

Background and Barriers to Legal Immigration

By Sadikshya Nepal and Rachel Iacono

The H-1B High-Skilled Visa: Background and Barriers

The H-1B process is fraught with confusing procedural government inflexibility, “black boxes” of no information, and long backlogs. The unpredictability of the pathway from H-1B to green card creates significant obstacles for nonimmigrants looking to use this path to gain long term residency in the United States.

First, the employer must file a Labor Condition Application form that attests to the Department of Labor that a nonimmigrant employee will not displace similarly employed U.S. workers, and is being paid the prevailing wage for the occupation in the area of employment. Additional attestations apply for companies that have a high percentage of H-1B workers in their workforce. The H-1B petition process [can take](#) up to eight months depending on the processing center. Sponsoring a nonimmigrant employee [costs](#) anywhere between \$1,250 to \$4,500 in filing fees, not including legal fees for the employer. According to U.S. Citizenship and Immigration Services, as of FY2018, there were 331,098 approved H-1B petitions, with 86,784 initial employment petitions and 244,314 continuing employment petitions.

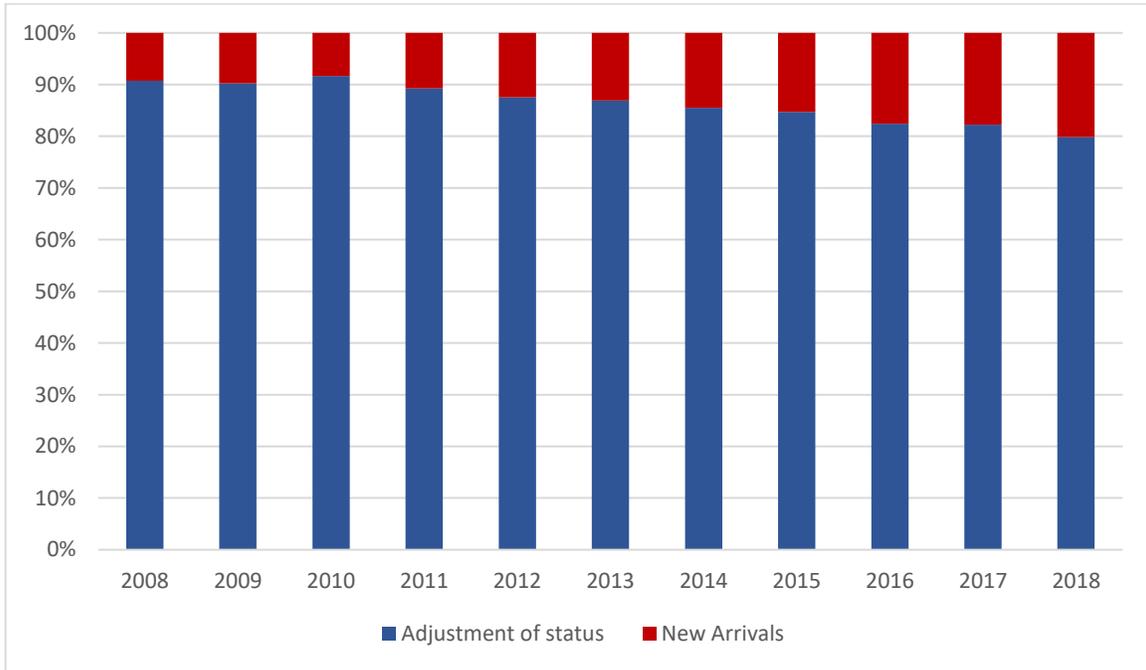
While the labor condition attestation helps employees secure a prevailing wage that is equal or higher than the wage paid to someone with similar qualifications in the area of employment, it also restricts the worker to their sponsoring employer. **An H-1B nonimmigrant visa holder may only work for the employer who petitioned for the candidate and only in the activities described in the petition.¹ If the employee wishes to change companies, they must find an employer willing to sponsor a new H-1B petition on their behalf. Furthermore, if nonimmigrant employees face job losses, they only have 60 days to find a sponsoring employer and start a new petition process before being deemed “out of status”—in other words, undocumented.**

