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Influencing Immigration: The Need for Immigration Reform in the Age of Social Media Influencers

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Influencing Immigration: The Need for Immigration Reform in the Age of Social Media Influencers

Cover Page Footnote

J.D. Candidate at LMU Loyola Law School, 2022. The author would like to thank Professor Kathleen Kim and the Loyola of Los Angeles Entertainment Law Review's staff and editors for their time and assistance in publishing this Note. Specifically, the author would like to thank Genie Doi for inspiring this Note and for her support throughout the writing process. Additionally, the author would like to give a special thank you to her friends and family for their constant love and support.

INFLUENCING IMMIGRATION: THE NEED FOR IMMIGRATION REFORM IN THE AGE OF SOCIAL MEDIA INFLUENCERS

*Sydney Wong**

The social media “influencer” has become a powerful marketing tool for American businesses to advertise their products and services. Foreign influencers have the ability to help American businesses reach international markets and are an effective solution to the marketing challenges that come with trying to break into these international markets. However, if a foreign influencer visits the United States and performs paid marketing work for an American business without a work visa, then the influencer will have violated U.S. immigration law. Indeed, even a seemingly harmless sponsored Instagram post may be a violation.

The clear solution to this problem would be for the foreign influencer to obtain a work visa in advance; however, current U.S. immigration law makes obtaining one very difficult. Further, the restrictive conditions of the work visas available to foreign influencers are not favorable due to unique characteristics of the influencer occupation. This Note examines the shortcomings of immigration law in the context of social media influencers and proposes reforms that would allow and encourage foreign influencers to legally perform marketing work in the United States for American businesses.

First, this Note examines each of the visa categories that are available to foreign influencers and addresses the challenges they are likely to face in the petitioning process and even after they have been approved for the visa. Next, the Note proposes reforms to current U.S. immigration law and alternatively suggests a new visa category for influencers. Finally, this Note provides general recommendations for reform in consideration of other areas of

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law that have also struggled to address the new norm that is social media marketing.

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I. INTRODUCTION

A popular Twitch streamer, who is a Canadian citizen, travels to the United States during the summer to visit family. She is a Twitch partner and sponsored by several American brands including Nike and Revolve Clothing. During her trip, she sticks to her streaming schedule of Tuesdays and Fridays. She is later paid by Twitch for subscriptions to her channel and the sponsors compensate her for advertising their products while streaming. Because the streamer is not an American citizen and has no visa or green card, she has violated immigration law by performing unauthorized and compensated work for American businesses on American soil.¹ The violation of her visitor status could subject her to negative consequences on future visa applications or attempts to acquire permanent residence or naturalized U.S. citizenship.² The American businesses who paid her may also be penalized through fines and potential business license revocation.³

In 1986, former President Ronald Reagan signed the Immigration Reform and Control Act (IRCA), which made it “unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”⁴ The purpose of the law was to curb illegal immigration into the United States by deterring employers from hiring undocumented immigrants.⁵ Yet, lawmakers in 1986 did not anticipate the globalization and rapid technological growth over the decades to come, let alone anticipate the types of jobs that would arise from such expansion.

There is significant tension between immigration law and how social media operates in the real world. While immigration law remains largely

1. Visitor Visa, U.S. DEP'T ST., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html/visa> [<https://perma.cc/6GPK-GBQH>] (stating that employment is not permitted while on a visitor visa); *see* 8 U.S.C. § 1324a(a)(1)(A).

2. *See* 8 U.S.C. §§ 1227(a)(1)(C), 1182(a)(9), 1255(c)(8).

3. TENN. CODE ANN. § 50-1-103(e)(1)(B) (West through 2021 Sess.); *see* 8 C.F.R. § 274a.10(a)–(b); *see, e.g.*, Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 600 (2011);

4. 8 U.S.C. § 1324a(a)(1)(A).

5. *See generally* Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov. 16, 2011), <https://www.migration-policy.org/article/its-25th-anniversary-ircas-legacy-lives> [perma.cc/QR8H-DPGW].

unchanged, social media's growth has exploded both technologically and in worldwide usage.⁶ Social media has been able to transcend physical and cultural boundaries so effectively that it is now heavily used for advertising and making sales all around the world.⁷ It has also helped make travel easier, more accessible, and more popular, as international travel "increased to 1.4 billion people in 2018, two years earlier than the World Travel Organization had predicted."⁸ Although new careers such as application developers and social media "influencers" have arisen and people and ideas are crossing borders more than ever due to social media growth, immigration law has not changed to reflect these new norms.

While there are a variety of immigrant and nonimmigrant visas available to foreign influencers in the United States, each visa poses substantial challenges during the application process and even after petition approval. Some scholars agree that United States immigration practices in the workplace are restrictive, as many workers are strictly constrained to the terms of their visas and may only do pre-specified work for the petitioning employer or else risk violation of their legal status.⁹ Given its outdated state, current

6. Christian Zilles, *The Influence of Technology On Social Media*, SOC. MEDIA EXPLORER (May 30, 2019), <https://socialmediaexplorer.com/social-media-marketing/the-influence-of-technology-on-social-media/> [<https://perma.cc/759L-5V5T>] (explaining how new technology such as VR and even Internet speed has changed the user's everyday social media experience); Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media> [<https://perma.cc/5VEN-7GA2>] (providing a chart showing how popularity of certain social media platforms have changed over time and how the number of users has significantly increased since 2004).

7. *Social Media Marketing Usage Rate in the United States from 2013 to 2022*, STATISTA (Aug. 4, 2021), <https://www.statista.com/statistics/203513/usage-trends-of-social-media-platforms-in-marketing/> [<https://archive.ph/Si2aT>] (providing statistics showing that approximately 90% of U.S. businesses were using social media for marketing purposes).

8. Elizabeth Chang, *Have Followers, Will Travel*, WASH. POST (Aug. 8, 2019), <https://www.washingtonpost.com/graphics/2019/lifestyle/travel/instagram-travel-influencers/> [<https://perma.cc/6HSY-UH9Z>].

9. A few scholars have written about the effect of IRCA on the workplace and how the law has given employers the power to exploit immigrant workers. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 558 (2007) (arguing that a visa being tied to a particular employer dramatically increases the potential for exploitation); see also Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 216 (2007). Further, a few scholars have also argued that U.S. immigration law is rooted in slavery, as workers are forced to succumb to the exploitative practices of employers. See Rhonda

immigration law should not determine how the entry of foreign influencers into the United States is regulated. If the Department of Homeland Security (DHS) continues enforcing its current immigration policy, foreign influencers may avoid making trips to the United States and advertising for American companies altogether.¹⁰ With social media generating billions of dollars in advertising revenue,¹¹ the United States should adopt immigration policy that will encourage foreign influencers to come to the country and allow businesses to readily utilize and compensate them for their talents.¹²

This Note will discuss the inability of current immigration law to adapt to a world in which social media drives a significant amount of business and explain why the law is worth changing in the context of social media influencers. Part II provides background information on the growth of social media, social media marketing, and the career of an influencer. Part II also explains how influencers typically earn money and are compensated for the content they post. Part III describes the importance of foreign influencers in international marketing and why American employers should have an interest in obtaining visas for them. Part IV analyzes the various immigrant and

V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 276 (2009); Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1573 (2015).

