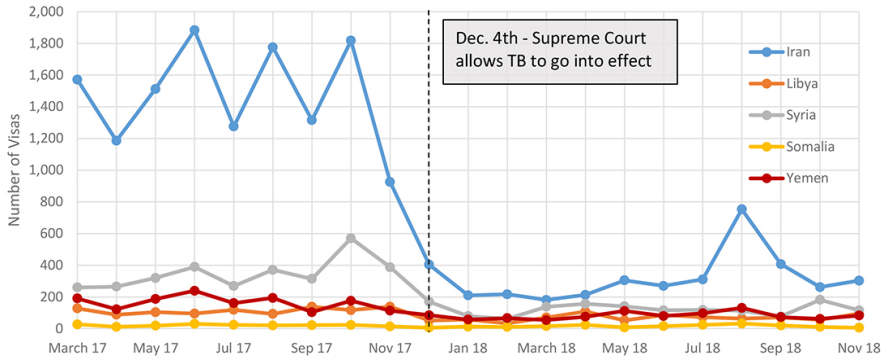


Figure 2.2. Monthly Immigrant Visas by Country, March 2017–November 2018

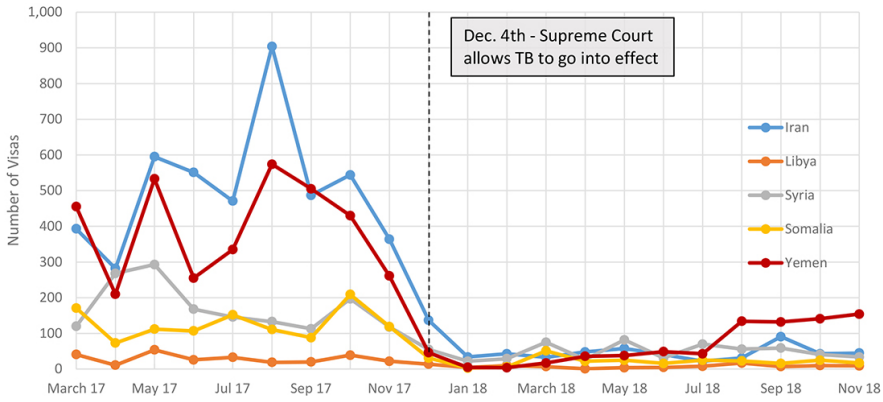


Figure 2.3. Monthly Total Visas by Country, March 2017–November 2018

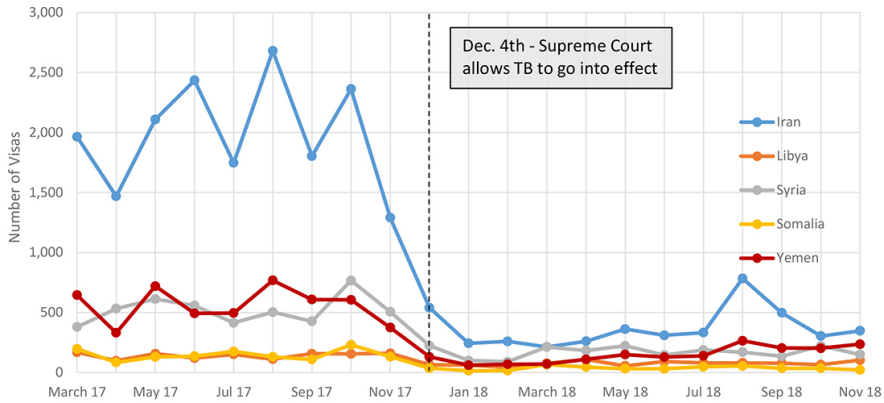
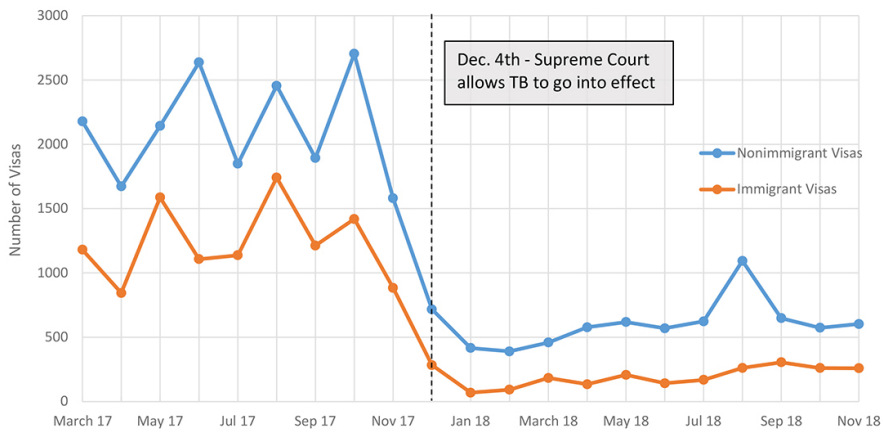


Figure 2.4. Monthly Total Visas to All Five Countries, March 2017–November 2018



Iran

Table I1.1. Yearly Immigrant and Nonimmigrant Visas to Iranians, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Nonimmigrant Visas	12,635	17,518	19,822	23,864	25,446	26,091	33,961	35,363	29,404	19,801	6,015
Immigrant Visas	6,414	6,316	8,057	7,323	8,126	8,057	7,049	7,179	7,727	6,643	1,446
Total	19,049	23,834	27,879	31,187	33,572	34,148	41,010	42,542	37,131	26,444	7,461

Sources: Reports of the Visa Office, 2017, Tables XIV and XVIII; Monthly Immigrant and Nonimmigrant Visa Issuance Statistics.

Table I1.2. Yearly Nonimmigrant Visas to Iranians by Visa Category, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
A	7	7	8	7	2	1	5	3	4	6	4
B-1	342	475	642	954	448	469	447	103	60	33	6
B-2	4,040	6,835	7,929	8,479	6,465	8,172	8,091	1,113	570	383	47
B-1/B-2	5,168	6,195	7,049	9,428	12,487	11,569	18,921	27,751	23,048	14,649	3,042
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	0
C	10	10	23	22	38	36	43	22	40	8	0
C-1/D	8	1	0	4	4	5	6	15	13	4	0
CW	—	—	—	—	0	0	0	0	0	0	0
D	1	0	0	0	0	0	2	0	0	0	0
E	21	20	42	28	49	41	48	27	19	24	1
F	1,199	2,054	2,017	2,878	3,512	3,566	3,838	3,796	3,139	2,638	1,643
G	485	479	619	528	532	472	528	537	477	482	470
H	242	228	257	277	310	276	275	290	213	171	29
I	8	6	11	11	5	6	20	23	19	4	1
J	538	602	597	743	1,021	965	1,043	1,139	1,220	930	662
K	461	509	527	389	435	378	549	374	376	358	45
L	31	32	37	44	29	37	51	67	98	53	16
M	3	4	3	16	31	24	14	9	9	0	1

