

GOING TO THE BACK OF THE LINE

A Primer on Lines, Visa Categories, and Wait Times

By Claire Bergeron

THE ISSUE: Immigration reform frameworks advanced by the Obama administration and a bipartisan group of senators known as the “Gang of Eight” would grant lawful permanent residence to eligible unauthorized immigrants only after current immigration backlogs have been cleared — in other words, sending them to the “back of the line.”

What is “the line,” who is in it, and what does it mean to be at the back of it? This issue brief examines existing pathways and current wait times for lawful permanent residence, and explains why many unauthorized immigrants may already be in the line but are unable to obtain lawful permanent residence (known as a green card) under current law. It also explains why for some there may be no line to join.

I. The Myth of a Single Line: Examining Current Family-Based and Employment-Based Channels

Contrary to popular belief, there is not one “line” that leads to lawful permanent residence (also known as LPR status). Current immigration law provides multiple paths to permanent residency. Two of the most common immigration channels — family-based and employment-based — are the focus of this brief because they are the pathways underlying the current discussions about the immigration line.

The family-based channels enable US citizens and lawful permanent residents to petition the government to grant green cards to certain of their close family members. Similarly, US employers can petition for certain needed workers, allowing the workers to apply for permanent resident status in the employment-based channel.¹ During fiscal year (FY) 2011, 78 percent those granted lawful permanent residence in the United States received LPR status through either a family-based or an employment-based channel.²

Current immigration law is administered on a first-come, first-served basis but is subject to limits on the number of persons who can be admitted as permanent residents in the family and employment channels each year. The demand to immigrate has exceeded these annual limits since the inception of the current immigration system in 1965, particularly

in specific family- and employment-based visa categories. Therefore, some applicants for permanent resident status must wait years or even decades to immigrate after their US relatives or employers petition for a green card on their behalf. This backlog is often referred to as the legal immigration line.

There are six categories of noncitizens who may apply for permanent residence through the family-based channel and five categories of workers who may apply through the employment-based channel (see Table 1). In most of these categories, there is a statutory limit on the number of people who may be granted lawful permanent residence each year.³

Table 1. Family and Employment-Based Immigration Channels and Numerical Limits

Category Name	Composition	Annual Cap
FAMILY CHANNEL		
Immediate Relatives of US Citizens	Spouses and minor children (under 21) of US citizens, and parents of US citizens who are 21 or older	No numerical limit
1st Preference	Unmarried adult sons and daughters (21 and over) of US citizens	23,400
2A Preference	Spouses and minor children of lawful permanent residents	114,200* shared between the 2A and 2B categories
2B Preference	Unmarried adult sons and daughters of lawful permanent residents	
3rd Preference	Married adult sons and daughters of US citizens	23,400
4th Preference	Siblings of US citizens who are 21 and older	65,000
EMPLOYMENT CHANNEL⁴		
1st Preference	Foreign nationals of “extraordinary ability,” outstanding professors and researchers; multinational executives and managers	40,040
2nd Preference	Foreign nationals who hold advanced degrees or demonstrate exceptional ability in the sciences, arts, or business	40,040
3rd Preference	“Skilled workers” (foreign nationals capable of performing skilled labor, requiring at least two years of experience); “professional workers” (foreign nationals who hold at least a baccalaureate degree); and “other workers” (foreign nationals capable of performing unskilled labor)	40,040; but no more than 10,000 visas are available for the subcategory of “other workers” ⁺⁺
4th Preference	“Special Immigrants,” including Afghan/Iraqi translators, international organization employees, and religious workers	9,940
5th Preference	Immigrant investors	9,940

*At least 77 percent of the total visas available to the 2nd Family Preference (2A and 2B) must be allocated within the 2A category.

⁺⁺The *Nicaraguan and Central American Relief Act* (NACARA), Pub. L. 105-100 (November 19, 1997), further limited the number of visas that may be issued in the 3rd preference “other” category, by allowing a reduction of up to 5,000 of the 10,000 visas allocated to this category to offset visas issued to NACARA beneficiaries.

