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## **Tribes and H-1Bs: Promoting Inclusion of Tribal Interests in Immigration Policy through Employment-based Visas.**

Alejandro Alvarado\*

### **ABSTRACT**

Tribal law and immigration law provide a comprehensive space, with plenty of crossover issues, for legal practitioners to explore how immigration law may benefit Tribes and Indigenous Peoples. These issues arise from the history of the United States undermining Tribal interests through immigration policy as it created international borders and established citizenship criteria. As a result, Indigenous Peoples have been impacted by U.S. immigration policy with regard to global mobility, family separation, issues related to border security, and economic prosperity. With the continued growth of Tribal economies, U.S. immigration policy risks limiting Tribal interests and welfare by not providing explicit employment-based immigration benefits for Tribes. In consideration of this legal history, this article will build upon the National Congress of American Indian's 2013 resolution for Tribal Inclusion and Consideration in Immigration Reform, calling for a Tribal set-aside for professional H-1B visa petitions. I argue that Tribes and Tribally-owned business fit under the current definition of an employer, for purposes of nonimmigrant visa petitions, despite no explicit inclusion of Tribes within the definition. I advocate for Tribes and Tribally-owned businesses to take advantage of the current H-1B visa program to fill open positions that satisfy the H-1B specialty occupation criteria, which would allow Tribes to continue to support Tribal members economically. This article also provides a brief analysis of Tribally-owned businesses that have the potential to hire foreign workers under the H-1B specialty occupation criteria. Overall, I argue that the United States Government has the opportunity to include Tribal interests in immigration policy by creating a Tribal set-aside of H-1B visas, clarifying the definition of a "U.S. employer" to include Tribes and Tribal corporations, and providing an opportunity to consult Tribes when drafting forthcoming immigration policy.

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## I. INTRODUCTION

On June 27, 2013, the United States Senate passed a monumental overhaul of legislation to reform U.S. immigration policy.<sup>1</sup> With a 68-32 vote, the Senate approved the Gang of Eight's proposed immigration reform bill, the Border Security, Economic Opportunity, and Immigration Modernization Act.<sup>2</sup> This bill included a pathway to citizenship for over 11 million undocumented immigrants in the United States and allocated unprecedented amounts of resources along the border.<sup>3</sup> Unfortunately, despite the Senate's momentum and ability to pass bipartisan legislation on such a divisive issue, the Republican-controlled U.S. House of Representatives stalled and eventually prevented the Senate Bill from reaching President Obama's office to become law.<sup>4</sup>

While the immigration debate was at the forefront of mainstream U.S. news, it was also an important issue for American Indian Tribes.<sup>5</sup> In June 2013, the National Congress of American Indians (NCAI) passed Resolution #REN-13-078, titled Tribal Inclusion and Consideration in Immigration Reform (hereafter "2013 NCAI Resolution").<sup>6</sup> The 2013 NCAI Resolution states that the Border Security,

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<sup>1</sup> *U.S. Senate Passes Far-Reaching Immigration Reform Bill*, BRITISH BROAD. CO., (June 27, 2013), <https://www.bbc.com/news/world-us-canada-23091302> [<https://perma.cc/2639-RKN9>].

<sup>2</sup> The Gang of Eight was a bipartisan group of eight Senators, including: Sen. Dick Durbin (D-Ill.); Sen. Marco Rubio (R-Fla.); Sen. Robert Menendez (D-N.J.); Sen. Jeff Flake (R-Ariz.); Sen. Chuck Schumer (D-N.Y.); Sen. John McCain (R-Ariz.); Sen. Michael Benett (D-Colo.); and Sen. Lindsay Graham (R-S.C.), tasked with preparing a major immigration reform bill in 2013. *Immigration's Gang of 8: Who are they?*, WASH. POST, (Jan. 28, 2013, 1:00 p.m. EST), <https://www.washingtonpost.com/news/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/> [<https://perma.cc/Z5PS-W233>]; Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

<sup>3</sup> *U.S. Senate Passes Far-Reaching Immigration Reform Bill*, *supra* note 1.

<sup>4</sup> Muzaffar Chishti and Faye Hipsman, *U.S. Immigration Reform Didn't Happen in 2013; Will 2014 Be the Year?*, Migration Policy Institute (Jan. 9, 2014), <https://www.migrationpolicy.org/article/us-immigration-reform-didnt-happen-2013-will-2014-be-year> [<https://perma.cc/PKM2-4MZE>].

<sup>5</sup> The "immigration debate" refers to the ideas and history related to immigration policy in the United States, including, statistics on the immigrant population in the United States, undocumented immigration, legal immigration, sentiment of the American population towards immigration policy, Congressional action on immigration policy, and other related issues. "American Indian Tribes" is used throughout this article because of how federal policy refers to tribes of the Indigenous Peoples of the United States territory. However, the term may be used interchangeably with "Tribal Nations", "Tribal Government" or "Indian Tribes" to describe and refer to the tribal governing body.

<sup>6</sup> "Founded in 1944, the National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. NCAI, a non-profit organization, advocates for a bright future for generations to come by taking the lead to gain consensus on a constructive and promising vision for Indian Country. The organization's policy issues and initiatives are driven by the consensus of our diverse membership, which consists of American Indian and Alaska Native tribal governments, tribal citizens, individuals, and Native and non-Native organizations."

Economic Opportunity, and Immigration Modernization Act “addresses issues which affect all segments of American society, including tribal nations.”<sup>7</sup> In effect, the resolution acknowledges the impact of U.S. immigration policy on Indigenous Peoples, tribal governments, and tribal policy. NCAI listed various immigration issues important to Tribes, such as: resources to secure tribal lands along with government-to-government coordination and consultation for border security; “treating the newest immigrants with fairness and decency;” inclusion of a tribal task force to advise the federal government concerning immigration policy; maintaining unification of Tribes and tribal members divided by U.S. borders; tribal sovereignty limiting access to the U.S. government on tribal land; and several funding initiatives.<sup>8</sup> Additionally, the 2013 NCAI Resolution states, “a wide variety of tribal businesses would benefit from accessing professional H-1B visas” and that “NCAI supports a tribal set-aside for professional H-1B visas and investor visas.”<sup>9</sup>

Now, approximately a decade removed, June 2013 was the last major bipartisan effort to reform U.S. immigration policy completely.<sup>10</sup> NCAI’s 2013 call for action regarding tribal access to H-1B visas raises several questions about the relationship between Tribes and U.S. immigration policy. How involved are Tribes in the U.S. immigration policy debate? Where do Tribes play a role in the immigration policies of the settler country?<sup>11</sup> What is an H-1B visa? What are the benefits of an H-1B visa? How could “a tribal set-aside for H-1B visas” benefit Tribes and Indigenous Peoples?<sup>12</sup>

This Article argues that forthcoming U.S. immigration policy should include the perspective of Tribal Nations and provide a solution to NCAI’s call for H-1B visas. Part I will provide a general overview of U.S. immigration policy today. Part II will address the relationship between Tribes and the U.S. federal government with regard to immigration policy. Part III will discuss the H-1B visa process and the benefits of an H-1B visa.<sup>13</sup> Finally, part IV will conclude with a review of the 2021 U.S. Citizenship Act presented to the U.S. House of Representatives as H.R. 1177 by President Biden in February 2021, and how it may be amended to include the perspective of Tribal Nations.

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*Home: About NCAI*, Nat’l Cong. Am. Indians, <https://www.ncai.org/about-ncai> [<https://perma.cc/6JPD-DQAT>] (last visited Mar. 20, 2023).

<sup>7</sup> Tribal Inclusion and Consideration in Immigration Reform Resolution, #REN-13-078, The Nat’l Cong. of Am. Indians (2013) [hereinafter 2013 NCAI Resolution].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Elaine Kamarck and Christine Stenglein, *Can Immigration Reform Happen Again? A Look Back*, BROOKINGS (Feb. 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back/> [<https://perma.cc/8SUA-LNQQ>].

<sup>11</sup> In this article, “settler country” refers interchangeably to currently existing nations, such as the United States, Canada, and Mexico, that are not indigenous to the North American continent.

<sup>12</sup> 2013 NCAI Resolution, *supra* note 7.

<sup>13</sup> This research paper will not discuss the investor visas or any other employment-based visas mentioned in the 2013 NCAI Resolution due to the complexity of the H-1B visa.

“Tribes and H-1B Visas”

## II. GENERAL HISTORY OF U.S. IMMIGRATION POLICY.

Today, immigration policy is a political issue important to most of the U.S. population. In November 2021, the University of Southern California (USC) Annenberg School for Communication and Journalism published results indicating that “immigration is the top issue contributing to the current high level of polarization.”<sup>14</sup> USC’s Polarization Index tracks national political division, measured by social media conversations.<sup>15</sup> According to the Polarization Index, the immigration debate ranked as the most polarized subject, above policing policy, racial equity, and gun legislation.<sup>16</sup> But why is immigration so polarizing? In part because the immigration debate addresses issues that are often nonnegotiable moral values.<sup>17</sup> In addition, immigration policy impacts all aspects of American society. Individuals from different walks of life are invested in the debate, whether for economic, national security, or humanitarian concerns. Whether Americans are mindful of changes in immigration policy because they fear that immigration threatens their community’s security or because members of their community can benefit from immigration reform, the subject is closely tied to community and personal identity.<sup>18</sup>

### A. Creation of Modern U.S. Borders.

The United States has established its current international borders through treaties with foreign governments. The present-day southern U.S. border was created primarily through three treaties between the United States and Mexico: the Treaty of Guadalupe Hidalgo, the Gadsden Purchase Treaty, and the Chamizal Treaty.<sup>19</sup> In 1848, the Treaty of Guadalupe Hidalgo ended the war between the United States and Mexico, where the United States annexed 55 percent of Mexico’s

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<sup>14</sup> University of Southern California Staff, *Political divide remains critically high and immigration is most divisive issue, according to new USC polarization index*, USC NEWS (Nov. 4, 2021), <https://news.usc.edu/194189/inaugural-usc-polarization-index-reveals-political-divide-remains-critically-high-and-immigration-is-most-divisive-issue/> [https://perma.cc/K4CG-HDFB].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Overcoming Polarization: How to Talk with Immigration Opponents*, AM. IMMIGRATION COUNCIL (March 30, 2021), <https://www.americanimmigrationcouncil.org/content/overcoming-polarization-how-talk-immigration-opponents> [https://perma.cc/VE5U-8KZ5].

