Center for Immigration Studies

Memorandum

March 2012

An Unintended Trifecta

EB-3 Is the Worst of the Foreign Worker Programs

By David North

There's a part of our dysfunctional immigration system that simultaneously:

1) Denies U.S. workers jobs,

2) Holds thousands of alien workers in virtual indentured servant status, for years, and then

3) Fails, in the end, to give them the green card promised to them years earlier.

It is another of the unattractive bits and pieces that clutter our immigration law, often obscure, often small in scale, often producing unintended results. This particular immigration backwater relates to the employment-based allocation of green cards.

Previously ignored administrative court records now reveal the way that one government agency paves the way for the admission of unneeded low-skilled or lightly skilled alien workers and then, years and years later, another agency decides that these aliens were not eligible in the first place, thrusting them into illegal status, often when they are middle-aged.

Meanwhile, for years, if not a decade, these workers have been tied down to these jobs, hoping for a green card at the end of the tunnel that never appears. It is a terrible arrangement.

Although hard numbers are not available for the aliens caught in this bind, there are probably 1,000 to 2,000 of them uncovered every year.

The system allows some aliens to hold jobs while they hope for green cards, then, in effect, notices years later that either they are not qualified to be legal residents, or their employers are not qualified to hire them, or both. So their applications are denied, which is totally appropriate, and that action almost always thrusts the workers into the status of unwitting illegal aliens.

The workers, usually of middling to lesser skills, suddenly find themselves in this situation through little or no fault of their own; and it happens to many of them in their thirties, forties, and fifties. Many have worked for a not very successful employer, in the expectation that he will arrange for permanent alien status. (In the end, the petitioning employer, who has often benefitted from the unusually low wages, does not get even a slap on the wrist.)

What our policy makers and administrators should do is to eliminate these arrangements early on, thus meeting two policy goals: 1) creating jobs for citizens and green card holders, and 2) saving the government from having to oust these aliens from the jobs they have held for years.

In immigration-speak, these are nonimmigrant and (some) illegal alien workers, currently in the United States, whose employers have sought green cards for them under the employment-based visa system. The employers had first, years earlier, secured a labor certification from the U.S. Department of Labor, a preliminary step in this

David North is a CIS fellow who has studied the interaction of immigration and U.S. labor markets for more than 30 years.

process, and have, more recently, filed an application with USCIS for the worker to move into permanent legal alien (green card) status.

In many of these cases the employment relationship started in 2000 or 2001 and the administrative court decisions that are the prime source of the data for this paper were made in 2010, reflecting the long delays that are so common in the immigration process.

The workers concerned cannot be considered the "best and the brightest" by anyone. They are third priority employment-based (EB-3) workers, and consist of skilled and "needed" unskilled workers and professionals with only a bachelor's degree who are seeking admission under Section 203(b)(3) of the Immigration and Nationality Act. As my CIS colleague Jessica Vaughan has suggested in a blog, there is absolutely no need for any of these alien workers.[1] Workers with more education and greater skills come in as EB-1s or EB-2s under other sections of the INA.

Currently, the EB-3 application at the green card level works for most of the aliens applying, but others find that USCIS has ruled against their applications, so in many cases the employers appeal to USCIS' semi-judicial Administrative Appeals Office (AAO).[2] And while most of USCIS' decision making process is a total secret, the filing of the appeals leads to the (delayed) publication of the judgments of the (anonymous) AAO adjudicators, some of whom are lawyers, some of whom are not.

How Often Does This Happen and Why?

How often does this happen? USCIS does not provide outsiders with application and denial data, though sometimes it provides approval numbers. We do know, however, that all the cases that get to the AAO in this category are based on staff-level denials of the green card applications. There are an unknown number of other denials that are not appealed.

We know, from AAO files, that there were about 900 EB-3 appeals decided in each of the last three years for which we have data, 2008, 2009, and 2010:

2008	749
2009	1,153
2010	778
	2,680

So, presumably there were at least 1,000 denials a year, probably twice as many.