Continues

Table I1.2. Continued

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
NATO	0	0	1	0	0	0	0	0	0	0	0
N	0	0	0	0	0	0	0	0	0	0	0
O	15	22	14	5	33	28	37	50	53	31	12
P	37	32	36	29	15	22	22	22	14	5	11
Q	0	0	0	0	0	0	0	1	0	0	0
R	4	0	1	9	1	0	0	1	0	0	0
S	0	0	0	0	0	0	0	0	0	0	0
T	0	0	0	0	0	0	0	0	0	0	6
U	0	0	1	0	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0	0	0	0	0
NAFTA*	15	7	8	13	29	24	21	20	32	22	0
Total Banned	10,895	14,858	17,205	20,227	20,882	21,536	29,066	30,419	25,036	16,233	3,690
Total Allowed	1,740	2,660	2,617	3,637	4,564	4,555	4,895	4,944	4,368	3,568	2,306
Total	12,635	17,518	19,822	23,864	25,446	26,091	33,961	35,363	29,404	19,801	5,996

Notes: Shaded cells indicate banned NIV categories; "—" indicates visa category not in use.

* NAFTA visas to Iranians issued as TD (TN dependent) visas.

Sources: Report of the Visa Office, 2008–2017, Table XVII; Monthly Nonimmigrant Visa Issuance Reports.

Table I2.1. Monthly Immigrant and Nonimmigrant Visas to Iranians, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Nonimmigrant Visas	1,572	1,186	1,513	1,883	1,276	1,776	1,316	1,818	926	404	210
Immigrant Visas	393	282	595	551	471	904	487	544	364	137	34
Total	1,965	1,468	2,108	2,434	1,747	2,680	1,803	2,362	1,290	541	244
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Nonimmigrant Visas	217	181	213	305	270	311	753	407	262	303	
Immigrant Visas	43	33	48	58	41	22	31	91	43	45	
Total	260	214	261	363	311	333	784	498	305	348	

Source: Monthly Immigrant and Nonimmigrant Visa Issuance Reports.

Table I2.2. Monthly Nonimmigrant Visas to Iranians by Visa Category, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
A	1	0	0	1	0	0	1	0	0	0	0
B-1	1	1	1	4	1	3	0	1	3	0	1
B-2	1	29	32	35	22	13	12	22	8	10	0
B-1/B-2	1,279	910	1,091	1,254	819	1,068	947	1,546	714	251	26
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	0
C	1	0	0	0	4	0	0	0	0	0	0
C-1/D	0	1	1	0	0	0	0	0	0	0	0
CW	0	0	0	0	0	0	0	0	0	0	0
D	0	0	0	0	0	0	0	0	0	0	0
E	4	0	1	1	1	5	4	0	1	0	0
F	91	80	233	414	293	543	96	108	77	91	111
G	23	33	21	48	42	31	147	42	29	21	23
H	12	12	9	8	9	16	13	9	3	0	2
I	0	0	0	0	0	0	0	0	1	0	0
J	80	89	93	83	49	76	59	45	69	28	45
K	38	23	24	31	29	16	33	25	13	2	0

L	2	3	6	0	3	1	3	5	4	1	0
M	0	0	0	0	0	0	0	1	0	0	0
NATO	0	0	0	0	0	0	0	0	0	0	0
N	0	0	0	0	0	0	0	0	0	0	0
O	0	3	0	2	4	2	0	3	3	0	1
P	1	1	1	0	0	1	0	10	0	0	0
Q	0	0	0	0	0	0	0	0	0	0	0
R	0	0	0	0	0	0	0	0	0	0	0
S	0	0	0	0	0	0	0	0	0	0	0
T	1	1	0	2	0	1	1	1	1	0	1
U	0	0	0	0	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0	0	0	0	0
NAFTA	0	0	0	0	0	0	0	0	0	0	0
Total Banned	1,364	1,017	1,187	1,386	934	1,157	1,161	1,664	780	285	54
Total Allowed	171	169	326	497	342	619	155	154	146	119	156
Total	1,535	1,186	1,513	1,883	1,276	1,776	1,316	1,818	926	404	210

Continues

Table I2.2. Continued

	Feb 18	March 18	Apr 18	May 18	June 18	July 18	Aug 18	Sept 18	Oct 18	Nov 18	
A	0	1	0	0	1	1	0	1	0	0	
B-1	0	0	0	0	1	0	0	0	1	0	
B-2	0	0	1	0	1	2	1	2	3	2	
B-1/B-2	71	52	52	100	68	54	53	55	63	62	
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	
C	0	0	0	0	0	0	0	0	0	0	
C-1/D	0	0	0	0	0	0	0	0	0	0	
CW	0	0	0	0	0	0	0	0	0	0	
D	0	0	0	0	0	0	0	0	0	0	
E	0	0	0	0	0	0	0	0	0	0	
F	44	34	54	108	121	201	562	132	95	138	
G	36	30	43	24	17	17	48	140	35	24	
H	2	1	0	4	0	1	5	2	1	2	
I	0	0	0	0	0	0	0	0	0	0	
J	63	60	58	67	37	34	82	74	59	71	
K	0	0	1	0	1	1	1	1	0	0	

L	0	1	1	1	3	0	0	0	2	0	
M	0	0	0	0	0	0	0	0	0	0	
NATO	0	0	0	0	0	0	0	0	0	0	
N	0	0	0	0	0	0	0	0	0	0	
O	1	1	1	1	1	0	0	0	0	2	
P	0	1	0	0	0	0	0	0	3	0	
Q	0	0	0	0	0	0	0	0	0	0	
R	0	0	0	0	0	0	0	0	0	0	
S	0	0	0	0	0	0	0	0	0	0	
T	0	0	1	0	1	0	1	0	0	1	
U	0	0	0	0	0	0	0	0	0	0	
V	0	0	0	0	0	0	0	0	0	0	
NAFTA	0	0	0	0	0	0	0	0	0	0	
Total Banned	110	87	100	130	94	76	109	201	108	93	
Total Allowed	107	94	112	175	158	235	644	206	154	209	
Total	217	181	212	305	252	311	753	407	262	302	

Notes: Shaded cells indicate banned NIV categories.

Source: Monthly Nonimmigrant Visa Issuance Reports.