Issues to Consider: Convoluted Path to Permanent Residency

The United States offers 140,000 employment-based green cards annually, which includes sponsored workers and their eligible spouses and children. According to Department of Homeland Security, the U.S. government [offered](#) 139,337 employment-based permanent residency visas to nonimmigrants in FY2018, of which 79% were adjustments of status for individuals already in the United States. **In the last ten years, 86% of all employment-based permanent green cards have been adjustments of status from other nonimmigrant visa categories (Figure 1).**

¹USCIS, *Nonimmigrant- Based Employment. Hiring a Foreign National for Short Term Employment*. Available at: https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Applicant%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf

Figure 1. Employment-Based Legal Permanent Residents
(FY 2008 – 2018)



Source: DHS Yearbook of Immigration Statistics

Foreign workers can apply for an [employment based \(EB\) green card](#) in the following categories. Most H-1B workers receive their green card through an employer sponsorship. The EB system is divided into five preference categories, of which the first, second, and third preferences directly relate to employer sponsorship (Figure 2). The fourth and fifth preference categories relate to miscellaneous “special immigrants” and immigrant investors.

Figure 2. Employment-based (EB) Preference Categories

Preference Category	Description
First Preference (EB-1)	Foreign workers with extraordinary abilities in arts, sciences, business, or athletics; outstanding professors or researchers; or managers and executives of certain multinational firms
Second Preference (EB-2)	Foreign workers in a profession that requires advanced degree; or have exceptional abilities in the sciences, arts, or business
Third Preference (EB-3)	Skilled workers with a minimum of 2 years of training experience; or a professional with a bachelor’s degree or a foreign equivalent; and unskilled workers

Source: USCIS Green Card Eligibility Categories

The sponsorship process requires employers to include a labor market test for most EB-2² and all EB-3 preferences. The employer must complete a Labor Certification Application with the Department of Labor proving that the employer was not able to secure a U.S. worker—defined as a U.S. citizen or current green card holder—for the role. **Even if the position already employs the foreign worker on a temporary visa, the employer must demonstrate that these new domestic recruitment strategies failed to find a U.S. worker for the position. Since most employment-based green card sponsorships are H-1B adjustments of status, temporary workers have had up to six years of experience in the job for which they are being sponsored. During that time, they have developed a robust understanding of their position and the job requirement. Given that the employer has already agreed to sponsor the foreign national for permanent residence, this domestic recruitment rarely results in a U.S. worker being hired for the sponsored position. In FY2019, the approval rate for Labor Certification Applications was around 95%, indicating that the certification application gets approved, and that a U.S. worker was not found to be available, in the vast majority of cases.**

Another challenge in the process of adjusting from temporary to permanent status is the annual green card limitations. In addition to the overall cap of 140,000 on EB-based green cards, limits are also set based on nationality; each nation is restricted to a seven percent per-country cap regardless of the size of the country or the demand for green cards from that country. **The country quota system has created an unprecedented backlog in employment-based immigration for certain nationalities. For example, as of 2019, there were an estimated 800,000 immigrants, the majority of whom are Indian nationals eligible for green cards, stuck in the backlog. Even after DHS approves the employer’s petition on behalf of the foreign worker, nationals from high immigration countries must wait for an extended time for a green card to be available.** According to a recent policy brief by the CATO Institute, green card backlog for skilled immigrants is expected to exceed 2.4 million by 2030. The backlog most affects Indian and Chinese skilled immigrants, with the largest backlog for Indian nationals at 780,579 petitions. With no change in the current processing system, foreign nationals from India would have the longest wait time for a green card in the EB-2 and EB-3 categories of 89 years.

