

Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti

**Royce Bernstein Murray
and Sarah Petrin Williamson**

Abstract

After a natural catastrophe in a developing country, international migration can play a critical role in recovery. But the United States has no systematic means to leverage the power and cost-effectiveness of international migration in its post-disaster assistance portfolios. Victims of natural disasters do not qualify as refugees under U.S. or international law, and migration policy toward those fleeing disasters is set in a way that is haphazard and tightly constrained. This paper comprehensively explores the legal means by which this could change, allowing the government more flexibility to take advantage of migration policy as one inexpensive tool among many tools for post-disaster assistance. It explores both the potential for administrative actions under current law and the potential for small changes to current law. For concreteness, it focuses on the case of the 2010 earthquake in Haiti, but its policy lessons apply to future disasters that are sadly certain to arrive. The paper neither discusses nor recommends “opening the gates” to all disaster victims, just as current U.S. refugee law does not open the gates to all victims of persecution, but rather seeks to identify those most in need of protection and provide a legal channel for entry and integration into American life.

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Foreword

In 2010 a catastrophic earthquake killed over 200,000 people in Haiti. If a similar fraction of the U.S. population were to die like this, it would be equivalent to the entire state of Tennessee or Arizona meeting a sudden end. Many Haitians were already on the edge of material survival—including half the population living on a dollar per day or less at U.S. prices—before this devastation. Many people’s dreams of opportunity were shattered, not because of who they were, but because of where they were. As in many past and certainly future disasters overseas, Americans expressed a desire to help. Substantial public and private aid flowed to Haiti.

But U.S. policy essentially neglected what has historically been the most powerful and least costly way to help Haitians: leveraging the power of human mobility. International migration—departing Haiti—has been responsible for the majority of all poverty reduction Haitians have experienced in the last two generations, a period during which the living standards of average people who remained in Haiti *fell* by half. Cash remittances back to Haiti from those who left have been roughly triple all foreign aid flows to Haiti. Remittances rise more quickly after disasters than aid, and remittances—unlike much aid—go directly into the pockets of needy families. Aid has certainly helped people in Haiti, but migration has done at least as much. And the humanitarian benefits from migration cost the U.S. government very little relative to aid.

Despite the great power of migration, U.S. post-disaster assistance to Haiti, as in all other recent cases of post-disaster assistance, focused almost exclusively on aid. Migration policy changes were small and did little to help people in Haiti affected by the quake. Many Haitians who arrived in the U.S. *before* the quake were temporarily exempted from deportation, and a number of orphans already in the process of international adoption *before* the quake were brought to the U.S. But essentially no Haitians needing to leave Haiti because of the earthquake have been allowed to come to the U.S.

Is zero the right number? Even allowing a few thousand Haitians to live and work in the U.S. would make a huge difference—leveraging the cheapest and most effective policy tool for Haitians to leave poverty—and would only represent a tiny increase of less than 1% in overall U.S. immigration. But U.S. policy and law were not used for this purpose.

The next time the U.S. government responds to a disaster, it could leverage migration as a powerful tool for assisting those affected. This paper spells out exactly how this could be accomplished. Royce Murray and Sarah Williamson exhaustively explore the ways that U.S.

could use its immigration policy to assist people from developing countries after they experience a natural catastrophe. They discuss what is possible under existing law as well as what could be accomplished with small changes to law. The authors focus on the case of the 2010 Haiti earthquake for concreteness, but the lessons are broadly applicable to most future cases of post-disaster assistance. Murray and Williamson are experts on U.S. refugee policy and law and on humanitarian assistance, with direct experience on Haiti.

The authors' goal is not at all to suggest that post-disaster relief efforts should focus primarily on migration policy. Assistance via human mobility is a complement to, not a substitute for, other forms of assistance. Along the way, they uncover many little-known surprises. For example, for 28 years U.S. law included victims of natural disasters in the legal definition of "refugees", though this was quietly changed in 1980. What emerges is a thought-provoking and legally precise menu of options for leveraging a highly effective and low-cost tool for post-disaster assistance the next time this sad need arises. All that is required to enact one of their many suggestions is leadership from the presidential administration or from Congress.

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I. Executive Summary

Natural disasters have a devastating impact on people's lives and a country's economy. The devastation often displaces people from their homes, leading them to seek safety elsewhere. While it can take years for a country to rebuild its infrastructure after a disaster, affected people have an immediate need to reconstitute their livelihoods. Migration can be used as a powerful tool of disaster recovery that allows for direct cash transfer from individuals to affected families.

This study addresses how migration policy can be a tool for post-disaster recovery. As the number of natural disasters increase, policy makers need more options at their disposal than aid transfers to address the complex needs of countries and people affected. Expanding international migration for disaster-affected populations as a means of economic development will increase remittances and result in growth. This paper discusses migration policy as a complement to, and by no means whatsoever a replacement for, other forms of post-disaster assistance. Likewise, this paper neither discusses nor recommends anything like "opening the gates" to all disaster victims; current U.S. refugee law provides for the orderly admission of a strictly limited number of victims of persecution—less than 1% of the world's refugees.

This study uses U.S. migration policy toward Haiti after the January 2010 earthquake as a case study of practical ways that migration policy can be one of many tools for post-disaster humanitarian assistance. By outlining the limited channels available to Haitians to enter the United States after the earthquake, as well as the administrative and legislative fixes which could expand methods of entry, this study aims to provide a comprehensive review of mechanisms that could be put in place for other disaster-affected populations. It should be noted that this study focuses on migration options available to the vast majority of earthquake-affected Haitians who are particularly vulnerable and in need of near-term economic development, rather than the small number of Haitians who are more highly-skilled, with greater resources and migration channels at their disposal.

Among the many policy options explored for Haiti, six potential methods of entry merit further consideration. Administrative options include adding Haiti to the list of countries currently eligible for low-skilled worker visas, developing a Haitian family reunification parole program, and expanding the use of parole under new "disaster-affected" criteria. Legislative options include amending the non-immigrant V visa classification to allow Haitian immigrants with long-time pending family petitions to come to the U.S., establishing a Haitian visa lottery, and permitting a humanitarian track in the refugee resettlement program for those in compelling circumstances who do not meet the refugee definition.

Interviews with key stakeholders in the U.S. government emphasized that there are no quick fixes. Some options, such as allowing Haitians to be eligible for low skilled worker visas and establishing a lottery, would not give arrivals any integration benefits to ensure their success. Other options such as expanding the use of parole or a humanitarian track in the refugee

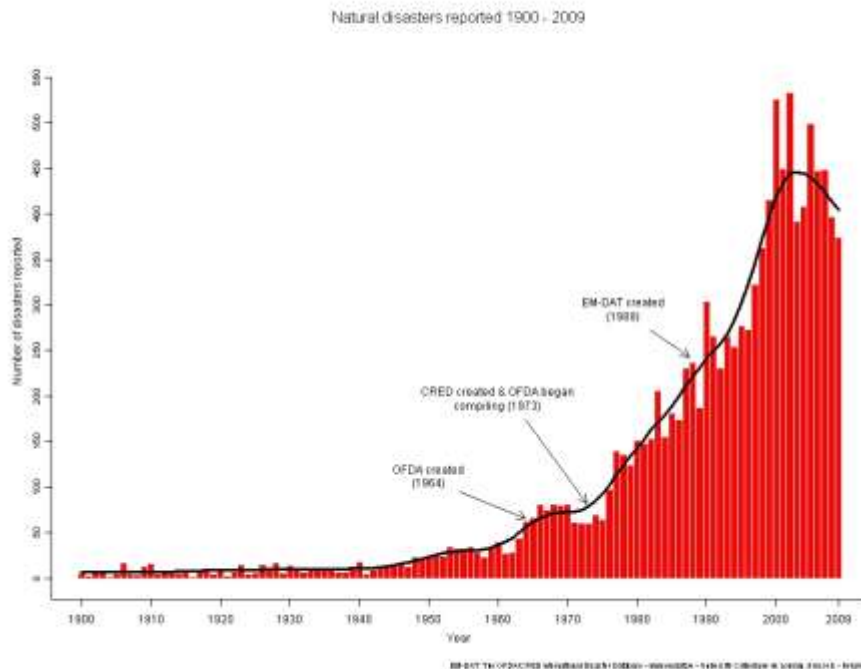
program would grant new arrivals substantial benefits but could have fiscal challenges, requiring evidence regarding the initial costs of migration to the government versus long-term gains in tax revenue.

Unfortunately there will more natural disasters in the Americas in the future, and the United States will be called upon to assist in various ways. Migration policy could be one of many powerful and cost-effective tools to carry out that assistance. All of the channels we identify to use migration policy for that purpose will require either strong leadership within the Administration, support from Congress, or both.

II. Natural Disasters

A. Disaster on the Rise

Natural calamity can take many forms, such as earthquakes, floods, droughts, cyclones, landslides, volcanic eruptions, storms, and fires. This chart from the Center for Research on the Epidemiology of Disaster (CRED) shows the increase in natural disasters over the past forty years.



Researchers at the CRED credit the growing number of disasters to better reporting mechanisms and communications capabilities that enable the world to witness and track trends. While this

chart shows the trend up to 2009, the CRED International Disaster Database (EM-DAT) recorded 435 natural disasters in 2010 alone.¹

The devastating earthquake that hit Haiti in January 2010 was perhaps the most tragic event of that year, killing over 200,000 people.² However, the earthquake in Chile and floods in China affected millions more people in countries better equipped to manage the aftermath. The Japan earthquake and tsunami in early 2011 has given the world a sense of the complex implications of managing natural disaster in a well-developed, highly industrialized society.

B. Disaster and Migration

When disaster strikes, some people are forced to migrate. Those who seek safety inside their countries of origin are considered internally displaced persons (IDPs) according to the Guiding Principles on Internal Displacement, which were developed in the late 1990s at the request of the UN Human Rights Commission.³ The principles recognize that IDPs are “persons or groups of persons who have been forced or obligated to leave their homes or habitual place of residence as a result of or in order to avoid the affects of...natural or human-made disasters, and have not crossed an internally recognized State border.”⁴ The international community is frequently called upon to assist IDPs in cooperation with national authorities in their country of origin.

Legal scholars are working to distinguish internal displacement caused by natural disaster from climate-induced displacement, and to determine the responsibility of states to protect such persons when they cross an international border.⁵ Although these efforts are beyond the scope of this paper, it is important to acknowledge that international law does not currently recognize disaster-affected displaced persons in a manner that would afford them protection to move or seek asylum abroad.⁶

Individuals affected by a disaster who cross an international border, seek to move abroad, or go overseas to live with family and friends, are considered migrants. Thus, the only way to determine whether a disaster-affected person has the option to migrate is to look at the

¹ Data generated from online database query, accessed March 28, 2011 at www.emdat.be/database.

² According to the US Geological Survey, 222,570 people died in the quake. Accessed April 21, 2011 at http://earthquake.usgs.gov/earthquakes/world/most_destructive.php

³ Francis Deng. Guiding Principles on Internal Displacement (2001), accessed March 28, 2011 at www.idpguidingprinciples.org.

⁴ Ibid.

⁵ See “Climate Change and Displacement” *Forced Migration Review* Issue 31 (2008), accessed March 29, 2011 at www.fmreview.org/FMRpdfs/FMR31/FMR31.pdf.

⁶ For more information on why disaster-affected persons are not considered refugees, see pg. 28 which discusses the U.S. Refugee Admissions Program (USRAP).

immigration laws and policies of a particular receiving state toward a particular country of origin. For this reason, the remainder of this paper looks at the specific case of how Haitians affected by the earthquake are viewed under U.S. immigration law.

III. Haiti

A. The Case for Migration

Using the case of U.S. policy toward Haitian migration after the earthquake, this paper lays out options for providing those affected by the disaster with legal forms of entry to the U.S. as a means of recovery and economic empowerment. The U.S. Government Strategy for Haiti focuses on economic development and democratic governance, but does not consider migration as a tool to achieve those goals.⁷ However, migration can serve as a means to development.

There are several reasons why migration is a powerful tool for disaster recovery in Haiti. First, the World Bank calculates that international remittances to Haiti are two or three times the total sum of all official development assistance (ODA).⁸ Remittances do not cost anything to donor governments, represent a direct cash transfer to the population, and rise more quickly after disasters than foreign aid.⁹ Annual remittances from the United States to Haiti are estimated at over \$2 billion, nearly double the \$1.15 billion pledge made by the United States at the 2010 Haiti Donor Conference.¹⁰ The U.S. Strategy for Haiti further acknowledges that Temporary protected status (TPS), which allows Haitians in the U.S. prior to the earthquake to remain for a period, will, “leverage the power of remittances in enabling economic growth in Haiti”.¹¹ Increasing opportunities for people in Haiti at the time of the earthquake to migrate to the U.S. will result in additional direct financial transfers to Haiti, fostering reconstruction.

Second, migration is a powerful and proven method to help individual households emerge from poverty. The large majority of all poverty reduction for people born in Haiti has been accomplished by departure from Haiti, not from any policy intervention that has occurred within

⁷United States, Department of State. “Post-Earthquake USG Strategy for Haiti: Toward Renewal and Economic Prosperity, January 2011,” accessed March 30, 2011 at www.state.gov/documents/organization/156448.pdf.

⁸ World Bank. Migration and Remittances Fact Book 2011. Washington, DC: accessed March 28, 2011 at <http://go.worldbank.org/QGUCPJTORO>.

⁹ Antonio David, 2010. “How Do International Financial Flows to Developing Countries Respond to Natural Disasters?” IMF Working Paper 10/166.

¹⁰United States, *Ibid.* Also see “Secretary of State Hillary Clinton, Remarks at the International Donors’ Conference on March 31, 2010,” accessed March 30, 2011 at www.haiticonference.org/pledges-statements.html.

¹¹ United States, *Ibid.*

Haiti.¹² Migration from a developing country to the United States typically increases an individual's annual real income by \$10,000 to \$15,000, up to triple the amount per capita in the country of origin.¹³ This is particularly acute for Haitians, whose real standard of living typically rises by 680% shortly after entering the U.S.¹⁴ This significant growth in income represents more than wages. It also suggests that Haitians in the U.S. gain skills in the workforce that could be used to generate business opportunities in Haiti.

Haiti is the poorest country in the Western hemisphere. The United Nations Development Programme (UNDP) cites Haitian gross domestic product (GDP) as \$1,040 (measured at US prices) with the average adult attending only 5 years of school.¹⁵ According to the U.S. Strategy for Haiti, only 10% of all businesses in Haiti are part of the formal sector.¹⁶ This means that 90% of the population receives income from informal economic activity. Without further education and experience in business development, it will be difficult for the majority of the Haitian people to contribute to economic growth. To address this, the U.S. Strategy for Haiti emphasizes vocational training for sectors capable of boosting economic growth including the garment industry, agribusiness, and construction. However, with such limited formal opportunities available in Haiti, expanding migration programs would allow more Haitians to build the skills they need to eventually become part of the formal sector.

Underdevelopment, chronic instability, and recurring natural disasters make migration out of Haiti an attractive option in the pursuit of employment and stability. However, very few legal options exist for Haitians to leave Haiti. The relationship between Haiti and the Dominican Republic is poor, with both populations seeing the other as unwelcome. Haitians often find ways to get to other Caribbean nations such as the Bahamas, Turks, and Caicos to work in the tourist industry, but do so as illegal migrant workers without options for regularizing their status and at great risk of being exploited.

The economic status of Haitians complicates their efforts to migrate to the U.S. because the vast majority of those wishing to depart cannot show self-sufficiency.¹⁷ Most Haitians who seek to visit or work temporarily in the United States must show they have the means to support themselves, and that they intend to return home. The U.S. is predominantly accessible to the

¹² Michael Clemens. "A Labor Mobility Agenda for Development." CGD Working Paper 201. January 2010, accessed March 20, 2011 at www.cgdev.org/content/publications/detail/1423717.

¹³ Ibid.

¹⁴ Clemens, Ibid.

¹⁵ United Nations Development Programme (UNDP). "Haiti Country Profile, UNDP Human Development Index 2009," accessed March 30, 2011 at <http://hdrstats.undp.org/en/countries/profiles/HTI.html>.

¹⁶ United States, Ibid.

¹⁷ Interviews with Haitians affected by the earthquake.