Figure I1.1. Yearly Immigrant and Nonimmigrant Visas to Iranians, FY08–FY18

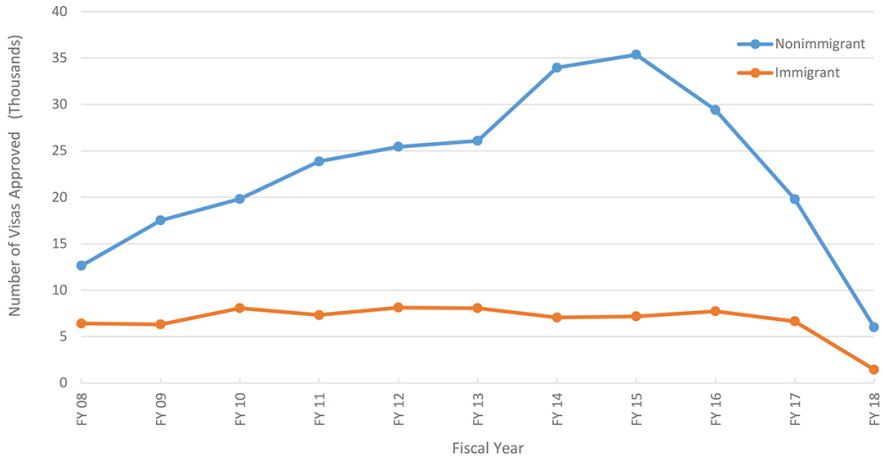


Figure I1.2. Yearly Nonimmigrant Visas to Iranians by Visa Category, FY08–FY18

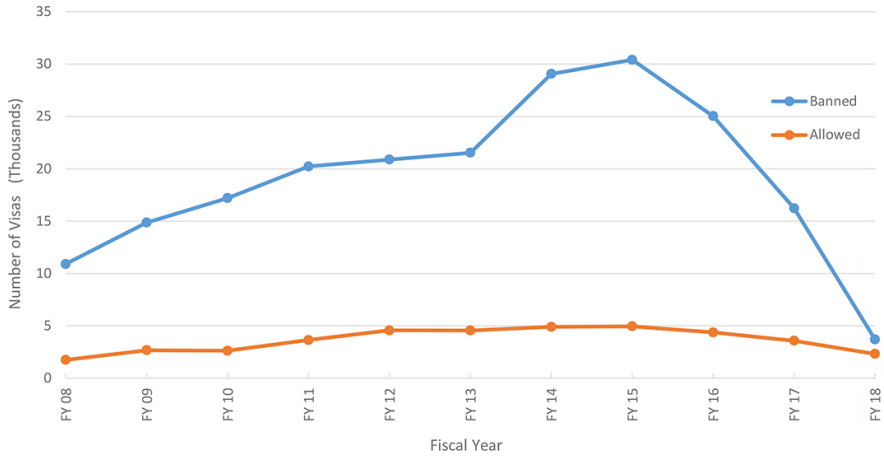


Figure I2.1. Monthly Immigrant and Nonimmigrant Visas to Iranians, March 2017–August 2018

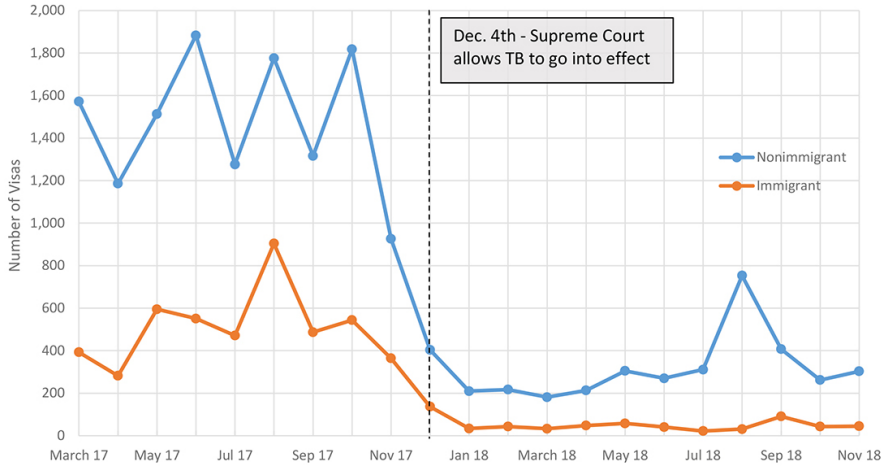
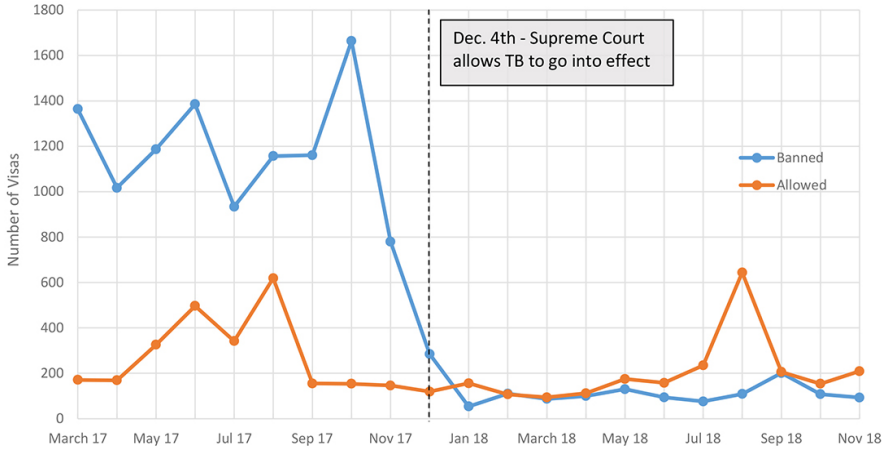


Figure I2.2. Monthly Nonimmigrant Visas to Iranians by Visa Category, March 2017–August 2018



Libya

Table L1.1. Yearly Immigrant and Nonimmigrant Visas to Libyans, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Nonimmigrant Visas	5,735	3,806	5,922	2,494	3,226	4,593	4,766	3,303	2,307	1,552	924
Immigrant Visas	141	155	172	198	134	163	189	272	383	458	139
Total	5,876	3,961	6,094	2,692	3,360	4,756	4,955	3,575	2,690	2,010	1,063

Sources: Reports of the Visa Office, 2017, Tables XIV and XVIII; Monthly Immigrant and Nonimmigrant Visa Issuance Statistics.