The backlog creates severe pressure on employees since they cannot find a sense of permanency in a country where they have worked, lived, paid taxes, and frequently raised their children for many years. The long wait for green cards due to the backlog has jeopardized permanent residence eligibility for many immigrant children who migrated to the United States as dependents on their parents’ temporary visa sponsorship. These children are at risk of aging out of eligibility after they reach 21, requiring them to convert to another nonimmigrant status, depart the country, or remain in an undocumented status; they would have to qualify for permanent residence at some point in the future on their own.

Furthermore, those with an ongoing adjustment of status application with USCIS have a difficult time traveling outside the United States while their application is under review. According to USCIS, traveling outside the United States while your adjustment of status is pending can have severe consequences, including inadmissibility back into the United States and the automatic withdrawal of one’s application. The process of securing one’s travel outside the United States during a status change is

² There is a provision that allows an immigrant to self-petition if they believe their presence in the United States would be in the “national interest.” To obtain a National Interest Waiver of the sponsorship requirement, the immigrant must show that the proposed endeavor is of substantial merit and national importance, they are well-positioned to advance the endeavor and that it would be beneficial to the United States to waive the requirement of a job offer, and thus labor certification. See: <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2>

often bureaucratic and convoluted. It requires application for an “advance parole” which entails an additional application and fee and can take several months to process. **In places like California, where there are a high number of immigration-related applications, changing one’s status from H-1B to Legal Permanent Resident [can take](#) anywhere between seven and a half months to over two years, assuming there are no backlogs from per-country caps, barring foreign temporary workers from traveling back to their home countries during that time.**

Foreign workers on temporary visas can be negatively [impacted](#) by abrupt changes in the United States immigration law. For example, the ban on H-1B visas issued under the Trump Administration has jeopardized the H-1B to green card pipeline for skilled nonimmigrant employees. Several foreign-born workers, who live in the United States, [are trapped](#) in their home countries and unable to return as a result of the visa ban. Many of these employees were eligible for green cards but were not able to receive one due to backlogs. Nationals from countries with high immigration rates are forced to reside in limbo due to the United States’ outdated immigration policies. A lack of an accessible route to a permanent status that can match our current rate of immigration [has deterred](#) future immigration of skilled immigrants to the United States.

The process of moving from a temporary visa to permanent residency in the United States is lengthy, requiring multiple bureaucratic processes. Many employment-based green card applicants have lived and worked in the United States for several years and in many cases first came the United States as students. **The irregular path to a green card requires varying degrees of labor market tests and attestations, and different types of sponsorships from employers with multiple application processes, making the journey from temporary status to permanent residency unpredictable, and many never make it through, costing the United States its investment in the human capital of these immigrants. As BPC’s Work in Progress report [shows](#), other countries have adopted different ways of streamlining the temporary-to-permanent residency process. There is no perfect system available, but there is a lot the U.S. immigration system can learn from other countries. Our temporary-to-permanent residency process needs reimagination and understanding the pros and cons that exist in other systems could be our first step.**

The H-2B Visa for Temporary Non-Agricultural Workers: Background and Barriers

The H-2B is a relatively small visa program, capped at 66,000 per year. The REAL ID Act of 2005 [divided](#) the H-2B visa category semi-annually, allocating 33,000 visas for seasonal workers from October 1-March 31, and the remaining 33,000, including the unused visas from the first half of the fiscal year to seasonal workers from April 1-September 30. This change was meant to preserve visas for employers whose seasonal need was later in the fiscal year. **However, certain foreign workers such as those currently in the United States on an H-2B visa seeking work extensions, those counted towards the cap in the same fiscal year, fish roe processors, technicians, and supervisors, and workers in the U.S. territories are [not counted](#) towards the overall cap.**