Source: *Immigration and Nationality Act* (INA) §§ 201, 203, 204.

The spouses and minor children (under age 21) of immigrants in the numerically capped preference categories derive LPR status through the principal applicant. These derivative beneficiaries are also counted against the annual numerical limits for the various visa categories.

II. The Process of Filing for Permanent Residence

Most foreign nationals qualifying in the above categories go through a two-step process to attain LPR status.⁵ In the first step, a US citizen or permanent resident relative or a US employer must file a visa petition with US Citizenship and Immigration Services (USCIS). Following approval of the visa petition, the beneficiary of the petition (the intending immigrant) applies for LPR status. This second step may be through application for an immigrant visa at a consular post abroad through the Department of State (consular processing) or for those qualified noncitizens who are already lawfully present in the United States through application to USCIS for adjustment of status in the United States. In both instances, the same qualifications must be met, including the availability of a current visa number, if applicable.

A. Step One: The Visa Petition

The first step in the process, whether consular processing or adjustment of status, is filing a visa petition. This petition demonstrates that a US family member or an employer has a relationship with the intending immigrant that qualifies him or her to apply for lawful permanent residence. Each year, hundreds of thousands of such petitions are filed. In FY 2012, USCIS reported that it received 723,000 family-based initial visa petitions (Form I-130) and 73,000 employment-based

petitions (Form I-140).⁶

When USCIS accepts visa petitions for numerically limited (preference) visas, a priority date for each petition is established. The priority date corresponds with the date on which the visa petition was received by USCIS and determined to be complete. This date establishes where the intending immigrant falls in the immigration line for his or her preference and country of chargeability (which in most cases is the intending immigrant's country of birth). When USCIS determines that the qualifying family or employment relationship has been established, it approves the petition. Only then can the prospective immigrant move to step two in the application process. As described below, this requires the priority date for the petition to be "current."

B. The Wait for a Current Priority Date

Individuals seeking permanent residence in the preference categories may not be eligible to file their applications for permanent residence (step two) immediately after their visa petitions have been approved (step one). To ensure that the number of permanent residence visas issued in a given year does not exceed the statutory limits for each visa category, these applicants are not permitted to apply for permanent residence until the Department of State has certified that a visa number is available in their requested visa category. The Department of State does this by publishing, on a monthly basis, a list of cutoff dates for each visa category. Applicants whose visa petitions bear priority dates that are earlier than the published cutoff dates are considered to have priority dates that are "current"—meaning that visa numbers are currently available for them to use.

For applicants in most family-based and employment-based visa categories, there is an extended waiting period — in some

cases as much as two decades — between the time an applicant’s relative or employer files the visa petition and the time when the intending immigrant’s priority date becomes current, enabling him or her to file an application for permanent residence.⁷ These delays are not the result of deliberate policy choices but are rather the consequence of the way patterns of demand to immigrate and the various limits within immigration law interact.

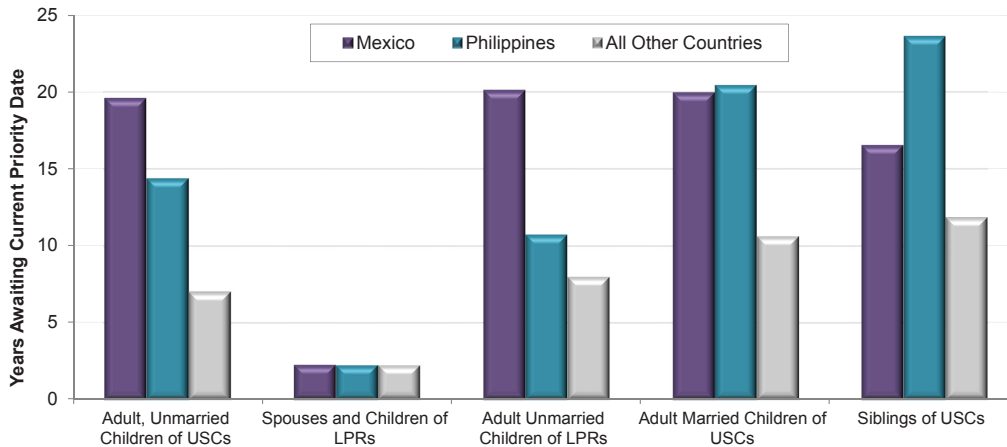
- First, demand for immigrant visas far exceeds the current annual statutory limits in most visa categories. As a result, USCIS receives many more immigrant visa petitions to bring relatives and workers each year than there are visas available. Decades of oversubscription in these visa categories have compounded this problem, creating lengthy backlogs.
- Second, per-country demand is not even. While overall visas are made available on a first-come, first-served basis, to ensure that intend-

