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The Visa Lottery:

A Result of the Influence of Special Interests on U.S. Immigration Law

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Testimony of

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Introduction

The 1965 Amendments to the Immigration and Nationality Act of 1952 were intended to end national origins-based discrimination in United States immigration policy. Yet, today, we are here to discuss the visa lottery, a program based explicitly on national origin. While it may be argued that the 1965 Act marked the end of national origins-based discrimination as a *central* feature of this country's immigration policy, it obviously cannot be said to have ended all such discrimination in our immigration system.

Indeed, 1965 marked the beginning of a new form of national origins-based discrimination that has nothing to do with any real or perceived intolerance on the part of Americans, but rather reflects which narrow special interests are able to influence Congress at any given time. The visa lottery is a blatant example of this special-interest-driven approach to policymaking, and it is perhaps the most reprehensible because the lottery is elevated under the law to an equal level with the three primary, historical purposes of immigration policy—reunifying nuclear family, attracting skilled workers, and satisfying humanitarian obligations.

The 1965 Amendments to the INA

When Congress passed the Immigration and Nationality Act of 1952, it justified retaining the quota system by claiming that it was a “rational and logical” way to restrict immigration numbers.¹ The 1952 law assigned quotas of at least

¹ S. REP. NO. 1515, 81st Congress, at 455 (1950).

100 visas to all countries except those in the Western Hemisphere, whose nationals could enter without any limits. Half of each country's quota was reserved for aliens with relatives living in the United States, and half was reserved for those with needed education, work experience or ability. Under this system, more than half of all immigrants came from Europe, with almost 30 percent coming from just three countries—Germany, the United Kingdom, and Ireland.²

In 1963, President John F. Kennedy told Congress that a national origins-based immigration system “neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism for it discriminates among applicants for admission into the United States on the basis of the accident of birth.”³ Thus, the 1965 Amendments, adopted in the wake of the Civil Rights Act, eliminated the national origins quota system and set a cap of 170,000 on immigrants from the Eastern hemisphere and 120,000 on those from the Western hemisphere. Within the Eastern hemisphere cap, seven preference categories were used to determine who was admitted. (Neither per country limits, nor the preference system were applied to the Western hemisphere cap until 1976.) This preference system reserved 84 percent of available visas for aliens with relatives residing in the United States, 10 percent for aliens with occupational skills or training needed in the United States, and six percent for refugees.

² Unless otherwise noted, all statistics are from the STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 1996-2003.

³ John F. Kennedy, PUB. PAPERS 594-597 (1964).

Recognizing that discrimination could no longer be tolerated in immigration law, Congress not only abolished the quota system, it included in the 1965 Amendments a general prohibition against discrimination in what would become the introduction to section 202(a) of the INA: "Except as specifically provided...no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence." The original exceptions for which the law specifically provided were:

- 1) Per country limits on family-based and employment-based immigrants so no country could completely dominate the flow; and
- 2) The provision that permits the immediate relatives of U.S. citizens to enter without numerical limits, while all other relatives must enter under quotas.

It seems obvious, both from the language of this section and from the exceptions, that immigration laws that either give or deny immigrant visas on the basis of national origin would be impermissible. Despite the Supreme Court's holding that Congress has the authority to discriminate on the basis of national origin in the admission of immigrants,⁴ it is contradictory, at the least, for Congress to pass laws that grant or deny immigrant visas explicitly on the basis of national origin after Congress itself has passed a general prohibition on this practice.

Yet, this is exactly what Congress has done, repeatedly and with no explanation of how such discrimination is to be justified, in the years since 1965.

⁴ See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

Instead of refraining from adopting discriminatory policies, Congress either ignores the prohibition or amends it by adding another exception—currently, there are four, including one that covers the visa lottery.

The Origins of the Visa Lottery

In 1978, Congress established the Select Commission on Immigration and Refugee Policy and gave it a mandate to “study and evaluate ... existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States.”⁵ By the time the commission began its work, two sets of special interest groups—conservative business interests and a liberal coalition of religious, immigrant, and civil liberties groups—had aligned themselves on the immigration issue and were growing in power and influence. They turned their focus on the commission to such an extent that the commission warned that the public's interests were being subjugated by the lobbying appeals of these special interests.

