
A Visa and Immigration Policy *for the* Brain-Circulation Era

Adjusting To What Happened in the World
While We Were Making Other Plans

By Victor C. Johnson, Senior Advisor for Public Policy



About the Author

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About NAFSA

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President Obama has committed his administration to constructive American engagement in the global community, to an economic recovery that enhances long-term economic competitiveness, and to robust student, scholarly, and citizen exchanges. NAFSA shares these objectives, and our mission—international education—is critical to all of them. In particular, these objectives require that the United States be open, accessible, and attractive to the world’s best talent to staff its universities, research institutes, and cutting-edge industries, and to the world’s future leaders who seek to further their education here. This will necessitate both a broader concept of national security and a better understanding of today’s patterns of global mobility.

A Broader Concept of National Security

Since 9/11, the following assumption has tended to guide U.S. policy: If a policy that would make the United States a more open and welcoming country *could* be exploited by a hypothetical terrorist—which of course any such policy could—then we shouldn’t do it. Understandable though that approach may be, it does not serve the nation adequately. It has also spawned layer upon layer of security controls and restrictions, all taken in the name of making us safer – but without careful consideration of the effectiveness or consequences of those measures.

All prudent steps must be taken to prevent another act of mass terrorism on American soil. But a policy based in fear, that causes us to turn away from the world, is profoundly inimical to American security—because openness is *part of* security. The United States needs international students, professors, researchers, scientists, and future leaders coming to this country to further our universities’ educational mission, teach our students, increase mutual understanding between the United States and the rest of the world, enhance our economic and scientific competitiveness, and support U.S. international leadership. There is no escape from the responsibility of achieving the necessary balance.

The Paradigm Shift in Global Mobility

To prosper, America must acknowledge the paradigm shift that is occurring in the world’s understanding of the myriad benefits that accrue to a country when it is able to attract talented and gifted individuals. Increasingly, other countries have recognized that in the current world economy, success comes to those who create and innovate. They welcome people from around the world who can contribute to the creation and development of new blockbuster or revolutionary ideas that have the potential to grow a company as successful as Microsoft or to produce the next generation of safer and cleaner energy production alternatives.

The United States has been successful at attracting and integrating immigrants who have added tremendous value to our country and economy. But over the past couple of decades, the United States has argued myopically over outmoded caps on the number of talented people who will be permitted to work and live in this country. Other countries have seized this weakness to lure people to their knowledge-based

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economies. While the United States provides a patchwork of limited, short-term work options with long and uncertain paths to permanent residency, other countries promise quick membership in their societies for talented people and their families. Canada has run advertisements in

major U.S. newspapers seeking to attract knowledge workers and their families who are stuck in U.S. green card backlogs. Sending countries like China and India are luring their nationals back with state-of-the-art facilities, and promises of good jobs with quick advancement. This is producing a phenomenon that is virtually unrecognized in the United States: the *outflow* of talent from this country back to its countries of origin or to other, more welcoming, countries.

Today's patterns of international mobility bear little resemblance to those in effect generations ago when the basic structure of U.S. immigration law was created.

Immigration law recognizes people as either "immigrants," those who apply for entry with the intent of remaining, or "nonimmigrants," those who apply for entry for a specific purpose and period of time, after which it is assumed that they will "go back home." But today's reality is that talent circulates: Skilled

people leave their home country for different reasons and seek to remain in the receiving country for varying periods of time based on complex factors. They may stay, return to their prior country of residence, move to a third country, establish homes in both the sending and receiving countries and divide their time between the two, travel back and forth constantly to engage in multinational research projects, or follow a variety of other patterns. Americans are part of this pattern—seeking opportunity, at different stages of their lives, in dynamic economies or knowledge centers abroad. For the United States to attract and retain the best talent to our college and university student bodies, faculties, and research centers, immigration law and visa policy must accommodate these realities. Today's complex patterns of global mobility do not recognize anachronistic immigrant-nonimmigrant distinctions.

A Visa and Immigration Policy for our Time

America can no longer assume that it is the preferred destination for people who seek to improve their lives outside their home country. Talented students and skilled workers have multiple options around the world for study and creative work, and they are attracted to the places that offer them the best opportunities. Our challenge is to participate in the global community in a way that lifts up Americans to compete in a global workforce while also being open, accessible, and attractive to the world's best talent and future leaders.