ing immigrants from all countries can migrate, current US immigration law places a statutory per-country limit of 7 percent of the worldwide ceiling on the number of nationals from any one country who may receive LPR status in a year.⁸

As a result, nationals of countries with especially high levels of demand in certain family-based and employment-based visa categories (currently Mexico, the Philippines, China, and India) face even longer wait times because fewer visas are issued within individual preferences each year to nationals of these countries.⁹ For example, at present, only applications filed prior to July 22, 1993 for applicants from Mexico or October 15, 1998 for applicants from the Philippines in the family-based first preference category are deemed current.¹⁰ However, immigrants from other countries benefit from this provision because more visas are available for their use in these preferences.

Figures 1 and 2 illustrate the length of the waits that intending immigrant visa

Figure 1. Years Applicants Eligible for Family-Based Visas Spent Waiting for a Current Priority Date as of March 1, 2013



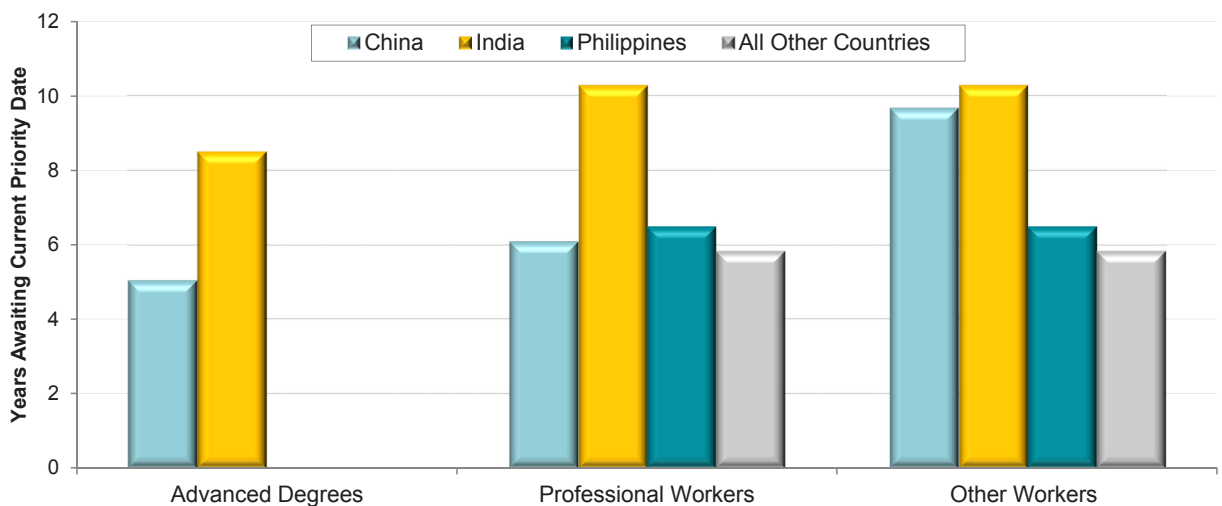
Note: “LPR” refers to lawful permanent resident; “USC” refers to US citizen.