10. There are no public statements from foreign influencers specifically about choosing to forego working in the United States or for American businesses due to current U.S. immigration policy. However, a few articles suggest that noncitizens have chosen to immigrate to other countries or return to their home country due to the struggles they face in trying to gain permission to lawfully reside and work in the United States. See Juliette Rihl, *For More than a Decade in Pittsburgh, We Lived the U.S. Immigration Nightmare. The Pandemic Sealed Our Move to Canada*, PUBLICSOURCE (Aug. 18, 2020), <https://www.publicsource.org/pittsburgh-immigration-impossible-moved-america-canada/> [<https://perma.cc/57UP-4BRS>] (telling the story of a couple from India who resided in the United States for eighteen years and decided to immigrate to Canada due to many unsuccessful attempts to become permanent residents); see also Christie Thompson & Andrew R. Calderón, *More Immigrants are Giving Up Court Fights and Leaving the U.S.*, MARSHALL PROJECT (May 8, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/05/08/more-detained-immigrants-are-giving-up-court-fights-and-leaving-the-u-s> [<https://perma.cc/YR6G-C83M>] (discussing the belief that applications for voluntary departure from the United States have increased because of the hopelessness that detainees feel in fighting their case to remain in the United States).

11. Megan Graham, *Digital Ad Revenue in the US Surpassed \$100 Billion for the First Time in 2018*, CNBC (May 7, 2019, 11:10 AM), <https://www.cnbc.com/2019/05/07/digital-ad-revenue-in-the-us-topped-100-billion-for-the-first-time.html> [<https://perma.cc/T8VS-96XE>].

12. See Howard F. Chang, *The Economics of Immigration Reform*, 52 U.C. DAVIS L. REV. 111, 114 (2018) (“Nations can gain from the free movement of not only goods but also workers because labor mobility allows them to enjoy gains from international trade in the labor market.”).

nonimmigrant visa options available to foreign influencers and addresses the shortcomings of each category in the context of the influencer career. Part V suggests reforms to the current immigration system to better embrace a world in which social media has a significant impact on business. Part VI provides further recommendations for immigration law reform in consideration of other fields of law that also struggle to address the new norm that is social media marketing.

II. THE RISE OF SOCIAL MEDIA AND THE INFLUENCER

Social media is “a computer-based technology that facilitates the sharing of ideas, thoughts, and information through the building of virtual networks and communities.”¹³ As of July 2021, there are an estimated 4.48 billion users of social media worldwide, encompassing approximately half of the global population.¹⁴ An estimated 7 in 10 Americans use some form of social media,¹⁵ including Facebook, TikTok, YouTube, and Instagram, which are some of the most popular platforms around the world.¹⁶ The massive growth of these platforms has given rise to the social media “influencer,” an individual “with the power to affect the buying habits or quantifiable actions of others by uploading some form of original—often sponsored—content to social media platforms.”¹⁷

Influencers have numerous social media platforms available to them on which they can upload content such as pictures, videos, blogs, and live streams. After selecting which platform or platforms to produce content on, an influencer must typically determine an “aesthetic” or theme for their posts

13. Maya Dollarhide, *Social Media*, INVESTOPEDIA (Aug. 31, 2021), <https://www.investopedia.com/terms/s/social-media.asp> [<https://perma.cc/7YZV-2QEU>].

14. Dave Chaffey, *Global Social Media Statistics Research Summary 2021*, SMART INSIGHTS (July 23, 2021), <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/> [<https://perma.cc/V4MG-AXBF>].

15. *Social Media Fact Sheet*, PEW RSCH. CTR. (April 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/C9HN-FJLW>].

16. See Ortiz-Ospina, *supra* note 6 (providing data on the estimated number of users of different social media platforms).

17. Paris Martineau, *The WIRED Guide to Influencers*, WIRED (Dec. 6, 2019, 10:00 AM), <https://www.wired.com/story/what-is-an-influencer/> [<https://perma.cc/B6D4-QKQ6>].

and upload relevant content.¹⁸ Over time, they may be able to build up a significant following by posting content regularly and engaging frequently with their audience.¹⁹ Influencers are known for their relatability to the general public and are favored for their ability to connect with their audiences on a more personal level.²⁰ If an influencer is able to garner enough attention on the platform, they may be able to use their account to earn income.²¹

Today, being an influencer is a lucrative career through which people can make a substantial living.²² There are various ways influencers earn money including brand sponsorships, selling merchandise, and using affiliate links to products they are recommending or advertising.²³ Another popular method of earning money is to create an account with Patreon, a membership platform where fans can directly pay their favorite creators for the

18. Werner Geysler, *How to Become an Influencer: 7 Easy Steps to Becoming a Social Media Influencer Today*, INFLUENCER MKTG. HUB (June 12, 2021), <https://influencermarketinghub.com/how-to-become-an-influencer/#toc-0> [<https://perma.cc/79PA-K6KU>]; Ahiza García-Hodges, *The Influencer Aesthetic Is Changing. You Might Even Recognize It Now.*, YAHOO! NEWS (May 27, 2020), <https://news.yahoo.com/influencers-time-coronavirus-fewer-yoga-205900705.html> [<https://perma.cc/Q5HT-MB3M>] (explaining how influencers have “aesthetics,” or a running theme throughout their social media posts such as a “jet-setting life” or “health and fitness.” “Aesthetics” may also change over time to adapt to changes in trends or life-changing events such as the COVID-19 pandemic.).

19. Geysler, *supra* note 18.

20. Martineau, *supra* note 17.

21. Audrey Conklin, *How Much Money Do Social Media Influencers Make?*, FOX BUS. (Mar. 11, 2020), <https://www.foxbusiness.com/lifestyle/social-media-influencer-pay> [<https://perma.cc/8E6M-4Y7Q>].

22. Sarah Min, *86% of Young Americans Want to Become a Social Media Influencer*, CBS NEWS (Nov. 8, 2019, 4:49 PM), <https://www.cbsnews.com/news/social-media-influencers-86-of-young-americans-want-to-become-one/> [<https://perma.cc/4JZK-HRTL>] (“‘Social media star’ has become the fourth-most popular career aspiration for kids.”); see Peter Suci, *Is Being a Social Media Influencer a Real Career?*, FORBES (Feb. 14, 2020, 7:00 AM), <https://www.forbes.com/sites/petersuci/2020/02/14/is-being-a-social-media-influencer-a-real-career/?sh=6891780a195d> [<https://perma.cc/ZCV8-EBZK>].

