

The Diversity Lottery: Keeping the Dream Alive

by Herbert A. Weiss

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As a practicing immigration lawyer for close to 45 years, I have enjoyed a bird's-eye view of our immigration laws and system for nearly half a century. During my years of practice, I witnessed many significant changes to our immigration laws including: 1) The Refugee Act of 1980, 2) The Immigration Reform & Control Act of 1986 (Simpson-Mazzoli) (IRCA), 3) The 1986 Marriage Fraud Act, 4) The Immigration Act of 1990 (IA90), and 5) The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). All of these legislative enactments significantly impacted the structure and enforcement of our immigration laws.

There has been one common, consistent refrain that I have heard during my many years of practice: that our immigration laws and system are broken and in need of urgent repair. At one point I grew tired of the refrain and wrote an article espousing that all the critics and naysayers were barking up the wrong tree. Our immigration system was not broken and rarely has been since the adoption of The Immigration and Naturalization Act of 1965 (Hart-Celler). With strong backing from President Kennedy and his brother Teddy, the 1965 Act largely redressed the discriminatory features that had found their way into our immigration system, such as the national origins quota system and discrimination against Asians. The gist of my article was that rather than a broken system, whatever changes that were made to our immigration laws post-1965 were merely responses to a different set of political problems, circumstances, and priorities that prevailed at the time of their adoption. And things have rarely been so bad or problematic that drastic reform was necessary.

To this author, none of the previously referred to major revisions to our immigration laws over the past 50 years were adopted during a time that could be called a crisis affecting the country. Instead, changes to our immigration laws occurred because Congress and the American people perceived a problem and then fashioned a solution. The Refugee Act of 1980 was enacted to align U.S. law with international and U.N. concepts and modalities concerning the definition of refugees and asylees and how they were to be treated. The 1980 Act was not driven by a refugee crisis at the border, or elsewhere, or by an uprising such as occurred in Hungary in 1956, which produced a large influx of refugees seeking relief from Communist oppression. IRCA (1986) was the product of Congress's desire to control undocumented immigration through a new system of

“employer sanctions” that penalized employers who hired undocumented workers. The trade-off to get such legislation passed was an amnesty for certain undocumented foreigners that resulted in several million of them receiving temporary status and then eventually green cards. The Marriage Fraud Act (1986) was passed because Congress believed that too many foreign nationals were gaming the system by entering into phony marriages with U.S. citizens or lawful permanent residents in order to gain green card status. IIRAIRA was designed to deal with immigration and employment issues that were impacting the country in the new globalized economy and technocratic age that the United States was entering as it approached the 21st century. IIRAIRA was a response to those who sought greater toughness in dealing with illegal immigration in general and persistent immigrant law violators in particular. Among other things, it made major changes to the concept of “entry,” a key term in the administration and enforcement of our immigration laws. It added to the grounds of inadmissibility to the country and the grounds for deportability, and it expanded the number and nature of crimes included in these grounds, even adopting a new term in immigration law known as “aggravated felony.” It also redesigned rules for relief or waivers from grounds of deportation such as suspension of deportation (re-named cancellation of removal) and a type of waiver known in the field as a “Francis” or 212(c) waiver.

On May 17, 2019, President Trump unveiled a proposal that called for a major overhaul of our immigration system. He had called for such a change earlier in his administration, but it had generated only modest enthusiasm in a Congress that seemed far more preoccupied with alleviating the problems facing DACA children, *i.e.*, undocumented persons brought to the United States unlawfully as children. His speech began with a discussion of illegal immigration at the border and offered a proposal to adopt the “most complete and effective border security package ever assembled by the country.” The President called for enhanced border security in response to the problems the country has been experiencing at the southern border for many months (some might say it has been for many years), as tens of thousands of Central Americans have made their way there in order to gain entry into the United States. Even some of the president’s staunchest critics and political opponents have stated publicly that the border is a mess if not in crisis mode. Where Americans have differed is what to do about it.

