Testimony to Subcommittee on Immigration, Border Security, and Claims,
Committee on the Judiciary, U.S. House of Representatives,
Thursday, April 29, 2004

Statement of Jan Ting[1]

Mr. Chairman and Members of the Subcommittee. I am grateful for your invitation to speak today to discuss the Diversity Visa Lottery with you and with the other presenters.

After Congress in 1965 finally repealed the racially and ethnically discriminatory national origins immigration quota system, the proportion of non-European immigrants – especially those from Asia – to the United States increased significantly.[2] By 1986, members of Congress were seeking to ameliorate the corresponding reduction in European immigration which was an unexpected byproduct of the 1965 legislation.[3] The so-called NP-5 program provided 5,000 non-preference visas for 1987 and the same number for 1988. Because eligibility for those visas was limited to natives of countries "adversely affected by" the 1965 immigration reform, the countries receiving the most visas turned out to be Ireland, Canada, and the United Kingdom.[4]

Encouraged by this desired result, Congress extended the program and increased the visas available to 15,000 each year for 1989 and 1990.[5] The same statute established the successor OP-1 program which offered an additional 10,000 visas each year for 1990 and 1991 in a lottery open only to those countries which used up less than 25% of the maximum per country cap allowable.[6] Thus would-be immigrants from China, India, Mexico, the Philippines, and other high immigration countries continued to be ineligible for diversity visas.[7]

---

[1] Professor of Law, Temple University Beasley School of Law; formerly Assistant Commissioner, U.S. Immigration and Naturalization Service (INS) from 1990 to 1993.
[2] 1993 Statistical Yearbook of the Immigration and Naturalization Service (1994), chart A at 12.
[3] See Aleinikoff, Martin and Motomura, Immigration and Citizenship (Thomson West, 5th ed., 2003), pages 282-284; Legomsky, Immigration and Refugee Law and Policy (Foundation Press, 3rd ed., 2002), pages 235-241; Wolfsdorf and Rahman, The Diversity Visa Lottery, 77 No. 37 Interpreter Releases 1365 (2000); Ting, "Other Than A Chinaman:: How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 Temple Pol. And Civil Rights L.R. 301 (1995).
[4] Legomsky, supra note 3, at 236 (citing 64 Interpreter Releases 291 (1987)).
[5] Ibid. (relying on the Immigration Amendments of 1988, Pub. L. No. 100-658, §2, 102 Stat. 3908).
[6] Ibid. (referring to the Immigration Amendments of 1988, Pub. L. No. 100-658, §3(b), 102 Stat. 3908).
[7] See Diversity Visa Lottery Registration Set for Earlly 1995, 71 Interpreter Releases 1587 (1994).

Continuing Congressional unhappiness with the predominantly Asian and Latin American character of immigration, and corresponding satisfaction with the success of the diversity visa programs in leavening the immigration mix with more Europeans, were reflected the Immigration Act of 1990. For the fiscal years of 1992, 1993, and 1994, a complex statutory scheme was enacted for the so-called AA-1 program which provided 40,000 visas each year in a lottery from which most Asian and Latin American intending immigrants were excluded.[8]

To insure that Congressional intent was implemented, the 1990 Act in a curiously indirect and camouflaged way, effectively directed that at least 40% of each year's AA-1 visas, or 16,000, be issued to citizens of one European country, Ireland.[9] The same 1990 Act increased the number of diversity visas to the current level of 55,000 annually.[10] The deliberately complex formula for assigning these visas arbitrarily disqualifies all natives from countries sending more than 50,000 immigrants in a five-year period under the regular family and employment preferences.[11]

WHAT'S WRONG WITH THE DIVERSITY VISA LOTTERY?

I have three main objections to the diversity visa lottery: 1. The lottery is unfair and expressly discriminatory on the basis of ethnicity and, implicitly, race. Whether or not this is legal, it is not good policy. 2. The lottery does not serve and is inconsistent with the priorities and best interests of the United States as otherwise expressed in our immigration laws. 3. The lottery is incomprehensibly complicated, an administrative burden, and a cruel deception of the overwhelming majority of the millions of would-be immigrants who apply for it each year.

I. IT'S UNFAIR AND DISCRIMINATORY.

---

[8] Legomsky, supra note 3, at 236 (referring to the Immigration Act of 1990, Pub. L. No. 101-649, §132, 104 Stat. 4978, 5000).
[9] Ibid. (referring to the Immigration Act of 1990, Pub. L. No. 101-649, §132(c), 104 Stat. at 5000).
[10] This number was effectively reduced to 50,000 beginning in FY 1999 by an annual offset of 5,000 to cover beneficiaries of the Nicaraguan and Central American Relief Act (NACARA), Pub. L. 105-100, §203(c), 111 Stat. 2160 (1997). See Aleinikoff, supra note 3, at 281-282; Legomsky, supra note 3, at 236.
[11] INA §203(c), 8 U.S.C. §1153(c).