Table L1.2. Yearly Nonimmigrant Visas to Libyans by Visa Category, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
A	179	245	178	73	187	519	420	217	191	171	197
B-1	31	5	4	24	22	30	29	7	23	5	0
B-2	9	7	12	12	4	15	34	8	16	6	1
B-1/B-2	1,064	1,830	2,642	1,162	1,120	1,590	1,792	1,374	1,406	806	208
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	0
C	3	6	0	1	2	6	1	2	3	3	1
C-1/D	0	0	0	0	0	18	0	0	0	0	0
CW	—	—	—	—	0	0	0	0	0	0	0
D	4	20	41	18	11	19	5	5	10	6	5
E	0	0	0	0	0	0	0	0	0	0	0
F	3,623	1,037	2,481	1,008	1,478	1,855	1,965	1,354	352	225	177
G	185	448	233	102	132	174	186	148	129	179	175
H	20	12	10	17	32	39	56	55	66	33	32
I	0	4	3	1	3	4	0	0	0	1	3
J	235	153	308	38	191	271	223	87	60	74	94
K	16	28	25	11	12	13	10	5	8	16	8

Continues

Table L1.2. Continued

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
L	3	4	2	23	30	27	18	35	37	26	21
M	0	0	0	0	1	13	27	5	5	0	0
NATO	0	0	0	0	0	0	0	0	0	0	0
N	0	0	0	0	0	0	0	0	0	0	0
O	3	2	1	4	1	0	0	0	1	0	0
P	0	0	0	0	0	0	0	0	0	1	2
Q	0	0	0	0	0	0	0	0	0	0	0
R	0	5	0	0	0	0	0	0	0	0	0
S	0	0	0	0	0	0	0	0	0	0	0
T	0	0	0	0	0	0	0	0	0	0	0
U	0	0	0	0	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0	0	0	0	0
NAFTA	0	0	0	0	0	0	0	1	0	0	0
Total Banned	1,104	1,842	2,658	1,198	1,146	1,635	1,855	1,389	1,445	817	209
Total Allowed	4,271	1,964	3,282	1,296	2,080	2,958	2,911	1,914	862	735	715
Total	5,375	3,806	5,940	2,494	3,226	4,593	4,766	3,303	2,307	1,552	924

Notes: Shaded cells indicate banned NIV categories; "—" indicates visa category not in use.

Source: Report of the Visa Office, 2008–2017, Table XVII; Monthly Nonimmigrant Visa Issuance Reports.

Table L2.1. Monthly Immigrant and Nonimmigrant Visas to Libyans, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Nonimmigrant Visas	128	88	104	95	119	93	138	117	139	52	57
Immigrant Visas	41	11	54	26	33	19	20	39	22	14	5
Total	169	99	158	121	152	112	158	156	161	66	62
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Nonimmigrant Visas	34	70	108	52	87	73	64	71	56	95	
Immigrant Visas	10	7	1	4	5	8	17	7	10	9	
Total	44	77	109	56	92	81	81	78	66	104	

Source: Monthly Immigrant and Nonimmigrant Visa Issuance Reports.

Table I.2.2. Monthly Nonimmigrant Visas to Libyans by Visa Category, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
A	21	10	25	8	37	17	27	15	34	9	8
B-1	1	0	0	0	0	1	2	0	0	0	0
B-2	0	0	0	0	6	0	0	1	0	0	0
B-1/B-2	57	50	46	30	34	33	46	64	65	22	7
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	0
C	0	0	0	0	0	0	0	0	0	0	0
C-1/D	0	0	0	0	0	0	0	0	0	0	0
CW	0	0	0	0	0	0	0	0	0	0	0
D	0	0	0	0	2	0	1	0	0	0	0
E	0	0	0	0	0	0	0	0	0	0	0
F	10	6	17	13	6	28	12	10	12	10	14
G	30	12	13	14	6	4	43	21	17	2	16
H	3	3	0	4	3	0	4	2	4	0	8
I	0	0	0	0	0	0	0	0	0	0	0
J	3	2	2	24	21	6	2	2	5	7	3
K	1	0	1	1	0	0	0	2	2	2	0

L	1	5	0	1	4	4	1	0	0	0	0
M	0	0	0	0	0	0	0	0	0	0	0
NATO	0	0	0	0	0	0	0	0	0	0	0
N	0	0	0	0	0	0	0	0	0	0	0
O	0	0	0	0	0	0	0	0	0	0	0
P	1	0	0	0	0	0	0	0	0	0	1
Q	0	0	0	0	0	0	0	0	0	0	0
R	0	0	0	0	0	0	0	0	0	0	0
S	0	0	0	0	0	0	0	0	0	0	0
T	0	0	0	0	0	0	0	0	0	0	0
U	0	0	0	0	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0	0	0	0	0
NAFTA	0	0	0	0	0	0	0	0	0	0	0
Total Banned	58	50	46	30	40	34	48	65	65	22	7
Total Allowed	70	38	58	65	79	59	90	52	74	30	50
Total	128	88	104	95	119	93	138	117	139	52	57

Continues

Table I.2.2. Continued

	Feb 18	March 18	Apr 18	May 18	June 18	July 18	Aug 18	Sept 18	Oct 18	Nov 18	
A	9	27	49	7	13	9	5	12	16	51	
B-1	0	0	0	0	0	0	0	0	0	0	
B-2	0	0	0	0	0	0	0	0	0	0	
B-1/B-2	7	11	2	3	12	5	6	4	1	2	
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	
C	0	0	0	0	0	0	0	1	1	0	
C-1/D	0	0	0	0	0	0	0	0	0	0	
CW	0	0	0	0	0	0	0	0	0	0	
D	0	0	1	1	0	1	1	1	0	0	
E	0	0	0	0	0	0	0	0	0	0	
F	7	8	19	13	19	34	24	7	0	20	
G	8	22	29	3	15	6	8	28	13	14	
H	1	0	1	2	4	2	3	5	0	4	
I	0	0	0	0	0	0	0	3	0	0	
J	2	1	7	22	18	15	3	9	2	2	
K	0	0	0	1	0	1	0	0	1	0	

L	0	1	0	0	6	0	14	0	0	0	
M	0	0	0	0	0	0	0	0	0	0	
NATO	0	0	0	0	0	0	0	0	0	0	
N	0	0	0	0	0	0	0	0	0	0	
O	0	0	0	0	0	0	0	0	0	0	
P	0	0	0	0	0	0	0	1	1	0	
Q	0	0	0	0	0	0	0	0	0	0	
R	0	0	0	0	0	0	0	0	0	0	
S	0	0	0	0	0	0	0	0	0	0	
T	0	0	0	0	0	0	0	0	0	1	
U	0	0	0	0	0	0	0	0	0	0	
V	0	0	0	0	0	0	0	0	0	0	
NAFTA	0	0	0	0	0	0	0	0	0	0	
Total Banned	7	11	2	3	12	5	6	4	1	3	
Total Allowed	27	59	106	49	75	68	58	67	34	92	
Total	34	70	108	52	87	73	64	71	35	95	

Note: Shaded cells indicate banned NIV categories.

Source: Monthly Nonimmigrant Visa Issuance Reports.