Haitian elite who have resources and family ties in the U.S. already. U.S. Government officials have indicated that the U.S. would not permit the poorest of the poor to enter the country.

However, reluctance to permit the entry of poor people to the United States could be reassessed in light of the impact of natural disaster. Individuals affected by catastrophic events may have lost all possessions and their ability to sustain a livelihood in their country of origin. They may be rendered vulnerable due to their social or economic status, and their government – who itself is likely overwhelmed, incapacitated, and distracted by the disaster – may be unable or unwilling to protect or restore them. This is particularly true for newly widowed women and female-headed households in Haiti that have been displaced, whose compounded losses due to the earthquake have resulted in significant economic deprivation. In such circumstances, migration can serve as a policy tool that both enables the restitution of economic activity and removes a person from harm. While migration is not a panacea for post-disaster assistance, it can be one of many powerful and cost-effective tools for targeted assistance to populations affected by natural disasters.

B. Historical Considerations

While the history of Haitian migration to the United States is a long and difficult story, it is virtually impossible to understand the current decision making process around the status of Haitians affected by the earthquake without reviewing the lessons of the 1990s mass migration of Haitians trying to reach the United States.

Restrictions on Haitian migration to the U.S. are built around mass migration concerns, due to periodic flights of Haitians by boat from Port-de-Paix, the northern coast of Haiti, which reached their peak after the 1991 coup in Haiti deposed President Aristide. The tens of thousands of Haitians who tried to reach the U.S. in the early 90s overwhelmed authorities who tried multiple strategies for managing the situation including forced repatriation, temporary stay on Guantanamo Bay, third-country resettlement, in-country refugee processing, and parole without the ability to adjust to lawful permanent resident status (LPR).¹⁸ Each of these options proved to be problematic for the U.S. Government, with none of them being particularly successful at mitigating the outflow until President Aristide was reinstated to power in October 2004 and people stopped fleeing the country.

In November 1991, the U.S. Coast Guard forcibly returned 538 people to Haiti, resulting in a Supreme Court case, *Sale vs. Haitian Centers Council*, claiming the United States had broken the law by practicing *refoulement*, forcibly returning asylum seekers to a place where they had a

¹⁸ While numbers vary, Coast Guard interdicted between 20,000-40,000 Haitians annually between 1991 and 1994. See U.S. Library of Congress, Congressional Research Report. “U.S. Immigration Policy on Haitian Migrants” by Ruth Ellen Wasem, January 2005.

well-founded fear of persecution.¹⁹ The prohibition of *refoulement* was codified in U.S. law by the Refugee Act of 1980 to conform to the 1951 Convention Relating to the Status of Refugees. However, the Court determined that the Haitian migrants had not reached the territorial United States and the laws of the U.S. cannot be applied extra-territorially.²⁰ For a brief period between 1993 and 1994, the U.S. allowed those who were returned to Haiti to apply for in-country refugee processing.²¹

During this period, the U.S. also began using facilities at Guantanamo Bay to house Haitians who had taken to the high seas. The U.S. Government did not want to consider the population for entry to the U.S. and asked UNHCR to find third countries that would take Haitians. Although several countries in the region such as Belize, Venezuela, Honduras, and Trinidad and Tobago agreed to take a handful of people, as the exodus from Haiti continued it became evident that third-country resettlement was not a solution.²²

Eventually, over 10,000 Haitians were paroled into the United States from Guantanamo in the late 1990s. However, various forms of discrimination ensued. Those parolees were unable to become permanent residents until Congress passed the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998, which allowed Haitians paroled before 1995 to adjust their status. A group of 158 Haitians who were HIV positive were held at Guantanamo because their medical condition barred them from admission to the U.S. The Centers for Disease Control (CDC) wrote an opinion in favor of barring these cases from admission to the U.S.²³ A court case challenged their detention and ruled that they were to be released “anywhere but Haiti,” leading to their arrival in the U.S.²⁴ These actions were followed by the temporary closure of migrant facilities at Guantanamo until 2003, when a private company contracted with Immigration and Customs Enforcement (ICE) to build a permanent Migration Operations Center at Guantanamo.²⁵

¹⁹ Ibid.

²⁰ See *SALE v. HAITIAN CTRS. COUNCIL, INC.*, 509 U.S. 155 (1993), accessed March 28, 2011 at www.caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=509+&page=155.

²¹ Bill Frelick, “In-country refugee processing of Haitians: The Case Against,” *Refuge* Vol. 21, No 4 (2003), accessed on March 30, 2011 at <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21310/19981>.

²² Wasem, Ibid.

²³ Amy Fairchild and Eileen Tynan, “Policies of Containment: Immigration in the Era of AIDS,” *American Journal of Public Health* Vol. 84, Number 12 (1994), accessed on March 30, 2011 at www.ncbi.nlm.nih.gov/pmc/articles/PMC1615381/.

²⁴ This was a federal district court decision, but DOJ negotiated to have it vacated as part of the release of the HIV+ Haitians because they didn’t want the precedent of U.S. law applying at Guantanamo Bay. See Brandt Goldstein, “Clinton’s Guantanamo,” *Slate*, accessed on March 30, 2011 at <http://www.slate.com/id/2132979/>.

²⁵ See USG Contract Number ACB-3-C-0008 between Wackenhut Corrections Corporation, GEO Group,

IV. Post-Earthquake Response

A. U.S. Strategy and Immigration Policy

When the earthquake struck Haiti on January 12, 2010, over one million people in the affected area were displaced, triggering a mass internal migration of those in Port-au-Prince to the countryside. Nearly 600,000 people left the capital city to seek shelter and support in other provinces.²⁶

The Department of Homeland Security (DHS) was so concerned that the earthquake would trigger a mass migration of boat people headed to the United States, similar to what occurred in the 1990s after the coup, that it gave the private contractor overseeing the Migrant Operations Center at Guantanamo an additional \$260,000 to prepare for a surge of Haitians.²⁷ The U.S. engaged the Haitian Ambassador in Washington, D.C. in a media campaign recording messages in Creole telling people not to take to the high seas, and other media statements told Haitians that help was coming to them.²⁸

Internal flight was the reflex response of many people affected by the earthquake, but due to the nature of the destruction, those affected were also trying to reunite with loved ones, recover the remains of family members, and salvage their belongings. This was only possible by remaining in the affected area, or traveling back and forth between the provinces and the capital city. The northern coast of Haiti, from where boat migration is often triggered, was too far from the affected area. Roads north from Port-au-Prince to Port-de-Paix were significantly destroyed, hindering travel to that region of the country. IOM also calculates the cost of taking to the seas by boat from Haiti to be near \$600, resources that most Haitians would not be able to access even in good times. It is particularly prohibitive in a post-disaster collapse of the economy and banking system.²⁹

The United States was quick to issue other humanitarian migration measures, and announced a designation of Haiti for Temporary protected status (TPS) on January 15, 2010. This designation allowed for anyone already living in the U.S. at the time of the earthquake to apply for a

and the Department of Homeland Security Immigrations and Customs Enforcement.

²⁶See OCHA Relief Web Map Center for Haiti Earthquake, accessed March 30, 2011 at www.reliefweb.int/rw/dbc.nsf/doc100?OpenForm.

²⁷ "Private Prison Company gets Haiti Contract," February 22, 2010. Center for Economic and Policy Research (blog), accessed on March 30, 2011 at www.cepr.net/index.php/relief-and-reconstruction-watch/private-prison-company-gets-haiti-contract-cont/.

²⁸ Remarks of Haiti Ambassador to the United States, Ray Joseph, accessed March 30, 2011 at www.america.gov/st/texttrans-english/2010/January/20100117120546ptellivremos0.2723657.html.

²⁹ In all large-scale emergencies with infrastructure collapse, access to cash is a problem.

temporary stay of removal and employment authorization through July 2011. DHS also issued guidance to Haitian migrants seeking to renew or revise other forms of status.³⁰

In the initial days after the earthquake, the U.S. Ambassador in Haiti declared an emergency, embassy staff were recalled, and American citizens were repatriated to Miami. During the repatriation process, mixed immigration status families were admitted to the United States.

Upon arrival to Miami, the State of Florida Department of Children and Families charged with helping those repatriated to their destination found multiple mixed status families, even cases where the child was a U.S. citizen, but one or both parents were on a tourist visa, which did not allow them to work.³¹ The State brought the issue to the attention of officials in Washington, D.C., requesting DHS to parole in these cases, but instead DHS chose to offer deferred action on such cases as a limited fix.³²

The State of Florida calculates that of the 27,000 people who were repatriated to the U.S. after the earthquake, nearly 6,210 Haitians were admitted with temporary visas.³³ The courts are now adjudicating these cases with attorneys looking to find creative forms of relief for their clients.

At the same time that American citizens were being evacuated from Haiti, U.S. Government officials began to visit the island to see what they could do for the relief effort. Pennsylvania Governor Ed Rendell got on a plane and brought 54 Haitian orphans whose adoptions were in progress back to the United States. DHS granted humanitarian parole to these children and other orphans whose adoptions were already approved by the Government of Haiti prior to the earthquake.

Congress acted quickly to provide orphans and medical evacuees who had been granted parole with legislation allowing for their adjustment to Lawful Permanent Resident (LPR) status. The HELP Haiti Act of 2010 was sponsored by Republican Congressman Jeffrey Fortenberry of Nebraska in the House and Democratic Senator Kristin Gillibrand of New York in the Senate.

Refugee and advocacy organizations that had been calling for TPS for Haitians for many years were delighted when the announcement was made on January 15, 2010. Many organizations also called for the U.S. to speed up visas for the 54,716 Haitians with approved immigration

³⁰ U.S. Citizenship and Immigration Services (USCIS) Fact Sheet on Haitian Relief Measures, updated December 2010.

³¹ Interview with Florida Department of Children and Families.

³² State of Florida Department of Children and Families memo on Deferred Action for Haitians who entered the United States after the earthquake, July 2010.

³³ Florida also received several hundred medical evacuees who were granted parole.

applications to the U.S., particularly for those with family petitions.³⁴ Some Florida-based advocates called for the broad use of parole for family reunification.

Among all these efforts, no organizations called for a generous migration policy that would allow for additional earthquake affected people to leave Haiti. The legal breakthroughs for Haitians came for those already in the United States. Opportunities to leave Haiti were based on strict humanitarian criteria that placed extremely tight restrictions on eligibility for entry.

B. Canada Post-Earthquake Initiatives

The country closest to the U.S. that made the most effort to accommodate Haitians immediately after the earthquake was Canada, which has a long history of providing police and military assistance to the island nation. In the days after the earthquake, Canada and Quebec (which handles its own provincial immigration affairs) announced that it would speed up all Haitian family reunification visas for primary relatives through the end of 2010. As a separate measure, Quebec – home to 90% of Haitians living in Canada³⁵ – instituted a humanitarian sponsorship program to allow petitions for the humanitarian entry of both primary and secondary relatives.³⁶ Opened in February 2010, this program was limited to the first 3,000 applicants who applied, which was quickly reached by July 2010. In January 2011, Quebec’s Immigration Minister reported that Quebecois had applied to sponsor 8,000 relatives, with 3,000 selected by that time and that there were expectations of ultimately reaching 5,000.³⁷ Applicants had to meet criteria for being "seriously and personally affected by the earthquake" to qualify. To prove this, the person had to be in the earthquake-affected zone and have remained in Haiti after the earthquake. There were fees for applying: \$250 for principal relatives and \$100 for each secondary relative thereafter. There were also different criteria for proving that one could support relatives upon arrival. For example, one had to demonstrate the ability to support aging parents but not a spouse or sibling of working age. The Government of Quebec partnered with local organizations to assist with integration needs of the population. During the 12 months

³⁴ U.S. Library of Congress, Congressional Research Service Report. "U.S. Immigration Policy on Haitian Migrants," by Ruth Ellen Wasem, January 2011.

³⁵ "The Haitian Community in Canada," Statistics Canada, modified Aug. 28, 2007, accessed March 29, 2011, <http://www.statcan.gc.ca/pub/89-621-x/89-621-x2007011-eng.htm>.

³⁶ Government of Quebec, "Séisme en Haïti – Programme de parrainage; Avis Important: Fin du programme special de humanitaire," accessed March 29, 2011, www.immigration-quebec.gouv.qc.ca/fr/informations/haiti-parrainage/index.html

³⁷ "Montreal draws 3,000 Haitian immigrants in a year," CBC News, Jan. 12, 2011, accessed March 29, 2011, <http://www.cbc.ca/news/canada/montreal/story/2011/01/12/montreal-haiti-immigration.html>.

following the earthquake, Quebec collectively admitted through all immigration channels more than 3,300 Haitians, an increase of over 80% since 2009.³⁸

V. Immigration Tools

There are a range of immigration tools that currently exist which could suit some or all of the needs of Haitians seeking to be employed in the United States. A number of these mechanisms, however, are legally or practically unavailable to the average Haitian due to the eligibility requirements, extreme limitations on the number of visas available, or the explicit exclusion of nationals of Haiti from accessing the benefit altogether. Immigration benefits are further constrained by the whereabouts of an applicant; there are fewer options available for Haitians still on the island of Haiti to travel to the U.S. for work.

The following is an overview of the ways in which a Haitian may be able to live and work in the U.S., either temporarily or permanently, under present law. It distinguishes between avenues for coming to the U.S., either temporarily or permanently, and ways to remain in the U.S. for some period if already physically present in the country. This summary further identifies each mechanism, the benefits conferred, and constraints presented. This paper explores ways in which the program could be modified and/or modeled after other initiatives that served similar objectives.

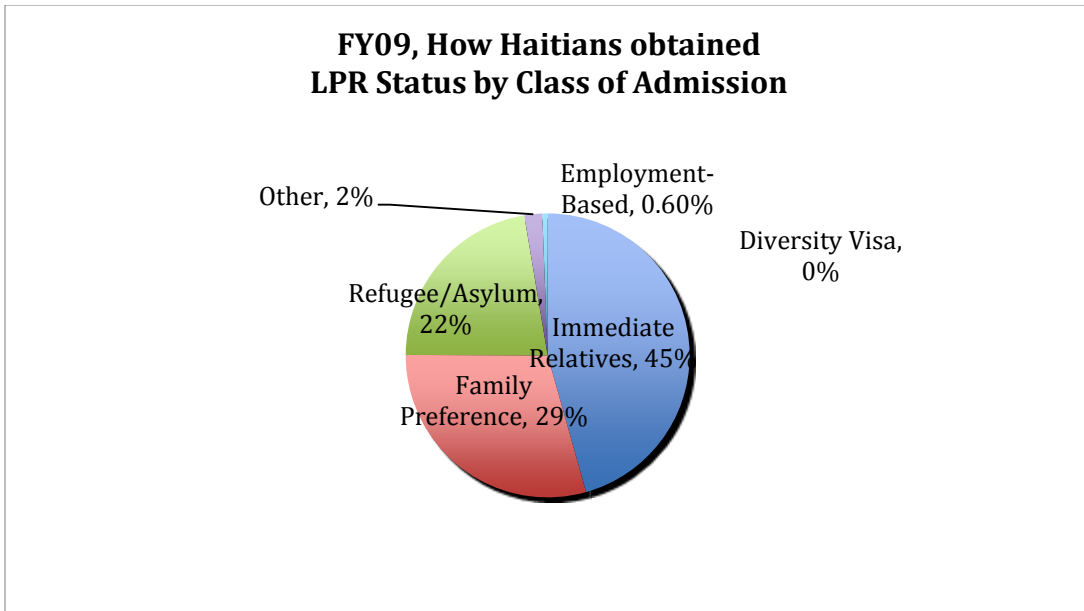
A. Haitians Seeking to Come to the United States

The U.S. immigration system is primarily premised on two main pillars: family reunification and employment-based migration. For Haitians lawfully immigrating to the U.S., family-based immigration has overwhelmingly been the avenue of choice, due in large part to the paucity of other options. For example, in Fiscal Year (FY) 2009, 24,280 Haitians became LPRs in the United States. Of those, nearly 75% were close relatives of U.S. citizens and lawful permanent residents,³⁹ while 22% were refugees and asylees, and less than 1% were sponsored by employers.⁴⁰

³⁸ "Haiti-Quebec: Haitian Immigration, Positive Results," *Haiti Libre*, Jan. 14, 2011, accessed March 29, 2011, <http://www.haitilibre.com/en/news-2116-haiti-quebec-haitian-immigration-positive-results.html>.

