

# EIGHT KEY U.S. IMMIGRATION POLICY ISSUES

State of Play and Unanswered Questions



By Doris Meissner and Julia Gelatt

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# Table of Contents

**Executive Summary ..... 1**

**Introduction ..... 2**

**Issue No. 1. Border Security and Immigration Enforcement Funding 3**

    A. The New Challenge: Changing Flows ..... 4

    B. The Need for New Responses ..... 6

**Issue No. 2. The Attorney General’s Referral and Review Power ..... 8**

    A. Referral and Review Power ..... 8

    B. The Trump Administration Reviews ..... 9

    C. Looking Ahead ..... 9

**Issue No. 3. Unaccompanied Minors ..... 10**

    A. New Fingerprint Policies ..... 11

    B. Increased Use of Emergency Shelters ..... 12

**Issue No. 4. Interior Enforcement Priorities ..... 13**

    Detention ..... 15

**Issue No. 5. Three- and Ten-Year Bars to Adjustment of Status ..... 16**

    The 1996 Law ..... 16

**Issue No. 6. Refugee Resettlement ..... 17**

    A. Cutting Refugee Admissions Levels ..... 17

    B. Extreme Vetting of Refugees ..... 18

**Issue No. 7. Skills-Based Immigration: The H-1B Program ..... 20**

    A. H-1B-Dependent Employers ..... 20

    B. Further Reforming the H-1B Visa ..... 22

    C. Administrative Reforms ..... 23

**Issue No. 8. The Agriculture Sector: Relief for Farmers and Workers 24**

    A. Grower and Worker Concerns ..... 24

    B. AgJOBS Proposal ..... 25

**Conclusion ..... 26**

**Works Cited ..... 27**



## Executive Summary

The United States is witnessing one of the most dynamic policy periods in the immigration arena, with the issue continuing to be central to the Trump administration's domestic agenda. From the earliest days of the administration, executive-branch tools—including presidential executive orders, proclamations, departmental policy memoranda, proposed regulatory changes, and an array of other actions—have been used to recalibrate longstanding policy and practice across much of the U.S. immigration system. This executive-branch activism contrasts with a nearly two-decades-long inability by Congress to legislate changes to the U.S. immigration system, except for appropriations that have demonstrated support across administrations and political parties for major funding increases for immigration enforcement, especially in the years since 9/11.

This period of significant action by the executive branch, which has surfaced a real questioning of long-held immigration policies and practices, presents a new opportunity for lawmakers to inject policy ideas of their own into what have been prolonged, often stagnant, legislative debates.

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*There are other, less visible yet important policy areas that deserve review and could benefit from more information sharing with the public and discussion of possible policy choices.*

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The 116<sup>th</sup> Congress began in January 2019 amid a partial federal government shutdown centered on questions of border security funding. Congress has thus far focused its attention primarily on certain high-profile administration measures, such as the separation of families at the U.S.-Mexico border in 2018 and spiking migrant flows from Central America, as well as the future of DREAMer and Temporary Protected Status (TPS) populations whose legal status programs in the United States were terminated by the Trump administration and are now being litigated in the courts.

Beyond these and other immigration topics that have received sustained public attention, there are other, less visible yet important policy areas that deserve review and could benefit from more information sharing with the public and discussion of possible policy choices. This report identifies eight such issues and unanswered questions surrounding them. It also highlights possible policy solutions or opportunities where, in the short term, Congress could begin conversations to advance future legislation.

Among the eight topics highlighted in the report that would benefit from additional information and discussion are:

- **Border security and immigration enforcement funding.** Debate over funding for U.S.-Mexico border security was at the heart of budget negotiations that forced the federal government into partial shutdown in late 2018 and early 2019. Yet a key question remains unanswered: What achievable definition of border security should the federal government be measured on? What spending is likely to generate the highest returns on investment going forward? And, among shifting flows and increasing numbers of arrivals, are actions aimed at deterring migration instead incentivizing crossings that are on the rise? These questions are significant, both as migration patterns at the Southwest border are changing rapidly and at a time the United States is spending 34 percent more on immigration enforcement than on all other principal federal criminal law enforcement agencies combined.
- **Interior enforcement.** The administration greatly expanded the categories of noncitizens considered priorities for arrest and deportation from within the United States to virtually



everyone who is present illegally. Arrests by U.S. Immigration and Customs Enforcement (ICE) jumped 46 percent from fiscal year (FY) 2016 to FY 2018, though still remained well below earlier peaks. Yet arrests of noncitizens without criminal convictions rose 426 percent during this period. Given the finite nature of enforcement resources, is there a public policy gain in generalized enforcement versus focusing resources on those with criminal records or who pose other public-safety or security threats?

- **High-skilled temporary immigration.** The H-1B visa program is the main vehicle through which U.S. employers can sponsor skilled foreign workers for admission. Criticized for decades for displacement of U.S. workers and other reasons, the program has long been ripe for reform. Even as employers deemed dependent on H-1B workers have faced additional labor-protection requirements, they still pay their H-1B employees less than do employers less dependent on H-1B workers, and employ fewer workers with advanced degrees. What further reforms would address concerns about the replacement of U.S. workers while still supplying a necessary workforce for employers? H-1B rejection rates have been rising, from 6.1 percent in FY 2016 to 15.5 percent in FY 2018.
- **Bars to adjustment of status.** Most unauthorized immigrants eligible to be sponsored for a green card by a family member or employer are unable to do so because they would need to leave the United States to apply, triggering a three- or ten-year bar on their re-entry under terms of a 1996 law. While it is difficult to estimate precisely how many of the country's 11.3 million unauthorized immigrants would be affected by the bars, the Migration Policy Institute (MPI) estimates that roughly 1.6 million spouses and minor children of U.S. citizens or green-card holders are effectively blocked by the ten-year bar from obtaining a green card. With nearly two-thirds of the unauthorized population having lived in the United States a decade or more, should Congress revisit the bars to re-entry to provide a path to legal status for those who are married to U.S. citizens or would otherwise be eligible for legal permanent residence?

As immigration will undoubtedly remain at the forefront of policy debates and political considerations over the next two years, particularly with a national election nearing in 2020, Congress, as with the courts and the executive branch, is likely to play a prominent role in this area. Determining immigration policy and practices that advance American values and serve U.S. national interests will require significant attention, informed debate, and careful examination at all levels and branches of federal government activity.

## Introduction

Because President Donald Trump has made immigration a high priority for his administration, it has elevated the issue into daily public life and the political and governing processes in ways unseen in earlier periods. From the travel ban the administration announced in its first week to actions in 2018 that limit access to the asylum system at the Southwest border, a wide array of recent immigration policy changes have sparked continuous media coverage and court actions, as well as advocacy and sharp divisions among policy actors at all levels of government and in the broader public.

The deployment of National Guard and active-duty troops to the U.S.-Mexico border, the 35-day partial federal government shutdown over the border wall, and round-the-clock media attention to “caravans” of Central American migrants headed across Mexico to reach the U.S.-Mexico border have brought the issue of border security to the fore in new ways.

There are numerous other facets of immigration policy, however, that pose important questions for the country. This report points to eight wide-ranging issues that merit increased discussion and answers to





key questions, and, in some cases, new policy ideas that could lay the groundwork for legislative solutions. For each, the report provides a brief summary of the issue, relevant analysis or evidence, and areas where additional information could clarify outcomes or suggest policy fixes.

The report touches on each topic lightly, providing a quick digest of topline developments and analysis intended to spark more in-depth discussion and attention by decisionmakers, elected officials, immigration stakeholders, and the public regarding the impact and public policy importance of these eight issues.

## Issue No. I. Border Security and Immigration Enforcement Funding

Recent debates around immigration enforcement funding have centered almost entirely on the Trump pledge that a wall be built along the U.S.-Mexico border and his \$5.7 billion ask during negotiations of fiscal year (FY) 2019 government funding that led to the 35-day partial government shutdown.<sup>1</sup> The focus on the wall has obscured a deeper reality: The dramatic growth and investment in border and immigration enforcement that Congress, under the leadership of both political parties, has successfully provided since 9/11. Those investments have been made up of a broad mix of support for Border Patrol and port-of-entry (POE) staffing, facilities, surveillance and contraband detection technology, lighting, aircraft, fencing, and other equipment.

As a result, immigration enforcement agencies have become the top recipients of federal law enforcement dollars. In fiscal year (FY) 2018, Congress appropriated \$24 billion to fund the principal immigration enforcement agencies—U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE)—as well as the Office of Biometric and Identity Management (OBIM), which is responsible for the electronic fingerprint system that screens foreign travelers arriving in the United States.<sup>2</sup>

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*Immigration enforcement agencies have become the top recipients of federal law enforcement dollars.*

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That spending level is 34 percent more than the \$17.9 billion allocated for *all* other principal federal criminal law enforcement agencies combined—i.e. the FBI, Drug Enforcement Administration, Marshals' Service, Secret Service, and the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (see Figure

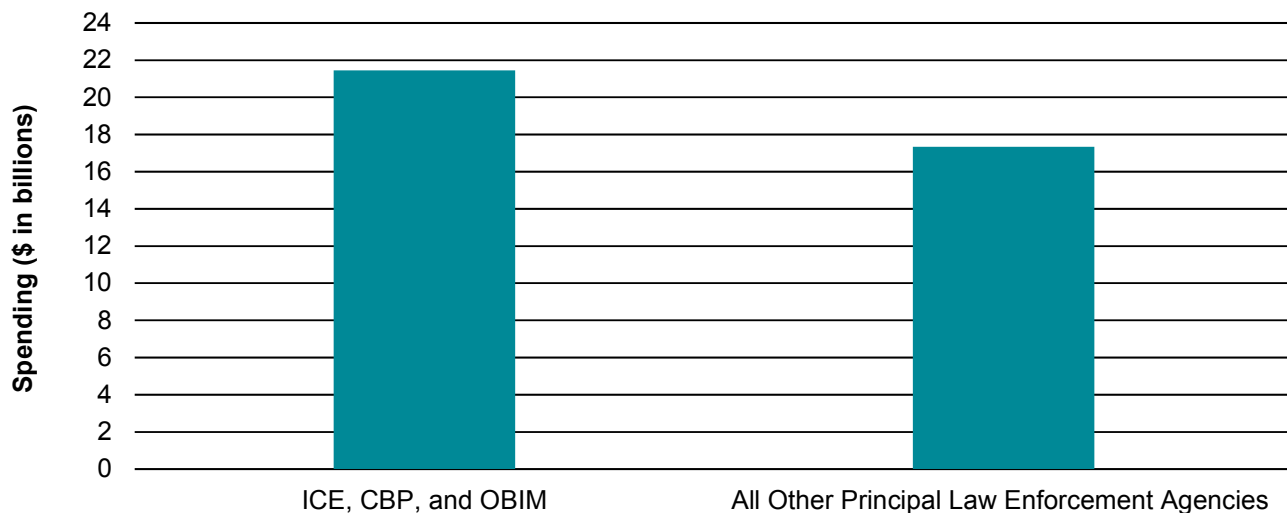
1 For fiscal year (FY) 2020, the Trump administration is seeking more than \$8 billion to build border barriers. And on May 1, the White House sent Congress a \$4.5 billion emergency spending request, including \$1.1 billion for border operations, citing the “humanitarian and security” crisis at the U.S.-Mexico border. See Erica Werner, Maria Sacchetti, and Nick Miroff, “White House Asks Congress for \$4.5 Billion in Emergency Spending at Border,” *Washington Post*, May 1, 2019, [www.washingtonpost.com/business/economy/white-house-asks-congress-for-45-billion-in-emergency-spending-for-border/2019/05/01/725e2864-6c23-11e9-8f44-e8d8bb1df986\\_story.html?utm\\_term=.68b62cd9b828](https://www.washingtonpost.com/business/economy/white-house-asks-congress-for-45-billion-in-emergency-spending-for-border/2019/05/01/725e2864-6c23-11e9-8f44-e8d8bb1df986_story.html?utm_term=.68b62cd9b828).

2 The Department of Homeland Security (DHS) Office of Biometric and Identity Management (OBIM) provides biometric identification services to federal, state, and local governments to help accurately identify the people they encounter and determine if any pose a risk to the country. See DHS, “Office of Biometric Security,” last updated November 18, 2018, [www.dhs.gov/obim](https://www.dhs.gov/obim).



1).<sup>3</sup> Slightly more than two-thirds—\$16.3 billion—was allocated to CBP to support its border security mission, up from \$9.5 billion a decade earlier.

