Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States

Andowah A. Newton

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Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on its Impact on African Immigration to the United States

Andowah A. Newton†

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Introduction

The newest immigrant visa category, the diversity visa, increases immigration opportunities for immigrants from regions currently underrepresented in the U.S. immigrant population. Since the program's inception, however, scholars have criticized it for failing to achieve its purported goal of promoting diversity in the immigrant flow to the United States.1 Some scholars have even adopted the term "anti-diversity visas"2 to describe the program, claiming that it maintains the status quo in our nation's racial and ethnic composition. Recently, critics have voiced their concerns that the program encourages fraud, abuse, and poses a security threat.3 Because of these concerns, critics have proposed moderate-to-drastic changes to the diversity visa program, including the complete elimination of the program.4 Most recently, in February 2005, Rep. Gresham J. Barrett (R-S.C.) introduced legislation in the House of Representatives to eliminate the program.5

Discourse regarding the diversity visa program, including the concerns raised during the congressional hearing, has mostly ignored or cursorily dismissed the program's impact on African immigration. U.S.


3. See DV Hearing, supra note 2, at 2.

4. In April 2004, the House of Representatives Subcommittee on Immigration, Border Security, and Claims held a hearing to review the diversity visa program, discuss critics' concerns, and propose changes. Id. In September 2004, the Subcommittee voted to send a bill that would eliminate the program to the full committee. See 81 INTERPRETER RELEASES 1271 (Sept. 20, 2004); see also Security and Fairness Enhancement for America Act of 2003 (SAFE for America Act), H.R. 775, 108th Cong. (2004). Later that month, the House Judiciary Committee voted to report the bill favorably to the House floor. See 81 INTERPRETER RELEASES 1384, 1385 (Oct. 4, 2004).

immigration law and policy has traditionally excluded and disfavored Africans. Historically, immigration laws have either explicitly excluded Africans or have had the effect of excluding them. The effects of those laws and policies continue to impact African immigration to the United States today. Africans continue to be disproportionately underrepresented in the U.S. immigration system and remain the least represented group of immigrants to the United States. Therefore, it is important to consider the impact on African immigration when evaluating the diversity visa program.

The diversity visa program presents an opportunity to reduce some of the effects of the past exclusion of Africans and to increase their representation in the U.S. immigrant population. Some aspects of the diversity visa program and proposals for eliminating the program, however, threaten to limit opportunities for increasing African immigration.

This Note considers the impact of the diversity visa program on African immigration and responds to criticisms regarding the diversity aspect of the program. The Note begins by providing an overview of the diversity visa program. Part II summarizes the criticisms of the diversity aspects of the program. Part III explores the historical and current immigration laws and policies that contribute to the disproportionate underrepresentation of Africans in the U.S. immigration system. Part IV analyzes the impact of the diversity visa program on African immigration and responds to criticisms of the program. Part V identifies aspects of the program that threaten to limit its ability to achieve diversity. Finally, Part VI proposes modifications to our immigration system to promote diversity more effectively.

I. The Diversity Visa Program

Congress created the diversity immigrant visa program as part of the Immigration Act of 1990. The program, which went into effect on October 1, 1994, offers registrants the possibility of obtaining a permanent residence visa. The program permits 50,000 people from countries and regions that are underrepresented in the U.S. immigration system to immigrate to the United States each year.


8. See sources cited supra note 7.

9. 8 U.S.C. § 1153(c).

10. 8 U.S.C. § 1151(e). The statute actually provides for 55,000 visas. Beginning in FY 1999, 5000 of these visas were temporarily reallocated to adjustments under the Nicaraguan Adjustment and Central American Relief Act (NACARA). Pub. L. No. 105-100, § 203(d), 111 Stat. 2160 (1997).
A. History: Predecessor and Temporary Programs

The diversity visa program emerged from a series of similar, temporary programs that Congress created after it abolished the national origin quota system in 1965.11 The national origin quota system, which Congress enacted in 1921 and modified in 1924, discriminated on the bases of race and ethnicity by restricting immigration opportunities to nationals of countries already reflected in the U.S. population.12 It created quotas based on the percentage of U.S. citizens from each nation.13 Thus, immigrants were admitted in direct proportion to their nation's representation in the U.S. citizen population.14 The quotas reflected Congress's desire to accept only those immigrants who were most similar to themselves.15 Scholars assert that the quotas were also an intentional expression of the United States' desire to maintain its racial and ethnic mix.16

Aware of the discriminatory nature of the national origin quota system, Congress replaced it in 1965 with a family and employment-based preference system.17 Because of these changes,18 Europeans had fewer opportunities to immigrate to the United States and they immigrated in much smaller volumes.19 Concerned with this significant decline in European immigration, Congress passed a series of immigration laws that made nonpreference visas available to persons from countries adversely affected by the 1965 Act and to persons from countries that were underrepresented in the U.S. immigration system.20

The NP-5 program, which Congress created in 1986 and renewed in 1988, set aside 5000 visas per year for two years, then 15,000 visas per year for two years, for persons from countries adversely affected by the 1965 Act.21 The visas were distributed to qualifying applicants in chronological

---

13. Id.
14. See id. The quotas were first based on percentages of the populations, then on the censuses of 1890, 1910, and 1920.
18. These changes resulted in immigration backlogs in for Western Hemisphere immigrants. See Boswell, supra note 16, at 328.
19. Between 1971 and 1980, the number of European immigrants decreased from 1,123,492 to 800,368 as compared to the preceding ten-year period (1961-1970), representing a total decline of almost thirty percent. See IMMIGRATION STATISTICS, supra note 6.
20. See 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §§ 40.03-40.04. See also 68 INTERPRETER RELEASES 137 (Feb. 4, 1991).
order according to the date on which the application was received.\textsuperscript{22} These applicants were exempted from the labor certification typically required under the preference system.\textsuperscript{23} By contrast, the OP-1 program, which Congress created in 1988, allocated 10,000 visas per year for two years to persons from underrepresented countries.\textsuperscript{24} The applicants for these visas were selected by random lottery.\textsuperscript{25} The OP-1 applicants were also exempted from labor certification requirements.\textsuperscript{26}

As part of an overall reform of the immigration system, Congress also created a temporary diversity visa program, the AA-1 program, in 1990.\textsuperscript{27} The AA-1 program initially distributed visas in chronological order of application receipt, then later by a lottery system.\textsuperscript{28} The program allocated 40,000 visas per year for three years to qualified persons from countries adversely affected by the 1965 Act.\textsuperscript{29} Not only did the program thereby restrict the thirty-four eligible nationalities primarily to natives of European countries,\textsuperscript{30} it also explicitly allocated forty percent of the visas to Irish natives.\textsuperscript{31}

While the AA-1 temporary program ended in 1994, the Immigration Act of 1990 also provided for a permanent program to take effect in FY 1995.\textsuperscript{32} The permanent program did not restrict eligibility to European nationals.\textsuperscript{33} This newer program is now generally the only one referred to as the "diversity visa program."

B. Permanent Program: Procedures and Requirements

To qualify for the diversity visa program, applicants must meet two primary requirements: 1) Be a citizen of a low-admission country,\textsuperscript{35} and 2)
have a high-school education or its equivalent. Each year, the State Department allows potential immigrants to register for the random lottery that determines who may apply for the diversity visa. Registrations may be disqualified for failure to submit the registration within the required timeline, failure to meet the requirements enumerated above, or failure to follow instructions generally. The random lottery selects approximately 90,000-110,000 winners each year.

Being a lottery winner, however, does not guarantee future possession of an immigrant visa. Rather, it merely permits lottery registrants to apply for a diversity visa once they have been notified of "winning" a space in the lottery. The lottery winners then proceed to apply for the diversity visa. In addition, the applications must be processed within the twelve-month period finishing with the end of the FY for which the applicant won the lottery. Many diversity visa lottery winners' applications either will not be processed within this period or the applicants will be denied visas based on admissibility or inadmissibility criteria. Through this process, the 90,000-110,000 lottery winners selected each year yield the approximately 50,000 diversity visas permitted by the statute.

The visas are distributed to qualifying applicants according to a multi-step regional allocation formula. This formula is recalculated each year based on immigration statistics from the previous five years. Under the formula, low-admission regions such as Europe and Africa receive a higher allocation of diversity visas than high-admission regions such as Asia and

gories during the five previous FYs. High admission countries are excluded from the participating in the program. See 8 U.S.C.A. § 1153(c) (2004). This determination generally results in the exclusion of approximately fifteen countries from the diversity visa program. Typically, the majority of these countries are Asian and Latin American countries.

36. The statute defines the equivalent of a high school education as at least two years experience, within the five years preceding application for the visa, in an occupation that requires two or more years of training or experience. See Department of State, Instructions for the 2006 Diversity Immigrant Visa Program (2004), http://travel.state.gov/visa/immigrants/types/types.1318.html [hereinafter DV INSTRUCTIONS] (last visited Oct. 25, 2004).

37. This lottery is generally referred to as the "diversity visa lottery." Applicants must submit their applications during a one to two month period that usually occurs during the fall preceding the two calendar years for which the visa will be issued. See id.

38. See id.


41. See DV RESULTS, supra note 39.

42. The formula is based on determinations of high-admission regions, low-admission regions, high-admission countries, and low-admission countries. For a detailed explanation of this formula, see 68 Interpreter Releases, supra note 20, at 138-40.

43. See id. See also INA § 203(c), 8 U.S.C.A. § 1153(c) (2004).
Injecting Diversity into U.S. Immigration Policy

The formula generally results in the allocation of approximately 24,000 diversity visas for the European region, 20,000 for the African region, 7,000 for the Asian region, 2,500 for the Latin American and Caribbean region, less than 1,000 to the Oceania region, and 8 to the North American region. The number of diversity visas issued to nationals of any eligible country may not exceed seven percent (3,500) of the total diversity visas available (50,000).

As of August 2003, registrants may only register electronically, via the Internet, for the diversity visa lottery. Registration for the electronic diversity visa (EDV) requires digital photographs of the principal registrant and his or her immediate family. Failure to submit the photographs according to the detailed specifications constitutes an additional ground for disqualification of the EDV registration.