Visa and immigration policy together determine who can knock on America's front door for admission and whether that door provides access to a country that welcomes those who step across its threshold. The Department of State issues visas under policy

guidance which, since 2003, has been the province of the Department of Homeland Security (DHS). A visa is only a document that permits an individual to apply at a port of entry for admission to the United States. DHS determines who may enter and how long they may legally remain. The determination of admissibility, the provision of immigration services to those legally admitted, and the enforcement of immigration law are respectively the responsibility of three different DHS agencies, none of which existed in their current form before DHS was created. To put this institutional puzzle together in the service of coherent policy is an enormous challenge, and it has not yet been met.

In this document, we seek to combine visa and immigration policy recommendations into a comprehensive set of guidelines appropriate for today's world.

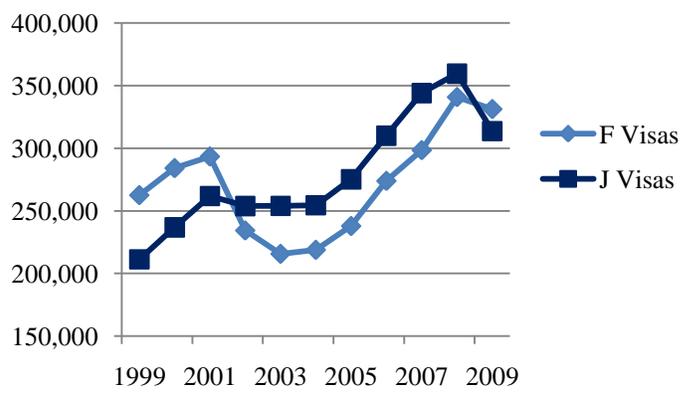
The Unfinished Visa-Reform Agenda

Since 9/11, various barriers, some of them unreasonable or unnecessarily cumbersome, have impeded access to timely visas for international students, scholars, and exchange visitors. Now, eight years later, it is possible to declare partial victory in the effort to rectify this situation. Although exchange visitor (J) visas recovered fairly quickly, issuance of student (F) visas crashed after 9/11 and did not recover to the 2001 level until 2007 (see graph at right). As of 2008, student visa issuance appeared to be back on a robust growth curve, but then declined in 2009, probably in part because of the global economic downturn.

It is thus important to acknowledge that visa processing does not now appear to be a serious impediment for U.S.-bound

international students and exchange visitors. Credit for this success is owed to many unfairly maligned bureaucrats in the U.S. government, especially the State Department's Bureau of Consular Affairs, and many outside the government who pushed, prodded, consulted, and supported—among whom we count ourselves. However, this does not mean that the problems the United States has

F-1 & J-1 Visa Issuance
FY1999-FY2009



Source: State Department's Bureau of Consular Affairs, Visa Issuance Statistics, http://travel.state.gov/visa/frvi/statistics/statistics_1476.html; FY=Fiscal Year (October 1 -September 30)

experienced attracting international students are over—far from it—because the visa-issuance process is only one among many factors that affect U.S. competitiveness for international students. The reality is that the decline in our competitiveness is a function of the transformation of the international student market over the past decade and the absence of a U.S. policy for addressing this reality.

Since 1999, international student mobility worldwide has increased at more than twice the rate of international student enrollment in U.S. higher education institutions—57 percent versus 27 percent, according to data from the Organization for Economic Cooperation and Development and the Institute of International Education. This gap illustrates that over the past ten years, international students increasingly are choosing to pursue higher

education abroad in places other than the United States. This is not entirely by accident, as numerous competitor countries have emerged during this time to seize a larger slice of the growing global marketplace of students. There are the traditional competitor countries, such as the United Kingdom and Australia,

The United States remains on the sidelines of this competition, and as a result, we are not benefiting nearly as much as we should from the growth in international student mobility.

who adopted and implemented aggressive national strategies to attract more international students to their colleges and universities and have seen their enrollments increase since 1999 by 77 percent and 183 percent, respectively. More recently, newer competitors, such as the European Higher Education Area, Canada, Singapore, and New

Zealand, have emerged with national campaigns of their own to boost international enrollments. Even traditional “sending” countries are entering the competition by taking significant steps to improve their own higher education systems in order to attract more students from abroad; in the past year, China, South Korea, and Japan have each announced international student recruitment targets – China: 500,000 by 2020; Japan: 300,000 by 2020; South Korea: 100,000 by 2010.