Figure L1.1. Yearly Immigrant and Nonimmigrant Visas to Libyans, FY08–FY18

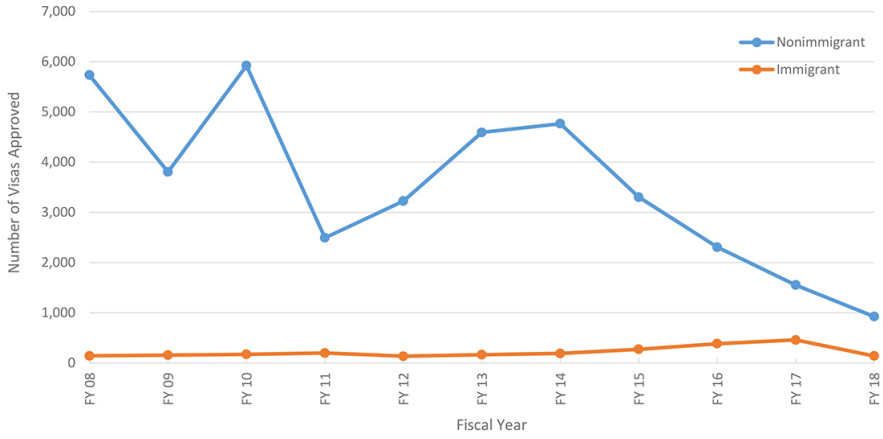


Figure L1.2. Yearly Nonimmigrant Visas to Libyans by Visa Category, FY08–FY18

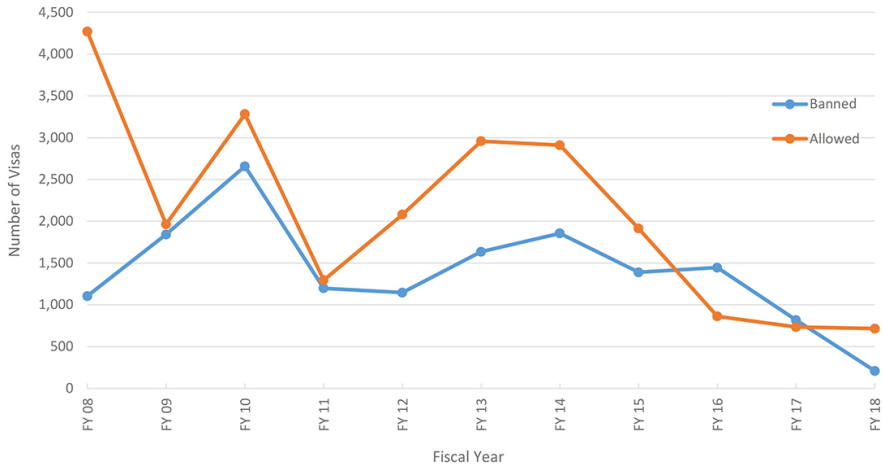


Figure L2.1. Monthly Immigrant and Nonimmigrant Visas to Libyans, March 2017–November 2018

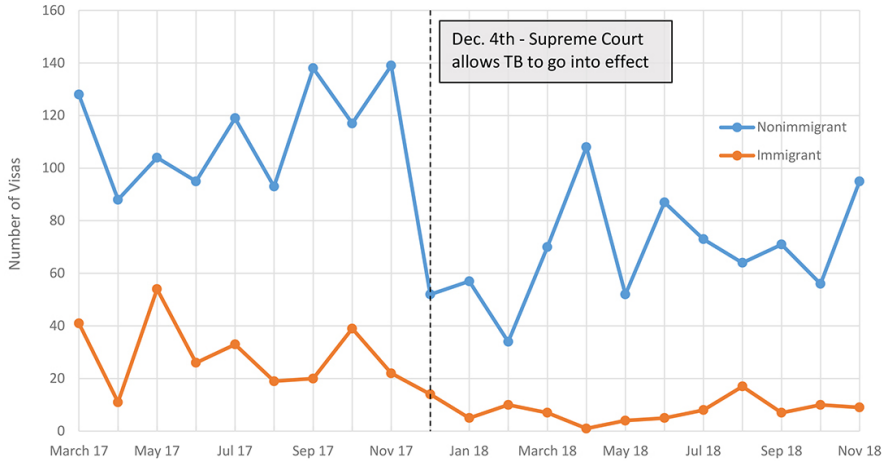
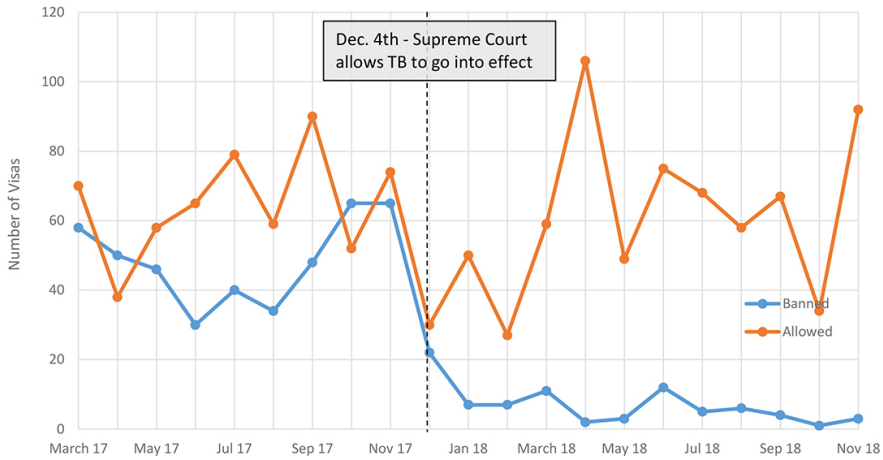


Figure L2.2. Monthly Nonimmigrant Visas to Libyans by Visa Category, March 2017–November 2018



Somalia

Table SO1.1. Yearly Immigrant and Nonimmigrant Visas to Somalians, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Nonimmigrant Visas	227	237	177	144	202	210	352	331	451	276	207
Immigrant Visas	510	619	690	698	921	1,047	1,705	1,078	1,797	1,791	546
Total	737	856	867	842	1,123	1,257	2,057	1,409	2,248	2,067	753

Sources: Reports of the Visa Office, 2017, Tables XIV and XVIII; Monthly Immigrant & Nonimmigrant Visa Issuance Statistics

Table SO2.1. Monthly Immigrant and Nonimmigrant Visas to Somalians, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Nonimmigrant Visas	27	12	19	30	24	21	22	23	14	6	13
Immigrant Visas	171	73	112	107	152	111	88	209	119	31	3
Total	198	85	131	137	176	132	110	232	133	37	16
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Nonimmigrant Visas	11	16	24	8	16	24	32	20	11	6	
Immigrant Visas	6	51	22	25	16	25	23	16	25	17	
Total	17	67	46	33	32	49	55	36	36	23	

Source: Monthly Immigrant and Nonimmigrant Visa Issuance Reports.