C. Purpose

One of Congress's purposes in reforming the immigration system in 1990 was to "further enhance and promote diversity" of immigrants. One scholar more specifically notes that the diversity visa program was implemented to promote European and African immigration. There is some ambiguity concerning Congress's purpose in establishing the diversity visa program. Although the stated purpose is to "enhance" and "promote" diversity, the main temporary and permanent diversity visa provisions of the Immigration Act of 1990 have done so in inconsistent ways. The temporary AA-1 program described in the previous section gave explicit preference to European immigrants and effectively excluded immigrants from other regions. By contrast, the permanent diversity visa program gives preference to the countries and regions which have recently been underrepresented in the immigrant population and is open to immi-

44. The statute divides the world into the six main regions listed in the text. High admission regions are those which have been issued more than 1/6 of all immigrant visas based on the family and employment preference visa categories during the previous five years.
45. See Gordon et al., supra note 20, § 40.04[5][b].
46. See INA § 203(c), 8 U.S.C.A. § 1153(c) (2004).
48. See id.
49. See id.
51. This view is supported by the projected results of the permanent diversity visa program. See supra note 45 and accompanying text; See Ogletree, supra note 16, at 764 (citing the State Department).
52. During a recent congressional hearing on the diversity visa program, for example, the Chairman, Subcommittee on Immigration, Border Security, and Claims, the Honorable John N. Hostettler, a Representative from the State of Indiana asked a witness, Mr. Jan Ting, Professor of Law, Temple University James E. Beasley School of Law, "Professor Ting, you have provided the Committee with an extensive discussion of the history of the visa lottery. And what were the original purposes of the visa lottery?" See DVHearing, supra note 2, at 52.
grants from all regions.\textsuperscript{54}

Congress's use of the word "further" indicates that it believed it had enhanced and promoted diversity with the temporary programs created in 1986 and 1998 (NP-5 and OP-1) described in the previous section.\textsuperscript{55} The differences in beneficiaries between these two programs may be contrasted in the same way as the temporary AA-1 program and the permanent diversity visa program: The OP-1 program and the permanent diversity visa program greatly expanded the eligible countries from which potential immigrants could apply.\textsuperscript{56} Considered together, these four programs suggest that Congress's priority was primarily to increase immigration from Europe, especially in the short-term, and increase immigration from all currently underrepresented regions and countries as a secondary, long-term goal.

II. Criticism of the Diversity Visa Program

Since the diversity visa program's creation, critics have accused the program of being discriminatory and failing to promote diversity in the U.S. immigration system.\textsuperscript{57} Recently, those critics have raised other concerns related to the potential for fraud and abuse of the program and concerns of national security.\textsuperscript{58} As this Note focuses on incorporating diversity in our immigration policy, it addresses only the criticisms related to the diversity aspects of the program.

The first main criticism is that the diversity visa program is discriminatory and exclusionary. Critics argue that the program is discriminatory based on its geographical distinction of potential immigrants since the country in which an immigrant was born determines his or her eligibility for participation in the program.\textsuperscript{59} The formula used to determine the allocation of the diversity visas results in significantly fewer spaces for potential immigrants from high admission regions (currently Asia and Latin America) as well as specific countries.\textsuperscript{60} Because nationality is closely tied to ethnicity, critics maintain that the program discriminates against Asians and Latin Americans.\textsuperscript{61} As most of the countries determined under the diversity visa program to be high admission countries are

\textsuperscript{54} Application of the allocation formula, however, results in the exclusion of specific countries from participation in the program. See INA § 203(c), 8 U.S.C.A. § 1153(c) (2004).

\textsuperscript{55} The programs also parallel each other in terms of their distribution method. The NP-5 and temporary diversity AA-1 visas were distributed in chronological order. The OP-1 visa recipients were primarily determined by a lottery system, as done for the permanent diversity visa program.

\textsuperscript{56} See supra notes 21, 24 and accompanying text.

\textsuperscript{57} See, e.g., DV Hearing, supra note 2; Lennox, supra note 15, Legomsky, supra note 1; Ogletree, supra note 16; Mark Krikorian, Gambling with Visas, 15 Am. Enter. 52 (2004).

\textsuperscript{58} See generally DV Hearing, supra, note 2. See, e.g., Krikorian, supra note 57.

\textsuperscript{59} For a discussion on the use of geographic distinctions in immigration policy, see Legomsky, supra note 1, at 323–30. See also supra notes 35–49 and accompanying text.

\textsuperscript{60} See supra note 45 and accompanying text.

\textsuperscript{61} See, e.g., DV Hearing, supra, note 2, at 12–13 (statement of Jan Ting).
located in Asia and Latin America, critics likewise maintain that the diversity visa is exclusionary based on ethnicity.⁶²

Additionally, some claim that the goals of the permanent diversity visa program were discriminatory⁶³ as a consequence of the discriminatory nature of the temporary and predecessor NP-5 and AA-1 visa programs.⁶⁴ According to these critics, Congress’s goals in implementing the permanent diversity visa program were to increase European immigration, decrease Asian and Latin American immigration, and thereby maintain the status quo in terms of ethnic and racial representation in the U.S. population.⁶⁵ Because the diversity visa program emerged from these temporary programs, critics maintain that the permanent diversity visa program is likewise discriminatory and exclusionary.

Second, some critics claim that the diversity visa program has not achieved diversity.⁶⁶ Critics observe that the regions most benefiting from U.S. immigration policies continue to be Asia and Latin America.⁶⁷ They argue that the program has therefore failed to significantly diversify the U.S. immigrant population.⁶⁸ Some critics further argue that the diversity

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⁶². See id. at 13 (statement of Jan Ting) ("Would-be immigrants from these 14 [primarily Asian and Latin American] countries . . . have been excluded from the Diversity Visa Lottery solely on the basis of their ethnicity.").

⁶³. See Lennox, supra note 15, at 716-17 (describing the temporary measures as "an affirmative action program designed primarily for illegal European immigrants" and arguing that "[t]he lottery makes a mockery of the attempt to eliminate racial preferences from immigrant quotas."). See also Legomsky, supra note 1, at 330 ("[T]he various ad hoc provisions enacted from 1986 to 1990, to the permanent new program for diversity immigrants [have] taken us in the same direction. Each of these enactments made the proportions of immigrants who are ethnically similar to the then existing United States population higher than the percentages that either unrestricted immigration or country-neutral immigration criteria would have produced . . . [t]he effect was clearly intended."). See also Michael M. Hethmon, Diversity, Mass Immigration, and National Security After 9/11 - An Immigration Reform Movement Perspective, 66 ALB. L. REV. 387, 391 (2003) (characterizing the legislative history of the diversity visa programs as lacking a "legal principle of diversity with general applicability to immigration law").

⁶⁴. See supra notes 21-33 and accompanying text.

⁶⁵. See, e.g., Legomsky, supra note 1. See also Ogletree, supra note 16, at 763-64 (quoting Legomsky, supra note 1 and stating that "the diversity visa system as originally established was openly based on ethnic criteria. The original intent of the diversity visa lottery was to benefit certain European groups."). See also Victor C. Romero, Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery, 66 ALB. L. REV. 375, 385 (2003) (comparing the diversity lottery to racial profiling and contending that "by preserving the status quo . . . the diversity lottery perpetuates[s] white supremacy").

⁶⁶. See, e.g., DV Hearing, supra note 2, at 31-33 (statement of Steven A. Camarota) (claiming that the diversity visa program has no significant effect on the "diversity of legal immigration." He based his conclusion on statistics showing that the ten countries that accounted for more than half of immigration for FY 2002 comprised more than half of immigration in FY 1992).

⁶⁷. See also Hethmon, supra note 63, at 395 (highlighting that in 2001, 20% of immigrants came from Mexico alone, and that 40% of immigrants came from only five different countries, adding that "the concentration of immigration flows makes the 'visa-rich' richer and the 'visa-poor' poorer").

⁶⁸. See id. ("The existence of the diversity lottery is an acknowledgement by lawmakers that an imbalance exists—but no more than that.").
visa program not only fails to promote diversity, but that it actually precludes diversity.\textsuperscript{69} Despite the fact that the program increases diversity in the immigrant population,\textsuperscript{70} critics argue that it may not increase diversity in the U.S. population.\textsuperscript{71} Furthermore, the program's formula tends to increase immigration from Europe more than any other region.\textsuperscript{72} The majority of the U.S. population is of European ancestry. Thus, critics assert that, by applying a formula that provides for more immigration from Europe than any other region, the program creates less diversity in the U.S. population.\textsuperscript{73} For this reason, one scholar has termed the visas "anti-diversity."\textsuperscript{74}

Finally, critics claim that the diversity visa program is inconsistent with our immigration system's primary goals of reuniting families and satisfying employment needs.\textsuperscript{75} They assert that these goals are reflected in the two main immigrant visa preference categories: family-based and employment-based visas.\textsuperscript{76} As eligibility for the diversity visa program is not based on criteria relating to either family unity or employment need, critics argue that the program does not reflect the nation's priorities in immigration policy.\textsuperscript{77} A variation of this criticism is the claim that the

\textsuperscript{69} See, e.g., Legomsky, supra note 1, at 334.

\textsuperscript{70} Some critics challenge this assertion, based on legal and illegal immigration combined. See, e.g., DV Hearing, supra, note 2, at 32-33 (statement of Steven A. Camarota) ("[T]he nation's total immigrant population (legal and illegal) has actually become less diverse during the course of the lottery.... [F]rom 1990 to 2000, Mexicans went from 22 percent of all immigrants to 30 percent, while immigrants from all of Spanish-speaking Latin America combined went from 37 to 46 percent of the total foreign-born population." [emphasis in original]).

\textsuperscript{71} See id.

\textsuperscript{72} See supra note 45 and accompanying text.

\textsuperscript{73} See Legomsky, supra note 1, at 334. See also Romero, supra note 65, at 386 (asserting that raising European immigration opportunities increases "the privileged racial class in a concrete, numerical sense, and it reinforces the majority western culture").

\textsuperscript{74} Legomsky, supra note 1, at 334. See also DV Hearing, supra note 2, at 16 (statement of Jan Ting) (agreeing with this appellation, but for different reasons "[T]he so-called diversity visas might properly be called anti-diversity visas, since they were created to offset the diversi try resulting from non-discriminatory immigration.").

\textsuperscript{75} These accepted priorities are based on the two main immigrant visa categories—family-based and employment-based—under which the vast majority of immigrants legally obtain the right to immigrate to the United States. Some assert that "provid[ing] a haven for those fleeing prosecution" is also a primary goal, based on a third immigration visa category: refugees. See, e.g., Ogletree, supra note 16, at 755 (arguing that the "historical purpose" of U.S. immigration policy "has been distorted and abandoned" through various provisions of U.S. immigration laws, including the diversity visa program).