The sixteen members of the commission were unable to reach agreement on many details, but they did release a final report in August 1981. In this report, they suggested that U.S. immigration policy should support three goals: family reunification, economic growth balanced by protection of the U.S. labor market, and “diversity consistent with national unity.” It was this third recommendation that eventually led to the enactment of the “diversity visa program,” or the visa lottery, in the Immigration Act of 1990.

⁵ Pub. L. No. 95-412, 92 Stat. 907 (1978).

The Commission, however, did not explain exactly what it meant by “diversity.” Instead, it proposed a new category of “independent immigrants” to be selected on the basis of their potential contributions to the U.S. labor market. In the congressional debates following the commission’s recommendations, at least three different concepts of diversity were used: 1) historians and other academics suggested that diversity involved the admission of immigrants from countries that had not *ever* sent significant numbers of their nationals to the United States; 2) some members of Congress argued that, since Latin American and Asian immigrants had come to dominate the immigration flow since the 1965 Amendments, diversity involved re-opening the immigration doors to European and other “traditional” source countries; and 3) various ethnic advocacy groups argued that diversity required the maximum number of visas to be made available to nationals of the countries they represented.

The 1986 Immigration Reform and Control Act (IRCA) contained the first legislative effort to reach a consensus on which concept of diversity would be applied to immigration law. IRCA included a temporary program under which 5,000 visas would be allocated in 1987 and 1988 to nationals of countries that were “adversely affected” by the enactment of the 1965 Amendments. The program, designed by Rep. Brian Donnelly (D-Mass.), left it up to the State Department to determine which countries would qualify. The State Department thus came up with a list of the countries whose nationals’ average annual rate of migration to the United States between 1966 and 1985 was less than their average annual rate between 1953 and 1965. The list included most of Europe,

North Africa, Argentina, Bermuda, Canada, Guadeloupe, Indonesia, Japan, Monaco and New Caledonia. Since the countries of sub-Saharan Africa had sent few immigrants either immediately before or after the 1965 law, they were excluded from the program. IRCA specified that applications for these visas would be processed on a first-come, first-served basis and it did not restrict the total number of applications each would-be immigrant could submit. The result was that applicants who were in the United States illegally during the application period, and so could rely on the U.S. mail service, had an overwhelming advantage. Some forty percent of all the visas made available under the program ended up being issued to Irish nationals who were already in the United States illegally.⁶

In 1987, after becoming the Chairman of the Senate Subcommittee on Immigration and Refugee Affairs, Sen. Edward Kennedy (D-Mass.) introduced a bill containing a program that combined the recommendations of the Select Commission and the lottery provision from IRCA.⁷ The Kennedy bill included a separate immigration category for "Independent Immigrants," with a subcategory for "Nonpreference Aliens." These Nonpreference Aliens were to be selected through the use of a points system under which applicants would be awarded points for certain attributes, including education, age, English language ability and work experience. The largest individual allocation of points, however, was to be

⁶ Walter P. Jacob, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 305-06 (1992).

⁷ S. 1611, 100th Cong., 1st Sess. (1987).

awarded to nationals of countries “adversely affected” by the enactment of the 1965 Amendments.

The bill was designed specifically to benefit Irish nationals, as was openly acknowledged during the subcommittee hearings in the Senate. Rep. Brian Donnelly, the creator of the 1986 lottery program, testified during the hearings about the positive contributions Irish immigrants had made to America and that the 1965 Amendments were discriminatory in much the same way as the national origins quota system that preceded them. He claimed that “the cumulative effect of the policy of the last 20 years has been to discriminate against many of the peoples who have traditionally made up our immigrant stock. You cannot solve the problems of discrimination by eliminating it for some and creating it for others.” Ironically, he went on to say that “[w]e must work to formulate a level playing field on which all peoples of the world are treated on a fair and equitable basis.”⁸

The Kennedy bill was not enacted. Instead, Congress passed the Immigration Amendments of 1988, which extended the IRCA lottery program for another two years, but increased the number of visas available annually to 15,000 from 5,000.⁹ The amendments did not, however, alter the application process, so Irish nationals living in the United States illegally retained their advantage.