23. Evan Edinger, *Evan Edinger: The Five Ways YouTubers Make Money*, BBC NEWS (Dec. 18, 2017), <http://www.bbc.co.uk/newsbeat/article/42395224/evan-edinger-the-five-ways-youtubers-make-money> [<https://perma.cc/6KJV-7VWH>]; see Joline Buscemi, *Here’s How Much Money These Influencers ACTUALLY Make, and How*, HUFFPOST (Dec. 19, 2019), https://www.huffpost.com/entry/how-much-influencers-make_1_5dee68a6e4b05d1e8a556bbc [<https://perma.cc/H3PD-ZPQJ>].

content they produce.²⁴ Finally, influencers may be able to partner directly with the platform they post content on and monetize their account.²⁵ For example, Twitch, a video live streaming platform, offers a Partnership Program where “Partners” can earn income by receiving a share of advertising revenue, accepting subscriptions from viewers, and receiving in-stream currency called “Bits.”²⁶ With so many ways to make money, influencers with large followings can earn more than \$30,000 each year, receiving thousands of dollars per sponsored post.²⁷ Oftentimes, the greater the number of “followers,” the more money influencers can earn; however, they are able to earn a substantial amount of money even with a smaller sized following.²⁸

Not only are influencers making a lot of money from their work, but so too are the businesses. Many businesses hire influencers for “social media marketing,” which involves “the use of social media platforms to connect with your audience to build your brand, increase sales, and drive website traffic.”²⁹ Businesses have capitalized on the popularity of social media and the impact influencers have on their audiences by advertising directly through their own company accounts or through popular influencers’

24. *What is Patreon?*, PATREON, <https://support.patreon.com/hc/en-us/articles/204606315-What-is-Patreon-> [<https://perma.cc/845Q-G347>].

25. It is important to note that users will not be able to become a Partner of the platform just by putting out content. To become a Partner, there are certain requirements set out by the platform that must be met. Nevertheless, influencers can still earn money in other ways discussed in this article, regardless of whether they earn Partner status or not. Taylor Lorenz, *Instagram Wants Its Influencers to Make More Money*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/style/instagram-influencer-monetization-live-igtv.html> [<https://perma.cc/5NTE-CAZ2>] (Instagram influencers can earn money through ad revenue generated from IGTV and from badges purchased by users); see *YouTube Partner Program Overview & Eligibility*, YOUTUBE HELP, <https://support.google.com/youtube/answer/72851?hl=en> [<https://perma.cc/5NTE-CAZ2>] (YouTube has its own partnership program through which creators can monetize videos).

26. *Twitch Partner Program Overview*, TWITCH, https://help.twitch.tv/s/article/partner-program-overview?language=en_US [<https://perma.cc/43DT-TMA4?type=image>].

27. Conklin, *supra* note 21.

28. *Id.*

29. *What Is Social Media Marketing*, BUFFER, <https://buffer.com/social-media-marketing> [<https://perma.cc/63LW-MCDL>].

accounts.³⁰ Major companies such as Subaru, Marriott, Fiji Water, and Microsoft have successfully used influencer marketing to increase business.³¹ Some smaller businesses have even built their brand solely using social media advertising.³² Today, approximately 72% of major brands claim to dedicate a significant portion of their marketing budget to pay influencers to advertise their products or services.³³ It is clear why: according to a survey by *Influencer Marketing Hub*, businesses make approximately \$5.20 per every \$1 spent on influencer marketing.³⁴ Further, “[m]arket analysts predict that the influencer marketing industry will be worth north of \$15 billion by 2022.”³⁵

III. THE FOREIGN INFLUENCER

Because social media is readily accessible and heavily used globally, it is a powerful tool American businesses can use to better reach international

30. See Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018, 6:00 PM), <https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube> [<https://perma.cc/9Y8U-5DYN>].

31. Harley Schachter, *20 Killer Examples of Influencer Marketing*, TRAVEL MINDSET, <https://www.travelmindset.com/20-influencer-marketing-examples/> [<https://perma.cc/7J93-S5FJ>].

32. See Taylor Avery, *For ‘Insta-Brands,’ Boycotting Facebook Advertising Isn’t Easy*, L.A. TIMES (July 3, 2020, 5:00 AM), <https://www.latimes.com/business/technology/story/2020-07-03/for-insta-brands-boycotting-facebook-advertising-is> [<https://archive.is/IXcLA>]; see also Sean Ludwig, *5 Companies Built on Influencer Marketing*, CO- (Dec. 30, 2019), <https://www.uschamber.com/co/grow/marketing/influencer-marketing-success-stories> [<https://perma.cc/DPC3-N272>].

33. Lieber, *supra* note 30.

34. Jacinda Santora, *100 Influencer Marketing Statistics for 2021*, INFLUENCER MKTG. HUB (Apr. 22, 2021), <https://influencermarketinghub.com/influencer-marketing-statistics/> [<https://perma.cc/TUE8-4RBQ>].

35. Amine Rahal, *Is Influencer Marketing Worth It in 2020?*, FORBES (Jan. 10, 2020, 6:30 AM), <https://www.forbes.com/sites/theyec/2020/01/10/is-influencer-marketing-worth-it-in-2020> [<https://perma.cc/4HJX-JF7B>].

markets.³⁶ Foreign influencers can be extremely helpful in this regard.³⁷ Instead of having to build up a reputation from scratch in a new market, American businesses can utilize the services of foreign influencers who have already developed a loyal fanbase and reputation in that area.³⁸ Foreign influencers will also have a better grasp on the culture and trends of their place of residence and can provide insight as to what products will sell better within that population. They may also be able to reach audiences that even the most well-known and popular American influencers cannot. International audiences may not follow or have an interest in American influencers for various reasons such as language barrier, lack of cultural connection, or relatability.³⁹

While their services may be more important abroad, foreign influencers are often invited to come to the United States for various jobs and events.⁴⁰ Because the social media industry moves at a rapid pace and has trends which change quickly, businesses require influencers to be able to attend those events which are relevant to the type of social media content they

36. Vanessa Mendiola, *How Princess Polly Shines Using Curated and Created Content*, MEDIUM (July 21, 2019), <https://medium.com/@vmendiola/how-princess-polly-shines-using-curated-and-created-content-24101c066307> [<https://perma.cc/H3FV-8DGB>] (explaining how an Australian boutique has expanded sales into the United States by heavily utilizing influencers).

37. See Joel Backaler, *To Grow Your Business Abroad, Partner with Local Influencers*, HARV. BUS. REV. (Sept. 25, 2018), <https://hbr.org/2018/09/to-grow-your-business-abroad-partner-with-local-influencers> [<https://perma.cc/T28G-QZ4Y>].

38. *Id.*

39. *How to Hire International Influencers*, BEATLY (May 23, 2018), <https://www.beatly.com/en/guide-article/hire-international-influencers> [<https://perma.cc/DJ86-YK BX>] (“...for people that don’t speak English fluently, interacting with a sponsored post in English might not be an option”).

