IMMIGRATION IMPACT

State Department Denies Substantial Percentage of Employer-Sponsored Immigrant Visas

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Surprising data recently revealed that consular officers denied applicants for employer-sponsored immigrant visas at a far higher rate than U.S. Citizenship and Immigration Services (USCIS) officers denied green cards to employer-sponsored applicants.

Data analyzed by the Cato Institute shows that since Fiscal Year 2008, USCIS denied about 8% of employer-sponsored immigrants while the average denial rate by consular officers was 63%. The Cato Institute has identified a disturbing difference that disadvantages employer-sponsored immigrants that apply abroad—and which, to our knowledge, has not been raised before. Our analysis of the findings and conclusions follows.

By "employer-sponsored," the Cato Institute means the employment-based (EB) second preference category for advanced degree professionals or persons of exceptional ability and the EB third preference category for skilled workers, professionals, or "other workers."

In these two categories (unless the noncitizen qualifies for an EB-2 national interest waiver), a noncitizen must have a job offer from a U.S. employer. The sponsoring employer first must have recruited for U.S. workers and received a certification from the Department of Labor (DOL) that employing the noncitizen in the job offered will not adversely affect the wages and working conditions of similarly-employed U.S. workers. Next, the sponsoring employer must receive approval from USCIS that the noncitizen is qualified for the employment-based preference category.

After USCIS' approval of the employer's petition, and if the noncitizen is in lawful nonimmigrant status in the United States, among other requirements, they may become a U.S. permanent resident upon USCIS approval of their application to adjust status. Otherwise, the noncitizen must have an immigrant visa issued by a consular officer at a U.S. Embassy or consulate abroad and then be admitted to the United States as a permanent resident.

For the consular officer denials, the Cato Institute used the numbers for immigrant visa ineligibility as to labor certification in the Department of State Visa Office's annual reports for Fiscal Years 1992 through 2020—with permanent labor certification only being required for the EB second (without national interest waiver) and third preferences.

The USCIS numbers the Cato Institute obtained have a broader scope: including any reason for denial and the EB first category (for persons of extraordinary ability, outstanding professors/researchers, and intracompany managers and executives), which has no labor certification requirement. Yet, the consular officer denials still far exceed USCIS denials.

According to the Cato Institute, consular officer denials "shot up in [Fiscal Year] 1995 and stayed extraordinarily high through the present." In Fiscal Years 2019 and 2020, consular officers denied 61% of employer-sponsored applicants. Yet in 2021, USCIS denied only 4%.

As the Cato Institute notes, no explanations are provided for the consular officer denials. A review of the Foreign Affairs Manual (FAM), which contains State Department policies and procedures, suggests the following possibilities. The FAM impresses on the consular officer that they, and not DOL or USCIS, assess the applicant in person and "have the responsibility" to resolve any doubt about whether the applicant has the qualifications for the job. Frequently, the consular officer will be interviewing the applicant years after DOL issued the labor certification. The consular officer may question whether the applicant still intends to work for the sponsoring employer in the job offered, even though the FAM states that the officer should have "objective reasons" to believe the applicant will not comply with the labor certification. The Cato Institute questioned why the FAM would list as a negative factor evidence that the applicant does not have prior work experience in the same type of business as the job offered. As stated in the blog, "The State Department should not be denying people for seeking different types of jobs than their jobs in their home countries."

While the disparity in denial rates the Cato Institute identifies is disturbing, the blog makes related claims that are questionable. The Cato Institute claims that the Departments of State, Homeland Security, and Labor "are directly incentivizing employers and immigrants to unnecessarily use the temporary work visa system." But immigrants are not avoiding consular processing because of low approval rates—the Cato Institute says, "no one has previously reported on it."

There are other disincentives to consular processing. The backlogs are enormous. Many immigrant visa applicants must first submit documentation to the U.S.-based National Visa Center—and only when they are "documentarily qualified" will the U.S. Embassy or Consulate schedule an interview. The National Visa Center's Immigrant Visa Center Backlog Report states that 426,486 eligible immigrant visa applicants (family- and employment-based) are still waiting to have interviews scheduled after June 2022 appointment slots have been filled. Aside from the delay, with the additional risk and expense inherent in traveling abroad, why would noncitizens who are already living in the United States risk the trip?

The blog also claims this "takes a temporary visa cap spot away from some worker for whom a temporary path makes more sense." But most employment-based immigrants apply to adjust status to permanent resident in the United States because they are working in the United States in temporary (nonimmigrant) categories Congress has provided. Congress specifically authorized H-1B (specialty occupation) workers—a category that has a "cap" unless an exemption is available—to work temporarily in the United States when they also may intend to become

permanent residents. Congress, not the agencies, is responsible for which temporary visa categories are available. Congress, not the agencies, limits the number of immigrant visas available per year, and further limits the percentage per country of birth. Congress has not reconsidered these limits for over thirty years.

There is no reason why U.S. employers should forego the opportunity to hire qualified noncitizens, and noncitizens forego the opportunity to work in the United States while navigating the green card process.