**Figure 1. Federal Funding for Immigration Enforcement and All Other Principal Federal Criminal Law Enforcement Agencies, FY 2018**



*Note:* ICE = U.S. Immigration and Customs Enforcement; CBP = U.S. Customs and Border Protection; OBIM = Office of Biometric and Identity Management. “All other principal criminal law enforcement agencies” are the Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service, Marshals Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives.

*Sources:* Department of Homeland Security (DHS), *FY 2020 Budget in Brief* (Washington, DC: DHS, 2019), [www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_FY-2020-Budget-In-Brief.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf); Justice Department, “Summary of Budget Authority by Appropriation” (budget document, Justice Department, Washington, DC, 2019), [www.justice.gov/jmd/page/file/1142461/download](https://www.justice.gov/jmd/page/file/1142461/download).

### A. The New Challenge: Changing Flows

The growth in border spending has paralleled dramatic decreases in numbers of Mexican migrants apprehended by the U.S. Border Patrol while trying to cross the Southwest border. In FY 2000, the peak year for apprehensions, Mexicans made up 98 percent of the 1.6 million apprehensions at the U.S.-Mexico border. This share began to decrease in FY 2004, and by FY 2017 Mexicans accounted for just 42 percent of apprehensions.<sup>4</sup> In recent years, the overall number of apprehensions has also fallen to about one-quarter of the 2000 peak, though the number increased significantly this year (see Figure 2).<sup>5</sup>

3 DHS, *FY 2019 Budget in Brief* (Washington, DC: DHS, 2018), [www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf](https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf); Justice Department, “Summary of Budget Authority by Appropriation,” budget document, 2018, [www.justice.gov/jmd/page/file/1033186/download](https://www.justice.gov/jmd/page/file/1033186/download).

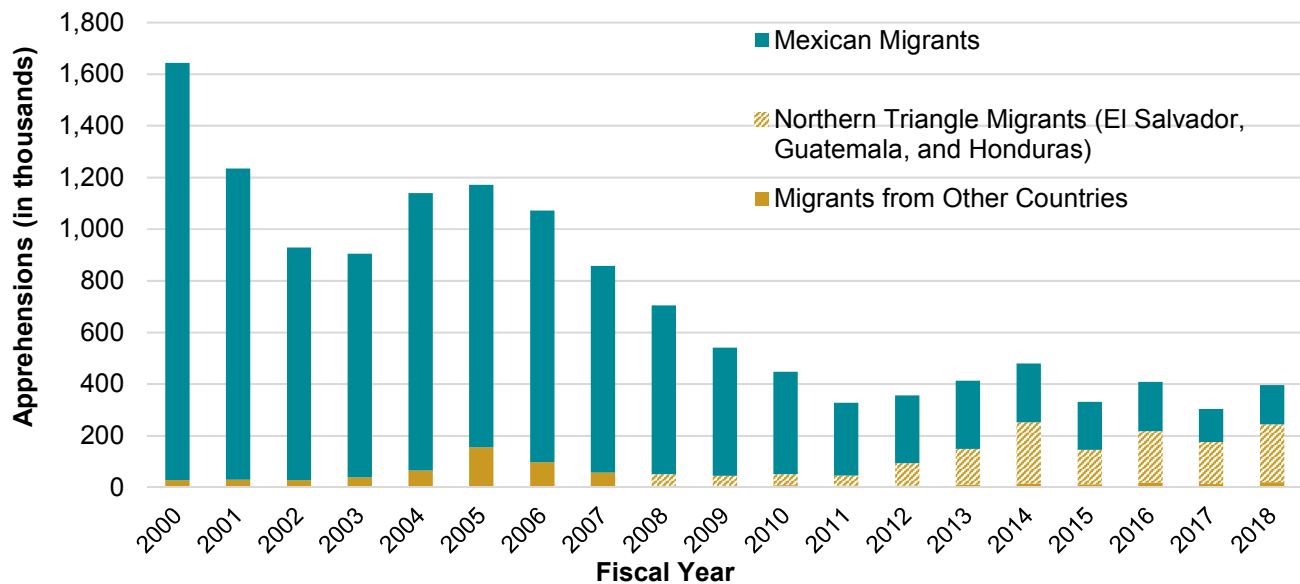
4 U.S. Border Patrol, “Total Illegal Alien Apprehensions by Fiscal Year (Oct. 1st through Sept. 30th),” data table, accessed March 18, 2019, [www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-apps-other-mexico-fy2000-fy2018.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-apps-other-mexico-fy2000-fy2018.pdf).

5 DHS, *Border Security Metrics Report* (Washington, DC: DHS, 2018), 57, [www.dhs.gov/sites/default/files/publications/18\\_0718\\_PLCY\\_FY2017-Border-Security-Metrics-Report.pdf](https://www.dhs.gov/sites/default/files/publications/18_0718_PLCY_FY2017-Border-Security-Metrics-Report.pdf).





**Figure 2. Border Patrol Southwest Border Apprehensions, by Nationality, FY 2000–18**



*Note:* Data on apprehensions of Northern Triangle migrants are not available before FY 2008, though they likely still made up a large portion of non-Mexican apprehensions.

*Sources:* DHS, *Border Security Metrics Report* (Washington, DC: DHS, 2018), 57, [www.dhs.gov/sites/default/files/publications/18\\_0718\\_PLCY\\_FY2017-Border-Security-Metrics-Report.pdf](http://www.dhs.gov/sites/default/files/publications/18_0718_PLCY_FY2017-Border-Security-Metrics-Report.pdf); U.S. Border Patrol, “Total Illegal Alien Apprehensions by Fiscal Year (Oct. 1st through Sept. 30th),” data table, accessed March 18, 2019, [www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-apps-other-mexico-fy2000-fy2018.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-apps-other-mexico-fy2000-fy2018.pdf); U.S. Border Patrol, “U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector in FY2018,” accessed May 1, 2019, [www.cbp.gov/sites/default/files/assets/documents/2019-Mar/BP%20Apps%20by%20Sector%20and%20Citizenship%20FY07-FY18.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/BP%20Apps%20by%20Sector%20and%20Citizenship%20FY07-FY18.pdf).

Meanwhile, the composition of the arriving migrant population has shifted from one of young Mexican males seeking work in the United States to one of primarily families and children from Central America migrating for mixed reasons. Some are economic migrants seeking opportunity. Others are seeking safety and protection from violence. Some leave in search of both.<sup>6</sup>

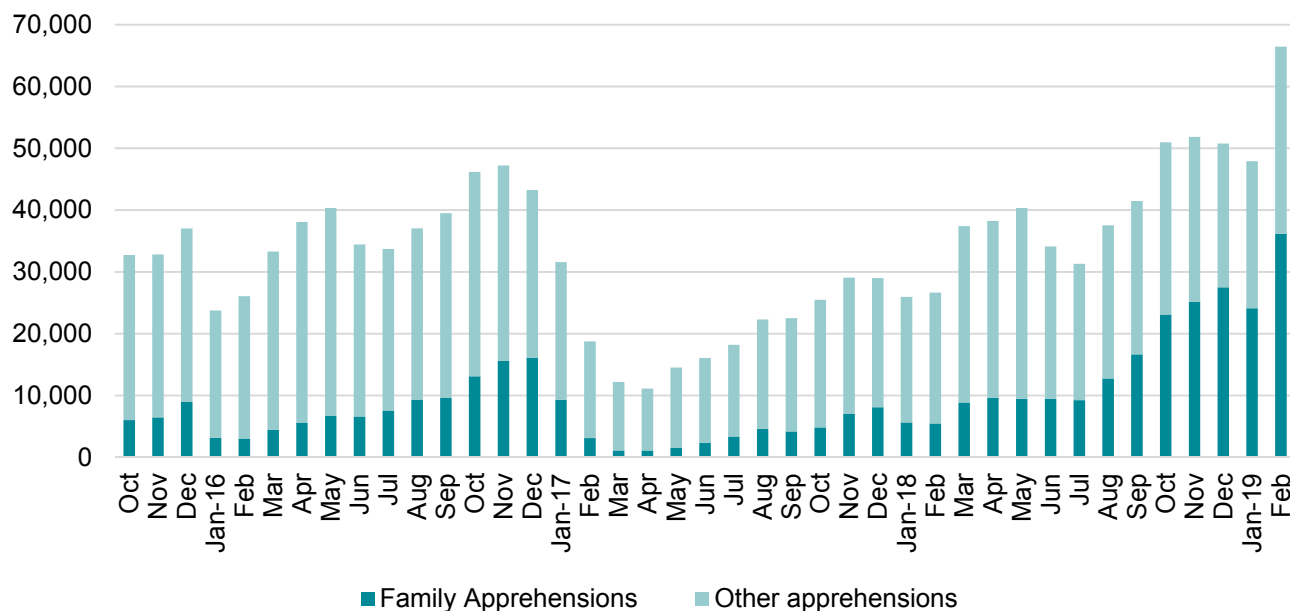
Apprehensions of nationals of the Northern Triangle countries of Central America (El Salvador, Guatemala, and Honduras) have risen, outnumbering those of Mexican migrants for the first time in FY 2014 and again in FYs 2016, 2017, and 2018.<sup>7</sup> Forty percent of all border apprehensions in FY 2018 were either of migrant families or unaccompanied children, compared to 10 percent in FY 2012.<sup>8</sup> And in the first six months of FY 2019, they accounted for 61 percent.<sup>9</sup> This has meant that U.S. border officials have increasingly had to deal with more vulnerable populations whose numbers in recent months are overwhelming existing facilities and processing capacity. (See Figure 3).

<sup>6</sup> Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward* (Washington, DC: Migration Policy Institute, 2018), [www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward](http://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward).

<sup>7</sup> U.S. Border Patrol, “U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector,” multiple years, accessed May 1, 2019, [www.cbp.gov/sites/default/files/assets/documents/2019-Mar/BP%20Apps%20by%20Sector%20and%20Citizenship%20FY07-FY18.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/BP%20Apps%20by%20Sector%20and%20Citizenship%20FY07-FY18.pdf).

<sup>8</sup> DHS, *Border Security Metrics Report*, 57; U.S. Customs and Border Protection (CBP), “Southwest Border Migration FY 2018,” updated November 9, 2018, [www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018](http://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018).

<sup>9</sup> CBP, “Southwest Border Migration FY 2019,” updated February 8, 2019, [www.cbp.gov/newsroom/stats/sw-border-migration](http://www.cbp.gov/newsroom/stats/sw-border-migration); DHS, “DHS Releases Southwest Border Enforcement Statistics” (press release, January 9, 2019), [www.dhs.gov/news/2019/01/09/dhs-releases-southwest-border-enforcement-statistics](http://www.dhs.gov/news/2019/01/09/dhs-releases-southwest-border-enforcement-statistics).

**Figure 3. Border Patrol Southwest Border Apprehensions of Families and Other Migrants, FY 2016-19\***

\* The 2019 numbers represent the first five months of the fiscal year.

Sources: U.S. Customs and Border Protection, “Southwest Border Migration FY 2019,” updated March 5, 2019, [www.cbp.gov/newsroom/stats/sw-border-migration](http://www.cbp.gov/newsroom/stats/sw-border-migration); U.S. Border Patrol, “Total Family Unit\* Apprehensions by Month,” accessed March 26, 2019, [www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf); U.S. Border Patrol, “Total Illegal Alien Apprehensions by Month,” accessed March 26, 2019, [www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf).

## B. The Need for New Responses

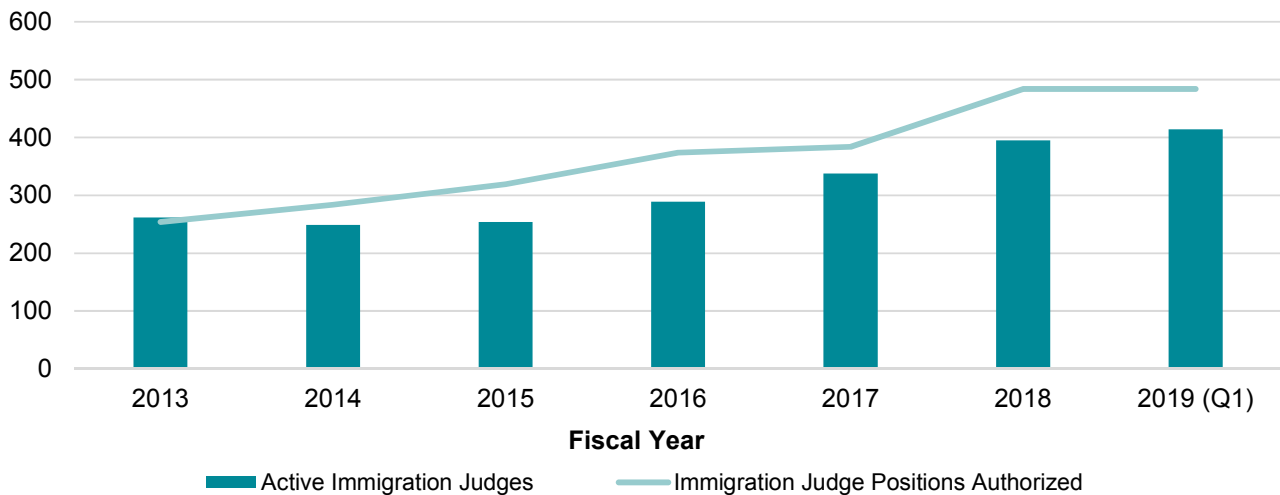
Border enforcement has been slow to adapt to the challenges associated with these changes in the characteristics of migrant arrivals. In particular, today’s crossers typically turn themselves in to border officials in order to apply for asylum. As a result, the asylum system has become overwhelmed and an already overtaxed immigration court system now faces historically unprecedented pressures.<sup>10</sup>

Congress has recognized the need for increased judicial capacity and has authorized the hiring of additional immigration judges every year since at least FY 2013. However, the Justice Department has not been able to keep up by hiring enough judges to fill the positions authorized (see Figure 4).