Nothing resembling an emergency or a “crisis” can be fairly said to be driving President Trump’s most recent push to change our current legal immigration system from its family-based orientation to one emphasizing skills and education. This push to change the orientation of our immigration system was contained in the second part of the president’s May 17 speech. The president believes our legal immigration process is “totally dysfunctional.” The changes he is proposing mirror similar recommendations made in the past. In 1995, the late Texas Congresswoman Barbara Jordan chaired the U.S. Commission on Immigration Reform. The commission recommended a scaling back of family chain-migration by eliminating certain family-based admission categories, *e.g.*, siblings of U.S. citizens. It also encouraged the country to focus on the admission of highly skilled individuals to support the national interest by

bringing to the United States individuals whose skills and talents would benefit our nation, and it went so far as to recommend the elimination of the admission of unskilled workers. Many other Western democratic republics, *e.g.*, Canada, Australia, and New Zealand, have also adopted immigration systems that stress skills-based and education-based immigration and attracting immigrants who will be easier to acculturate and assimilate. According to the president, the three Western countries previously referred to and others with merit-based systems—those with points-based systems include, among others, Sweden, Spain, Norway, and Japan—admit 60 to 75 percent of their immigrants based on skill or merit. In comparison, only 12 percent of U.S. immigrants in 2017 came from the employment-based preference category.

In support of his initiative to change our immigration system to one more firmly based on skill and merit that will attract the “best and brightest” among foreign nationals, the president pointed to several ills he believes plague our current system: 1) Family-based immigration attracts low-skilled workers who take jobs away from the most vulnerable American workers and drives down wages. The earning power of these vulnerable Americans is something the government should be doing its utmost to protect. 2) Highly educated, even brilliant, foreign nationals who come to the United States to study and who want to remain post higher education often do not have a family-based connection. The employment-based system can be difficult to navigate even for them, and backlogs that currently plague employment-based immigration (especially for Chinese and Indian nationals) are driving many to leave the United States and take their considerable talents and U.S.-acquired training and education with them. 3) Because we do not encourage high-end talent, U.S. companies are moving their offices to other countries that offer them a greater pool of talent, and entrepreneurs who want to build businesses are taking their ideas, talent, and capital elsewhere.

In a study conducted in 1997 that seems to support the president’s belief regarding the limited economic benefits that our current immigration system brings to the country, the National Academy of Sciences (NAS) found that immigrants only contribute roughly from \$1 to \$10 billion to the U.S. economy, a negligible amount. The NAS is a private, nonprofit organization of the country’s leading researchers. Many regard election to membership in the NAS as one of the highest honors that a scientist can receive. Although the study is more than twenty years old, it is not unreasonable to believe that the impact of immigration to the United States in terms of dollars generated to our GDP is not significantly greater or lower at the present time. The study acknowledged, however, that immigrants’ contribution to the U.S. economy represented a “significant positive gain in absolute terms.”

Our current immigration system, which heavily favors family-based immigration and fosters chain-based migration, is largely based on the concept of family reunification. Those who favor a continuation of the current system believe that this important objective of our historical immigration policy should be preserved. Advocates for family-based immigration also point to the fact that the potential bankruptcy of our social security system safety net can be solved by maintaining or even increasing family-based immigration. A decline in U.S. fertility rates over

the last decade or so and the fact that there are less people working today than ever before to support an increasing number of retirees are realities that seem to bolster this argument. But the plan unveiled by the White House does not call for a reduction in the number of green cards issued—around one million per year over the last decade—so if family-based immigration is decreased while employment-based immigration is increased, the net effect on the solvency of our social security system of the president’s proposal should at worst be zero. Family-based immigration advocates also believe that emphasizing family connections helps our country benefit from the wide diversity of people who come here and the different cultures, cuisines, and other positive traits that foreign nationals bring with them.

Regardless of where one stands on the president’s proposal to remodel the immigration system to emphasize skills-based immigration, there is one aspect of his proposal, supported earlier by the 1995 Jordan Commission, that is based neither on supporting family values nor promoting skills-based immigration. This aspect is his call to eliminate the diversity visa (DV) lottery, which was introduced by IA90. The DV lottery allows foreign nationals from most countries of the world, deemed low-admission countries, to participate in a random selection lottery that can award up to 50,000 green cards each year to lucky winners. Low admission countries are defined as any country with fewer than 50,000 natives admitted to the United States in the previous five years. Prohibited from participating in the 2018 DV were nationals from at least eighteen countries from which large-scale immigration to the United States has occurred, *e.g.*, Dominican Republic, Mexico, China, India, and the Philippines.

To be eligible for the DV program, applicants must be admissible to the United States under the Immigration & Nationality Act and have either a high school education or at least two years of recent qualifying work experience. The odds of being selected for a DV are very small as the number of applications filed has averaged over thirteen million each year for the last few years. Those receiving a DV lottery immigrant visa comprise roughly only four to five percent of those immigrating to the United States each year.