⁸ *Legal Immigration Reforms: Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 3, 52-3 (1987).

⁹ Pub. L. No. 100-658, 102 Stat. 3908

Senators Kennedy and Alan Simpson (R-Wyo.), the ranking member of the Senate Subcommittee on Immigration and Refugee Affairs, then introduced the Immigration Act of 1989, S. 358, which included a category of "Independent Immigrants." This category would be used by immigrants who could not qualify for admission under the current law because they did not have family members or an employer in the United States. It included a subcategory of "Selected Immigrants," which would be allocated 55,000 visas. Selected Immigrants would be chosen through a point system much like the one in the original Kennedy bill, except that no extra points would be allocated to nationals of countries "adversely affected" by the 1965 Amendments. The provision to award points for English language ability was removed during the Senate Judiciary Committee markup, but the rest of the bill was passed by the Senate in July 1989.

In the meantime, advocates for the Irish were honing their lobbying skills. Led by a hired Washington lobbyist, the Irish Immigration Reform Movement (IIRM) began working directly with then-Rep. Charles Schumer (D-N.Y.) and his staff to draft a diversity program that differed significantly from any considered up to that point. The Schumer proposal would have set aside 75,000 visas each year for a new category of "diversity immigrants."¹⁰ Under this proposal, the world would be separated into "high-admission regions" and "low-admission regions," within which would be "high-admission states" and "low-admission states." High-admission states would be those from which at least 25,000 immigrants had come to the United States within the most recent five-year period. While no state would

¹⁰ H.R. 4165, 101st Cong., 2d Sess. (1990).

be allocated more than seven percent of available visas, the bulk of visas would go to low-admission states in low-admission regions, with a much smaller number allotted to low-admission states in high-admission regions. Any visas not used by the state to which they were allocated would go to the remaining eligible states.

The regions used in the Schumer proposal were: 1) Africa; 2) Asia; 3) Europe; 4) North America, excluding Mexico; 5) Oceania; and 6) South America, Mexico, Central America and the Caribbean. The largest beneficiaries undoubtedly would be Europe and Africa, since Asia and Latin America would be high-admission regions and Oceania and North America were unlikely to send large numbers of immigrants in any case. Moreover, by lumping together countries that send vastly different numbers of immigrants, the plan seriously disadvantaged some "low-admission states" that fell into a "high-admission region." Finally, thanks to major pressure from the IIRM, Rep. Schumer agreed that Northern Ireland would be treated as a separate state for purposes of visa allocation. Irish nationals would get 14 percent of the available visas, instead of seven percent.¹¹

However, Rep. Schumer refused to include in his bill a program specifically targeted at legalizing the large number of Irish living illegally in the United States, which was a major goal of IIRM. So IIRM went to House Immigration Subcommittee Chairman Rep. Bruce Morrison (D-Conn.) for help.¹² In March 1990, Rep. Morrison introduced a bill, H.R. 4300, with a different version of Rep.

¹¹ Jacob, *supra* note 6, at 319.

¹² *Id.* at 319-20.

Schumer's diversity program. The Morrison bill would have allocated 75,000 visas per year for "Diversity Immigrants," but only for a period of three years.¹³ One-third of those visas, however, were to be reserved for illegal aliens who would have qualified for the diversity program included in the 1986 law. Much to the disappointment of the IIRM, though, Rep. Morrison refused to treat Northern Ireland as a separate state under his plan.¹⁴

The House Immigration Subcommittee adopted a diversity program that represented a compromise between the Schumer and Morrison proposals.¹⁵ The approved version of H.R. 4300 included a "Diversity Transition Program," which set aside up to 25,000 visas per year for three years for illegal aliens who would have qualified for the 1986 diversity program. Beginning in 1994, 55,000 visas would be allocated each year to a new, permanent category of "Diversity Immigrants," as defined by the Schumer bill.

