

IS THE FUTURE UNITED STATES IMMIGRATION SYSTEM JUST NORTH OF THE BORDER?: WHY CANADA’S ECONOMIC IMMIGRATION SYSTEM SHOULD BE ADOPTED BY THE UNITED STATES

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INTRODUCTION

In 1965, amendments to the U.S. Immigration and Nationality Act arguably created the basis of the United States immigration system that continues to be utilized for immigration to America.¹ While there has been a number of changes to United States immigration laws in the intervening five decades, the framework created in 1965 changed the focus of the immigration system to a family-sponsored and employment-based immigration system.²

According to the American Immigration Council (“AIC”), in the 2019 fiscal year, family-sponsored immigrants comprised 68.8% of new Lawful Permanent Residents to the United States.³ In comparison, employment-based preference immigrants made up only 13.5% of new Lawful Permanent Residents.⁴

The Canadian system has similar categories for immigration: namely, “family class” immigration, which is roughly equivalent to the United States’s family-based sponsorship framework and the “economic class,” which is roughly equivalent to the United States’s employment-based sponsorship framework.⁵ As the names suggest, the family-based sponsorships in the United States and the family class stream in Canada offer a pathway to permanent residence for those who have an eligible family member who will anchor their application. The employment-based pathway in the United States and the economic class in Canada are used by

1. *See generally Immigration and Nationality Act of 1965*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1951-2000/Immigration-and-Nationality-Act-of-1965/> [<https://perma.cc/C53P-XTVM>].

2. *See generally id.*

3. *See generally How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (Sept. 14, 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works> [<https://perma.cc/WFT6-6L7H>].

4. *See id.*

5. *See generally* Amelia Cheatham, *What Is Canada’s Immigration Policy?* COUNCIL ON FOREIGN RELS. (Aug. 3, 2020, 9:00 AM), <https://www.cfr.org/background/what-canadas-immigration-policy> [<https://perma.cc/P54E-EWDC>].

employers and employees as a pathway to permanent residence for qualified workers.⁶

Even with a similar basis for immigration in both countries, the immigration levels of Canada are dramatically different from those of the United States. According to Canada's Department of Immigration, Refugee, and Citizenship Canada ("IRCC"), for the 2021 calendar year, slightly more than twenty-six percent of new Canadian permanent residents were family class immigrants (lower than that in the United States), while fifty-eight percent of new Canadian permanent residents were admitted through Canada's economic classes (higher than that in the United States).⁷

From the statistics above, Canada's economic class seems to attract proportionately more applicants than the employer-based sponsorship model in the United States. In Canada's immigration system, the vast majority of immigrants are economic immigrants, and significant power to select economic immigrants is devolved to local governments. Such a system stands in stark contrast to the United States system, where over two-thirds of new immigrants are family-based and the immigration selection system is centralized with the United States federal government.⁸ This Article argues that the reasons for this difference is likely due, in large part, to a distinguishing factor between the two systems: the involvement of the provincial and territorial governments in immigration in the Canadian economic class system.

Like in the United States, immigration to Canada is a federal program and is overseen by the IRCC, a federal department that facilitates the arrival of immigrants and offers programming to help newcomers to Canada.⁹ Under the IRCC's federal system for immigration to Canada, the Canadian federal government has entered into agreements with twelve out of the thirteen provincial and territorial governments to cede power over the selection of economic immigrants to Canada.¹⁰ In 2019, slightly over forty-six percent of the economic immigrants to Canada were selected for Canadian permanent residency by Canadian provincial and territorial governments.¹¹ This allows the provinces and territories the control to select

6. See generally *id.*; *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 9, 2020), <https://www.uscis.gov/working-in-the-united-states/permanent-workers> [https://perma.cc/4YTX-3PVS].

7. See *2020 Annual Report to Parliament on Immigration*, GOV'T OF CANADA (Dec. 31, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2020.html> [https://perma.cc/CGP6-Q4JJ].

8. See generally AM. IMMIGR. COUNCIL, *supra* note 3.

9. See *Immigration, Refugees and Citizenship Canada*, GOV'T OF CANADA (Dec. 14, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship.html> [https://perma.cc/6ND2-RMDR].

10. See *Federal-Provincial/Territorial Agreements*, GOV'T OF CANADA (Mar. 7, 2018), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial.html> [https://perma.cc/495E-VU8N].

11. See GOV'T OF CANADA, *supra* note 7.

permanent residents who will live and work in their jurisdictions and stimulate and/or benefit their local work forces.

As the United States moves through its third decade of the twenty-first century, we suggest that it is time for the United States to reduce its reliance on family reunification and to refocus its immigration programs to one that is more driven by economic immigrants and that considers local population and economic needs through a decentralization of its immigration system to its states and territories.

I. THE UNITED STATES IMMIGRATION SYSTEM

A. Employment-Based Immigration

The employment-based immigration system in the United States divides workers into five different categories.¹² These categories group specific occupations into certain priority processing streams by assigning them a specific preference visa.¹³

These five categories are as follows:

1. EB-1 for Priority Workers. An employee may be eligible for an employment-based, first preference visa if he or she is an alien of extraordinary ability, is an outstanding professor or researcher, or is a certain multinational executive or manager.
2. EB-2 for Persons of Exceptional Ability Plus Certain Professionals. An employee may be eligible for an employment-based, second preference visa if he or she is a member of a profession holding an advanced degree or its equivalent or is a foreign national who has met the definition of exceptional ability.
3. EB-3 for Skilled Workers, Other Professionals, and Unskilled Labor. An employee may be eligible if he or she can be classified as one of any of the following:
 - a. Skilled Workers: a person whose job requires a minimum of two years training or experience, not of a temporary or seasonal nature. The skilled worker must meet the educational, training, or experience requirements of the job opportunity. Relevant post-secondary education may be considered as training.
 - b. Professionals: a person whose job requires at least a United States baccalaureate or foreign equivalent degree and is a member of the profession.
 - c. Other Workers: a person who fits within a subcategory for persons performing unskilled labor requiring less

12. See generally AM. IMMIGR. COUNCIL, *supra* note 3.

13. See generally U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 6.

than two years training, education, or experience, not of a temporary or seasonal nature.

4. EB-4 for Special Immigrants. This category is for certain religious workers, Special Immigrant Juveniles, or members of the United States Armed Forces.
5. EB-5 for Investors. United States immigration law allows certain aliens who are employment-based immigrants to become Lawful Permanent Residents (eligible for a Green Card). This category includes aliens who have invested or are actively in the process of investing \$1 million (or \$500,000 in targeted employment areas) in a new commercial enterprise that will benefit the United States economy and create at least ten full-time positions for qualifying employees.¹⁴

The vast majority of employment-based immigrants apply under one of the first three categories.¹⁵ For the most part, employment-based immigrants in the EB-1, EB-2, and EB-3 categories must have job offers from United States-based employers to qualify under these categories.¹⁶ While there are limited exceptions for certain EB-1 workers of extraordinary ability, the general rule is that a job offer is necessary to qualify under any of these categories.¹⁷

These categories also consider the employee's education, background, and other relevant factors when determining his or her eligibility for permanent residence.¹⁸

14. See *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 23, 2020), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> [https://perma.cc/37Q9-JGSW]; *Employment-Based Immigration: Second Preference EB-2*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 2, 2020), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> [https://perma.cc/KT7V-J3G7]; *Employment-Based Immigration: Third Preference EB-3*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 2, 2020), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3> [https://perma.cc/GE3L-F4L6]; *Employment-Based Immigration: Fourth Preference EB-4*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 11, 2021), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4> [https://perma.cc/JP89-WD4V]; *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 4, 2021), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program> [https://perma.cc/6PAQ-WZJE].

15. See generally AM. IMMIGR. COUNCIL, *supra* note 3.

16. See generally *Employment-Based Immigration Visas*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html> [https://perma.cc/MCC8-K67P].

17. See generally *id.*; U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 6.

18. See *EB-1: Employment Based Immigration – Permanent Workers – Extraordinary Ability/Outstanding Professor/Multinational Executive*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 1, 2020), <https://www.uscis.gov/forms/explore-my-options/eb-1-employment-based-immigration-permanent-workers-extraordinary-abilityoutstanding> [https://perma.cc/2U7S-GL2P]; *EB-2: Employment-Based Immigration– Advanced Degree or Exceptional Ability*,

The EB consideration criteria does not lend any weight to whether an employee has existing family members in the United States or whether he or she has United States-based education or previous work experience as the Canadian system does. These differences leave the family-based applicants and employment-based applicants wholly separate from one another and does not give any consideration to an employee's ability to more easily settle in the United States if he or she has an existing family support system available. The EB criteria also fails to recognize any significance to one having previously studied or worked in the United States and the benefits that come along with having employees who are otherwise trained by United States standards and able to enter the workforce.