Issues to Consider: H-2B Program is Beneficial but in Need of Reform

The H-2B visa program’s core function is to help provide U. S. businesses with willing and qualified temporary foreign workers to fulfill labor demands when there are no U.S. workers to take the job. But, participation in the program also [helps](#) foreign workers improve their own livelihoods in their

home countries.³ The remittances that foreign workers send back, who migrate largely from poor communities with persistent poverty, help foreign workers’ families and their community with improvements in health, education, and nutrition. The H-2B visa program also [provides](#) foreign workers with a consistent source of employment and income at the prevailing wage rate that they can rely on, albeit seasonal. **The program is one of the few legal and viable routes for foreign workers with lesser education or job training skills to access the U.S. labor market, which in turn can [drive down](#) undocumented migration from countries like Mexico and Guatemala, which were among the highest H-2B visa [recipients](#) in FY2019.**

Figure 5: Countries with Highest H-2B Visas Issued (FY2019)

H-2B Visa Issued Country	Number of Total Visas
Mexico	72,284
Jamaica	10,078
Guatemala	3,262
South Africa	1,830
Serbia	1,381

Source: United States Citizenship and Immigration Services Annual Submission April 2020

H-2B visas can be instrumental in helping businesses in the United States thrive, [especially](#) in remote and smaller states where businesses find it [difficult](#) to fill labor shortages with native- born Americans. Research suggests that higher H-2B visa demands correlate with higher U.S. employment rates; a one percent growth in employment [correlates](#) with adding 216 additional H-2B workers, and unemployment rates in counties with higher H-2B employers were 0.4 percentage points [lower](#) than in counties without H-2B employers, debunking the myth that H-2B workers take jobs away from Americans. **Employers’ reliance on H-2B visas for business sustainability is clear in a recent report by the Government Accountability Office in April 2020, where employers they [surveyed](#) have suggested that any decrease in the number of expected H-2B visas does significantly impact their business decisions.** Moreover, in some industries such as the seafood industry, employers who did not acquire the requested number of H-2B workers, due to the cap, reported revenue decline and loss of customers and contracts in FY2016.

However, the H-2B program in its current form has not been free of controversy. **Employers have argued that the [uncertainty](#) of whether businesses would be approved of the required H-2B visas under the cap, exacerbated by the lottery system, makes the current visa system inequitable.** Moreover, a rigid labor certification test requires employers to prove there are not enough U.S. workers willing to take the job, so a cap in addition to the certification makes the H-2B visa process redundant, overly bureaucratic, and cumbersome. Some business owners in the GAO survey suggested that the visas should be distributed fairly under the cap, while some elected officials have [recommended](#) increasing the cap⁴ in past years to support small businesses.

Elected officials on the other end of the argument claim that the visa program, in its current form, is [not rigid enough](#) and [fails to protect](#) American citizens, while in some cases being [subject](#) to labor violations. Proponents of regulating the H-2B visa [claim](#) that foreign workers on H-2B visas perform low-wage work that takes jobs away from Americans, though [the GAO report](#) from April 2020 signals to

³ The study is based on the H-2B program’s impact on the local livelihood of Guatemalan forest and conversation workers in Alabama.

⁴ Increasing the cap by utilizing unused available visas.

the contrary. **Advocates of regulating the visa also state that tying the foreign worker to their employer through visa sponsorship makes the program exploitative towards foreign workers. A [GAO report](#) from March 2015 on H-2A and H-2B visas does confirm some violations by employers who charge workers excessive fees for recruitment, provide inaccurate job information, and wages paid. However, whether these violations are selective or industry-wide is controversial.** For example, while labor unions [contend](#) that H-2B visas routinely expose foreign workers to abuses and companies hires foreign workers for cheap labor, proponents of decreasing H-2B visa regulation [claim](#) that most employers are in complete compliance with the program and that most H-2B violations are just minor infractions. Proponents further argue that higher regulations would lead to more violations, and hiring of unauthorized workers, not less.

Whatever grievances experts on either end of the H-2B debate may have, one can safely argue that the program, if managed adequately, can be a win-win situation for migrants, businesses, and the U.S. economy. The H-2B program is also one of the few avenues that foreign workers, especially those from poor countries, can use to access the U.S. labor market, significantly improving their lives at home and driving down illegal border crossings. However, the H-2B program, in its current iteration, is in need of major reform. Since its inception in 1986, the visa program has remained the same, whereas our labor trends and needs have changed significantly. A deeper look at how the program can meet our current labor needs in a way that protects employers, U.S. workers, and migrants, while keeping the visa program fair and equitable for U.S. businesses and workers, is necessary.