³⁹ Of the total number of Haitians who immigrate to the U.S. based on family relationships, 45% are "immediate relatives" and 29% are based on a family-based visa preference category.

⁴⁰ DHS Office of Immigration Statistics, "2009 Yearbook of Immigration Statistics," Table 10, p. 28, (Aug. 2010), accessed March 28, 2011, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.



Source: DHS Office of Immigration Statistics, *2009 Yearbook of Immigration Statistics*, Table 10, p. 28,

1. Family-Based Immigration

An unlimited number of *immediate relatives* (spouses, children, and parents of adult U.S. citizens) are allowed to enter the United States each year once they have an approved Form I-130 Petition for Alien Relative from U.S. Citizenship and Immigration Services (USCIS). Generally speaking, these beneficiaries are able to travel to and remain in the U.S. permanently as lawful permanent residents (LPR status) (for spouses and parents) or citizens (certain children under the Child Citizenship Act). LPR status confers employment authorization and the ability to travel overseas. Individuals with other familial relationships to U.S. citizens and LPRs (“green card” holders) can obtain one of approximately 226,000 visas⁴¹ made available annually for immigration to the United States but are subject to a four-tiered preference system.⁴²

Family-Based Visa Preference	Qualifying Relationship	Numerical Cap/Year
First Preference	Unmarried sons and daughters of USCs, and their children, if any	23,400

⁴¹ Section 201 of the Immigration and Nationality Act (INA) makes a minimum of 226,000 visas available for qualifying family relationships each fiscal year. 8 U.S.C. § 1151.

⁴² INA § 203 establishes the family-based and employment-based preference categories for immigrant visas. 8 U.S.C. § 1153.

Second Preference	2A: Spouses and minor children of LPRs 2B: Unmarried sons and daughters (age 21 and over) of LPRs *At least 77% of this category must go to 2A spouses and minor children of LPRs.	114,200
Third Preference	Married sons and daughter of USCs, and their spouses and minor children	23,400
Fourth Preference	Siblings of USCs over age 21, and their spouses and minor children	65,000

Source: Department of State, Bureau of Consular Affairs, accessed March 29, 2011: http://travel.state.gov/visa/immigrants/types/types_1306.html.

Because these visas are oversubscribed, petitions are held in a queue based on their application date, or “priority date,” determined by the date of proper filing of the petition with USCIS. By statute, no country can receive more than 7% of the total annual family-based preference and employment-based visa allocations each fiscal year, regardless of the number of petitions filed.⁴³ In other words, a single country’s nationals may not receive more than 15,820 family-based preference visas (excluding immediate relatives) in a given year when the minimum number of 226,000 has been allocated. As a result, countries with a high demand for immigrant visas who reach that 7% cap, including mainland China, Dominican Republic, India, Mexico, and Philippines, have additional backlogs going back as far as 1988 (for Filipino siblings of U.S. citizens) specific to each country.

The Department of State issues a monthly visa bulletin to show how the queue is moving and to help set reasonable expectations for petition beneficiaries. For nationals of Haiti (and other countries that have not reached the 7% cap), the April 2011 visa bulletin indicates a wait as “short” as four years (for 2A Preference Family Visas) and *as long as 11 years* (for 4th Preference Family Visas) before a priority date becomes current and a visa is made available.⁴⁴ As of November 2010, when immigrant visa statistics were last made available,⁴⁵ Haitians had the fourth longest wait for a family-based first preference immigrant visa, only behind top-sending countries Mexico, the Philippines, and Jamaica. Similarly, Haiti ranked third and fourth in the

⁴³ See INA §202(a)(2). Dependents of beneficiaries are capped, again by statute, at 2% of the total. 8 U.S.C. § 1152(a)(2).

⁴⁴ Department of State Bureau of Consular Affairs, “Visa Bulletin for April 2011,” accessed March 28, 2011, http://travel.state.gov/visa/bulletin/bulletin_5368.html. On March 8, 2011, the State Department reported that due to continued high demand for numbers in the family first preference category, the dates have actually retrogressed for the worldwide, China, and India priority dates.

⁴⁵ “Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2010,” accessed March 28, 2011, <http://www.travel.state.gov/pdf/WaitingListItem.pdf>.

family-based 2A and 2B preference categories, respectively, in terms of wait times for a visa.⁴⁶ Despite these long delays, about one in every 20 Haitians live in the United States.⁴⁷

Admissibility Concerns: Public Charge Grounds

To receive an immigrant visa, a beneficiary must not only have a qualifying relationship but also be admissible to the United States. Inadmissibility grounds address concerns such as an individual's criminal history, involvement in terrorism-related activities, and previous immigration violations.⁴⁸ Of particular importance to Haitians most affected by the earthquake are the requirements in INA §212(a)(4) that an individual not be or be likely to become a "public charge." Although no single factor determines whether a person will indeed be a "public charge," over the past decade USCIS and its predecessor agency, the Immigration and Naturalization Service (INS), have considered whether someone is or will be "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense."⁴⁹ The agency analyzes a number of factors, such as "age, health, family status, assets, resources, financial status, education, and skills."⁵⁰

Concerns about whether an applicant for admission is inadmissible on public charge grounds are addressed through the requisite Form I-864, Affidavit of Support. Filed by the family member petitioner (and if necessary, a co-sponsor), this form is essentially a contract with the U.S. government that the sponsor(s), if necessary, will provide financial support to the beneficiary to avoid his/her use of public benefits. The sponsor must demonstrate that s/he has an annual income of no less than 125% of the federal poverty level. A waiver of the public charge ground is available to certain groups of humanitarian immigrants—including some Haitians applying for

⁴⁶ Ibid. Mexico and the Dominican Republic outranked Haiti for the 2A family preference category, while the Philippines joined them in outranking Haiti's wait in the 2B family preference category. Interestingly, Haiti was not in the top 10 countries in terms of wait times within the third preference family category and ranked tenth in the fourth preference category.

⁴⁷ Aaron Terrazas, Migration Policy Institute (MPI)/Migration Information Source, "Haitian Immigrants in the U.S.," Jan. 2010, accessed March 28, 2011, <http://www.migrationinformation.org/USfocus/display.cfm?id=770#top>.

⁴⁸ INA §212(a); 8 U.S.C. § 1182(a).

⁴⁹ Immigration and Naturalization Service (INS), "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 Fed. Reg. 28689 (May 26, 1999).

⁵⁰ USCIS, "Fact Sheet: Public Charge," Oct. 20, 2009, accessed March 28, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=354fb2a3fffb4210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

a green card under special legislation⁵¹—but not as a rule for family-based or employment-sponsored immigrant visas.

HOW TO MAKE FAMILY-BASED IMMIGRATION WORK BETTER FOR HAITIANS

Although family-based visas have been the primary vehicle for the legal migration of thousands of Haitians over the years, its long wait no longer serves the needs of most disaster-affected Haitians who seek to leave and earn a living elsewhere. Advocacy groups have circulated several proposals for amending or supplementing the family-based visas system to expedite departures from Haiti.

One proposal would be to **exempt Haiti from the cap on or calculation of visa numbers**. In order to do so, Congress would need to amend two provisions in section 202(a) of the INA, including the non-discrimination principle explicitly stated in section 202(a)(1) as well as the universal 7% visa cap on all countries in a given year found in section 202(a)(2).

Advocates have also sought the **creation of a Haitian Family Reunification Parole Program** for the approximately 105,000 Haitians who are the already-approved beneficiaries of a family-based petition but whose priority date is not yet current. Rather than waiting 4 to 11 years for a visa in Haiti, beneficiaries could be paroled in to the United States where they can be reunited with family and have employment authorization. This proposal has merit not only for the humanitarian purpose it would serve but also to enable Haitians to send more remittances home and foster economic development with greater speed. Although parole is typically nothing more than a limbo status, the underlying approved family petition puts these potential parolees on track for eventual adjustment to lawful permanent resident status.

Instituting a family reunification parole program for Haitians is simpler than it may appear. Parole authority is already within the discretion of the Secretary of Homeland Security, per section 212(d)(5) of the INA. The primary challenges are bureaucratic—the reported demand such a program would create on U.S. human resources in Haiti and in the U.S. is more than DHS appears prepared to authorize. DHS could consider parole requests based on the order in which the requesters' visa petitions were approved or, in the alternative, minimize costs by prioritizing a smaller number of parole requests, such as those made by spouses and minor children of lawful permanent residents. Any costs should, of course, be weighed against the high costs of other forms of humanitarian assistance in post-disaster situations.

Likewise, some DHS officials have expressed reservations about creating a precedent that other countries experiencing a natural disaster or in need of economic development would demand.

⁵¹ As discussed later, the public charge inadmissibility grounds do not apply to Haitians applying for adjustment of status under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), to applicants registering for Temporary protected status (TPS), or to asylum seekers and refugee applicants.

This precedent, however, has already been created in the form of the Cuban Family Reunification Parole Program, initially announced in August 2006⁵² and further detailed by USCIS in November 2007.⁵³ Citing existing statutory and regulatory authority,⁵⁴ the Secretary of Homeland Security decided to commence such a program for Cubans alone in order to 1) promote family unity in the face of long waits for visas, 2) to encourage legal, orderly migration rather than hazardous, irregular travel by sea, and 3) to help meet the terms of the 1994 U.S.-Cuba Migration Accords which commit to issuing 20,000 travel documents to Cubans each year. A Haitian Family Reunification Parole Program would achieve similar goals of family unity and orderly migration – and would have no net effect on the number of immigrant visas ultimately issued. Further discussion of the exercise of parole authority is found in Section V.A.5.

In the alternative to a parole program for family reunification, Congress could take action to **reinvigorate the V nonimmigrant visa classification**. Originally created by the Legal Immigration Fairness and Equity Act of 2000 (LIFE Act), the V visa allows an LPR who has filed a family-based petition under the 2A preference category (for a spouse or child) to bring those beneficiaries to the U.S. if the petition has been pending for more than three years and a visa has not yet come available.⁵⁵ The statute currently states that the underlying petition must have been filed on or before December 21, 2000 – making it highly unlikely that many, if any, Haitians could currently qualify. To render the V nonimmigrant visa a viable option for Haitian beneficiaries, Congress would need to amend the statute to update the filing date or add other Haitian-specific eligibility criteria. Indeed, the Haitian Emergency Life Protection Act of 2010 (S. 2998/H.R. 4616) proposed to allow Haitian beneficiaries of family-based petitions approved on or before January 12, 2010 to apply for a V visa.⁵⁶

⁵² DHS Office of the Press Secretary, “USCIS Will Further Strengthen Measures That Support the Reunification of Families Separated by the Castro Regime,” Aug. 11, 2006, accessed March 28, 2011, http://www.dhs.gov/xnews/releases/pr_1158350356206.shtm.

⁵³ USCIS, “Questions and Answers: Cuban Family Reunification Parole Program,” Nov. 21, 2007 (updated Jan. 28, 2008), accessed March 28, 2011, http://www.uscis.gov/files/pressrelease/CFRP_QA_21nov02.pdf.

⁵⁴ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); see also 8 C.F.R. § 212.5(c) & (d).

⁵⁵ INA §101(a)(15)(V), 8 U.S.C. § 1101(a)(15)(V); Department of State Bureau of Consular Affairs, “Nonimmigrant (V) Visa for Spouse and Children of a Lawful Permanent Resident (LPR),” accessed March 28, 2011, http://travel.state.gov/visa/immigrants/types/types_1493.html.

⁵⁶ H.R. 4616 was introduced on February 5, 2010 by Rep. Yvette Clark (NY) with 43 co-sponsors and was referred to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law in April 2010, where it stalled. S. 2998 was introduced by Rep. Kirsten Gillibrand (NY) and 6 co-sponsors (the day before H.R. 4616 was introduced) and referred to the Senate Committee on the Judiciary. For additional information about these bills, see Library of Congress THOMAS, “Bill Summary and Status, 111th Congress, H.R. 4616,” accessed March 28, 2011, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04616>; Library of Congress THOMAS, “Bill Summary and Status, 111th Congress, S. 2998,” accessed March 28, 2011, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.2998>.

2. Employment-Based Visas

As noted above, very few Haitians take advantage of employment-based mechanisms of immigration to the U.S. or nonimmigrant visas in a given year. This appears to be the case based on certain characteristics of the Haitian workforce, such as low literacy rates,⁵⁷ formal job training, and limited English proficiency. Apart from the small minority of Haitian elite with advanced degrees and job skills who can qualify for skilled worker visas, the average Haitian worker would likely qualify for unskilled worker immigrant and nonimmigrant visas alone. These vehicles, however, affirmatively exclude or are effectively rendered unavailable to most Haitians.

a. Unskilled Nonimmigrant Visas: H-2A and H-2B

Among the long list of nonimmigrant visas, two options are made available to unskilled workers. The H-2A program enables employers to bring foreign workers to the United States to fill temporary *agricultural* jobs, whereas the H-2B program allows employers to fill temporary *non-agricultural* jobs with foreign workers.⁵⁸ Typical H-2B jobs include resort and hospitality services, landscaping, and construction.⁵⁹ Both tracks require an employer to petition for a worker (even if that worker is unnamed) and obtain a labor certification from the Department of Labor, attesting to the fact that American workers are not qualified, interested and available to fill the relevant jobs and that the existence of foreign workers will not adversely affect wages of American workers similarly situated.⁶⁰

H-2A and H-2B classifications are typically issued for no more than one year but can be renewed annually for up to three years, at which time the worker must leave the U.S. for at least three months and apply for readmission. The employee's spouse and children can travel to the U.S. on an H-4 classification but are not permitted to work.⁶¹ Although there is no limit on the

⁵⁷ Estimates of literacy rates in Haiti range from 52.8% to 65.3%. "Field Listing: Literacy, Haiti," (2003 estimate), *CIA World Factbook*, accessed March 28, 2011, <https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html>; United Nations Development Programme (UNDP), "Haiti: Country Profile of Human Development Indicators," accessed March 28, 2011, <http://hdrstats.undp.org/en/countries/profiles/HTI.html>.

⁵⁸ INA § 101(a)(15)(H)(ii)(a), (b); 8 U.S.C. § 1101(a)(15)(H)(ii)(a), (b).

⁵⁹ USCIS, "H-2A and H-2B Nonimmigrant Worker Classifications" (presented at the 2010 National Congressional Conference) accessed March 28, 2011, <http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/H-2A%20and%20H-2B%20Nonimmigrant%20Worker%20Classifications.pdf>.

⁶⁰ See INA § 218(a)(1); 8 U.S.C. § 1188(a)(1).

⁶¹ USCIS, "H-2A Temporary Agricultural Workers," last updated Jan. 14, 2011, accessed March 28, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=88>

number of H-2A visas, H-2B visas are capped at 66,000 visas per year, with 33,000 issued for each half of the fiscal year.

While these nonimmigrant visas are available to unskilled workers, only nationals of certain countries are eligible to participate in the programs. Each year, following consultation with the Department of State, the Secretary of Homeland Security publishes a list of eligible countries in the Federal Register,⁶² including 53 countries for 2011.⁶³ These decisions are discretionary but guided by a non-exhaustive list of regulatory criteria, including:

- (1) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal;
- (2) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;
- (3) The number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and
- (4) Such other factors as may serve the U.S. interest.⁶⁴

When the Secretary made her determination of eligible countries for 2011, she also considered other factors, including “evidence of past usage of the H-2A and H-2B programs by nationals of the countries to be added, and evidence relating to the economic impact on particular U.S.

[9f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD.](http://www.federalregister.gov/a/2011-646)

⁶² Although there is no specified deadline for making this determination, each designation expires after 12 months. These decisions are generally made and published near the start of the calendar year.

⁶³ Countries eligible to participate in the H-2A and H-2B programs for 2011 include: Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Honduras, Hungary, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Nauru, The Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu. Of these countries, the following were designated for the first time this year: Barbados, Estonia, Fiji, Hungary, Kiribati, Latvia, Macedonia, Nauru, Papua New Guinea, Samoa, Slovenia, Solomon Islands, Tonga, Tuvalu, and Vanuatu. See DHS, “Designation of Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs,” 76 Fed. Reg. 2915 (Jan. 18, 2011) accessed March 28, 2011, <http://federalregister.gov/a/2011-646>.