Why does this happen?

There are two main factors that explain the different decisions regarding the same worker: 1) the fact that there are different standards set by the law over the labor certifications, on one hand, and the green card decisions, on the other; and, 2) the passage of time between the original labor certification and USCIS staff and appeals decisions. Much can happen in the intervening years to change the facts on the ground and their interpretations.

One of the differing responsibilities of the two organizations in connection with these cases was spelled out in an AAO decision relating to the worker's level of qualifications; it quoted a Ninth Circuit ruling:

> "[It] appears that the DOL responsibility is only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear the DOL's role extends to determining if the alien is qualified for the job for which he seeks [legal] status.

> That determination appears to be delegated to the INS under section 204(b), 8 U.S.C., as one of the legal determinations incident to the INS's decision whether the alien is entitled to [legal] status."[3] (USCIS now has the old INS responsibilities.)

There are other disconnects between the obligations of the two departments, which put these illegals in awkward situations.

As to the passage of time, there are three separate problems, sometimes joined to each other, that slow up the process, sometimes considerably:

A. After the initial certification is decided (favorably) by DOL, the employer is to file a different form, the I-140 "Immigrant Petition for Alien Worker" with USCIS. This produces the inevitable processing delays, even if there are no other complications.

B. USCIS does not process the I-140 until it is clear that a numerically controlled visa is potentially available to the worker, a significant variable discussed below.

C. Often after a negative decision on the I-140 is made, it is appealed to the AAO, which then starts the decision making process from scratch, or *de novo*. The three factors routinely produce multi-year gaps between the initial DOL decision and the subsequent AAO one.

Green cards have numerical limits,[4] and fairly narrow ones, for third preference workers. In fact, EB-3 visas are available only to aliens whose applications have been pending for a long time. The February 2012 cutoff date for would-be EB-3 workers from India is August 15, 2002, and for others the date ranges from December 1, 2002, to February 2, 2006, depending on the nation of origin.[5]

Caught in between are the aliens, once regarded as legitimate by one department, and then rejected by another. It is an example of dreadful legislative craftsmanship. And since these are individual cases, usually involving people with modest skills and relatively small employers, and it all happens one case at a time, no significant lobbies have emerged to try to change matters.

This whole area is pretty obscure. I have been doing immigration policy research for more than 30 years — including conducting the Labor Department's own first evaluation of the labor certification program some years ago — and I was totally unaware of the numbers involved until I started reading the appeals cases.

Sample AAO Decisions

Last fall I spent several days reviewing a sample of these EB-3 decisions — you can read them on the Web — and I learned much about this, yet one more highly questionable aspect of our immigration system.[6]

In the AAO's part of the immigration scheme, unlike in the immigration courts, neither the aliens nor their lawyers play a role; it is all up to the employers and *their* lawyers, on the one hand, and USCIS officials on the other. The upshot in some 900 cases a year is that AAO does what the government should have done years, sometimes decades, earlier; i.e., decided that the job should not go to the alien in question.

Reviewing these decisions was a frankly depressing process. While I enjoy watching trials[7] and reading judicial decisions, perhaps an odd hobby for a non-lawyer, there is no pleasure to be had from reading this material.

The contents of these AAO decisions describe work usually in the lower reaches of the American labor market and show how aliens stayed in often miserable jobs at low wages while employed by marginal employers who often failed to meet the standards expected of them by the immigration laws they were seeking to use.

The AAO decisions themselves are not a terribly impressive body of work; they seem to be decided in the narrowest terms possible, with no recognition of broader issues, such as the state of the U.S. labor market. The documents also seem to be largely cobbled together from prior decisions on similar cases — there is a strong aroma of cut-and-paste.

Further, the decisions are sparse on the facts in the cases. Not only are the aliens' (and their employers') names redacted, we are told nothing of the immigration status of the would-be green card holders at the time of the application, nor at the time of the judgment. There is often no more than a single word describing the occupation of the alien, and another word regarding the business of the employer. The reader can sometimes glean the gender of the worker, but not always; when this is known it is usually male.