<sup>18</sup> *Out of Many, One*, NAT’L IMMIGRATION F. (Oct. 10, 2018), <https://immigrationforum.org/article/out-of-many-one/> [https://perma.cc/RL8T-KX9E].

<sup>19</sup> See generally Christina Leza and Alianza Indigena Sin Fronteras/Indigenous Alliance Without Borders, *Handbook on Indigenous Peoples’ Border Crossing Rights Between the United States and Mexico*, at 2, <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Call/IndigenousAllianceWithoutBorders.pdf> [https://perma.cc/6WYV-CU88] (last visited Dec. 12, 2022) [hereinafter Handbook].

territory.<sup>20</sup> The Treaty established the Rio Grande River as the southern U.S. border when the United States gained territory that currently consists of present-day California, Nevada, Utah, New Mexico, and portions of Arizona, Colorado, Oklahoma, Kansas, Texas, and Wyoming.<sup>21</sup> Through the Gadsden Purchase of 1853, the U.S. gained additional territories south of the Gila River, which are now the southernmost parts of the states of Arizona and New Mexico.<sup>22</sup> In 1963, the Chamizal Treaty ceded territory to Mexico along the El Paso, Texas, Ciudad Juarez, Chihuahua region and finalized the current position of the southern border of the United States.<sup>23</sup>

To the north, defining the present-day boundary between the United States and Canada began through The Definitive Treaty of Peace of 1783 between British North America and the United States.<sup>24</sup> Article 2 of the Treaty of Peace establishes the border “from the ‘mouth of the St. Croix River in the Bay of Fundy’ to the north-westernmost point of Lake of the Woods, and thence due west to the Mississippi River and down that river.”<sup>25</sup> The boundary was further defined in 1794 through the Treaty of Amity, Commerce, and Navigation, commonly known as the Jay Treaty.<sup>26</sup> The Jay Treaty also established various commissions to maintain the borders between the United States and modern-day Canada.<sup>27</sup> The United States and Canada have maintained the International Boundary Commission since 1908, in which both countries assign an expert geographer and surveyor to accurately define and mark the boundary between the two nations.<sup>28</sup>

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<sup>20</sup> See generally *Treaty of Guadalupe Hidalgo (1848)*, Milestone Documents, U.S. NAT’L ARCHIVES (Sept. 20, 2022), <https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo#:~:text=This%20treaty%2C%20signed%20on%20February,Oklahoma%2C%20Kansas%2C%20and%20Wyoming> [https://perma.cc/67RG-NKJT]

<sup>21</sup> See generally Handbook, *supra* note 19; See generally, *Treaty of Guadalupe Hidalgo (1848)*, *supra* note 20.

<sup>22</sup> See generally Handbook, *supra* note 19.

<sup>23</sup> The U.S.-Mexico border at the Rio Grande River was maintained through the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary of 1970 as a result of failed policies by President Nixon along the U.S.-Mexico border that complicated the boundary and led to this treaty in 1970. 1 NAT’L IMMIGR. PROJECT OF THE NAT’L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE 3, at 8-9 § 2:6 (Philip Hornik ed., Spring ed. 2023) [hereinafter IMMIGR. LAW & DEFENSE]; University of Arizona, *A Brief Legislative History of the Last 50 Years on the U.S.-Mexico Border*, MEXICO INITIATIVES (April 24, 2020); See generally, Handbook, *supra* note 19.

<sup>24</sup> *About Us: History*, INT’L BOUNDARY COMM’N, <https://www.internationalboundarycommission.org/en/about/history.php> [https://perma.cc/Z9FR-XTBP] (last visited Feb. 17, 2023) [hereinafter INT’L BOUNDARY COMM’N].

<sup>25</sup> The Definitive Treaty of Peace, U.K.-U.S., art. II, Sept. 30, 1783, [https://avalon.law.yale.edu/18th\\_century/paris.asp](https://avalon.law.yale.edu/18th_century/paris.asp) [https://perma.cc/Z6ZQ-V7N4] (last visited Feb. 17, 2023); INT’L BOUNDARY COMM’N, *supra* note 24.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

The consequences of these invisible yet jurisdictional lines create real effects on the various Tribal Nations that have lived in these geographical areas since time immemorial. The Tohono O’odham Nation is “the second-largest in the U.S., by land holdings,” located in southern Arizona, and whose territory crosses the southern U.S. border into Sonora, Mexico.<sup>29</sup> The Tribe has 34,000 members, and 2,000 of them live in Sonora.<sup>30</sup> Members of the Tohono O’odham Tribe are afforded the same rights on both sides of the border, regardless of whether they are U.S. citizens.<sup>31</sup> However, “tribal members say it has become more difficult for those living in Mexico to secure their rights” due to changing U.S. leadership and immigration policies.<sup>32</sup> As the Tohono O’odham Nation faces arbitrary treatment under immigration law with each sitting U.S. President, the Tribe has faced internal conflict as the tribal council must balance its relationship with the U.S. Government and the difficulty that the imposed border creates within its people.<sup>33</sup>

### **B. Timeline of U.S. Immigration Policy.**

U.S. immigration policy primarily derives from congressional acts and executive orders. The first federal immigration act passed by the United States Congress was the Naturalization Act of 1790, which limited citizenship to “free white persons.”<sup>34</sup> In 1798, the Alien and Sedition Acts notoriously allowed the president to deport anyone deemed “dangerous to the peace and safety of the country.”<sup>35</sup> Then, Congress passed the Act of 1882, which barred admission to the United States for those deemed to be “idiots, lunatics, convicts, and persons likely to become public charges,” which are still valid restrictions under current immigration law.<sup>36</sup> Finally, xenophobia controlled immigration policy through the early twentieth century as laws required literacy tests to receive immigration benefits, such as naturalization, due to increased immigrants arriving from southern and eastern Europe.<sup>37</sup> These laws created the “Asiatic Barred Zone,” which excluded most Asian immigrants.<sup>38</sup>

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<sup>29</sup> Dianna M. Nájuez, *A border tribe, and the wall that will divide it*, USA TODAY: THE WALL, <https://www.usatoday.com/story/tohono-oodham-nation-arizona-tribe/582487001/> [https://perma.cc/F4SV-EZUQ] (last visited Feb. 17, 2023).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (discussing a protest held by the Tohono O’odham members on the Mexican side of the border, involvement from tribal police, and the difficulty that the tribal council has faced in having to maintain a relationship with the U.S. Government or fear losing federal funding for the Tribe.).

<sup>34</sup> IMMIGR. LAW & DEFENSE, *supra* note 23, at 4 § 2:2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> IMMIGR. LAW & DEFENSE, *supra* note 23, at 5 § 2:3.

<sup>38</sup> *Id.*

It is difficult to determine the extent that Indigenous Peoples were involved in these earlier policies. The unique relationship between the U.S. Government and Indigenous Peoples is complex, shaped by the U.S. treating Indigenous Peoples first as citizens of separate nations, then treating them as wards of the federal government, then as U.S. citizens beginning in 1924, and currently as members of a racial minority.<sup>39</sup> A progressive understanding acknowledges that these early Congressional acts, especially those prior to 1924, excluded perspectives of Tribal Nations and the interests of Indigenous Peoples.

The mid-twentieth century brought about changes that impacted Indigenous Peoples in the Americas. The Immigration and Nationality Act (INA) of 1965 eliminated the long-standing quota system that favored the admission of foreign nationals from western European nations and terminated restrictions related to people from Asian countries.<sup>40</sup> However, the INA established restrictions on persons born in the western hemisphere for the first time. Prior to the INA, persons from the western hemisphere were treated “like other Americans.”<sup>41</sup> This change impacted Indigenous Peoples outside of the United States, primarily from Canada and Latin America, because they were excluded from becoming U.S. citizens under the Indian Citizenship Act of 1924 due to geographic location.

Toward the end of the twentieth century, employment-based immigration became a focal point as legislation increased efforts to scrutinize U.S. employers with regard to hiring foreign nationals. Meanwhile, the United States worked with North American countries to improve economic ties. The Immigration Reform and Control Act of 1986 (IRCA) under President Reagan demonstrates the political fear of unauthorized immigrants being actively employed within the United States.<sup>42</sup> IRCA prohibited U.S. employers from knowingly hiring, recruiting, or referring for a fee any person who is unauthorized to work, or continuing to employ someone after knowing of their unauthorized status.<sup>43</sup> At the same time, IRCA provided lawful status through amnesty to a portion of the undocumented immigrant population if they met strict requirements.<sup>44</sup> By prohibiting employers from hiring undocumented immigrants and simultaneously creating an exclusive group of those

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<sup>39</sup> Rebecca Tsotzie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1706, 1717 (2016).

<sup>40</sup> University of Arizona, *supra* note 23; IMMIGR. LAW & DEFENSE, *supra* note 23, at 7 § 2:5.

<sup>41</sup> IMMIGR. LAW & DEFENSE, *supra* note 23, at 7 § 2:5.