\textsuperscript{76} See, e.g., Romero, supra note 65, at 382-83 ("The other avenues of immigration—through familial relations, employment opportunities, and refugee status—reflect values that our country has long held dear. Underlying these immigration categories are the virtues of family reunification, economic contribution, and protection from persecution. But what value is preserved through the diversity visa lottery?").

\textsuperscript{77} See e.g., DV Hearing, supra note 2, at 13 (statement of Jan Ting) (contending that the two main priorities of family unity and satisfaction of employment needs are "designed and intended to benefit the people of the United States. In comparison, the benefit, if any, of Diversity Visas to the people of the United States is highly questionable

diversity visa program serves no purpose in U.S. immigration policy.\textsuperscript{78}

Although critics have repeatedly voiced their discontent with the program during the past ten years, the impact on African immigration has largely been missing from this discourse\textsuperscript{79} or has received only a cursory review.\textsuperscript{80}

Due to their past and present disproportionate underrepresentation in the U.S. immigration system, Africans are in a unique position compared to immigrants from other regions; they stand to benefit the most from the program. Therefore, it is important to evaluate the diversity visa program in light of its impact on African immigration to the United States. In order to properly analyze the impact of the diversity visa on African immigration, it is necessary to first review the historical and current patterns of African immigration to the United States.

III. Disproportionate Underrepresentation of Africans in U.S. Immigration System

The hallmark of African immigration to the United States is the disproportionate underrepresentation and exclusion of Africans in the U.S. immigration system. Of the 705,827 immigrant visas issued in FY 2003, immigrants from Africa received 45,640 (6.5%).\textsuperscript{81} By contrast, immigrants from Latin America received 290,238 (41.1%), immigrants from Asia received 236,039 (33.4%), and immigrants from Europe received 102,843 (14.6%) of the total immigrant visas in FY 2003.\textsuperscript{82} In his article entitled \textit{Immigration Policies: Messages of Exclusion to African Americans}, Professor Bill Ong Hing thoroughly reviewed the cultural, economic, and institutional phenomena, including historical laws and policies, that have contributed to the disproportionate underrepresentation of Africans in the U.S. immigration system "as a voluntary immigrant group."\textsuperscript{83}

This section highlights the explanations offered by Professor Hing that relate to immigration laws and policies. It focuses on two of the five main explanations offered by Professor Hing: the historical exclusion of Africans from the

\begin{itemize}
  \item See id. at 32-34 (statement of Steven A. Camarota) (arguing that the diversity visa program lacks a humanitarian purpose and that, unlike employment-based immigration, it does not select people based on their skills nor does it unite families).
  \item See Walter P. Jacob, Note, Diversity Visas: Muddled Thinking and Pork Barrel Politics, 6 Geo. Immigr. L.J. 297, 323 (1992) (noting the lack of lobbying on behalf of African immigrants during the hearings that discussed the diversity provisions of the programs prior to the diversity visa program).
  \item See e.g., DV Hearing, supra note 2, at 16 (statement of Jan Ting) ("The fact that beneficiaries of the [lottery now include significant numbers of Africans and Bangladeshis does not make the discrimination against other nationalities, solely because of ethnicity, any less objectionable.").
  \item See IMMIGRATION STATISTICS, supra note 6, at 12-15 tbl. 2. These figures include visas issued under all immigrant visa categories, including the diversity visa program.
  \item See id.
  \item Bill Ong Hing, Messages of Exclusion to African Americans, 37 How. L.J. 237, 240 (1994).
\end{itemize}
U.S. immigration system and the current immigration laws and policies limiting African immigration.  

A. Historical Exclusion of Africans

Professor Hing's first explanation asserts that the disproportionate underrepresentation of Africans in the U.S. immigration system can be traced to historical immigration policies. The historical exclusion of Africans in America begins with the institution of slavery, during which Africans in America were not considered citizens or even full persons. In fact, Africans were specifically precluded from acquiring citizenship by The Nationality Act of 1790. Slavery "destroyed African ancestral family and cultural structure" by severing slaves' ties with Africa and thereby preventing family reunification.

The European colonization of the African continent also contributed to the small number of African immigrants in early U.S. history. Colonial domination prohibited Africans from exerting their free will and deprived them of the opportunity to migrate to the United States. Furthermore, through the use of quotas, U.S. immigration laws severely limited opportunities for immigration from colonies.

As a direct result of slavery and colonization, voluntary African immigration was negligible in early U.S. history: 648 Africans immigrated to the United States between 1820 and 1870, representing 0.008% of the total immigrant population during this period. From 1870 through 1920, 17,376 Africans immigrated to the United States, representing 0.06% of the total immigrant population during this period. Interestingly, during this same period (1870–1920), the United States experienced its largest influx of immigrants totaling more than 26,277,000 altogether.

84. See id. at 244–62.
85. See id. at 244 (explaining that the institution of slavery discouraged immigration because Africans were "unable to take advantage of immigration rights," even if they had desired to do so).
86. See id. at 245. This explicit exclusion ended in 1870 when Congress permitted Africans and persons of African descent to naturalize. Act of July 14, 1870 16 Stat. 254 (1870).
87. See id. at 24, 257 (identifying one major post-slavery obstacle to African immigration as the unwelcome atmosphere of a country that had just emerged from slavery).
88. See id. at 240, 256–57 (speculating that before the 1950s, "the low numbers may have been attributable to the fact that most of the African continent was controlled by Europe").
89. See id. at 256–57 (observing that since the late eighteenth century and until the recent past, European colonization "severely restricted the movement of most Africans outside of the continent").
90. See id. at 257 (explaining that African nations were not independent, the national origin system "effectively barred African immigration," and that "even after [the national origin system was abolished] colonies were limited to annual quotas of two hundred").
91. See IMMIGRATION STATISTICS, supra note 6; see also Hing, supra note 83, at 245 (noting that before 1870, Africans could not become citizens by naturalizing).
92. See IMMIGRATION STATISTICS, supra note 6.
93. Id.
The first major immigration laws to directly exclude Africans were the immigration quotas based on national origin. Through the national origin quotas, U.S. immigration law perpetuated the effects of slavery and colonization on African immigration. Because the quotas were designed to reflect the composition of the U.S. population, they reinforced the prior exclusion of Africans. As a result, after Congress repealed the national origin quotas, immigrants from Africa comprised only 58,449 (0.51%) of the total immigrant population between 1920 and 1970. Not only did the national origin quotas perpetuate the past exclusion of African immigrants, but they also formed a foundation for future exclusion.

### Immigrants from Africa to the United States 1820-1970

<table>
<thead>
<tr>
<th>YEARS</th>
<th>NUMBER</th>
<th>% OF TOTAL IMMIGRANTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1820-1870</td>
<td>648</td>
<td>0.008%</td>
</tr>
<tr>
<td>1870-1920</td>
<td>17,376</td>
<td>0.006%</td>
</tr>
<tr>
<td>1920-1970</td>
<td>58,449</td>
<td>0.51%</td>
</tr>
</tbody>
</table>

B. Current Immigration Laws and Policies Limiting African Immigration

Professor Hing further explains that, despite the removal of the explicitly exclusionary language, current U.S. immigration laws and policies perpetuate the prior exclusion of African immigrants and disproportionately decrease opportunities for African immigration to the United States under both immigrant and nonimmigrant visa categories. African immigrants, as a result, are prevented from participating in U.S. immigration to the same extent as immigrants from other regions.

One aspect of U.S. immigration law that disproportionately affects Africans involves the categories for family-sponsored and employment-based immigrant visas. These categories contain inherent biases against Africans, although the laws are facially neutral. The family-sponsored categories require some familial relation to a U.S. citizen or lawful permanent resident. Because Africans were not present in large numbers in

94. These quotas excluded descendants of slaves in their calculation of the U.S. population. See supra notes 11-17 and accompanying text.


96. See IMMIGRATION STATISTICS, supra note 6.

97. See id.

98. Nonimmigrant refers to foreign nationals seeking temporary admission to the United States, as opposed to the permanent admission and "lawful permanent resident" status sought by immigrants.

99. See Legomsky, supra note 1, at 329 (describing how "placing a high priority on family unity tends to reinforce existing immigration patterns"). See also Ogletree, supra note 16, at 761.

100. INA § 203(a), 8 U.S.C. § 1153(a).
the United States before the creation of these visa categories, they have a smaller proportional opportunity to sponsor their relatives in Africa.\textsuperscript{101} Thus, persons from any region that established ties to the United States through immigration before the enactment of the current laws benefit to a greater extent from the family-sponsored visa category than do Africans.\textsuperscript{102} As a result, in FY 2003, Africans received only 1.8\% of the immigrant visas issued in the family preference category.\textsuperscript{103} By contrast, immigrants from Asia received 44.1\% and immigrants from Latin America received 49.5\% of these visas.\textsuperscript{104} Therefore, although the family-sponsored visa categories have the neutral, and even justified, intent of accomplishing family reunification, the effects perpetuate the exclusion of Africans from the U.S. immigration system.

The employment-based immigrant visa categories require that an applicant possess certain needed skills or a job offer that does not decrease job opportunities for potential U.S. employees.\textsuperscript{105} Africans have historically obtained fewer nonimmigrant visas\textsuperscript{106} and, as a result, they have fewer opportunities to come into contact with employers that may sponsor them in the future, thus disproportionately denying them opportunities to immigrate to the United States.\textsuperscript{107} Thus, in FY 2003, Africans received only 3.8\% of the immigrant visas issued in the employment-based preference categories, while immigrants from Asia and Latin America received 63.0\% and 13.7\%, respectively, of these visas.\textsuperscript{108}

Another aspect of U.S. immigration law that disproportionately affects Africans involves nonimmigrant visas and the non-reviewability of consular decisions: U.S. consulate decisions on whether to grant or deny visa applications cannot be reviewed by a U.S. immigration judge or in the federal

\textsuperscript{101} See Boswell, supra note 16, at 334 (arguing that the "anchor immigration system" creates "extremely difficult obstacle[s]" for Africans and other immigrants of color). See also Hing, supra note 83, at 241-42, 256-57, who notes that because Africans were disproportionately underrepresented in the immigrant population prior to the implementation of the family-sponsored immigrant visa category, there were fewer opportunities to obtain these types of immigrant visas. "[T]he underrepresentation of immediate relative African immigrants suggests that . . . there simply are not many eligible Africans . . . . [T]he pool of Africans already in the United States who can petition for relatives in Africa is small." Id. at 256-57. He also states that "Africans . . . have not been able to take advantage of . . . [the family reunification] policy to the same extent as some Asians and Latinos." Id. at 241-42.