The DV moderates to some limited extent the fact that our immigration system heavily favors individuals who have close family ties to certain qualifying relations who live in the United States or who have U.S. employers who seek their services. The DV was promoted by those who believe that diversity is a core American value encouraging immigration from a broad swath of countries. Many who support the DV apparently believe that by creating more diversity in our immigration pool, a greater balance in our immigration system is achieved. Support for the DV also came from those who thought that the Immigration Act of 1965 did not go far enough in reversing the discrimination that certain nationals faced prior to the Act’s adoption, thus leaving many countries still underrepresented in our population makeup and perpetuating certain vestiges of discrimination.

Because the DV does not promote the values of family-based or employment-based immigration, the two linchpins of our immigration system other than marriage to a U.S. citizen, there have

been many calls for its elimination. The DV received a major black eye on October 31, 2017, when an Uzbekistan national who had entered the United States through the DV program drove a rented car into a crowd of people out for a stroll or run on a promenade in Lower Manhattan. This horrific act caused the deaths of eight people and injured dozens. Among the deceased were two Argentinians visiting the United States together and celebrating their graduation from school thirty years ago. The incident was commonly accepted as an act of terrorism as the culprit was of the Muslim faith and claimed to be acting on behalf of ISIS. His case is currently wending its way through federal court and the accused could receive the death penalty if convicted. The DV received an additional black eye in July 2019 when it was determined that a DV immigrant from Kazakhstan who became a naturalized U.S. citizen in 2006 went on to become an ISIS sniper in Syria.

Notwithstanding such incidents, which appear to be few and far between, as long as proper and meticulous screening of DV immigrants takes place, it would be an overreaction to derail the DV program based solely on the acts of terrorists or mad persons. Immigration under the family-based or employment-based preferences are just as likely to yield terrorists or disturbed persons. The only answer to keeping out immigrants of this kind is better vetting. In the final analysis, it seems likely that most Americans would agree that the question of perpetuating the DV program should ultimately depend on whether or not it benefits America.

There is merit to both sides of the debate on keeping the DV. Diversity is a worthwhile value if it can be made to work and perhaps should be considered a “core value” of a 21st century major Western democracy such as ours living in an inter-connected world that becomes smaller by the day. On the other hand, many believe that our country is already diverse enough and that we are having a great deal of trouble assimilating certain newcomers to the American mainstream and melting pot. And besides, the DV does nothing to foster the two major cornerstones of our immigration system: family reunification and addressing labor shortages and needs.

So, despite there being merit on both sides, who is ultimately right about the DV? Is it those who see it as a core value or those who see it as an unnecessary or even detrimental dollop of ill-conceived generosity in our immigration system, ill-suited to the needs and interests of the nation-state in the modern world or, to come right down to it, the best interests of the United States? Is it fair for those who believe the DV promotes a core value to argue that advanced liberal democracies that have adopted meritocratic or point-based immigration systems are opponents or unsympathetic to diversity because they do not have a DV or its equivalent? Is it fair to castigate countries that do not have a lottery for favoring immigrants who bring real, demonstrable skills and education, including the ability to speak their native language, to the table? Is it not more honest to say that those countries that have adopted meritocratic immigration systems may have, in doing so, simply employed a rational calculus from which they concluded that the ill-educated and poorly skilled have little to offer and, potentially, much to detract from their country?

Many would agree that it is wrong to accuse countries that have adopted meritocracy as the linchpin of their immigration system of intolerance, cold-heartedness, or if one wants to be particularly nasty, “racism” simply because they want to foster what they believe to be in their nation’s best interests from a purely pragmatic point of view. Unlike many other advanced Western democracies, however, immigration to the United States since the nation’s founding has always been about more than the calculation of cold, naked material or national interests. The arc of our history, despite some episodes of discrimination, has been one of unmitigated and unashamed generosity and welcome to the foreign born who have made their way to our shores. No nation like ours boasts so loudly, and with good reason and great pride, that it is a “nation of immigrants.”

The DV, because it is non-meritocratic, allows us to continue in this proud tradition. But the DV offers something more than merely perpetuating a noble and worthwhile tradition. When nations calculate their interests, they look not only to “hard power,” *e.g.*, military and economic, but to “soft power” as well, such as culture, tradition, support for civil and human rights and the rule of law, etc. And sometimes it is these soft power attributes that can pack and wield as much power and influence as a nuclear-powered submarine or a highly advanced cyber network. Stalin, in order to prove his military superiority, once smirked, in so many words, about the Pope’s power: “Yes, but how many divisions [military] does he have?” Stalin’s communism was eventually consigned to the dustbins of history; the Pope and the Catholic Church live on.