Figure SO1.1. Yearly Immigrant and Nonimmigrant Visas to Somalians, FY08–FY18

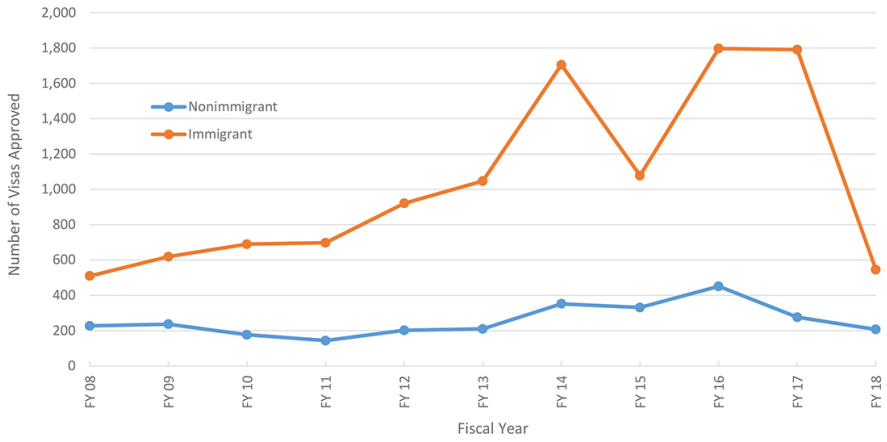
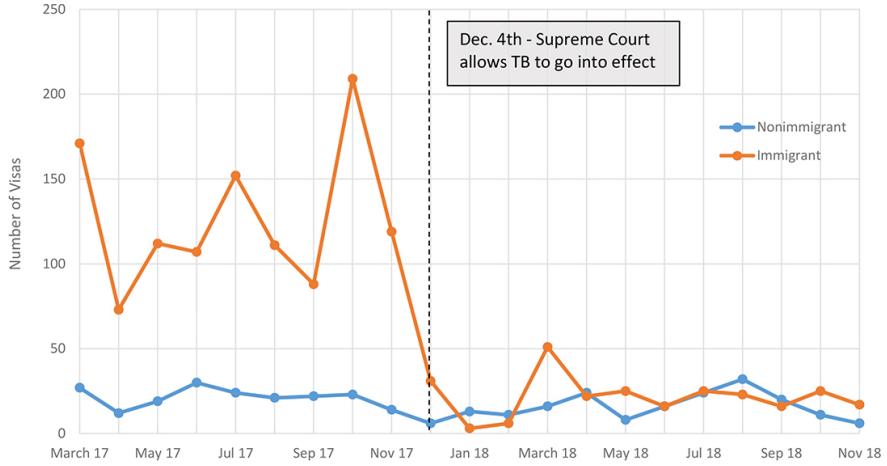


Figure SO2.1. Monthly Immigrant and Nonimmigrant Visas to Somalians, March 2017–November 2018



Syria

Table SY1.1. Yearly Immigrant and Nonimmigrant Visas to Syrians, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Nonimmigrant Visas	6,421	7,408	8,427	8,366	9,408	15,130	12,671	10,061	9,096	5,411	2,130
Immigrant Visas	1,260	1,436	1,478	1,641	1,926	2,179	1,984	1,901	2,633	2,551	821
Total	7,681	8,844	9,905	10,007	11,334	17,309	14,655	11,962	11,729	7,962	2,951

Sources: Reports of the Visa Office, 2017, Tables XIV and XVIII; Monthly Immigrant & Nonimmigrant Visa Issuance Statistics

Table SY2.1. Monthly Immigrant and Nonimmigrant Visas to Syrians, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Nonimmigrant Visas	260	265	320	390	269	371	314	570	388	170	79
Immigrant Visas	120	268	293	168	146	133	113	197	118	55	22
Total	380	533	613	558	415	504	427	767	506	225	101
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Nonimmigrant Visas	62	138	157	141	116	118	114	77	182	116	
Immigrant Visas	29	75	27	82	31	70	56	59	41	34	
Total	91	213	184	223	147	188	170	136	223	150	

Source: Monthly Immigrant and Nonimmigrant Visa Issuance Reports.

Figure SY1.1. Yearly Immigrant and Nonimmigrant Visas to Syrians, FY08–FY18

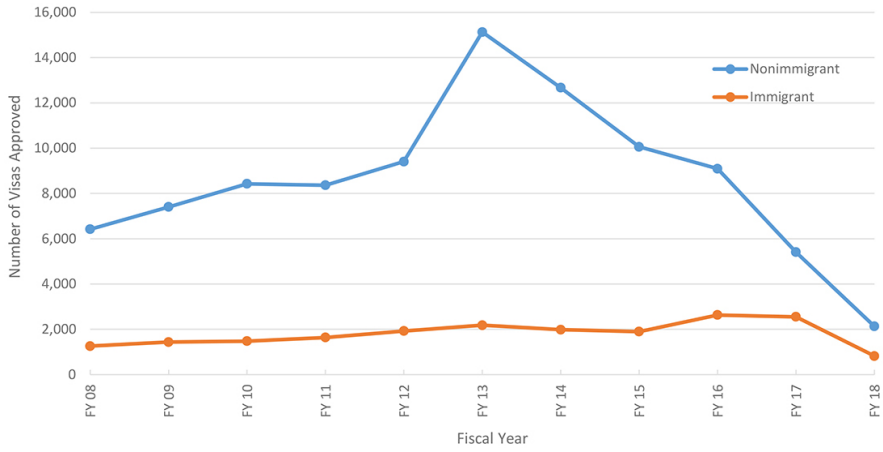
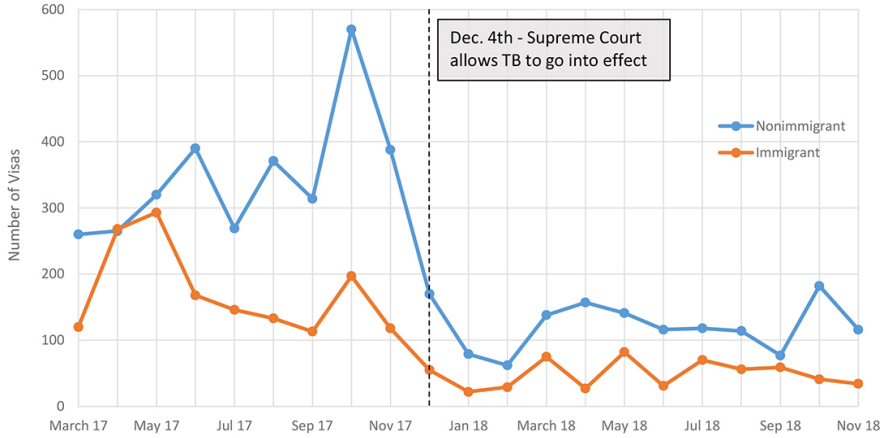


Figure SY2.1. Monthly Immigrant and Nonimmigrant Visas to Syrians, March 2017–November 2018



Yemen

Table Y1.1. Yearly Immigrant and Nonimmigrant Visas to Yemenis, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
Nonimmigrant Visas	1,573	2,091	2,329	2,345	3,497	4,079	5,842	4,525	5,203	2,919	1,120
Immigrant Visas	1,270	3,052	2,416	2,761	2,681	3,158	2,939	3,143	12,998	5,419	1,195
Total	2,843	5,143	4,745	5,106	6,178	7,237	8,781	7,668	18,201	8,338	2,315

Sources: Reports of the Visa Office, 2017, Tables XIV and XVIII; Monthly Immigrant and Nonimmigrant Visa Issuance Statistics.