\textsuperscript{102} See Legomsky, supra note 1, at 332 (acknowledging that "prioritizing family unity tends today to produce high numbers of Asian and Hispanic immigrants and low numbers of European immigrants"). The historical exclusionary immigration laws and policies that negatively affected Africans add to this disproportionate effect. See, e.g., supra notes 84-96 and accompanying text.

\textsuperscript{103} See IMMIGRATION STATISTICS, supra note 6, at 29-32 tbl. 8.

\textsuperscript{104} See id.


\textsuperscript{106} This point is discussed below.

\textsuperscript{107} See Boswell, supra note 16, at 333-34.

\textsuperscript{108} See IMMIGRATION STATISTICS, supra note 6, at 29-32 tbl. 8.
Thus, Africans applying for both immigrant and nonimmigrant visas are subject to the discretion of the consular officer in their respective countries.

Many believe that consular officers are predisposed to deny Africans visas, because of the consular officers’ belief that applicants from African countries will commit fraud, overstay their visas, and/or become public charges. The actual visa denial rates are generally unavailable, making it difficult to determine the precise impact these beliefs have on Africans. The stark differences in the number of nonimmigrant visas issued to Africans compared to people from other regions of the world, however, may be attributed in significant part to the consular decisions. Africans were issued only 371,788 (1.3%) of the total 28 million nonimmigrant visas issued in FY 2003. Africans represent the region with the lowest number of nonimmigrant visas. Nonimmigrants from the Oceania region received more than double the amount of nonimmigrant visas issued to Africans in FY 2003. By comparison, nonimmigrants from Asia had 24.4% and nonimmigrants from Latin America received 30.1% of the nonimmigrant visas issued in FY 2003.

The disparity in the number of nonimmigrant visas issued to Africans and the number of nonimmigrant visas issued to people from other regions is especially detrimental to African immigration. This is due to the potential the nonimmigrant visas have for creating future immigration opportunities through the immigrant visa categories. Professor Hing stressed that “[t]he number of nonimmigrants from Africa is . . . relevant to the number of Africans who become immigrants.” The personal contacts created through nonimmigrant visa categories, which include tourists, students, business representatives, and government personnel, may establish future employment or marriage prospects. These prospects increase potential opportunities to immigrate through the family and employment-based immigrant visa categories. Therefore, the fact that Africans receive only

109. See generally James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 WASH. L. REV. 1, 16-34, 63-72 (1991) (discussing broad discretion of consular officers in granting visa applications and the need for a “more formal review” of the process.)
110. See Boswell, supra note 16, at 341 (citing accounts of racism and bias among consular officers).
112. In addition, it is difficult to determine the extent to which these beliefs disproportionately impact Africans over visa applicants from other regions. Some scholars have suggested that financial obstacles, such as the requirements for students to have sufficient finances to support them through the end of their school term, also contribute to the low issuance rate of nonimmigrant visas to Africans. See Hing, supra note 83, at 257-58 (discussing the “legal barriers” to nonimmigrant visas, specifically the student F-1 visa requirements).
113. See IMMIGRATION STATISTICS, supra note 6, at 89-100 tbl. 23.
114. Id.
115. Id.
116. See Hing, supra note 83, at 243.
117. See id.
118. See id. (observing that “tourists and students often become permanent immigrants”).
approximately 1.3% of nonimmigrant visas significantly diminishes their opportunities to establish the ties required for immigrant visas.\textsuperscript{119}

**Immigrant & Nonimmigrant Visas Issued by Region FY 2003\textsuperscript{120}**

<table>
<thead>
<tr>
<th>REGION</th>
<th>FAMILY-BASED IMMIGRANT VISAS</th>
<th>EMPLOYMENT-BASED IMMIGRANT VISAS</th>
<th>NONIMMIGRANT VISAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>1.8%</td>
<td>3.8%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Asia</td>
<td>44.1%</td>
<td>63.0%</td>
<td>24.4%</td>
</tr>
<tr>
<td>Latin America</td>
<td>49.5%</td>
<td>13.7%</td>
<td>30.1%</td>
</tr>
</tbody>
</table>

Finally, U.S. refugee policy has disadvantaged Africans. Africans have been disproportionately underrepresented in the allocation of refugee admissions: the proportion of the allocation reserved for Africans was smaller than the proportion of Africans represented in the worldwide refugee population.\textsuperscript{121} During the past few years, however, the United States has steadily increased its refugee authorizations for Africans: 28.6% for FY 2005, an increase from 8.4% for FY 1998.\textsuperscript{122} This increased figure better reflects the proportion of Africans (32%) in the worldwide refugee population.\textsuperscript{123}

IV. The Diversity Visa Program's Impact on African Immigration & Responses to Criticism of the Program

A. Increases African Immigration and Achieves Diversity

Overall, the diversity visa program has increased opportunities for African immigration to the United States by 64% between FY 1994 and FY 1997.\textsuperscript{124} Without diversity visas, Africans would have received 33% fewer

\textsuperscript{119} This problem is amplified when one considers that there is no limit to the number of nonimmigrant visas that may be issued in any given year. See id.

\textsuperscript{120} See Immigration Statistics, supra note 6, at 12-15 tbl. 8, 89-100 tbl. 23.

\textsuperscript{121} Compare Immigration Statistics, supra note 6, at 53 tbl. 14 (showing that Africans represented only 14% and 20% of the total authorized admissions for FY 1999 and FY 2000, respectively), with United Nations High Commissioner for Refugees (UNHCR), Refugees and Others of Concern to UNHCR, 2000 Statistical Overview, tbl. 1.1. (2002), available at http://www.unhcr.ch/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&rid=3d4e7bec5 (showing that Africans represented approximately 30% of the total worldwide refugee population at the end of 1999 and 2000).


\textsuperscript{124} The percentage is based on the average number of diversity visas issued to Africans between FY 1995 and FY 1997 (16,931) (the years following the diversity visa program's implementation), as compared to the total visas issued to Africans in 1994 (26,609), (the year preceding implementation). See Office of Immigration Statistics, Department of Homeland Security, 1997 Statistical Yearbook of the Immigration and Naturalization Service, tbl. 8 (1999), available at http://uscis.gov/graphics/shared/statistics/yearbook/1997YB.pdf; Office of Immigration Statistics, Department
immigrant visas in 2003. Africans won the most lottery spaces between Fys 2000 and 2005. Winning spaces in the lottery, however, does not guarantee actual receipt of visas.

Immigrant Visas Issued to Immigrants from Africa Pre and Post-Diversity Visa

<table>
<thead>
<tr>
<th>FISCAL YEARS</th>
<th>TOTAL VISAS</th>
<th>DIVERSITY VISAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>26,609</td>
<td>-</td>
</tr>
<tr>
<td>1995</td>
<td>42,456</td>
<td>13,760</td>
</tr>
<tr>
<td>1996</td>
<td>52,889</td>
<td>20,808</td>
</tr>
<tr>
<td>1997</td>
<td>47,791</td>
<td>16,224</td>
</tr>
</tbody>
</table>

Diversity visas significantly contribute to increasing African immigration; in FY 2003, diversity visas represented 33.9% of the total immigrant visas issued to Africans. Although critics claim that the diversity visa program does not achieve diversity, these statistics indicate the opposite. One critic maintained that because the diversity visa program does not increase diversity in the U.S. population, it does not achieve its goals. Although the diversity visa program may not increase diversity in the U.S. population, these statistics show that the program does increase diversity in the immigrant population to the United States, an achievement that is in line with Congress’s stated goals. Congress’s stated goals were not necessarily to increase diversity in the U.S. population—its stated goals were to increase diversity in the immigrant population to the United States. Therefore, this particular criticism fails to take into account this


125. See IMMIGRATION STATISTICS, supra note 6, at 29-32 tbl. 8.
126. See DV RESULTS, supra note 39.
127. See supra note 41 and accompanying text. For example, although Africans represented 43.4% of the total 590,563 lottery winners during this period, see DV RESULTS, supra note 39, they received only 34.4% of the diversity visas issued between FY 1997 and FY 2003. See IMMIGRATION STATISTICS, supra note 6, at 29-32 tbl. 8 from FY1997 through FY2003.
128. These figures represent permanent diversity visa program only—there were approximately 200 visas issued to Africans in FY 1994 as part of the temporary/predecessor diversity visa program. See OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION TO THE UNITED STATES [FISCAL YEARS 1994-1996], tbl. 6 (1995).
129. See id. at 29-32 tbl. 8, 104-109 tbl. 25. For a thorough review of the recent surge in immigration from Africa, see Sam Roberts, More Africans Enter U.S. Than in Days of Slavery, N.Y. TIMES, Feb. 21, 2005, at A1 (describing the increasing flow of Africans, especially during the 1990's, and citing statistics for African-born populations in the United States).
130. See supra notes 66-74 and accompanying text.
131. See supra note 66 and accompanying text.
132. See supra note 50 and accompanying text.
success.\textsuperscript{133}

The level of diversity achieved by the program, however, is insufficient because the diversity visa program fails to significantly impact the overall immigrant population to the United States. Diversity visas represent only about six percent\textsuperscript{134} of the total immigrant visas issued in the United States each year and therefore change the overall immigration population only by six percent, maximum. Thus, critics are correct in asserting that the regions most benefiting from U.S. immigration policies after the implementation of the diversity visa continue to be Latin America and Asia.\textsuperscript{135}

When analyzed in terms of African immigration, however, the diversity visa program diversifies the immigrant population by significantly increasing\textsuperscript{136} opportunities for African immigrants. Thus, the program "enhances diversity" by increasing immigration from one region that has been historically underrepresented in the U.S. immigration system. Although the program does not resolve the continued problem of Africans' disproportionate underrepresentation in the U.S. immigration system, it slightly diminishes their underrepresentation. Thus, the fact that Europeans also benefit from the program\textsuperscript{137} does not necessarily preclude the program's ability to increase diversity in the immigrant population.