<sup>42</sup> Boston University, *Immigration Reform and Control Act (IRCA)*, BOS. UNIV. HUM. RES., <https://www.bu.edu/hr/policies/federal-and-state-laws/immigration-reform-and-control-act-irca/#:~:text=IRCA%20p%20rohibits%20employers%20from%20knowingly,mechanisms%20by%20the%20federal%20government> [https://perma.cc/PK2C-Y9AD] (last visited Feb. 18, 2023).

<sup>43</sup> *See generally*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3361 (1986).

<sup>44</sup> IMMIGR. LAW & DEFENSE, *supra* note 23, at 14 § 2:9 (discussing how millions of immigrants did not qualify).



eligible for amnesty, IRCA drove millions of immigrants underground through systemic economic repression and exploitation.<sup>45</sup>

In the 1980s, amidst the sweeping reforms in immigration law under President Reagan, the Texas Band of Kickapoo were able to carve out an immigration-related exception for themselves by lobbying the U.S. Government.<sup>46</sup> The Kickapoo originated from the Algonquin territory in New York, and migrated through Wisconsin, Illinois, Kansas, Oklahoma, and Texas until eventually arriving at Nacimiento, Mexico.<sup>47</sup> History shows that while they were in Nacimiento, Mexico, the Treaty of Guadalupe Hidalgo and the Gadsden Purchase were signed, establishing the southern U.S. border.<sup>48</sup> Therefore, the Texas Band of Kickapoo do not have “a treaty basis for their right to cross the border.”<sup>49</sup> Nonetheless, the Kickapoo successfully lobbied the U.S. Congress to pass legislation recognizing them as an Indian Tribe in Texas while preserving “their right to freely cross the border to visit their religious sites in Nacimiento.”<sup>50</sup>

In the late 1980s and early 1990s, then Mexican-President Salinas de Gortari privatized what were previously nationalized industries, causing severe deregulation of the Mexican government and an increased influx of migration from Mexico to the United States.<sup>51</sup> The Immigration Act of 1990 under President George H.W. Bush increased legal immigration limits from 500,000 to 700,000, and established the U.S. Commission on Immigration Reform to strengthen border patrol initiatives.<sup>52</sup> Notably, the H-1B nonimmigrant visa category was created in 1990.<sup>53</sup> The Clinton administration then prioritized national security, deportations, and encouraging documented immigrants to pursue naturalization.<sup>54</sup> Employment-based immigration remained an important part of U.S. immigration policy through the enactment of the North American Free Trade Agreement (NAFTA). NAFTA was enacted in 1994 and established a zone of free trade between Mexico, Canada,

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<sup>45</sup> *Id.*

<sup>46</sup> Sara Daly, *Bordering on Discrimination: Effects of Immigration Policies/Legislation on Indigenous Peoples in the United States and Mexico*, 38 *Am. Indian L. Rev.* 157, 163 (2014).

<sup>47</sup> Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 *Tex. F. on C.L. & C.R.* 191, 205 (2000).

<sup>48</sup> *Id.* at \*206.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*205.

<sup>51</sup> University of Arizona, *supra* note 23.

<sup>52</sup> *Id.*

<sup>53</sup> *The H-1B Visa Program and Its Impact on the U.S. Economy*, AMERICAN IMMIGRATION COUNCIL (July 15, 2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_h-1b\\_visa\\_program\\_and\\_its\\_impact\\_on\\_the\\_us\\_economy.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_and_its_impact_on_the_us_economy.pdf) [<https://perma.cc/HL8U-CKX8>].

<sup>54</sup> University of Arizona, *supra* note 23.

and the United States, and created new economic opportunities for all three North American countries.<sup>55</sup>

At the start of the new millennium, the attacks on the World Trade Center on September 11, 2001 gave rise to an increased emphasis on national security and fear of foreign nationals. In response, the U.S. Department of Homeland Security (DHS) was established in 2003.<sup>56</sup> Then, in 2004, the Intelligence Reform and Terrorism Prevention Act authorized 10,000 new immigration agents, and expanded DHS's Secure Border Initiative.<sup>57</sup> In 2005, Border Patrol conducted Operation Streamline: a zero-tolerance approach focused on the Mexico-U.S. border to remove undocumented immigrants expeditiously.<sup>58</sup> As a result, self-proclaimed militias against immigration, as well as migrant aid groups such as *No Mas Muerte/No More Deaths* were founded.<sup>59</sup> Then, in 2006, the Secure Fence Act authorized the construction of 650 miles of fencing along the Mexico-U.S. border.<sup>60</sup>

The U.S. Government's response to 9/11 has had a direct impact on Indigenous Peoples that regularly cross international borders. For instance, the Blackfeet Tribe is located in northwest Montana, and their territory reaches into Alberta, Canada.<sup>61</sup> The Blackfeet are an indigenous group that were not only divided by the Jay Treaty of 1794, but whose border crossing rights are based on that same treaty.<sup>62</sup> While Blackfeet members are only required to present their tribal ID to cross the border, some face arbitrary mistreatment from immigration officials, sometimes restricting their treaty rights of passage.<sup>63</sup> For example, Glenn Still Smoking is a Blackfeet tribal member who often crosses the border and faces difficulty in crossing by either U.S. authorities or Canadian Border Services officers.<sup>64</sup> At times, he has been asked to prove that he has no outstanding warrants to cross, while other times, the same officers allow him to pass freely.<sup>65</sup> This arbitrary treatment prohibits tribal members from exercising their right to cross the border freely under the Jay Treaty. Additionally, Blackfeet tribal councilman Joe McKay indicates that since 9/11, security at the border has increased and that crossing the border was much more informal before these changes.<sup>66</sup>

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<sup>55</sup> North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

<sup>56</sup> University of Arizona, *supra* note 23.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Maritza Dominguez, *Border Crossing Not Always Seamless For Blackfeet*, University of Arizona School of Journalism Bordering 110° Project, <http://www.bordering110.com/maritza-dominguez-native-crossings/> [<https://perma.cc/APG4-7WTQ>] (last visited February 12, 2023).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

In recent history, Presidential Candidate Donald Trump's "America First" platform promised tougher immigration restrictions and the construction of a border wall on the southern border.<sup>67</sup> Under President Trump's immigration policy, the realities of the southern border demonstrated inhumane treatment of migrants as young children were separated from their parents while in custody for immigration violations.<sup>68</sup> Toward the end of President Trump's term, U.S. Customs and Border Protection (CBP) announced plans to build more than 150 miles of a 30-foot high border wall in Arizona, New Mexico, and California in addition to existing projects in Texas.<sup>69</sup>

Building, maintaining, and securing the border wall has raised concerns among Tribal Nations on or near the southern, northern, and Alaskan borders. In 2018, the Pascua Yaqui Tribe and leaders from 40 other Tribal Nations united to form the Tribal Border Alliance in response to "the ongoing debate over immigration and border security."<sup>70</sup> As a result, the Tribal Border Alliance proposed a series of tribal-driven solutions to "secure our nation, all while respecting [their] traditional and cultural practices and protocols."<sup>71</sup> The proposal called for: amending the Immigration and Nationality Act and developing an Indigenous Visa Category to address border-crossing issues; annual consultation between the U.S. Department of Homeland Security and Tribal Governments; requiring national and local tribal cultural trainings for U.S. immigration agencies; and "direct, sufficient, flexible and consistent funding for tribal-driven border security."<sup>72</sup>

Several Tribal Nations have also rejected a border wall independently. For example, the Lipan Apache have sought action from the United Nations against the U.S. Government, claiming Indigenous rights violations with regard to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>73</sup> UNDRIP "confirm[s] the right of Indigenous Peoples to maintain connections to their homelands and peoples across international borders."<sup>74</sup> Numerous organizations

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<sup>67</sup> University of Arizona, *supra* note 23.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Letter From The Chairman*, TRIBAL BORDER ALL., <https://www.tribalborderalliance.org/about/> [<https://perma.cc/8ZNT-TSN3>] (last visited Feb. 21, 2023).

<sup>71</sup> *Tribal Border Alliance Proposal*, TRIBAL BORDER ALL., <https://www.tribalborderalliance.org/proposal/> [<https://perma.cc/FL5A-EVJR>], (last visited Feb. 21, 2023).

<sup>72</sup> *Id.*

<sup>73</sup> Christina Leza, *What Is the U.S. – Mexico Border to Indigenous Peoples Who Have Lived There?*, (July 7, 2020), <https://www.yesmagazine.org/opinion/2020/07/07/mexico-border-indigenous-leaders> [<https://perma.cc/L3YU-TF4B>].

<sup>74</sup> *Id.* *But see* *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 301 F.Supp.3d 50, 60 (D.D.C. 2018) (mem.) (stating that "UNDRIP is a non-binding declaration that does not create a federal cause of action" in the United States).

have also called attention to the negative impacts of current border security efforts.<sup>75</sup>

Most recently, President Biden has chosen not to renew various restrictions imposed upon the H-1B visa process that expired in March 2021.<sup>76</sup> Additionally, President Biden has the potential to cement a long-lasting legacy in immigration policy if Congress passes his proposed 2021 U.S. Citizenship Act. However, his impact on immigration will ultimately be determined at the end of his presidential term.

### III. INDIGENOUS PEOPLES' UNIQUE RELATIONSHIP WITH U.S. IMMIGRATION POLICY.

The relationship between Tribal Nations and the United States government is a result of a complicated history. The basic framework for the relationship between Indigenous Peoples and the U.S. government is established under the Marshall Trilogy. This relationship is impacted by Congress' plenary power. Tribal Nations are also proactive changemakers in this relationship when they implement solutions to address immigration-related concerns of Indigenous Peoples through their tribal codes.