Source: US Department of State, Bureau of Consular Affairs, *Visa Bulletin*, No. 54, Volume IX, (Washington, DC: Department of State, 2013), http://travel.state.gov/visa/bulletin/bulletin_5885.html.

applicants with current priority dates as of March 2013 have encountered since their visa petitions were filed by a US relative or employer. Wait times vary dramatically depending on the applicant’s visa category and country of nationality. Among all family-based and employment-based immigrants currently eligible to

apply for lawful permanent residence, siblings of adult US citizens from the Philippines waited the longest — almost 24 years from the time their visa petition was filed in July 1989 to the time that they became eligible to start the application process in March 2013.

Figure 2. Years Applicants Eligible for Employer-Based Visas Spent Waiting for a Current Priority



Note: “LPR” refers to lawful permanent resident; “USC” refers to US citizen.
 Source: US Department of State *Visa Bulletin*, Number 54, Volume IX.

C. Step Two: The Application for Lawful Permanent Residence

Once a priority date is current, prospective immigrants are notified that they may proceed to step two: applying for an immigrant visa if the intending immigrant is outside the United States, or applying for adjustment of status if the intending immigrant is inside the United States, in most cases in legal status. At this stage, applicants submit additional forms and documentary evidence, biometrics, and the results of their medical exam demonstrating that they are admissible to the United States and still eligible for permanent residence based on the category in the visa petition filed on their

behalf. Finally, applicants must be interviewed by DOS consular officers or USCIS adjudications officers to confirm their eligibility.

Upon approval, applicants outside the United States are issued immigrant visas, which can be used for up to six months to apply for admission at a US port of entry. Assuming nothing has changed affecting admissibility upon arrival in the United States, these new immigrants are admitted as lawful permanent residents and receive their green card by mail within a few weeks. Those who apply through the adjustment of status process receive formal approval from USCIS either at the interview or by mail, and their green cards soon after, also by mail.

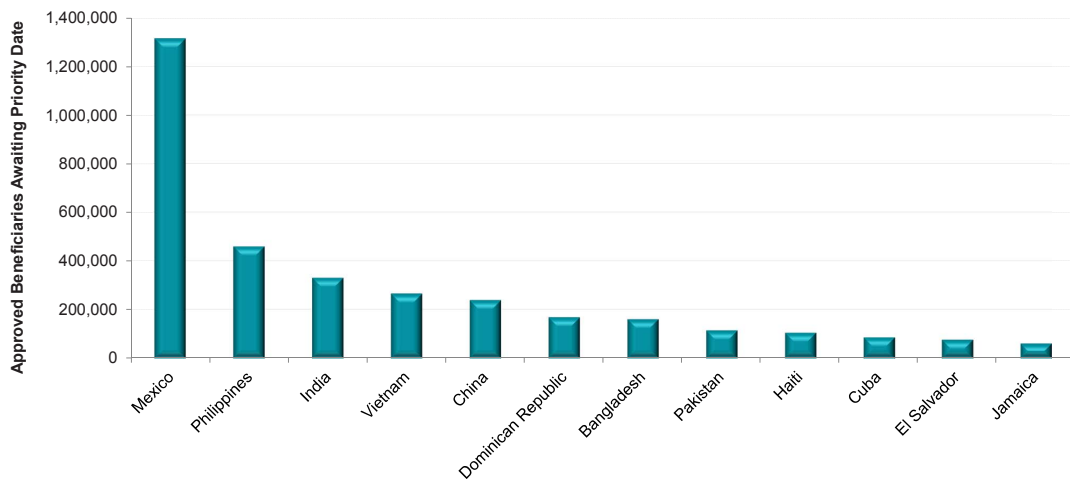
III. How Many Are Waiting in Line? What We Know and What We Don't About the Current Numbers

The Department of State reported that as of November 1, 2012, there were over 4.4 million persons (including principal applicants and spouses and children listed on their petitions) for whom visa petitions had been approved by USCIS but whose cases were still pending for permanent residence (generally because their priority dates had not yet become current).¹¹

Of these 4.4 million persons, the vast majority (97 percent) were applicants for family-based visas.¹²