Several members of the full Judiciary Committee were openly skeptical of a "diversity" program that would mostly benefit Europeans. Rep. John Bryant (D-Tex.) questioned the value of a program that sought specifically to restore immigration from traditional source countries and argued instead that the goal of U.S. immigration policy should be to help the most needy, including refugees and

¹³ H.R. 4300, 101st Cong., 2d Sess. (1990).

¹⁴ Jacob, *supra* note 6, at 321.

¹⁵ SUBCOMM. ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW, HOUSE COMM. ON THE JUDICIARY, 101ST CONG., 2D SESS., FAMILY UNITY AND EMPLOYMENT OPPORTUNITY IMMIGRATION ACT OF 1990 (Amendment-in-the-Nature of a Substitute to the Comm. Print, May 7, 1990).

those seeking asylum.¹⁶ He characterized the Morrison bill as “a patchwork of special-interest pleadings from various nationalities.”¹⁷

The House Judiciary Committee passed H.R. 4300 in August 1990, with Rep. Morrison’s Diversity Transition Program remained intact. Rep. Schumer’s Diversity Immigrants program was retained, as well, but with an important change: a state would only be categorized as high admission if it had sent at least 50,000 (instead of the original 25,000) immigrants to the United States within the most recent five-year period. This meant that the nationals of more countries would be eligible for diversity visas. Northern Ireland would still be treated as a separate state under the program.

Eight of the 12 Members of the Judiciary Committee who voted against the bill voiced strong dissent in the House Report. Their critique argued:

Instead of fashioning a policy for the national interest of all Americans, H.R. 4300 responds to every special interest group that has made a demand on the U.S. immigration system...Instead of creating an underlying immigration system which is neutral as to race, religion, or national origin, H.R. 4300 grants additional visas to specific countries and regions which, the bill alleges, have been treated unfairly. This is not a rational way to create immigration policy.¹⁸

¹⁶ Dick Kirschten, *A Patchwork, Not a Policy*, 1990 NAT’L.J. 1, 980.

¹⁷ *More on House Legal Immigration Reform Bill*, 67 INTERPRETER RELEASES 918 (1990).

¹⁸ H.R. REP. NO. 101-723, pt. 1, at 138-39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6776.

Hoping to get the bill passed by the full House before the close of the 101st Congress, the IIRM turned up the heat. In one day, members of the IIRM visited more than two-thirds of the offices of Members of the House of Representatives. Even the Irish Embassy sent staff members to lobby members of Congress.¹⁹ Their efforts paid off. Before floor consideration of H.R. 4300, the House Rules Committee agreed to limit the number and subject matter of amendments to the bill; amendments to the lottery program were among those that were precluded.

Both Democrats and Republicans expressed concerns during the floor debate that the visa lottery provisions in the bill were the product of special-interest pressures rather than deliberative policymaking. Rep. Bryant expressed such concerns several times during the two-day debate:

Legislation with regard to immigration ought to be crafted in such a way that it suits the national interest, not every group of special-interest-pleading organizations that come before the Congress asking that their particular concern be met in this, a patchwork piece of legislation which is designed not to pursue a coherent national purpose but which is designed to satisfy the demands of legions of special-interest groups that have come to this Congress.

They say that we need to increase diversity. We are already the most diverse country in the world. I would ask: How can it be that a bill which extends more visas and the right to enter to more Europeans

¹⁹ Jacob, *supra* note 6, at 327-28.

*than we are allowing to enter now which are already the majority group, white Europeans are already the majority group in America, how can that advance the cause of diversity, as though it need to be advanced in a country as diverse as ours already? How can bringing in so many people of the same race as the majority race encourage diversity?*²⁰

Other Members pointed out that Congress would, once again, institutionalize national origins-based discrimination by enacting the lottery:

Supposedly, in 1965 we took discrimination out of our immigration laws. What this bill does is to put discrimination back in...[for] countries that benefited from the discrimination of the pre-1965 law.