In any given year, around eighty-five percent of the quotas for visas (or "green cards") in these categories are met.¹⁹

The requirement for a job offer essentially places selection of these immigrants in the hands of employers. While other criteria must be met for Lawful Permanent Residence, without a full-time and committed position from the United States-based employer, an individual will generally not qualify for employment-based immigration.²⁰

B. Family-Based Immigration

Family-based immigration, on the other hand, does not require that an individual have a job offer in order to immigrate to the United States.²¹ In fact, the family-based immigration categories do not require the prospective immigrant to meet any minimum levels of education, work experience, or language proficiency.²² The family-based immigration categories only require proof of certain familial relationships to a United States citizen or a United States Lawful Permanent Resident.²³

Foreign nationals seeking to immigrate to the United States as a family-based immigrant must be petitioned by a family member who is a

U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 1, 2020), <https://www.uscis.gov/forms/explore-my-options/eb-2-employment-based-immigration-advanced-degree-or-exceptional-ability> [https://perma.cc/T55V-MXMZ]; *EB-3: Employment-Based Immigration – Skilled Workers - Professionals and Other Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 1, 2020), <https://www.uscis.gov/forms/explore-my-options/eb-3-employment-based-immigration-skilled-workers-professionals-and-other-workers> [https://perma.cc/Y9PV-3WFH].

19. *See Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts: Fiscal Years 2016-2020**, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport_TableI.pdf [https://perma.cc/BW6Z-USHY].

20. *See* U.S. DEP'T OF STATE, *supra* note 16.

21. *See Family Immigration*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration.html> [https://perma.cc/4R98-32HE].

22. *See id.*

23. *See id.*

United States citizen or United States Lawful Permanent Resident.²⁴ Thus, family-based immigrants are not able to immigrate to the United States under this immigration category without the support of their United States citizen or United States Lawful Permanent Resident family member.²⁵

United States citizens and United States Lawful Permanent Residents can petition their spouses and unmarried children for Lawful Permanent Residency.²⁶ Additionally, United States citizens may petition their married children, siblings, and parents for Lawful Permanent Residency.²⁷

Family-based immigration to the United States is also based on a preference system similar to that of the employment-based system.²⁸ As a result, applications to sponsor spouses and children are processed more quickly as they are considered a higher priority.²⁹ Applications for these family members are normally processed in twelve to eighteen months from the time the application is submitted, assuming that there are no hiccups in the application process.³⁰

However, there can be a wait for Permanent Resident visas of months, or even years, for some classes of family members who originate from certain specified countries.³¹ For instance, as of October 2021, a sibling of a United States citizen who was born in Mexico may face a wait of over twenty-two years for an immigrant visa.³² Similar wait times can be seen for extended family members from countries such as the Philippines, China, and India.³³ These delays may result in practical impediments to the effective use of some of the family-based immigration categories to immigrate to the United States, and family members, who otherwise would be eligible for sponsorship, may be required to seek alternate pathways to the United States.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* AM. IMMIGR. COUNCIL, *supra* note 3.

28. *See id.*

29. *See Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 29, 2021), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-family-preference-immigrants> [<https://perma.cc/8E8B-N7W8>].

30. *See Average Green Card Processing Times*, BOUNDLESS IMMIGR. INC., <https://www.boundless.com/immigration-resources/average-green-card-wait-times/> [<https://perma.cc/3Y92-AE9G>] (last visited Jan. 7, 2022).

31. *See id.*

32. *See Visa Bulletin For October 2021*, U.S. DEP'T OF STATE (Sept. 7, 2021), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-october-2021.html> [<https://perma.cc/8X7D-A829>].

33. *See id.*

II. THE CANADIAN IMMIGRATION SYSTEM

A. Economic Classes of Immigration

The Canadian employment-based immigration system is found within Canada's economic classes of immigration.³⁴ While these economic classes of immigration also include individuals selected as entrepreneurs and investors (much like the EB-5 category in the United States), in 2019, the vast majority of individuals were selected because of previous work experience in Canada or because of a job offer (vetted and approved by the government of Canada or a provincial or territorial government of Canada).³⁵

While Canada's economic classes of immigration do not mandate that a prospective immigrant has Canadian work experience or a job offer from a Canadian employer in order to immigrate to Canada, previous Canadian work experience or a Canadian job offer has become a *de facto* prerequisite to immigration.³⁶

The economic classes of Canadian immigration are run by the federal government and various provincial and territorial governments across Canada.³⁷ Excluding economic immigration classes for entrepreneurs and investors (which made up approximately five percent of immigrants in the economic classes in 2019), the economic classes of immigration to Canada include the following:

1. The federal government's Skilled Worker Class;
2. The federal government's Canadian Experience Class;
3. The federal government's Federal Skilled Trades Class;
4. The federal government's Caregiver Class;

34. See *Permanent Resident Program: Economic Classes*, GOV'T OF CANADA (May 26, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes.html> [https://perma.cc/84CJ-PZYX].

35. See *Express Entry Year-End Report 2020*, GOV'T OF CANADA (Dec. 13, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/express-entry-year-end-report-2020.html> [https://perma.cc/ACJ7-433R]. The analysis for this is a bit complicated. It involves looking at the rounds of invitations carried out by the Canadian federal government in their Express Entry system this year. When one looks at this website, invitations sent out pursuant to the Canadian Experience Class do require previous work in Canada. However, invitations sent out pursuant to a Provincial Nominee Program rely on local criteria. Yet, most provincial criteria requires a job offer of previous work experience in Canada.

36. See, e.g., *Pathways for Caregivers*, GOV'T OF CANADA (July 8, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes/pathways-for-caregivers.html> [https://perma.cc/K8NR-NBBE]; *Eligibility to Apply for the Canadian Experience Class (Express Entry)*, GOV'T OF CANADA (Jan. 7, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/canadian-experience-class.html> [https://perma.cc/QV6L-JDQ5].

37. See generally GOV'T OF CANADA, *supra* note 34.

5. The federal government Atlantic Immigration Pilot Program;
6. Various provincial and territorial nominee programs; and
7. The Quebec skilled worker class.³⁸

The general characteristics of the above economic classes of immigration to Canada require individuals to score a number of “points” and/or meet certain minimum prerequisites for immigration to Canada.³⁹ While criteria may differ depending on which level of government is responsible for the selection decision, the following characteristics may be considered as factors: an individual’s age, educational attainment, previous work experience, language proficiency in English and/or French (Canada’s official languages), and the presence of certain relatives in Canada.⁴⁰

Considering the various immigration criteria that can be found in statutes, regulations, and government websites, it should be relatively easy to immigrate to Canada without previous work experience in Canada or a job offer (vetted and approved by the government of Canada or a provincial or territorial government of Canada) from the Canadian employer.⁴¹ In practice, however, the lack of a Canadian job or job offer is generally a prohibition on immigrating to Canada under the economic classes simply because the “points” that are afforded to those who do have the previous work experience or a vetted job offer place them significantly higher in the point pool than individuals who do not have these characteristics.⁴²

Of the seven economic classes listed above, five of those classes (the Canadian Experience Class, the Caregiver Class, the Atlantic Immigration Pilot Program, the various provincial and territorial nominee programs, and the Quebec skilled worker class) generally also have a minimum requirement, outside of the point system, that requires previous work experience in Canada for a Canadian job offer to be successful.⁴³

38. *See id.*

39. *See generally Express Entry: How the Comprehensive Ranking System (CRS) Works*, CANADA VISA (Nov. 30, 2021), <https://www.canadavisa.com/express-entry-comprehensive-ranking-system.html#gs.vdxu1w> [<https://perma.cc/JH3M-5XP2>].

40. *See Ministerial Instructions Respecting the Express Entry System – Current*, GOV’T OF CANADA (June 23, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/express-entry-application-management-system/current.html> [<https://perma.cc/S46K-2E95>] (see § 8(1) for relevant factors).

41. *See, e.g., id.*

42. *Id.* (see §§ 15, 19, 22–24, and 29 for relevant points awarded).