40. See Tina Mulqueen, *Brands Paid Hefty Prices to Send Micro-Influencers Dancing in the Desert at Coachella*, FORBES (Apr. 16, 2019, 3:58 PM), <https://www.forbes.com/sites/tinamulqueen/2019/04/16/brands-paid-hefty-prices-to-send-micro-influencers-dancing-in-the-desert-at-coachella/#2b3a6fe52bf3> [<https://perma.cc/896Q-Q7EJ>] (brands are sending influencers to the Coachella music festival for marketing purposes); see also Clare Fitzgerald, *UK YouTubers Announced for VidCon 2019*, TENEIGHTY (June 6, 2019), <https://teneightymagazine.com/2019/06/06/uk-youtubers-announced-for-vidcon-2019/> [<https://perma.cc/7KUX-3LP9>] (British YouTubers confirmed to attend the popular convention for YouTubers in the United States); see also Chang, *supra* note 8 (“Tourism-related brands quickly recognized the advertising potential of such images and began offering top Instagrammers payment or comped visits in return for social media promotion”).

produce.⁴¹ It is possible for a foreign influencer to get around the law by waiting to do the “work” of social media, like editing and posting content, once they return to their home country. However, with trends in social media such as live streaming,⁴² a need to stay “relevant,”⁴³ or brands dictating when and how influencers are supposed to post, posting at a later time may not be an option.⁴⁴

DHS has not publicly cracked down on foreign influencers doing unauthorized work by posting sponsored content on social media while in the United States. Given social media’s digital nature, it is likely not immediately obvious to the U.S. government that a foreign influencer is performing unauthorized work, especially if not discussed with U.S. Customs and Border Patrol (CBP) when the foreign influencer enters the country. Further, it

41. See Dakota Shane, *Social Media Trends Change Quickly. This 6-Step Guide Will Help You Keep Up*, INC. MAG. (May 18, 2017), <https://www.inc.com/dakota-shane/social-media-trends-change-quickly-this-6-step-guide-will-help-you-keep-up.html> [<https://perma.cc/6L45-SZT4>]; see also *The Growing Trend of Influencer Events*, MEDIAKIX, <https://mediakix.com/blog/influencer-events-guide/> [<https://perma.cc/ZX9H-LPLF>].

42. Krystal Overmyer, *The Psychology Behind Why We Love Live Video*, SKYWORD (May 12, 2016), <https://www.skyword.com/contentstandard/the-psychology-behind-why-we-love-live-video/> [<https://perma.cc/73GT-T8CC>]. There are popular platforms primarily for live streaming such as Twitch, and other social media platforms such as Facebook and Instagram have added live streaming features in the past few years. It has become apparent that fans of influencers enjoy this feature because it further emphasizes the influencer’s authenticity and relatability by giving viewers a real glimpse into their lives and personalities, rather than an edited version of themselves.

43. Mary Jane, *Hannah Brown Is Now Using Instagram Ads to Make Money After The Bachelorette*, MONSTERS & CRITICS (Jan. 22, 2021, 11:12 AM), <https://www.monstersandcritics.com/tv/reality-tv/hannah-brown-is-now-using-instagram-ads-to-make-money-after-the-bachelorette/> [<https://perma.cc/3EKZ-P235>] (discussing how former star from *The Bachelorette* has become an influencer and recently promoted a meal kit in an “attempt to stay relevant online and make money from her social media content”); see Alfred Lua, *How the Instagram Algorithm Works in 2021: Everything You Need to Know*, BUFFER, <https://buffer.com/library/instagram-feed-algorithm/> [<https://perma.cc/4K7G-FSSF>] (discussing how Instagram users’ feeds are affected by an algorithm that takes into account how the likelihood of users’ interest, the timeliness of the post, and the relationship to the account).

44. Mulqueen, *supra* note 40 (businesses are sending influencers to locations at the Coachella festival where they can get the most engagement); Natalie Zfat, *Here’s How Long It Takes Your Favorite Influencer to Create an Instagram Post*, FORBES (Aug. 22, 2019, 9:53 AM), <https://www.forbes.com/sites/nataliezfat/2019/08/22/heres-how-long-it-takes-your-favorite-influencer-to-create-an-instagram-post/#3507317b3f46> [<https://perma.cc/8VDE-9SJE>] (Influencer explains that businesses have rules and regulations for posts, and that sponsored posts may require additional planning and discussion with the business).

is unclear if the platforms and businesses paying the foreign influencer and issuing tax forms⁴⁵ to them are considering where the work was performed each time.⁴⁶ Therefore, the U.S. government may be aware that a foreign influencer earned income in the United States through tax filings⁴⁷ but is probably unaware of where the work was physically performed.

However, in 2019, the Trump Administration implemented a policy that requires all visa applicants to provide all social media account handles used in the last five years for vetting.⁴⁸ It is not impossible that DHS might continue to monitor social media accounts while the influencer is staying in the United States or that U.S. Citizenship and Immigration Services (USCIS) would review the influencer's account to determine if there was a past violation that might be grounds for denying a new application, especially when social media has already been used as a basis for revoking visas.⁴⁹ Therefore,

45. Nonresident aliens who earn income in the United States are generally required to pay taxes on that income unless they can claim a tax treaty benefit. *See Claiming Tax Treaty Benefits*, I.R.S. (Nov. 17, 2020), <https://www.irs.gov/individuals/international-taxpayers/claiming-tax-treaty-benefits> [<https://perma.cc/LV84-J97R>]; *see also Tax Information Interview Guide*, AMAZON DEV. https://developer.amazon.com/tax-interview/help?nodeId=201588330&locale=en_US [<https://perma.cc/7ZZJ-NMDL>] (Providing information for how international Twitch streamers may monetize their account, stating, "If you are a resident of a country that has an active Double Taxation treaty with the United States, you may be eligible to receive a reduction in the statutory U.S. withholding tax rate of 30% if you qualify as a resident under Article 4 of the treaty between your country of residence and the United States").

46. For example, Twitch requires users who monetize their accounts to select the country where services will be provided or will be performed. Amazon.com, Inc., the owner of Twitch, states in its Tax Information Interview: "You must provide notification in writing, or by retaking the tax information interview, should the location of the services provided change. Please select the checkbox acknowledging that you will update your information in the event that the location of services change." This suggests that Twitch does not actively monitor users' accounts to see if any one particular stream was done in another country and relies on users to report their location. *Tax Information Interview Guide*, *supra* note 45.

47. Nonresident aliens who earn income in the United States generally must file a tax return. *Taxation of Nonresident Aliens*, I.R.S., <https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens> [<https://perma.cc/9H5X-R3T3>].

48. *US Demands Social Media Details from Visa Applicants*, BBC NEWS (June 1, 2019), <https://www.bbc.com/news/world-us-canada-48486672> [<https://perma.cc/8C9N-SSNL>]. This policy was challenged in *Doc Society et al. v. Pompeo et al.* (Docket No. 1:19-cv-03632), filed in December 2019 by two documentary film organizations. As of July 2021, the case has been stayed until August 16, 2021.