Mr. Chairman, it has always been my understanding that the best immigration policy would be a policy that is fair and that applies equally to every country. In 1965, the last year that we passed a legal immigration bill, the whole point of that immigration bill was to make up for past discrimination and come up with a legal immigration bill that would be fair and equal to all countries, and here we are today debating a bill that is special interest legislation that gives special privileges only to individuals from certain countries. I think that

²⁰ 136 CONG. REC. H8,640 (Oct. 2, 1990).

*violates the fairness and equity that we all should expect in our immigration laws.*²¹

The bill passed the House by a vote of 231 to 192, after less than two days of debate, and with the lotteries intact.

Sen. Simpson opposed several provisions in H.R. 4300, including the Transition Diversity Program.²² Knowing the 101st Congress was close to adjournment, Sen. Simpson blocked the appointment of Senate conferees to force informal negotiations. Once the negotiators had reached an agreement that Sen. Simpson could live with, the conference committee was appointed, met, agreed and issued a report that passed both chambers, all within a four-day period.

As passed, the Immigration Act of 1990 included a Diversity Transition program that allocated 40,000 visas per year in 1992, 1993 and 1994 to nationals of "adversely affected" countries, as defined by the 1986 diversity program. In lieu of a specific program to legalize illegal Irish immigrants living in the United States, the IIRM settled for a provision in the Diversity Transition program that would guarantee Irish nationals at least 40 percent of the 40,000 visas made available each year. Instead of referring specifically to a set-aside for Ireland, however, the law allotted at least 40 percent of the Diversity Transition visas to "the foreign state the natives of which received the greatest number of visas issued under section 314 of the Immigration Reform and Control Act."

²¹ 136 CONG. REC. H8,635 (Oct. 2, 1990).

²² Jacob, *supra* note 6, at 331.

The visa lottery program would be allocated 55,000 visas per year on a permanent basis beginning in 1995. Eligible countries would be determined as prescribed by H.R. 4300, as passed by the House. The point system in S. 358 was eliminated, and instead, beneficiaries would have to show that they had the equivalent of a high school education or two years of job training or experience.

The new law also retained the 1986 program's first-come, first-served system for processing applications, though it set aside the 40 percent of the visas that were to go to Irish applicants during the first three years. It also failed to set a limit on the number of applications each would-be beneficiary could submit. The result of this system in 1992 was that, while the State Department expected to receive around five million entries for the 40,000 available visas, in fact it received almost 19 million applications. The State Department estimated that each applicant submitted an average of 10 applications, though some people claimed to have submitted more than 1,000. About three-quarters of the 1992 beneficiaries gave U.S. mailing addresses, suggesting that they were already living in the United States illegally.²³

How successful has the 1990 Immigration Act's visa lottery been at bringing "diversity" to the United States? The table on the following page shows lottery beneficiaries by region and the leading countries of nationality. Europeans are the clear winners, so if by "diverse" we mean more White, the program is a success.

²³ Center for Immigration Studies, *The Visa Lottery: Increasing Immigration with a Spin O' the Wheel*, SCOPE, No. 10, 8-9 (1992).

Lottery Beneficiaries by Region					
1992-2003					
Region/ Country	1992-94 Transition	1995	1996	1997	1998
Total	108,435	47,245	58,790	49,374	45,499
Europe	93,421	23,741	24,855	21,783	19,423
Asia	9,643	6,418	9,636	8,254	7,768
Africa	725	13,760	20,808	16,224	15,394
Oceania	227	594	795	669	526
N. America (excl. Mexico)	2,461	303	190	145	130
Mexico, Central & S. America & the Caribbean	1,958	2,429	2,506	2,288	2,133
	1999	2000	2001	2002	2003
Total	47,571	50,945	42,015	42,829	46,347
Europe	21,636	24,585	17,952	16,867	19,162
Asia	7,192	7,244	5,958	7,175	8,131
Africa	15,526	15,810	15,499	16,310	16,503
Oceania	654	808	675	533	555
N. America (excl. Mexico)	111	125	84	78	74
Mexico, Central & S. America & the Caribbean	2,335	2,312	1,775	1,821	1,864

Source: U.S. Citizenship and Immigration Services, Department of Homeland Security

It is clear that the Diversity Transition program did not increase diversity in the immigrant flow. The permanent visa lottery program did a somewhat better job in that African immigrants received one-third of the available visas, while they have accounted for only 1.2 percent of all immigrants to the United States since 1820. The fact that 52 percent of all lottery visas have been awarded to Europeans, who represent 56 percent of all immigrants since 1820, should be sufficient to dispel the notion that true diversity was the goal.