<sup>10</sup> Meissner, Hipsman, and Aleinikoff, *The U.S. Asylum System in Crisis*.



**Figure 4. Number of Active and Authorized Immigration Judges, FY 2013–19 (Q1)**



Sources: Justice Department, Executive Office for Immigration Review (EOIR), “Immigration Judge (IJ) Hiring” fact sheet, January 2019, [www.justice.gov/eoir/page/file/1104846/download](http://www.justice.gov/eoir/page/file/1104846/download); Senate Appropriations Committee, “S. Rept. 113-78 - Departments of Commerce and Justice, and Science, and Related Agencies Appropriations Bill, 2014,” 113th Cong., 1st sess., *Congressional Record* 159, no. 103 (July 18, 2013): S5799, [www.congress.gov/congressional-report/113th-congress/senate-report/78/1](http://www.congress.gov/congressional-report/113th-congress/senate-report/78/1); Rep. Hal Rogers, Explanatory Statement by Chairman of the House Committee on Appropriations Regarding the House Amendment to the Senate Amendment on HR 83, 113th Cong., 2nd sess., *Congressional Record* 160, no. 151 (December 11, 2014): H9307, <https://docs.house.gov/billsthisweek/20141208/113-HR83sa-ES-Intro.pdf>; House Appropriations Committee, “Consolidated Appropriations Act, 2016, Committee Print,” 114th Cong., 2nd sess. (February 9, 2016), [www.govinfo.gov/app/details/CPRT-114HPRT98155/CPRT-114HPRT98155](http://www.govinfo.gov/app/details/CPRT-114HPRT98155/CPRT-114HPRT98155); Rep. Rodney Frelinghuysen, Explanatory Statement by Chairman of the House Committee on Appropriations Regarding the House Amendment to the Senate Amendments on HR 244, 115th Cong., 1st sess., *Congressional Record* 163, no. 76 (May 3, 2017): H3327, [www.congress.gov/crec/2017/05/03/CREC-2017-05-03-bk2.pdf](http://www.congress.gov/crec/2017/05/03/CREC-2017-05-03-bk2.pdf); Frelinghuysen, Explanatory Statement by Chairman of the House Committee on Appropriations Regarding the House Amendment to Senate Amendment on HR 1625, 115th Cong., 2nd sess., *Congressional Record* 164, no. 50 (March 22, 2018): H2084, [www.congress.gov/crec/2018/03/22/CREC-2018-03-22-pt2-PgH2045-2.pdf](http://www.congress.gov/crec/2018/03/22/CREC-2018-03-22-pt2-PgH2045-2.pdf).

More broadly, appropriations requests and bills have largely overlooked the need to build enforcement capacity and fund strategies that respond to changing migration flows. Today’s most urgent border security needs are in buttressing the asylum and immigration court systems, given how many people crossing the border are now asylum seekers, and in strengthening infrastructure, including detection technology at official ports of entry, where most illegal drugs that cross the border pass through.<sup>11</sup>

The latter should include both building out processing space for asylum seekers and refitting Border Patrol facilities and operations along the entire border to handle families and children who make up the largest shares of today’s arrivals. They are often exhausted or in ill health after arduous journeys, presenting different processing and custody challenges from prior Mexican migrant adults, who were largely returned on a turnaround basis to a contiguous country.

Finally, just as improved conditions in Mexico have been key to reducing illegal crossings of Mexicans, it will be necessary to address the violence, corruption, and poverty driving Central Americans to flee their native countries. Other nearby countries, such as Costa Rica and Belize, for example, are also experiencing sharp increases in the numbers of people seeking safety from the Northern Triangle. Thus, U.S. policies and funding should encompass longer-term solutions developed in collaboration with Mexico and Central American nations that advance shared interests in North America.

<sup>11</sup> CBP, “CBP Enforcement Statistics FY 2019,” accessed April 16, 2019, [www.cbp.gov/newsroom/stats/cbp-enforcement-statistics](http://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics).



### Key Questions for Public Debates

1. Given current levels of spending on immigration enforcement, what measures of effectiveness should be used to assess future spending requests and needs? The current definition Congress has set for measuring operational effectiveness at the Southwest border is deterrence of 100 percent of drugs and illegal crossings. Is this realistic? What definition of border security should government officials and lawmakers seek to achieve?
2. What border spending is likely to generate the highest returns on investment going forward? What technologies, infrastructure, and capabilities can best contribute to strengthening border security?
3. What adaptations in border enforcement strategies and resources are needed in light of shifts in arrivals, from predominantly Mexican economic migrants to mixed flows of humanitarian and economic migrants, particularly families with children, from Central America?
4. The Justice Department has not hired the additional immigration judges authorized in last year's budget and 50 more have just been authorized. What has slowed the hiring process? What steps are being taken to speed judge hiring to enable reduction of the immigration court backlog?
5. Why are ports of entry not staffed and designed to handle more than minimal numbers of asylum seekers? Is the pace of processing at ports of entry (known as "metering") incentivizing crossings that have recently increased in the most remote, dangerous areas of the border?
6. What strategies and funding could reduce the origin-country conditions that drive Central American emigration?
7. What can the United States do to support efforts by Mexico and other countries in the region to strengthen their asylum systems and protection capabilities?

## Issue No. 2. The Attorney General's Referral and Review Power

Immigration judicial functions are carried out through an administrative court system, within the Justice Department, that reports to the attorney general. As part of overseeing that system, attorneys general have what is known as referral and review power. Through it, the Trump administration's attorneys general—Jeff Sessions and his successors Matthew Whitaker and William Barr—have issued legal decisions at an unprecedented level during the past two years, in addition to policy memoranda and court-management measures that together have changed the legal landscape for asylum seekers and all but eliminated the ability of immigration judges to exercise discretion.

### A. Referral and Review Power

The referral and review power gives the attorney general a unique role in overseeing decisions made by the Board of Immigration Appeals (BIA), which is the immigration appellate court. Historically, the power was largely a dispute-resolution mechanism, with the BIA or the Immigration and Naturalization Service (the predecessor immigration agency to DHS) referring precedent-setting cases or policy differences to the attorney general for a ruling when one disagreed with the other.

With the creation of the Department of Homeland Security (DHS) in 2003, most immigration functions, except the immigration court system, were moved to this new Cabinet agency. After this move, every case reviewed by the attorney general has been one that the attorney general, not the BIA or DHS, has referred to him or herself.



There have been ten self-referred cases during the first two years of the current administration; three remain pending.<sup>12</sup> This is a sharp uptick from the George W. Bush administration, during which nine cases were self-referred over the course of two terms. Just four such cases occurred during the Barack Obama presidency.<sup>13</sup>

Thus, the review power has increasingly been used as a mechanism that enables attorneys general to influence immigration policy administration wide.

## B. The Trump Administration Reviews

Sessions, the Trump administration's first attorney general, made extensive use of the referral and review power to accomplish two goals: narrow the criteria for who qualifies for asylum, with a particular focus on asylum seekers arriving at the U.S.-Mexico border, and speed immigration proceedings in a massively backlogged court system.

Sessions greatly diminished the ability of immigration judges to manage their caseloads. For example, judges are, for the most part, no longer permitted to close or dismiss cases.<sup>14</sup> He also set performance metrics and quotas to push judges to adjudicate cases more quickly. Together, the limitations on docket-management tools and the implementation of these metrics have given immigration judges little choice but to quickly issue decisions—largely deportation—on cases.

In the attorney general decision that perhaps garnered the most attention, and that is the most consequential, Sessions in *Matter of A-B-* sharply limited the circumstances under which domestic or gang violence can be considered valid grounds for asylum.<sup>15</sup> This decision refutes decades of evolving case law, and particularly affects the viability of asylum claims of Central Americans, many of which turn on such forms of violence. In other asylum-related decisions, Sessions raised the possibility that judges could issue summary denials of asylum without hearing testimony and Barr determined asylum seekers are ineligible for release on bond, allowing for their indefinite detention until their cases are decided.<sup>16</sup>

## C. Looking Ahead

At present, the attorney general can only use the power of referral and review with cases decided by the BIA. However, the Justice Department is working on regulations, expected to be issued in Spring 2019, that would broaden this power to also permit review of cases pending before the BIA, as well as those decided by immigration judges but not yet appealed. This would increase the number of cases on which

- 12 The three pending cases are *Matter of Daniel Girmai Negusie*, 27 I&N Dec. 481 (Attorney General, October 18, 2018), [www.justice.gov/eoir/page/file/1101746/download](http://www.justice.gov/eoir/page/file/1101746/download) (considering whether to further limit asylum by narrowing an exemption to the persecutor's bar); *Matter of L-E-A-*, 27 I&N Dec. 494 (Attorney General, December 3, 2018), [www.justice.gov/eoir/page/file/1116866/download](http://www.justice.gov/eoir/page/file/1116866/download) (considering whether an applicant may qualify for asylum based on persecution on account of membership in a particular social group if that group is the foreign national's family); *Matter of Castillo-Perez*, 27 I&N Dec. 495 (Attorney General, December 3, 2018), [www.justice.gov/eoir/page/file/1116871/download](http://www.justice.gov/eoir/page/file/1116871/download) (considering when an applicant lacks the "good moral character" required for cancellation of removal, including the impact of multiple convictions for driving while intoxicated).
- 13 Sarah Pierce, "Sessions: The Trump Administration's Once-Indispensable Man on Immigration," *Migration Information Source*, November 8, 2018, [www.migrationpolicy.org/article/sessions-trump-administrations-once-indispensable-man-immigration](http://www.migrationpolicy.org/article/sessions-trump-administrations-once-indispensable-man-immigration).
- 14 *Matter of Castro-Tum*, 27 I&N Dec. 271 (Attorney General, May 17, 2018), [www.justice.gov/eoir/page/file/1064086/download](http://www.justice.gov/eoir/page/file/1064086/download); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (Attorney General, September 18, 2018), [www.justice.gov/eoir/page/file/1095371/download](http://www.justice.gov/eoir/page/file/1095371/download); *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (Attorney General August 16, 2018), [www.justice.gov/eoir/page/file/1087781/download](http://www.justice.gov/eoir/page/file/1087781/download).
- 15 *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, June 11, 2018), [www.justice.gov/eoir/page/file/1070866/download](http://www.justice.gov/eoir/page/file/1070866/download).
- 16 *Matter of E-F-H-L-*, 27 I&N Dec. 226 (Attorney General, March 5, 2018), [www.justice.gov/eoir/page/file/1040936/download](http://www.justice.gov/eoir/page/file/1040936/download); *Matter of M-S-*, 27 I&N Dec. 509 (Attorney General, April 16, 2019), [www.justice.gov/eoir/file/1154747/download](http://www.justice.gov/eoir/file/1154747/download).



the attorney general could rule by more than 700 percent—from an average of 33,000 cases per year to 247,000.<sup>17</sup>

Thus, the immigration court system is increasingly vulnerable to political pressure, and its judges do not have the protection of fixed terms of office. They are subject to the discretionary removal and transfer authority of the attorney general. This lack of basic structural and procedural safeguards that exist in other areas of the justice system have largely persisted because immigration proceedings are matters of administrative law involving noncitizens.