43. *See, e.g., Pathways for Caregivers*, GOV’T OF CANADA (July 8, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes/pathways-for-caregivers.html> [<https://perma.cc/K8NR-NBBE>]; *Eligibility to Apply for the Canadian Experience Class (Express Entry)*, GOV’T OF CANADA (Jan. 7, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/canadian-experience-class.html> [<https://perma.cc/QV6L-JDQ5>]; *Atlantic Immigration Pilot Programs: Application Process and Who Can Apply*, GOV’T OF CANADA (Apr. 8, 2021),

While immigrants with previous work experience in Canada or a Canadian job offer may, in some cases, meet the minimum prerequisites under these programs, practically speaking, previous work experience in Canada or a Canadian job offer is needed to meet the point score in order to be selected to immigrate to Canada.⁴⁴

The reason for the unofficial need for Canadian work experience is twofold. First, some of the economic classes, such as the Canadian Experience Class, the Caregiver Class, the Atlantic Immigration Pilot Project, and the Quebec Skilled Worker Class require previous work in Canada and/or a Canadian job offer as a prerequisite for immigration.⁴⁵ This requirement means that the point score an applicant would receive does not otherwise matter, unless the general prerequisites are met. Second, the Canadian immigration programs that do not explicitly require previous Canadian work experience or a Canadian job offer award potential immigrants “points” for previous Canadian work experience or a Canadian job offer.⁴⁶ This allowance limits the pool of individuals without these characteristics from immigrating to Canada.

The economic immigration streams that the Canadian federal government solely administers are illustrative.⁴⁷ In the first three quarters of 2021, the total number of immigrants admitted to Canada under these streams was approximately 103,710.⁴⁸ The percentage of immigrants under each of the immigration streams below was as follows:

<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes/atlantic-immigration-pilot-programs/application-process-who-apply.html> [https://perma.cc/UVU4-L7BZ]; *Processing Provincial Nominee Program (PNP) Applications: Determining Membership in the Class*, GOV'T OF CANADA (Apr. 8, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes/provincial-nominees/determining-membership-class.html> [https://perma.cc/VM6B-DPAM]; *Quebec Skilled Worker Program*, QUEBEC IMMIGR. (2019), <https://www.quebecimmigration.org/> [https://perma.cc/S65D-7AZG].

44. See, e.g., *id.*

45. See, e.g., *id.*

46. David Cohen, *A Guide to Canadian Immigration*, MONSTER, <https://www.monster.ca/career-advice/article/a-guide-to-canadian-immigration> [https://perma.cc/3KZV-P7Q8] (last visited Jan. 7, 2022).

47. Alexandra Miekus, *Canada Boasts More Than 100 Economic Immigration Pathways*, CIC NEWS (July 24, 2020, 11:50 AM), <https://www.cicnews.com/2020/07/canada-boasts-more-than-100-economic-immigration-pathways-0715137.html> [perma.cc/7DEX-F4NS].

48. See *Permanent Residents – Monthly IRCC Updates – Canada – Admissions of Permanent Resident by Province/Territory of Intended Destination and Immigration Category*, GOV'T OF CANADA (Apr. 12, 2017), https://open.canada.ca/data/en/data/set/f7e5498e-0ad8-4417-85c9-9b8aff9b9eda/resource/5582034d-8f89-49d5-8597-483d628078a1?inner_span=True [https://perma.cc/SX7Y-FR58].

Economic Class Subsection	Approximate Percentage of Immigrants Admitted Under Class ⁴⁹	Is Previous Work in Canada a Prerequisite for This Class? ⁵⁰
Canadian Experience Class	77%	Yes
Federal Skilled Worker Class	20%	No
Federal Skilled Trades Class	Less than 1%	No
Caregiver Class	1%	Yes
Atlantic Immigration Pilot Project	2%	Yes

Clearly, individuals with previous Canadian work experience made up approximately eighty percent of immigrants under these economic classes administered by the federal government. While a Canadian job or job offer is not a *de jure* prerequisite to immigrate to Canada under the other streams administered by the Canadian federal government, the awarding of additional points to individuals with previous Canadian work experience or a Canadian job offer makes this a *de facto* requirement for economic immigration to Canada.

B. Family-Based Immigration

Like the family-based immigration categories of the United States,⁵¹ the Canadian family class of immigration works in an almost identical fashion. Individuals become qualified under the family class due solely to a familial relationship with a Canadian citizen or Canadian permanent resident.⁵² Canadian family class immigrants do not have to meet any minimum educational, work experience, or language proficiency requirements.⁵³

One significant difference between the Canadian and United States family-based immigration systems is the number of categories of relatives that the Canadian system covers. While both Canada and the United States allow for spouses, dependent children, and parents to qualify as family

49. See generally AM. IMMIGR. COUNCIL, *supra* note 3.

50. See GOV'T OF CANADA, *supra* note 48.

51. See *infra* Section II.B.

52. *How To Immigrate Through Canada Family Class Sponsorship*, VISAPLACE, <https://www.visaplace.com/canadian-immigration/family-immigration> [<https://perma.cc/U93V-GMCL>] (last visited Jan. 7, 2022); see also AM. IMMIGR. COUNCIL, *supra* note 3.

53. Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.) at 117(1).

members, the Canadian system also includes common-law partners, conjugal partners, and grandparents.⁵⁴

Common-law partners are couples who have lived together for at least one year in a conjugal relationship.⁵⁵ Conjugal partners are similar to common-law partners, but applicants may qualify without previously living together if they can prove that their inability to cohabitate was based on reasons beyond their control.⁵⁶

Of note, the Canadian family class excludes siblings, unlike the United States immigration system.⁵⁷ However, in certain economic immigration classes, a prospective immigrant can be awarded “points” for having a sibling in Canada who is a Canadian citizen or a Canadian permanent resident.⁵⁸ While the awarding of points does not automatically qualify an immigrant sibling of a Canadian citizen or Canadian permanent resident to immigrate to Canada in these immigration classes, these “points” are not available to individuals seeking to immigrate to Canada without this familial relationship.

If a sibling of a Canadian citizen or permanent resident can score enough “points” through a combination of their familial relationship and the points Canada allocates for age, education, work experience, and other factors, the sibling may find that he or she may qualify to immigrate to Canada.⁵⁹

In addition to siblings, some provincially and territorially-run immigration programs also extend “points” to more distant relatives, such as first cousins.⁶⁰ Individuals who have first cousins as Canadian citizens or permanent residents in these jurisdictions may find that the “points” awarded will make their applications to these Canadian jurisdictions more competitive than individuals who do not have these familial relationships. The “points” awarded to a sibling or first cousin family member who is otherwise applying under the economic class may very well be the difference in the “points” needed to meet the eligibility threshold, thereby giving a leg-up to those applicants who have existing familial ties in Canada.

54. *Id.*

55. *Id.* at 1(1).

56. *Id.* at 1(2).

57. Richard Sanders, *A Layered Look at Canadian and U.S. Immigration*, WILSON CTR. (July 21, 2020), <https://www.wilsoncenter.org/article/layered-look-canadian-and-us-immigration> [<https://perma.cc/8EZT-TLDB>].

58. Immigration and Refugee Protection Regulations, SOR /2002-227 (Can.) at 83(5)(a)(v).

59. *Comprehensive Ranking System (CRS) Criteria – Express Entry*, GOV'T OF CANADA (Jan. 11, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html> [<https://perma.cc/BRV3-RNNL>].

60. *Determine Your Eligibility – Skilled Workers Overseas*, MANITOBA: MY NEW HOME, <https://immigratemanitoba.com/immigrate-to-manitoba/swo/swo-eligibility> [<https://perma.cc/A3P9-TUBR>] (last visited Jan. 7, 2022).

C. Federalism and Canadian Provincial and Territorial Immigration Programs

The current United States immigration system is federally regulated by the United States Citizenship and Immigration Services Department (“USCIS”), a sub-department of the United States Department of Homeland Security (“DHS”).⁶¹ The legal basis for its regulations is housed in the Code of Federal Regulations (“C.F.R.”)⁶² and Immigration and Nationality Act (“INA”).⁶³

The current United States immigration design allows immigration to all fifty states and all United States territories without having any restrictions or guidelines as to which individuals go where.⁶⁴ United States visas and Lawful Permanent Residence (“LPR”) statuses are issued through various subsectors, such as the National Visa Center, designated USCIS service centers, and in some cases, reviewing Customs and Border Protection agents at various ports of entry (“POE”) to the United States.⁶⁵

Unlike the United States immigration system, the Canadian immigration system has elements of shared jurisdiction between the federal government and Canadian provincial and territorial governments.⁶⁶ Under Section 95 of Canada’s Constitution Act, Canadian provincial governments have jurisdiction to make laws in relation to immigration into their provinces unless the provincial laws conflict with laws made in relation to immigration by the federal government.⁶⁷ As the federal government of Canada has made laws in relation to immigration, the federal government of Canada effectively possesses jurisdiction over immigration to all areas of Canada.