⁶⁴ 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(i).

industries or regions resulting from the addition or continued non-inclusion of specific countries.”⁶⁵ Although a number of countries in Latin America (e.g., Belize, El Salvador, Guatemala, Honduras, and Nicaragua) and the Caribbean (e.g., Barbados, Dominican Republic, Jamaica) satisfied these collective criteria for inclusion in this list, Haiti has been excluded.

The only way for a national of Haiti to qualify for an H-2A or H-2B visa is to pursue *individual consideration* under a narrow regulatory exception for excluded countries. Only the Secretary of Homeland Security is authorized to determine if “it is in the U.S. interest for that alien to be a beneficiary of such petition.”⁶⁶ Factors to be taken into account during this determination, may include:

- (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list [of eligible countries];
- (2) Evidence that the beneficiary has been admitted to the United States previously in H-2A status;
- (3) The potential for abuse, fraud, or other harm to the integrity of the H-2A visa program through the potential admission of a beneficiary from a country not currently on the list; and
- (4) Such other factors as may serve the U.S. interest.⁶⁷

These criteria set an extremely high standard for any worker to meet and are therefore unlikely to serve the needs of Haitian workers in any meaningful way.

HOW TO MAKE NON-IMMIGRANT WORKER VISAS WORK BETTER FOR HAITIANS

Given the Secretary’s broad discretion to determine which countries are eligible for the H-2A and H-2B programs, advocates for Haitian workers could place pressure on the Secretary to revisit how she assessed Haiti against the regulatory criteria. Moreover, the fourth regulatory prong – “such other factors as may serve the U.S. interest” – provides an opening for advocates to explain how Haitians working temporarily in the U.S. not only improves the individual’s economic well-being but fosters development in Haiti as well. A stronger, more economically

⁶⁵ DHS, “Designation of Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs,” 76 Fed. Reg. 2915 (Jan. 18, 2011) accessed March 28, 2011, <http://federalregister.gov/a/2011-646>.

⁶⁶ 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii)

⁶⁷ 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii).

stable Haiti serves the U.S. interest in a myriad of ways, not the least of which include a reduced risk of mass migration by sea and a potentially diminished need for international aid.

b. Unskilled Immigrant Visas: EB-3

Akin to the family-based preference categories, there are tiers of preferences within the broader category of employment-based (EB) immigrant visas. One of those preferences is the EB-3 visa, available to skilled workers with limited training or educational backgrounds as well as “other workers” performing unskilled labor. To become a beneficiary of an EB-3 “other worker” or “unskilled worker” visa, an individual must be capable of performing unskilled labor that is not temporary or seasonal in nature and for which qualified workers are not available in the United States. Therefore, the employer must obtain a labor certification and make a full-time job offer to the beneficiary. Spouses and minor unmarried children can receive visas to accompany the EB-3 worker. Similar to the family-based visas, all employment-based immigrant visa beneficiaries must be admissible to the United States and establish that they will not become a public charge.

Of the 140,000 employment-based immigrant visas available each year, only 10,000 are reserved for these “other” unskilled EB-3 visa holders.⁶⁸ Since Fiscal Year 2002, this small number has been further cut by as much as half on account of a provision of the Nicaraguan Adjustment and Central American Relief Act (NACARA)⁶⁹ that allocates 5,000 of the unskilled EB-

⁶⁸ There is a cap of 40,000 visas available to the EB-3 visa category, but that figure is allocated among three subcategories: skilled workers with two years of training or experience, professionals with a baccalaureate degree or equivalent, and “other workers” performing unskilled labor. It is the last of these three that we discuss here. INA § 201(d)(1)(A), 8 U.S.C. § 1151(d)(1)(A) (regarding worldwide levels of immigration); INA § 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii) (regarding unskilled workers); INA § 203(b)(3)(B), 8 U.S.C. § 1153(b)(3)(B) (regarding 10,000 cap on unskilled workers).

⁶⁹ Signed into law on Nov. 19, 1997, the Nicaraguan Adjustment and Central American Relief Act (NACARA) was designed to ameliorate the harsh effects of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on certain groups of Central Americans. In particular, IIRIRA amended the laws pertaining to suspension of deportation – now called cancellation of removal – by requiring longer periods of presence in the U.S., cutting off the calculation of one’s physical presence as of the date that charging documents for immigration proceedings were issued (“stop-time” rule), establishing a tougher standard for demonstrating the hardship posed to others by one’s removal, and creating an annual numerical cap on suspensions/cancellations. These changes were expected to unfairly disadvantage those Central Americans who had fled civil wars in the 1980s and early 1990s and whose applications for immigration relief were stalled in INS backlogs or received discriminatory treatment. Although the Clinton Administration originally submitted a bill to Congress that focused on special treatment for Guatemalans and Salvadorans who were members of the American Baptist Church (ABC) settlement agreement (*American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991)),

3 visas to NACARA beneficiaries so long as they are needed.⁷⁰ In the end, only a handful of the remaining EB-3 unskilled worker visas are used by Haitians each year.⁷¹ In FY 2009, for example, just 149 Haitians became LPRs based on an employment-based petition, including workers of all backgrounds and skill levels.⁷²

In addition to the shortage of available visas, a major problem with the EB-3 “other worker” visa is the extremely long processing period. As of the April 2011 Visa Bulletin, the priority date for this “other worker” sub-category was July 22, 2003.⁷³ For Haitians living in post-quake Haiti, waiting eight years for an opportunity to live and work in the United States seems interminable. Perhaps once NACARA’s demand on EB-3 visa numbers disappears entirely, the waiting period for a visa will shorten. That would also be an opportune time for Congress to allocate some of

Congress ultimately expanded its application to include certain Nicaraguans and Cubans (who can apply for adjustment of status under section 202 of NACARA) and Guatemalans, Salvadorans, and certain nationals of former Soviet bloc countries (who can apply for suspension of deportation or special rule of cancellation of removal under section 203 of NACARA). Nicaraguan Adjustment and Central American Relief Act (NACARA), Sec. 203(e), as amended by Section 1(e) of Pub. L. 105-139; USCIS RAIO Asylum Division, “Asylum Officer Basic Training Course Lesson Plan: NACARA Suspension of Deportation and Special Rule Cancellation of Removal,” updated 2009, accessed March 29, 2011, <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/NACARA-31aug10.pdf>.

⁷⁰ According to statistics provided by the USCIS Asylum Division and the Executive Office of Immigration Review, the number of current NACARA applications has diminished considerably in recent years. As of May 31, 2010, the Asylum Division had only 719 NACARA applications pending, and EOIR reported only 20 NACARA-specific proceedings in FY2009. USCIS Asylum Division, “NACARA Cumulative Report, 6-21-99 Through 5-31-10,” accessed March 28, 2011, [http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/June%202010/NACARA%20Statistics%20\(March%20-%20May%202010\).pdf](http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/June%202010/NACARA%20Statistics%20(March%20-%20May%202010).pdf); Executive Office for Immigration Review, *FY 2009 Statistical Year Book*, p. C3-4, accessed March 28, 2011, <http://www.ilw.com/immigrationdaily/news/2010,0302-EOIR.pdf>.

⁷¹ China, South Korea, Mexico, Philippines, and India (in that order), collectively comprise nearly 82% of the waitlist for unskilled EB-3 visas being consular processed abroad. The Department of State notes that approximately 90% of employment preference visas are being processed as adjustment of status applications in USCIS offices within the U.S. Figures pertaining to waits for consular processing abroad may understate actual demand for these visas. “Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2010,” accessed March 28, 2011, <http://www.travel.state.gov/pdf/WaitingListItem.pdf>.

⁷² DHS Office of Immigration Statistics, *2009 Yearbook of Immigration Statistics*, Table 10, p. 28, (Aug. 2010) accessed March 28, 2011, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

⁷³ “Visa Bulletin for April 2011” (see note 42).

these “other worker” visas specifically to a country like Haiti, or other similarly situated countries ravaged by natural disaster, to enable a small number of people to immigrate to the United States and send home remittances.

3. Diversity Visa Lottery

For those individuals who have neither qualifying family members in the U.S. or the prospect of a job offer, the Diversity Visa (DV) immigrant category provides a more equitable avenue for obtaining lawful permanent residence.⁷⁴ Created by the Immigration Act of 1990,⁷⁵ the DV program is a random lottery designed to give green cards to nationals of countries who do not currently benefit from a large number of immigrant visas. Diversity visas are apportioned among six geographic regions,⁷⁶ but no more than 7% can be issued to persons born in any one country.

By statute, 55,000 diversity visas are made available each year,⁷⁷ although 5,000 of these visas have been reallocated to offset the adjustment of status of NACARA beneficiaries. (This figure is in addition to the 5,000 visas used by NACARA beneficiaries from the EB-3 category, discussed above). The demand for the DV program is overwhelming; in the 2011 DV lottery, there were 12.1 million qualified applicants (16.5 million with derivative family members) for the 50,000 available spots.

The Secretary of Homeland Security is authorized to determine which regions and foreign states qualify as “high-admission” (and thereby receive no diversity visas), and “low-admission.”⁷⁸ Different visa allocations are made for low-admission states in low-admission and high-admission regions.⁷⁹ Using statutory formulas, in the 2011 DV lottery, Haiti is excluded from participating.⁸⁰

⁷⁴ See INA § 203(c), 8 U.S.C. § 1153(c); 22 C.F.R. § 42.33.

⁷⁵ The Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, enacted November 29, 1990.

⁷⁶ These regions are: 1) Africa, 2) Asia, 3) Europe, 4) North America (other than Mexico), 5) Oceania, and 6) South America, Mexico, Central America, and the Caribbean. See INA § 203(c)(1)(F), 8 U.S.C. § 1153(c)(1)(F).

⁷⁷ See INA § 201(e); 8 U.S.C. § 1151(e).

⁷⁸ See INA § 203(c)(1); 8 U.S.C. § 1153(c)(1).

⁷⁹ See INA § 203(c)(1)(E); 8 U.S.C. § 1153(c)(1)(E).

⁸⁰ The complete list of 19 countries excluded from the 2011 DV lottery includes: Brazil, Canada, China (mainland-born, excluding Hong Kong S.A.R. and Taiwan), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, the Philippines, Poland, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. Department of State Bureau of Consular Affairs, “Diversity Visa Lottery 2011 (DV 2011) Results,” accessed March 28, 2011, http://travel.state.gov/visa/immigrants/types/types_5073.html.

HOW TO MAKE A VISA LOTTERY PROGRAM WORK BETTER FOR HAITIANS

In order for **Haiti to participate in the DV program**, Congress would need to amend section 203 of the INA to exempt the island nation from the limits placed on high-admission states. Legislative action could also be taken to **reallocate some portion of the diversity visas to Haitians** specifically, or otherwise to victims of natural disaster. The prospect for doing so is not entirely far-fetched. In recent years, congressional debate over reforming our nation's immigration laws has included discussions about eliminating or revising the DV program to better serve U.S. interests. For instance, on January 5, 2011, Representative Darrell Issa (CA) introduced H.R. 43, which would eliminate the diversity visa lottery and reallocate those 55,000 to the EB-2 employment-based category that requires an advanced degree.⁸¹ As recently as February 15, 2011, a different bill was introduced by Representative Bob Goodlatte and 21 cosponsors that would terminate the DV program without any reassignment of those visas.⁸²

Given the expanded geographic diversity of immigrants to the United States in the 20+ years since the DV program was created, the time may be ripe to revisit how to best utilize the distribution of these 55,000 green cards. These pending legislative proposals may even present a near-term opportunity for Congress to consider where else those visas could be re-directed. Fostering economic development in the Western Hemisphere for countries devastated by natural disasters is one viable rationale for reallocating some portion or all of the diversity visas. Indeed, NACARA established a precedent for doing just this, by taking 5,000 visas from both the DV program and the EB-3 unskilled worker visa numbers.

If Haitians were permitted to participate in the DV program as it currently exists, many applicants would struggle against the statutory eligibility criteria, namely possessing at least a high school education or its equivalent, or two years of work experience in an occupation requiring at least two years training or experience.⁸³ A DV beneficiary must also be admissible to the United States, including that he or she is not subject to the public charge inadmissibility

⁸¹ H.R. 43, To amend the Immigration and Nationality Act to eliminate the diversity immigrant program and to re-allocate those visas to certain employment-based immigrants who obtain an advanced degree in the United States, 112th Cong., 1st sess., introduced Jan. 5, 2011, accessed March 28, 2011, <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.43.IH>. The bill was referred to the House Subcommittee on Immigration Policy and Enforcement on January 24, 2011, but no action has been taken on it since that time. Representative Issa introduced the same bill two years ago as H.R. 3687 (111th Cong., 1st sess.), and it too got stuck with the House Immigration Subcommittee.

⁸² H.R. 704, Security and Fairness Enhancement for America Act of 2011 ("SAFE for America Act"), 112th Cong. 1st sess., introduced Feb. 15, 2011, accessed March 28, 2011, <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.704>: This bill was referred to the House Immigration Subcommittee on February 28, 2011.

⁸³ 22 C.F.R. § 42.33(a)(1).

grounds. Congress would need to revisit these criteria and possibly consider a waiver for some or all of these requirements.

In the alternative to manipulating the DV program, DHS and Congress could instead **create a Special Haitian Migration Program**, a new visa/parole lottery program serving only Haitians. Such a plan could be modeled after the Special Cuban Migration Program (also known as “Cuban Visa Lottery”), created by INS in 1994 for Cubans who could not qualify as refugees or immigrants and who the governments of Cuba and the United States sought to deter migrants from unsafely and illegally traveling to the U.S. by sea.⁸⁴ To qualify for the Cuban Visa Lottery, applicants must be between 18 and 55 years of age and have two of the following three characteristics: (1) completion of higher level education or secondary education, (2) three years of work experience, or (3) relatives in the U.S.⁸⁵ Lottery registration and selection are held inside Cuba; beneficiaries are selected at random and are eligible for *parole status* to enter the United States. Those selected must also prove their admissibility, including that they are not subject to the public charge inadmissibility ground. Once they have arrived in the U.S., these Cuban lottery parolees can receive federal benefits and subsequently adjust to lawful permanent resident status under the Cuban Adjustment Act of 1966.⁸⁶

A Haitian Visa Lottery might operate in similar fashion, and the eligibility criteria for the lottery could be determined to meet a range of U.S. economic, foreign policy or humanitarian interests. A subset of the Haitian population, such as those particularly affected by the earthquake, could be permitted to register for the lottery. Although DHS has discretion to generously use its parole authority to benefit Haitians, additional measures would be needed to accommodate Haitian lottery parolees once they arrive in the U.S. In particular, statutory authority to adjust the status of these Haitian parolees would be required, since the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) only allowed for adjustment of status for those Haitians who, as a

⁸⁴ The Special Cuban Migration Program was an integral part of the U.S.-Cuba Migration Accords, whereby the U.S. agreed to permit 20,000 Cubans each year to immigrate to the United States and Cuba agreed to limit irregular migrations by sea. To meet these numbers, Cubans currently receive family-based immigrant visas, refugee status, family reunification paroles, and lottery paroles. USCIS “USCIS Will Further Strengthen Measures That Support the Reunification of Families Separated by the Castro Regime,” Aug. 11, 2006, accessed March 30, 2011, http://www.dhs.gov/xnews/releases/pr_1158350356206.shtm.

⁸⁵ U.S. Interests Section in Havana, Department of State, “Lottery (Special Program for Cuban Migration),” undated, accessed March 30, 2011, <http://havana.usint.gov/media/pdfs/lottery.pdf>.

⁸⁶ Pub. L. No. 89-732, 80 Stat. 1161, November 2, 1966, as amended. The Cuban Adjustment Act of 1966 permits Cubans who have been inspected and admitted or paroled into the United States to after January 1, 1959, who have been physically present in the U.S. for at least one year, and who are otherwise admissible, to be granted lawful permanent residence.

general rule, were present in the U.S. before 1996 and who applied for adjustment before April 1, 2000.⁸⁷ The adjustment to LPR status is a necessary step to acquiring U.S. citizenship.