A majority of these applicants came from just a handful of high-demand countries. Applicants from Mexico alone made up over 1.3 million (30 percent) of those waiting.¹³ Figure 3 shows the 12 countries with the highest numbers of approved beneficiaries who were waiting for immigrant visas as of November 1, 2012. Together, nationals from these countries constituted 77 percent of the total Department of State waitlist.¹⁴

Figure 3. Top 12 Countries with Approved Beneficiaries on the State Department Waiting List as of November 1, 2012



Source: US Department of State, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2012* (Washington, DC: Department of State, 2012), www.travel.state.gov/pdf/WaitingListItem.pdf.

The 4.4 million Department of State estimate does not represent the full extent of the number of applicants “in line” for lawful permanent residence because it includes only those individuals listed on visa petitions to be processed by the Department of State. Thus, this number excludes cases that are currently pending at USCIS because the beneficiary intends to adjust status in the United States. It also excludes

visa petitions that USCIS has not yet approved, often because the priority date is so far in the future that USCIS has not adjudicated the petition.¹⁵ So, in reality, the number of applicants awaiting LPR status could be larger than the 4.4 million figure.

Also, the 4.4 million person backlog also may not accurately reflect the number of people who might ultimately seek

permanent residence in the United States for the following additional reasons:

- Multiple visa petitions (Forms I-130 or I-140) may be filed on behalf of the same beneficiary, causing an overcount in the number of individuals reported to be waiting.
- The derivative beneficiaries (spouse and minor children) listed on a visa petition may not be the same people or the same number of people who qualify to immigrate when the priority date becomes current. This is primarily because the applicant, depending on the preference, may be in a different marital status or may have more or fewer qualifying children.
- Some may not move ahead when their priority dates become current for a variety of reasons, including that they no longer wish to immigrate, no longer qualify, have already immigrated through another means, or have died.

Based on the Department of State data, it is not possible to know how many of the estimated 11 million unauthorized immigrants in the country are also part of the 4.4 million person backlog. This is a critical point because the impact of any new legalization program on the current backlog will undoubtedly depend on how many unauthorized immigrants are being double-counted in both groups.

Nevertheless, the estimated 4.4 million individuals waiting for immigrant visas (4.3 million of whom applied through family-based immigration channels) provide a reasonable estimate of the size of one portion of “the line” and how long it would take to clear it. Currently, US law permits approximately 226,000 numerically limited family-based “preference” immigrants to attain lawful permanent resident status each year.¹⁶ At this rate — assuming the number of immediate relatives filing for lawful permanent residence as well as demand in the employment-based categories remained roughly the

same — it would take 19 years to clear the existing backlogs in the family-based preference categories if no additional visas are allocated. This calculation assumes that *no additional petitions for family-based preference immigrants were filed during this time*. This estimate also does not account for further delays for some applicants resulting from the current per-country limits, which would likely increase the time to clear existing backlogs for nationals of some high-demand countries, such as Mexico.

IV. The Line and the Unauthorized

It is not possible to know what percentage of the current unauthorized population in the United States, now estimated at 11 million people, could qualify under current law because US relatives or employers have already filed visa petitions on their behalf or could do so in the future. However, given that nearly two-thirds of the 10.2 million unauthorized adults have now lived in the United States for ten or more years,¹⁷ it is possible that many unauthorized immigrants have spouses or other relatives qualified to file visa petitions on their behalf under existing immigration law.

However, unauthorized immigrants who may already have started down the path to permanent residency or qualify to start down the path may not ultimately be able to *receive* lawful permanent residence under current law because of bars that prevent unauthorized immigrants from adjusting status in the United States.¹⁸ Consequently, when their priority dates become current, most unauthorized immigrants must leave the United States to obtain immigrant visas at consular posts abroad.¹⁹ If they do so, another provision of law²⁰ bars their re-entry to the United States for either three or ten years, depending upon the amount of time that they were unlawfully present in the United States.