61. *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 27, 2020), <https://www.uscis.gov/about-us/mission-and-core-values/what-we-do> [https://perma.cc/Q7TV-RPFK].

62. *Regulations*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 7, 2021), <https://www.uscis.gov/laws-and-policy/regulations> [https://perma.cc/4ET9-P6B3].

63. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> [https://perma.cc/GV5T-99C4].

64. *Welcome to the United States: A Guide for New Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 2015), <https://www.uscis.gov/sites/default/files/document/guides/M-618.pdf> [https://perma.cc/D5RH-WS3G]; see also AM. IMMIGR. COUNCIL, *supra* note 3.

65. *NVC’s Role in Your Immigrant Visa Journey*, NAT’L VISA CTR. (Nov. 2016), https://travel.state.gov/content/dam/visas/PDF-other/NVC_role_in_IVs_for_applicants_November_2016.pdf [https://perma.cc/G5FN-7XUA]; see also *US Gov’t Agencies Involved in the Immigration Process*, HACKING IMMIGR. L., LLC, <https://thevisafirm.com/dc-immigration-lawyer/us-government-agencies-involved> [https://perma.cc/6U3K-ECXQ] (last visited Jan. 14, 2022).

66. Mary Liston & Joseph Carens, *Immigration and Integration in Canada* 1, 10 (Allard Rsch. Commons, Working Paper, 2008).

67. Margaret Young, *Immigration: Constitutional Issues*, L. & GOV’T DIV., Oct. 1991, at 1.

While the Canadian federal government maintains jurisdiction over the immigration criteria for individuals falling within the family class and over individuals immigrating to Canada as refugees and protected persons, the Canadian federal government has devolved certain immigration powers to Canadian provinces and territories with the classes of economic immigrants to Canada.⁶⁸

In 1971, the first immigration agreement between the federal Canadian government and a Canadian province or territory was signed.⁶⁹ The 1971 Canada-Quebec Immigration Agreement gave the Canadian provincial government of Quebec (Canada's second most populous province) the ability to have representatives in Canadian embassies promote immigration to that province.⁷⁰ In 1978, another agreement between Canada and Quebec gave Quebec the power to define its own selection criteria for economic immigrants to that province.⁷¹ For the most part, only immigrants chosen by Quebec government officials implementing government criteria are selected as economic immigrants to Quebec.⁷²

While the Canadian federal government ceded power to the provincial government of Quebec on the selection criteria for economic immigrants to that province, Canada still retained jurisdiction on individuals immigrating to that province under the family class and as refugees or protected persons.⁷³

Beginning in the 1990s, Canadian provinces and territories outside Quebec began entering into agreements with the Canadian federal government, which gave these jurisdictions the non-exclusive ability to select the economic immigrants for their provinces.⁷⁴ One of the first agreements was the 1996 Canada-Manitoba Immigration Agreement signed with the province of Manitoba.⁷⁵

This agreement paved the way for the creation of provincial and territorial nominee programs in the ensuing years.⁷⁶ Currently, twelve of Canada's thirteen jurisdictions have agreements with the federal

68. See generally GOV'T OF CANADA, *supra* note 34.

69. *The Canada-Quebec Accord Made Easy*, GOV'T OF CANADA (Nov. 2, 1994), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/quebec/canada-quebec-accord-made-easy.html> [https://perma.cc/GPM2-BBVN].

70. *Id.*

71. *Id.*

72. Davide Strazzari, *Immigration and Federalism in Canada: Beyond Quebec Exceptionalism?*, 9 PERSPS. ON FEDERALISM 3, 56, 64, 66–67, 69 (2017).

73. *Id.* at 66–67, 69.

74. See *MPNP20: Timeline*, MANITOBA: MY NEW HOME, <https://immigratemanitoba.com/community-stakeholders/mpnp20/#:~:text=1998%20%E2%80%93%20Manitoba%20signs%20a%20PNP,immigration%20growth%20to%20the%20province> [https://perma.cc/M7XW-WCDM] (last visited Jan. 7, 2022).

75. *Id.*

76. F. Leslie Seidle, *Canada's Provincial Nominee Immigration Programs*, 43 IRPP STUDY, Dec. 2013, at 1.

government that allow these jurisdictions to exercise some power in selecting immigrants.⁷⁷ As an important note for the comparison between the United States and Canadian systems, the Canadian federal government retains jurisdiction to determine if an immigrant, once selected by a province or territory, is inadmissible to Canada for criminal, security, medical, or other grounds.⁷⁸

For some of Canada's smaller provinces, such as Manitoba, the ability to select immigrants has resulted in Manitoba receiving a larger influx of immigrants than the historic pattern.⁷⁹ Because these immigrants are selected for their ability to contribute economically to Manitoba, many of these immigrants enter directly into the workforce upon arriving in Canada.⁸⁰

While the immigration criteria of provincial and territorial programs differ, a common theme is the employer-driven focus of these programs. For example, most of the current programs are similar to the employment-based immigration programs in the United States in that employers select the immigrants to whom they would offer employment.

III. RECOMMENDATIONS FOR CHANGE

A. Refocusing Priorities: Implementing an Employer-Driven Immigration System

The key to an immigration system designed to meet the economic needs of a society is threefold:

1. First, it must prioritize immigrants who can meet the employment needs of the community in which they intend to settle;
2. Second, it must select immigrants with transferable skills as movement between employers and occupations increasingly becomes more commonplace; and
3. Third, where possible, it should leverage existing familial ties to United States citizens and Lawful Permanent Residents to assist immigrants in settling in the United States and to increase the prospects that immigrants will remain in the United States.

For the United States immigration system, these goals will entail:

77. GOV'T OF CANADA, *supra* note 10.

78. *Reasons You May Be Inadmissible to Canada*, GOV'T OF CANADA (Sept. 10, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/reasons.html> [<https://perma.cc/YY4R-Y2J2>].

79. *Manitoba Accepts Highest Number of Immigrants in Province's History*, MANITOBA (Feb. 11, 2020), <https://news.gov.mb.ca/news/?archive=&item=46837> [<https://perma.cc/W37K-N9NF>].

80. *Id.*

1. A rebalancing of the proportion of immigrants entering the United States so that a greater proportion of immigrants arrive primarily under employer-based categories rather than primarily as family-based candidates;
2. A change to employer-based categories that provides an incentive for employers to recruit family members of United States citizens and Lawful Permanent Residents; and
3. A change to employer-based category criteria that weighs both the immediate employment need the immigrant is intended to fill and the ability for that immigrant to be successful in the long term.

1. Rebalancing the Proportion of Immigrants Entering the United States

This Article proposes that the United States change its proportion of family-based immigrants versus employment-based immigrants from the current five to one ratio to a one to five ratio. In doing so, we propose that priority of the new employment-based immigration criteria be given in the following manner:

Program Requirements	Priority #1	Priority #2	Priority #3	Priority #4
Foreign nationals with long-term job offers from a United States-based employer	X	X	X	X
Foreign nationals with completed post-secondary education	X		X	
Foreign nationals without post-secondary education		X		X
Foreign nationals with a prescribed familial relationship	X	X		
Foreign nationals without a prescribed familial relationship			X	X

2. *Having a Long-Term Job Offer from a United States-Based Employer*

The first and only mandatory criteria of our proposed employment-based immigration system will be the necessity for all intending immigrants to have a long-term job offer from a United States-based employer. The purpose of this criteria is to ensure that employment-based immigrants will directly enter (or continue in) the workforce upon the issuance of Lawful Permanent Residence. This requirement allows a United States employer to fill a vacant position while assuring the employment-based immigrant a job upon entry.

To address the proposed requirement of job offer from a United States-based employer, this Article proposes that the elements of the required long-term job offer may differ depending on whether: (1) The foreign national has been working in the United States in legal nonimmigrant status for at least one year immediately prior to applying for Lawful Permanent Residence in a full-time basis; or (2) The foreign national is immigrating to the United States directly from abroad. In both cases, the full-time job offer must be valid until at least the date the foreign national becomes a Lawful Permanent Resident.