B. No Significant Impact on Immigration from Asia and Latin America

Critics' complaints that the diversity visa program results in discrimination against and exclusion of immigrants from Asia and Latin America\textsuperscript{138} are justified. Immigrants from these regions, however, are not being discriminated against in the U.S. immigration system as a whole. Asians and Latin Americans are not excluded from the remaining ninety-five percent of visas available, nor are they disproportionately underrepresented in the U.S. immigration system. Therefore, the exclusion that results from application of the diversity visa program's formula does not result in the exclusion or disproportionate representation of immigrants from Asia and Latin America in the immigrant population as a whole. As noted by one scholar, immigrants from these regions have represented a large majority of the immigrant population\textsuperscript{139} for over ten years.\textsuperscript{140} By contrast, immigrants from Africa currently represent only 6.5\% of the total

\textsuperscript{133} For further discussion on ways to measure diversity in immigration, see Hethmon, supra note 63 at 394-98 (distinguishing quantitative diversity, under which an immigration system would allocate "visa preferences exclusively to natives of countries whose members would constitute a visible minority in the receiving state," from qualitative diversity, under which the system would "evenly distribute immigrants across all appropriate sending countries").

\textsuperscript{134} See IMMIGRATION STATISTICS, supra note 6, at 29-32 tbl. 8.

\textsuperscript{135} See supra notes 66, 82 and accompanying text.

\textsuperscript{136} See supra Part IV.A.

\textsuperscript{137} Diversity visas comprised nineteen percent of the immigrant visas issued to Europeans in FY 2003. See IMMIGRATION STATISTICS, supra note 6, at 29-32 tbl. 8.

\textsuperscript{138} See supra notes 57-65 and accompanying text.

\textsuperscript{139} Almost seventy-five percent, based on FY 2003 statistics. See IMMIGRATION STATISTICS, supra note 6, at 12-15 tbl. 2.

\textsuperscript{140} See supra note 66 and accompanying text.
immigrant population.\textsuperscript{141}

Furthermore, although the formula used to allocate diversity visas results in the exclusion of some immigrants from Asian countries from participation in the program, visa applicants from Asia already receive approximately 200,000–400,000 immigrant visas and approximately 280,000–330,000 nonimmigrant visas each year.\textsuperscript{142} By contrast, visa applicants from Africa receive approximately 50,000–60,000 immigrant visas and approximately 28,000–30,000 nonimmigrant visas each year.\textsuperscript{143} Current immigration laws as a whole thus disproportionately disfavor, discriminate against, and exclude Africans, as compared to immigrants from other regions.

These statistics do not justify discrimination against or exclusion of immigrants from any region—they merely suggest that immigrants from Asia and Latin America are not underrepresented in the current immigration system when it is viewed as a whole.

The increased opportunities for potential immigrants from Africa created by the diversity visa program far outweigh the limited opportunities for participation in the program for immigrants from Asia and Latin America. While diversity visas represented 33.9% of immigrant visas issued to immigrants from Africa, diversity visas represented only 3.3% and 0.6% of the immigrant visas issued to immigrants from Asia and Latin America, respectively, in FY 2003.\textsuperscript{144} Even if immigrants from Asia or Latin America had received the 16,503 diversity visas that immigrants from Africa received in FY 2003, this would have only represented 7.0% and 5.6%, respectively, of the total immigrant visas issued to immigrants from Asia and Latin America that year.\textsuperscript{145} Thus, the criticism that the diversity visa program discriminates against and excludes Asians and Latin Americans fails to consider that those regions disproportionately benefit from the current U.S. immigration system, as compared to Africans.

C. Not "Anti-Diversity"

Arguments that object to the diversity visa program as being anti-diversity because it offsets the diversity created by nondiscriminatory legislation\textsuperscript{146} are flawed in several respects. First, as mentioned above, they fail to acknowledge that the legislation replacing the national origin quotas was and continues to be discriminatory against Africans.\textsuperscript{147} Second, the claim overemphasizes the comparatively minimal benefit to immigrants from Europe, but disregards the significant benefits to immigrants from

\textsuperscript{141} See supra note 81 and accompanying text.
\textsuperscript{143} See id.
\textsuperscript{144} See id. at 29–32 tbl. 8.
\textsuperscript{145} In addition, the diversity visas represent only nineteen percent of immigrant visas for immigrants from Europe. See id. at 29–32 tbl. 8.
\textsuperscript{146} See, e.g., supra notes 73–74 and accompanying text.
\textsuperscript{147} See supra Part III.B.
Africa provided by the program. Europeans have not truly been underrepresented in the U.S. immigration system, and therefore, do not need diversity visas to increase their immigration opportunities. Even if one accepts the argument that the diversity visa was implemented to increase immigration from Europe, the resulting increases in African immigration justify continuing the program because these increases slightly reduce the exclusion and disproportionate underrepresentation of Africans from the U.S. immigration system.

Africans, unlike Europeans, have been underrepresented in the U.S. immigration system throughout its history and have never received any disproportionate advantages. Instead, they have always been disproportionately disadvantaged and the diversity visa serves to alleviate that disadvantage somewhat. Despite this fact, Africa remains the region from which the fewest number of people, in proportion to regional populations, receive immigration visas.

D. Addresses the Goal of Diversity

Despite some critics' claims, the diversity visa program does serve a purpose. It extends new immigration opportunities to Africans who have been disproportionately excluded from and underrepresented in the immigration system, and thereby slightly reduces the gross underrepresentation of Africans in the immigration system. This does not mean that the diversity program is not flawed or that it should not be modified. Nor does it mean that Congress's goal of diversity has been adequately addressed. On the contrary, as discussed below, the goal of the diversity visa and the general benefits of diversity would be better addressed if certain modifications were made. Until the effects of slavery, colonization, national origins quotas, and the uneven distribution of non-immigrant visas cease to perpetuate the exclusion of Africans from the U.S. immigration system, the diversity visa program must continue to afford Africans a chance to obtain the immigration opportunities currently enjoyed by immigrants from other regions.

Lastly, the claim that the diversity visa program is inconsistent with the primary goals of our immigration system is unfounded. Simply because diversity is a newly articulated goal in immigration policy does not make it an inconsistent, invalid, or unjustifiable one. Congress explicitly added diversity to its immigration goals by implementing the diversity visa program. Furthermore, Congress stated that its goals were "to promote and enhance diversity." The creation of the diversity visa program

148. See supra Part III.
149. See supra note 81 and accompanying text.
150. See supra note 78 and accompanying text.
151. See supra notes 80–83 and accompanying text.
152. As mentioned above, even if these particular results were not originally part of Congress's goals, they do not render the diversity visa program invalid for lack of purpose. See supra notes 124–128 and accompanying text.
153. See supra notes 75–78 and accompanying text.
154. See supra note 50 and accompanying text.
sends a clear message that Congress intended to generate immigration opportunities based on criteria that were independent of the requirements under the immigrant visa categories then in existence.

The number of visas Congress allocated under the diversity visa program may reflect the priority and importance Congress intended to give to the goal of diversity. The fact that Congress made only 50,000 visas available under the diversity program, while it maintained the number of visas available under the family and employment-based immigration visa categories at approximately 480,000 and 140,000, respectively, may suggest the primary importance Congress placed on family reunification and satisfaction of employment needs as goals of immigration. However, the creation of the diversity visa program makes it clear that Congress wanted to add diversity to its main goals in immigration law and policy.

Moreover, the diversity visa program is not the first time Congress has evinced an intent to incorporate diversity in the immigrant population. Rather, this intent was already reflected in the immigration laws that provide for country caps for certain visas, although perhaps not as explicitly expressed as it is in the diversity visa program. Simply because diversity is more explicitly stated in the diversity visa program than in other immigration categories does not make it inconsistent with the goals of the immigration system. Additionally, the mere fact that the goals are different from the family-based, employment-based, and refugee categories does not make these goals inconsistent with the other policies. It is possible, and even desirable, for a nation to address several different goals simultaneously in its immigration policy. Therefore, the argument that the diversity visa program does not reflect our nation’s priorities in immigration policy is unfounded.

V. Aspects of the Program that Threaten to Limit Diversity

Although the diversity visa program generally increases diversity in the immigrant population by increasing opportunities for immigrants from Africa, several aspects of the program threaten to limit that diversity. Specifically, (1) the high school education requirement, (2) the procedural requirements involving the statutory deadlines and recently increased application fees, and (3) the new electronic filing require-

155. See supra note 10.
156. See INA §§ 201(c)-(d), 8 U.S.C.A. § 1151(c)-(d) (2003).
157. Some critics disagree with this proposition as it pertains to diversity. See Hethmon, supra note 63, at 396 (speculating that "nepotism and diversity are contradictory" in an immigration system driven by chain migration).
158. See supra Parts IV.A, IV.D. The impact of the electronic filing requirement on African immigration is discussed below.
159. See supra note 36 and accompanying text.
160. On February 2, 2005, the Department of State revised the Schedule of Fees for Consular Services, increasing the lottery surcharge for diversity immigrant visa applications from $100 to $375, effective March 8, 2005. DOS Publishes Final Rule on Consular Fees, 82 INTERPRETER RELEASES 278, 279 (Feb. 7, 2005); Schedule of Fees for Consular
ment, all have the potential to reduce the diversity of the immigrant population based on economic status. Economic diversity, however, is not the only type of diversity that these regulations potentially limit. Economic status and race and ethnicity are inextricably linked, thus, any economic restrictions also threaten to limit the racial and ethnic diversity of the immigrant population.

First, the high school education or equivalency requirement effectively restricts the pool of eligible immigrants to those who have obtained a sufficiently high level of educational or work qualifications. These types of qualifications are often tied to economic status. Thus, the requirement diminishes the potential diversity of the immigrant population by limiting eligibility to a select group of immigrants. The result is to dilute the effects of increased diversity by reducing economic, and potentially ethnic and racial diversity.

It is therefore difficult to justify the need for such requirements for the diversity visa program, given that they threaten to limit the goal of the program. The family-based and refugee immigrant visa categories do not require similar qualifications. Moreover, there were no educational or work requirements for the transitional or predecessor programs to the permanent diversity visa program. These requirements were only added to the permanent diversity visa program.

Second, the procedural requirements effectively limit the potential diversity of the immigrant population. The deadlines for registering for the diversity visa lottery and for processing winners’ applications require lottery winners to submit all supporting documentation required to


161. See supra notes 47–49 and accompanying text.

162. See e.g., Elizabeth Heger Boyle & Fortunata Ghati Songora, Former Legality and East African Immigrant Perceptions of the "War on Terror," 22 LAW & INEQ. 301, 311 (2004) (observing that East African immigrants who immigrated through the diversity lottery are "usually more highly educated and have higher incomes in their countries of origin than refugees"); See also Hing, supra note 83, at 261 (predicting that, because of the high school education requirement, "the amount of assistance the program actually provides to African immigrants ultimately will depend upon the socioeconomic characteristics of various African nations").