However, immigration proceedings result in life-altering decisions that may deprive individuals of their freedom, or even be a matter of actual life and death. The extent and sweep of the recent use of the attorney general's referral and review power bolsters the many longstanding calls for the establishment of an independent immigration court structure to insure the independence of the immigration judiciary and fair, impartial decision-making.<sup>18</sup>

### Key Questions for Public Debates

1. Has recent use of the attorney general's review and referral authority stretched beyond congressional intent? What regulations, guidelines, or criteria are in place to govern its use, and are any adjustments needed?
2. What other measures would insure greater independence for the immigration judicial system?
3. Has the time come to establish an Article I court system for immigration, similar to the U.S. Tax Court and the U.S. Bankruptcy Court, or an independent executive-branch immigration adjudicatory body?

## Issue No. 3. Unaccompanied Minors

The number of migrant children in the custody of the Office of Refugee Resettlement (ORR) has grown in recent years, raising questions about both the factors driving this trend and what can be done to reverse it. The size of this child population hit an all-time high of more than 14,000 in December 2018, up from about 9,200 when the Trump administration took office in January 2017.<sup>19</sup> This growth has occurred as the average length of children's stay in ORR care nearly tripled, from an average of 34 days in January 2016 to 89 days in October 2018.<sup>20</sup>

The full set of factors behind the increased number of children in ORR shelters is unclear. To be sure, part of this growth stems from increases in the number of children arriving at the U.S.-Mexico border without

17 Migration Policy Institute (MPI) analysis based on data from Executive Office for Immigration Review (EOIR), *Statistical Yearbook, Fiscal Year 2017* (Washington, DC: EOIR, 2018), [www.justice.gov/eoir/page/file/1107056/download](http://www.justice.gov/eoir/page/file/1107056/download).

18 See, for example, American Bar Association, "Recommendation," February 8-9, 2010, [www.americanbar.org/content/dam/aba/directories/policy/2010\\_my\\_114f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2010_my_114f.authcheckdam.pdf); Appleseed Network, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts* (Washington, DC: Appleseed Network, 2009).

19 Garance Burke and Martha Mendoza, "A Moral Disaster": AP Reveals Scope of Migrant Kids Program," Associated Press, December 20, 2018, <https://apnews.com/a857e04de9bc4871995b65784ed7ccd8>; Arelis R. Hernández, "Trump Administration Is Holding Record Number of Migrant Youths," *Washington Post*, December 21, 2018, [www.washingtonpost.com/local/immigration/trump-administration-is-holding-record-number-of-migrant-youths/2018/12/21/183470c0-03b7-11e9-b5df-5d3874f1ac36\\_story.html](http://www.washingtonpost.com/local/immigration/trump-administration-is-holding-record-number-of-migrant-youths/2018/12/21/183470c0-03b7-11e9-b5df-5d3874f1ac36_story.html); Caitlin Dickerson, "Detention of Migrant Children Has Skyrocketed to Highest Levels Ever," *The New York Times*, September 12, 2018, [www.nytimes.com/2018/09/12/us/migrant-children-detention.html](http://www.nytimes.com/2018/09/12/us/migrant-children-detention.html).

20 Burke and Mendoza, "A Moral Disaster."





a parent or guardian.<sup>21</sup> About 8,000 more unaccompanied minors were referred from DHS to ORR in FY 2018 than in FY 2017. Nonetheless, the FY 2018 number remained below the peak years for referrals of unaccompanied minors—FY 2014 and FY 2016 (see Table 1)—suggesting that other factors have also played a strong role.<sup>22</sup> This year, the number of unaccompanied children being referred to ORR is growing again, and could surpass the number in FY 2016.<sup>23</sup> In this context, it is important to understand what led to such high growth in the number of children in ORR care in FY 2017 and 2018, when referrals were relatively lower.

**Table 1. Unaccompanied Minors Referred to ORR and Average Length of Stay, FY 2012–18**

Fiscal Year	Referrals from DHS to ORR	Average Length of Stay (in days)*
2012	13,625	-
2013	24,668	-
2014	57,496	-
2015	33,726	34
2016	59,170	34
2017	40,810	41
2018	49,100	60

\* Data on the average length of migrant children's stay in custody are unavailable prior to FY 2015.

Source: Office of Refugee Resettlement, "Facts and Data," updated November 30, 2018, [www.acf.hhs.gov/orr/about/ucs/facts-and-data](http://www.acf.hhs.gov/orr/about/ucs/facts-and-data).

## A. New Fingerprint Policies

One part of the explanation for lengthier custody periods lies with a policy change initiated by the Trump administration in June 2018, but later phased out, to expand the use of fingerprinting when screening prospective sponsors who apply to take custody of unaccompanied children. Prior to June 2018, ORR collected fingerprints only for would-be sponsors who were either not the child's parent or parents seeking to sponsor particularly vulnerable children or about whom U.S. authorities had concerns (e.g., evidence of risk of abuse, maltreatment, or trafficking of the child). Background checks for most parents were completed using the parents' names.

The new policy expanded this pool to require that fingerprints be collected from all adult members of the household in which an unaccompanied child would be placed, including parent sponsors. This change in practice followed an agreement signed between the U.S. Department of Health and Human Services (HHS), which houses ORR, and DHS in April 2018 to share fingerprinting information with ICE to allow the latter to conduct criminal and immigration background checks.<sup>24</sup> Previously, fingerprinting results were only

21 Children from countries other than Mexico or Canada who arrive at the U.S. border alone are transferred from the Border Patrol to the Office of Refugee Resettlement (ORR), which places them in a shelter operated by an ORR grantee or contractor until they can be released to a sponsor—a parent, relative, or other appropriate individual. ORR is charged with holding children in the "least restrictive setting that is in the best interest of the child." ORR also screens children for human trafficking involvement, provides legal orientations and in some cases legal counsel, and oversees residential facilities. ORR facilities offer classroom instruction, recreational opportunities, mental and medical health services, and case management. See U.S. Department of Health and Human Service (HHS) Administration of Children and Families (ACF), "Unaccompanied Alien Children Program," fact sheet, ACF, Washington, DC, updated April 2019, [www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf?language=es](http://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf?language=es).

22 ORR, "Facts and Data," updated November 30, 2018, [www.acf.hhs.gov/orr/about/ucs/facts-and-data](http://www.acf.hhs.gov/orr/about/ucs/facts-and-data).

23 Priscilla Alvarez and Geneva Sands, "Federal Government Preparing for Unaccompanied Minors in its Care to Double," CNN, March 28, 2019, [www.cnn.com/2019/03/28/politics/unaccompanied-minors-in-custody/index.html](http://www.cnn.com/2019/03/28/politics/unaccompanied-minors-in-custody/index.html).

24 Kevin K. McAleenan, Thomas D. Homan, Steven Wagner, and Scott Lloyd, "Memorandum of Agreement among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters," April 13, 2018, [www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1#fullscreen&from\\_embed](http://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1#fullscreen&from_embed).



reviewed to determine whether the sponsor presented any risk to the child, not for routine immigration enforcement.

This policy change seems to have added significantly to the time required to conduct background checks and deterred some potential sponsors from coming forward for fear of arrest and deportation. ICE has reported that its officers used ORR fingerprint information to arrest 170 people between July and November 2018, the majority of whom had no criminal record.<sup>25</sup>

In December 2018, ORR stopped requiring fingerprint checks on adult household members apart from sponsors, with the assistant secretary of HHS noting that the extra screening “is not adding anything to the protection or safety of children.”<sup>26</sup> And in March 2019, ORR indicated it would temporarily stop requiring fingerprints from parent sponsors in most cases. Further, the government funding bill signed by the president on February 15, 2019 barred ICE from arresting or removing sponsors of unaccompanied minors based on information provided by HHS, unless the sponsor has certain felony charges or convictions, or trafficking links.<sup>27</sup> It remains to be seen whether these new developments will reduce the amount of time children spend in ORR custody, even as more children are referred to the agency.

## **B. Increased Use of Emergency Shelters**

ORR has placed more children in larger facilities, including in two “emergency influx” shelters; the fact that the numbers of children in care had grown steadily might have allowed for time to arrange additional shelter space.<sup>28</sup> While one such shelter—the Tornillo facility in Texas—closed in January 2019, the Homestead facility in Florida is being expanded for a second time, to accept up to 3,200 children.<sup>29</sup> The costs of housing unaccompanied minors in these temporary shelters are three times as high as for care in regular ORR shelters.<sup>30</sup> To cover these costs, HHS in FY 2018 shifted \$446 million away from other programs, such as cancer research and Head Start.<sup>31</sup>

In addition to cost, concerns have also been raised about the quality of care in these facilities. Temporary shelters on federal property are not subject to the state licensing and monitoring rules that other shelters for unaccompanied minors have to follow. For example, the Tornillo facility had a substantially lower ratio of mental health professionals to children than do other facilities for unaccompanied minors,

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25 Tal Kopan, “ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children,” *San Francisco Chronicle*, December 10, 2018, [www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php](http://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php).

26 Robert Moore, “Thousands of Migrant Children Could Be Released with Trump’s Major Policy Reversal,” *Texas Monthly*, December 18, 2018, [www.texasmonthly.com/news/trump-fingerprint-policy-change-reduce-migrant-children-detention-tornillo/](http://www.texasmonthly.com/news/trump-fingerprint-policy-change-reduce-migrant-children-detention-tornillo/); Miriam Jordan, “Thousands of Migrant Children Could Be Released after Sponsor Policy Change,” *The New York Times*, December 18, 2018, [www.nytimes.com/2018/12/18/us/migrant-children-release-policy.html](http://www.nytimes.com/2018/12/18/us/migrant-children-release-policy.html).

27 *Consolidated Appropriations Act, 2019*, Public Law 116-6 (2019), [www.congress.gov/116/bills/hjres31/BILLS-116hjres31enr.pdf](http://www.congress.gov/116/bills/hjres31/BILLS-116hjres31enr.pdf).

28 One shelter was the Tornillo facility outside of the El Paso, Texas, port of entry. The facility, which consisted of large canvas tents, opened in June 2018 and closed in January 2019. The other shelter is located close to Miami in Homestead, Florida. The Homestead shelter had been used in the past when arrivals of unaccompanied minors were high. It reopened in February 2018. As of January 2019, there were 1,350 children living in Homestead, and plans to add 1,000 more. See John Burnett, “Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.,” National Public Radio, February 13, 2019, [www.kut.org/post/inside-largest-and-most-controversial-shelter-migrant-children-us](http://www.kut.org/post/inside-largest-and-most-controversial-shelter-migrant-children-us).

29 Associated Press, “Migrant Teen Detention Camp in Florida Expands Once Again,” Associated Press, April 3, 2019, <https://apnews.com/e79349e0e79048338b32f75b8ef85635>.

30 Burnett, “Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.”

31 Moore, “Thousands of Migrant Children Could Be Released with Trump’s Major Policy Reversal.”



and staff did not undergo full Federal Bureau of Investigation (FBI) fingerprint background checks, instead receiving less comprehensive checks by a private contractor.<sup>32</sup>

These issues come on top of existing concerns about the wellbeing of children even in standard ORR facilities and the adequacy of monitoring practices. Reports have emerged of physical and sexual abuse by shelter staff and prolonged detention of children in secure facilities.<sup>33</sup> The Justice Department is also investigating one shelter provider for misuse of federal funds.<sup>34</sup>

### Key Questions for Public Debates

1. What were the factors that have led the number of children in ORR care to increase since May 2017? What plans are underway to reduce the size of this population? What led to the use of influx shelters rather than expanding standard shelter capacity, given that there has been steady growth in the unaccompanied minor population in ORR's care?
2. How is ORR now planning to prepare for the growing numbers of children referred to its care by DHS? Is it signing new contracts or expanding current contracts to increase its regular shelter capacity?
3. What was the rationale for expanding fingerprint-based background checks when placing unaccompanied children with sponsors given that HHS has noted that fingerprinting other household members was not adding to the safety of children? Is there evidence for the value of this practice that outweighs the deterrent effect it is having on the willingness of some potential sponsors to come forward?
4. Before new legislation ended the practice, how was ICE targeting and prioritizing the arrest of unauthorized immigrants identified using data collected while screening potential sponsors of unaccompanied minors?
5. What assistance is ORR providing minors in locating legal services while they are in ORR custody and after their release?

## Issue No. 4. Interior Enforcement Priorities

In an executive order issued during his first week in office, Trump greatly expanded the scope of arrests and deportations of unauthorized immigrants living in the United States.<sup>35</sup> The order rescinded enforcement priorities set in the latter half of the Obama administration, which prioritized for removal

32 Garance Burke and Martha Mendoza, "US Waived FBI Checks on Staff at Growing Teen Migrant Camp," Associated Press, November 28, 2018, [www.apnews.com/0c62b088c27147b0a6055d1e8394a3af](http://www.apnews.com/0c62b088c27147b0a6055d1e8394a3af); Memorandum from Daniel R. Levinson, Inspector General, U.S. Department of Health and Human Services, to Lynn Johnson, Assistant Secretary, Administration for Children and Families, "The Tornillo Influx Care Facility: Concerns about Staff Background Checks and Number of Clinicians on Staff," November 27, 2018, <https://oig.hhs.gov/oas/reports/region12/121920000.pdf>.