Foreign nationals permitted to work in the United States in legal nonimmigrant status have presumably been vetted prior to entry to the United States and are allowed to work in the United States either because an employer has established, through a labor market test, that there are no qualified United States citizens or permanent residents willing and able to take on the position⁸¹ or because government regulations allow for that foreign national to work in the United States absent a labor market test.⁸²

For instance, through a number of free trade agreements, Canadian citizens, Mexican citizens, Singaporean citizens, and Chilean citizens are permitted to work in the United States as professionals in certain occupations negotiated in treaties with these countries.⁸³ United States employers who hire and employ individuals under these categories should not be required to demonstrate the absence of willing and qualified workers in the United States before petitioning these existing employees for Lawful Permanent Residence. Instead, a minimum number of years of experience working in the United States in these specific United States nonimmigrant categories should be used to show that an individual is beneficial to the United States-based employer's company.

Similarly, the United States allows various international company employees to work in the United States through the nonimmigrant L visa category.⁸⁴ One of the criteria used to qualify these individuals for an L visa

81. See 20 C.F.R. § 655.1(a) (2015).

82. See, e.g., 9 FAM 402.9-2-3 (rules for E visas); 9 FAM 402.9-4 (rules for E visas); 9 FAM 402.13-2 (rules for O visas); 9 FAM 402.14-2 (rules for P visas).

83. 9 FAM 402.10-3; 9 FAM 402.10-5(A); 9 FAM 402.17-1(C); 9 FAM 402.17-2.

84. 9 FAM 402.1-2.

is a minimum number of years of work experience abroad in an executive, managerial, or specialized knowledge capacity.⁸⁵ This criteria, in and of itself, would eliminate most United States citizens and Lawful Permanent Residents from the potential pool of employees who would be qualified for these positions.

For workers who have secured a long-term job offer from a United States employer and have worked in the United States for at least one year, we would require that the year of work be in a full-time position. By setting these minimum requirements, the labor market impact of foreign nationals' employment has already occurred, and establishing a labor market test subsequent to their initial period of employment will have limited value. In all likelihood, these long-term employees will have contributed to United States society through the work for their employer, the payment of United States taxes, and their local spending in the United States. Presumably, if an employer does not feel that the foreign national employee is qualified, then that employee would have been terminated before the end of the first year of employment.

By requiring that the full-time job offer remain valid until at least the date that the foreign national becomes a Lawful Permanent Resident, the effective validity of the long-term job offer will extend to the length of processing time of the Lawful Permanent Residency application.

In our proposal, we believe that all foreign nationals who meet the above criteria should be qualified for permanent residency regardless of their occupation. We do not propose to prioritize one type of occupation over the other, as we would leave the assessment as to the need for a specific employee to employers. In this connection, we propose that all nonimmigrants who fit within the basic criteria would qualify, as we believe that employers who work within this framework are better placed than the government to establish the economic need for the immigrant.

3. The Long-Term Job Offer for Foreign Nationals Immigrating to the United States Directly from Abroad

For foreign nationals immigrating to the United States directly from abroad, we propose a different test for assessing eligibility. For all of these types of applications, we propose the continuance of the current use of the Labor Condition Application ("LCA").⁸⁶ Using the LCA would require employers to establish that no United States citizen or Lawful Permanent

85. *L-1A Intracompany Transferee Executive or Manager*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 12, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager> [https://perma.cc/SW37-BZX8].

86. *Labor Condition Application (LCA) Specialty Occupations with the H-1B, H-1B1 and E-3 Programs*, U.S. DEP'T OF LAB., <https://flag.dol.gov/programs/LCA> [https://perma.cc/7YAU-MRHK] (last visited Jan. 7, 2022).

Resident is willing and qualified to fill the position through the passing of a labor market test. It would also require certification that any sponsored individuals for employer-based immigrant visas will be paid the prevailing wage in the area where the job is located. Such a requirement ensures that the pay covers living expenses in the area and that the pay rate is high enough to attract qualified United States citizens and Lawful Permanent Residents to apply for the job.

Using the LCA system to ensure that their pay will be sufficient to cover their expenses will eliminate most needs for government assistance upon arriving in the United States. By having a pay rate that is also high enough to attract qualified United States citizens and Lawful Permanent Residents to apply for the job, qualified United States citizens and Lawful Permanent Residents would not be dissuaded from filling these jobs.

In this sense, the current LCA system would continue in that it would require that employers hiring foreign nationals from abroad first actively recruit for the vacant position within the United States domestic workforce in the geographical area where the job will be located.⁸⁷ At no time is our proposal suggesting to overlook local and eligible United States citizens or United States Lawful Permanent Residents. By requiring the LCA and recruitment, minimum universal advertising and recruitment standards are put in place to ensure that United States-based potential applicants have a level playing field to apply and to secure the position.

By adhering to these strict requirements, United States citizens and Lawful Permanent Residents can be assured that foreign nationals immigrating to the United States as employment-based immigrants are not “taking away jobs” from people already in the United States and that “cheap labor” is not being brought into the United States to undercut wages. Rather, a robust LCA process will ensure that employer-based immigrants are filling positions where there is a legitimate shortage and need.

The extent of the advertising and recruitment efforts undertaken by United States employers could differ depending on the occupation. For instance, employers looking to fill entry-level jobs where short-term training is required may have to go through more robust recruitment efforts than employers looking to fill jobs where the minimum requirements include licensing, certifications, or higher education. Efforts must be made to preserve as many entry-level jobs as possible for United States citizens, as these jobs are often used as the first step in the career ladder.

4. *The Education Component*

The second criteria that we propose is based on the educational level of the prospective employment-based immigrant. For the second

87. *Permanent Labor Certification*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent> [<https://perma.cc/G4UV-K6SY>] (last visited Jan. 7, 2022).

criteria, we do not propose a minimum educational requirement to immigrate under the employment-based category. Rather, we suggest that priority should be given to individuals with higher levels of education or those who have received their education in the United States.

The reasoning behind this education component is that employers in their designated fields are best placed to determine the qualifications needed for a particular position.⁸⁸ By imposing minimum educational requirements, employers who need to fill vacancies in jobs that require less formal education may not be able to hire the people they need. Since most employers will have to go through an LCA process to establish the absence of willing and qualified United States citizens and Lawful Permanent Residents before hiring a foreign national, setting minimum education levels should not impact the hiring of United States citizens and Lawful Permanent Residents. We believe that the required level of education for an employee should be determined by the employer.

In suggesting a proposed minimum education level, we recognize from the Canadian immigration experience that higher levels of education are important for mobility within a national workforce. As individuals in the workforce may change jobs and employers over their lifetimes, individuals with transferable skills may have more long-term success in United States society. If educational levels can be used as a measurement of transferable skills, we propose that higher educated employment-based immigrants be given priority over the ones with lower levels of education without eliminating the possibility for immigration for those with lower levels of education when and where there is a need.

In relation to this factor, there is room for considering requirements for a minimum language proficiency in English when assessing applicants for employment-based immigration. In the Canadian economic-based system, minimal levels of language proficiency are often required depending on the type of occupation that one will be taking up in Canada.⁸⁹

However, we would suggest rejecting this language-based scheme on the basis of our previous position that employers are best placed to determine the qualifications of a particular employee whom they wish to hire, including the necessary language proficiency level. As a result, in the model we are suggesting, we would leave the assessment as to language proficiency up to the employer and would not call for a set minimal proficiency level.

One of the potential issues that may arise with not prescribing a minimum level of language proficiency is the potential that employers will prescribe a minimum level of proficiency in a language not commonly spoken in the United States to create or “tailor” a position for a particular

88. *Defining Job Qualifications When Hiring*, WOLTERS KLUWER (Nov. 18, 2020), <https://www.wolterskluwer.com/en/expert-insights/defining-job-qualifications-when-hiring> [<https://perma.cc/742E-TY73>].

89. Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.) at 74.

individual. To address this possible scenario, we propose implementing a requirement in the LCA process that would require an employer to justify the need for proficiency in a language other than English. If the reviewing body does not believe that the need for the language proficiency is necessary or that the stated need is not legitimate, the LCA could be denied with the possibility of an employment-based application terminated.

Of course, if an employer can show a bona fide occupational requirement for an employee to speak a particular language, that employer should not be prohibited from requiring an employee to have that language proficiency. For instance, if an employer runs a translation company and has a large French company as a client, requiring that their translators are proficient in English and French would be a bona fide occupational requirement and would not create a basis for a denial of the LCA.

5. The Prescribed Familial Relationship

The final criteria that we propose be taken into account in our employer-based immigration model are familial relationships to United States citizens and Lawful Permanent Residents. By prioritizing immigrants with familial relationships to United States citizens and Lawful Permanent Residents, we preserve elements of family reunification of the existing immigration system.