163. See Kevin R. Johnson, The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. REV. 1481, 1502 (2002) (discussing the overlap of race and class in an immigration context).

164. See supra note 36 and accompanying text.

165. See supra notes 23, 26 and accompanying text. The AA-1 program, however, required a one-year firm offer of employment. See supra note 29 and accompanying text.

166. See Hing, supra note 83, at 262 (describing the high school education or equivalent requirement as "troubling").

167. For a detailed discussion of the procedural requirements, see Bernard P. Wolsdorf & Naveen Rahman, The Diversity Lottery: Asians and Latinos Need Not Apply (A Summary), 77 INTERPRETER RELEASES 1365, 1368–70 (Sept. 25, 2000).

168. See supra notes 38, 40 and accompanying text.
process their application or to adjust their immigration status\textsuperscript{169} within a specified twelve-month period.\textsuperscript{170} Applicants must pay a processing fee, which was recently more than tripled from $100 to $375.\textsuperscript{171} Even if the applicant submits the application and supporting documentation within the deadline, the applicant may still lose the opportunity to obtain a diversity visa if the application is not processed by the appropriate immigration agency by the deadline.\textsuperscript{172} Thus, many lottery winners do not actually obtain diversity visas.\textsuperscript{173} As a result, some lottery winners who were not awarded diversity visas after winning a space in the lottery have sued.\textsuperscript{174} Obtaining a visa may therefore require follow-up efforts that demand additional money, which increases the potential for limiting the diversity of the applicants on an economic basis. Although the visas are distributed in order of processing according to the regional allocations, these procedures may significantly reduce the number of visas issued to any particular region, as occurred for the African region in FY 2003.\textsuperscript{175} Therefore, the combined effect of these procedural requirements also reduces the economic diversity, and potentially, the ethnic and racial diversity of the immigrant population.

Third, the recent modification to the diversity visa program that requires electronic registration for the lottery also threatens to reduce the economic diversity of the immigrant population. It has the potential for significantly reducing the number of African applicants in particular, as well as substantially increasing the number of disqualified African applications, due to the low rates of Internet access and usage in some African countries compared to other regions participating in the diversity visa program.

\begin{itemize}
\item \textsuperscript{169} This is applicable where the potential immigrant is already in the U.S. immigration system as a nonimmigrant or is on the waiting list for a different immigrant visa category.
\item \textsuperscript{170} See supra note 40.
\item \textsuperscript{171} See supra note 160.
\item \textsuperscript{172} See supra notes 38, 40 and accompanying text.
\item \textsuperscript{173} See supra notes 41, 127 and accompanying text; see also Wolfsdorf & Rahman, supra note 167, at 1367–73.
\item \textsuperscript{174} For example, five circuit courts have addressed this issue during the past two and a half years, but have declined to compel the adjudication or processing of diversity visa lottery winners' applications once the statutory deadline has passed. See Coraggio-oso v. Ashcroft, 355 F.3d 730 (3d Cir. 2004); Carrillo-Gonzalez v. Immigration and Naturalization Service, 353 F.3d 1077 (9th Cir. 2003) (where the immigration judge did not have the power to equitably toll the deadline); Ahmed v. Department of Homeland Security, 328 F.3d 383 (7th Cir. 2003); Nyaga v. Ashcroft, 323 F.3d 906 (11th Cir. 2003); Iddir v. Immigration and Naturalization Service, 301 F.3d 492 (7th Cir. 2002). For a non-legal recount of Nyaga's story, see Julia Malone, \textit{Lottery for Visas Criticized as Unfair}, ATLANTA J.-CONST. (Apr. 30, 2004), at A8. In June 2004, the Supreme Court denied the petition for a writ of certiorari for the Coraggio-oso case. Coraggio-oso v. Ashcroft, 124 S. Ct. 2884 (2004). More recently, however, a district court granted a motion to compel and ordered the Citizenship and Immigration Services to adjust the statuses of the plaintiffs to lawful permanent residents. Przhebelskaya v. U.S. Bureau of Citizenship and Immigration Services, 338 F. Supp. 2d 399 (E.D.N.Y. 2004). In February 2004, the Senate Judiciary Committee proposed a bill that would allow diversity lottery winners to be eligible for the visas after the FY for which they won the lottery. S. 2809, 108th Cong. (2004).
\item \textsuperscript{175} See supra note 127 and accompanying text.
\end{itemize}
gram. These differences are especially apparent when Internet usage rates in Africa are compared to those in Europe. Combined, the two regions represent almost eighty percent of the total diversity lottery spaces awarded from FY 2000 to FY 2005.

Diversity Visa Lottery Winners by Region FY 2000-2005

<table>
<thead>
<tr>
<th>REGION</th>
<th>WINNERS</th>
<th>% OF TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>256,213</td>
<td>43.4%</td>
</tr>
<tr>
<td>Europe</td>
<td>205,791</td>
<td>34.8%</td>
</tr>
<tr>
<td>Asia</td>
<td>93,403</td>
<td>15.8%</td>
</tr>
<tr>
<td>Central &amp; South America, Caribbean</td>
<td>25,990</td>
<td>4.4%</td>
</tr>
<tr>
<td>Oceania</td>
<td>9,057</td>
<td>1.5%</td>
</tr>
<tr>
<td>North America</td>
<td>109</td>
<td>0.02%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>583,373</td>
<td>100%</td>
</tr>
</tbody>
</table>

On average, the European countries that most benefited from the lottery prior to the electronic filing requirement have higher Internet usage rates (11.2%) than do the African countries that most benefited from the lottery before the electronic filing requirement (0.5%).


177. It is relevant to compare data from these two regions because they are the two regions benefiting the most from the diversity visa lottery. Europeans have won approximately thirty-five percent of the diversity lottery spaces over the past six years. See DV RESULTS, supra note 39.

178. See id.

179. See id.

180. See WORLD FACTBOOK, supra note 176. This conclusion is based on a comparison of the three countries in Europe and Africa with the largest number of diversity visa lottery winners in FY 2004, the year before the electronic filing requirement was imposed. The three European countries are: Bulgaria (3,482), Poland (5,467), and Ukraine (4,494). Combined, they represent approximately thirty-seven percent of the total winners from Europe. The three African countries are Ethiopia (6,353), Ghana (7,040), and Nigeria (7,145). Combined, they represent approximately forty-one percent of the total winners from Africa. See DV RESULTS, supra note 39.
Internet User Rates of European and African Countries with Largest Number of Diversity Visa Lottery Winners in FY 2004

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>INTERNET USER RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>8.4%</td>
</tr>
<tr>
<td>Poland</td>
<td>23.2%</td>
</tr>
<tr>
<td>Ukraine</td>
<td>1.9%</td>
</tr>
<tr>
<td>AVERAGE</td>
<td>11.2%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>INTERNET USER RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethiopia</td>
<td>0.1%</td>
</tr>
<tr>
<td>Ghana</td>
<td>0.8%</td>
</tr>
<tr>
<td>Nigeria</td>
<td>0.5%</td>
</tr>
<tr>
<td>AVERAGE</td>
<td>0.5%</td>
</tr>
</tbody>
</table>

This data suggests that Africans would have fewer opportunities to register for the diversity visa lottery due to the electronic filing requirement. There was an overall decline of twenty percent in the total number of applications filed for all regions in the year after the electronic filing requirement modification. The decline is probably due to this requirement. As information regarding the number of registrations filed and disqualified for immigrants from Africa is unavailable and since results for only one lottery have been released after the electronic filing requirement, it is difficult to determine the precise impact of the electronic filing requirement on the number of Africans registering for the diversity visa lottery.

181. See World Factbook, supra note 176.
182. See DV Results, supra note 39. For DV-2006 (the lottery held from November 2004 to January 2005), a total of 6.3 million registrations were received by the State Department. See Media Note, Department of State, 2006 Diversity Visa Lottery Registrations (Feb. 10, 2005), available at http://www.state.gov/r/pa/prs/ps/2005/42131.htm. If the disqualification rate is similar to that of prior years, this figure would likely represent a further decline in the number of registrations.
183. See Nina Bernstein, Far Fewer Immigrants Apply in Computerized Version of Green-Card Lottery, N.Y. Times, Dec. 27, 2003, at B3 (stating that immigrants attribute the decline to the lack of access to digital photo scanners, computers, and Internet connections and the fear of deportation as a result of leaving a computer trail). See also Troubled Lottery, 9-02 Bender's Immigr. Bull. 6 (2004) (citing reports in the New York Times and the Washington Post of immigrants' reluctance to provide information electronically and lack of computer and Internet access abroad, as main contributors to the decline in applications). The State Department, however, does not believe that the electronic filing requirement has resulted in a decline in diversity visa applications. Daily Press Briefing, U.S. Department of State, State Department Noon Briefing (Sept. 30, 2004) (asserting that there were "very, very similar percentages of applicants from different countries and area as . . . with the paper process, that there was apparently no drop-off from developing countries or so-called disadvantaged areas in countries"), available at http://www.state.gov/r/pa/prs/dpb/2004/36647.htm.
Even if the number of Africans who register decreases, the formula should allocate approximately the same proportion of diversity visa spaces to Africans each year, provided Africans were underrepresented in the immigration system during the five years preceding the lottery, and provided more than 50,000 Africans register for the diversity visa lottery. For example, the number of diversity lottery winners from Africa decreased by approximately ten percent the year after the electronic filing requirement took effect, but Africans won the same percentage of lottery spaces compared to the total (forty-five percent) as in the previous year.

There is an interesting difference in the diversity lottery results within the African region. Before the electronic filing requirement, several sub-Saharan African countries such as Ghana and Kenya won a significant number of diversity lottery spaces. For example, in the DV-2004 lottery, Ghanaians and Kenyans won 7,040 and 5,721 diversity lottery spaces, respectively. After the electronic filing requirement was imposed, Ghanaians and Kenyans won 3,974 and 3,618 diversity lottery spaces, respectively, in the DV-2005 lottery. This represents decreases of 44% and 37%, respectively. The changes in these countries’ diversity lottery spaces are relevant because they represent two of the countries within Africa that received the largest amount of diversity lottery spaces before the electronic filing requirement. By contrast, diversity lottery spaces awarded to Egyptians increased by 45% after the electronic filing requirement was imposed. Interestingly, Egypt’s Internet user rate (3.5%) is, on average, four times higher than Ghana’s (0.5%) and Kenya’s (1.2%).