49. In August 2019, an incoming Harvard University freshman, Ismail B. Ajjawai, had his visa revoked after immigration officers spent hours looking into his social media accounts and

businesses must adhere to immigration law and ensure that foreign influencers obtain the requisite visa if they want to utilize the influencers' services and compensate them for it.⁵⁰ Although businesses may not want to have to pay the high costs and go through the process of petitioning for a visa, there are various compelling reasons why doing so would be beneficial for the business outside of how profitable influencers can be.

Firstly, it would ensure that the business as an employer is compliant with the law, as hiring an unauthorized worker in the United States can result in various civil and criminal penalties.⁵¹ These penalties may cost thousands of dollars, and the amount increases after repeated offenses.⁵² Some states even have laws that allow a business's license to be suspended or revoked after repeated offenses.⁵³ The owner of the business or a hiring manager for the business can further be sentenced to jail time.⁵⁴

Second, the employer should be considerate of the consequences to the foreign influencers who are found by DHS to have violated the law or terms of their stay. Individuals who are caught violating the terms of their visas may be deported and potentially banned from admission to the United States for a minimum of three years.⁵⁵ Additionally, an individual who "was employed while the alien was an unauthorized alien . . . or who has otherwise

found anti-American posts made by his friends. Shera S. Avi-Yonah & Delano R. Franklin, *Incoming Harvard Freshman Deported After Visa Revoked*, HARV. CRIMSON (Aug. 27, 2019), <https://www.thecrimson.com/article/2019/8/27/incoming-freshman-deported/> [https://perma.cc/8AR6-9QJM].

50. See 8 U.S.C. § 1324a(a).

51. See generally 8 C.F.R. § 274a.10(a)–(b).

52. *Id.* § 274a.10(a)–(c).

53. TENN. CODE ANN. § 50-1-103(e)(1)(B) (West through 2021 Sess.) (Tennessee state law that provides for suspension of a person's license for one year if violations occur within three years from the first violation); see Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 600 (2011) (holding that an Arizona state law, The Legal Arizona Workers Act of 2007, which provided for suspension or revocation of a business's license was not preempted by federal immigration law).

54. See generally *When Breaking the Law by Hiring Illegal Aliens Doesn't Pay*, FAIR (November 2008), <https://www.fairus.org/issue/societal-impact/when-breaking-law-hiring-illegal-alien-doesnt-pay> [perma.cc/VQW8-P9UM].

55. See 8 U.S.C. § 1182(a)(9)(B)(i)(I).

violated the terms of a nonimmigrant visa” is ineligible to apply for an adjustment of status to become a permanent resident of the United States.⁵⁶ Further, if later denied entry into the United States, it would be difficult for the individual to claim excuse because they did not know about the past violation or were never told by USCIS that they had done anything wrong.⁵⁷

Third, having the influencer actually present in the United States for a longer term is beneficial for content production, advertising, and fan engagement. Location plays a crucial role for platforms like TikTok, where “Tik-Tokers” tend to flock to Los Angeles due to its celebrity environment and the ability to be near other creators with whom they can collaborate with.⁵⁸ A visa that is valid even for just one year would allow the influencer to be able to legally carry out substantial paid work for the employer in the United States, as compared to none without the visa.

56. 8 U.S.C. § 1255(c)(8). Even if an employment-based immigrant has overstayed their visa or violated their status, they may still be able to adjust their status under 8 U.S.C. section 1255, subdivision (k). However, this exception applies only to individuals who have already been approved for a select few categories of employment-based visas and who meet the other requirements of the statute. See U.S. CITIZENSHIP & IMMIGR. SERVS., 8QDOMO 70/23.1-PAD06-07, MEMORANDUM: APPLICABILITY OF SECTION 245(K) TO CERTAIN EMPLOYMENT-BASED ADJUSTMENT OF STATUS APPLICATIONS FILED UNDER SECTION 245(A) OF THE IMMIGRATION AND NATIONALITY ACT 2 (2008).

57. *Wong v. Napolitano*, No. CV-08-937-ST, 2010 U.S. Dist. LEXIS 22324, at *52–53 (D. Or. Mar. 10, 2010) (citing *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir 1986)) (holding that the plaintiff’s claim of estoppel based on USCIS overlooking violations in a previously approved nonimmigrant application could not be justified because estoppel only applies if USCIS’s actions “rise to the level of affirmative misconduct showing ‘a deliberate lie’ or ‘a pattern of false promises’”).

58. See Kat Tenbarge, *An Influencer Whose Visa Expired Threatened to ‘Sneak Into the US’ or Marry Someone for a Green Card in a Livestream, Saying ‘I’ll Risk Getting Banned for 10 Years’*, INSIDER (Mar. 12, 2020, 9:40 AM), <https://www.insider.com/kristen-hancher-instagram-canada-visa-expired-deported-youtube-team-10-2020-3> [<https://perma.cc/5ZT4-7RF5>] (TikTok star voices concern over being unable to create her content in Los Angeles while she deals with visa issues); see also Abram Brown, *TikTok Star Josh Richards’ New Fame Says a Lot About the App—and Who Is Making Millions from It*, FORBES (Aug. 14, 2020, 9:25 AM), <https://www.forbes.com/sites/abrambrown/2020/08/14/tiktok-star-josh-richards-new-fame-says-a-lot-about-the-app-and-who-is-making-millions-from-it/#10e418a0451d> [<https://perma.cc/Y34H-7944>] (Canadian TikTok star moves to the United States to live in content creator houses, developed for helping fellow creators film and develop ideas).

IV. POSSIBLE VISA CATEGORIES

A. *The B Visa*

Nonimmigrant B visas are a category of visas used by individuals who wish to visit the United States temporarily for business (B-1), tourism (B-2), or a combination of both.⁵⁹ Generally, applicants for this visa must submit an application and attend an interview at the U.S. Embassy or Consulate in their home country.⁶⁰ If approved, the B-1/B-2 visa will allow the holder to travel to any U.S. port-of-entry and request permission to enter the country.⁶¹ CBP will then determine the length of time that the visitor is permitted to stay, which is usually the amount of time that is reasonable to complete the purpose of the visit.⁶² The length of stay may not exceed six months.⁶³

The B-1/B-2 visa is an attractive option for foreign influencers who do not intend on living long-term in the United States and only plan to make short trips. It requires less extensive documentation than other visas and the filing fee is much cheaper in comparison.⁶⁴ Further, depending on what country the individual is coming from, they may not need to go through the application process at all. Citizens of countries participating in the Visa

59. *Visitor Visa*, *supra* note 1.

60. At the interview, the individual may be asked to provide additional documentation to show intent of the trip, intent to depart the United States at the end of the trip, and ability to pay all the costs of the trip. *Id.*

61. *B-1 Temporary Business Visitor*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-visitors-for-business/b-1-temporary-business-visitor> [<https://perma.cc/XA2B-PGY4>]; *Visitor Visa*, *supra* note 1.

62. *What the Visa Expiration Date Means*, U.S. DEP'T OF ST., <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-expiration-date.html#2> [<https://perma.cc/KKZ7-TR7F>].

