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THE FORGOTTEN FEW: FOREIGN PROFESSIONAL WORKERS & U.S. FOREIGN POLICY

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THE FORGOTTEN FEW: FOREIGN PROFESSIONAL WORKERS & U.S. FOREIGN POLICY

Adrian Pandev

I. BACKGROUND

A. Foreign and Immigration Policy Under Trump Administration

U.S. foreign policy took a dramatic shift since the Trump Administration took office in 2017. The country has pulled out of the Paris Agreement, has imposed more sanctions on Russia, and has vowed to renegotiate international trade deals to “Make America Great Again.”

The most notable of these is the current U.S.-China trade war, in which the U.S. imposed tariffs on various Chinese goods.

In addition, the President has initiated his plan of reforming U.S. immigration policy. The Administration has taken numerous steps in this regard, including issuing an Executive Order imposing a travel ban on nationals of certain predominantly Muslim countries (Trump, 2017, March 6; Trump Travel Ban: What does this ruling mean?, 2018, June 26), and issuing a Presidential Proclamation preventing migrants from lodging asylum applications anywhere but at a port of entry or other legal checkpoint (Jordan, 2018, November 20; Trump, 2018, November 9). Immigration reform inevitably also has foreign policy consequences as it always involves citizens of another state and border security questions. The most notable of these is the Trump administration’s plan to build a wall along the U.S.’s southern border with Mexico, debate over which caused a federal government shutdown on December 22, 2018 (Collins, Jansen, & Jackson, 2018, December 23).

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Interestingly, outside of the U.S.-Mexico border and trade negotiations, there has been very limited discussion about the impact of U.S. foreign policy and trade negotiations on the movement of human talent across borders. This paper shows that it is hard to find a group more affected by new foreign policies than foreign professional workers, yet both government officials and media outlets rarely consider the needs of these individuals whose future goals and plans are at stake (Clemens & Graham, 2018, January 30).

B. U.S. Immigration and Executive Authority

Before examining the effects of foreign policy decisions on foreign professional workers, it is important to consider why the President has the authority to define U.S. foreign and immigration policy decisions and alter the course of his predecessors’ diplomatic initiatives. Article II of the U.S. Constitution explicitly grants the President the power to make treaties, appoint and receive ambassadors. (U.S. Const. art. II, § 2–3). From this explicit authority flows the President’s implicit power to engage in diplomacy with foreign nations and to recognize foreign governments (Powell, 1999, March).

Although not as well-defined, the President’s authority to regulate immigration policy is regarded to flow from his power to control the nation’s foreign affairs. At first glance, the Immigration and Naturalization Act appears to limit the President’s immigration policy making discretion (Cox & Rodriguez, 2009,

December). However, in practice, an overview of U.S. immigration history shows that the President exercises inherent authority to regulate immigration matters, and retains extensive control over which foreign nationals may enter and reside in the United States (2009, December). This was confirmed by the Supreme Court in the landmark case *United States ex rel. Knauff v. Shaughnessy*, where the Court held that, “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation” (*United States ex rel. Knauff v. Shaughnessy*, 1950). Presidents have relied on this inherent authority to regulate immigration, to advance their own policy agendas. For example, Presidents have under enforced certain parts of the immigration code thereby transforming the laws enacted by Congress into regulations that reflect executive branch priorities (Cox & Rodriguez, 2015, October). Recently, in *Trump v. Hawaii* (2018), the Supreme Court reiterated that the President has very broad authority to exclude foreign nationals from entering the United States. Specifically, the Court held that the President lawfully banned the entry of all citizens of certain countries under the authority granted to him by 8 U.S.C. § 1182(f), which allows the President to deny entry to classes of foreign nationals deemed “detrimental to the interests of the United States” (8 U.S.C. § 1182(f)). The Supreme Court explained that the immigration code “vests the President with ‘ample power’ to impose entry restrictions in addition to those elsewhere enumerated in the [Immigration and Nationality Act]” (*Trump v. Hawaii*, 2018, 2; *Sale v. Haitian Centers Council, Inc.*, 1993). Altogether, as the above demonstrates, the President has broad discretion to define the nation’s foreign and immigration policies, which govern the lives of foreign professional workers in the United States.

C. Immigrant vs. Non-Immigrant Visas

The difference between immigrant and non-immigrant visas is important to consider in the context of foreign professional workers.