Waivers of the unlawful presence bars are only available to individuals who can demonstrate that their inability to return to the United States would cause “extreme hardship” to a US citizen or LPR spouse or parent. Thus, unauthorized immigrants who lack a US citizen or permanent resident spouse or parent or who cannot demonstrate extreme hardship are effectively precluded from being able to apply for lawful permanent residence through the current process, even if they have approved visa petitions. Further, even among those unauthorized immigrants who have relatives or employers who could petition for them, the risk and uncertainty associated with the USCIS application process may lead many to not apply.

In January 2013, USCIS published a final rule implementing a new filing process for unlawful presence waivers. Under the new rule, individuals seeking unlawful presence waivers who are immediate relatives of US citizens will be permitted to file for and receive “provisional waivers” of their unlawful presence *before* they depart from the country. The rule is intended to minimize some of the risk and uncertainty associated with the unlawful presence waiver process, as individuals whose provisional waivers are approved will be able to leave the country knowing with some certainty that their final waiver applications will also be approved. It will also decrease the amount of time that visa applicants must spend abroad awaiting adjudication of their applications and waivers.

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under which the lawful permanent residence petition is filed.

V. Conclusion

Discussions about unauthorized immigrants going “to the back of the line” are commonplace today as Congress and the Obama administration weigh proposals that would confer legal status on eligible unauthorized immigrants but would provide lawful permanent residence only after all current green card backlogs are cleared.

As this issue brief makes clear, and contrary to popular belief, there is not a single “line” that leads to lawful permanent residence; there are multiple lines based on the immigration channel used and the category

under which the lawful permanent residence petition is filed.

Wait times can vary dramatically — as much as two decades — depending on the applicant’s visa category and country of nationality. As a hypothetical, assuming that current conditions apply going forward and no new visas are made available in the family categories, it would take 19 years to clear the existing backlogs in the family-based preference categories. This calculation assumes that no additional petitions for family-based preference immigrants were filed during this time.

As such, any legalization program that requires applicants to “go to the back of the line” prior to applying for lawful permanent residence will have to contemplate adding additional visas in order to be meaningful.

Endnotes

- 1 Certain renowned or very highly skilled workers may be able to obtain permanent resident status based on their qualifications alone.
- 2 Randall Monger and James Yankay, *U.S. Legal Permanent Residents: 2011* (Washington, DC: Department of Homeland Security, Office of Immigration Statistics, 2012), www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf. Sixteen percent of those who received lawful permanent residence in 2011 did so based on having previously held asylee or refugee status in the United States, making this means the second most common pathway to LPR status (after family-based immigration channels, but before employment-based channels). Because there is no numerical limit on the number of asylees and refugees who may adjust status each year (and thus no backlog in the asylee and refugee adjustment process), this issue brief does not examine grants of lawful permanent residence based on asylee or refugee status. Similarly, the diversity visa program is not discussed here.
- 3 If the limit in a particular category is not met, the law provides mechanisms for unused visas to be used in another category either in the current or the following year.
- 4 Under the *Immigration and Nationality Act* (INA) § 203(b), the statutory caps for the employment-based categories are listed as percentages of the worldwide level of employment-based visas. Table 1 calculates the actual number of visas allocated in each category in accordance with the current 140,000 annual “floor” of employment-based visas.
- 5 Notably, because there is no statutory limit on the number of immediate relatives (spouses, minor children, and parents) of US citizens who may receive permanent resident status each year, immediate relatives who are eligible to adjust status in the United States may file their application for adjustment at the same time their sponsoring relative files the visa petition. Employers seeking workers through the employment preferences must also file a separate petition with the US Department of Labor (DOL), which adds a third step to the steps mentioned above.
- 6 US Citizenship and Immigration Services (USCIS), “Service-wide Receipts and Approvals for all Form Types,” www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all-form-types-performance-data_fy2012_qtr4.pdf. Also during fiscal year 2012, USCIS received 5,922 I-360 petitions filed by individuals seeking lawful permanent residence as “special immigrants” in the 4th preference employment category. USCIS also received 6,041 I-526 petitions—the form filed by immigrant investors seeking lawful permanent residence in the 5th preference employment category.
- 7 A few categories of immigrants in the family-based and employment-based visa channels do not have any wait times. Chief among these groups are immediate relatives of US citizens (minor children and spouses of US citizens and parents of adult US citizens) who are not subject to any of the numerical limitations. In these cases the US citizen relative still files a visa petition with USCIS, which upon approval is sent to the Department of State to begin visa processing. If the intending immigrant is in the United States and will adjust status, the application for adjustment of status may be submitted at the same time the visa petition is filed with USCIS.
- 8 For allocating visas to nationals of countries reaching the 7 percent statutory limit during a year, the law prorates visa issuance by preference within the country ceiling the following year. This provision prevents nationals from one or a few countries from using most visas within a preference category during a single year.
- 9 A notable exception to the per-country limit falls within the 2A family-based preference category (spouses and minor children of LPRs), where 75 percent of the visas issued are not subject to the per-country limit.
- 10 Department of State, *Visa Bulletin for March 2013*, No. 54, Vol. IX (Washington, DC: Department of State, 2013), www.travel.state.gov/visa/bulletin/bulletin_5885.html.
- 11 Department of State, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2012* (Washington, DC: Department of State, 2012), www.travel.state.gov/pdf/WaitingListItem.pdf.
- 12 Ibid.
- 13 Ibid.
- 14 Ibid.
- 15 USCIS typically waits to adjudicate visa petitions with priority dates far in the future until closer to the time that the beneficiaries will have current priority dates as an efficiency measure to ensure that the relationship still exists and the beneficiary is still qualified for the visa category. The agency does not publish statistics on the number of these pending petitions.