Table Y1.2. Yearly Nonimmigrant Visas to Yemenis by Visa Category, FY08–FY18

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
A	183	197	257	234	301	422	345	180	51	56	61
B-1	28	43	57	57	55	63	77	60	115	65	7
B-2	14	10	13	4	8	7	7	15	32	20	4
B-1/B-2	806	1,179	1,340	1,299	2,077	2,452	3,870	3,007	3,786	2,019	534
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	0
C	1	2	3	0	1	0	2	0	1	5	0
C-1/D	6	2	7	12	6	8	37	24	19	17	11
CW	—	—	—	—	0	0	0	1	0	0	0
D	1	0	2	2	2	0	1	0	0	0	0
E	0	0	0	1	0	0	0	1	0	0	3
F	117	207	279	333	611	694	1,009	935	840	425	243
G	111	128	136	144	205	193	223	169	191	184	170
H	11	20	20	9	13	1	7	4	9	5	8
I	2	0	0	0	7	11	7	3	1	1	2
J	136	143	134	148	170	171	189	73	62	34	42
K	148	140	74	86	29	19	46	21	46	53	9
L	1	1	1	7	4	21	1	22	32	26	23

Continues

Table Y1.2. Continued

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18
M	8	14	5	8	6	15	20	10	12	6	3
NATO	0	0	0	0	0	0	0	0	0	0	0
N	0	0	0	0	0	0	0	0	0	0	0
O	0	3	0	1	2	2	1	0	3	0	0
P	0	2	0	0	0	0	0	0	1	0	0
Q	0	0	0	0	0	0	0	0	0	0	0
R	0	0	0	0	0	0	0	0	1	0	0
S	0	0	0	0	0	0	0	0	0	0	0
T	0	0	0	0	0	0	0	0	0	0	0
U	0	0	0	0	0	0	0	0	0	2	0
V	0	0	0	0	0	0	0	0	0	0	0
NAFTA	0	0	1	0	0	0	0	0	1	1	0
Total Banned	848	1,232	1,410	1,360	2,140	2,522	3,954	3,082	3,933	2,104	545
Total Allowed	725	859	919	985	1,357	1,557	1,888	1,443	1,270	815	575
Total	1,573	2,091	2,329	2,345	3,497	4,079	5,842	4,525	5,203	2,919	1,120

Notes: Shaded cells indicate banned NIV categories; "—" indicate visa category not in use.

Sources: Report of the Visa Office, 2008–2017, Table XVII; Monthly Nonimmigrant Visa Issuance Reports.

Table Y2.1. Monthly Immigrant and Nonimmigrant Visas to Yemenis, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
Nonimmigrant Visas	191	122	187	239	161	194	104	176	114	85	57
Immigrant Visas	455	210	533	255	335	574	505	430	261	46	5
Total	646	332	720	494	496	768	609	606	375	131	62
	Feb 18	**March 18**	**Apr 18**	**May 18**	**June 18**	**July 18**	**Aug 18**	**Sept 18**	**Oct 18**	**Nov 18**	
Nonimmigrant Visas	66	54	75	112	80	97	131	73	62	83	
Immigrant Visas	4	17	36	38	49	43	134	132	141	154	
Total	70	71	111	150	129	140	265	205	203	237	

Source: Monthly Immigrant and Nonimmigrant Visa Issuance Reports.

Table Y2.2. Monthly Nonimmigrant Visas to Yemenis by Visa Category, March 2017–November 2018

	March 17	Apr 17	May 17	June 17	July 17	Aug 17	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18
A	1	3	7	10	4	3	1	12	0	4	7
B-1	2	3	1	16	4	3	1	1	0	1	1
B-2	1	0	0	3	4	0	0	0	1	0	1
B-1/B-2	152	88	128	157	66	85	59	129	90	32	14
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	0
C	0	0	0	0	0	0	0	0	0	0	0
C-1/D	1	1	0	0	1	0	1	1	1	1	1
CW	0	0	0	0	0	0	0	0	0	0	0
D	0	0	0	0	0	0	0	0	0	0	0
E	0	0	0	0	0	0	0	0	0	0	0
F	9	8	17	37	44	66	15	10	10	26	22
G	14	18	17	11	32	29	10	11	8	5	7
H	0	0	0	0	1	0	1	0	0	0	0
I	0	0	0	0	0	1	0	0	0	0	0
J	0	0	8	3	2	4	1	8	0	4	1

K	7	1	3	1	3	3	8	3	1	1	0
L	1	0	5	1	0	0	7	1	3	11	3
M	2	0	0	0	0	0	0	0	0	0	0
NATO	0	0	0	0	0	0	0	0	0	0	0
N	0	0	0	0	0	0	0	0	0	0	0
O	0	0	0	0	0	0	0	0	0	0	0
P	0	0	0	0	0	0	0	0	0	0	0
Q	0	0	0	0	0	0	0	0	0	0	0
R	0	0	0	0	0	0	0	0	0	0	0
S	0	0	0	0	0	0	0	0	0	0	0
T	0	0	1	0	0	0	0	0	0	0	0
U	1	0	0	0	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0	0	0	0	0
NAFTA	0	0	0	0	0	0	0	0	0	0	0
Total Banned	155	91	129	176	74	88	60	130	91	33	16
Total Allowed	36	31	58	63	87	106	44	46	23	52	41
Total	191	122	187	239	161	194	104	176	114	85	57

Continues

Table Y2.2. Continued

	Feb 18	March 18	Apr 18	May 18	June 18	July 18	Aug 18	Sept 18	Oct 18	Nov 18	
A	8	6	0	5	8	2	0	9	9	4	
B-1	0	1	0	1	0	0	2	0	0	0	
B-2	0	0	0	0	1	0	1	0	2	0	
B-1/B-2	38	20	38	38	29	31	45	29	30	36	
B-1/B-2/BCC	0	0	0	0	0	0	0	0	0	0	
C	0	0	0	0	0	0	0	0	0	0	
C-1/D	0	1	1	1	0	1	2	1	0	4	
CW	0	0	0	0	0	0	0	0	0	0	
D	0	0	0	0	0	0	0	0	0	0	
E	3	0	0	0	0	0	0	0	0	0	
F	6	12	10	27	22	43	45	10	10	17	
G	10	11	24	27	13	8	25	21	3	11	
H	0	0	0	0	0	7	0	1	1	0	
I	0	0	0	0	0	0	2	0	0	0	
J	1	2	1	11	7	4	3	0	3	2	
K	0	0	1	0	0	0	1	2	0	1	

L	0	0	0	0	0	0	5	0	1	7	
M	0	1	0	1	0	1	0	0	0	1	
NATO	0	0	0	0	0	0	0	0	0	0	
N	0	0	0	0	0	0	0	0	0	0	
O	0	0	0	0	0	0	0	0	0	0	
P	0	0	0	0	0	0	0	0	0	0	
Q	0	0	0	0	0	0	0	0	0	0	
R	0	0	0	0	0	0	0	0	0	0	
S	0	0	0	0	0	0	0	0	0	0	
T	0	0	0	0	0	0	0	0	0	0	
U	0	0	0	0	0	0	0	0	0	0	
V	0	0	0	0	0	0	0	0	0	0	
NAFTA	0	0	0	0	0	0	0	0	0	0	
Total Banned	38	21	38	40	30	31	48	29	32	36	
Total Allowed	28	33	37	72	50	66	83	44	27	47	
Total	66	54	75	112	80	97	131	73	59	83	

Note: Shaded cells indicate banned NIV categories.