Legislative modifications to HRIFA have been attempted a number of times over the past decade, but often without success. Although the Legal Immigration Family Equity (LIFE) Act Amendments, enacted in December 2000, succeeded in expanding access to HRIFA by including those Haitians who had been removed from the United States and subsequently re-entered, other efforts have failed. Varying versions of the “HRIFA Improvement Act” have been unsuccessfully introduced by two members of the Florida delegation in Congress, Senator Bob Graham and Representative Kendrick Meek, a total of seven times since 2003 to address issues such as waivers of certain inadmissibility grounds and to resolve issues about the qualifying age of derivative children.⁸⁸ This legislative history should be considered in any new efforts to grant Haitians a more permanent status.

4. U.S. Refugee Admissions Program (USRAP)

Apart from immigration through family-based petitions, employment-based categories, and the diversity visa program, many foreign nationals legally arrive in the United States through the U.S.

⁸⁷ Under HRIFA, the five categories of Haitians eligible to apply for adjustment of status were: (1) Haitian nationals who applied for asylum before Dec. 31, 1995; (2) Haitian nationals who were paroled into the United States before Dec. 31, 1995, either because they had a credible fear of persecution, or for emergent reasons, or it was in the public interest to do so; (3) Haitian children who arrived in the U.S. without parents and have remained in the U.S. and without parents since their arrival; (4) Haitian children who became orphaned after arriving in the U.S.; and (5) Haitian children who were abandoned by their parents or guardians prior to Apr. 1, 1998, and who have remained abandoned. There is no application deadline for HRIFA dependents. Omnibus Consolidated Appropriations, Title IX, Sec. 902, Pub. L. No. 105-277, 112 Stat. 2681, 105th Cong., Oct. 21, 1998, accessed March 30, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=publaw>; 8 C.F.R. § 245.15.

⁸⁸ The HRIFA Improvement Act was introduced in the House of Representatives five times and in the Senate twice. H.R. 1567, HRIFA Improvement Act of 2009, 111th Cong., 1st Sess., introduced by Rep. Kendrick Meek on March 17, 2009; H.R. 454, HRIFA Improvement Act of 2007, 110th Cong., 1st Sess., introduced by Rep. Kendrick Meek on Jan. 12, 2007; H.R. 1737, HRIFA Improvement Act of 2005, 109th Cong., 1st Sess., introduced by Rep. Kendrick Meek on Apr. 20, 2005; H.R. 3658, HRIFA Improvement Act of 2005, 109th Cong., 1st Sess., introduced by Rep. Kendrick Meek on Sept. 6, 2005; S. 2187, HRIFA Improvement Act of 2004, 108th Cong., 2nd Sess., introduced by Sen. Bob Graham on Mar. 10, 2004; S. 3006, HRIFA Improvement Act of 2004, 108th Cong., 2nd Sess., introduced by Sen. Bob Graham on Nov. 18, 2004; H.R. 3238, HRIFA Improvement Act of 2003, 108th Cong., 1st Sess., introduced by Rep. Kendrick Meek on Oct. 2, 2003.

Refugee Admissions Program (USRAP). Following annual consultations between DHS, the Department of State, the Department of Health and Human Services (HHS), and Congress, the President determines the number of refugees to admitted to the United States each fiscal year.⁸⁹ In Fiscal Year (FY) 2011, the President set the admissions ceiling at 80,000 refugees, which were further broken down by region:⁹⁰

REGION	FY 2011 CEILING
Africa	15,000
East Asia	19,000
Europe and Central Asia	2,000
Latin America/Caribbean	5,500
Near East/South Asia	35,500
Unallocated Reserve	3,000
TOTAL	80,000

The overall and regional ceilings vary year to year, and due to refugee processing challenges, actual admissions can fall far short of those figures. Over the past 30 years of refugee processing, the U.S. has annually admitted as many as 207,116 refugees (FY 1980) and as few as 27,110 (FY 2002, following security concerns and a shutdown generated by the Sept. 11th, 2001 terrorist attacks).⁹¹ The Department of State Bureau of Population, Refugees, and Migration (PRM), as the office responsible for overseeing and managing the refugee program, has worked hard in recent years to narrow the gap between the ceiling and the number of admitted

⁸⁹ Per INA § 207(e), “appropriate consultation” must be had between “designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives.” As part of these consultations, DHS, the Department of State, and the Department of Health and Human Services (HHS) submit a report to Congress on behalf of the President which lays out an assessment of the global refugee situation, which populations are best suited for resettlement to the United States, and what impact they will have on U.S. economic and foreign policy interests. DHS, Dept. of State, & Dept. of Health & Human Serv., “Report to the Congress: Proposed Refugee Admissions for Fiscal Year 2011,” accessed March 30, 2011, <http://www.state.gov/documents/organization/148671.pdf>.

⁹⁰ Presidential Memorandum – Refugee Admissions, “Fiscal Year 2011 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), Respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended,” Presidential Determination No. 2011-2, Oct. 8, 2010, accessed March 30, 2011, <http://www.whitehouse.gov/the-press-office/2010/10/08/presidential-memorandum-refugee-admissions>.

⁹¹ Refugee Council USA, “History of the U.S. Refugee Resettlement Program,” accessed March 30, 2011, <http://www.rcusa.org/index.php?page=history>.

refugees each year. Although the refugee program only admitted 39% of the allocated ceiling in FY 2002, approximately 98% (73,311) of the allocated ceiling of 75,000 refugees were admitted in FY 2010 (excluding 5,000 visas set aside as an unallocated reserve).⁹²

The refugee program serves a specific purpose in our immigration system—to resettle in the United States vulnerable populations of humanitarian concern from around the world. The United States’ historical commitment to refugees is very real; the U.S. is the largest refugee resettlement country in the world. Created by the Refugee Act of 1980⁹³ over 30 years ago, the USRAP replaced the *ad hoc* issuance of parole to refugees and instead provides a formal mechanism for granting refugee status.⁹⁴ Prior to the Refugee Act of 1980, refugee populations were brought to the United States using the Attorney General’s⁹⁵ parole authority or other conditional entrant status. In order to regularize their status after arrival, Congress had to pass special legislation for each population to provide lawful permanent residence.

In order to qualify for refugee status, an applicant must be outside of the U.S., fit within one of the programs processing “priorities,”⁹⁶ be admissible, and meet the definition of a “refugee” in INA sec. 101(a)(42)(A). The Refugee Act of 1980 amended the refugee definition to bring it into conformance with the international legal definitions found in Article 1 of the 1951 United Nations Convention Relating to the Status of Refugees.⁹⁷ INA sec. 101(a)(42)(A) reads:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

⁹² Refugees International, “Helpful Facts & Figures,” accessed March 30, 2011, <http://www.refugeesinternational.org/get-involved/helpful-facts-%2526-figures>.

⁹³ Pub. L. No. 96-212, 94 Stat. 102.

⁹⁴ Authorization for the USRAP is found at INA § 207, 8 U.S.C. § 1157.

⁹⁵ Prior to the creation of the Department of Homeland Security, immigration functions were housed within the Immigration and Naturalization Service (INS) at the Department of Justice (DOJ).

⁹⁶ If a person wants to *access* the USRAP, he or she must fall into one of three processing categories: Priority 1 (P-1) includes referrals from UNHCR, U.S. embassies, or designated NGOs; Priority 2 (P-2) includes groups of special humanitarian concerns; and Priority 3 (P-3) includes certain family members of refugees and asylees in the U.S. Once a person qualifies to access the USRAP, then s/he is interviewed by a DHS officer to determine whether the individual meets the refugee definition and is admissible.

⁹⁷ The United States did not sign the Refugee Convention but it ratified the 1967 United Nations Protocol Relating to the Status of Refugees, and thereby adopted the Convention’s definition of “refugee.”

Although the Refugee Act of 1980 created the current U.S. definition of “refugee,” the term existed and was defined by law for at least 28 years beforehand. The 1952 Immigration and Nationality Act had a more limited focus on those who fled communism or countries in the Middle East.

Interestingly, apart from ideological and geographical limitations, the 1952 refugee definition also included “persons uprooted by catastrophic natural calamity.”⁹⁸ The definition was revised by the Refugee Relief Act of 1953 but continued to include those affected by natural disasters, adding criteria that all refugees must be “in urgent need of assistance for the essentials of life or for transportation.”⁹⁹

Amendments made by the 1965 Immigration Act shifted U.S. law from a discriminatory, national origin-based quota system to a preference-based system open to all countries.¹⁰⁰ A 7th preference visa category was created for refugees, whose revised definition continued to include those fleeing natural disasters. Moved to INA sec. 203(a)(7), conditional entry for refugees was available to:

- (7) [A]liens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country,
 - (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area... and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or
 - (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode.¹⁰¹ (emphasis added)

⁹⁸ Merissa Kandalraft, “The Overseas Refugee Program, Foreign Policy, Public Opinion, and Refugee Policy,” (undated) accessed March 30, 2011, <http://repository.unm.edu/bitstream/handle/1928/2926/MerissaKandalraft.pdf?sequence=1>.

⁹⁹ Refugee Relief Act of 1953, § 2(a), Pub. L. No. 83-203, 67 Stat. 400. The full text of the 1953 refugee definition read: “any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, *natural calamity* or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and *who is in urgent need of assistance for the essentials of life or for transportation.*” (emphasis added) In 1957, this language was incorporated into the immigration regulations at 22 C.F.R. § 44.1. 22 Fed. Reg. 10826 (Dec. 27, 1957).

¹⁰⁰ Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

¹⁰¹ Section 203(a)(7) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1153(a)(7) (1964 ed., Supp. V).

Continued inclusion of these disaster-affected populations was no accident. In 1965, Congress specifically stated that its purpose in including aliens “uprooted by catastrophic natural calamity” was “to provide relief in those cases where aliens have been forced to flee their homes as a result of serious natural disasters, such as earthquakes, volcanic eruptions, tidal waves, and in any similar natural catastrophes.”¹⁰²

In the 28 years that environmental refugees could have been brought to the United States, no refugees were admitted to the U.S. using that “catastrophic natural calamity” refugee provision.¹⁰³ Legislative history behind the 1965 immigration amendments suggests that some felt “the United States should render financial, technical, and material aid to areas struck by disasters, but should not encourage migration to the United States.”¹⁰⁴ There were additional concerns that allowing migration under these circumstances would cause a brain drain at a time when a country’s best and brightest were needed most. Others viewed the problems caused by a natural disaster as temporary, and that providing a means of permanent immigration to the U.S. was an inappropriate solution.

The only people admitted to the U.S. based on displacement by a natural disaster in that time period—not technically as refugees, but as part of an ad hoc admission—were a group of 1,500 citizens of Portugal living in the Azores Islands. Due to a series of earthquakes and volcanic eruptions in 1957, Congress passed the Azorean Refugee Act of 1958 to authorize issuance of special, non-quota visas.¹⁰⁵ The Azorean program was renewed in future years, allowing many thousands more to come.

When the refugee definition was ultimately amended by the Refugee Act of 1980, the natural calamity language was intentionally excluded but doing so was subject to little discussion.¹⁰⁶ At that time, the focus was rather exclusively on ensuring that the U.S. implemented its international law obligations. The drafters also wanted to eliminate the ideological and

¹⁰² Jeanhee Hong, “Refugees of the 21st century: environmental injustice,” Cornell J. of Law & Pub. Policy, Mar. 22, 2001, accessed March 30, 2011, <http://www.highbeam.com/doc/1G1-81596463.html>.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Pub. L. No. 85–892 (September 2, 1958). *See also* Report of the Committee on the Judiciary, United States Senate, Made by its Subcommittee on Immigration and Naturalization, Pursuant to S. Res. 235 (March 5, 1959) 86th Cong. 1st Sess., Report No. 78, accessed March 30, 2011, <http://ftp.resource.org/gao.gov/82-414/00002EE7.pdf>.

¹⁰⁶ Interview with David Martin, Warner-Booker Distinguished Professor of International Law, University of Virginia School of Law, Mar. 11, 2011. Martin served as Special Assistant to the Assistant Secretary for Human Rights and Humanitarian Affairs at the Department of State from 1978-1980 and participated in the drafting of the Refugee Act of 1980. He later served as INS General Counsel (1995-1998) and DHS Principal Deputy General Counsel (2009-2010).

geographical discrimination found in the earlier definition. Moreover, the wars and political conflicts that generated vast numbers of refugees in the years leading up to the Refugee Convention and Refugee Act informed decision makers' perspectives about who the refugee program should be designed to protect.

MAKING THE USRAP WORK BETTER FOR HAITIANS: A HUMANITARIAN TRACK

As a general rule, Haitians affected by the earthquake will not be served by the refugee program. Those who have been devastated by the earthquake will fail to meet the refugee definition in INA sec. 101(a)(42)(A). Refugee processing is also designed to primarily serve those who have left their country and are waiting in a country of first asylum. In-country refugee processing is permitted under INA sec. 101(a)(42)(B),¹⁰⁷ but only for those countries that the President designates in his annual determination – and Haiti is not one of those countries.¹⁰⁸ For FY 2011, the President also permitted the USRAP to consider in-country refugee applications from, “in exceptional circumstances, persons identified by a United States Embassy *in any location*.”¹⁰⁹ (emphasis added) This provision is typically interpreted to apply to individuals in urgent need of resettlement who cannot leave his/her home country in a timely and safe manner. As a result, as a group, Haitians are unlikely to be processed through the refugee program without a country-specific designation.

In-country refugee processing did take place in Haiti from 1992-1994, ending with the reinstatement of Aristide, but by most accounts it was a disaster.¹¹⁰ The program was opened with the hopes that it would deter Haitians from fleeing in large numbers by boat. In May 1992,

¹⁰⁷ INA § 101(a)(42)(B) states in relevant part, “(B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

¹⁰⁸ According to the FY 2011 Presidential Determination, only the following groups may engage in in-country refugee processing: a) persons in Cuba; b) persons in the former Soviet Union; c) persons in Iraq; and d) in exceptional circumstances, persons identified by a United States Embassy in any location.

¹⁰⁹ Presidential Memorandum – Refugee Admissions, “Fiscal Year 2011 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), Respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended,” Presidential Determination No. 2011-2, Oct. 8, 2010, accessed March 30, 2011, <http://www.whitehouse.gov/the-press-office/2010/10/08/presidential-memorandum-refugee-admissions>.

¹¹⁰ Bill Frelick, “In-Country Refugee Processing of Haitians: The Case Against,” *Refugee*, Vol. 21, No. 4, pp. 66-72 (2003).

President George H.W. Bush issued an executive order directing the U.S. Coast Guard to return to Haiti all Haitians interdicted at sea and direct those with protection concerns to apply to the in-country program in Port au Prince.¹¹¹ However, those who applied in-country were almost universally denied. By the end of the program, 54,219 applications were filed, 10,644 cases were decided, and only 817 were approved (7.7% approval rate).¹¹² Haitian applicants were seen as economic migrants whose claims of feared persecution by the Cedras regime did not fit within the refugee definition. In-country applicants also put themselves at great risk by self-identifying, visiting U.S. Government offices (which were across from a Haitian police office and flanked by criminal thugs) for interviews and processing, and waiting for visas in Haiti – all while the risk of persecution continued.¹¹³

The Presidential Determination for FY 2011 includes 5,500 visas for refugees from Latin America and the Caribbean (less than 7% of the worldwide allocation of 80,000). These spots are mostly intended for previously approved refugee cases from FY 2010 that did not travel and Cubans in-country; just 300 slots are planned for Colombian refugees referred by the United Nations High Commissioner for Refugees (UNHCR), refugees in the Dominican Republic and other Caribbean countries, and a handful of family reunification cases.¹¹⁴ The resettlement of Haitians is not currently a focus of the USRAP; indeed, despite the earthquake's recent devastation, Haiti is hardly mentioned in the FY 2011 Report to Congress. The report refers to processing some individual Haitian cases in FY 2010, but merely states that the U.S. "continues to support UNHCR's efforts to help governments in the Caribbean address the needs of Haitians and asylum seekers."¹¹⁵

In order to serve Haitians better, **the USRAP could be expanded to include a humanitarian track that would admit Haitians, victims of natural disasters, or other vulnerable populations.** There have been several proposals in recent years to make such changes. The first of these was

¹¹¹ The change in interdiction policy, perhaps in combination with in-country refugee processing, appeared to work. While 37,618 Haitian boat people were interdicted in FY 1992, that figure dropped to 4,270 people in FY 1993. Ibid, p. 67.