We propose that the familial relationships that should be taken into account in our employer-based system be the same as the familial relationships in the existing family-based categories. In other words, spouses of United States citizens and Lawful Permanent Residents, children of United States citizens and Lawful Permanent Residents (regardless of marital status), and brothers and sisters of United States citizens would have the option of immigrating through either the family-based or employment-based systems. For foreign nationals who may have to wait years for a Lawful Permanent Residency application to be approved through the family-based system, being able to apply through an employment-based immigration category will be a welcome option. Family members of United States citizens and Lawful Permanent Residents who come through the employer-based system will, by virtue of having a long-term job offer, be given a higher priority by being able to economically contribute to their families and society upon arrival to the United States.

To be sure, this prioritizing of employment-based immigrants with familial ties to the United States will not automatically fast track all relatives of United States citizens or Lawful Permanent Residents into the country. Our proposal to re-balance the proportion of immigrants selected through an employment-based category versus a family-based category will result in fewer family-based immigrants arriving in the United States. However, by prioritizing family-based immigrants in the employer-based category, we hope to encourage prospective immigrants, their families in

the United States, and United States employers to seek out individuals with familial relationships outside of the United States for jobs in the United States because of their fast-track capability. As a result, this priority will provide a benefit to existing family-based immigrants who are highly qualified for jobs in the United States.

While we would prioritize employer-based immigrants with familial relationships, we do not propose to make a familial relationship with a United States citizen or Lawful Permanent Resident a mandatory prerequisite to employer-based immigration. Qualified foreign nationals identified by United States employers for jobs in the United States should also be allowed to fill vacant positions in the United States, subject, of course, to the elements of our model designed to protect United States jobs first.

6. *Processing Times*

In an ideal world, an employer-based immigration system would issue visas to prospective immigrants as soon as they have been selected by their United States-based employer. In our experience, an immigration system will not be able to react as fast to the additional levels of scrutiny that potential immigrants must undergo.

Because immigration to the United States will allow a foreign national to live and work in the United States permanently and, in many cases, become a United States citizen, it is understandable that delays will occur in order for United States government officials to complete medical checks, criminal background checks, security screening, add other due diligence that would not be needed if a prospective employee were already a United States citizen or Lawful Permanent Resident.⁹⁰ The above proposed model should allow for processing times to be dramatically reduced.

In the Canadian immigration system, the majority of employment-based immigrants are processed through Canada's Express Entry system.⁹¹ Canada's Express Entry system currently processes immigration applicants in six months or less from the date of application.⁹² This process is achieved, in part, by prescreening applicants before inviting them to apply

90. See *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/historic-pt> [<https://perma.cc/42FB-RDJ7>] (last visited Dec. 14, 2021) (showing processing times for I-129 visa applications ranging from 2.1 to 3.8 months).

91. See *id.*

92. *Express Entry – Check Your Application Status*, GOV'T OF CANADA (June 29, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/apply-permanent-residence/check-your-status.html> [<https://perma.cc/VNZ8-SX7S>] (“We process most Express Entry applications within 6 months or less of getting your complete application.”).

for permanent residency.⁹³ By eliminating applicants who would clearly not qualify for immigration through a pre-screening process, processing resources are only devoted to individuals who would likely qualify for permanent residency.⁹⁴

Our employment-based model requires immigration processing officers to assess only three items: the presence of a long-term job offer, the educational level of the prospective immigrant, and the familial relationship of the prospective immigrant to a United States citizen or Lawful Permanent Resident.

By limiting the criteria that immigration officers must assess, processing can be streamlined. However, even in adopting the proposed model, the United States government would have to devote resources to staff the immigration system to create a faster processing experience.

B. International Students: The Case for Opening More Pathways to Green Cards

Under the current United States immigration framework, the only pathway to Lawful Permanent Residence for foreign nationals who come to study in the United States at a post-secondary level is to find employment in their field and hope that their new employers will be willing to sponsor their green card application through the EB-1, EB-2, or EB-3 pathway.⁹⁵ If a newly graduated international student, who has studied, trained, and graduated from a post-secondary educational institution is not able to find work in his or her field, he or she will be forced to return home.

While there may be an argument for inviting foreign nationals to come to the United States and pay for their education and living expenses in the United States, one might ask whether the United States is losing talented individuals who would otherwise join the local workforce, pay taxes, and be long-standing, contributing members of society if they were able to secure permanent residency following their education.

The Canadian immigration system allows for international students who graduate from government-designated learning institutions to apply for permission to work in Canada subsequent to graduation without an employer for a set period of time based on the length of the educational program that was completed.⁹⁶ Should this international student obtain employment in Canada, he or she could use the work experience gained in

93. *Do You Want to Come to Canada as a Skilled Immigrant?*, GOV'T OF CANADA (Mar. 18, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/services/come-canada-tool-immigration-express-entry.html> [https://perma.cc/5MRA-7VUU].

94. *Id.*

95. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 6.

96. *Post-Graduation Work Permit Program (PGWPP)*, GOV'T OF CANADA (Feb. 21, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/study-permits/post-graduation-work-permit-program.html> [https://perma.cc/73VG-JKWQ].

this connection to apply for Canadian permanent residency through certain streams.⁹⁷

While we are not proposing changes to the current criteria for post-graduation employment for international students in the United States, we would propose that there be a second or third preference pathway that would allow graduates with a minimum of a post-secondary degree to apply for permanent residency without an employer sponsor. Under this system, even though an employer sponsor would not be required, preference would be given to those applicants who could secure and provide evidence that they have a long-term job offer from a United States-based employer.

Because one of the barriers that students face under the current system is finding an employer who is willing to sponsor their application, sometimes immediately after graduating from a post-secondary institution, this type of system would take the pressure off of employers to be financially responsible for applicants because they would be applying for themselves. Rather, this system would incentivize employers to offer long-term positions to qualified students to use as a basis for their personally funded applications.

1. Would This Lead to Employers Taking Advantage of Foreign Students and Compromise Fair Wages?

In our proposal, we would not suggest the use of an LCA for a student pathway, but, rather, we suggest utilizing the long-standing job offer to monitor fair wages and working conditions for applicants. The job offer must include information such as wage, hours, vacation, benefit entitlement, and general working conditions. Then, the job offer would be reviewed as part of the application process, and the prevailing wage could be considered at this stage in the application. Our proposed system thus incentivizes employers to pay fair wages to qualified candidates who have United States-based education or training, by allowing them to offer a position to a recent graduate without requiring the employer to take on the financial responsibility for the application.

2. How Does This Align with Our Overall Proposed Model?

In 2020, the United States Department of Immigration and Customs Enforcement (“ICE”) reported that there were 1.25 million active foreign national students in the United States, which is a decrease from pre-COVID-19 stats in 2019.⁹⁸ ICE reviews data broken down into four geographical regions of the United States: namely, the West, the Midwest,

97. *Id.*

98. See ICE Report on International Students in US Details Impact of COVID, U.S. IMMIGR. & CUSTOMS ENF’T (Mar. 19, 2021), <https://www.ice.gov/news/releases/ice-report-international-students-us-details-impact-covid> [<https://perma.cc/4KZV-53US>].

the Northeast, and the South.⁹⁹ While enrollment in these areas has been impacted by COVID-19, each of these regions continues to see enrollment in its post-secondary institutions spread throughout the regions.¹⁰⁰

It is reasonable to assume that international students who are enrolling in most post-secondary institutions are spread throughout the regions.¹⁰¹ Because family members of foreign students can accompany visa holders while they study, it is reasonable to assume that at least some foreign students will settle with their families in the local community near their educational institution. Since one of the overall goals of our proposed models is to distribute immigrant workers more evenly throughout the United States, allowing foreign students enrolled in institutions all over the United States will work to achieve this goal on the presumption that some, if not most, foreign students will seek employment in the regional area where they have attended schools.

C. Foreign Workers: Why More Temporary Guest Workers Should Have a Path to a Green Card

As we have alluded throughout our proposal, it is important to note that our proposal is designed not to increase immigration to the United States, but rather, to redirect immigration to attract immigrants coming to the United States who will enter workforces in more rural or less populous states that would benefit from an increase in individuals who are ready and willing to work in needed fields.

Because the current employer-based immigration system requires an employer sponsor or only allows temporary work visas, the current system deters individuals from truly settling in the United States. A system that would eventually lead to permanent residence in the United States for workers working in needed fields would incentivize individuals who have families, who work in economically stimulating fields, and who possess higher education to settle permanently in the United States and to contribute to the economy in their geographical location.