### Diversity Lottery Winners in Africa by Selected Country DV-2004 & DV-2005

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>WINNERS DV-2004</th>
<th>WINNERS DV-2005</th>
<th>CHANGE</th>
<th>INTERNET USER RATE</th>
<th>INTL. BANDWIDTH (KBPS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ghana</td>
<td>7,040</td>
<td>3,974</td>
<td>-44%</td>
<td>0.5%</td>
<td>4,096</td>
</tr>
<tr>
<td>Kenya</td>
<td>5,721</td>
<td>3,618</td>
<td>-37%</td>
<td>1.2%</td>
<td>28,000</td>
</tr>
<tr>
<td>Egypt</td>
<td>4,189</td>
<td>6,070</td>
<td>+45%</td>
<td>3.5%</td>
<td>535,000</td>
</tr>
</tbody>
</table>

184. See supra notes 42-46 and accompanying text.
185. The decrease was from approximately 50,000 in the FY preceding the electronic filing requirement, to approximately 45,000 the following year. See DV RESULTS, supra note 39.
186. See id.
187. See id.
188. See id.
189. See WORLD FACTBOOK, supra note 176.
190. The DV-lottery year is usually the year after the FY in which the lottery was held. See DV RESULTS, supra note 39.
191. See WORLD FACTBOOK, supra note 176.
192. The international bandwidth indicates shared or public access to the Internet and the use of corporate networks. These statistics are for 2002. See Mike Jensen, *The Current Status of Information and Communications Technologies in Africa*, in INFORMATION AND COMMUNICATION TECHNOLOGIES FOR AFRICAN DEVELOPMENT, supra note 176, at 56-57, 68.
These changes may indicate that the electronic filing requirement creates disadvantages based on economic differences within the geographic regions. Given the general correlation between economic status and Internet usage and access, this result would not be surprising. The electronic filing requirement narrows the group of potential beneficiaries of the diversity visa program to people with Internet access. Although the requirement and technological improvements permit more efficiency in processing the registrations, these advances are being accomplished at the cost of limiting the diversity of the immigrant population.

Collectively, the electronic filing, high school diploma, and procedural requirements threaten to limit the diversity visa program's ability to achieve its goal of increasing diversity in the immigrant population. These requirements are continued reflections of the inconsistent policies that have historically pervaded the U.S. immigration system. Despite the diversity visa program's ability to increase diversity in the immigrant population, these requirements threaten to limit its effectiveness.

The diversity visa program should continue to be used to increase immigration opportunities for underrepresented groups rather than narrow the opportunities that it was originally intended to create. While these aspects of the program do not necessarily disadvantage all Africans, and the requirements may also adversely affect immigrants from other regions, Africans are disproportionately affected because they are in a better position to benefit from the diversity visa program. Moreover, as stated above, the economic-based limitations may also threaten to limit racial and ethnic diversity of the immigrant population due to the link between economic status and race and ethnicity.

VI. Proposals for Promoting Diversity in the Immigrant Population

Diversity is emerging as one of our nation's primary cultural values. Promoting diversity is not only an important goal, it is also a valid

193. See id. at 56-57 (comparing GDP per capita to Internet usage and access indicators).


195. Unfortunately, as the State Department does not provide diversity visa registrant information by country or region nor does it publish the number of registrations disqualified by country or region, it is therefore difficult to determine whether Africans, in particular, are disproportionately disadvantaged by these requirements. The State Department provides only the total number of registrations each year, which has ranged from approximately 6 to 11 million during the past six years. The percentage of disqualifications each year has represented approximately 20-40% of the total number of registrations. Thus, it is only possible to conjecture the proportion of disqualified Africans. Moreover, the State Department did not release the total number of registrations disqualified from the most recent lotteries (DV-2005 and DV-2006). See DV RESULTS, supra note 39; 2006 Diversity Visa Lottery Registrations, supra note 182.

196. See supra note 163 and accompanying text.

197. See PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE, 3-5 (2003). Yale Law School recently held a symposium on this scholarly work.
Diversity encourages exchanges of ideas and culture, which results in greater awareness and knowledge. "It brings a richness that makes this country a more lively and culturally interesting place in which to live."\textsuperscript{199}

More importantly, in addition to the traditional justifications for diversity used in contexts outside of immigration policy,\textsuperscript{200} promoting diversity addresses the historical exclusion and continued underrepresentation of certain immigrants, as discussed in Part III above. While some criticize this type of justification for diversity in other contexts,\textsuperscript{201} Congress chose to use diversity to address underrepresentation in the immigration context. This choice makes promotion of diversity the most direct way to address the wrongs of historical exclusion and current underrepresentation in the immigration system—the structure to correct these wrongs, albeit an imperfect structure, already exists in the diversity visa program. Thus, promoting diversity is an important goal in immigration policy because it addresses the exclusion and underrepresentation of certain immigrants and simply because Congress chose to make it one.

Furthermore, immigration policy is a reflection of our nation's values. The way we select who to admit into our country is critical because it makes a statement about the type of person with whom we want to associate, to let become part of our nation, and, conversely, the type of person we want to exclude. As Professor Legomsky expressed it:

\begin{quotation}
Immigration laws are about as central to a nation's mission as anything can be . . . because they literally shape who we are as a people . . . [and] because they function as a mirror, reflecting and displaying the qualities we value in others . . . . They reveal, for ourselves and for the world, what we really believe in and whether we are prepared to act on those beliefs.\textsuperscript{202}
\end{quotation}

\textsuperscript{198} Diversity is ambiguous—scholars struggle to consistently define the concept and its definition seems to vary with the context in which it is used. See Schuck, supra note 197, at 7–10.

\textsuperscript{199} See Legomsky, supra note 1, at 334 (arguing that despite these benefits of diversity, increasing diversity in the immigrant population will not necessarily result in increasing the diversity of the U.S. population). However, increased diversity in the immigrant population may positively affect the U.S. by increasing in diversity in the domestic population in certain areas within the United States.

\textsuperscript{200} See Schuck, supra note 197, at 41–72 (tracing the historical development of diversity as an ideal in the United States and the current justifications for diversity in the context of education, employment, immigration, housing, and religion, based on principles of liberalism, communitarianism, utilitarianism, and functionalism).

\textsuperscript{201} See Orlando Patterson, On the Provenance of Diversity, 23 YALE L. & POL'Y REV. 51, 59–60 (2005) (arguing that redressing past wrongs is a sufficient justification for affirmative action, and that the further justification of diversity is unnecessary).

\textsuperscript{202} See Legomsky, supra note 1, at 335.
Therefore, promoting diversity is an especially valid goal for our nation's immigration laws and policies, because it reflects our belief in and commitment to diversity.

The diversity visa program attempts to reflect the emerging value of diversity. While it achieves its goal of promoting diversity in the immigrant population by increasing African immigration, it does not significantly promote or enhance the diversity of the immigrant population.\textsuperscript{203} In addition, some of the program's stringent requirements threaten to limit the goal of diversity.\textsuperscript{204} Therefore, U.S. immigration laws and policies should be modified to promote diversity in the immigrant population more clearly and effectively. Additionally, when modifying U.S. immigration laws to promote diversity, legislators should give due weight to the long history of exclusion and the continued disproportionate underrepresentation of immigrants from Africa in the U.S. immigration system. Any modifications to the diversity visa program should reflect this consideration.\textsuperscript{205}

Congress should continue to promote diversity in our immigration system by (1) incorporating diversity into the framework of our current immigration system by modifying the existing diversity visa program, or (2) establishing a new framework for our immigration system by allocating immigrant visas through a points system.\textsuperscript{206} The first proposal more directly addresses diversity and is more realistic in terms of its implementation. Thus, the first proposal should be implemented as soon as possible. The second proposal, although theoretically more ideal, is more difficult to implement. It is also unlikely to be implemented in the near future because it would require a major overhaul of the current immigration system and because, as discussed below, the concept of a points system has already been considered and rejected in the United States. However, past proposals for points systems focused on certain categories of immigrant visas, and did not propose consolidating all immigrant visa categories. Thus, the second proposal should be seriously considered and analyzed in a manner that reflects Congress's goal of promoting diversity in the immigrant population, and that gives due consideration to the implications for immigrants from Africa.

A. Modify the Existing Diversity Visa Program

The following modifications constitute relatively simple ways to quickly increase diversity within the current framework of our immigration system. They directly promote diversity by continuing the diversity

\textsuperscript{203} See supra Part IV.A-B.
\textsuperscript{204} See supra Part V.
\textsuperscript{205} Some correctly argue that the goals of remedying inequality and intentional discrimination should not be combined with the goal of promoting diversity. See Jacob, supra note 79, at 340-41; Patterson, supra note 201, at 59-60, 63. Notwithstanding the soundness of these arguments, it is unlikely that these more precise goals would be addressed as directly if they were not bundled together with the promotion of diversity as a conceptual package. This may partially be due to the great weight our society has placed on the value of diversity. See supra notes 197-198 and accompanying text.
\textsuperscript{206} The points system proposal is discussed further below.
visa program, with some enhancements. First, a significantly larger amount of visas should be allocated to the diversity visa program.207 This can be accomplished by increasing the total amount of immigrant visas available or by reallocating some of the visas currently allocated for family and employment-based visas.208 It is difficult to assert that the diversity visa program sufficiently promotes diversity when only approximately six percent of immigrant visa allocations are set aside for it. Increasing the number of diversity visas would promote diversity more significantly.

In addition, the number of years used to calculate the eligible countries for diversity visa lottery registration should be increased to reflect a much longer period, if not all, of U.S. immigration history.209 Restricting this period to the past five years appears to reflect a negative, knee-jerk reaction to the types of immigrants who have most recently immigrated to the United States. The restriction implies an underlying discriminatory motive similar to the discriminatory motives of the temporary and predecessor programs that sought to compensate for less immigration from Europe and reacted to increased immigration from Asia and Latin America.210

Finally, the aspects of the program that threaten to limit diversity, discussed in Part V above,211 should be eliminated and/or modified. First, the high school diploma requirement should be eliminated. It does not promote diversity in the immigrant population—rather, it threatens to limit diversity.212 There is no valid justification for imposing additional economic-related requirements on diversity visa immigrants. Imposing such requirements sends the message that immigrants from underrepresented countries and regions are desired, but only if they belong to a higher economic class than other immigrants. Congress should reevaluate whether this is an appropriate message to send, especially within the context of a program which aims to promote diversity. If Congress truly values a high school diploma or equivalent in the immigrant population, it should impose this as a requirement on all immigrants, not solely on immigrants who have been underrepresented in the immigration system.