¹¹² Ibid, p. 68.

¹¹³ At a June 1992, Harold Koh (now State Department Legal Advisor) testified at a congressional hearing on the in-country refugee processing in Haiti. He called it "suicide" for Haitian refugees to access the in-country program, stating that the refugee "would have to leave hiding, pass numerous security roadblocks, enter the heavily militarized capital city of Port-au-Prince, travel to areas surrounding the U.S. Consulate and Embassy that are especially dangerous given the high concentration of security forces, present and identify himself to the Haitian security forces before entering, subject himself to their scrutiny, engage in highly adversarial proceedings with U.S. immigration officials, then repeat the entire process several times before receiving a final determination on his asylum request."

¹¹⁴ "Report to the Congress: Proposed Refugee Admissions for Fiscal Year 2011," p. 44.

¹¹⁵ Ibid, p. 41-42.

made by David Martin, who was commissioned by the Department of State Bureau of Population, Refugees, and Migration (PRM) in 2003 to assess the challenges faced by the USRAP and make recommendations for improvements. Among his recommendations was to broaden the class of persons eligible to be admitted as refugees through the USRAP. Rather than amending the refugee definition in INA sec. 101(a)(42), he suggested revising the statutory authority to admit refugees under INA sec. 207(c)(1)(A) to also allow admission of groups of people unable or unwilling to return to their country of nationality (or last habitual residence) due to a “genuine risk of serious harm in that country” and “whose resettlement is justified by humanitarian concern or is otherwise in the national interest.”¹¹⁶

This proposal had in mind long-stayer populations who had resided in refugee camps or first countries of asylum for extended periods of time with no durable solution or prospect for return. These individuals often had difficulty articulating a refugee claim that met the 101(a)(42) refugee definition, but were nevertheless in compelling need of resettlement on humanitarian grounds. There were additional processing advantages associated with this proposal; refugee applicants whose family relationships or personal stories do not neatly fit the narrow refugee definition or access criteria for the USRAP but who are in need of resettlement could more honestly relay their situation to DHS officers during the refugee interview.

The Refugee Protection Act of 2010 included a similar effort to broaden access to the USRAP.¹¹⁷ Like the Martin proposal, the bill would have amended INA sec. 207, expanding refugee resettlement to include those “who otherwise have a shared need for resettlement due to vulnerabilities or a lack of local integration prospects in their country of first asylum.”¹¹⁸ Hearings were held on the bill in May 2010, and an effort was made to include humanitarian track language in a State Department authorization bill in mid-late 2010, but ultimately the effort died with the end of the 111th Congress. It is noteworthy that such language was vetted and cleared by both DHS and the White House. However, the language could not be included in the authorization bill due to adverse scoring by the Congressional Budget Office (CBO), indicating that the revision would expand the number of refugee admissions (which remains in dispute) and as result, have a high cost to the government.¹¹⁹ But again, the costs of assisting displaced people in this way must be weighed against the high costs of carrying out other forms of humanitarian assistance through foreign aid.

¹¹⁶ David A. Martin, Migration Policy Institute, “The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement,” pp. 115-116 (2005). See complete text of the suggested amendment in Appendix C.

¹¹⁷ Refugee Protection Act of 2010, S. 3113, 111th Cong., 2nd Sess., pp. 64-66, accessed March 30, 2011, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s3113is.txt.pdf.

¹¹⁸ Refugee Protection Act of 2010, p. 65.

¹¹⁹ Interview on March 11, 2011 with David Martin, DHS Deputy General Counsel for Immigration at the time of these legislative deliberations.

If a revision to the USRAP were made to better accommodate Haitians or other victims of natural disasters, these efforts provide useful statutory language. Based on conversations with PRM, UNHCR, and others, it appears preferable to make revisions to the USRAP by amending INA sec. 207, rather than the refugee definition in INA sec. 101(a)(42), as that definition is also employed in the domestic asylum program. The Secretary of State would have the option of determining which groups of people should access the program under the new humanitarian criteria and could tailor the description to serve U.S. interests.

An additional benefit of bringing Haitians to the U.S. through the USRAP is the individual's access to refugee resettlement benefits. In order to maximize the likelihood that resettled Haitians succeed once in the United States, they would need the same types of housing assistance, job training, language skills, and sponsorship that traditional refugees receive. To achieve this without adding to the refugee resettlement budget, humanitarian-tracked Haitians could use unused refugee numbers (in the Latin America/Caribbean region or other region, if authorized), for which funding is lost at the end of the fiscal year if the spots go unused. This may be difficult given how close the USRAP has come in the past few years to reaching the refugee ceilings, not to mention the fact that the number of unused slots would have to be estimated near the end of the year. In the alternative, humanitarian-tracked refugees could use the unallocated reserve, which are not funded at the outset but are instead funded through savings within the program if called into use that fiscal year.¹²⁰

When asked for their thoughts about allowing Haitians to use a humanitarian track in the USRAP to migrate to the United States, government officials expressed concerns about using a humanitarian program for economic purposes. If the USRAP becomes the vehicle of choice, the benefit of economic development would have to be positioned as an ancillary effect of a primarily humanitarian program. Along a similar vein, PRM and others have voiced concerns about watering down the refugee definition if the USRAP is used to resettle "non-Convention" refugees. With modifications to INA sec. 207 rather than INA sec. 101(a)(42), plus the continuation of a robust, "traditional" refugee program, there is no reason why the addition of one should confuse the other.¹²¹

5. Parole

Section 212(d)(5)(A) of the INA provides the Secretary of Homeland Security with broad discretion to issue parole to foreign nationals on a case-by-case basis for urgent humanitarian reasons (Humanitarian Parole) or significant public benefit (Significant Public Benefit Parole or "SPBP"). Prior to a grant of parole, an applicant must demonstrate that a visa is not available,

¹²⁰ Refugee resettlement agencies have concerns about the unallocated reserve not being used by the government because the refugees are often there waiting in line.

¹²¹ For the purpose of this study, UNHCR was asked if they refer non-Convention refugees for resettlement anywhere in the world, and they currently do not.

why a waiver of inadmissibility is not available (if applicable), and that there are urgent, compelling reasons why the person needs to enter the United States. Parole status confers no benefits besides authorization to lawfully enter and remain in the United States temporarily, plus employment authorization for the duration of the parole. It does not put an individual on a path to permanent residence.

Humanitarian parole requests are handled by USCIS and are granted for the duration of the need, but no longer than one year (at which time the parolee can request re-parole to extend the stay).¹²² SBPB requests are handled by Immigration and Customs Enforcement (ICE) and are either referred by a U.S. Government office, such as a U.S. Embassy, or more commonly, by a law enforcement agency in connection with a legal case or investigation.

Parole was the vehicle of choice for bringing hundreds of thousands of refugees to the United States for many years prior to the creation of the USRAP. Indeed, it was the extensive, *ad hoc* use of parole that prompted concerns by Congress that a more formal system for refugee admissions – including consultations with Congress – was needed. Haitians and Cubans are among the many nationalities that historically benefited from broad exercise of parole authority. During the mass migrations of boat people in the 1980s and 1990s, many Haitians and Cubans were granted parole to enter the U.S. because no other visa or status was available. Parole status was one of the eligibility criteria for the Cuban/Haitian Entrant Program (CHEP), which provided funding and services through the Office of Refugee Resettlement (ORR) at the Department of Health and Human Services.¹²³

HOW TO MAKE THE PAROLE AUTHORITY WORK FOR HAITIANS

Haitians' need for parole has increased exponentially since the earthquake. A relatively small number of paroles have been granted since January 2010, the vast majority of which were orphans in the process of being adopted at the time of the quake.¹²⁴ As discussed above, DHS

¹²² USCIS, "Humanitarian Parole Fact Sheet," *updated* Apr. 15, 2010, accessed March 30, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b48efd9a46767210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

¹²³ Cuban/Haitian entrants are defined under section 501(e) of the Refugee Education Assistance Act of 1980." *See also* 8 C.F.R. § 212.5(h); USCIS, "Cuban Haitian Entrant Program," *updated* Feb. 16, 2011, accessed March 30, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=221ef7c555b2e210VgnVCM100000082ca60aRCRD&vgnnextchannel=acc3e4d77d73210VgnVCM100000082ca60aRCRD>. Per 8 C.F.R. § 212.5(h)(2), SBPB parolees do not qualify for CHEP program benefits.

¹²⁴ In April 2011, USCIS reported to the Philadelphia Inquirer that since January 2010, a total of 1,443 humanitarian paroles were approved for Haitians, including 1,163 for orphans being adopted. Michael

could grant parole on a case-by-case basis for already approved beneficiaries of family-based petitions through a Haitian Family Reunification Parole Program. The Secretary could also select some other subset of Haitians who would be favorably considered for humanitarian parole.

Parole as a tool already exists—no modifications are necessarily needed. DHS just has to favorably exercise its discretion to grant it. For those seeking to improve their economic situation by temporarily working in the United States, parole provides access to employment authorization. The primary challenge for parolees is figuring out what to do next; without special legislation authorizing adjustment of status, parolees are held in limbo with a path to permanent residency or citizenship. In addition, given Congress' historical concerns about the excessive use of parole, one can expect that any broad exercise of parole in great numbers would raise flags on Capitol Hill.

B. Haitians in the United States Seeking to Remain

Although this paper is focused on examining ways for Haitians currently in Haiti to come to the United States to work, it is important to understand the ways in which Haitians already present in the U.S. are given permission to stay. While some will become eligible for family-based and employer-sponsored petitions (admissibility issues aside), many thousands of Haitians live in the U.S. without status. Some of these overstayed their nonimmigrant visas, while others unlawfully arrived either by sea, across the southern border, or through document fraud at a port of entry.

1. Temporary protected status (TPS)

After years of requests by the Haitian advocates and the Government of Haiti itself, the Secretary of Homeland Security designated Haiti for Temporary protected status (TPS) on January 21, 2010, just days after the earthquake.¹²⁵ As the 18-month designation approached its expiration, the Secretary extended the designation through January 22, 2013 and re-designated Haiti for TPS, allowing those who came to the U.S. within the year after the earthquake to register.¹²⁶ The Secretary can designate a country (or a part of a country, like Kosovo) for TPS based on an ongoing armed conflict, an environmental disaster, or extraordinary and temporary

Matza, Philadelphia Inquirer, "Haitian Couple in Philadelphia hope for humanitarian parole for kin," Apr. 1, 2011, accessed April 19, 2011, http://articles.philly.com/2011-04-01/news/29370734_1_haitian-children-humanitarian-parole-immigration-law.

¹²⁵ 75 Fed. Reg. 3476 (Jan. 21, 2010).

¹²⁶ DHS, "Secretary Napolitano Announces the Extension of Temporary Protected Status for Haiti Beneficiaries," May 17, 2011, accessed May 17, 2011, http://www.dhs.gov/ynews/releases/pr_1305643820292.shtm.

conditions that make it unsafe for a country's nationals to return.¹²⁷ Designations based upon an environmental disaster require the Secretary to make three findings:

- There has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
- The foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
- The foreign state officially has requested designation under this sub-paragraph.¹²⁸

These designations can be made for 6, 12, or 18 months and renewed by the Secretary upon expiration if the qualifying conditions persist. The primary benefits of TPS include employment authorization, a stay of removal, and not being held in detention, though TPS beneficiaries can also apply for advance parole to return to the U.S. after brief travel abroad. Individuals with TPS are statutorily ineligible for federal benefits and assistance programs.

TPS was created by the Immigration Act of 1990 (IMMACT 90) and was a congressional response to the *ad hoc* use of "Extended Voluntary Departure" (EVD) as a means of allowing certain populations to remain in the U.S. for limited periods of time. Similar to the concerns about the use of parole prior to the creation of the refugee program, Congress sought to establish a standing legal mechanism with statutory designation and eligibility criteria – even though great discretion was left to the Attorney General (and now DHS Secretary) to implement the program.

TPS is primarily a retrospective program, addressing the concerns of a population already in the United States when a problem occurs in a home country. To qualify for TPS under the original designation, a Haitian registrant must have already been residing in the United States on January 12, 2010 (the date of the earthquake), physically present in the U.S. as of January 21, 2010 (a statutory requirement linking the presence date with the date of designation), and register for TPS within the one-year filing period ending on January 18, 2011. The re-designation of TPS allows those individuals who resided in the U.S. on January 12, 2011 to qualify as well. An applicant must also be admissible and not subject to certain bars (pertaining to persecutors, criminals, and national security concerns). TPS is a temporary status with no derivative benefits for spouse and children; it does not put the beneficiary on a path to adjustment of status. When the registration deadline arrived in mid-January 2011, more than 53,000 Haitians had applied for

¹²⁷ INA § 244(b)(1); 8 U.S.C. § 1254(b)(1).

¹²⁸ INA § 244(b)(1)(B); 8 U.S.C. § 1254(b)(1)(B).

TPS (with more than 46,000 approved), though the number of applications is far short of the estimated 100,000 Haitians who are eligible.¹²⁹

Haiti is not the first instance when TPS has been used to respond to environmental disasters. At present, El Salvador, Honduras, and Nicaragua are all designated for TPS based on the effects of a 2001 earthquake (El Salvador) and 1999 Hurricane Mitch (Honduras and Nicaragua). TPS designations like these are criticized for failing to be truly “temporary,” as it becomes politically difficult to terminate a designation, particularly those with vocal advocates and organized constituencies.¹³⁰ The sending government is often the most vocal advocate, as remittances sent home from to TPS beneficiaries are usually in the billions of dollars. In the eyes of many, the TPS designation for Haiti meets the objective of allowing (a large number of) Haitians to work in the United States and send remittances home, even though it only benefits those who were in the U.S. at the time of the earthquake.

2. Deferred Enforced Departure (DED)

Deferred Enforced Departure (DED) is quite similar to TPS, as it provides a stay of removal from the U.S. and employment authorization for a limited time.¹³¹ The most significant difference

¹²⁹ Kirk Semple, NY Times, “U.S. Sees Success in Immigration Program for Haitians,” Jan. 19, 2011, accessed March 30, 2011, http://www.nytimes.com/2011/01/20/nyregion/20haitians.html?_r=1; Georgia East, “Many Haitians in U.S. Afraid to Seek Amnesty,” Bellingham Herald, Jan. 11, 2011 (quoting USCIS spokesperson, Ana Santiago), accessed March 30, 2011, <http://www.bellinghamherald.com/2011/01/11/1810720/many-haitians-in-us-still-afraid.html>. Many have speculated on the reasons why many Haitians did not register for TPS, including the high fees to apply (as much as \$470 initially, plus costs to renew documents if the designation is extended), fear of bringing themselves to the attention of ICE, and misinformation about the availability of the benefit. It is interesting to note that USCIS prepared to adjudicate up to 200,000 Haitian TPS applications. USCIS Office of the Ombudsman, “Annual Report 2010,” June 30, 2010, p. 84, accessed March 30, 2011, http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf

¹³⁰ Montserrat is the only example of a TPS designation based on an environmental disaster that was successfully terminated. The Secretary of Homeland Security concluded that the ongoing volcanic eruptions that rendered 75% of the island uninhabitable and predictions for them to continue for decades into the future no longer met the statutory requirement that the disaster be “temporary.” This decision was softened somewhat by an opportunity that arose for Montserratians to become citizens of the United Kingdom. USCIS, “Termination of TPS for Nationals of Montserrat: Questions and Answers,” July 6, 2004, accessed March 30, 2011, http://www.uscis.gov/files/pressrelease/MontserratQATPS_7_6_04.pdf.

¹³¹ USCIS, “Deferred Enforced Departure,” *updated* Feb. 15, 2011, accessed March 30, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=fbff3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=fbff3e4d77d73210VgnVCM100000082ca60aRCRD>.

between the programs is the source of authority to designate a country; DED derives from the President's foreign policy and prosecutorial authority, rather than any authority given to the Secretary of Homeland Security. The different sources of authority for these two programs are not inconsequential, as the President is not constrained by statute to establish any particular eligibility criteria. In the past, for example, DED was granted to certain groups of Chinese students in the wake of democracy uprisings, as opposed to all Chinese in the U.S. at a certain time.