I was, of course, looking at a middling set of situations. On the one hand, USCIS approves the green card petitions in the majority of cases, and on the other there are (totally out of sight) an unknown number of truly bad applications, all rejected, and so bad that they are not appealed. Applications in my study group of 43 were initially rejected, but the applicants were optimistic enough about their chances to appeal them.

Before looking at these cases in more detail, it would be helpful to get a sense of the ratio of denials, on one hand, and approvals, on the other. USCIS, however, rarely offers operating statistics along these lines, so analysts have to create such ratios from scraps of data obtained in other ways.

In this field — the granting of employment priority green cards — we have to adopt some proxy measures. For approvals we substitute adjustments of aliens from another status to green card status by visa class; and for denials we will use appeals from denials by visa class. Our measure, the number of denials that are appealed is, of course, much smaller than the total number of denials.

In order to get some perspective on how USCIS handles these third priority worker applications, it is useful to look at the broader picture of that agency's decision making. Putting it bluntly, it is an agency that routinely says "yes" to petitions brought before it. We at CIS filed a Freedom of Information Act request and secured a skimpy, partial response as we noted in a couple of blogs that showed USCIS saying "yes" 208 times for every time it said "no".[8]

In contrast to this state of affairs, as shown in Table 1, the ratio of adjustments growing out of USCIS approvals, compared to appeals to the AAO among the EB-1 and EB-2 workers, was 78 to one. But when the same measure is used on the EB-3 workers, the subject of this paper, that ratio falls to 20 to one.

The significant point from the table is that the rejection rate among the EB-3 workers is unusually high. In other words even this routinely pro-migration agency had much more trouble approving this group of applications than it does for most of the petitions it sees. So the denials are much more frequent, and the denials usually are upheld on appeal. In short, the EB-3 cases must be truly troublesome to the agency staff, a situation that I have never heard discussed.

There were 43 appeals in the study group; in only two cases did the AAO sustain the appeal and grant the benefit; in three other cases the merits were unclear and they were remanded back to the staff; in the other 38 the aliens lost one way or another. There were 32 rejections by the AAO, five withdrawals (where there is no data at all), and a case regarded as moot.

The review of the 32 AAO rejections, skimpy though they often were, reveals the nature of the problems, and the length of time it takes before the agency notices them. The reader should bear in mind that our study group of 43

cases, all taken from 2010 decisions, may not be a precise mirror of all the EB-3 appeals decisions taken over the years. But in general terms, these were the problems noted by the AAO; in many cases the AAO found a multiplicity of them. In the 32 rejections there were:

- 13 instances of workers who were not qualified for the desired immigration benefit;
- 15 instances in which the employer's finances were regarded as too feeble to hire the worker, though in every case the employer *had* employed the worker, often for many years; and
- 17 other instances of a variety of difficulties: employer incompetence, hidden worker-employer family relationships, an attempt by the worker to be his own employer, the lack of a full-time job, and other discrepancies, often several of them in a single application.

The numbers above add to 45, not 32, which is explained by the fact that many of the applications were rejected for more than one reason.

Table 1. Much Lower Staff Approval Rates Reported for EB-3 Workers

Migration Category and Approvals or Adjustments	Description of Populations	Denials or Appeals From Denials	Ratio of Positive Decisions to a Proxy for Negative Ones
All nonimmigrant workers sought on the I-129 form; 294,016 approvals (FY 09)	Temporary alien workers of all kinds	1,045 denials	208 to 1
EB - Priorities 1 and 2 (EB categories relate to permanent resident aliens); 42,025 adjustments FY 10	EB-1 aliens with extraordinary ability, outstanding professors or researchers, and multinational executives or managers; and EB-2 alien professionals with advanced degrees or aliens of exceptional ability	539 appeals from denials	78 to 1
EB - Priority 3; 15,780 adjustments FY 10)	Skilled alien workers, professionals with BA degrees (only), and "needed" unskilled workers	778 appeals from denials	20 to 1