33 See, for example, Blake Ellis, Melanie Hicken, and Bob Ortega, "Handcuffs, Assaults, and Drugs Called 'Vitamins': Children Allege Grave Abuse at Migrant Detention Facilities," CNN, June 21, 2018, [www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html](http://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html); Roque Planas, "A Single Trump Appointee Was Responsible for Keeping Hundreds of Kids Locked up Longer," *Huffington Post*, July 26, 2018, [www.huffingtonpost.com/entry/scott-lloyd-refugee-resettlement\\_us\\_5b58cd0fe4b0fd5c73cb3c1a](http://www.huffingtonpost.com/entry/scott-lloyd-refugee-resettlement_us_5b58cd0fe4b0fd5c73cb3c1a). An HHS document provided to Axios by a member of Congress detailed thousands of allegations of sexual abuse against unaccompanied minors over a four-year period. See Caitlin Owens, Stef W. Kight, and Harry Stevens, "Thousands of Migrant Youth Allegedly Suffered Sexual Abuse in U.S. Custody," February 26, 2019, [www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html](http://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html).

34 Rebecca R. Ruiz, Nicholas Kulish, and Kim Barker, "Justice Department Investigating Migrant Shelter Provider," *The New York Times*, December 20, 2018, [www.nytimes.com/2018/12/20/us/southwest-key-migrant-shelters.html](http://www.nytimes.com/2018/12/20/us/southwest-key-migrant-shelters.html).

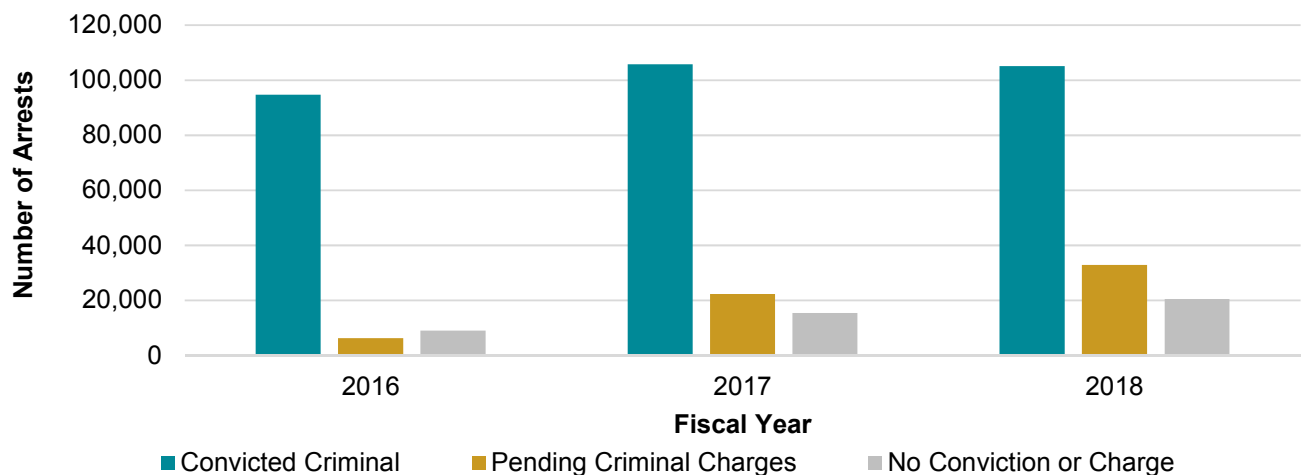
35 Donald J. Trump, "Executive Order 13768 of January 25, 2017: Enhancing Public Safety in the Interior of the United States," *Federal Register* 82, no. 18 (January 30, 2017): 8799–803, [www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf](http://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf).



noncitizens convicted of serious crimes and those who had recently crossed the border illegally. The Trump order also, rescinded DHS and INS memos stretching back to 1973 calling for immigration enforcement authorities to use discretion in deciding which cases to prioritize for arrest, detention, and deportation. The Trump administration's public statements and enforcement actions make clear that virtually all unauthorized immigrants as well as lawful permanent residents convicted of certain crimes are at risk for detention and removal.

As a result of these changes, ICE arrests jumped 46 percent over a two-year period beginning in FY 2016, from 110,000 to 159,000, and deportations of noncitizens arrested within the country have followed suit.<sup>36</sup> While noncitizens with criminal convictions still make up a large majority of those arrested, arrests of immigrants charged but not convicted of a crime rose 426 percent, and those with no criminal history at all rose 125 percent (see Figure 5).<sup>37</sup> The increase in arrests and the reprioritization of unauthorized immigrants who for several years had been low priorities for immigration enforcement have created a climate of fear in many immigrant communities around the country.

**Figure 5. ICE Administrative Arrests by Criminality, FY 2016-18**



Source: ICE, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, 2018), 3, [www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf](http://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf).

At the same time, these arrest figures are far from record-setting. ICE interior arrests and deportations remain at about half their peak levels from FYs 2010 and 2011, partly because immigrant-dense states (California and Illinois in particular) and major cities (including New York, Chicago, Philadelphia, Boston, Seattle, Baltimore, and Washington, DC) have enacted policies that limit cooperation by state and local law enforcement with ICE (known as “sanctuary” policies).<sup>38</sup> In the past five years, between two-thirds and three-quarters of ICE arrests were the result of screening individuals in state and local jails for immigration status and criteria that would make them deportable, down from more than 85 percent during FY 2008 through FY 2011.<sup>39</sup> And the share of ICE arrests coming from California, which has the greatest statewide restrictions on ICE cooperation, accounted for 14 percent of the agency's national arrest totals in FY 2017, down from 23 percent in FY 2013.<sup>40</sup>

36 ICE, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, 2018), 2, [www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf](http://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf).

37 Ibid, 3.

38 Passage of these policies began in Cook County, Illinois in 2011, during the years of particularly intense immigration enforcement under President Obama, but the number of states and localities with policies limiting cooperation with ICE has continued to grow during the Trump administration.

39 ICE arrests not stemming from state and local jails are the result of at-large operations, where ICE arrests individuals at their homes, workplaces, or elsewhere in the community. See Randy Capps, Muzaffar Chishti, Julia Gelatt, Jessica Bolter, and Ariel G. Ruiz Soto, *Revving Up the Deportation Machinery: Enforcement and Pushback under Trump* (Washington, DC: MPI, 2018), 25–26, [www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback](http://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback).

40 Ibid., 27.



## Detention

With a growing budget, ICE has been able to substantially increase the number of people in detention on an average day, from 34,000 in FY 2016 to 48,000 in January 2019.<sup>41</sup> Detention is a critical, if costly, element in implementing ICE's interior enforcement and deportation missions. In FY 2017, more than 70 percent of the budget for ICE's Enforcement and Removal Operations (\$2.3 billion out of \$3.2 billion) went to Custody Operations.<sup>42</sup> The estimated cost of detaining an adult was \$133 per day,<sup>43</sup> compared with alternatives to detention—such as ankle-bracelet monitoring devices and supervised release—which range in cost from \$5 to \$50 per day (with the high end of this range for monitoring an entire family).<sup>44</sup>

Prior administrations have set policy priorities to guide the use of interior enforcement resources. By widening enforcement priorities and effectively putting nearly the entire unauthorized population and some lawful permanent residents at risk of deportation, the Trump administration has sidestepped the process of assessing the tradeoffs inherent in choices about how to prioritize the spending of limited enforcement dollars. This, combined with state and local policies on (non-)compliance with ICE have deepened unevenness in enforcement outcomes across the country, depending on whether states and local jurisdictions accept or reject federal enforcement measures.

### Key Questions for Public Debates

1. Given the finite nature of enforcement resources, is there a sound public policy rationale for deporting individuals with a long history of U.S. residence, community ties, and no criminal convictions or convictions for minor crimes such as traffic violations?
2. What evidence has the federal government collected or observed on how state or local cooperation with ICE affects the willingness of immigrant populations to cooperate with local law enforcement and/or federal investigations? Conversely, what is the evidence on how so-called sanctuary policies affect public safety?
3. How is ICE targeting and conducting enforcement operations in workplaces? Have these operations shown any effect on reducing improper hiring and employment of unauthorized workers? What has been the impact of such enforcement actions on workers as against employers?
4. How is ICE prioritizing who is and is not detained while awaiting their court date? What do cost-benefit analyses show about how traditional detention practices compare to alternatives to detention with robust case management (such as the Family Case Management Program<sup>45</sup>) in terms of assuring immigrants' appearance at hearings and compliance with deportation orders?
5. Are detention standards in ICE's privately and publicly contracted detention facilities being met? Are the standards adequate or should they be revisited? What do internal monitoring reports show about access to legal representation, visitation by family members, free/reasonably priced telephone calls or electronic communications, health care, and scheduling for recreation and other activities?

41 Hamed Aleaziz, "ICE Might Be Violating Federal Law by Keeping Immigrants Detained during the Shutdown," BuzzFeed, January 9, 2019, [www.buzzfeednews.com/article/hamedaleaziz/shutdown-ice-detention-may-violate-federal-law](http://www.buzzfeednews.com/article/hamedaleaziz/shutdown-ice-detention-may-violate-federal-law); ICE, *Budget Overview: Fiscal Year 2018 Congressional Justification* (Washington, DC: ICE), 14, [www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf](http://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf).

42 ICE, *Budget Overview*, 115.

43 Ibid., 128.

44 Ibid., 179–80; National Immigrant Justice Center, "The Real Alternatives to Detention" (fact sheet, National Immigrant Justice Center, Chicago, June 2017), [www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf](http://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf).

45 Jane C. Timm, "This Obama-Era Pilot Program Kept Asylum-Seeking Migrant Families Together. Trump Canceled It," NBC News, June 24, 2018, [www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896](http://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896).





## Issue No. 5. Three- and Ten-Year Bars to Adjustment of Status

Calls for unauthorized immigrants to get in line for lawful permanent residence (also known as a green card) and immigrate legally ignore an important obstacle to their doing so under U.S. immigration law. Even if they are eligible to be sponsored for admission by a family member or employer, most unauthorized immigrants would need to leave the country and apply for a green card from abroad. However, leaving the country would trigger a three- or ten-year bar on their re-entry.

While it is hard to say with certainty how many of the country's 11.3 million unauthorized immigrants could obtain a green card if not for the re-entry bars, the number could be substantial. Taking just one slice of this population, the Migration Policy Institute (MPI) estimates that roughly 1.6 million spouses and minor children of U.S. citizens or green-card holders are effectively blocked by the ten-year bar from obtaining green cards for which they might otherwise be eligible.<sup>46</sup>

### The 1996 Law

These bars on re-entry date back to the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) of 1996. Under this law, immigrants who have accrued more than 180 days of unlawful U.S. presence are barred from re-entering the country for three years, while those with at least one year of unlawful presence are barred for ten years.<sup>47</sup> The rationale for the bars was to deter illegal immigration by preventing unauthorized immigrants from adjusting their status from within the United States.

There are, however, two narrow avenues around these bars for some unauthorized immigrants. First, those who entered the United States with a visa but overstayed it and are sponsored as the parent, spouse, or minor child of a U.S. citizen can apply for a green card without leaving the United States. As a result, their bar to re-entry is never triggered. Crucially, this avenue is only open to family members of U.S. citizens who have become unauthorized by overstaying a temporary visa. It is not available to those who came across the U.S. border unlawfully.

The second way is through a waiver—a path available to visa overstayers and those who entered illegally alike. Waivers to the re-entry bars are available to unauthorized immigrants applying for green cards who can prove that their extended absence from the United States would cause “extreme hardship” to a U.S.-citizen or lawful permanent resident (LPR) spouse or parent. Since 2013, unauthorized immigrants have been permitted to apply for waivers within the United States, and 206,000 people have been approved for

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<sup>46</sup> MPI estimated the size of these specific subpopulations, because they are the ones that can be observed in MPI's data on unauthorized immigrants, which use the American Community Survey (ACS). In the ACS data, people's relationships can be observed only if they live in the same household, which is not necessarily the case among adult children and their parents, nor among siblings. To generate these estimates, MPI looked at how many unauthorized immigrants had lived in the United States for at least one year, and would therefore face a ten-year bar to reentry. The researchers then estimated how many of these unauthorized immigrants lived with a U.S.-citizen or LPR parent or spouse. For more on MPI's imputations of legal status in the ACS, see Jeanne Batalova, Sarah Hooker, Randy Capps, and James D. Bachmeier, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action* (Washington, DC: MPI, 2014), [www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action](http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action).