DED is unavoidably retrogressive, however, as it does not provide a means for people to lawfully enter the U.S.; the President is simply deferring enforcement of an alien's departure from the United States. DED is most often used when a group of people or country does not or no longer meets the statutory criteria for TPS, but there are foreign policy or other reasons for allowing those individuals to temporarily remain. It has also been used when there is reason to believe that Congress is planning to introduce legislation that would benefit a population and the President chooses not to remove those people in the interim.

Historically, the President has authorized DED only six times, including once for Haiti, beginning on Dec. 23, 1997. This one-year DED designation was made in large part because President Clinton was expecting Congress to pass HRIFA, which the President signed into law on Oct. 21, 1998. INS automatically extended the employment authorization documents of Haitian DED beneficiaries until December 1999 to provide an opportunity for Haitians to apply for adjustment of status under HRIFA. At present, Liberia is the only country designated for DED.¹³²

3. Deferred Action

Deferred action is discussed briefly here because it is often part of the package of "benefits" that DHS offers to nationals whose countries experience natural disasters (in lieu of or in addition to TPS) and because it is frequently confused with DED. Deferred action is nothing more than a discretionary form of relief that signals that no further enforcement actions will be taken, such as deportation, against an individual for an interim period of time. It does not derive from any statutory authority but is considered an inherent part of the agency's prosecutorial discretion and ability to determine its own priorities.¹³³ When USCIS grants deferred action, the alien is eligible for employment authorization.¹³⁴

Much like parole, deferred action is a flexible tool to be used with great discretion. Although granted on a case-by-case basis, deferred action can be made available to a group, such as was

¹³² Memorandum from President Obama to the Secretary of Homeland Security dated March 18, 2010.

¹³³ "Recommendation from the CIS Ombudsman to the Director, CIS," Apr. 6, 2007, accessed March 30, 2011, http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf.

¹³⁴ 8 C.F.R. § 274a.12(c)(4).

done for certain Haitians repatriated to Florida as well as Hurricane Katrina-affected foreign students.¹³⁵

4. Other Temporary Relief Measures

Apart from TPS, DED, and deferred action, DHS has other administrative processing tools at its disposal that it can employ more quickly, more temporarily, and with less political fall-out. These measures typically aid those individuals already in the United States who have either a lawful immigration status that needs to be extended or changed, or who have a benefit application pending that needs to be expedited and favorably considered.

An alien whose status is expiring is faced with a predicament in the face of a natural disaster – Stay in the U.S. and risk overstaying one’s status? Or depart the U.S. and face grave uncertainties in a homeland trying to recover? Temporary relief measures are intended to relieve affected aliens of that quandary.

In the case of Haiti, USCIS offered the following measures to all Haitians in the United States soon after the earthquake:

- Favorable adjudication, where possible, of requests for change or extension of nonimmigrant status;
- Acceptance of applications for change or extension of nonimmigrant status submitted after the alien’s authorized period of admission has expired;
- Re-parole of aliens granted parole by USCIS;
- Extension of certain grants of advance parole;
- Expedited parole;
- Expedited processing of advance parole requests;
- Favorable and expedited adjudication, where possible of requests for off-campus employment authorization due to severe economic hardship for F-1 students;
- Expedited processing of immigrant petitions for children of U.S. citizens and LPRs;
- Issuance of employment authorization, where appropriate; and
- Assistance to LPRs stranded overseas without documents.¹³⁶

¹³⁵ “Recommendation from the CIS Ombudsman to the Director, CIS,” Apr. 6, 2007, p. 2, accessed March 30, 2011, http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf

¹³⁶ USCIS, “Haitian Relief Measures: Questions and Answers,” updated Dec. 21, 2010, accessed March 29, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=855260f64f336210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. It should also be noted that in January 2010, ICE temporarily suspended deportations to Haiti, but removals were resumed in January 2011. U.S. Immigration and Customs Enforcement, “ICE Assists in

These measures come in handy, particularly if a country that experienced a natural disaster does not want or request a TPS designation, perhaps to encourage its best and brightest to return home to aid the recovery. At other times, making a TPS designation is a political or bureaucratic challenge, such as when only a small part of a large, populous country is affected by a disaster. Such was the case in December 2004, when the Indian Ocean earthquake and tsunami devastated many countries in whole or in part. Temporary relief measures were offered to foreign nationals in the U.S. originating from Sri Lanka, Maldives, and Seychelles, as well as the affected regions of Bangladesh, Burma, India, Indonesia, Kenya, Malaysia, Somalia, Tanzania, and Thailand.¹³⁷ These kinds of measures have recently been offered to nationals of Japan, in light of the March 11, 2011 earthquake and tsunami.¹³⁸ Following each of those earthquakes/tsunamis, USCIS presented these temporary relief measures *in lieu of* a TPS or DED designation. In the case of Haiti, the following measures were implemented *in conjunction with* a TPS designation to further support Haitian nationals already in the United States.

VI. Eligibility Considerations

For the purpose of this paper, the goal in identifying options for Haitians to come to the United States is to utilize migration as one of many tools to help Haitians suffering from the aftermath of a horrific catastrophe. This paper considered migration options that would bring the following categories of Haitians to the U.S.:

- Haitians who are currently in Haiti
- Those who do not have any other means of entry
- Those in economic need as a result of the earthquake
- Those who would benefit most from work authorization and livelihood opportunities

Haiti Relief Effort,” Jan. 18, 2010, accessed March 29, 2011,

<http://www.ice.gov/news/releases/1001/100118washingtondc.htm>;

¹³⁷ USCIS Memorandum for Service Center Directors, et. al., “Relief Efforts for Aliens Affected by the December 26, 2004 Tsunami,” Jan. 10, 2005, accessed March 29, 2011,

http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/tsunamiguide011005.pdf.

¹³⁸ USCIS, “USCIS Reminds Japanese Nationals Impacted by Recent Disaster of Available Immigration Benefits,” Mar. 17, 2011, accessed March 29, 2011,

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=d219c337ab5ce210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

Interestingly, nationals of Japan were offered expedited processing of *immediate relative petitions* (not just children), whereas nationals of Haiti received expedited processing only for *children of U.S. citizens and LPRs*, perhaps based on volume of respective caseloads.

Given the devastating effects of the earthquake, several million Haitians could possibly fit this category. The numbers could be greatly limited by a variety of additional criteria, applied either separately or jointly. The next section explores additional subsets of criteria.

A. Criteria for Entry

In identifying options for Haitians to come to the U.S. the challenge of establishing access and eligibility criteria was mentioned by several stakeholders interviewed. If the policy recommendation is not to pursue a nationality-alone-based program where beneficiaries are chosen at random, like a lottery, or based upon the order in which they apply, like a family reunification parole program, then additional criteria will be needed. One refugee expert interviewed posed the question, “How will you positively discriminate against people?” There are too many people who fit both humanitarian and economic vulnerability criteria as a result of the earthquake. Here are examples of criteria that could be used to narrow the number of people eligible for any new or revised immigration benefit.

Humanitarian Criteria:

Earthquake-affected – those who were in the earthquake affected zone at the time of the disaster who can prove how they were personally affected by losses they sustained

Displaced – those who remain dispossessed of their home or normal place of residence, whether living in a camp or not

Vulnerable – those who are at-risk of harm or discrimination based on a social characteristic such as female-headed households, those who are newly handicapped those who lost primary relatives who were their means of support¹³⁹

Economic Criteria:

Livelihood – those with a history of working who have lost their means to an income as a result of earthquake devastation

Household Income – those with an annual household income below \$5,000-\$10,000 (figure here is based on Haiti GDPx4 plus – depending on whether remittances count as income for purposes of GDP calculations)

¹³⁹ U.S. Committee for Refugees and Immigrants (USCRI) protection programs in Haiti found that most especially vulnerable individuals (EVIs) were in a situation compounded by the loss of primary relatives, leaving individuals without any support group to collectively vie for their survival. This was particularly true for women who had lost their husbands, high school and college age youth who lost their parents, the elderly who lost all family, and newly handicapped.

Living conditions – those who can prove that their overall living conditions and quality of life has significantly deteriorated by post-earthquake hardships

Social Indicators:

Gender – admitting women may be more compelling

Age – admitting people of working age or university students

Individuals or households – admitting individuals could initially be more feasible than families

When considering which eligibility criteria would be optimal in the case of Haiti, one must also examine the practical processing realities. Regardless of how narrow the program is tailored, the need to migrate remains the same. Individuals desperate to access the program may present fraudulent documents or testimony to demonstrate eligibility. Even legitimate beneficiaries will likely have trouble securing authentic documents from Haitian government offices to prove basic biographical facts like birthdate, marriage, and education. It is likewise difficult to prove a negative, like homelessness or poverty, other than through testimony. Former INS officials recount enormous challenges getting consistent testimony from Haitians during the in-country refugee processing of the 1990s in light of cultural issues that affected how personal stories are told. As has been said about other immigration programs, such as the USRAP that operate in countries with less infrastructure, “If you ask for a document, you’ll get it.” Therefore, to have a successful program, a balance must be struck between targeting the right population and making the adjudicative process run smoothly.

Apart from eligibility criteria, the recommended mechanism must consider whether the migration should be temporary, circular, or permanent. While temporary programs may suit the more short-term nature of natural disasters, Haiti may well be a case in point where the earthquake devastation is unavoidably long-term. Temporary work programs in the past, such as the Bracero program in the 1950s and 1960s, typically enable workers to build equities and relationships in the U.S. that discourage them from returning to their home countries. Mechanisms to encourage return at the conclusion of the program would need to be incorporated into any short-term program to make it truly temporary.

Timeframe:

Temporary – limited period for purpose of employment and remittances

Circular – longer period with requirement to return

Permanent – settlement in the United States with path to citizenship

B. Selection Process for Entry

Due to the large number of people likely to be eligible for any new or revised immigration benefit, the selection process should be guided not only by the criteria, indicators, and proof listed above but may also require a more intentional selection process. The following options could be considered.

Individual selection – This is most likely in terms of a visa lottery (modeled after the Special Cuban Migration Program) or immigrant visas.

Overseas Processing Entity (OPE) – The refugee admissions program relies on contracts with an agency to document cases of refugees eligible for the program, recommend specific persons for admission, and ensure that bona fide candidates are presented to the government which then selects and “assures” cases to enter the U.S. The International Organization for Migration (IOM) serves as an OPE for refugee cases referred to the United States in several regions, and could easily serve as an OPE for Haiti due to its leadership over the Camp Coordination and Camp Management (CCCM) cluster within the UN system. IOM has registered many of the people who remain displaced, including social demographics and vulnerability indicators.

In the case of parole, there are indicators that applicants who have assistance preparing their documents and making a case are more likely to receive the benefit. A new parole program for Haitians may require a Collection Center to receive applicants outside the vicinity of the embassy in Port-au-Prince.

C. Benefit Eligibility

Due to the economic conditions in Haiti, it is difficult for Haitians who migrate to the U.S. to sustain themselves here without support. Those who arrived in Florida on tourist visas after the earthquake were not eligible for state benefits.¹⁴⁰ The Haitian community turned to immigration and refugee agencies, which raised private funds rather than federal resources to assist newcomers.

This raises questions about whether having family already in the U.S. should be part of the eligibility criteria for any new or revised immigration benefit. People in Haiti with family members abroad are more likely to receive remittances, and would not be considered those most in need from an economic perspective. Yet, those without family ties who live in untenable

¹⁴⁰ Interview with Florida Department of Children and Families

circumstances may not have a formal education or speak English, two qualifications that are important for finding meaningful work in the U.S.

Haitians that meet the disaster-affected eligibility criteria discussed previously and make a compelling case for entry would arguably be in need of integration services in the U.S. to help them find affordable housing, employment, and educational opportunities such as language training. These benefits are not available to most categories of migrants.

However, the refugee resettlement program offers an innovative model for ensuring early self-sufficiency of new arrivals. Resettlement program benefits are split between the Department of State Bureau for Population, Refugees and Migration (PRM), and the Department of Health and Human Services Office of Refugee Resettlement (ORR).

The Reception and Placement (R&P) grant awarded by PRM is intended to help refugees achieve early economic self-sufficiency and cover costs of living in the 30-90 day window after arrival. The program is administered by national voluntary agencies (VOLAGs), which give refugees a cash grant to assist with integration needs including first month's rent, furnishings, food, clothing, transportation, and health care.¹⁴¹ The VOLAG receives a portion of the funding to provide case management services to the refugees including the identification of housing, employment, and educational opportunities.¹⁴²

Assistant Secretary of State Schwartz at PRM raised this grant from \$900 to \$1,800 in January 2010 to adjust for inflation since the Refugee Act of 1980, enabling refugees who were hard pressed to find jobs and housing in the recession to have additional support.¹⁴³ Very few Haitians ever benefit from R&P funding because they are usually admitted as asylum seekers or parolees, who are not part of the refugee admissions program, but are covered by domestic benefits provided by the Department of Health and Human Services (HHS).

The Office of Refugee Resettlement (ORR) within HHS offers benefits for refugees and other categories of migrants including Cuban and Haitian entrants, victims of trafficking, and unaccompanied minors. ORR has several kinds of benefits that facilitate integration:

¹⁴¹ National voluntary agencies include the U.S. Committee for Refugees and Immigrants (USCRI), U.S. Conference of Catholic Bishops (USCCB), International Rescue Committee (IRC), Hebrew Immigrant Aid Society (HIAS), Lutheran Immigration and Refugee Services (LIRS), World Relief, Episcopal Migration Ministries (EMM), Church World Service (CWS), and Ethiopian Community Development Council (ECDC).

¹⁴² United States, Department of State. "FY11 R&P Program Announcement," accessed March 30, 2011 at www.state.gov/g/prm/141763.htm.

¹⁴³ It is unclear whether FY11 and FY12 budget cuts will impact this increase, which was intended to be permanent.

Transitional and Medical Assistance (TAMS) reimburses states for the cost of transitional and medical benefits for refugees up to eight months after their arrival. To be eligible for TAMS, refugees have to be enrolled in employment services aimed at ensuring economic self-sufficiency as soon as possible.

The Match Grant program provides refugees with an alternative to state welfare benefits by using matched public-private funds to expedite self-sufficiency. Funds can be used to provide an array of services to refugees that will help them find employment, and can be also be used to help refugees start small businesses. The State of Florida has the largest Match Grant program in the country due to Haitian and Cuban Entrants making use of this benefit. Those enrolled in the Match Grant program cannot make use of any other state or federal benefits.

Haitian and Cuban parolees are commonly described as “Cuban/Haitian Entrants,” which describes their eligibility for ORR benefits but is not a legal immigration status. The following Haitians are eligible for ORR benefits:

1. Granted parole
2. Pending asylum application
3. In removal proceedings
4. I-94 Arrival/Departure record pending

Thus, for the purpose of receiving ORR benefits, the best immigration status for Haitians coming to the U.S. as part of earthquake relief would be parole, although this would leave Haitians with a precarious status without congressional action allowing them to adjust. Parole is more feasible, given that victims of natural disaster are unlikely to be granted asylum without a persecution claim. ORR benefits are not available to those Haitians who have been granted TPS.

Government officials indicate that Haitians with parole take longer to become employed because of the time it takes to process their Employment Authorization Document (EAD), which is necessary before enrolling in the Match Grant program. A parolee must also wait to have the EAD prior to applying for a Social Security card, which can also delay employment eligibility. To complicate matters further, a parolee is not eligible for Medicaid and other state based social services until s/he has a Social Security number. This process can take up to three months after receiving parole.