An immigrant visa is the technical term used throughout the Immigration and Nationality Act to describe U.S. permanent residence, also colloquially referred to as a “green card.” (Dutta, 2018, December 8). Permanent residence gives a foreign national the right to reside in the United States indefinitely without significant restrictions on one’s ability to seek employment in the United States. In contrast, non-immigrant visas which are enumerated in 8 U.S.C. § 1184, are temporary visas issued for different purposes and known by different letter-number combinations (Bray, 2015, p. 356; Dutta, 2018, December 8). General group of non-immigrant visas includes, B-2 visitors, F-1 students, E-2 investors, L-1 intracompany transferees, H-1B specialty occupation holders, and TN NAFTA professionals. The U.S. government issues a non-immigrant visa to a foreign national to perform a specific activity while in the United States. The foreign national is granted a specific visa authorizing the activity to be performed, and only that activity, for a specific, limited time (Bray, 2015). So how is a non-immigrant visa different from an immigrant visa? Simply put, an immigrant visa is permanent, hence the title “permanent residence,” and does not widely restrict the types of legal activities the foreign national may engage in during her stay in the United States. In contrast, a non-immigrant visa is temporary and allows the foreign national to engage in certain specific activities (Bray, 2015). While foreign professional workers are able to obtain permanent residence in the United States, most initially secure a non-immigrant visa and, only later after residing in the United States, petition for permanent residence. (Dutta, 2018, December 8).

II. IMPACT OF FOREIGN POLICY ON FOREIGN PROFESSIONAL WORKERS

Foreign professionals in the U.S. and those abroad who are seeking to move to the U.S. to pursue professional opportunities depend on visa categories that are heavily impacted by U.S. foreign policy. Although the Administration has stated that the U.S. needs skilled foreign workers, according to the Center for Global Development in Washington, D.C., its current policies are expected

to reduce the number of immigrants in the U.S. with a university or other advanced degree by 17.6% (Clemens & Graham, 2018, January 30).

This is a significant number when considering the number of temporary visas the U.S. issues to foreign nationals. In the single month of November 2018, U.S. embassies and consular posts issued a total of 634,227 temporary, non-immigrant visas worldwide. (“Nonimmigrant Visa Issuance By Nationality November 2018 (FY 2019)”, 2018). A significant percentage of these visas were granted to foreign professional workers. For example, just in November 2018, 1,234 work visas were issued to Australian professionals and their families alone (U.S. Department of State, 2018). These individuals have valid job offers from U.S. companies and are moving to the U.S. as intracompany transferees, as members of a specialty occupation, such as engineers or accountants, or as individuals who have demonstrated extraordinary ability in their field.

Of all visas issued to Australian nationals, 872 were E-3 visas, which is a special visa category only available to Australian citizens created under the Australia-U.S. Free Trade Agreement (Australia – United States Free Trade Agreement, 2015, January 1; 9 F.A.M § 402.9. If the Australia-U.S. Free Trade Agreement were to be renegotiated and its visa categories were abolished, all of these Australian professionals would be forced leave the country and return to Australia. They would only be able to return to the U.S. and their jobs, homes, and lives they have built here, if they could qualify for another visa category and have a U.S. employer who is willing to (re)sponsor them. While the domestic immigration debate mainly focuses on migrants fleeing impoverished and dangerous parts of the world, thousands of foreign professionals, many of whom come from wealthy western countries, are just as much threatened by the Administration’s new foreign policies.

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III. EXAMPLES OF RECENT U.S. FOREIGN POLICIES HARMFUL TO FOREIGN PROFESSIONALS

A. Executive Order No. 13769 – The “Travel Ban”

On January 27, 2017, the Trump Administration issued an Executive Order banning admission to the U.S. of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen (Trump, 2017, March 6). After a series of lawsuits, on September 24, 2017, the Administration issued a new Proclamation amending the original list of banned countries to: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen (Gerstein, Lin, & Mihalik, 2017, September 25; Trump, 2017, September 24).

The official foreign policy goal of this Executive Order, colloquially termed “travel ban,” was to prevent terrorism in the U.S. However, in the end, the travel ban had a tremendously negative impact, not only on professionals from the above countries who are now banned from obtaining

work visas to move to the U.S., but also foreign professionals already residing in the U.S. For example, a professor at James Madison University in Virginia, who holds a valid immigration status and work authorization in the U.S., and who also completed her PhD in the U.S. in valid F-1 student status, could not travel to her father’s funeral in Iran because she was afraid she could not obtain a visa to reenter the U.S. and continue her employment in the U.S. (Hadian-Jazy, 2018, July 19; Hauslohner, 2018, April 24). Even those professionals who have multiple-entry visas fear leaving the country. This has had negative personal and professional consequences on their lives. For example, a PhD student at Fordham University, in New York, declined to attend a professional conference in Germany in fear of not being able to return to the U.S. ((Hadian-Jazy, 2018, July 19). Although she had obtained a valid visa which should grant her reentry to the U.S., she still