This trend is likely to continue, especially as other countries increasingly offer more courses taught in English. Yet the United States remains on the sidelines of this competition, and as a result, we are not benefiting nearly as much as we should from the growth in international student mobility. Now is not the time for complacency.

It is time to turn our attention to the unfinished visa-processing agenda. In a market grown

exponentially more competitive, it would be folly to fail to address the remaining problems that place unnecessary obstacles in the way of those we want to attract, negatively impact their incentives to visit the United States, and inhibit scientific collaboration and innovation—all without any positive impact on U.S. safety or security. The State Department must be given the tools to manage the visa caseload and the risks that are inherent in visa adjudication. The actions recommended below will permit a more focused visa policy, less hassle for low-risk visa applicants, and the more strategic deployment of consular resources, and will enhance security.

Rationalizing the Consular Interview Policy

After 9/11, the secretary of state issued temporary guidance to all consular posts essentially prohibiting waiver of personal appearance (interviews) for most visa applicants in order to give the department time to craft an appropriate policy for the new risk environment. Congress unwisely wrote this temporary guidance into law in 2004, thus compelling many would-be visitors to the United States to travel long distances and incur significant expense for interviews that available technology and risk-assessment techniques really make unnecessary. Requiring overworked consular officers to waste time on brief, pro-forma interviews with low-risk visitors does little to enhance our security. Some foreign governments have retaliated by requiring Americans to travel to their consulates for interviews.

- **The most important action required** is for Congress to restore to the secretary of state the authority to grant U.S. consulates discretion to waive personal appearance as appropriate based on risk analysis, subject to

State-DHS guidance, and according to plans submitted by each consulate for State Department approval.

Expediting Reviews for Low-Risk Travelers

With such discretion, the Department of State could ease another key bottleneck in the visa process: Too many resources are expended on the repetitive processing of the same people, which alienates our friends and distracts

Since 9/11, the annual number of visas submitted for Mantis clearances increased an astonishing 2,328 percent, from 24 in 2001 to 55,888 in 2008.

consular attention from those who might wish us ill. Today, renowned scientists who travel to the United States frequently to engage in scientific activities are treated the same as strangers who are first-time applicants every time they require a new

visa. Students and scholars have suffered prolonged separation from their families and have seen their research or their degree programs collapse because they were unable to return to the United States in a timely manner from a routine visit abroad.

- **The department should expedite visa approval for two categories of visitors:** frequent visitors with a prior history of visa approval who have already cleared a background check; and students and scholars in valid status who are pursuing programs in the United States, leave the country temporarily, and require a new visa to return to the same program.

Reforming the Security Clearance Process for Scientists

The security clearance process for scientists must be rationalized. Procedures have long been in place to prevent the proliferation of advanced, sensitive technologies, relevant to the design and production of weapons of mass destruction, by controlling access to such technologies by foreign scientists from countries of concern. These procedures entail the referral of certain visa applications to Washington for inter-agency clearance through a process currently known as “Visas Mantis.”

Since 9/11, the annual number of visas submitted for Mantis clearances has increased an astonishing 2,328 percent, from 24 in 2001 to 55,888 in 2008. Even allowing for the likelihood that Mantis procedures were too lax prior to 9/11, it is impossible to imagine that proliferation-sensitive cases have grown by that order of magnitude. Virtually all Mantis cases that proceed to completion are approved—a sure sign that many of the reviews are unnecessary. But the process periodically breaks down under the weight of the caseload, leaving applicants stranded for months awaiting clearance.

To solve this problem, all of the following needs to be done:

- **The Department of State should provide better guidance** for consular officers on which cases need to be submitted for Mantis reviews.
- **For those on J (scholar) and H (employment) visas**, State should extend the duration of security clearances to conform to the duration of the program for which the clearance is sought, thus avoiding repetitive processing of the same case.

- **State should conduct biennial reviews of the list of controlled technologies (the Technology Alert List, or TAL)**, with the participation of experts in the scientific community and the private sector, to ensure that technologies are removed from the list as they obsolesce or become widely available.
- **Congress should appropriate necessary funds** for the staffing of interagency reviews, and State should establish effective time guidelines to expedite the reviews.

Effective time guidelines for Mantis clearances do now appear to be in place as a result of new procedures announced on June 1, 2009. This is an important advance, which we support and applaud. However, we remain concerned about the long-term viability of any regime for vetting scientists so long as the caseload keeps outpacing resources, and in the absence of an effective system for TAL reviews.