D. State-Specific Immigration: How Immigration Should Be Modified to Better Support Individual States

An effective immigration system is one which prioritizes immigrants who can contribute to the economy of a specific location and

99. *See id.*; *SEVIS by the Numbers: Annual Report on International Student Trends*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/doclib/sevis/pdf/sevisBTN2020.pdf> [<https://perma.cc/V4PR-5HHJ>] (last visited Jan. 3, 2022).

100. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 99.

101. *See, e.g.*, Emma Israel & Jeanne Batalova, *International Students in the United States*, MIGRATION POL'Y INST. (Jan. 14, 2021), <https://www.migrationpolicy.org/article/international-students-united-states-2020> [<https://perma.cc/QGH6-Z23Q>].

are offered employment in that location.¹⁰² An employer-driven immigration system is even more important and impactful for small, less populous states that may be less attractive to immigrants seeking to build their careers and possible lives in the United States.¹⁰³

As discussed throughout the text to follow, the United States immigration system could benefit from a review and implementation of immigration practices similar to the Canadian system of provincial and territorial immigration programs. Adopting a similar model of immigration would not serve to increase or decrease immigration into the United States but, rather, would focus the practices already in place to better disperse working immigrants and their families to areas of the United States that have high employment needs.

The following comparison of the impact of immigration on two neighboring cross-border jurisdictions illustrates this point: the Canadian province of Manitoba and the state of North Dakota.

The province of Manitoba has a population of approximately 1.38 million¹⁰⁴ with the majority of Manitoba's population living in a geography similar to the Great Plains of North Dakota.¹⁰⁵ Manitoba shares a land border with North Dakota, and travel between Manitoba and North Dakota is common.¹⁰⁶

According to the American Immigration Council, only four percent of North Dakota residents are immigrants, while nearly twenty-five percent of residents in California are immigrants.¹⁰⁷ In comparison, from 2009 to 2018 alone, almost 150,000 immigrants settled in Manitoba.¹⁰⁸

It is no secret that states such as California are attractive to immigrants and foreign workers due to its climate, reputation, and perceived opportunities. However, how does Manitoba, which has similar climate, reputation, and perceived opportunities to North Dakota, have a greater percentage of immigrants than North Dakota?

102. See, e.g., GOV'T OF CANADA, *supra* note 34.

103. See generally *Immigrants in North Dakota*, AM. IMMIGR. COUNCIL (Aug. 6, 2020), <https://www.americanimmigrationcouncil.org/research/immigrants-in-north-dakota> [https://perma.cc/C5WX-NMJW].

104. *Part 2: Population of Manitoba*, MANITOBA HEALTH, SENIORS AND ACTIVE LIVING POPULATION REP. (June 1, 2020), <https://www.gov.mb.ca/health/population/parttwo.pdf> [https://perma.cc/7RQ9-YT6B].

105. *Great Plains*, BRITANNICA, <https://www.britannica.com/place/Great-Plains> [https://perma.cc/5SQL-2YP7] (last visited Jan. 4, 2022).

106. *Manitoba*, BRITANNICA, <https://www.britannica.com/place/Manitoba> [https://perma.cc/6RF9-3KBD] (last visited Jan. 4, 2022).

107. AM. IMMIGR. COUNCIL, *supra* note 103; *Immigrants in California*, AM. IMMIGR. COUNCIL (Aug. 6, 2020), <https://www.americanimmigrationcouncil.org/research/immigrants-in-california> [https://perma.cc/KC6Q-ST4J].

108. *Manitoba Immigration Facts Report 2018*, MANITOBA: MY NEW HOME, <https://immigratemanitoba.com/manitoba-immigration-facts-report2018> [https://perma.cc/U E4L-XVBA] (last visited Jan. 4, 2022).

The answer to this question is immigration. As indicated above, from 2009 to 2018, almost 150,000 individuals immigrated to Manitoba.¹⁰⁹ Sixty-five percent of these immigrants came through immigration programs administered by the Manitoba government, while the remaining thirty-five percent have come from immigration programs administered by the Canadian federal government.¹¹⁰ This data is clear evidence that a locally designed and employer-driven immigration system not only allows for the selection of the best people to fill jobs in a jurisdiction but also allows for the best people to stay in this province.

The United States Bureau of Labor Statistics estimates that the national-wide unemployment rate in the United States is currently 4.2%.¹¹¹ According to Job Services North Dakota, the unemployment rate in North Dakota is 3.2% as of November 2021.¹¹² California's unemployment rate, on the other hand, exceeds the national average and sits at 6.9%.¹¹³

Prior to the COVID-19 pandemic, in North Dakota, it was estimated that the State currently has 17,073 online job openings available statewide.¹¹⁴ With high-paying oil and construction jobs along with Amazon's expansion creating more than 200 customer service jobs, the Labor Market in North Dakota is only expected to grow in the coming years.¹¹⁵

Structurally speaking, the current United States federally-centered immigration system does not have the ability to react to local labor force demands in particular areas that have higher labor force needs.¹¹⁶ Practically speaking, a federally-centered immigration system will continue to cater to the economic needs of communities that make the biggest

109. *Id.*

110. *Id.*

111. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., <https://data.bls.gov/timeseries/LNS14000000> [<https://perma.cc/T829-J5NG>] (last visited Dec. 22, 2021).

112. *Economy at a Glance: North Dakota*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/eag/eag.nd.htm> [<https://perma.cc/V63Y-ZSFH>] (last visited Dec. 22, 2021).

113. *Economy at a Glance: California*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/eag/eag.ca.htm> [<https://perma.cc/8J4X-3REC>] (last visited Dec. 22, 2021).

114. *North Dakota Online Job Openings Report*, LAB. MKT. INFO. CTR., https://www.ndlmi.com/admin/gsipub/htmlarea/uploads/lmi_ojornd.pdf [<https://perma.cc/AES7-NPDU>] (last visited Dec. 22, 2021).

115. *Industry Employment Projections – Long Term*, N.D. LAB. MKT. INFO., <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjLzIGuyfj0AhUJQTABHXzTCKMQFnoECAMQAQ&url=https%3A%2F%2Fwww.ndlmi.com%2Faltentry.asp%3Faction%3Dlmiquest%26whereto%3DINDPRJ&usg=AOvVawltFXimkOIDCUkTiW0uu8Ez> [<https://perma.cc/B3JA-X7BV>] (last visited Dec. 22, 2021).

116. See, e.g., Harry J. Holzer, *Immigration and the U.S. Labor Market: A Look Ahead*, MKT. MIGRATION POL'Y INST. (Aug. 2019), <https://www.migrationpolicy.org/research/immigration-us-labor-market-look-ahead> [<https://perma.cc/QYZ2-6XK4>].

economic impact on the nation. Generally, this would mean that a federally-centered immigration system will be more advantageous to more populous states and cities at the expense of less populous states with larger rural populations.

To ensure that all states, including states such as North Dakota, receive qualified immigrant applicants who are willing to live in and fill vacant positions, the immigration system would need to be modified in such a way that employers in a state are given the opportunity to utilize immigration to fill their needs while providing foreign nationals the opportunity to enter into the work force immediately upon entering the United States.

This recommendation is not to suggest that the United States immigration system needs to be de-federalized or modified to allow different regimes to each individual state. Rather, an immigration system that would be responsive to state needs would allow States to select the qualified workers who would benefit and complement their current employment needs while the federal government oversees and regulates which individuals are able to apply to the specific states by determining whether they are “inadmissible” to the United States for criminal, security, and other grounds. This type of immigration system will allow each state a larger role in determining which immigrants are needed in their respective workforces and which they would like to invite to work in their state.

1. Comparison to the Canadian Immigration System

The United States federal government should give states the ability to select immigrants in a similar way that the Canadian federal government allows provinces and territories to participate in the selection of their immigrants.¹¹⁷

In many cases, applicants for permanent residency under the Manitoba Provincial Nominee Program must work in Manitoba between six and twelve months before being eligible to apply for permanent residency.¹¹⁸ After applying for permanent residency, programs exist to allow the applicant to extend their temporary Canadian work permits to allow them to continue to work in Canada while their permanent residency applications are being processed.¹¹⁹ Currently, permanent residency applications in Manitoba can take between six to twenty-one months to

117. *How the Provincial Nominee Program (PNP) Works*, GOV'T OF CANADA (Mar. 21, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/provincial-nominees/works.html> [<https://perma.cc/7HBS-B4VH>].