It is not an overstatement to say, as I have, that the history of U.S immigration law is the history of Asian exclusion from the United States.[12] Legal restrictions on immigration to the U.S. were not enacted until the late 19th century when immigrants began arriving from Asia. The first court test of U.S immigration law, and one of the first cases read today by any student of U.S. immigration law is the so-called Chinese Exclusion Case[13] of 1889 in which the U.S. Supreme Court unanimously upheld the constitutionality of the Chinese Exclusion Act[14] of 1882. This law initiated 61 years of explicit Chinese exclusion from the United States. The Supreme Court's sustaining this statute against constitutional challenge provides the legal and constitutional authority for the modern system of restrictive immigration law and border control.[15]

In 1893, in a second landmark immigration opinion, a divided Supreme Court upheld the deportation of a Chinese laborer who could not produce as required by a revised Chinese Exclusion Act "at least one credible white witness" to testify he was a lawful resident.[16] In upholding the power of Congress to order deportation of immigration law violators, the Supreme Court determined that deportation is not criminal punishment, and therefore that constitutional requirements of due process, trial by jury, and the prohibitions against unreasonable searches and seizures, as well as against cruel and unusual punishments, have no application in deportation proceedings.[17] Like its predecessor, the Chinese Exclusion Case, Fong Yue Ting v. United States remains good law and is routinely studied and taught in U.S. law school courses on immigration law.

The Nationality Act of 1940 codified the existing laws on naturalization by specifying that the right to become a naturalized citizen "shall extend only to white persons, persons of African nativity or descent, and descendents of races indigenous to the Western hemisphere"[18], i.e. not

---

[12] See Ting, supra note 3.
[13] Chae Chan Ping v. United States, 130 U.S. 581 (1889).
[14] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).
[15] The Chinese Exclusion Case was cited with approval in 2001 by Justice Breyer in Zadvydas v. Davis, 533 U.S. 678 (2001), though for its dictim that even sovereign powers are "restricted in their exercise only by the Constitution itself and considerations of public policy and justice." See also Sanmuganathan Nakeswaran v. INS, 23 F.3d 394 (1st Cir. 1994) (quoting Kleindienst v. Mandel, 408 U.S. 753, 769-770 (1972)) where the First Circuit cites Chinese Exclusion for the proposition that "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established."
[16] Fong Yue Ting v. United States, 149 U.S. 698 (1893). See Ting, supra note 2, at 304-305.
[17] Ibid. at 730.
[18] Nationality Act, ch. 876, 54 Stat. 1137, 1140 (1940).

Asians. When explicitly exclusionary anti-Asian statutes were repealed in the 1940's and 1950's, Asians received the smallest possible immigration quotas under the national origins quota system.[19]

After repeal of the national origins quota system in 1965,[20] only vestiges of Asian exclusion remain in our immigration laws. One of those vestiges is the per-country cap of INA §202(a)(2), 8 U.S.C. §1152(a)(2), which currently obliges qualified immigrants from India, the Philippines and Mexico to wait longer, sometimes significantly longer, for immigrant visas than equally qualified immigrants from all other countries.[21] Until well into the 1990's, immigrants from China also suffered from the discrimination of the per-country cap.[22]

The other vestige of Asian exclusion in our immigration law is the diversity visa lottery from which most Asians, all Mexicans, and some other Latin Americans have been excluded from the very first year of diversity visas in 1987. The 14 countries whose nationals were disqualified from the Diversity Visa Lottery for FY 2004 include China, India, Pakistan, the Philippines, South Korea, and Vietnam. The other disqualified countries for FY 2004 are Canada, Colombia, the Dominican Republic, El Salvador, Haiti, Jamaica, Mexico, and the United Kingdom (except Northern Ireland!).[23]

Would-be immigrants from these 14 countries (and other countries in other years) have been excluded from the Diversity Visa Lottery solely on the basis of their ethnicity. I find it difficult to justify this current discrimination as a remedy for the adverse impact of the 1965 immigration reform abolishing discriminatory ethnic quotas. When discrimination against women, minorities and the handicapped is ended by law, should able-bodied white males receive a legal remedy because they have been adversely affected by having to compete against others who are finally treated equally?

---

[19] See Immigration and Nationality Act, ch. 477, §§201(a), 202(e), 66 Stat. 163 (1952). See Ting, supra note 2, footnotes 32 and 33, pages 305-306.