63. *B-1 Temporary Business Visitor*, *supra* note 61.

64. *Compare Visitor Visa*, *supra* note 1 (The B-visa filing fee is \$160 as of September 10, 2020), with *Fee Schedule*, DEP'T OF HOMELAND SEC. (Apr. 1, 2020), <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf> [<https://perma.cc/C68L-JX2V>] (As of October 24, 2020, Form I-129 (Petition for Nonimmigrant Worker) filing fee is \$460. The filing fee for Form I-140, Immigrant Petition for Alien Worker, is \$700.).

Waiver Program generally may travel to the United States for tourism or business for up to 90 days without obtaining a visitor visa.⁶⁵

The B-1/B-2 visa seems ideal because of the relative ease in obtaining it, but it cannot actually be used by foreign influencers who plan to perform paid work for an American employer within the United States. Employment with American companies and paid performances are expressly forbidden when using either a B-1 or B-2 visa.⁶⁶ Despite the B-1 visa being primarily for “business,” it does not permit the type of business that social media influencers primarily perform like advertising or brand promotion.⁶⁷ Business activities are limited to specific activities such as: (1) consulting with a business associate; (2) settling an estate; (3) negotiating a contract; or (4) attending a scientific, educational, or business convention or conference.⁶⁸ The B-2 visa would not be an option by nature of its purpose for tourism only.

If found to have violated the terms of the visitor visa, a foreign influencer would be subject to removal proceedings or visa revocation.⁶⁹ A removal on record may be problematic for the foreign influencer later if they wanted to return to the United States, even solely for tourism.⁷⁰ Therefore,

65. Even if an individual is not required to apply for the B-visa to visit the United States, he or she is still subject to U.S. immigration law. *Citizens of Canada and Bermuda*, U.S. DEP’T OF ST., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/citizens-of-canada-and-bermuda.html> [<https://perma.cc/LX6X-LQNZ>] (Canadian citizens generally do not need a nonimmigrant visa at all and Bermudian citizens generally do not require one for stays of up to 180 days); see *Visa Waiver Program*, U.S. DEP’T OF ST., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> [<https://perma.cc/JP5S-Q7LJ>]; see generally 8 U.S.C. § 1324a.

66. 9 F.A.M. 402.2-5(A)(a) (2021) (“Engaging in business contemplated for B-1 visa classification generally entails business activities other than the performance of skilled or unskilled labor. Thus, the issuance of a B-1 visa is not intended for the purpose of obtaining and engaging in employment while in the United States”); *In re Wong*, 11 I. & N. Dec. 704, 704–05 (B.I.A. July 5, 1966); see 9 F.A.M. 402.2-4(A)(1)–(8) (listing criteria for aliens who may be classified as non-immigrant B-2 visitors, which does not include paid employment, except for reimbursed incidental expenses).

67. 9 F.A.M. 402.2-5(A).

68. See 22 C.F.R. § 41.31.

69. See 8 U.S.C. § 1227(a)(1)(B)–(C).

70. *Id.* § 1182(a)(9)(A)(i)–(ii) (“(i) Arriving aliens [-] Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien’s arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal

the B-1/B-2 visa is not a viable option for foreign influencers visiting the United States who plan to utilize their social media platforms for pay by an American company.

B. The H-1B Visa

The H-1B nonimmigrant visa is designated for foreign individuals planning to perform services in a “specialty occupation.”⁷¹ Foreign influencers could qualify for this visa by petitioning to perform services in any occupation that meets the criteria of a “specialty occupation,” such as a marketing specialist.⁷² The employer must first submit a Labor Condition Agreement to the Department of Labor for certification,⁷³ followed by a petition for the beneficiary influencer and a possible payment of hefty filing

or at any time in the case of an alien convicted of an aggravated felony) is inadmissible. (ii) Other aliens [-] Any alien not described in clause (i) who- (I) has been ordered removed under section 1229a of this title or any other provision of law, or (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien’s departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.”).

71. 8 C.F.R. § 214.2(h)(1)(ii)(B)(1); *Id.* § 214.2(h)(4)(ii) (defining specialty occupations as “an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States”).

72. *Id.* § 214.2(h)(4)(ii) (“Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”).

73. *Labor Condition Application (LCA) Specialty Occupations with the H-1B, H-1B1 and E-3 Programs*, U.S. DEP’T OF LAB., <https://flag.dol.gov/programs/lca> [<https://perma.cc/2R6V-RHLA>].

fees.⁷⁴ An approved H-1B visa is generally valid for a period of up to three years and set to a maximum of six years.⁷⁵

The primary challenge for foreign influencers in obtaining an H-1B visa is meeting the “specialty occupation” qualification requirements. First, an influencer who does not have a baccalaureate degree or equivalent that is specific to and required for the specialty occupation will not qualify for this visa.⁷⁶ For example, an individual with a degree in political science will not qualify for a marketing specialist job which can be assumed to require some kind of degree in marketing. Second, neither the title of the position nor an employment requirement of a specific degree determine whether the job qualifies as a “specialty occupation”; rather, it is whether the position normally requires attainment of a baccalaureate degree or higher in the specific specialty or requires knowledge usually associated with a baccalaureate degree or higher.⁷⁷ Therefore, in order to be approved for this visa, the foreign influencer will need to make a strong argument that the position actually does require specialized knowledge and expertise to the extent that a baccalaureate education is the norm for such a position.

Even if the foreign influencer is approved for an H-1B visa, its conditions allow for significant exploitation by employers. The employer has a lot of power over the employee in that if the employer were to terminate the employment, the visa holder would have to leave the country within sixty days or by the end of the authorized validity period, whichever is shorter.⁷⁸

74. See *H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/forms/all-forms/h-and-l-filing-fees-for-form-i-129-petition-for-a-nonimmigrant-worker> [<https://perma.cc/9Q8H-M73J>].

75. 8 C.F.R. §§ 214.2(h)(9)(iii)(A), (h)(13)(iii)(A).

76. See *id.* § 214.2(h)(4)(iii)(C). The H-1B visa requires at minimum for the individual to have either: (1) a United States baccalaureate degree or higher degree required by the specialty occupation; (2) foreign degree determined to be equivalent; (3) an unrestricted State license, registration or certification authorizing the individual to fully practice the specialty occupation; or (4) education, specialized training, and/or experience equivalent to completion of a U.S. baccalaureate or higher in the specialty occupation and have recognition of the expertise in the specialty. *Id.*

77. See generally *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (holding that an employer requiring contract employees to have B.S.N. degrees before it contracted them could not mask the fact that nursing is not a specialty occupation).