<sup>47</sup> If immigrants re-enter the country illegally after they have accrued more than one year of unlawful presence, they face a permanent bar from the United States. Children do not accrue unlawful presence until they turn 18. See U.S. Citizenship and Immigration Services (USCIS), “Unlawful Presence and Bars to Admissibility,” updated August 9, 2018, [www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility](http://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility).





one to date.<sup>48</sup> Those who receive a waiver can then depart the country to apply for their green card with greater certainty that they will be allowed to return. However, many people—even those with U.S.-citizen children or spouses—cannot meet the standard set for “extreme hardship,” do not know about the option, or remain reluctant to risk leaving and being kept outside the United States for years.

### Key Questions for Public Debates

1. With an estimated 62 percent of the unauthorized population having lived in the United States for ten years or more,<sup>49</sup> should legislation be proposed to reduce or eliminate the bars to re-entry to provide a path to legal status for those who would otherwise be eligible for green cards?
2. Should narrower legislation be proposed that allows U.S. citizens who marry unauthorized immigrants to sponsor their spouse for a green card, regardless of how that person entered the country?

## Issue No. 6. Refugee Resettlement

Under the Trump administration, refugee admissions to the United States have been sharply reduced, even as the size of the world’s forcibly displaced population is at a record high.<sup>50</sup> In addition to stepping away from the United States’ history of leadership in refugee resettlement, this has caused a serious erosion of the network of organizations that support resettled refugees across the country. For example, Catholic Charities has closed 22 of its 72 refugee resettlement offices nationwide, and the International Rescue Committee has closed three of its 28 U.S. offices.<sup>51</sup>

When office closures leave a locality without a refugee service provider, refugees already living in that community, as well as other populations eligible for services, such as asylees and holders of Special Immigrant Visas,<sup>52</sup> are left without vital assistance to support them as they work to achieve self-sufficiency in their new country.

### A. Cutting Refugee Admissions Levels

Under the *Refugee Act of 1980*, the president sets an annual ceiling for refugee admissions in consultation with Congress.<sup>53</sup> The annual ceiling has varied over the years, from a high of 231,700 in FY 1980 to a prior low of 67,000 in FY 1986.<sup>54</sup>

48 At first, this process was open to those being sponsored as the spouse, minor child, or parent of a U.S. citizen whose absence would cause “extreme hardship” to a U.S.-citizen spouse or parent. Starting in August 2016, this process was expanded further to anyone applying for a green card through any channel who could demonstrate that their absence from the United States would cause “extreme hardship” to a U.S.-citizen or lawful permanent resident (LPR) child or spouse. See USCIS, “Service-Wide Receipts and Approvals for All Form Types,” FY 2013-2018, accessed April 22, 2019, [www.uscis.gov/tools/reports-studies/immigration-forms-data?topic\\_id=23035&field\\_native\\_doc\\_issue\\_date\\_value%5Bvalue%5D%5Bmonth%5D=&field\\_native\\_doc\\_issue\\_date\\_value\\_1%5Bvalue%5D%5Byear%5D=&combined=&items\\_per\\_page=10](http://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=23035&field_native_doc_issue_date_value%5Bvalue%5D%5Bmonth%5D=&field_native_doc_issue_date_value_1%5Bvalue%5D%5Byear%5D=&combined=&items_per_page=10).

49 MPI Data Hub, “Unauthorized Immigrant Population Profiles,” accessed January 31, 2019, [www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles](http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles).

50 United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2017* (Geneva: UNHCR, 2018), [www.unhcr.org/en-us/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html](http://www.unhcr.org/en-us/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html).

51 Priscilla Alvarez, “America’s System for Resettling Refugees Is Collapsing,” *The Atlantic*, September 9, 2018, [www.theatlantic.com/politics/archive/2018/09/refugee-admissions-trump/569641/](http://www.theatlantic.com/politics/archive/2018/09/refugee-admissions-trump/569641/).

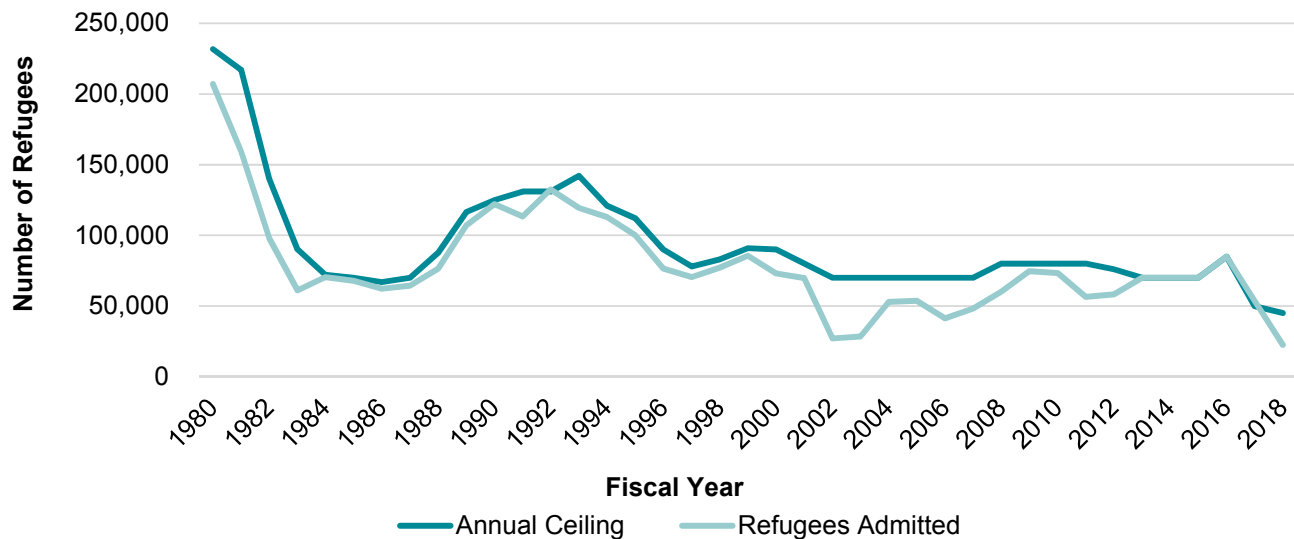
52 Special Immigrant Visas are available to Iraqi and Afghan nationals who have worked on behalf of the U.S. government (e.g., as interpreters or translators for the military).

53 *The Refugee Act of 1980*, Public Law 96-212, *U.S. Statutes at Large* 94 (March 17, 1980): 102, [www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf](http://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf).

54 Refugee Processing Center, “Admissions and Arrivals,” accessed April 4, 2019, [www.wrapsnet.org/admissions-and-arrivals/](http://www.wrapsnet.org/admissions-and-arrivals/).

Amid a large exodus of Syrians from their war-torn country, President Obama raised the refugee ceiling for FY 2017 to 110,000. After taking office, Trump reduced the FY 2017 cap to 50,000, and for FY 2018 set one at a historic low of 45,000. Far fewer refugees—22,491—were actually resettled in FY 2018. As shown in Figure 6, past administrations have generally strived to meet the annual cap, with the notable exception of the period following the terrorist attacks of September 11, 2001.<sup>55</sup>

**Figure 6. Annual Refugee Ceiling and Actual Refugee Arrivals, FY 1980–2018**



*Notes:* The graph shows refugee resettlement numbers and annual ceilings set since the U.S. resettlement program was created with by the *Refugee Act of 1980*. It includes Amerasian immigrants except in FYs 1980 to 1988.

*Source:* Migration Policy Institute (MPI) analysis of Worldwide Refugee Admissions Processing System (WRAPS) data from the State Department Bureau of Population, Refugees, and Migration. See Refugee Processing Center, “Admissions and Arrivals,” accessed January 10, 2019, [www.wrapsnet.org/admissions-and-arrivals/](http://www.wrapsnet.org/admissions-and-arrivals/).

The cap for FY 2019 is even lower: 30,000. And as with the previous year, arrivals are not keeping pace with the ceiling. At the current rate the United States is resettling refugees, the country is on course to take in about 24,000 this year.<sup>56</sup>

## B. Extreme Vetting of Refugees

In addition to lowering the ceiling for refugee admissions, the Trump administration has taken another set of steps to limit the resettlement program. During his campaign for the 2016 presidential election, Trump called for restrictions on the immigration of Muslims and of immigrants from countries with a history of terrorism, plus “extreme vetting” of refugees being admitted to the United States.<sup>57</sup> Refugees are already more extensively vetted than any other class of immigrant, with screening conducted by DHS, the Department of State, the FBI, and national intelligence agencies, with additional vetting in place for refugees from Syria.<sup>58</sup>

<sup>55</sup> In the years following the 9/11 terrorist attacks, the refugee program was at first halted while the government reviewed the security of the program, and later restarted slowly, with additional screening measures in place.

<sup>56</sup> Refugee Processing Center, “Admissions and Arrivals.”

<sup>57</sup> Remarks by presidential candidate Donald Trump, “Transcript of Donald Trump’s Immigration Speech,” *New York Times*, September 1, 2016, [www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html](http://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html); Jenna Johnson, “Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’” *Washington Post*, December 7, 2015, [www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.0179588c6013](http://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.0179588c6013).

<sup>58</sup> Amy Pope, “The Screening Process for Refugee Entry into the United States” (infographic, White House, Washington, DC, November 20, 2015), <https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states>.



After taking office, Trump initially paused refugee resettlement to allow the government to review the program.<sup>59</sup> In October 2017, the administration instituted new security measures, including collecting additional biographic information and subjecting more applicants to a lengthier and more intensive form of vetting.<sup>60</sup> And in January 2018, the administration imposed additional vetting on refugees from 11 countries deemed to be high risk.<sup>61</sup>

These measures have sharply reduced the number of refugees arriving in the United States, particularly from the countries identified as high risk. For example, while the overall number of refugees admitted fell 74 percent between FY 2016 and FY 2018, the number admitted from Somalia fell by 97 percent, from Iraq by 99 percent, and from Syria by 99.5 percent, to just 62 refugees in FY 2018.<sup>62</sup> Combined, the share of all refugee admissions from these 11 countries fell from 28 percent in FY 2017 to 2 percent in FY 2018.<sup>63</sup>

In advancing these changes, the administration has relied on incomplete or selective information to argue that the refugee program does not serve U.S. national interests. The administration dismissed a 2017 report by the National Counterterrorism Center describing why terrorists are unlikely to use the resettlement program to gain access to the United States. And the administration in an official report showcased only select findings from a leaked HHS report on the fiscal costs of refugees, sidestepping the conclusion that refugees have a net positive fiscal impact of \$63 billion at federal, state, and local levels.<sup>64</sup>

The refugee resettlement program has long had bipartisan support and remained outside of the political fray. That is no longer true. In this changing landscape, Congress could seek to ensure that its committees and the public have access to high-quality information on the full costs and benefits of the resettlement program to inform debate and decisions about its place within the U.S. immigration system.

59 Following court action, the pause went into effect from July 2017 to October 2017. During this pause, admissions were allowed for refugees with family members in the United States. See Donald J. Trump, “Executive Order 13769 of January 27, 2017: Protecting the Nation from Foreign Terrorist Entry into the United States,” *Federal Register* 82, no. 20 (February 1, 2017): 8977, [www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states](http://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states); Donald J. Trump, “Executive Order 13780 of March 6, 2017: Protecting the Nation from Foreign Terrorist Entry into the United States,” *Federal Register* 82, no. 45 (March 9, 2017): 13209, [www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states](http://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states); Donald J. Trump, “Executive Order 13815 of October 24, 2017: Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities,” *Federal Register* 82, no. 207 (October 27, 2017): 50055, [www.federalregister.gov/documents/2017/10/27/2017-23630/resuming-the-united-states-refugee-admissions-program-with-enhanced-vetting-capabilities](http://www.federalregister.gov/documents/2017/10/27/2017-23630/resuming-the-united-states-refugee-admissions-program-with-enhanced-vetting-capabilities).

60 These new measures included requiring applicants to renew security checks if any information in their application changes, and subjecting more applicants to Security Advisory Opinions—a security clearance investigatory process used by consular officers.