Note: The first row shows approvals and denials, the others record post-approval adjustments (i.e. changes of status) and appeals from denials; these are proxy measures made necessary by the non-publication of basic operating data by USCIS. If we were comparing denials, not appeals from denials, and if half the denials were appealed, the differences in ratios between row one, on one hand, and rows two and three, on the other, would be even more dramatic.
Sources: First row approvals and denials, for FY 2009, are from CIS FOIA request to USCIS NCR2010022570; second and third rows, adjustments, 2010 Yearbook of Immigration Statistics, DHS, 2011, table seven; same rows, appeals, calculated by author from data from the Office of Administrative Appeals, USCIS; for the technique used to obtain these data, see End Note 6.

A good example of an appeal with multiple problems, a perfect immigration storm, if you will, can be found in one decided on March 30, 2010.[9] The employer was a long-established dry cleaning facility in Florida, and the application was for a green card for a dry cleaning supervisor.

The application was denied for a variety of reasons: There was insufficient evidence that the worker had two full years of experience as a dry cleaning supervisor when the application was first submitted in 2001; the employer's tax records indicated that he could not have afforded to have paid the worker the proffered $39,000 in many of the years since that time; the employer did not submit an *original* and *certified* labor certification from the U.S. Department of Labor; various documents that were supposed to be signed were not signed; it was not clear that the current employer was a "successor of interest" to the original one; and further, though not bearing on the decision, the lawyer presenting the appeal had been suspended from the practice of law on the date the appeal was submitted and the former lawyer had been disbarred. (Given the representation problems, the AAO regarded the dry cleaner as "self-represented" which is an acceptable practice to the AAO but not necessarily a wise one for the employer involved.) Many of the other rejected cases had multiple, if somewhat less daunting, combinations of problems.

Do we, as a nation, really need to grant an immigration visa to someone who is a dry cleaning supervisor? Are there not plenty of residents of this country who do that kind of work?

Unfortunately those basic, common-sense questions have virtually nothing to do with the USCIS decision making process, which must follow guidance laid down by Congress (as swayed by industry lobbyists). The only real defense against even larger numbers of immigrant workers are the detailed rules laid down by USCIS and the staff members who follow those rules (sometimes to what appear to be extremes.)

With that (grim) thought in mind, let's look a little further at the three sets of barriers mentioned above, worker qualifications, employer finances, and other issues.

Worker Qualifications

In the labor certification filings the employer lays out the educational and experience requirements he has established for the job. In all of these cases, DOL has accepted those qualifications, has agreed that there are no U.S. workers available for the job in question, and has then given the employer the right to hire the alien worker in question.

Years pass.

At the next stage of the process, the employer files documents with USCIS asking that the worker be granted a green card. Sometimes — this happened 13 times in the 43 cases studied — USCIS staff decide that the worker does not meet the employer's original qualification, and though the worker has held the job for years, he is not qualified to do so. The petition is then rejected and that rejection is appealed to the AAO. In these 13 cases the AAO agreed with the agency and the matter, finally, appeared in the open.

Let's look at two examples.

In the first, the employer, a financial services company, had filed for a systems analyst. It said the worker needed a "Bachelor of Science, or academic equivalent, in 'computer science, physics, or a related field'". The alien it hired in 2004 (with the consent of DOL) had received a "Bachelor of Science in Aviation Maintenance from Embry Riddle Aeronautical University in August 1997".

When USCIS got its hands on the case, it said that the degree was not in a "related field" and denied the application; the AAO agreed and rejected the appeal[10] in 2010; that decision, in a better system, should have been made six years earlier.

In the second case, the employer, a software firm, had, with DOL assent, hired a programmer analyst and stated, to DOL, that the education needed for the job was a "Bachelor's Degree or Equiv."