78. 8 C.F.R. § 214.1(i)(2); Ron Hira, *H-1B Workers Are in a State of Indentured Servitude*, U.S. NEWS & WORLD REP. (Dec. 27, 2011, 4:41 PM), <https://www.usnews.com/debate-club>

The substantial consequences of losing a job and having to leave the country results in the employee having unequal bargaining power.⁷⁹ Influencers in particular may struggle with the degree of control employers have under the H-1B visa because of their frequently expressed desire to retain creative freedom.⁸⁰

Finally, the H-1B visa is not a suitable visa choice for foreign influencers due to the more recent challenges in attaining one and the uncertainty of its availability in the future. There are only 65,000 regular H-1B visas available each year through a lottery and 20,000 that are considered exempt for individuals with master's degrees.⁸¹ Hundreds of thousands of people apply and have their petitions approved each year, but less than half of applicants are actually granted the visa through the lottery system.⁸² Not only was the visa already generally difficult to get, but the Trump Administration actively tried to make it even more so.

Throughout his presidency, former President Donald Trump attempted to restrict issuance of H-1B visas.⁸³ For example, in 2020, the U.S.

/should-h-1b-visas-be-easier-to-get/h-1b-workers-are-in-a-state-of-indentured-servitude [https://perma.cc/8WNL-DK3E].

79. See Laura D. Francis, *H-1B Workers Put in Long Hours to Reach the American Dream*, BLOOMBERG L. (Mar. 5, 2019, 3:15 AM), <https://news.bloomberglaw.com/daily-labor-report/h-1b-workers-put-in-long-hours-to-reach-the-american-dream> [https://perma.cc/R6SX-PV67].

80. See generally Brent Scott, *Revitalize and Scale Your Content Strategy with Influencer Generated Content (IGC)*, NEAL SCHAFFER (June 6, 2021), <https://nealschaffer.com/give-influencers-creative-freedom/> [https://perma.cc/DSE3-UZGZ].

81. *H-1B Fiscal Year (FY) 2021 Cap Season*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2021-cap-season> [https://perma.cc/RS5F-DLWE] (“Congress set the annual cap for the H-1B category at 65,000.”).

82. Rohit Mittal, *H1B Lottery Results: How to Find Out if You've Been Selected in 2020*, STILT, <https://www.stilt.com/blog/2018/01/will-find-h-1b-application-successful/> [https://perma.cc/5ZHW-59DJ].

83. See Zolan Kanno-Youngs & Miriam Jordan, *Trump Moves to Tighten Visa Access for High-Skilled Foreign Workers*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/h1b-visas-foreign-workers-trump.html> [https://perma.cc/NS6V-LE8Q]; see also Stuart Anderson, *Trump Will End H1-B Visa Lottery*, FORBES (Oct. 29, 2020, 12:53 AM), <https://www.forbes.com/sites/stuartanderson/2020/10/29/trump-will-end-h-1b-visa-lottery/> [https://perma.cc/2TU7-B8UV] (On October 29, 2020, the Trump Administration proposed a rule that would end the H-1B visa lottery).

Department of Labor raised the prevailing wages set by federal law for H-1B workers by about 30%.⁸⁴ Some experts believe that the rule was designed to price workers holding H-1B visas out of the U.S. labor market.⁸⁵ In addition, President Trump banned issuance of H-1B visas during the COVID-19 pandemic to ensure jobs were protected for unemployed Americans through March 2021.⁸⁶ The pandemic also severely impacted immigration into the United States overall, as travel restrictions were imposed and the Department of State suspended “routine visa services” at all embassies and consulates abroad.⁸⁷ As of February 2021, current President Joseph Biden has reversed some of the immigration policies implemented by former President Trump, but it is unclear exactly what the future of the H-1B visa will be under his administration.⁸⁸ Because of the uncertainty surrounding the H-1B visa’s

84. Genevieve Douglas, *DOL’s Sudden Mandatory Pay Increase Rocks H-1B Worker Employers*, BLOOMBERG L. (Oct. 8, 2020, 2:31 AM), <https://news.bloomberglaw.com/daily-labor-report/dols-sudden-mandatory-pay-increase-rocks-h-1b-worker-employers> [<https://perma.cc/BR4N-WBPX>].

85. Roy Maurer, *The DOL Increases H-1B Wage Minimums*, SHRM (Oct. 26, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-increases-h1b-wage-minimums.aspx> [<https://perma.cc/9ZA6-Z6T2>].

86. Michelle Hackman, *Trump Administration Extends Ban on H-1B and Other Work Visas, Green Cards*, WALL ST. J. (Dec. 31, 2020, 10:28 PM), <https://www.wsj.com/articles/trump-administration-extends-ban-on-h-1b-and-other-work-visas-green-cards-11609455695> [<https://archive.ph/E2R11>].

87. Jorge Loweree, Aaron Reichlin-Melnick & Walter Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system> [<https://perma.cc/E57Y-DB94>].

88. As of February 2021, the Biden Administration has revoked the “Buy American and Hire American” executive order signed by President Trump in 2017, which had resulted in increased rates of requests for evidence in H-1B cases as well as increased denial rates post-requests for evidence for those same H-1B cases. See Brian D. Bumgardner & Andrew G. Drozdowski, *President Biden Revokes ‘Buy American and Hire American’ Executive Order*, NAT’L L. REV. (Feb. 5, 2021) <https://www.natlawreview.com/article/president-biden-revokes-buy-american-and-hire-american-executive-order> [<https://perma.cc/2PUV-CAJV>]. Although President Biden appears to be taking the opposite approach as President Trump, there is no way to know for sure exactly what policies he will implement or refuse to change in the future. Changes to immigration in the United States in the last few decades have been largely driven by policy rather than changes to the law, and immigration policy is likely to shift under any transition of executive power. See generally The World Staff, *Trump’s Hard-Line Immigration Policies Build on the History of Former US Presidents*, WORLD (July 12, 2019, 1:00 PM), <https://www.pri.org/stories/2019-07-12/trumps->

future, the difficulty in obtaining one, and its less-than-ideal conditions, it is not a feasible option for foreign influencers to use to work in the United States.

C. *The H-1B3 Visa*

The H-1B3 nonimmigrant visa is designated for fashion models of distinguished merit and ability.⁸⁹ The petitioning process and permitted length of stay is similar to that of the H-1B visa, but the influencer must instead prove that they are prominent in the field of fashion modeling and that the services they are to perform require such prominence.⁹⁰ By definition, “fashion influencers” may be classified as fashion models since, like traditional fashion models, they are paid by brands to attend events or pose for photos wearing the brand’s apparel.⁹¹

However, it is unlikely that influencers will be able to obtain this visa largely because influencer modeling is ultimately perceived differently from traditional modeling.⁹² Fashion influencers can make a strong argument that they meet at least two of four criteria to show their distinction as a fashion model:

- (1) Has achieved national or international recognition and acclaim for outstanding achievement in his or her field as evidenced by

hard-line-immigration-policies-build-history-former-us-presidents [https://perma.cc/X3YH-K6EN].

89. 8 C.F.R. § 214.2(h)(1)(ii)(B)(3).

90. *Id.* § 214.2(h)(4)(i)(C) (“Prominence” is defined as “high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling”); *id.* §§ 214.2(h)(4)(i)(C), 214.2(h)(9)(iii)(A), 214.2(h)(13)(iii)(A).