#### A. The Marshall Trilogy, Congress' plenary power, and Tribal codes' impact on immigration policy.

In *Johnson v. M'Intosh* (1823), the United States Supreme Court held that the U.S. Government had the sole right to negotiation with tribes and that Indigenous Peoples themselves did not have the right to sell their property to individuals.<sup>77</sup> In *Cherokee Nation v. Georgia* (1831), Justice Marshall articulated that indigenous nations are neither states nor foreign nations, holding:

They may more correctly perhaps be denominated domestic dependent nations . . . Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . .<sup>78</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Under President Trump, H-1B petitions were initially being denied at higher rates than in prior years. 14 percent from fiscal year 2018 through fiscal year 2019, in comparison to only 3 percent of denials between fiscal year 2014 through fiscal year 2017. *The H-1B Visa Program and Its Impact on the U.S. Economy*, AM. IMMIGRATION COUNCIL (July 15, 2022), <https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet> [<https://perma.cc/F8RL-U8E5>].

<sup>77</sup> See generally, *Johnson v. M'Intosh*, 21 U.S. 543, (1823).

<sup>78</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

The Marshall Trilogy concludes with the 1832 case of *Worcester v. Georgia*.<sup>79</sup> In *Worcester*, the Supreme Court held that state law has no authority to regulate intercourse between citizens of its state and members of indigenous nations.<sup>80</sup> Justice Marshall wrote, “The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves . . .”<sup>81</sup> By including language that denies the citizens of Georgia entry into Cherokee territory, the *Worcester* decision presents an issue that could relate to present-day conversations regarding border crossings and the sovereignty of foreign nations.

Since the Marshall Trilogy, the underlying issues of who has jurisdiction in Indian Country and the role the Congress’ plenary power has over Indigenous Tribes continually complicates the relationship between Tribal Nations and the U.S. Government.<sup>82</sup> The jurisdiction of Indian Tribes is geographically limited to Indian Country. The Supreme Court has determined that the United States has ultimate title to all lands within its territory and geographical boundaries and therefore, Indian Country is held in trust for Tribes while Indigenous People have a right to occupancy of such land.<sup>83</sup> The federal government’s trust relationship with Tribes, along with the body of cases involving tribal jurisdiction, provides the basis for Congress’s plenary power over Tribes.<sup>84</sup> Congress’s duties towards Tribes under their plenary power include: “1) Protection of Indian trust property, 2) Protection of the Indian right to self-government, and 3) Provision of those social[,] medical[,] and educational services necessary for the survival of the tribes.”<sup>85</sup> Altogether, Congress’ plenary power allows it to assert jurisdiction over Indigenous Peoples.<sup>86</sup>

Despite the United States’ ability to assert jurisdiction over Indigenous Peoples through its plenary power, Tribes have continued to exercise their own authority in several ways, including controlling tribal membership and actively addressing jurisdictional issues with regard to immigration policy. Tribes control tribal membership through their tribal codes. For example, the Saint Regis Mohawk Tribe requires an application for membership which must include: 25% Akwesasne Mohawk blood quantum, a four-generation biological family tree, enrollment

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<sup>79</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>80</sup> *Worcester v. Georgia*, 31 U.S. 515, LEXIS 483, at \*47 (1832).

<sup>81</sup> *Id.* at \*14 (1832).

<sup>82</sup> Here, Indian Country refers to reservations, dependent Indian communities, and Indian allotments per 18 U.S.C. § 1151.

<sup>83</sup> Sarah L. Gross, *Pulling the “Plenary Authority” Card: The United States’ “Get Out of Jail Free Card”* in

*Membership Disagreement with Indian Tribes*, 43 TULSA L. REV. 119, \*127 (Lexis). See generally, *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

numbers of the biological parents, and an original birth certificate of the applicant in order to request tribal membership.<sup>87</sup> The Saint Regis Mohawk Tribe also requires Canadian-born Indigenous Peoples to submit a Canadian long-form birth certificate.<sup>88</sup>

Tribal membership and blood quantum are important to Indigenous Peoples' right to migrate throughout the North American settler states. Indigenous Peoples and Tribes living along the U.S.-Canadian border are granted the freedom to "pass and repass" across the boundary line.<sup>89</sup> Article III of the Jay Treaty, states,

It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America [...] and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.<sup>90</sup>

The rights afforded to Indigenous Peoples under the Jay Treaty were applied in the 1928 *McCandless v. United States* case.<sup>91</sup> *McCandless* involves Paul Diabo Kanento, a Kahnake Mohawk, who lived in Canada and worked on the Benjamin Franklin Bridge in Philadelphia, Pennsylvania, at the time when the relevant facts occurred in the case.<sup>92</sup> As a cross-border worker, Kanento had been previously arrested and deported to Canada.<sup>93</sup> In an effort to maintain Indigenous mobility rights for the Iroquois Confederacy, Kanento risked his own liberty to challenge the validity of the rights granted to Indigenous Peoples via the Jay Treaty of 1794.<sup>94</sup> Kanento's risk was ultimately beneficial as the United States Supreme Court decided in his favor, holding that the United States acknowledges the right of Indigenous People to cross the international border for employment and residential

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<sup>87</sup> SAINT REGIS MOHAWK TRIBE, *Membership*, <https://www.srmt-nsn.gov/membership> [<https://perma.cc/4FAP-GGUM>] (last visited Feb. 21, 2023).

<sup>88</sup> *Id.*

<sup>89</sup> Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. III, ¶ 1, Nov. 19, 1794, 8 Stat. 116.

<sup>90</sup> *Id.*

<sup>91</sup> *McCandless Commission of Immigration v. United States ex rel Diabo*, 25 F.2d 71 (3d Cir. 1928).

<sup>92</sup> Doug George Kanentiio, *Paul Diabo Case Affects Us All*, INDIAN TIME (Mar. 27, 2008), <https://www.indiantime.net/story/2008/03/27/opinion/paul-diabo-case-affects-us-all/032020121950302917470.html> [<https://perma.cc/ZTT9-4TP2>].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

purposes.<sup>95</sup> Since *McCandless*, the United States permits Canadian-born people with at least 50% aboriginal blood to enter, live in, and work in the United States without immigration restrictions and fear of deportation.<sup>96</sup>

While blood quantum permits Indigenous Peoples the right to freely travel across the northern border, tribal membership, which may or may not include blood quantum requirements depending on the tribe, also impacts Indigenous Peoples' rights to international travel. Under DHS's Western Hemisphere Travel Initiative (WHTI), Indigenous Peoples can freely travel across U.S. international borders with a U.S. passport, Form I-872 American Indian Card, or an enhanced tribal card.<sup>97</sup> However, the WHTI created an unfunded mandate for Tribes to comply with enhanced tribal cards to facilitate their members' international travel.<sup>98</sup> The NCAI has advocated before the U.S. Government for tribe-issued identification cards to be recognized for passport purposes.<sup>99</sup>

### B. Indigenous Peoples as Foreigners in their Homelands.

Within the context of the Marshall Trilogy and the plenary power of the United States over tribal affairs and immigration policy, the present-day immigration debate tends to exclude the voice of individual Indigenous Peoples. Nonetheless, U.S. immigration policies have a direct impact on Indigenous individuals. Through the Plan de Iguala of 1824, which formally declared the independence of New Spain from Old Spain, Indigenous Peoples of modern-day Mexico were assimilated to become New Spaniards and, thereafter, Mexicans. Article XII of the Plan de Iguala declared: "All the inhabitants of New Spain, without distinction of Africans, Europeans, or Indians, are Citizens of this Monarchy, with eligibility to all [e]mployments, according to their virtues and merits."<sup>100</sup> As stated earlier, the present-day southern U.S. border was established through the Treaty of Guadalupe Hidalgo, the Gadsden Purchase, and the Chamizal Treaty. Not only were Indigenous Tribes neither consulted nor adequately considered in the negotiations, but the Indigenous Peoples assimilated under the

<sup>95</sup> *Id.*

<sup>96</sup> *Border Crossing Rights Under the Jay Treaty*, PINE TREE LEGAL ASSISTANCE, <https://www.ptla.org/border-crossing-rights-jay-treaty#:~:text=It%20was%20a%20treaty%20of,their%20%22own%20proper%20goods%22%20when> [https://perma.cc/2G6G-AZG2] (last visited Feb. 21, 2023).

<sup>97</sup> U.S. DEP'T OF HOMELAND SEC., *Western Hemisphere Travel Initiative*, <https://www.dhs.gov/western-hemisphere-travel-initiative> [https://perma.cc/UV5L-E83K] (last visited Oct. 17, 2022).

<sup>98</sup> THE NAT'L CONG. OF AM. INDIANS, *Homeland Security*, <https://www.ncai.org/policy-issues/tribal-governance/homeland-security> [https://perma.cc/F4AG-N7CX] (last visited Dec. 3, 2022).

<sup>99</sup> *Id.*

<sup>100</sup> Plan of Government for Mexico, proposed by Don Augustin de Iturbide to His Excellency the Count de Venadito, Viceroy of New Spain, *translated in* WORLD CONSTITUTIONS ILLUSTRATED 398, <https://heinonline.org/HOL/P?h=hein.cow/zzmx0003&i=1>.