The (nameless) Indian national that it hired had a bachelor's degree from Madras University, but this was a three-year degree (a common pattern in what used to be the British Empire) and USCIS decided that this was not an "Equiv." as required by the employer. The AAO agreed, saying: "Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes."[11]

Now a reasonably well-informed employer might have said, at the beginning, that he needed a worker with a three- or four-year bachelor's degree in the computer sciences, and there would have been no problem, but the ability of small employers to work with this system is often lacking.

Again, we have a decision that should have been made years earlier.

There is, of course, a public policy objective met by holding employers to their original educational and skill requirements; they are supposed to advertise that they need a worker that meets these qualifications, and they should not be allowed to say they require one set of skills in their ads, and then hire an alien with a lesser set of skills.

Employer Finances

Just as employers are held by USCIS and the AAO to their original statement of needed qualifications, so they are tied to their original offer of wages for the job.

What happens — again, years later — is that the agency compares the offered wages with tax documents to see whether or not the employer paid the worker as much as he said he was planning to do. If not, the petition is denied. (One wonders if employers know, when they sign the labor certification application and its associated wage offer, that they will be asked to provide tax documents years later to support that offer — probably not.)

A single example will suffice.

In a decision[12] dated March 15, 2010, relating to a cook hired by a restaurant, the AAO noted that the alien worker, offered $10.45 an hour ($21,736 per year), had received these payments:

2002:	$12,960
2003:	$13,500
2004:	$12,000
2005:	$12,000
2006:	$22,676
2007:	$25,716
2008:	$32,400

Given this evidence the AAO rejected the application. My sense is that this put the alien into illegal status, but (unless something happened outside the text of the decision) caused nothing but inconvenience for the employer.

Note in this case, not an unusual one, the length of time that the worker labored for minimal pay before a decision was finally issued.

Other Issues

The AAO, as it routinely points out in its decisions, has the power to examine all aspects of the cases before it *de novo*. The pattern, which must be labor-intensive and thus expensive, seems to be to go through each and every variable, and if there is more than one reason to deny a case, each and every one is discussed in some detail. I am not a lawyer, but I know that there are plenty of times when a judge will decide a case on a single significant variable, and not bother with other issues.

In the case of the ill-paid cook noted above, for example, the (anonymous) AAO decision-maker wrote: "[T]he petitioner [the employer] … was not incorporated and did not exist until September 20, 2004, more than five months after the filing date of April 6, 2004, as indicated on page 9 of the ETA Form 9089."

ETA stands for the Employment and Training Administration of DOL, the agency handling such matters.

In several cases, at the time of the green card decision, it was clear to USCIS staff, and to the AAO reviewer, that there had been, all along, a family relationship between the petitioner (employer) and the beneficiary (worker), something that is contrary to law.[13] In one instance it involved a home health aide and in another an air conditioning technician.

In a decision dated April 7, 2010, the employer's finances were examined to see if he could afford not only the worker covered by the petition, but if he could afford to pay all the other alien workers he had sought.[14] He had four or five labor certifications at various times, and the AAO determination, appropriately, was "no"; his tax records did not show that he could afford to pay them. So the petition was denied.

Without going into too much detail, many of the petitions rejected by USCIS, denials subsequently confirmed by the AAO, showed remarkable ineptness by either the employer, the lawyer, or both. The wrong petitions were filed, filing deadlines were ignored, supporting documents requested by the government were not provided, and the like. All of these procedural errors led to or reinforced denials.

Conclusion

Rather than trying to fix this system by, for example, putting all elements of the application process in a single agency with a unified set of rules, Congress should simply abolish the employment third preference for the future, allowing those now in the pipeline to be processed as time passes.

With millions of unemployed Americans do we really need to bring in more cooks, dry cleaning supervisors, and computer programmers? With two million unemployed college graduates do we need any more alien workers whose only qualification is a bachelor's degree? I do not think so.

End Notes

[1] Jessica Vaughan, "Proposal to Axe Green Cards for Unskilled Workers Considered", CIS Blog, http://www.cis.org/vaughan/green-cards-for-unskilled-workers.