Conclusion

Even if the lottery were successfully diversifying America, however, it would still be bad policy. In fact, the entire premise on which the lottery is based is false. The United States does not need to admit a single additional immigrant to ensure ethnic and racial diversity here. It is a demographic certainty that the United States will be increasingly diverse regardless of immigration policy. The only question is how soon, not whether, we will become a majority-minority society. Our overall immigration policy certainly influences the answer to that question. With a legal immigration flow of around a million per year, plus another million or so coming illegally, 50,000 lottery visas have very little impact on diversity, no matter who the beneficiaries are.

While the lottery is not effectively serving its stated goal, it is undermining our immigration system and our values as a nation, and built into it is a serious potential for physical harm to Americans. The visa lottery is inescapably and inexcusably a national origins-based policy. It discriminates to the detriment of

some and to the benefit of others based solely on a person's nationality. If we are serious about removing all discrimination from our laws, the lottery must go.

If we are serious about the rule of law itself, the lottery must go. A U.S. green card is one of the two most coveted documents in the world (the other being a U.S. passport), and yet we hand out 50,000-55,000 visas each year to randomly chosen winners made eligible solely because of where they happen to have been born. Is it any wonder that much of the world looks at our immigration law as a joke when it includes the equivalent of a huge lotto game based on national origin? The visa lottery undermines any attempts to make our immigration policy coherent, and it creates false expectations that result in increased illegal immigration.

Immigration policy is supposed to serve the national interest. The reunification of nuclear family clearly meets that test, as does the importation of some number of highly skilled, foreign workers, so long as adequate protections for American workers are in place. The admission of refugees and asylees serves the national interest in two ways. It allows us to meet our international obligations, and, perhaps more importantly, it satisfies our desire to be compassionate and to share our good fortune with those who need protection.

The visa lottery, on the other hand, actually threatens our national interest. It presents a significant security threat, since nationals of virtually every terrorist-sponsoring state are eligible to try their luck. As long as a terrorist has not been added to the watchlist, he has nothing to fear. According to DHS statistics, about

54 percent of lottery winners are male, and about half are single and between the ages of 20 and 34. A terrorist would blend right in.

The lottery also adds 50,000 new, mostly low-skilled workers to our labor force each year to compete with America's most vulnerable workers. Around one-quarter of lottery winners report that they have executive, management, professional, or technical jobs. The other three-quarters have low-skilled jobs, or no jobs. The fact that all lottery winners must pay around \$200 in visa fees and then pay their way here means that these are not the poorest, the neediest, or necessarily the most deserving of the five billion people in the world who live in countries poorer than Mexico.

This is the problem with nationality-specific immigration laws – there is no principled place to draw the line. There are many countries around the world whose nationals are deserving of protection, whether from persecution, economic privation or environmental destruction. Granting that protection on the basis of which groups have the most political clout in the United States, or which groups come from countries with governments the United States opposes certainly is not a principled way to draw lines. Granting protection to some groups, but not others who are similarly situated also is not fair.

The United States obviously cannot provide a permanent home to all the people of the world who would like to live here, or even to all the people of the world who are deserving of a better life. The goal of U.S. immigration policy, then, should be to establish a race- and nationality-neutral system that can grant

admission to those with the most compelling need for resettlement and to those who are most needed by the United States.

Some argue that programs like the lottery are needed because U.S. law has discriminated against various nationalities in the past. It may be true that in some instances, redress is needed. The argument does not hold up where the lottery is concerned, however. It is absurd to think that, by removing from the law those provisions that were discriminatory, we are now discriminating against those who benefited from the prior discrimination. The entire argument rests on the false premise that one group has a right to the special treatment.

In the words of John F. Kennedy, the visa lottery “neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism for it discriminates among applicants for admission into the United States on the basis of the accident of birth.”