Limited Legal Channels to Working in the United States

Border Enforcement as a Panacea?

Much of the immigration reform debate has emphasized increased border enforcement to address these unauthorized migrations. IRCA set out to eliminate illegal border crossing by [supplying](#) new technology and increased border funding and resources, as well as implementing requirements for employers to verify the employment eligibility of all new hires. Similarly, the Border Security, Economic Opportunity, and Immigration Modernization Act (S.744), which passed the Senate in 2013, also set out to [tighten our southern border](#) by increasing enforcement at the U.S.-Mexico border, adding additional Border Patrol and U.S. Customs and Border Protection officers, and including National Guard support for securing the border, [as a precursor to](#) providing a pathway for unauthorized immigrants living in the United States. The U.S. Citizenship Act also advances some policy initiatives to manage our southern border by deploying smart technology, which bill sponsors say will help detect and prevent illicit activity, improve situational awareness, and counter transnational crime networks.

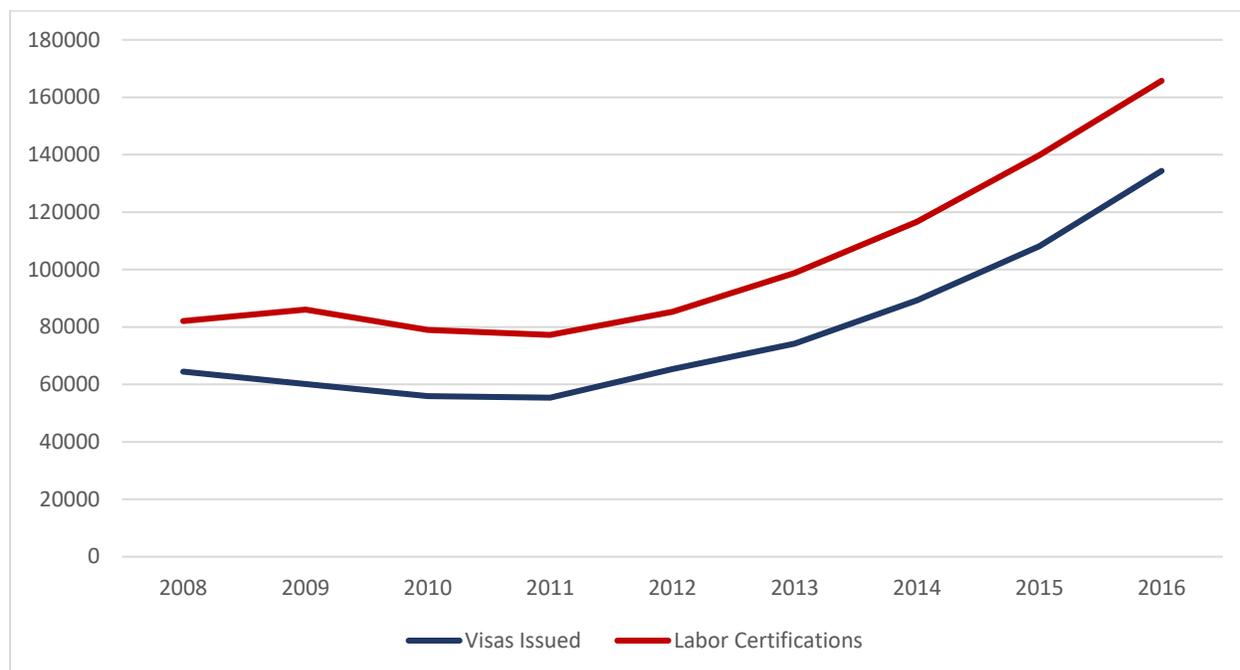
While these policies emphasize stricter border control to reduce illegal immigration, the majority of the new undocumented population that [enter](#) the United States in recent years do so by overstaying their visas. Without a long-term strategy that buttresses the legal immigration channels to the United States, visa overstays and undocumented migration are likely to continue.