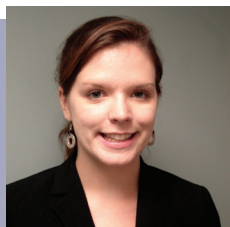
- 16 The *Immigration and Nationality Act* provides a “floor” of 226,000 preference-based immigrants who may be admitted as lawful permanent residents each year; the “ceiling” on such admissions is the statutory cap of 480,000 family-sponsored immigrants *minus*: the number of immediate relatives who were admitted during the prior fiscal year; the number of children admitted as permanent residents in the prior fiscal year who were born subsequent to the issuance of a visa to an accompanying parent; the number of children admitted as permanent residents in the prior of fiscal year who were born abroad to an LPR parent during temporary trips outside the United States; and the number of certain noncitizens paroled into the United States two years prior. To this number is added any unused employment-based visas from the prior fiscal year. In recent years, the number of immediate relatives admitted as lawful permanent residents has always far exceeded 254,000 each year, making the statutory floor of 226,000 effectively the number of preference-based immigrants who may be granted lawful permanent residence.
- 17 Paul Taylor, Mark Hugo Lopez, Jeffrey Passel, and Seth Motel, *Unauthorized Immigrants: Lengths of Residency, Patterns of Parenthood* (Washington, DC: Pew Hispanic Center, 2011), www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/.
- 18 INA § 245(c).
- 19 There is an exception to this general rule under INA §245 for some unauthorized immigrants who were lawfully admitted to the United States and who are applying for lawful permanent residence based on being the immediate relative of a US citizen.
- 20 INA §212(a)(9)(B).

Acknowledgments

The author wishes to thank Lisa S. Roney, former Director of Research and Evaluation at US Citizenship and Immigration Services, for her technical review and advice, as well as MPI's Doris Meissner and Muzaffar Chishti.

This is the first in a series of issue briefs examining issues that are arising in the context of the current debate over immigration reform in the United States. Additional briefs and other research and resources from the Migration Policy Institute can be accessed at www.migrationpolicy.org/CIR.

About the Author



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Cover Design and Typesetting: April Siruno, MPI

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Suggested citation: Bergeron, Claire. 2013. *Going to the Back of the Line: A Primer on Lines, Visa Categories, and Wait Times*. Washington, DC: Migration Policy Institute.

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