[20] See Act of Oct. 3, 1965, Pub. L. No. 89-236 §201(e), 79 Stat. 911 (terminating the quota system as of June 30, 1968).

[21] See the State Department's Visa Bulletin for any month. The Visa Bulletin for April, 2004, is reprinted at 84 Interpreter Releases 351, 367 (March 15, 2004). See also the discussion of per-country caps at Ting, supra note 2, at 308.

[22] See for example the State Department's Visa Bulletin for November 1994, reprinted in Aleinikoff, Martin and Motomura, Immigration Process and Policy (West, 3rd ed., 1995) at p. 135.

[23] Aleinikoff, supra note 3, at p. 282.

Students of immigration law have correctly observed that the so-called diversity visas might properly be called anti-diversity visas, since they were created to offset the diversity resulting from non-discriminatory immigration.[24]

Yes, discrimination in the Diversity Visa Lottery is constitutional, just as Chinese Exclusion was constitutional, and the deportation law requiring one credible white witness was constitutional, and the national origins quota system was constitutional. But that doesn't make it either right or good public policy. 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. The most recent available statistics for FY 2001 and 2002 continue to show Europe as the number one regional source of diversity immigrants.[25]

II. IT'S INCONSISTENT WITH NATIONAL INTEREST, PRIORITIES.

Academics can debate the question of whether we should put any limits on the number of immigrants admitted each year, or whether we should accept every single person in the whole wide world who wants to come here. Congress has decided to limit the number of immigrants admitted each year, and I have no doubt that the decision to put a limit on the number of immigrants admitted each year enjoys popular support.[26]

But having made the decision to set the number of admissions below the number of people who would like to immigrate, Congress must answer, and has answered the question, which would-be immigrants should we admit? We must necessarily have what I call a "pick and choose" system of immigration, where we pick and choose those who will be admitted as immigrants from all those who would like to be chosen.

---

[24] Legomsky, supra note 3, at 241.

[25] For FY 2002, see 2002 INS Statistical Yearbook, Table 8, available on-line at http://uscis.gov/graphics/shared/aboutus/statistics/IMM02yrbk/IMM20002.pdf . For FY 2001 see 2001 INS Statistical Yearbook, Table 8, quoted in Aleinikoff, supra note 3, at 283.

[26] It should be noted that our immigration laws and policy are the most generous in the world. We admit each year more legal permanent residents with opportunity to become citizens than all the rest of the nations of the world combined.

The two primary priorities Congress has chosen are family re-unification and work skills.[27] While we can debate the extent to which Congress has correctly balanced these two priorities, or the extent to which Congress has extended each of these priorities, there can be no doubt that each of these priorities is 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 debatable and far from clear.

While we place no numerical limits on the admission of immediate relatives of U.S. citizens, current law makes the spouses and minor children of legal permanent resident aliens (LPR's) wait in a queue from which five year old applications are just now being processed.[28] Spouses and children of Mexican LPR's wait in an even longer line from which applications more than seven years old are just now being processed.[29] The resulting separations have caused so much suffering and misery that Congress has had to created a temporary visa category for such spouses and children whose petitions have been pending for at least 3 years.[30]

How can it make sense to give out 50,000 immigrant visas each year in a discriminatory lottery, when admissible spouses and minor children of LPR's are kept out of the United States, making family re-unification impossible?

And those are not the only admissible immigrants kept waiting in long queues while winners of the discriminatory lottery are admitted in their place. Unmarried adult children of U.S. citizens wait in a line nearly four years long (unless they are from Mexico or the Philippines in which case they must wait 10 years or 14 years respectively). Married children of U.S. citizens must wait seven years (9 years or 14 years if from Mexico or the Philippines respectively). Admissible siblings of U.S. citizens must wait 12 years (13 years or 22 years if from India or the Philippines respectively).[31] And no temporary visas have been made available for them while they wait.

Winners of the diversity visa lottery are admitted even in the absence of any job skills or family ties to the United States. How does this help the

---

[27] INA §203(a),(b), 8 U.S.C. §1153(a),(b).
[28] supra, note 21.
[29] Ibid.
[30] INA §101(a)(15)(V), 8 U.S.C. §1101(a)(15)(V).
[31] supra, note 21.