[2] Officials of the Administrative Appeals Office (AAO) perform the appeals function by reading the papers submitted to them and do not hold hearings. Unlike the open-to-the-public hearings of most sessions of immigration judges, the AAO's work happens behind closed doors, and the only visible work product is its decisions, which can be read on the Internet. To the best of my knowledge, no statistics are published by the agency and observers have to make their own tallies from the decisions.

[3] This is from pp. 8-9 of the decision regarding a computer programmer from India, at http://www.uscis.gov/err/B6%20-%20Skilled%20Workers,%20Professionals,%20and%20Other%20Workers/Decisions_Issued_in_2010/Feb182010_10B6203.pdf.

[4] One needs to be a Talmudic scholar to keep track of the full set of numerical limits and country-by-country visa availability, which are presented each month in the State Department's *Visa Bulletin,* http://travel.state.gov/visa/bulletin/bulletin_5640.html. Suffice it to say for the purposes of this paper that the formula creates a multi-year-long, mandatory gap between the original DOL decision and the ultimate DHS decision on the granting of the green card.

[5] There is a bill now pending before the Senate that has passed the House, HR 3012, that would even out the waiting times for EB-2 and EB-3 immigrants, speeding up green card eligibility for people from India and China and slowing it up for others; it would not add any new slots for any employment-based migrants.

[6] When I drew the sample, in July 2011, I based it on the AAO's 724 EB-3 decisions that had been published for the first eight months of 2010; these were the latest available at that time. (The AAO uses the code B6 for this group of decisions.) Figuring that a 6 percent sample would be sufficient, I marked, on the B6 decision index for the calendar year, every 16th or 17th case, having no idea in each instance of what was decided, or what was at issue. I drew a study group of 43 cases in this manner. Later, the staff published 54 more decisions, which accounts for the number 778 that appears in Table 1.

To access these decisions, see http://www.uscis.gov/portal/site/uscis/menuitem.2540a6fdd667d1d1c2e21e10569391a0/ and choose the year or years of interest; then go to the index of the individual cases for that year, which are organized by date.

[7] I have done this all over the world, from merit hearings in the Arlington (Va.) immigration court, to an appeal before the High Court of Fiji; there have been civil, criminal, and bankruptcy trials, federal and in many American states; and in Australia, England, and Scotland. Incidentally, I found in Fiji, some 20 years ago, that the Fijian Parliament had no air conditioning, while the court did, probably relating to the robes and the wigs worn by the mostly expatriate judges, as opposed to the more sensible tropical clothing of the indigenous parliamentarians.

[8] See http://www.cis.org/North/FOIA-USCIS-Treasury and http://www.cis.org/north/USCIS-approval-statistics.

[9] For the full text, see http://www.uscis.gov/err/B6%20-%20Skilled%20Workers,%20Professionals,%20and%20Other%20Workers/Decisions_Issued_in_2010/Mar302010_07B6203.pdf.

[10] See http://www.uscis.gov/err/B6%20-%20Skilled%20Workers,%20Professionals,%20and%20Other%20Workers/Decisions_Issued_in_2010/Jan072010_04B6203.pdf.

[11] See the decision at p. 5, http://www.uscis.gov/err/B6%20-%20Skilled%20Workers,%20Professionals,%20and%20Other%20Workers/Decisions_Issued_in_2010/Mar122010_09B6203.pdf.

[12] See the decision at p. 9, http://www.uscis.gov/err/B6%20-%20Skilled%20Workers,%20Professionals,%20and%20Other%20Workers/Decisions_Issued_in_2010/Mar152010_14B6203.pdf.

[13] There are more than ample provisions in the immigration law for the admission of relatives of U.S. residents; workers (those with EB preferences) are supposed to be admitted for their talents, not their family relationships.

[14] See the decision at p. 9, http://www.uscis.gov/err/B6%20-%20Skilled%20Workers,%20Professionals,%20and%20Other%20Workers/Decisions_Issued_in_2010/Apr072010_02B6203.pdf.