missed out on an important conference which could have benefited her research and career. Moreover, the travel ban also banned these foreign professionals' close relatives and family members from visiting them in the U.S. Although this does not impact these professionals' careers in the U.S., it is still a significant burden to several thousand people who have not violated any immigration or other rules (Hadian-Jazy, 2018, July 19). The travel ban is a perfect illustration how broader U.S. foreign policy negatively impacts foreign professional workers.

B. Suspension of U.S. Visa Services in Turkey

Another recent example of U.S. foreign policy impacting foreign professional workers is the recent U.S.-Turkey visa crisis. In October 2017, the U.S. suspended the issuance of all temporary, non-immigrant, visas at consular posts in Turkey, including Istanbul and Ankara (Cunningham & Morello, 2017, December 28; La Porte, 2017, October 9). The Turkish government quickly reciprocated by suspending all visa services to U.S. citizens. (Cunningham & Morello, 2017, December 28; La Porte, 2017, October 9). The two countries' relationship had deteriorated in the past years because of the U.S. arming of Kurdish fighters in Syria and the U.S.'s refusal to extradite Fethullah Gulen, a Pennsylvania-based cleric who the Turkish authorities blame for a coup attempt in 2016 (La Porte, 2017, October 9). The Administration decided to stop issuing non-immigrant visas at U.S. missions in Turkey after a Turkish employee of the U.S. Consulate General in Istanbul was detained by Turkish authorities for alleged links to Fethullah Gulen (La Porte, 2017, October 9).

The impact of this foreign policy decision was immediately felt by foreign professionals who were seeking to enter the U.S. from Turkey. In September 2017, 7,400 temporary, non-immigrant, visas were issued at the U.S. Consulate General in Istanbul and U.S. Embassy in Ankara (La Porte, 2017, October 9; Monthly Nonimmigrant Visa Issuance Statistics, 2017). In November, when limited visa service was restored at Turkish

consular posts, a mere 1,800 non-immigrant visas were issued. This means, numerous Turkish professionals who had accepted U.S. job offers, including those applying for L-1 intracompany transferee or H-1B specialty occupation visas, or who had invested a substantial amount to start a U.S. enterprise, including those applying for E-2 visas, had to put their lives on hold to wait for the U.S. to reinstate visa issuance (9 F.A.M § 402.9; 9 F.A.M § 402.10; 9 F.A.M § 402.12). This is another example demonstrating how U.S. foreign policy interests in a region affect foreign professionals, who have no recourse but to adjust their lives, plans, and goals, based on the new reality created by the new policies.

IV. FOREIGN PROFESSIONALS NOTABLY MISSING FROM RECENT USMCA TRADE NEGOTIATIONS

On November 30, 2018, U.S. President Donald Trump, Mexican President Enrique Peña Nieto, and Canadian Prime Minister Justin Trudeau signed the United States-Mexico-Canada-Agreement ("USMCA") (United States-Mexico-Canada Agreement, 2018, November 30), which is meant to supersede the North American Free Trade Agreement ("NAFTA") (1994, January 1). Although barely considered during the trade negotiations, and barely, if at all, discussed in the media, certain USMCA provisions play an important role in the cross border movement of professional talent between Mexico, Canada, and the U.S.

The North American Free Trade Agreement, which came into effect on January 1, 1994, created a new work visa category – the TN visa and associated TD visa issued to dependents of TNs (North American Free Trade Agreement, 1994, January 1). The TN visa provides expedited temporary admission and U.S. work authorization, for up to three-years with infinite renewals, to Canadian and Mexican individuals in certain professions, such as engineers, economists, and medical professionals, and many others (9 F.A.M § 402.17). It is estimated that almost 100,000 TN visa holders are currently residing and working in the U.S. in various professions, including engineers, teachers,