Plan de Iguala were disassociated from their Tribes and were then considered citizens of the United States under the Treaty of Guadalupe Hidalgo.<sup>101</sup> They were eventually granted citizenship rights under the Indian Citizenship Act of 1924.<sup>102</sup> By gaining equality through assimilation, present-day conversations regarding immigration policy fail to acknowledge the history of the land. In addition, it requires reliance on life after dispossession from populations pre-existing in the settler state.<sup>103</sup>

Furthermore, scholarship on U.S. immigration policy, and U.S. immigration policy itself, excludes Indigenous Peoples through space, time, and membership.<sup>104</sup> Key terms in the field of immigration law, such as citizen, alien, birthright citizenship, and even “U.S. employer” fail to include Indigenous Peoples.<sup>105</sup> The definition for a U.S. employer for employment-based visa petitions refers to an entity that employs others “within the U.S.” and requires an IRS tax ID number but fails to clarify whether tribal governments or businesses on tribal lands are considered “within the U.S.”<sup>106</sup> With the recent emphasis on border security, current immigration discussions omit Indigenous Peoples from their past, present and future relationship with the land. Despite the various treaties that established U.S. international borders, immigration policy assumes that people cross borders, forgetting that the borders previously crossed people.<sup>107</sup>

In 2019, the Navajo Times reported that a Navajo mother of three children decided to move to Mexico to accompany her deported husband.<sup>108</sup> Carlayna Holiday, a Navajo woman and descendant of Navajo Code Talkers, stated, “I am moving to Mexico with my husband because I love him and I love my family . . . My family means everything to me. It breaks my heart every time I think about our family separating.”<sup>109</sup> Ms. Holiday’s sister then commented on the lack of access to employment-based visas, adding, “Every turn we took ended in a dead end and it quickly became costly . . . It became apparent that money is necessary, for example, applying for citizenship legally, through visas, work visas and so forth.”<sup>110</sup> In 2011, New Mexico Congressman Ray Begaye introduced House Bill 23 in the New Mexico legislature that allowed the New Mexico Secretary of

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<sup>101</sup> Handbook, *supra* note 19.

<sup>102</sup> Bethany R. Berger, *Birthright Citizenship on Trial: Elk V. Wilkins And United States V. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1241-1243 (2016).

<sup>103</sup> Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 289 (2015).

<sup>104</sup> *Id.* at 289-293.

<sup>105</sup> *Id.* at 293.

<sup>106</sup> 8 C.F.R. § 214.2(h)(4)(ii).

<sup>107</sup> Volpp, *supra* note 103 at 291-292.

<sup>108</sup> Arlyssa Becenti, *Diné plans to go to Mexico with deported husband*, NAVAJO TIMES, Jan. 8, 2019, <https://navajotimes.com/reznews/dine-plans-to-go-to-mexico-with-deported-husband/> [<https://perma.cc/E9S3-9K6K>].

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*



Taxation to waive requirements in the Motor Vehicle Code.<sup>111</sup> These changes would allow tribes to issue driver's licenses to foreign nationals if they reside on the reservation, are married to and live with an enrolled member, and are a parent of an enrolled tribal member child.<sup>112</sup> This process would have allowed the Navajo Nation to impose restrictions on U.S. immigration policy to benefit their community, however, the bill never became law.<sup>113</sup>

#### IV. THE PROCESS AND BENEFITS OF H-1B VISAS.

The 2013 NCAI Resolution calling for inclusion in crafting immigration policy and providing employment-based opportunities for Tribes and indigenous businesses highlights a perfect opportunity for the U.S. Government to be inclusive of Tribal Nations when drafting immigration policy.

The Immigration and Nationality Act (INA), 8 U.S.C.A. § 1101, establishes the presumption that foreign nationals seeking admission to the United States are "immigrants."<sup>114</sup> "Immigrant" means someone who intends to remain permanently or indefinitely in the United States.<sup>115</sup> In addition, the INA includes "nonimmigrant" categories. A "nonimmigrant" visa is issued to persons that intend to enter the United States temporarily "for tourism, business, medical treatment and certain types of temporary work."<sup>116</sup> To obtain a nonimmigrant visa, the foreign national must prove that they fit into a specific nonimmigrant category and convince the consul that they do not intend to remain permanently in the United States.<sup>117</sup> The foreign national is then issued a nonimmigrant visa at a United States consulate or embassy abroad.<sup>118</sup>

An H-1B visa is a type of nonimmigrant visa. The H-1B visa category is intended to help U.S. employers who cannot otherwise "obtain needed business skills and abilities from the U.S. workforce" and thus, fill the need with foreign workers.<sup>119</sup> Those eligible for an H-1B visa include individuals who perform services in a specialty occupation, services of exceptional merit and ability related

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<sup>111</sup> Ray Begaye, *Letter: Deportation story all too common on Navajo*, NAVAJO TIMES, Jan. 17, 2019, <https://navajotimes.com/opinion/letters/letters-deportation-story-all-too-common-on-navajo/> [<https://perma.cc/TH4E-Z5AQ>].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> IMMIGR. LAW & DEFENSE, *supra* note 23 at 28 § 3:1.

<sup>115</sup> *Id.*

<sup>116</sup> U.S. CUSTOMS AND BORDER PROTECTION, *Requirements for Immigrant and Nonimmigrant Visas*, <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas> [<https://perma.cc/EMW4-574L>] (last visited Dec. 3, 2022).

<sup>117</sup> *See generally, Id.*

<sup>118</sup> IMMIGR. LAW & DEFENSE, *supra* note 23, at 28-29 § 3:1.

<sup>119</sup> U.S. DEP'T OF LABOR, *H-1B Program*, Wage and Hour Division, <https://www.dol.gov/agencies/whd/immigration/h1b> [<https://perma.cc/6683-SQXS>] (last visited Dec. 4, 2022) [hereinafter H-1B Program].

to Department of Defense (DOD) research and development projects; or services as a fashion model of distinguished merit or ability.<sup>120</sup> This discussion focuses on H-1B visas for foreign nationals that perform services in a specialty occupation and how they may benefit tribal economies.

### A. General H-1B Criteria.

A specialty occupation “requires the application of a body of highly specialized knowledge.”<sup>121</sup> The foreign national must also obtain at least a bachelor’s degree or equivalent through experience and recognition in their area of expertise through progressive related employment positions.<sup>122</sup> Examples of specialty occupations include strategic planning managers, software design engineers, market research analysts, database administrators, accountants, computer programmers, human resource managers, and social workers.<sup>123</sup> The job position itself qualifies as a specialty occupation if:

“(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; (3) The employer normally requires a degree or its equivalent for the position; *or* (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.”<sup>124</sup>

Under the specialty occupation classification, an H-1B foreign national requires a U.S. employer to sponsor the petition for the H-1B visa.<sup>125</sup> The Code of Federal Regulations defines a U.S. employer as an entity that: (1) engages a person to work within the U.S.; (2) has an employer-employee relationship in that it may hire, pay,

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<sup>120</sup> U.S. CITIZENSHIP & IMMIGR. SERV., *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations> [<https://perma.cc/E7JQ-J4NU>] (last visited Dec. 3, 2022) [hereinafter H-1B Specialty Occupations].

<sup>121</sup> H-1B Program, *supra* note 119.

<sup>122</sup> 8 U.S.C.A. § 1184 (West).

<sup>123</sup> Ira J. Kurzban, *KURZBAN’S IMMIGR. LAW SOURCEBOOK*, 2111, 2122-24 (18th ed.) (citing several precedent cases).

<sup>124</sup> 8 C.F.R. § 214.2(h)(4)(iii)(A) (emphasis added).

<sup>125</sup> H-1B Specialty Occupations, *supra* note 120.

fire, supervise, or otherwise control work; and (3) has an IRS tax ID number (TIN).<sup>126</sup>

An employer seeking to hire an H-1B foreign national must comply with legal standards to protect “similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers” and protect the H-1B workers as well.<sup>127</sup> Therefore, before filing a petition with the U.S. Citizenship & Immigration Services (USCIS), the employer must obtain certification of a Labor Condition Application (LCA) from the U.S. Department of Labor (USDOL).<sup>128</sup> The LCA allows the USDOL to certify the wage offered to the H-1B worker, employment start date, nature of the job offered, and area of intended employment.<sup>129</sup> To determine the appropriate wage, the employer may file a Prevailing Wage Determination (PWD) with the USDOL.<sup>130</sup> The PWD process safeguards against overpaying or underpaying the H-1B worker at the expense of the U.S. workforce. The prevailing wage is “the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.”<sup>131</sup>

## B. Tribes as Employers.

It is essential to recognize the impact of tribal commerce on the present-day economy of the U.S., and the magnitude of the trade networks of Tribal Nations before European contact, to determine the potential impact of H-1B foreign workers on tribal employers. Today’s commercial goods transportation along U.S. highways follows “ancient trade routes Natives ... traveled for centuries.”<sup>132</sup> However, Tribal Nations have seen a “high rise in poverty, disease, and shortened life expectancy of ... tribal citizens” as a repercussion of hundreds of years of the U.S. Government undermining “tribal nationhood, commercial activity, and prosperity.”<sup>133</sup> Despite facing such adversity, Tribal Nations have survived economically through their ability to adapt, innovate, and continue to prosper. Commercial activity has been recorded throughout the Midwest since 3000 BCE.<sup>134</sup> Additionally, archaeological and anthropological records demonstrate that trading relationships existed

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<sup>126</sup> 8 C.F.R. § 214.2(h)(4)(ii).

<sup>127</sup> H-1B Program, *supra* note 119.

<sup>128</sup> Kurzban, *supra* note 123, at 2140.

<sup>129</sup> *Id.* at 836-840.

<sup>130</sup> *Id.* at 838.

<sup>131</sup> U.S. DEP’T OF LABOR, *Prevailing Wage Information and Resources*, Employment and Training Admin., <https://www.dol.gov/agencies/eta/foreign-labor/wages> [<https://perma.cc/S8UF-5V96>] (last visited Dec. 4, 2022).

<sup>132</sup> Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 383 (Winter 2008).

<sup>133</sup> *Id.* at 384.

<sup>134</sup> *Id.* at 385.

throughout the United States well before the arrival of Europeans.<sup>135</sup> The decision of Indigenous Peoples to extend friendship to the recent arrivals created a relationship between Tribal Nations and international trade as products from present-day North America were transported to Europe.<sup>136</sup> As a result, Indigenous Peoples were active players in global trade well before the founding of the United States,<sup>137</sup> and they continue to be vital partners in international trade through successful Tribal corporations.