An Immigration Agenda for a Competitive America

Fixing visa processing alone will not create the conditions necessary for the United States to regain and maintain its competitive edge for international students, educators, and researchers. This will require immigration reform. NAFSA supports the administration and those in Congress who seek to enact comprehensive immigration reform as soon as possible that addresses the following needs.

Caps on Employment-Based Immigration

The United States cannot be competitive for the world's most talented students unless those students know that they will have

employment opportunities after graduation, should they wish to pursue them, in order to pursue career objectives or earn money to pay off student loans. And we cannot be competitive for skilled teachers and highly trained scholars from abroad, who are needed on U.S. campuses to help create tomorrow's knowledge and educate the next generation of Americans, without functional employment-based visa categories that are appropriate for them. This will require changes in both green-card and temporary-employment provisions of law.

Green Card Relief

Much of the public debate regarding visas for skilled workers has focused on the H-1B visa, which is a nonimmigrant visa. However, the main factor driving the visibility of H-1B visas in the public mind is that these visas are used as a surrogate for immigrant visas due to the unavailability of green cards. Companies seek to string together a series of temporary fixes, including H-1B visas, for workers whom they consider part of their permanent workforce, while the worker waits in line for years for a green card. If there were adequate availability of green cards, much of the pressure would be removed from the temporary employment-based visa system.

Absent such a fix, it is difficult to envision a temporary-visa solution that both meets the country's needs and is politically acceptable. Therefore, green card relief is the cornerstone of employment-based immigration reform.

- **Congress must provide sufficient green card relief** to ensure that America can attract and employ the talent it requires to maintain its cutting-edge universities and to fuel its high-tech economy.

H-1B Cap Exemption for Certain International Students

Even with green card reform, there will remain a need for temporary employment-based visas for skilled individuals for whom they are appropriate. The H-1B visa cap, currently set by law at 65,000 annually, hampers the ability of American businesses to hire and retain such individuals. This cap has been reached every year it has been in effect, except for times of economic downturn. Recognizing this, current law exempts up to 20,000 international students from the cap who graduate from U.S. higher education institutions with graduate degrees.

- **To ensure that U.S. businesses can hire the foreign talent that they need**, rather than sending it off to a competitor country, the arbitrary 20,000 annual limit on H-1B visas for international students should be removed.

Facilitating Access for International Students

Today's students demand choice—and that is as true of international students as it is of Americans. Immigration policy needs to be flexible enough to permit international students to avail themselves of the myriad educational opportunities that exist in this country.

Rationalizing the Intending Immigrant Criterion

Under current immigration law, applicants for student (F) visas must demonstrate to the satisfaction of the reviewing consular officer that they intend to return home after their course of study—i.e., that they do not intend to immigrate to the United States. Failure to

prove this inherently un-provable negative constitutes by far the most common reason for visa denial for international students. And yet of course, both the applicants and the consular officers know that international students will have the opportunity under other provisions of law to apply for change of status in order to remain in the United States after graduation—and U.S. companies actively recruit them to do so. The reality is that some applicants intend to avail themselves of this opportunity, some don't, and many have no specific intention one way or the other. No public policy purpose is served by basing visa policy on the pretense that this is not so. The decision on whether or not students can become immigrants is best made when they actually apply for that status.

- **The intending immigrant criterion should be eliminated for student (F) visas** for applicants to degree programs who can show that they are *bona fide* students and can meet the other criteria of the law.

Permitting Short-term Visits for Educational or Academic Purposes

In the era of student and scholar mobility, there are myriad reasons for short-term visits to the United States for educational or scholarly purposes. Some common reasons are to attend summer courses, institutes, or seminars at U.S. universities; to study English, often in conjunction with visits for purposes of tourism; to defend Ph.D. dissertations; and to meet university requirements for a brief period in residence as part of an online degree program. Yet, incredible as it may seem, there is often no visa that is strictly legal for this category of visitor—i.e., visitors who intend to be students, but not full-time students in a degree program.

- **Short-term visitors** intending to stay 90 days or less for educational purposes should be able to enter on tourist visas.

DHS Management

With the inauguration of a new administration, it is time to take the management of the Department of Homeland Security to a new level, to fix the early mistakes that are inherent in establishing any such new agency, and to complete the task of integrating the department’s disparate agencies and functions into a coherent whole. With respect to DHS’s immigration functions, this means the following.