118. *MPNP Renewal: Skilled Worker in Manitoba Stream*, MANITOBA: MY NEW HOME, <https://immigratemanitoba.com/immigrate-to-manitoba/mpnp-renewal/renewed-swm/#1> [<https://perma.cc/2ZSH-BUFY>] (last visited Dec. 22, 2021).

119. *Id.*

process.¹²⁰ As a result, most individuals immigrating to Manitoba are normally working in Canada for twelve to thirty-three months before becoming Canadian Permanent Residents.¹²¹ This time frame acts as an informal probationary period in which both the business and intending immigrant can decide if living and working in Manitoba is a fit for them.¹²²

Immigrants to Canada and the United States move to these countries for better opportunities.¹²³ By creating an informal probationary period where intending immigrants can live and work in states such as North Dakota, North Dakota communities and businesses will be able to show an intending immigrant what local opportunities there are for them and their families. In Manitoba, intending immigrants who have set down roots in Manitoba are less likely to move to other areas of Canada once their permanent residency applications are finalized.¹²⁴

2. *Whether States Would Benefit from an Employer-Driven System*

Our proposed employer-based system would be beneficial to the local needs of states such as North Dakota because it encourages qualified applicants to apply directly to the state, incentivizes them to remain in the state and in the state workforce, and allows employers to select immigrants based on their current workforce needs.

This system would also benefit states nationwide as it would spread the settlement of immigrants throughout the states, lessening the strain on any one particular area, and it would prioritize applicants who are willing and able to enter the workforce upon arriving in the United States.

For small states, state-run immigration programs can be extremely helpful in filling economic needs brought on by high employment levels. In periods of high unemployment, states given this power could simply choose not to use it to ensure that their local residents are prioritized for jobs first. Applicants are not required to apply to specific states, and employers are

120. *Provincial Nominee Program: After You Apply (Paper Process)*, GOV'T OF CANADA (Nov. 2, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/provincial-nominees/after-apply-next-steps.html> [https://perma.cc/FZM9-MNG5].

121. *See, e.g., Manitoba Immigration*, CANADIAN CITIZENSHIP & IMMIGR. RES. CTR. INC. (Feb. 7, 2020), <https://www.immigration.ca/manitoba-immigration> [https://perma.cc/7RG7-GBLD] (requiring a minimum of six to twelve months of work experience for Manitoba work experience pathways).

122. *See, e.g., Probationary Period and Termination*, MANITOBA, https://www.gov.mb.ca/labour/standards/siu_probationary_period_and_termination.html [https://perma.cc/2D4U-DBR7] (last visited Jan. 6, 2022).

123. *Why Do People Immigrate? – The Different Causes of Immigration*, LUTHERAN IMMIGR. & REFUGEE SERV. (July 14, 2021), <https://www.lirs.org/causes-of-immigration/> [https://perma.cc/Y4SN-F9WX].

124. *Choose Manitoba*, MANITOBA: MY NEW HOME, <https://immigratemanitoba.com/choose-manitoba/> [https://perma.cc/4HSJ-AG3M] (last visited Dec. 22, 2021) (stating that ninety-five percent of families settle permanently in the community).

not required to utilize the program. However, employers are provided the option to fill positions with willing applicants if needed.

This proposal is not to suggest that other current legal pathways to permanent residency or citizenship would be removed. Rather, it would simply create a system that would encourage skilled workers to apply to states that have actual needs to fill job openings that are not currently being met.

3. *What Is Necessary for a Change in Immigration to Occur?*

In order to effectually change the immigration system to allow more state involvement, the following must occur:

1. The federal government must enact any necessary statutory or regulatory changes that would allow states to choose the foreign employment that each state needs.
2. Upon giving states the ability to select immigrants, the federal government can and should reserve the right to screen potential immigrants for inadmissibility or elevated safety concerns. If a potential immigrant has a criminal record, is a security threat, or otherwise could be inadmissible to the United States, the federal government should be able to deny an application on that basis.
3. In order to ensure that these new immigrants come to states to provide the greatest economic impact, a simple and easy to use system—such as the one we propose—should be implemented by the state government to allow employers to nominate potential immigrants whom they would like to see settle in their state.
4. Upon completing the probationary immigration, the intending immigrant could apply for adjustment of status and become a Lawful Permanent Resident. Similar systems exist for EB-1 applicants, such as employer-sponsored LPR applications for foreign nationals who have been an employee of their company for a prescribed period of time. However, many of these programs only allow for certain types of nonimmigrant workers to become Lawful Permanent Residents.

Thus, only the selection and placement portions of the immigration system would need to be revised for state involvement, while the transition from temporary foreign worker to Lawful Permanent Resident and the general inadmissibility of individual applicants would only need to be modified slightly to account for state involvement.

Many states are in need of workers, specifically in certain unskilled positions that they are otherwise unable to fill.¹²⁵ The advantage of a system of probationary or temporary residency over a system where an individual comes directly into a job with Lawful Permanent Residence status is that it would give the state businesses and community an ability to “sell” the intending immigrant on a life in their particular state.

4. *Capacity to Implement an Employer-Driven, State-Specific Immigration Program*

While the federal government has the authority over immigration, there is or should be flexibility to allow for the participation of states in the exercise of these exclusive federal powers. For instance, Congress has discretion over the Highway Trust Fund, which provides federal grant allocations to specific states.¹²⁶ The federal government has and continues to use the promise of these federal funds to states as leverage to force participation in federal regulatory compliance when the action is otherwise reserved for state governance.¹²⁷ For example, in 1987, in *South Dakota v. Dole*, the Supreme Court held that the Spending Clause allowed the federal government to withhold funds from South Dakota if it refused to comply and enforce the national drinking age.¹²⁸

Over the years, the Spending Clause and the Highway Trust Fund have been used to leverage states to implement laws on the national drinking age, mandatory speed limits, motorcycle helmets, texting while driving, and criminalizing failure to submit to a breathalyzer.¹²⁹ It is this type of cooperative federalism that can take place in immigration selection decisions.

Although we have not discussed the EB-5 investor visa pathway in the majority of this paper, a slight comparison to our suggested model to the current EB-5 system reveals that the EB-5 model provides incentives for drawing investments to the targeted employment areas. The EB-5 model creates these incentives by reducing the overall investment required for an applicant to be eligible.¹³⁰ Under the current EB-5 model, an investor must

125. Eduardo Porter, *The Danger From Low-Skilled Immigrants: Not Having Them*, N.Y. TIMES (Aug. 8, 2017) <https://www.nytimes.com/2017/08/08/business/economy/immigrants-skills-economy-jobs.html> [https://perma.cc/95RA-P69P].

126. *The Highway Trust Fund*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN. (Aug. 15, 2018) <https://www.fhwa.dot.gov/policy/olsp/fundingfederalaid/07.cfm> [https://perma.cc/U2CA-5C66].

127. *Id.*; see also Brian Resnick, Emma Roller, & National Journal, *Four Times the Government Held Highway Funding Hostage*, THE ATLANTIC (July 16, 2014) <https://www.theatlantic.com/politics/archive/2014/07/four-times-the-government-held-highway-funding-hostage/454167/> [https://perma.cc/M3Q8-NCXB].

128. *South Dakota v. Dole*, 483 U.S. 203 (1987).

129. Resnick, *supra* note 127.

130. *About the EB-5 Visa Classification*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Dec. 20, 2021), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employ>

invest a minimum of one million dollars as a base requirement to apply for an immigrant visa.¹³¹ The exception to this rule, however, is that if an applicant invests in a targeted employment area recognized by USCIS and the federal government to be in need of investment and employed workers, then an investor must only invest \$500,000 to be eligible for an immigrant visa.¹³² The current United States immigration model, then, by way of the EB-5 investment system, already affirms the need to disburse incoming foreign workers to areas of the United States that are more in need. By combining the motives that lead to the development of the targeted employment areas of the EB-5 system with the practical application model employed in Canada, the United States immigration system could increase employment-based immigration, leading to economic stimulation throughout the country.

CONCLUSION

In an era where the best and brightest from all over the world can increasingly choose where they wish to live and work, an immigration program that attracts foreign nationals and gives communities and businesses the opportunity to showcase their communities as a place to live and raise their families would be the best solution to ensure the continual growth and expansion of the United States economy.

To be sure, the implementation of this type of new immigration program would require the federal government to change its way of thinking when it comes to immigration selection decisions. Clearly, a legislative consensus in Washington D.C. would be required, followed by a consensus to an act of this sort of program.

ment-based-immigration-fifth-preference-eb-5/about-the-eb-5-visa-classification [https://perma.cc/7ERR-THFA].

131. *Id.*

132. *Id.*