Source: Monthly Nonimmigrant Visa Issuance Reports.

Figure Y1.1. Yearly Immigrant and Nonimmigrant Visas to Yemenis, FY08–FY18

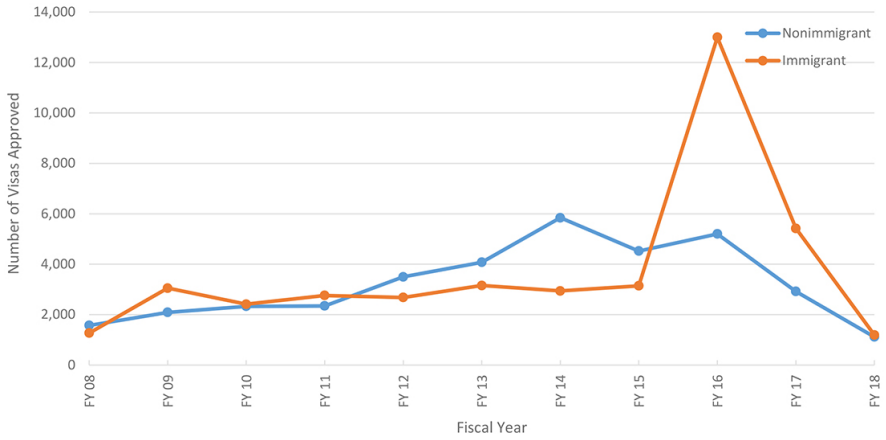


Figure Y1.2. Yearly Nonimmigrant Visas to Yemenis by Visa Category, FY08–FY18

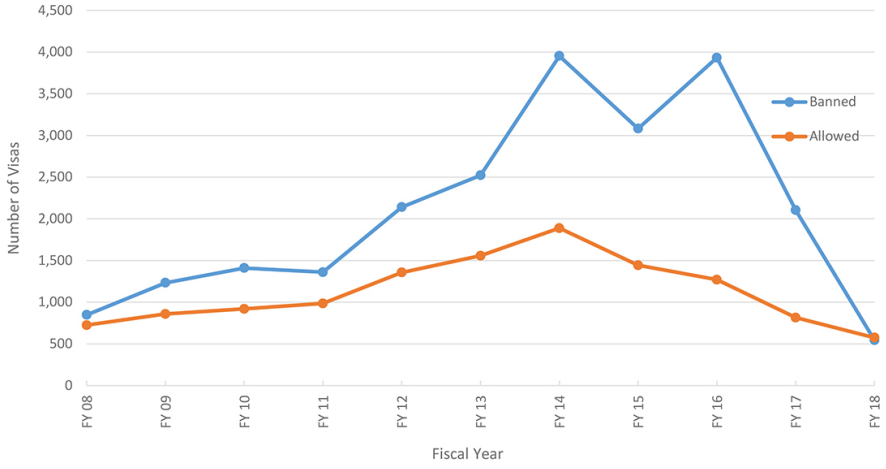


Figure Y2.1. Monthly Immigrant and Nonimmigrant Visas to Yemenis, March 2017–November 2018

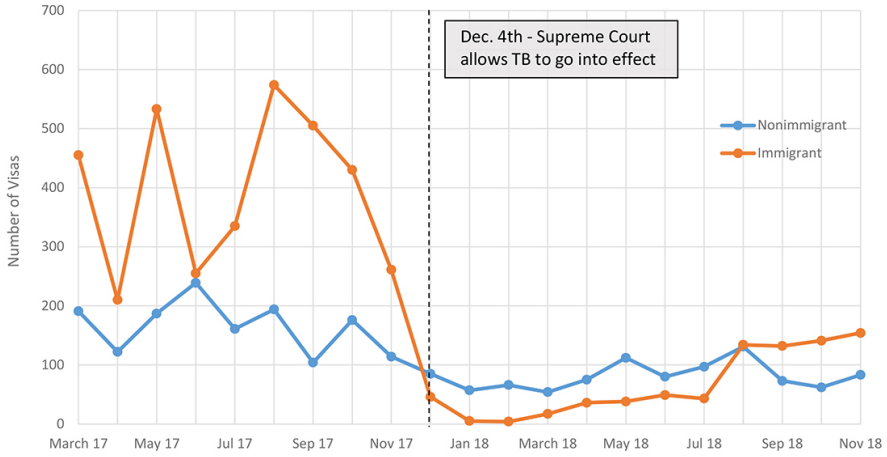
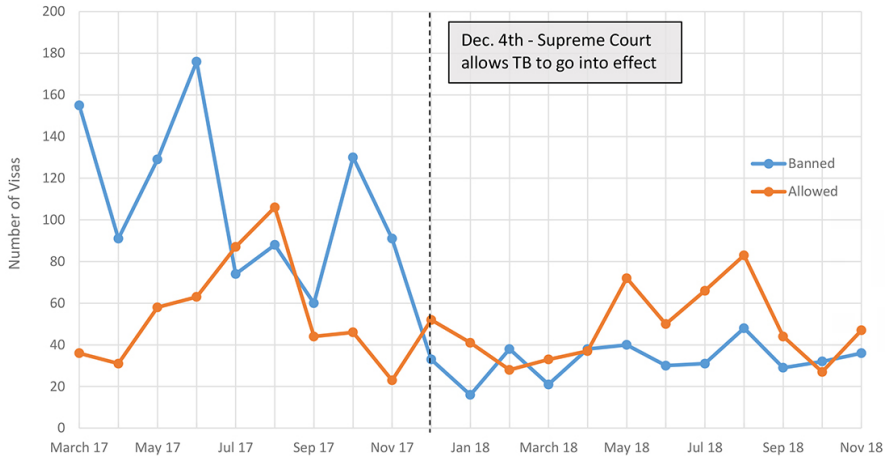


Figure Y2.2. Monthly Nonimmigrant Visas to Yemenis by Visa Category, March 2017–November 2018



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