Strengthening the Immigration Policy Function

For better or worse, DHS is now the necessary locus of U.S. immigration policy; if DHS cannot conduct a coherent immigration policy, then we won’t have one. Yet the promise of creating three specialized immigration agencies —U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE)—and integrating them into a single new department has not been realized.

- **Each of the three immigration agencies must focus on its core mission** so that DHS can benefit from the specialized distribution of immigration functions.
- **At the same time, mechanisms must be created** to coordinate and integrate the work of these three agencies.
- **For the secretary of homeland security to have any possibility of imposing coherent policy** on the immigration agencies, her

policy office needs to be dramatically upgraded.

Strengthening the policy function will facilitate the achievement of three other necessary reforms, all of which can be accomplished at no cost to security and indeed would enhance it.

CBP: Creating Welcoming Ports of Entry

First, it is simply not the case that treating people with civility and respect when they transit through our ports of entry is incompatible with security. No security gain is achieved when people who want to have a relationship with America go through the experience of entry into the United States and vow never to return.

- **If the United States is to be an attractive destination** for the world’s best talent and future leaders, its ports of entry must look like gateways to a free country.

USCIS: Reforming the Immigration Process

Second, the immigration process needs to be reformed to reduce unnecessary processes and paperwork that waste the time and resources of both the applicant and the adjudicator, with no benefit for either.

- **USCIS should eliminate procedures that duplicate those of other agencies** (such as duplicate background checks or fraud-detection procedures) and focus on its core mission of adjudicating eligibility for immigration benefits.
- **USCIS should create a precertification or “trusted employer” program** that would

eliminate duplicative filing of the same information and redundant reviews by immigration adjudicators for employers that file frequently with the agency.

- **Any new USCIS databases or systems must be developed in coordination with other DHS agencies** and with any other federal department that must either rely on or share information with the new database or system.

ICE: Finding an Appropriate Home for the Student and Exchange Visitor Program

Third, for inexplicable reasons, when the Student and Exchange Visitor Program (SEVP) was created, it was housed in ICE, an enforcement agency whose responsibility is to track down and protect us from terrorists, criminal gangs, human smugglers and traffickers, and the like. This arrangement has served neither ICE nor students and schools well. For ICE, it means that resources that could be focused on the apprehension of people who are dangerous to the security of the homeland are instead diverted to the management of an extensive database of non-threatening people (SEVIS) and to the pursuit of “leads” generated primarily by minor, technical immigration-paperwork violations. For students and schools, it means that complex determinations of immigration status and the adjudication of immigration benefits for students and exchange visitors are made by a police agency that lacks both the mission and the requisite expertise for carrying out these responsibilities. This constitutes a misuse of a specialized agency set up under the law for another purpose, and it negatively impacts international students and U.S. schools for no security benefit.

SEVP’s primary role is to make determinations about immigration status. This

role falls under the purview of USCIS, which has the expertise to understand the intricacies of immigration status and the U.S. higher education system.

- **SEVIS should be housed in USCIS.** ICE should be notified of violations of immigration status by students or exchange visitors requiring its action.
- **DHS should review the goals of SEVP** and rebuild it to fit DHS and stakeholder needs.

Identity Documents and Document Security

Since 9/11, the United States has appropriately become much more deliberate about requiring determination of proper immigration status before issuing identity documents or providing employment opportunities. This process is plagued by the same problem that bedevils many other post-9/11 measures: In the rush to accomplish a laudable goal, functionality and workability go out the window. Often there has not been a proper recognition of the diversity of immigration statuses, or the training required to understand the complexity of the law.

The REAL ID Act, passed without any real debate, includes provisions that effectively bar some international students and scholars legally in the United States from obtaining driver’s licenses, and that require others to renew licenses annually—an imposition that serves no legitimate purpose but does overburden already-swamped Departments of Motor Vehicles across the nation. If this act goes into full effect, it will constitute yet another disincentive for students and scholars to choose the United States, without providing any additional security. Congress is currently considering the PASS ID Act, which would ease the situation somewhat but still retains

many of the same damaging provisions.

- **Congress should repeal the REAL ID Act** and revert to the negotiated rulemaking process for achieving the same objectives that was in process when REAL ID was passed.
- **Failing that, whichever legislation proceeds to full implementation should be amended** to provide that (1) the duration of driver's licenses for F, J, and M visa holders is equivalent to the duration of their program or to the normal duration of the state's driver's license, whichever is shorter, and (2) maintenance of valid SEVIS status is deemed to be sufficient documentation of immigration status for purposes of driver's license renewal.