Tribal corporations are “government-run businesses with Tribal Councils ultimately overseeing business activities.”<sup>138</sup> Tribal economies involve “tribalistic economic theory” that encompasses key elements of “the kinship basis for trade relationships, good faith in transactions, generosity as the basis of Tribal prosperity, stewardship and protection of intergenerational resources, and sense of interdependence with all living beings.”<sup>139</sup> Tribal corporations, along with “native cultural adaptability allow Tribal members and leaders to envision full participation in global markets by sound traditional principles.”<sup>140</sup> Furthermore, Tribal employers are permitted to prefer Indian<sup>141</sup> applicants over non-Indian applicants as part of the “Indian Preference” hiring practice protected by federal law.<sup>142</sup> While the Civil Rights Act “prohibits preferential employment based on race, color, sex, national origin, and religion,” Title VII provides “a special exemption that makes Indian Preference permissible.”<sup>143</sup> Therefore, Tribal corporations may hire non-Indian applicants but are permitted to prefer Indian applicants if they choose to do so.

### C. The H-1B “Lottery” and USCIS Filing Process.

Understanding the H-1B lottery selection process provides context to NCAI’s call for a Tribal set-aside of H-1B visas. The H-1B nonimmigrant category has an annual numerical limit of 65,000 new visas each fiscal year.<sup>144</sup> The law provides an additional 20,000 visas for petitions filed on behalf of H-1B beneficiaries with a master’s degree or higher.<sup>145</sup> The 85,000 limit is commonly

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 388.

<sup>137</sup> *Id.* at 389.

<sup>138</sup> *Id.* at 398.

<sup>139</sup> *Id.* at 384-85.

<sup>140</sup> *Id.* at 397.

<sup>141</sup> The term “Indian” is used here because of the reference to “Indian preference” or other similar terms commonly used in Federal Indian Law cases related to tribal corporations.

<sup>142</sup> MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW*, 794 (2d ed. 2020).

<sup>143</sup> Letter from Kevin Bearquiver, Deputy Bureau Dir., Indian Serv., to Mark J. Gabriele, Harris Beach PLLC. Att’y’s Law (Nov. 25, 2009), <https://turtletalk.files.wordpress.com/2009/12/indian-preference-seneca.pdf> [<https://perma.cc/8VR2-W5Q4>].

<sup>144</sup> H-1B Specialty Occupations, *supra* note 120.

<sup>145</sup> *Id.*

referred to as “the cap” or the “H-1B cap.” Because the number of H-1B petitions filed each year usually exceeds the cap, USCIS performs a lottery where H-1B petitions are randomly selected and permitted to proceed without actually filing the H-1B petition with USCIS.<sup>146</sup> In 2020, USCIS implemented an electronic registration system to streamline the process for prospective employers intending to file H-1B petitions subject to the cap.<sup>147</sup> In 2022, the registration period was held between March 1 and March 18.<sup>148</sup> Only the electronically-registered employers that are selected in the H-1B lottery can proceed by filing the appropriate paperwork with USCIS by April 1 of the same year.<sup>149</sup> The employers not selected in the lottery are placed on a waitlist in case they are randomly selected if any earlier-selected petitions are denied.<sup>150</sup>

The employer then submits the certified LCA, documentation proving eligibility<sup>151</sup>, and the appropriate forms and fees to USCIS.<sup>152</sup> USCIS then adjudicates the H-1B petitions, and if they are approved, the H-1B status is valid

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<sup>146</sup> AM. IMMIGR. LAWYERS ASSOC., FY2023 H-1B REGISTRATION FACT SHEET FOR EMPLOYERS, (Aug. 23, 2022), [https://www.aila.org/advo-media/issues/all/h1b-registrationtool?utm\\_source=aila.org&utm\\_medium=FeaturedSearch](https://www.aila.org/advo-media/issues/all/h1b-registrationtool?utm_source=aila.org&utm_medium=FeaturedSearch) [hereinafter Fact Sheet].

<sup>147</sup> U.S. CITIZENSHIP & IMMIGR. SERV., USCIS ANNOUNCES IMPLEMENTATION OF H-1B ELECTRONIC REGISTRATION PROCESS FOR FISCAL YEAR 2021 CAP SEASON (Dec. 6, 2019), <https://www.uscis.gov/news/news-releases/uscis-announces-implementation-of-h-1b-electronic-registration-process-for-fiscal-year-2021-cap> [<https://perma.cc/VQ5J-ED8N>] (predicting that the new system would “dramatically streamline [lottery] processing by reducing paperwork and data exchange” between employer petitioners and USCIS).

<sup>148</sup> FACT SHEET, *supra* note 146.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Including, but not limited to: the beneficiary’s biographical information such as passport(s); degrees, evidence of experience, an education evaluation if academic degree was earned abroad; license or temporary license, if applicable; and evidence of having met applicable USDOL requirements during the LCA process. KURZBAN, *supra* note 123, at 2131.

<sup>152</sup> The employer files Forms I-129, and other supplement forms, paying several fees. U.S. CITIZENSHIP AND IMMIGR. SERV., OMB NO. 1615-0009, I-129, PETITION FOR A NONIMMIGRANT WORKER (2022), <https://www.uscis.gov/i-129> [<https://perma.cc/JKP7-E5CH>] (Form I-129); U.S. CITIZENSHIP AND IMMIGR. SERV., H-1B SPECIALTY OCCUPATIONS, DOD COOPERATIVE RESEARCH AND DEVELOPMENT PROJECT WORKERS, AND FASHION MODELS (2022), <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations> [<https://perma.cc/PYS7-KBGN>] (Specialty occupations require a bachelor’s degree at the minimum and may require supplemental forms); U.S. CITIZENSHIP AND IMMIGR. SERV., H AND L FILING FEES FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER (2018), <https://www.uscis.gov/forms/all-forms/h-and-l-filing-fees-for-form-i-129-petition-for-a-nonimmigrant-worker> [<https://perma.cc/765P-SY7G>] (The employer must pay the corresponding fees, which include: a \$460.00 filing fee; a \$1500.00 fee for employers with more than 25 full-time employees, or \$750 for employers with 25 or fewer full-time employees; a \$500.00 fraud prevention fee. The fees cannot be paid by the H-1B nonimmigrant worked and must be paid by the employer).

beginning October 1 of the same year.<sup>153</sup> Therefore, October 1 is the start of the fiscal year, and the date when the H-1B visa is available under the annual limit.<sup>154</sup> H-1B petitions approved by USCIS are then reviewed by the corresponding U.S. consulate or embassy abroad.<sup>155</sup> The U.S. consulate or embassy then issues the physical visa stamp into the H-1B beneficiary's passport. Once in the United States, the H-1B beneficiary is granted a period of stay of up to three years, with options for employment portability, changes in employment, and extensions of their H-1B status for a maximum of six years.<sup>156</sup>

#### D. Statistics and Impact of the H-1B Visa Program.

The H-1B process is a highly-coveted employment-based visa for foreign workers and U.S. employers. In 2019, one-in-five temporary employment visas issued were H-1B visas.<sup>157</sup> Just as U.S. employers have filled the need for workers in specific areas of their business, so can Tribal governments and Tribal businesses benefit from H-1B foreign workers.

Foreign workers, especially H-1B nonimmigrant workers, have been found to impact the U.S. economy positively. Per the American Immigration Council, foreign workers fill a critical need in the U.S. labor market in science, technology, engineering, and math (STEM).<sup>158</sup> Because the U.S. workforce does not fill many STEM-related occupations, H-1B workers serve a complementary role and fill those roles, expanding job opportunities for others through their work product.<sup>159</sup>

Furthermore, statistics demonstrate that foreign workers in the United States create new employment opportunities in the U.S. labor market. This is

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<sup>153</sup> U.S. DEP'T OF HOMELAND SEC., STUDY IN THE STATES: H-1B STATUS AND THE CAP GAP EXTENSION, <https://studyinthestates.dhs.gov/students/h-1b-status-and-the-cap-gap-extension> [<https://perma.cc/5LE5-ZKHB>] (last visited Dec. 4, 2022).

<sup>154</sup> *Id.*

<sup>155</sup> See generally KURZBAN, *supra* note 123, at 2013-15.

<sup>156</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, H-1B SPECIALTY OCCUPATIONS, DOD COOPERATIVE RESEARCH AND DEVELOPMENT PROJECT WORKERS, AND FASHION MODELS (2022), <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations>; see also KURZBAN, *supra* note 123, at 2135.

<sup>157</sup> Employment visas considered by the Pew Research Center include H-1B, H-2A, H-4, H-2B, H-1B1, H-3, L, O, P, and Q visas. Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key Facts About U.S. Immigration Policies and Biden's Proposed Changes*, PEW RESEARCH CENTER (Jan. 11, 2022), <https://www.pewresearch.org/fact-tank/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/> [<https://perma.cc/543Y-JXKC>].

<sup>158</sup> The American Immigration Council is a non-profit, non-partisan organization based in Washington, D.C., that employs litigation, research, communications, and legislative and administrative advocacy, as a method of reforming U.S. immigration policy that creates a more welcoming U.S. and takes into account the needs of the U.S. economy. <https://www.americanimmigrationcouncil.org/about/our-mission> [<https://perma.cc/C8ET-LB9F>]; AMERICAN IMMIGRATION COUNCIL, *supra* note 53.