207. Legislation proposing a doubling of the amount of visas available under the program was introduced in the House of Representatives in January 2005. See Comprehensive Immigration Fairness Act, supra note 5.
208. Since many of the employment-based visas are not distributed, see DV Hearing, supra note 2, at 25 (prepared statement of Jan Ting), these visas could be reallocated to the diversity visa program. Only approximately 80,000 of the 140,000 allocation for employment-based visas were used in FY 2003. See Immigration Statistics, supra note 6, at 20 tbl. 4.
209. Professor Hing similarly proposed, “If we are serious about helping nationals of countries that have been underrepresented, let’s consider underrepresentation not just since 1965, but also underrepresentation resulting from affirmative exclusion policies and national origin tests.” Hing, supra note 83, at 281-82. The immigration statistics used in such a formula should reflect voluntary immigration only.
210. See supra notes 17-32 and accompanying text.
211. See supra Part V.
212. See supra notes 164-166 and accompanying text.
Similarly, the processing deadline should be extended for diversity visa applicants who have submitted all of the required documentation by the twelve-month deadline, but whose applications have not been processed due to administrative inaction. In such cases, some courts have already compelled adjustment of status to lawful permanent resident in accordance with the diversity visa program, despite the statutory requirement. These modifications would thus ensure the allocation of diversity visas on a more equitable basis.

These adjustments, however, would be limited by the current immigration system's capacity to account for diversity, as one of several priorities in our immigration policy. Under the current immigration system, several priorities overlap within each immigrant visa preference category. Immigrants admitted under the employment-based visa and diversity visa categories may bring their family members. Those admitted under the family-based visa category must demonstrate that they will not become a public charge, and immigrants admitted though the diversity visa program must have a high school diploma or equivalent. Immigrants admitted through the employment-based, family-based, and diversity visa categories are all subject to numerical limits by country. All of these preference categories reflect some combination of our immigration priorities, but the priorities are applied differently within each category. The following proposal offers an alternative to the current framework for our immigration system which would account for all of our immigration priorities in a more consistent and equitable manner.

B. Allocate the Immigrant Preference Visas Using a Points System

Ideally, our laws and policies for issuing immigrant preference visas would consistently and simultaneously take into account all of our priorities in immigration. It would be more logical to issue visas to immigrants who reflect a combination of these priorities than to immigrants who reflect only one of these priorities. We would thereby incorporate all the factors we consider most important when granting immigrant visas. Therefore, we should establish a new framework for our immigration system, under which each major priority would be attributed a certain weight. Points could be used to measure the weight that should be attributed to each priority. A potential immigrant who satisfies our nation's economic needs, is related to a U.S. citizen, and comes from an underrepresented country would receive priority over a potential immigrant who satisfies only one of these immigration priorities. This approach would

214. "Preference" refers to the family-based, employment-based, and diversity visa categories. The priority of providing a safe haven for refugees—with its unique nature and international implications—should be excluded from this proposal.
215. For example, using a system of 100 possible points, a maximum of approximately 33 points could be awarded for each of the three main preferences: Family-based, employment-based, and diversity-based. Within each of these preferences, smaller increments (of 5, 10, 15, or 20 points, for example) could be allocated according to criteria similar to those currently used for each of these immigrant visa categories.
address our priorities in our immigration system in a more consistent manner.

Establishing a new framework for our immigration system through a points system is a daunting task as it would require restructuring the system. Congress has already considered similar proposals to implement a points system in the United States, but rejected them in favor of the predecessor programs to the diversity visa program.216 These proposals were modeled upon the points systems used in Australia and Canada, and applied to employment-based immigration only.217 The Australian system uses a points test for general skilled migration to Australia.218 The Canadian system uses six selection factors as part of its skilled worker program.219 The United Kingdom is currently considering implementing a similar system.220

216. See U.S. Commission on Immigration Reform, Executive Summary, 1995 Legal Immigration Report to Congress, 7 STAN. L. & POL‘Y REV. 11, 11 (1996). Congress chose to implement the diversity visa program, instead, because it "equalized[d] the impact of the 1965 amendments more directly than the point-system." See Austin T. Fragomen, Jr. & Steven C. Bell, Latest Legislative developments in the 101st Congress, 404 PRACTICING LAW INSTITUTE, 157, 173 (1990). See also Kennedy, Donnelly Introduce Legal Immigration Reform Bills, 64 INTERPRETER RELEASES 940, 941 (Aug. 17, 1987) (describing the points system advocated in legislation entitled "Immigration Act of 1987," through which 50,000 nonpreference visas would be allocated using a points system similar to those used in Canada and Australia. 30 of 147 points would be reserved for those adversely affected by the 1965 elimination of the national origin quota, as with the predecessor and temporary programs described above. Additional points would be given in smaller quantities for skills, age, education, work experience, family relations to U.S. citizen, and English language ability.).


219. Under this system, points are awarded for education (25 maximum points), official languages (24 max.), work experience (21 max.), age (10 max.), arranged employment in Canada (10 max.), and adaptability (10 max.), for a total of 100 points, with a "pass mark" of 67 points. See Citizenship and Immigration Canada, Government of Canada, Six Selection Factors and Pass Mark, http://www.cic.gc.ca/english/skilled/qual-5.html (last visited Sept. 26, 2005). Criteria such as English-language ability and "adaptability" used in the Australian and Canadian systems, however, should not be used under a points system adopted in the United States because of their potential for being used in a discriminatory and arbitrary manner.

220. See generally, Tories Unveil Work Permit Plans, BBC NEWS, Mar. 1, 2005, http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/4307193.stm (outlining a plan to prevent people in Britain on temporary work permits from settling there permanently); Immigra-
None of these points systems, nor the points systems discussed in the United States, proposed allocating points for several immigration priorities simultaneously. Therefore, implementing a points system for immigrant visas that accounts for diversity goals in immigration should be seriously analyzed and considered. If a new system strives to achieve diversity by adding a preference for immigrants from underrepresented countries and regions, the countries should be determined using a longer period of immigration history, as suggested in the previous section. In addition, preference for diversity should be attributed considerable weight in order to achieve a significant level of diversity in the immigrant population. Before implementing such a system, due consideration and analysis should be given to the possible implications for immigrants from Africa. The immigration system should reflect all of our priorities, consistently and equitably, and appropriately account for the disproportionate underrepresentation of voluntary immigrants throughout our immigration history.

Conclusion

The diversity visa program should not be eliminated. Despite criticism and calls for its elimination, the program addresses Congress’s goal of promoting diversity in the immigrant population. It has a positive impact on African immigration to the United States. It also offers a small window of opportunity for Africans to immigrate to the United States, even while they continue to be virtually excluded from the other channels of our immigration system.

The diversity visa program, however, is not perfect. The program is flawed in its failure to significantly diversify the immigrant population. It also fails to adequately address the prior exclusion and continued disproportionate underrepresentation of immigrants from certain countries and regions. Furthermore, certain program requirements threaten to limit diversity by discriminating against potential immigrants who are economically disadvantaged. Therefore, we must modify the diversity visa program to more effectively promote diversity in our immigration system.

Unless we take measures to ensure Africans are included in our immigration system, diversity in the immigration system will become an illusion. Africa will remain the region from which we will admit a disproportionately small number of immigrants. If enlarged and modified to reflect underrepresentation throughout a longer period of U.S. immigration history, the diversity visa program could promote diversity and thereby increase opportunities for African immigration without disturbing the structure of our current immigration system. If modified to limit the economic-based discrimination, the diversity visa program could promote diversity more equally.

Finally, more significant strides towards inclusion of Africans can be made to our overall immigration system. The diversity visa program comprises only approximately six percent of immigrant visas and does not apply to nonimmigrant visas. The positive impact of the diversity visa program is therefore only a tiny step towards addressing the historical exclusion from and continued disproportionate underrepresentation of Africans in our immigration system. Even with the diversity visa program, Africans receive only 6.5% of immigrant visas. The modifications to the diversity visa program suggested above—increasing the number of diversity visas, lengthening the period of immigration history used to allocate the diversity visas, eliminating the high school education requirement, and extending the processing deadline in appropriate cases—should address the inequalities in the issuance of immigrant visas. The virtual exclusion of Africans as nonimmigrants, as evidenced by their receipt of only 1.3% of nonimmigrant visas, should be discontinued, so that Africans will eventually be able to benefit from the traditional immigrant visa categories. Another approach would be to consider a points system, giving due analysis to its potential implications for African immigration. These proposals could establish the essential "critical mass," "seeds," or "pipeline," of Africans in the United States so that they may begin to benefit from the traditional immigrant visa categories to the same extent as immigrants from other regions. Scholars should explore and develop additional methods for increasing African immigration.

Our nation's priorities and goals in immigration would be more clearly reflected in its immigration policy by implementing the proposals highlighted above. Hopefully, this reflection would continue to welcome, rather than exclude immigrants from Africa. Whether Congress modifies or enlarges the diversity visa program, or whether Congress promotes diversity and addresses underrepresentation through other methods, the viewpoint of the African immigrant should no longer be ignored. Scholars, critics, and commentators should begin to include in their discourse the impact of our nation's immigration policies on African immigration.

221. See Hing, supra note 83, at 259, 261-62 ("The history of Asian immigration to the United States after the 1965 amendments . . . indicates that a small critical mass needed to be developed in the United States before sufficient numbers of Asians could benefit from the family immigration categories."). Professor Hing further argued that the "set-aside" designed to help Irish nationals, see supra notes 27-32 and accompanying text, is "necessary for African immigrants if we are to earnestly increase their numbers." Hing supra note 83, at 262. He continued,

The justification for special treatment for Irish nationals . . . was the recognition that under the primarily family-based immigration system, a special seed or pipeline category needed to be established in order to get a significant number of people in who could then take advantage of the family categories . . . . Africans certainly deserve the extra push just as much as the Irish.

Id. at 259-60.