Reforming Visa Programs

IRCA's one success in curbing unauthorized border crossing may have been in amending the Immigration and Nationality Act and separating the preexisting H-2 temporary visa program into H-2A and H-2B visas for agricultural and non-agricultural workers. **Though both visa programs still require substantial reform, they have provided a legal channel for lesser-skilled labor migration to the United States. According to [estimates](#), the H-2 visa programs helped decrease Mexican illegal border crossing**

between 2008-2018, demonstrating that migrants are willing to use a legal channel to come to the U.S. if one is available to them. The H-2A program, which is not subject to any visa caps, is a popular program with migrant farmworkers and in spite of challenges, is increasingly being used by farm owners as well. The usage of agricultural visas has continued to increase over the last several years (Figure 1), and, according to estimates by the State Department, [there were](#) just over 213,000 visas issued for fiscal year 2020.

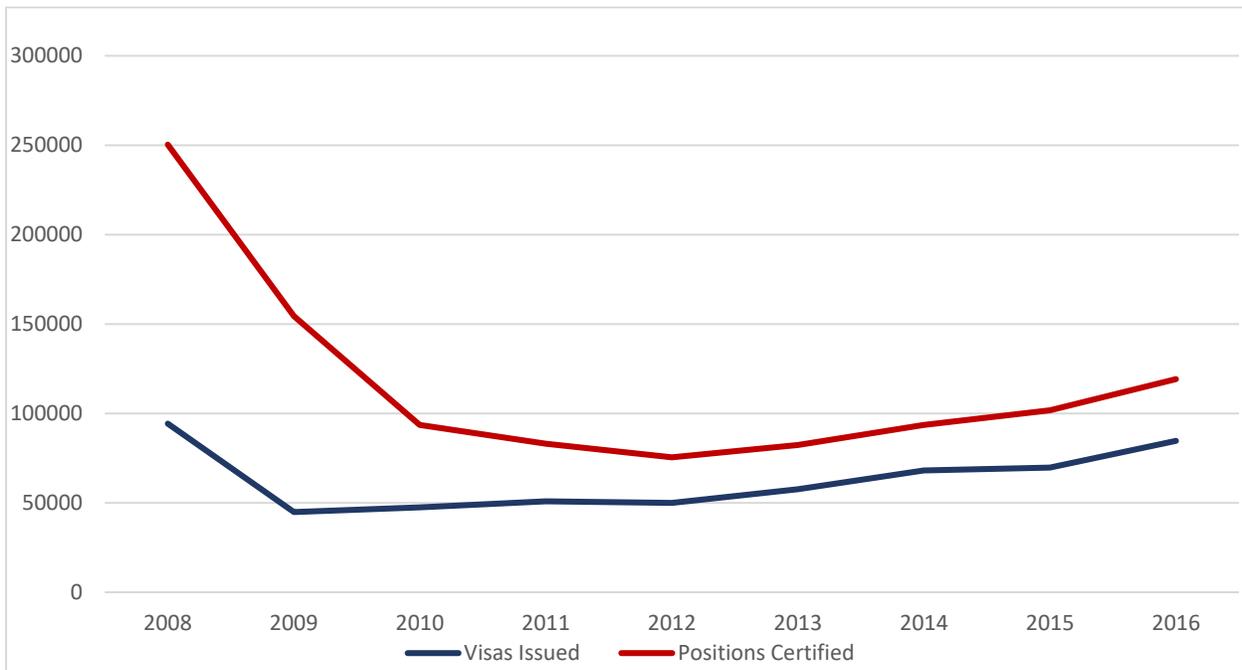
Figure 1. H-2A Visa Issued and Positions Certified (FY2008-FY2016)