61 Sarah Pierce, Jessica Bolter, and Andrew Selee, *Trump’s First Year on Immigration Policy: Rhetoric vs. Reality* (Washington, DC: MPI, 2018), [www.migrationpolicy.org/research/trump-first-year-immigration-policy-rhetoric-vs-reality](http://www.migrationpolicy.org/research/trump-first-year-immigration-policy-rhetoric-vs-reality); DHS, “DHS Announces Additional, Enhanced Security Procedures for Refugees Seeking Resettlement in the United States” (press release, January 29, 2018), [www.dhs.gov/news/2018/01/29/dhs-announces-additional-enhanced-security-procedures-refugees-seeking-resettlement](http://www.dhs.gov/news/2018/01/29/dhs-announces-additional-enhanced-security-procedures-refugees-seeking-resettlement).

62 Refugee Processing Center, “Admissions and Arrivals.”

63 Muzaffar Chishti and Jessica Bolter, “The Travel Ban at Two: Rocky Implementation Settles into Deeper Impacts,” *Migration Information Source*, January 31, 2019, [www.migrationpolicy.org/article/travel-ban-two-rocky-implementation-settles-deeper-impacts](http://www.migrationpolicy.org/article/travel-ban-two-rocky-implementation-settles-deeper-impacts).

64 Dan De Luce and Julia Ainsley, “Trump Admin Rejected Report Showing Refugees Did Not Pose Major Security Threat,” NBC News, September 5, 2018, [www.nbcnews.com/politics/immigration/trump-admin-rejected-report-showing-refugees-did-not-pose-major-n906681](http://www.nbcnews.com/politics/immigration/trump-admin-rejected-report-showing-refugees-did-not-pose-major-n906681); Julie Hirschfeld Davis and Somini Sengupta, “Trump Administration Rejects Study Showing Positive Impact of Refugees,” *The New York Times*, September 18, 2017, [www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html](http://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html).



### Key Questions for Public Debates

1. What specific policies and practices are slowing refugee processing and admissions, leading to admissions below the stated cap?
2. What changes to screening processes have been introduced by extreme vetting, and have they demonstrated the ability to identify security risks that would have gone undetected under earlier procedures?
3. Why have resettlement numbers from certain countries, many of them Muslim majority, facing serious humanitarian crises fallen so dramatically? Considering the United States prioritizes the resettlement of the most vulnerable, are the victims of conditions in such countries not those the refugee program would most want to reach?
4. Should Congress provide baseline funding to sustain the basic operations of the refugee service provider network, so that refugees who have already been resettled can continue to access critical services, and providers have capacity in the event of humanitarian emergencies that call for higher refugee admissions levels?
5. What role could Congress play in building public awareness of the costs and benefits of refugee resettlement, and the foreign policy and national security implications of refugee admissions?

## Issue No. 7. Skills-Based Immigration: The H-1B Program

The H-1B visa, the main vehicle through which U.S. employers can sponsor skilled foreign workers, has faced substantial criticism for decades.<sup>65</sup> At the same time, skilled immigration is one of the few areas of immigration policy that enjoys strong support for standalone or piecemeal immigration reform.

In the long run, the H-1B program should be rethought as part of broad changes to employment-based immigration policy and systems. But for the present, a set of past proposals is ripe for Congress to reconsider, with the aim of better balancing the interests of employers, U.S. employees, and foreign workers. In so doing, changes must balance desires to protect U.S. workers against competition from lower-wage contracted workers, with the reality that the technology industry overall has increasingly relied on contract labor, because companies find it more cost-effective to outsource IT work.

### A. H-1B-Dependent Employers

Similar to today, in the 1990s Congress was confronted by reports of U.S. workers being displaced by H-1B visa holders. To address this, Congress created the category of “H-1B-dependent employers”—those whose H-1B workforce constituted at least 15 percent of their total staff—to ensure that such employers recruited only highly skilled or high-paid workers from abroad who would not unfairly compete with U.S. workers for jobs. Such employers face additional labor-protection requirements, such as providing additional proof that U.S. workers are not being displaced, but can avoid the additional scrutiny if their

<sup>65</sup> More than 365,000 H-1B visa petitions were approved in FY 2017. This number includes the 85,000 capped visas, as well as applications approved for employers who are exempt from the cap and continuing H-1B workers who are renewing their visas. To qualify for an H-1B visa, the employee must be coming to work in a job that requires a bachelor’s degree or higher in a specific specialty, and they must have at least such a degree or its equivalent. While the visa can be used for workers in any “specialty occupation,” it is increasingly used to fill programming and other technology-related jobs. USCIS, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2017 Annual Report to Congress* (Washington, DC: 2018), [www.uscis.gov/sites/default/files/files/nativedocuments/Characteristics\\_of\\_H-1B\\_Specialty\\_Occupation\\_Workers\\_FY17.pdf](http://www.uscis.gov/sites/default/files/files/nativedocuments/Characteristics_of_H-1B_Specialty_Occupation_Workers_FY17.pdf).



H-1B employees qualify as “exempt” by earning at least \$60,000 annually or having a master’s or higher degree in a specialty related to their job.<sup>66</sup>

Despite these measures, the top “H-1B-dependent” companies meet the criteria to avoid additional scrutiny but still pay their H-1B workers less and employ fewer workers with advanced degrees than those that are not H-1B-dependent (see Tables 2 and 3).

**Table 2. Average Salaries for H-1B Workers at the Top 30 Employers, by H-1B Dependency, FY 2018**

H-1B-Dependent		Not H-1B-Dependent	
	Average Salary		Average Salary
Cognizant Tech Solutions US Corp	\$86,653	Deloitte Consulting LLP	\$107,100
Tata Consultancy Services Ltd	\$75,000	Microsoft Corporation	\$131,011
Infosys Limited	\$81,058	Amazon Com Services Inc	\$125,000
Wipro Limited	\$74,818	Google LLC	\$140,000
Capgemini America Inc.	\$90,000	Apple Inc.	\$145,000
Facebook Inc.	\$150,000	Accenture LLP	\$82,955
Tech Mahindra Americas Inc.	\$79,415	Ernst & Young US LLP	\$96,030
HCL America Inc.	\$89,896	JPMorgan Chase & Co	\$114,500
Larsen & Toubro Infotech Limited	\$84,903	Intel Corporation	\$107,350
L&T Technology Services Limited	\$70,044	Oracle America Inc.	\$126,326
Mphasis Corporation	\$85,000	Cisco Systems Inc.	\$128,000
Syntel Inc.	\$79,165	IBM India Private Limited	\$81,837
Mindtree Limited	\$80,993	IBM Corporation	\$120,349
		Wal-Mart Associates Inc.	\$117,880
		Deloitte & Touche LLP	\$80,000
		Amazon Corporate LLC	\$126,900
		Cummins Inc.	\$83,250
<b>Average salary of the above, weighted by petitions approved</b>	<b>\$85,470</b>	<b>Average salary of the above, weighted by petitions approved</b>	<b>\$115,844</b>

*Note:* Averages can also vary between companies based on the cost of living in the worksite locations and needed skill levels.

*Source:* U.S. Citizenship and Immigration Services (USCIS), “Approved H-1B Petitions (Number, Salary, and Degree/ Diploma) by Employer, Fiscal Year 2018,” accessed May 2, 2019, [www.uscis.gov/sites/default/files/USCIS/Data/Employment-based/H-1B/approved-h-1b-petitions-by-employer-fy-2018.pdf](http://www.uscis.gov/sites/default/files/USCIS/Data/Employment-based/H-1B/approved-h-1b-petitions-by-employer-fy-2018.pdf).

<sup>66</sup> Ruth Ellen Wasem, *Immigration: Nonimmigrant H-1B Specialty Worker Issues and Legislation* (Washington, DC: Congressional Research Service, 1998), [www.everycrsreport.com/files/19980804\\_98-531\\_1d4d96119caf5211d21997c7eba3b89201754a9d.pdf](http://www.everycrsreport.com/files/19980804_98-531_1d4d96119caf5211d21997c7eba3b89201754a9d.pdf); *Christian Science Monitor*, “Letting in the Skilled,” *Christian Science Monitor*, May 7, 1998, [www.csmonitor.com/1998/0507/050798.edit.edit.2.html](http://www.csmonitor.com/1998/0507/050798.edit.edit.2.html); Timothy Burn, “Tech Firms Defend Role of Foreign Workers – Some See Losses for U.S. Citizens,” *Washington Times*, October 12, 1998, [www.washingtontimes.com/longtermsearch/](http://www.washingtontimes.com/longtermsearch/).

**Table 3. Education Levels of H-1B Workers at the Top 30 Employers, by H-1B Dependency, FY 2018**

H-1B-Dependent		Not H-1B-Dependent	
	Share of H-1Bs with Master's Degree or More (%)		Share of H-1Bs with Master's Degree or More (%)
Cognizant Tech Solutions US Corp	24	Deloitte Consulting LLP	38
Tata Consultancy Services Ltd	21	Microsoft Corporation	64
Infosys Limited	25	Amazon Com Services Inc	72
Wipro Limited	41	Google LLC	79
Capgemini America Inc.	32	Apple Inc.	74
Facebook Inc.	78	Accenture LLP	27
Tech Mahindra Americas Inc.	37	Ernst & Young US LLP	66
HCL America Inc.	35	JPMorgan Chase & Co	56
Larsen & Toubro Infotech Limited	21	Intel Corporation	92
L&T Technology Services Limited	17	Oracle America Inc.	61
Mphasis Corporation	33	Cisco Systems Inc.	63
Syntel Inc.	34	IBM India Private Limited	36
Mindtree Limited	29	IBM Corporation	71
		Wal-Mart Associates Inc.	64
		Deloitte & Touche LLP	59
		Amazon Corporate LLC	76
		Cummins Inc.	76
<b>Average percentage of the above, weighted by petitions approved</b>	<b>30</b>	<b>Average percentage of the above, weighted by petitions approved</b>	<b>61</b>

Source: USCIS, "Approved H-1B Petitions (Number, Salary, and Degree/Diploma) by Employer, Fiscal Year 2018."

Thus, the additional scrutiny provisions have not fully curtailed labor-protection weaknesses within H-1B-dependent workplaces.

## B. Further Reforming the H-1B Visa

Recent reform proposals have focused on creating incentives for H-1B-dependent employers to hire U.S. workers, including by raising the salary an employer must pay to be considered exempt and eliminating the master's degree exemption. However, this would not necessarily address the replacement of U.S. workers by foreign nationals on H-1B visas more broadly. H-1B-dependent employers are only a subset of all employers who hire H-1B workers. Indeed, as shown in Tables 2 and 3, H-1B-dependent employers represent less than half of the top 30 employers receiving H-1B visas.

Other ideas for program reform more specifically seek to address the use of H-1B workers to fill contract positions at other companies. Some large outsourcing and staffing firms hire many H-1B workers, and then contract them out to other employers—to third-party sites—for time-limited periods.





For example, IT contracting firms may send H-1B workers to another company to help with a transition in IT systems, or to get a new system up and running. In the past, such arrangements have sometimes been used to replace permanent U.S. employees at a company with H-1B workers. To avoid such replacement of U.S. workers, legislation has proposed to require third-party employers to provide written assurance that they have not replaced any U.S. workers by employing the H-1B worker.<sup>67</sup> This proposal would also do more to protect U.S. workers by allowing the government to revoke the H-1B visas of any temporary foreign workers who were used to replace U.S. nationals.

### C. Administrative Reforms

While the Trump administration is concerned about the replacement of U.S. workers using H-1B visas, it has proposed and is implementing sweeping changes that affect all users of this significant pipeline for skilled labor. The changes include increased scrutiny of applications, increased evidentiary requirements for workers hired by one company to work at another, increased site visits, suspended expedited processing, and a recently finalized rule that changes how the H-1B lottery is run to select more workers with master's or higher degrees.<sup>68</sup>

The administration has also indicated it will redefine what type of workers and employment qualify for the visa category.<sup>69</sup> Such changes, if enacted, would be the biggest reforms to the H-1B program since its creation in 1990.

#### Key Questions for Public Debates

1. H-1B rejection rates and requests for additional evidence about applications have been on the rise. For example, H-1B rejection rates grew from 6.1 percent in FY 2016 to 7.4 percent in FY 2017 and 15.5 percent the following year.<sup>70</sup> What policy changes have led to greater rates of rejections of H-1B applications in the past two years? What have been the economic consequences of this increased scrutiny?
2. H-1B visas are available for workers in “specialty occupations”—a term U.S. Citizenship and Immigration Services (USCIS) has said it plans to redefine. What are USCIS’s plans in proposing this change?
3. USCIS has also announced that it plans to redefine what an employer-employee relationship is for the purposes of an H-1B visa. What are the policy goals of this step? Is the goal to reduce or eliminate the use of H-1B visas at third-party sites? What are the expected consequences for employers if H-1B visa holders were no longer permitted to work at third-party sites?
4. In 2018, the Labor Department started collecting information on the third-party users of H-1B visa holders.<sup>71</sup> What do these data show?