doctors, and lawyers (Kendall, 2018, March 14; Maurer, 2018, October 5). Between January and November 2018, almost 17,000 TN and TD visas were issued to Mexican professionals and their families alone (U.S. Department of State, 2018). The TN visa category provides U.S. employers with an alternative to other high-skilled visa categories, such as the overburdened H-1B visa category which is limited to an annual cap of 85,000 and subjects foreign professionals and U.S. employers to a dreaded selection lottery (8 C.F.R. § 214.2(h)(8)(ii)(B); 8 U.S.C. 214(g)(1)(A); H-1B Fiscal Year (FY) 2019 Cap Season, 2018); Maurer, 2018, October 5). The TN visa program has allowed professionals from Canada, Mexico, and the U.S. to freely move between the three countries and to fill skills shortages where necessary. It has also provided a useful tool to companies that operate in one of the countries and wish to expand their operations to the other two countries (Maurer, 2018, October 5). It is used frequently by U.S. employers who want to quickly send Canadian workers with specialized skills to U.S. operations for a short-term project. For example, TN visas are often utilized when the U.S. branch of a company needs short-term support and expertise from its Canadian affiliate (Maurer, 2018, October 5). The TN visa is widely regarded as critical component of meeting labor demands in both the U.S. and Canada, and its revocation could cause significant upheaval at large Canadian and U.S. companies (Ordonez, 2018, May 21).

"Many U.S. employers complain that the occupation classification list, established 25 years ago, does not reflect the reality of a modern technology focused workforce and the skills needed in new technology oriented careers."

When trade negotiations between the U.S., Canada, and Mexico started, President Trump initially called for limits on TN visa renewals. Senate Judiciary Committee Chairman Charles Grassley, R-Iowa, had asked U.S. trade negotiators to consider scaling back the program during their negotiations. This, understandably, raised anxiety levels among the 100,000 TN workers residing in the United States who were worried that their

work status will soon be eliminated. (Maurer, 2018, October 5; Ordonez, 2018, October 1; Ordonez, 2018, May 21).

In the end, per usual, the topic of foreign professional workers was "not even on the radar" during the trade negotiations, which encompassed many areas, including agriculture and automotive industries, government procurement, and dispute resolution (Kendall, 2018, March 14). Both Canada and Mexico put forth proposals to discuss the TN visa and professional mobility. However, such proposals never materialized. (2018, March 14). The Agreement's final provisions, notably USMCA Chapter 16, which grants temporary entry and work authorization to Mexican and Canadian business professionals remained essentially unchanged from its NAFTA predecessor (United States-Mexico-Canada Agreement, 2018, November 30; North American Free Trade Agreement (NAFTA), 1994, January 1).

Although the lack of change to the TN visa category is widely regarded as a positive for TN workers given the Trump Administration's initial negative attitude towards the program, many view this as a missed opportunity to modernize an outdated program (Maurer, 2017, August 30; Maurer, 2018, October 5). Reportedly, the U.S. rejected requests from Mexico and Canada to expand and update the occupational classification list and educational requirements, which are widely regarded as outdated. Many U.S. employers complain that the occupation classification list, established 25 years ago, does not reflect the reality of a modern technology focused workforce and the skills needed in new technology oriented careers. For example, employers are often forced to categorize Technical Sales Specialists, and similar information technology roles, as engineers or scientists, neither of which accurately reflect the nature of the position (Maurer, 2017, August 30).

The media also largely ignored the high stakes faced by TN workers during the USMCA negotiations. Media attention was mainly focused on the top points of discussion during the negotiations: the automotive industry, U.S. dairy exports to Canada, Mexican environmental and labor rights, and an international settlement dispute mechanism (Baker, 2018, November 30; Long, 2018a, October 1; Long, 2018b, October 1; Rapperport, 2018, September 30). One article, discussing all winners and losers of the USMCA negotiations in detail, mentions everyone from the President to U.S. dairy farmers, labor unions, and even stock market investors, but does not mention anywhere the 100,000 TN workers who narrowly hung onto their work authorization (2018b, October 1). This is by no means a criticism of the author or the article, which provides a great summary of the final USMCA. This example is simply used to illustrate the lack of media coverage TN workers received, which is a byproduct of the lack of concern shown for them by government officials at the negotiating table. All in all, the lack of attention by the press further proves the lack of regard for the interests of foreign professional workers during U.S. foreign policy decision making.

V. CONCLUSION

In conclusion, U.S. foreign policy has an enormous impact on the lives of foreign professionals, from the ability to obtain work visas to being able to simply travel to the U.S. to pursue employment opportunities. The USMCA negotiations, including its associated press coverage, demonstrate the lack of concern among foreign policy makers for foreign professional workers who often have so much at stake when it comes to major foreign policy decision. Although threatened with life changing consequences by the USMCA negotiations, professional workers were barely considered by negotiators responsible for foreign policy decision making. Luckily, in this case, being ignored and status quo persistence worked to the foreign professionals' benefit.

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