Source: Department of State and Department of Labor

Similarly, the H-2B program has also remained in high demand with businesses requesting more seasonal foreign workers each year, exceeding the annual 66,000 cap. **Temporary foreign workers have become an integral part of the U.S. labor market, filling jobs in occupational sectors where employers cannot find U.S. workers for the position, especially in rural and remote states, and seasonal areas. This has remained true even during periods of high unemployment such as when COVID visa restrictions drastically reduced work visas for foreign temporary workers.** The demand for H-2B workers to fill labor shortages in the United States has steadily increased since 2010, compelling lawmakers to allow cap increases every year. For example, in FY2016, 119,000 H-2B positions were certified, a 17% increase since 2015. (Figure 2)

Figure 2. H-2B Visa Issuances and Labor Certifications (FY2008-FY2016)



Source: Department of Labor

The majority of seasonal workers that enter on lesser-skilled temporary visas such as the H-2A and H-2B programs have historically come from Mexico. For example, out of [around](#) 442,000 total H-2A admissions to the United States in FY2019, 94% were Mexican nationals. Similarly, in FY2019 around 72,000 H-2B visas out of approximately 98,000 visas, or 74%, [were issued](#) to Mexicans, followed by nationals of Jamaica and Guatemala who got 10% and 3% of the total visa issuance, respectively.

[Research suggests](#) that Mexicans are more likely to have access to H-2 visas and therefore have a higher representation in the U.S. seasonal labor market. For example, in 2019, Mexican migrants were 32 times more likely to receive H-2 visas than Honduran nationals per capita. Unsurprisingly, Hondurans were 20 times more likely, per capita, to get apprehended at the border than their Mexican counterparts.

These visas have tremendous potential to improve the lives of participants in their respective home countries. The visas provide consistent, albeit seasonal, employment at a “prevailing wage” rate. For example, a study by the Center for Global Development using a sample of Haitian farmers in the United States [showed](#) that the short-term agricultural guestworker program benefited poor Haitian families during the post-Haiti earthquake more than any other aid program; roughly doubling their families’ income back home.

Moving Away from Amnesty-Only Approach to Addressing Unauthorized Migration

To avoid the need for another large-scale amnesty in the future, a reorganization of our legal immigration system that incorporates temporary guestworker visa reform may be necessary. Currently, the U.S. Citizenship Act would reform our employment-based legal immigration system by

raising visa caps on some existing permanent visa categories.⁵ However, these [cap increases](#) would mostly benefit high-skilled immigrants and their family members who [may already be](#) in the United States. The bill, unfortunately, [does not offer](#) substantial reform to our temporary guestworker programs nor introduce new visas in the lesser-skilled category.

Immigration reform that includes improvements in temporary guest worker programs is also more likely to benefit migrants from Central America. Presently, those fleeing from the Northern Triangle, due to economic challenges in their home countries, have no lawful option, besides asylum, to legally enter the United States. Guestworker visa reforms and other legal pathways for people to access U.S. labor markets may reduce illegal border crossings and better manage Central American migration challenges in the long-term. According to a 2019 report by the Congressional Research Service, nearly 52% of migrants from Central America [cited economic opportunity](#) as their reason for fleeing the region. Additionally, the [World Bank](#) reports that around 54% of El Salvadorians, 63% of Guatemalans, and 56% of Hondurans are of working age and the ratio of the working age population in these countries is expected to continue to rise. Therefore, it is likely that we will continue to see young people migrate towards the United States in search of job opportunities.

Guestworker programs that facilitate migrants' access to our labor markets, therefore, might be a benefit to all. But if we continue to prioritize the same enforcement-based approach to border crossing without providing an alternative and accessible route for immigration to migrants, we might end up where we started in a few decades; discussing amnesty for a large group of undocumented immigrants in need of relief and ever-increasing border security.

⁵ The bill also exempts spouses and children of foreign workers from visa caps which further increase total immigration numbers.