What the DV allows the United States to do is to confirm and validate its honorable and honored tradition and continued relevance as the hope of mankind to the oppressed and poverty-stricken peoples of the world. This has real value because it enables the people of the world to believe with reason that there is still a country that respects freedom and values what they could contribute to our country if given the chance, not to mention a country that believes in their innate ability to join us in the grand experiment of American democracy, freedom, and exceptionalism. These natives of other lands really do look at America as a “city on a shining hill,” a “Golden Medina,” a country that is willing to accept “wretched refuse” from “teeming shores.” In other words, we are still the land of opportunity and a beacon of hope to the people of the world. How do you quantify the value of that? As the commercial says, it is likely “priceless.” If you *could* quantify it, it would arguably be a very big number. We should remember that the people of the world do not “run away” from America but, if given the chance, “run to” America. And once they get here, the vast majority keenly wants to stay and will pay almost any price to do so. This has been the case for practically all of our history.

One might view this image of America as the “Grand Welcomer” as sentimental nonsense and particularly unsuited to the needs of the nation-state in the 21st century. But this would be a short-sighted view. The United States was able to win the 45-year Cold War against the Soviet Union in part because of our strong, consistent dedication to and insistence that the nations of the world respect “human rights.” This dedication was enshrined by our signature to the Helsinki Accords (1975) that made freedom and the protection of human rights important moral and

political commitments to which the Soviet Union had to at least pay lip service. The Helsinki Accords in turn gave strength to oppressed people everywhere such as Anatoly Sharansky and other Soviet refuseniks who were able to withstand their cruel imprisonment, brutal interrogations, and other Soviet depredations because they had reason to believe that the United States, the world's most powerful nation, had not forgotten them, nor their voices and suffering, and would continue to press the Soviets for their liberation and an end to totalitarian repression.

My more than 40 years of experience as an immigration lawyer has taught me another value of the DV. Many foreigners who wish to immigrate here are precluded from doing so because they have neither family nor an employer available to sponsor them. But many lacking such relationships are nonetheless desperate to stay. If they are unable to claim that they would be the victims of persecution in their homelands, their only recourse for immigration purposes in most cases is to enter into a marriage with a U.S. citizen or green card holder. As one can imagine, a good number of these marriages are of dubious quality and quite a few are outright fake. To foreigners experiencing this immigration bind, entering into a "loveless" marriage, or worse an illegal sham marriage, is not an exorbitant price to pay for the opportunity to immigrate. A significant part of the budget of the U.S. Citizenship & Immigration Services (USCIS) is spent on investigating the bona fides of what appear to be "immigration marriages," *i.e.*, those entered into solely for the purpose of obtaining an immigration benefit. The Marriage Fraud Act of 1986 was Congress's response to a significant fraud problem plaguing the system.

Does the DV help to curtail marriage fraud? It does, perhaps, to some degree. My faith in humanity leads me to believe that there is a substantial number of people who, as long as they can realistically believe that there is a lawful option open to them to immigrate to the United States no matter how limited, will not try to game the system.

The current DV system, however, is in need of changes. The continued emphasis on diversity, frankly, should be eliminated. The DV should simply become a lottery. Few countries, if any, have provided a more fair, hospitable, and generous immigration system over time than ours. The lottery should not focus on addressing past grievances as if we have something of which to be ashamed or that demands redress. It should be open to people from all countries of the world no matter how many nationals they have sent to the United States in prior years. Although it appears harsh and discriminatory, retirees should be excluded. The United States benefits most when it has young, ambitious people, full of spit and vinegar, and who have huge dreams to improve themselves and their families. Older people should recognize and accept that the dream and hope that America offers cannot be limitless and is best suited to and appropriate to the needs of the young. And for older people, the EB-5 investor program is available to some who have been able to accumulate assets.

Requiring a greater level of English command than is currently the case is probably a good idea as well. And public charge requirements should be enforced and DV applicants required to be self-sufficient, although some leniency may be called for because lottery immigrants must, like

all Americans, have the chance to fail from an economic standpoint. Failure is no sin and no reflection on moral character considering the demanding nature of our competitive capitalist system. And, perhaps, the number of lottery visas available should be reduced or raised. That is a political question and is within Congress's ambit to decide.

If the DV has suffered some failures in the past, that is no reason to give up on it. Our country and its leaders should take note of what our immigrant tradition means to the people of the world and to our national identity. By allowing natives from other lands to nurture the dream of coming to America, we honor our tradition and what we have always stood for. We also foster good will, and this has real value even in a world that is becoming more pragmatic and less idealistic by the day. It is better to let the people of the world believe that there is still a place for them in America and that we have not shut our doors to them because we believe they are not "good" enough.

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