VII. Preferred Options

Given all the options considered in this study (see Options for Migration Matrix in Appendix A), the following migration tools are outlined and ranked by order of preference according to their feasibility:

A. Administrative Tools

1. Add Haitians to the list of nationalities which qualify for the H-2A/H-2B Visa
 - a. Unskilled labor visa would bring in economically disadvantaged
 - b. There is no cap on H2As
 - c. There would be no benefit eligibility
2. Establish a Haitian Family Reunification Parole Program
 - a. Modeled after the Cuban Family Reunification Parole Program
 - b. Depends on family ties
3. Exercise parole for a new “earthquake-affected” category of Haitians
 - a. Establish new eligibility criteria
 - b. Most likely to admit those with no other options

B. Legislative Fixes

1. Amend the V Non-immigrant Visa to allow for Haitian family reunification
 - a. Similar to parole, allows people already approved for visa to enter the U.S. to wait out their time here before the visa number comes up
 - b. Legislation was introduced to accomplish this, the Haitian Emergency Life Protection Act of 2010, but was never fully considered
2. Establish a Haitian lottery modeled after the Cuban lottery
 - a. Allows for random selection of individuals without ties to the U.S.
 - b. Generic lottery makes it difficult to ensure those who enter are economically disadvantaged
 - c. Establish new eligibility criteria
3. Humanitarian Track in the U.S. Refugee Admissions Program
 - a. Is part of the Refugee Protection Act of 2010
 - b. Largely discretionary as to which “non-refugees” can enter
 - c. Recommended by other papers, such as the David Martin Report
 - d. Allows for full integration benefits toward economic self-sufficiency
 - e. Allows for eventual adjustment to citizenship

VIII. Conclusion

There is currently no readily available mechanism to admit disaster-affected populations to the United States. However, there are several administrative and legislative options worth exploring. In order to determine which immigration mechanisms best serve this purpose, the beneficiary criterion needs to be narrowed and the compelling reasons for admission need to be made clear.

Looking at the case of Haiti, the compelling circumstances of the January 2010 earthquake opened some doors to Haitians already in the United States, such as TPS, but it did not open new channels of entry for those affected by the disaster. This paper presents a number of options for migration that have the potential to empower Haitians without the means to sustain themselves and strengthen U.S. efforts to contribute to the economic development of Haiti. For example, employment based visas have the potential to generate substantial income for Haitians in the U.S. and their families in Haiti through remittances. Employment visas could also provide Haitians with the working knowledge and skills to make business investments in Haiti, furthering the growth of the private sector, a critical aspect of developing a tax base for democratic governance.

Ironically, the same economic circumstances that make disaster-affected populations a compelling group to admit to the United States also keep them from a number of visa options where migrants are required to show they won't become a public charge upon arrival. Waiving this criterion for visa eligibility would enable those who really need the relief in order to come to the U.S.

This paper seeks to generate discussion between refugee and immigration advocates and the U.S. Government agencies that already have statutory authority to provide more options for Haitians affected by the earthquake. Certain visa categories discussed in the paper only require the approval of the Secretary of Homeland Security and/or Secretary of State, and could be further considered in consultation with the White House as part of the U.S. Government Strategy for Haiti.

The United States could also consider negotiating a bilateral agreement with the new Haitian Government to regularize migration, much in the same way that was done with Cuba to discourage people from taking to the high seas, or is regularly done with Mexico. Such an agreement would serve the interests of both States seeking to foster economic development and expedite disaster recovery.

Achieving other options for disaster-affected populations to migrate to the U.S., such as the generous use of parole and a humanitarian track in the refugee program, would require a more comprehensive political effort. Lessons from previous efforts to admit new populations such as Iraqis, who assisted U.S. forces during the Iraq War, indicate that the Executive Branch is willing to expand immigration benefits when Congress takes the lead. Given congressional

preoccupation with the budget and the next election cycle, passing any legislation through the House and Senate would require a concerted strategy with multiple agencies behind the proposal.

ABOUT THE AUTHORS

Royce Bernstein Murray is an attorney who specializes in the field of refugee, human rights, and immigration law. She is currently an adjunct professor at the University of the District of Columbia David A. Clarke School of Law and an independent humanitarian consultant. She is the author of “Deportation in the Time of Cholera: DHS’s Mixed Response to Haiti’s Earthquake” (Immigration Policy Center, May 2011) and co-author of “Second Annual DHS Progress Report: An Analysis of Immigration Policy in the Second Year of the Obama Administration” (April 2011) and “DHS Progress Report: The Challenge of Reform,” (March 2010). In May 2010, Ms. Murray traveled to Haiti with a delegation from the Lawyers Earthquake Relief Network and was a contributing author to the follow-up report “Our Bodies are Still Trembling: Haitian Women’s Fight Against Rape,” (July 2010). Ms. Murray is presently a member of the American Bar Association’s (ABA) Haiti Task Force. She worked for six years for U.S. Citizenship and Immigration Services (USCIS) as Associate Counsel on the Refugee and Asylum Law Division where she was the primary legal contact for the TPS program. Ms. Murray began her government career with the Immigration and Naturalization Service (INS) as a Presidential Management Fellow and Asylum Officer. She received her J.D. from the Georgetown University Law Center.

Sarah Petrin Williamson is a humanitarian protection expert and senior consultant with the Global Emergency Group (GEG), which provides professional services to the humanitarian response industry. Sarah has had an extensive career establishing refugee and humanitarian programs around the world. She has built partnerships between United Nations agencies, international NGOs, and local civil society leaders in response to natural disasters such as the earthquake in Haiti and tsunami in Southeast Asia. She has also lead international teams in complex emergencies along the borders of Somalia-Kenya and Afghanistan-Pakistan. Sarah has been the Director of International Programs at the U.S. Committee for Refugees and Immigrants (USCRI), where she had earlier served as the Director of Government Relations and Spokesperson. Sarah worked in Haiti immediately after the January earthquake to support local organizations, provide critical supplies for especially vulnerable populations, and monitor the relocation of internally displaced people from camps to formal settlements. Previously she served as a Senior Advisor to the International Committee of the Red Cross (ICRC), the Outreach Director for the United Nations Foundation, and a staffer for U.S. Senator Olympia Snowe. She holds a Masters Degree in Forced Migration from Oxford University.

Appendix A: Options for Haitian Migration Matrix

OPTION	BENEFIT CONSIDERATIONS	LEGAL LIMITATIONS	ACTION NEEDED
ADMINISTRATIVE TOOLS			
Non-Immigrant Worker Visa <ul style="list-style-type: none"> • H-2A (agricultural/seasonal jobs) • H-2B (non-agricultural jobs) 	-Employment authorization -No ORR benefits	-Haiti excluded under regulatory criteria -Quotas for H-2B; long wait -Questions about immigrant intent -Requires DOL labor certification	-Exercise of discretion to include Haiti under existing regulatory criteria
Parole <ul style="list-style-type: none"> • Haitian Family Reunification Parole Program • Humanitarian Parole 	-Employment authorization -ORR/HHS CHEP Status and corresponding ORR benefits -Broad discretionary authority	-Discretionary -Reluctance to use for large populations -Temporary (typically not longer than 1 yr, but renewable) -No adjustment to LPR status	-Exercise of discretion under existing statutory authority to grant parole -Administrative decision regarding what subset of the population would be eligible to apply; could model a Haitian Family Reunification Parole Program after Cuban program for approved family visa beneficiaries -Legislation needed to adjust status of parolees to LPR status; could update HRIFA
LEGISLATIVE FIXES			
Non-Immigrant “V” Visa for spouse and children of LPRs	-Employment authorization -Does not increase the total number of people coming to US b/c they are family petition beneficiaries (waiting for a visa)	-Established by the LIFE Act of 2000, which only allows people to apply if their underlying I-130 family petition was filed on or before Dec. 21, 2000	-Legislation needed to amend and update relevant the filing deadline
Visa Lottery * Haiti Visa Lottery * Diversity Visa (DV) Lottery	-LPR Status -Can benefit those without family or a job offer in the U.S. -No ORR benefits	-Haiti excluded from DV lottery due to sufficient number of Haitian immigrants through other channels -DV lottery requires high school education and job training	-Legislation needed to create Haitian lottery in Haiti modeled after Cuba visa lottery OR -Legislation to exempt Haitians from

		-DV lottery applicants subject to public charge inadmissibility grounds	cap that blocks access to DV lottery -Would need a waiver from public charge inadmissibility
U.S. Refugee Admissions Program (USRAP)	-Full integration services -Housing; employment -Case management -R&P-State; ORR-HHS benefits -Employment authorization -Path to LPR Status, Citizenship -Does not necessarily increase total number of people coming to US b/c they would fall within regional allocations for USRAP	-Victims of natural disasters won't meet refugee definition to qualify -Overseas Processing Entity (OPE) likely needed to facilitate applications in-country -May require additional appropriations for State MRA Account, ORR TAMS Account	-Legislation needed to amend USRAP to include those who are not "refugee" under the definition at INA §101(a)(42) -Could use unused regional allocation of refugee admissions for Caribbean OR unallocated reserve
Employment-Based Immigrant Visa • EB-3 Immigrant Visa for unskilled workers	-LPR Status -Does not need to increase total number of people coming to US b/c they would fall within existing cap	-Cap of 10,000/yr reached quickly and 5,000 of those are used for NACARA -Requires an employer to petition and get a labor certification from the Dept. of Labor	-Legislation to allocate some of the 10,000 visas to Haiti or other victims of natural disaster to help them rebuild; NACARA demand on EB-3 visa numbers should be diminishing
Family-Based Immigrant Visas • Immediate Relatives • Preference Categories	-LPR Status -No backlog for immediate relatives	-Average 4-11 year wait for preference relatives depending on relationship -Cap on any one country receiving more than 7% of visas/yr	-Legislation to exempt Haiti from 7% cap to minimize or eliminate backlogs -Parole into the U.S. approved beneficiaries during wait for visa OR legislation needed to update and issue V nonimmigrant visas to those with long-time pending petitions

Appendix B

Relevant provisions, Refugee Protection Act of 2010 (S. 3113), pp. 65-66

SEC. 20. AUTHORITY TO DESIGNATE CERTAIN GROUPS OF REFUGEES FOR CONSIDERATION.

(a) IN GENERAL.—Section 207(c)(1) of the Immigration and Nationality Act (8 U.S.C. 1157(c)(1)) is amended—

- (1) by inserting “(A)” before “Subject to the numerical limitations”; and
- (2) by adding at the end the following:

“(B)(i) The Secretary of State, after notification to Congress, may designate specifically defined groups of aliens **whose resettlement in the United States is justified by humanitarian concerns or is otherwise in the national interest** and who share common characteristics that identify them as targets of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion **or who otherwise have a shared need for resettlement due to vulnerabilities or a lack of local integration prospects in their country of first asylum.**

“(ii) An alien who establishes membership in a group designated under clause (i) to the satisfaction of the designee of the Secretary of Homeland Security shall establish, for purposes of admission as a refugee under this section, that such alien has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

“(iii) A designation under clause (i)—

“(I) shall expire at the end of each fiscal year; and

“(II) may be extended by the Secretary of State after notification to Congress.

“(iv) An alien’s admission under this subparagraph shall count against the refugee admissions goal under sub-section (a).

“(v) A designation under clause (i) shall not influence decisions to grant, to any alien, asylum under section 208, protection under section 241(b)(3), or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York December 10, 1984.”

(emphasis added)

Appendix C

David Martin's Proposed USRAP Humanitarian Track

Source: David A. Martin, Migration Policy Institute, "The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement," pp. 115-116 (2005).

Amend section 207(c)(1) of the Immigration and Nationality Act to read, in pertinent part:

(A) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Secretary of Homeland Security may, in the Secretary's discretion and pursuant to such regulations as the Secretary may prescribe, admit

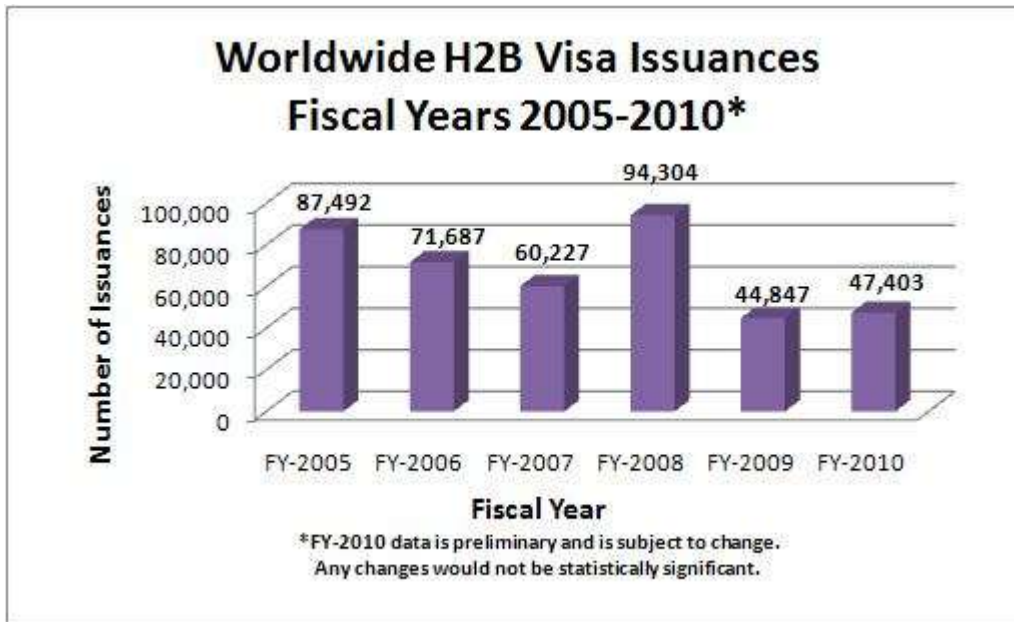
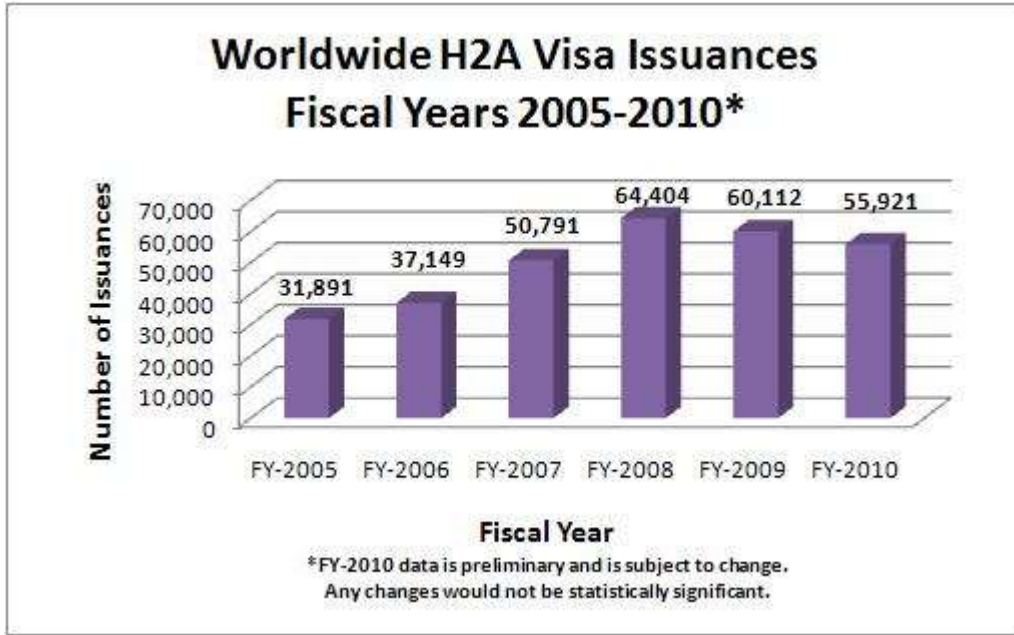
- (i) any refugee, or
- (ii) any person who is a member of a group or category designated under subparagraph (B), who is not firmly resettled in any foreign country, *is determined to be of special humanitarian concern* to the United States, and is admissible...as an immigrant under this Act.

(B) The President may, in such special circumstances as the President after appropriate consultation...may specify, designate specific groups or categories of persons who may be admitted as refugees under this section, *without regard to the definition appearing in section 101(a)(42)*. Such designation shall apply only to a group or category that the President determines is unable or unwilling to return to the country of nationality or, in the case of groups or categories composed in whole or in part of persons having no nationality, to the country of last habitual residence, owing to a genuine risk of serious harm in that country, and *whose resettlement in the United States is justified by humanitarian concern or is otherwise in the national interest*. Any such designation shall take effect only with respect to admission under this section and shall have no bearing on decisions to grant asylum under section 208 or protection under section 241(b)(3) or under the regulations implementing the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

(emphasis added)

Appendix D

H-2A and H-2B Admissions, FY2005-FY2010



Source: Department of State, Bureau of Consular Affairs, available at:
http://travel.state.gov/visa/statistics/graphs/graphs_4399.html.