<sup>159</sup> *Id.*

demonstrated in five ways. First, as stated above, the complementary relationship between foreign and U.S. workers results in the two groups not competing for the same jobs.<sup>160</sup> Secondly, foreign workers become consumers by spending and investing their wages in the U.S., resulting in increased demand for the goods and services they purchase.<sup>161</sup> Third, immigration laws that are less restrictive and encourage foreign workers to migrate to the U.S. cause global businesses to respond by expanding their operations within the U.S. and, thus, benefit the U.S. economy as a whole.<sup>162</sup> On the other hand, when U.S. immigration agencies apply a more restrictive interpretation towards granting employment-based visas, global corporations seek opportunities for their employees in other countries.<sup>163</sup> Fourth, immigrants expand the U.S. labor market by creating new businesses once they are in the United States.<sup>164</sup> And lastly, economists find that immigrants develop new ideas and innovations that “fuel economic growth.”<sup>165</sup> These five characteristics demonstrate the positive impact of foreign workers on the economy of the United States.

H-1B foreign workers can contribute to Tribal economies through specialty occupations in STEM fields just as they have contributed to the U.S. workforce. For example, the Blackfeet Tribe of Montana is both a political entity and a business corporation.<sup>166</sup> The Tribe is one of the primary employers on the reservation and manages several programs and departments, including a Geographic Information Systems (GIS) Program.<sup>167</sup> GIS programs are part of the STEM curriculum and therefore, participating in GIS programs may provide skills that suit H-1B specialty occupation criteria. The Rocky Boy’s Reservation is also located in Montana and provides a computer science degree program at Stone Child College.<sup>168</sup> Although both Tribal Nations face high unemployment rates between 60-80 percent, having government programs and academic degree programs in GIS and computer science demonstrate the need for STEM-related industries on their reservations.<sup>169</sup>

Additionally, businesses and organizations outside the reservation are interested in supporting STEM-related programs on Tribal lands throughout the U.S. In 2022, Amazon’s “global philanthropic computer science education program,” known as Amazon Future Engineer, announced “a commitment of \$2.25

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> MONTANA OFFICE OF PUBLIC INSTRUCTION, DIVISION OF INDIAN EDUCATION, MONTANA INDIANS: THEIR HISTORY AND LOCATION, at 9.

<sup>167</sup> *Id.* at 9-10.

<sup>168</sup> *Id.* at 82.

<sup>169</sup> *Id.* at 10, 82.

million to support Indigitize Computer Science.”<sup>170</sup> Indigitize is an initiative “created . . . to support Indigenous schools and school districts in accessing culturally responsive [computer science] curriculums.”<sup>171</sup> Additionally, organizations like Science Foundation Arizona are committed to providing computers and after-school programs to indigenous communities.<sup>172</sup> Advancing Indigenous People In STEM (AISES) is a nonprofit promoting equal access to STEM opportunities for Indigenous youth.<sup>173</sup> AISES strives to “[bring] Native culture into computer science” and “[use] computer science for Nation building” through programs that allow Indigenous youth to gain familiarity in the field of computer science and contribute to Native communities.<sup>174</sup> The rise in STEM-related programs designed for indigenous communities correlates with the need to fill STEM-related occupations throughout Tribal economies. H-1B foreign workers provide a potential solution to fill these types of specialty occupations.

Foreign workers under the H-1B visa program have been found to benefit the communities where they are employed. By earning high wages and experiencing low unemployment rates, H-1B workers provide stability and contribute to their local economies. In 2019, seventy-eight percent of H-1B employers paid above the prevailing wage determined by the USDOL, thus demonstrating that H-1B workers do not drive down wages in the communities where they are employed.<sup>175</sup> Also, communities where H-1B workers are employed range from large metropolitan areas such as New York City, to rural centers like College Station, Texas, which had the highest concentration of H-1B workers between 2010 and 2016.<sup>176</sup> Additionally, because H-1B specialty occupations require educational requirements, most occupations are professional, which see lower unemployment levels than non-professional jobs.<sup>177</sup> Specifically, H-1B workers saw low unemployment rates despite the COVID-19 pandemic while simultaneously impacting COVID-19 vaccine production as eight major U.S.

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<sup>170</sup> Amazon Staff, *Indigenous Youth Face Significant Barriers to Accessing Computer Science—Here’s How Amazon is Helping to Close the Gap*, AMAZON, Sept. 27, 2022, <https://www.aboutamazon.com/news/community/indigenous-youth-face-significant-barriers-to-accessing-computer-science-heres-how-amazon-is-helping-to-close-the-gap#:~:text=Indigenous%20youth%20face%20significant%20barriers,helping%20to%20close%20the%20gap&text=Native%20American%20students%20are%20among,in%20computer%20science%20by%202025> [https://perma.cc/MG4E-EK3N].

<sup>171</sup> *Id.*

<sup>172</sup> Sierra Ciaramella, *Importance of Computer Science for Native American Students*, CHAMBER BUSINESS NEWS, Oct. 2, 2018, <https://chamberbusinessnews.com/2018/10/02/importance-of-computer-science-for-native-american-students/> [https://perma.cc/ZEE6-RSR5].

<sup>173</sup> Christina B. Silva, et al., *What Motivates Native Computer Science Students?*, WINDS OF CHANGE, Spring 2021, <https://woc.aises.org/content/what-motivates-native-computer-science-students> [https://perma.cc/X8BW-ZHCK].

<sup>174</sup> *Id.*

<sup>175</sup> AMERICAN IMMIGRATION COUNCIL, *supra* note 53.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*



vaccine-producing companies received over 3,000 H-1B visa approvals between 2010 and 2019.<sup>178</sup>

While some Tribal Nations have struggled with high unemployment rates, others established lucrative Tribal corporations that are the primary employer for the Tribe. Should these Tribes be interested in, or find a need to hire H-1B foreign workers, they may benefit from a Tribal set aside of H-1B visas. One such Tribe may include the Salish and Kootenai Tribes of Montana, which established S&K Technologies, a Tribal corporation with success in aerospace and other fields, having “realize[d] sales over \$40,000,000 and employ[ed] over 210 individuals” in the fiscal year 2004.<sup>179</sup> In April 2023, S&K Technologies had several job postings open beyond 30 days for potential H-1B specialty occupations.<sup>180</sup> Specifically, open positions for Information Security Analyst, Database Manager, and Budget Manager, may satisfy the general H-1B specialty occupation criteria.<sup>181</sup> First, each of these positions require a bachelor’s degree or higher.<sup>182</sup> Next, the petitioning employer would need to demonstrate that the degree requirement is normally the minimum requirement for the particular position, that the degree requirement is common to the industry, that the employer normally requires a degree or its equivalent for the position, or that the nature of the specific duties are so specialized and complex that knowledge needed to perform such duties are usually attained through a bachelor’s degree or higher.<sup>183</sup> Similarly, Ho-Chunk, Inc., a multi-million dollar Tribal corporation on the Winnebago Reservation in Nebraska, provides computer hardware, IT services, marketing and advertising, and telecommunication technology hardware.<sup>184</sup> Ho-Chunk, Inc. is owned by the Winnebago Tribe, whose

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<sup>178</sup> *Id.*

<sup>179</sup> EagleWoman, *supra* note 132, at 414.

<sup>180</sup> S&K TECHNOLOGIES, INC., *Current Openings*, <https://www.sktcorp.com/career-center/> [<https://perma.cc/H8ZT-UHWZ>] (click on “Search Jobs” to be directed to new tab showing “Current Openings”) (last visited Apr. 29, 2023).

<sup>181</sup> S&K TECHNOLOGIES, INC., *Information Security Analyst*, [https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=35054926-66c8-40b9-ad6d-2b10240d7729&ccId=19000101\\_000001&type=JS&lang=en\\_US&selectedMenuKey=CurrentOp enings&jobId=462857](https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=35054926-66c8-40b9-ad6d-2b10240d7729&ccId=19000101_000001&type=JS&lang=en_US&selectedMenuKey=CurrentOp enings&jobId=462857) [<https://perma.cc/SYU5-WBU5>] (last visited Apr. 29, 2023); S&K TECHNOLOGIES, INC., *Database Manager SKMS*, [https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=35054926-66c8-40b9-ad6d-2b10240d7729&ccId=19000101\\_000001&type=JS&lang=en\\_US&selectedMenuKey=CurrentOp enings&jobId=464262](https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=35054926-66c8-40b9-ad6d-2b10240d7729&ccId=19000101_000001&type=JS&lang=en_US&selectedMenuKey=CurrentOp enings&jobId=464262) [<https://perma.cc/2GY Y-MJSF>] (last visited Apr. 29, 2023); S&K TECHNOLOGIES, INC., *Budget Manager SKMS*, [https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=35054926-66c8-40b9-ad6d-2b10240d7729&ccId=19000101\\_000001&type=JS&lang=en\\_US&selectedMenuKey=CurrentOp enings&jobId=464264](https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=35054926-66c8-40b9-ad6d-2b10240d7729&ccId=19000101_000001&type=JS&lang=en_US&selectedMenuKey=CurrentOp enings&jobId=464264) [<https://perma.cc/D9D3-5N5H>] (last visited Apr. 29, 2023).

<sup>182</sup> *Id.*

<sup>183</sup> 8 C.F.R. § 214.2(h)(4)(iii)(A).

<sup>184</sup> EagleWoman, *supra* note 132, at 413.

traditional name is Hochungra, which “is often shortened to Ho-Chunk.”<sup>185</sup> In April 2023, Ho-Chunk, Inc. had open positions for an Infection Preventionist and a Staff Architect.<sup>186</sup> Both positions require at least a bachelor’s degree and appear to satisfy the general H-1B specialty occupation criteria. Large Tribal businesses such as S&K Technologies, Inc. and Ho-Chunk, Inc. may be entities that would benefit from a Tribal set aside of H-1B visas, as filling these positions with foreign workers may allow these businesses to satisfy employment gaps when no Indian applicant that meets the qualifications applies.