United States? It is true that until about 1978 it was possible to gain admission as a "nonpreference" immigrant without such qualifications.[32] And it has been argued that perhaps the visa lottery can be justified as a means to give hope to a large group of people wishing to immigrate to the U.S. but with no other way to acquire immigrant status.[33]

If it does provide hope, that hope is largely an illusion, since millions of applications are received each year for the 50,000 diversity visas made available.[34] For the FY 2003 lottery held in October, 2001, about 8.7 million applications were received.[35]

Even if that slight hope were deemed sufficient to maintain a visa lottery, the ethnic discrimination should be ended in order to spread the hope worldwide, and the number could be cut back to 2,500 or 5,000, to provide additional visas for family reunification of relatives of LPR's and U.S. citizens, which should be a higher priority.

III. IT'S TOO COMPLICATED, BURDENSOME AND ARBITRARY.

The complexity of the current statute providing for the diversity visa lottery[36] is comparable to that of the most complicated provisions of the Internal Revenue Code. Defenders of the lottery should be forced to read through the statute and apply it to calculate the number of visas allocable to each country. The sheer number of applications which must be processed each year compared to the number of diversity visas actually granted testifies to the waste of human and administrative resources.[37]

This complexity and burden on the U.S. government creates potential for abuse of the diversity visa system. What is for most foreigners the false illusion that they can gain legal admission to the U.S. through the lottery can make them susceptible to swindlers who claim inside knowledge and special connections in seeking to sell their services to assist applicants. This kind of

---

[32] Preference immigrants now use up all available visa numbers. See Aleinikoff, supra, note 3, at 282.
[33] Wolfsdorf, supra, note 3.
[34] The effective number of diversity visas was reduced from 55,000 to 50,000 by an annual set-aside of 5,000 visas each year for beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, 111 Stat. 2160 (1997).
[35] Aleinikoff, supra., note 3, at 283.
[36] INA §203(c), 8 U.S.C. §1153(c).
[37] About 8.7 million applications received for the FY 2003 program. Aleinikoff, supra., note 3 at 283.

abuse seems almost inevitable, and has drawn the attention of the Federal Trade Commission.[38]

Normal rules of chargeability may allow persons of one nationality to utilize a different nation of chargeability either to make themselves eligible or to improve their chances. For example, an alien from a high admission country, ineligible for a diversity visa, may qualify for a derivative diversity visa as the spouse or child of an applicant from another country.[39] And since marital status is determined not at the time of application or selection, but at the time of the principal applicant's admission to the United States, anyone the applicant marries before admission to the U.S., even though not named on the application, is entitled to derivative status as a diversity immigrant.[40]

An alien from a high admissions country may apply for derivative chargeability through a spouse or parent of a different nationality even if the spouse or parent is not himself or herself applying for the diversity visa lottery. In such cases, both persons are considered to be applicants for purposes of cross-chargeability, and both must be issued visas and apply for admission simultaneously.[41]

Because chargeability is determined primarily by place of birth,[42] a national of an ineligible country may qualify for the lottery if born in an eligible country, e.g. the child of Chinese diplomats born in Malawi while parents were on temporary assignment there. Conversely, children born in ineligible countries while parents were on temporary assignment, may claim the chargeability of the foreign state of either parent.[43]

The statutory requirements of a high school education "or its equivalent" or "at least 2 years work experience in an occupation which requires at least 2 years of training or experience" are also challenging and problematic.[44]

---

[38] See "Federal Trade Commission Alleges Fraud by Visa Services Company" announcements by U.S. Dept. of State and Federal Trade Commission, updated 13 Nov. 2003, accessed at http://usinfo.state.gov/gi/Archive/2003/Nov/13-850792.html on April 24, 2004.
[39] INA§202(b)(2), 8 U.S.C. §1152(b)(2).
[40] 9 FAM 42.33 Note 6.8, accessed at http://foia.state.gov/masterdocs/09FAM/0942033N.PDF on April 24, 2004. See also INA §203(d), 8 U.S.C. §1153(d).
[41] 9 FAM 42.33 Note 4.2, supra., Note 40.
[42] 9 FAM 42.33 Note 4.1, supra., Note 40.
[43] INA §202(b)(4), 8 U.S.C. §1152(b)(4).
[44] See 9 FAM 42.33 Notes 7 and 8, supra., note 40.

These are not problems that need to be or can be corrected. In my opinion they are inherent in the notion of a diversity visa lottery. Instead of trying to get the diversity visa lottery to work better, we should get to the root of the problems by abolishing the discriminatory visa lottery itself.

IN CONCLUSION

I urge this subcommittee to endorse repeal of the diversity visa lottery in order to end this aspect of ethnic discrimination in our immigration law, re-allocate visa numbers to conform with our acknowledged immigration priorities, and to simplify U.S. immigration law and end the waste of human and administrative resources.

I thank the chairman and the members of the subcommittee for the privilege of presenting my views on this subject.