67 *Protect and Grow American Jobs Act*, HR 170, 115th Cong., 1st sess., *Congressional Record* 163, no. 1, daily ed. (January 3, 2017): H 194, as amended, [https://web.archive.org/web/20181223145711/https://judiciary.house.gov/wp-content/uploads/2017/11/TG\\_001\\_xml.pdf](https://web.archive.org/web/20181223145711/https://judiciary.house.gov/wp-content/uploads/2017/11/TG_001_xml.pdf).

68 USCIS, “Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens” *Federal Register* 84, no. 21 (January 31, 2019): 888, [www.govinfo.gov/content/pkg/FR-2019-01-31/pdf/2019-00302.pdf](https://www.govinfo.gov/content/pkg/FR-2019-01-31/pdf/2019-00302.pdf).

69 DHS, “Strengthening the H-1B Nonimmigrant Visa Classification Program” (proposed rule 1615-AC13, Fall 2018), [www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1615-AC13](https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1615-AC13).

70 USCIS, “I-129, Petition for a Nonimmigrant Worker Class Preference: H-1B Receipts, Completions, and Requests for Evidence (RFE) Sent FY15 - FY19 (Through December 31, 2018), Aggregated by Fiscal Year and Month,” January 2, 2019, [www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/non-immigrant-worker-rfe-h-1b-quarterly-data-fy2015-fy2019-q1.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/non-immigrant-worker-rfe-h-1b-quarterly-data-fy2015-fy2019-q1.pdf).

71 Labor Department, “Side-by-Side: Major Changes to Labor Condition Application (LCA) ETA Form 9035/9035E” (fact sheet, Labor Department, Washington, DC, November 2018), [www.foreignlaborcert.doleta.gov/pdf/Major\\_Changes\\_9035\\_Side\\_by\\_Side\\_Nov\\_2018.pdf](https://www.foreignlaborcert.doleta.gov/pdf/Major_Changes_9035_Side_by_Side_Nov_2018.pdf).

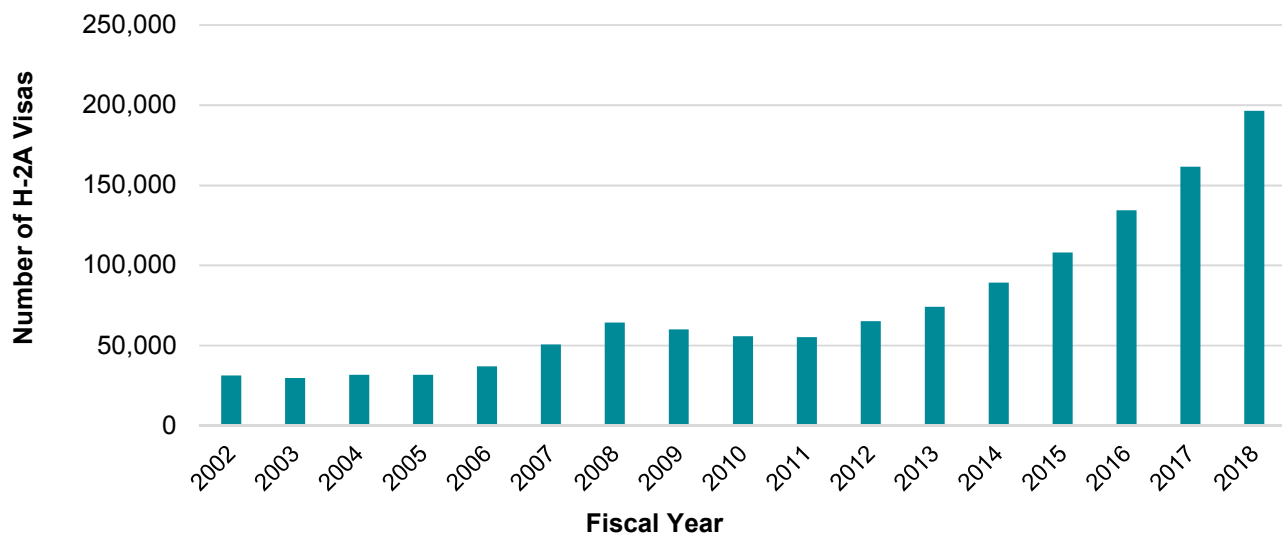


## Issue No. 8. The Agriculture Sector: Relief for Farmers and Workers

That U.S. food production depends heavily on immigrant farmworkers, primarily those from Mexico, is an open secret. For decades, many U.S. growers met their labor needs by hiring unauthorized migrant workers, including some who traveled back and forth for seasonal jobs and others who were living in the United States year round. As of 2000, 55 percent of farmworkers were unauthorized immigrants.<sup>72</sup> However, with tougher border enforcement, a slowdown in illegal immigration since the onset of the Great Recession, and the requirement by more states that employers use the E-Verify system to verify the immigration status of their new hires, the ability of growers to hire unauthorized workers has diminished.

These trends have coincided with unprecedented growth in the use of the H-2A visa for foreign-born farmworkers in recent years. While 32,000 H-2A visas were issued in FY 2002, this number rose to about 56,000 in FY 2010 and 196,000 in FY 2018 (see Figure 7).<sup>73</sup> As farmers turn increasingly to H-2A workers to grow and harvest crops, concerns about the program's weaknesses have become more pressing. For employers, the program has burdensome and rigid requirements that sometimes make it difficult to meet pressing labor needs. For workers, concerns have been raised about the adequacy of the labor protections built into the program for U.S. and foreign workers alike.

**Figure 7. H-2A Visas Issued, FY 2002–18**



Source: U.S. Department of State, "Report of the Visa Office: Table XVI(B) Nonimmigrant Visas Issued by Classification" various years, accessed January 15, 2019, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports.html>.

### A. Grower and Worker Concerns

While the H-2A program is increasingly popular, it is not a perfect solution. Employers argue that the rigid timelines of the program, costs of providing housing for workers, and the application process are cumbersome. To avoid learning to comply with these requirements, many growers do not directly sponsor H-2A visas, instead relying on farm labor contractors. Responding both to these program

<sup>72</sup> Philip Martin, *Immigration and Farm Labor: From Unauthorized to H-2A for Some?* (Washington, DC: MPI, 2017), 1, [www.migrationpolicy.org/research/immigration-and-farm-labor-unauthorized-h-2a-some](http://www.migrationpolicy.org/research/immigration-and-farm-labor-unauthorized-h-2a-some).

<sup>73</sup> DHS, Office of Immigration Statistics, *Yearbook of Immigration Statistics* (Washington, DC: DHS, 2000, 2010, and 2017), [www.dhs.gov/immigration-statistics/yearbook](http://www.dhs.gov/immigration-statistics/yearbook).



limitations and to broader trends within the industry, some farmers are adapting using other strategies, including investing in mechanical productivity aids, mechanizing harvesting completely, or moving operations to Mexico where labor is cheaper and readily available.<sup>74</sup>

At the same time, farmworker advocates point out that H-2A workers are sometimes charged illegal recruiting fees, housed in unsafe or unsanitary conditions, or paid less than the full wages owed to them.<sup>75</sup> H-2A farmworkers may be reluctant to report unfair wages or working conditions since they depend on the sponsorship of their employers to lawfully stay in the country. And farmworkers are often geographically isolated, limiting their access to information and resources to help them better assert their employment rights.

More broadly, there are some concerns about the incentives the program may create for employers to favor foreign over domestic workers. For example, employers must pay Social Security and unemployment taxes on domestic workers' wages, but not on the wages of H-2A workers.

## B. AgJOBS Proposal

Congress has for years tried to address labor-market challenges in the agriculture sector. In 2006, Senator Dianne Feinstein (D-CA) introduced the *Agricultural Job Opportunities, Benefits, and Security Act* (AgJOBS), a bill that represented a compromise between growers and United Farm Workers, the primary union representing farmworkers. AgJOBS would have provided a path to permanent legal status for noncitizen agricultural workers already in the United States, streamlined requirements for employers, standardized wage increases, and provided access to courts for H-2A workers, among other provisions.<sup>76</sup> That bill has formed the blueprint for subsequent proposals for updating the system governing the admission of foreign farmworkers, but so far none has passed Congress.

### Key Questions for Public Debates

1. While U.S. agricultural employers have long complained about the onerous requirements of the H-2A visa program, a growing number of farmworkers are being recruited using it. What data do DHS and other federal agencies have that explain the reasons for this growth? What continuing concerns do employers have about the program?
2. How do attempts to recruit U.S. workers, wages, and working conditions compare between farm labor contractors and employers who directly sponsor H-2A workers?
3. How effective is Labor Department enforcement of labor rights and protections—both for U.S. workers and H-2A workers? What are USCIS and the Labor Department doing to detect and prevent abuse of H-2A workers, particularly unscrupulous recruitment practices abroad, wage theft, blacklisting by recruiters, and provision of substandard housing?

<sup>74</sup> Martin, *Immigration and Farm Labor*; Miriam Jordan, "As Immigrant Farmworkers Become More Scarce, Robots Replace Humans," *The New York Times*, November 20, 2018, [www.nytimes.com/2018/11/20/us/farmworkers-immigrant-labor-robots.html](http://www.nytimes.com/2018/11/20/us/farmworkers-immigrant-labor-robots.html).

<sup>75</sup> Letter from Farmworker Justice et al. to Thomas Perez, Secretary, U.S. Department of Labor, and Jeh Johnson, Secretary of Homeland Security, *H-2A Coalition Letter*, June 24, 2016, [www.farmworkerjustice.org/sites/default/files/H-2A-Coalition-Letter6-24-16.pdf](http://www.farmworkerjustice.org/sites/default/files/H-2A-Coalition-Letter6-24-16.pdf).

<sup>76</sup> Farmworker Justice Fund, Inc. "Summary of AgJOBS: Agricultural Job Opportunities, Benefits and Security Act of 2006," *Farmworker Justice Bulletin*, March 30, 2006, [www.ufw.org/pdf/FJFBulletinAgJOBS3-29-2006.pdf](http://www.ufw.org/pdf/FJFBulletinAgJOBS3-29-2006.pdf).



## Conclusion

In the coming months and years, immigration promises to continue to be a centerpiece of policy debates and political positioning. With a new Congress in session and the House now in the hands of Democrats who are vowing active participation in the immigration sphere and review of the Trump administration's actions, the legislative branch, alongside the courts and the executive branch, can be expected to play a more active, influential role in shaping the direction of immigration policymaking. Beyond the highly visible border-security issues at the heart of the recent partial federal government shutdown, the president has continued to make immigration a significant priority for his administration. Congress also can be expected to step up its activities on immigration. This is likely to involve addressing a wide assortment of challenges that together determine how well the U.S. immigration system is working and serving the country's national interests.

The issues highlighted in this report are among the consequential questions decisionmakers face in what has become one of the most contentious and unsettled areas of policy in the life of the nation.

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*The issues highlighted in this report are among the consequential questions decisionmakers face in what has become one of the most contentious and unsettled areas of policy in the life of the nation.*

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Her responsibilities focus in particular on the role of immigration in America's future and on administering the nation's immigration laws, systems, and government agencies. Her work and expertise also include immigration and politics, immigration enforcement, border control, cooperation with other countries, and immigration and national security. She has authored and coauthored numerous reports, articles, and op-eds and is frequently quoted in the media. She served as Director of MPI's Independent Task Force on Immigration and America's Future, a bipartisan group of distinguished leaders. The group's report and recommendations address how to harness the advantages of immigration for a 21st century economy and society.

From 1993–2000, she served in the Clinton administration as Commissioner of the INS, then a bureau in the U.S. Department of Justice. Her accomplishments included reforming the nation's asylum system; creating new strategies for managing U.S. borders; improving naturalization and other services for immigrants; shaping new responses to migration and humanitarian emergencies; strengthening cooperation and joint initiatives with Mexico, Canada, and other countries; and managing growth that doubled the agency's personnel and tripled its budget.

She first joined the Justice Department in 1973 as a White House Fellow and Special Assistant to the Attorney General. She served in various senior policy posts until 1981, when she became Acting Commissioner of the INS and then Executive Associate Commissioner, the third-ranking post in the agency. In 1986, she joined the Carnegie Endowment for International Peace as a Senior Associate. Ms. Meissner created the Endowment's Immigration Policy Project, which evolved into the Migration Policy Institute in 2001.

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The Migration Policy Institute is a nonprofit, nonpartisan think tank dedicated to the study of the movement of people worldwide. MPI provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic and thoughtful responses to the challenges and opportunities that large-scale migration, whether voluntary or forced, presents to communities and institutions in an increasingly integrated world.

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