Furthermore, revenue generated by Tribally-owned businesses generally funds governmental and social welfare programs on the reservation. Because S&K Technologies is owned by the Confederated Salish & Kootenai Tribes, the corporation’s revenue is “infused into the community through the CSKT Tribal General Fund, which funds many social programs on the reservation.”<sup>187</sup> Similarly, Ho-Chunk, Inc. highlights the corporation’s economic impact as a leading regional employer and its social impact, which has led to “decreased poverty and increased education on the Winnebago Reservation.”<sup>188</sup> As Ho-Chunk, Inc. has grown, its impact on the Winnebago Tribe has expanded through their creation of Ho-Chunk Village – a comprehensive housing plan designed to create additional housing on the Winnebago Reservation, complete with opportunities for Tribal members to improve their credit scores and benefit from a real estate advocate to successfully navigate the home buying process.<sup>189</sup> These circumstances demonstrate that H-1B foreign workers can benefit Tribes by filling employment gaps, contributing to revenue-generating Tribal corporations, and facilitate the ability of Tribal corporations to grow and continue their essential work for the economic and social benefit of the Tribe.

While nonimmigrant visas, such as an H-1B visa, require that the foreign national intend to enter the U.S. temporarily, the doctrine of dual intent allows H-1B workers to proceed with a path towards permanent residence while being

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<sup>185</sup> HOCHUNK, INC., *About*, <https://www.hochunkinc.com/> [<https://perma.cc/EN9W-P3Y4>] (last visited Apr. 28, 2023).

<sup>186</sup> HOCHUNK, INC., <https://www.hochunkinc.com> [<https://perma.cc/64DD-QAZ3>] (hover over “Employment” tab on top-right corner, then click on “Careers,” then use drop-down filter to “Sort By” “Requisition Post Information\*: Posted Date (Ascending)”) (last visited Apr. 29, 2023); HOCHUNK, INC., *Infection Preventionist*, <https://careers-flatwater-group.icims.com/jobs/6038/infection-preventionist/job?hub=26> [<https://perma.cc/QV2H-27W8>] (last visited Apr. 29, 2023); HOCHUNK, INC., *Staff Architect – Blustone Architectural Services*, <https://careers-ho-chunk.icims.com/jobs/6407/staff-architect---blustone-architectural-services/job?hub=26> [<https://perma.cc/739D-GUF5>] (last visited Apr. 29, 2023).

<sup>187</sup> S&K TECHNOLOGIES, INC., *About S&K*, <https://www.skcorp.com/culture-community/> [<https://perma.cc/BW89-BYRF>] (last visited Apr. 28, 2023).

<sup>188</sup> HOCHUNK, INC., *Impact Overview*, <https://www.hochunkinc.com/impact-overview/> [<https://perma.cc/NPW2-E2U2>] (last visited Apr. 28, 2023).

<sup>189</sup> HOCHUNK, INC., *Ho-Chunk Village*, <https://hochunkinc.wpengine.com/impact-overview/ho-chunk-village/> [<https://perma.cc/CPT8-6WLU>] (last visited Apr. 28, 2023).

employed temporarily.<sup>190</sup> This means that H-1B foreign nationals do not need to maintain a foreign residence and can actively seek permanent residence in the United States.<sup>191</sup> This makes an H-1B visa highly coveted because it offers additional opportunities to make a permanent home in the U.S., which other nonimmigrant visas do not. As a result, H-1B visas offer a valuable opportunity for Tribes to grow their local economies, and having a Tribal set-aside would increase their ability to take part in this highly coveted visa program.

#### V. OPTIONS FOR CONGRESS TO INCLUDE TRIBAL PERSPECTIVES IN IMMIGRATION POLICY.

President Biden sent the U.S. Citizenship Act of 2021 to the U.S. House of Representatives on his first day in office.<sup>192</sup> The bill was sponsored by U.S. Representative Linda Sanchez (D-CA-38), as House Bill 1177 – U.S. Citizenship Act (H.R. 1177) on February 18, 2021.<sup>193</sup> H.R. 1177 has since gone through various committees – its most recent action being on April 28, 2021, when the Committee on the Judiciary referred H.R. 1177 to the Subcommittee on Immigration and Citizenship. The U.S. Citizenship Act of 2021 creates an opportunity for U.S. immigration policy to accommodate NCAI’s 2013 Resolution on Tribal Inclusion and Consideration in Immigration Reform.

First, the 2021 U.S. Citizenship Act can satisfy NCAI’s request for consultation and consideration in crafting immigration policy. NCAI’s 2013 Resolution states, “NCAI calls for federal, state, and local governments to consult, notify, and coordinate with tribal governments” with regard to government action on immigration.<sup>194</sup> Under the current draft, H.R. 1177 includes various provisions that require consultation with secretaries of state,<sup>195</sup> with entire geographic regions such as Central America,<sup>196</sup> and even permits the Secretary of State to enter into bilateral agreements with other countries.<sup>197</sup> Therefore, Congress can afford Indigenous Peoples and Tribes the same opportunity to consult and advise U.S. immigration agencies on future immigration policy while remaining in line with other areas of the proposed legislation.

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<sup>190</sup> KURZBAN, *supra* note 123, at 2008.

<sup>191</sup> *Id.* at 760.

<sup>192</sup> THE WHITE HOUSE, *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [https://perma.cc/VQJ7-2HBE].

<sup>193</sup> U.S. Citizenship Act, H.R. 1177, 117th Congress (2022).

<sup>194</sup> 2013 NCAI Resolution, *supra* note 7.

<sup>195</sup> H.R. 1177, at 38.

<sup>196</sup> *Id.* at 104

<sup>197</sup> *Id.* at 128.

Second, NCAI's 2013 Resolution calls for "a tribal set-aside for professional [H-1B] visas..."<sup>198</sup> In recent years, the H-1B cap has been met before each fiscal year ends, proving that the demand for H-1B visas is more than the supply.<sup>199</sup> In the fiscal year 2022, USCIS received 483,927 registrations from U.S. employers entering the H-1B cap lottery.<sup>200</sup> The statutory limit of 85,000 total H-1B visas per fiscal year is clearly insufficient to meet the demand of U.S. employers for foreign workers. However, since the H-1B category was created in 1990, the annual limit has been increased several times. Specifically, it was raised to 115,000 visas in 1999, then 195,000 visas in 2001, before decreasing again in the mid-2000s.<sup>201</sup> Just as Congress has increased the visa cap before, the current demand for H-1B visas now provides sufficient reason for another increase under the 2021 U.S. Citizenship Act.

Alternatively, Congress may create a Tribal set aside similar to the H-1B1 visa category for citizens of Chile and Singapore. The H-1B1 visa category was created in 2004 under the Chile and Singapore Free Trade Agreements.<sup>202</sup> H-1B1 visas allow Chilean and Singaporean professionals to work lawfully in the United States in specialty occupations.<sup>203</sup> Each year, 6,800 visas are apportioned for H-1B1 beneficiaries from Chile and Singapore.<sup>204</sup> The 6,800 visas are counted against the H-1B visa cap of 85,000 if Chilean and Singaporean citizens fill them.<sup>205</sup> The Indian Appropriation Act of 1871 and the Supreme Court decision in *Antoine v. Washington* indicate that Congress has the authority to establish such a change in immigration policy as it relates to Tribal Nations.<sup>206</sup>

Third, the U.S. Citizenship Act of 2021 provides an opportunity to be more inclusive of the perspectives of Tribal Nations and Indigenous Peoples through employment-based immigration. The Code of Federal Regulations defines a U.S. employer as an entity that: (1) engages a person to work within the U.S.; (2) has an employer-employee relationship in that it may hire, pay, fire, supervise, or

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<sup>198</sup> 2013 NCAI Resolution, *supra* note 7.

<sup>199</sup> AMERICAN IMMIGRATION COUNCIL, *supra* note 53.

<sup>200</sup> *Id.*

<sup>201</sup> Jeanne Batalova, *H-1B Temporary Skilled Worker Program*, Migration Policy Institute (Oct. 7, 2010), <https://www.migrationpolicy.org/article/h-1b-temporary-skilled-worker-program> [<https://perma.cc/U7CS-5KQ8>].

<sup>202</sup> AUSTIN T. FRAGOMEN, JR. ET AL., *H-1B HANDBOOK* (2023 ed.), § 5:54, Westlaw (database updated March 2023).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See generally Phillip M. Kannan, *Reinstating Treaty-Making with Native American Tribes*, 16 WM. & MARY \*809, \*809-810 (2008) (discussing the Executive Branch's limitations in forming political partnerships with Native American Tribes); see generally, Marren Sanders, *De Recto, De Jure, Or De Facto: Another Look at The History of U.S./Tribal Relations*, 43 Sw. L. Rev. 171, \*180-181 (2013) (discussing the shift in policy that ended the Treaty-Making era in 1871).

otherwise control work; and (3) has an IRS tax ID number (TIN).<sup>207</sup> However, this definition lacks clarity about whether Tribal governments are eligible U.S. employers. The U.S. Citizenship Act of 2021 provides the opportunity to clarify the eligibility of Tribal governments and businesses so that they may also partake in the current H-1B system, if the H-1B cap does not provide an exclusive path for them otherwise.

## VI. CONCLUSION.

The long and complicated history of United States immigration policy has created a settler state that inadequately recognizes the role of Indigenous Peoples. While U.S. immigration policy continues to impact Indigenous Peoples and Tribes through deportation, international travel restrictions, and the limited availability of employment-based visas, their interests continue to be unaccounted for by Congress and immigration agencies. Now, with the potential of reforming immigration policy through the U.S. Citizenship Act of 2021, the United States government has the opportunity to address these issues and include Indigenous Peoples and Tribes by creating a Tribal set-aside of H-1B visas for Tribes and Tribally-owned businesses, providing opportunities to consult Tribes while crafting new legislation and regulations, and clarifying the eligibility of Indian Tribes and businesses as H-1B petitioning employers.

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<sup>207</sup> 8 C.F.R. § 214.2(h)(4)(ii) (2022).