91. See generally Ella Alexander, *What Is the Difference Between a Fashion Influencer and Blogger?*, HARPER’S BAZAAR (Sept. 14, 2018), <https://www.harpersbazaar.com/uk/fashion/fashion-news/news/a41898/fashion-influencer-fashion-blogger-definition/> [https://perma.cc/8Q4H-JGWT].

92. See Aisha Moktadier, *What’s the Difference Between an Instagram Model & a High-Fashion Model?*, VIX (Oct. 2, 2020), <https://www.vix.com/en/ovs/trending/56846/what-s-the-difference-between-an-instagram-model-a-high-fashion-model> [https://perma.cc/8J94-48QE].

reviews in major newspapers, trade journals, magazines, or other published material; (2) Has performed and will perform services as a fashion model for employers with a distinguished reputation; (3) Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field; or (4) Commands a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.⁹³

However, in addition to those criteria, the petitioner must prove that the position requires prominence, and this specific criterion will give fashion influencers the most difficulty.⁹⁴ To establish that a position requires prominence, the petitioner must show that either: (1) the services involve events or productions which have a distinguished reputation; or (2) that the organization for which the services will be performed has a record of hiring prominent persons.⁹⁵ The first way to establish prominence means that the influencer cannot work as a fashion model at just any event, it would require an event akin to shooting a cover for *Vogue* magazine or walking in New York Fashion Week.⁹⁶ This would rule out a significant majority of influencers since even most traditional models do not get asked to work at such events.⁹⁷ For example, in New York Fashion Week, some brands, like Alice + Olivia, will only hire 10%–20% of the models who show up to a casting call and others will only hire models they have an existing relationship with.⁹⁸

The second alternative way to establish prominence, showing that the hiring organization has a record of hiring prominent persons, is also difficult for fashion influencers to show because H-1B3 visa applicants tend to be

93. 8 C.F.R. § 214.2(h)(4)(vii)(C).

94. *Id.* § 214.2(h)(4)(vii)(B).

95. *Id.*

96. 2 Charles Gordon et. al., *Immigration Law and Procedure* § 20.08 (Matthew Bender, Rev. Ed. 2020); Kit Johnson, *Importing the Flawless Girl*, 12 NEV. L.J. 831, 847 (2012).

97. *See generally* Johnson, *supra* note 96.

98. Diana Nguyen, *NYFW by the Numbers: What Really Goes Into a Fashion Show?*, E! ONLINE (Feb. 7, 2018, 6:05 AM), <https://www.eonline.com/news/912190/nyfw-by-the-numbers-what-really-goes-into-a-fashion-show> [<https://perma.cc/D2KK-PKRP>].

sponsored by a modeling agency rather than a specific fashion label.⁹⁹ Fashion influencers may have a large following and be very talented, but historically approximately half of all model applicants for the H-1B3 visa have been fashion models from well-established modeling firms such as Wilhelmina International Inc. and Ford Models.¹⁰⁰ Fashion influencers without agency sponsorship will likely have difficulty competing with fashion models who are represented by these agencies because of the power and recognition they hold in the fashion industry.¹⁰¹ Not being sponsored by a well-known agency may also cast doubt on whether the fashion model applicant truly meets the requirements of the H-1B3 visa.¹⁰²

Finally, this visa is not ideal for influencers because it only allows them to work as a fashion model for the employer who sponsors the visa and requires any additional employers to petition separately.¹⁰³ Having each employer separately petition is an expensive and time-consuming process. An alternative would be to use an influencer or modeling agency as a petitioner to avoid this issue.¹⁰⁴ Although this simplifies the process and allows the influencer to model for multiple brands, it does not change the fact that the influencer will be restricted to fashion modeling only. This can pose significant challenges to influencers generally, as it is not uncommon for them to

99. *Melania Trump: The Complex World of Visas and Modeling*, YAHOO! LIFE (Aug. 5, 2016), <https://www.yahoo.com/lifestyle/melania-trump-had-us-wondering-what-kind-of-visas-do-models-need-to-work-in-the-us-200901315.html> [<https://perma.cc/PCE3-NB86>] (“[A] foreign model can’t even get an H-1B3 without first getting a U.S.-based agency to sponsor her for it or offer her employment through its agency”); *see also* Johnson, *supra* note 96, at 847.

100. Bill Murphy Jr., *Why Fashion Models Are Twice as Likely to Get H-1B Visas as Computer Programmers*, INC. (May 20, 2013), <https://www.inc.com/bill-murphy-jr/why-fashion-models-are-twice-as-likely-to-get-h1b-visas-as-computer-programmers.html> [<https://perma.cc/E289-4L68>].

101. *See* Hannah Elliott, *The Most Influential Modeling Agencies*, FORBES (Sept. 13, 2011, 3:42 PM), <https://www.forbes.com/sites/hannahelliott/2011/09/13/the-most-influential-modeling-agencies/#107ec0c578b3> [<https://perma.cc/QY23-YTTR>].

102. *See* Johnson, *supra* note 96, at 845–47 (suggesting it is easier for an applicant to prove their work involves “events or productions which have a distinguished reputation” when the model is represented by one of the “big-name” fashion agencies).

103. 8 C.F.R. § 274a.12(b)(9) (those holding an H-1 visa “may be employed only by the petitioner through whom the status was obtained”).

104. *See id.* § 214.2(h)(2)(i)(F).

change the type of content they post to adjust to current trends or events.¹⁰⁵ However, promoting non-fashion products or performing non-fashion modeling work would be unacceptable under the H-1B3 visa. Thus, the H-1B3 visa is not a viable option for fashion influencers.

D. The E-2 Visa

The E-2 nonimmigrant visa is used for the “treaty investor” who “has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States.”¹⁰⁶ Instead of petitioning for a visa as an individual employed by an American business, the foreign influencer may try to present him or herself out as planning to develop an enterprise for social media marketing. Although the visa restricts the beneficiary to solely developing and directing the enterprise,¹⁰⁷ the ability of the beneficiary to determine what the enterprise will be prior is advantageous since he or she will not be constrained to working for a specific employer.

One major limitation of the E-2 visa is that it is only available to individuals from certain countries. The “treaty investor” applicant must be a national of a country that the United States maintains a treaty of commerce and navigation with. While the number of eligible countries is not terribly limited,¹⁰⁸ an influencer from a non-treaty country cannot obtain this visa. Some countries such as India and Indonesia, where social media usage is among the highest in the world, are not on the list of treaty countries.¹⁰⁹

A second challenge associated with the E-2 visa is the requirement that the treaty investor “has invested or is actively in the process of investing a substantial amount of capital,” with substantial amount of capital meaning:

105. See generally García-Hodges, *supra* note 18.

106. 8 C.F.R. § 214.2(e)(2)(i).

107. *Id.* § 214.2(e)(16).

108. See *Treaty Countries*, U.S. DEP’T OF ST., <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html> [<https://perma.cc/7WXF-FWXL>] (listing “treaty countries” for E-1/E-2 visa purposes).

109. See *id.*; see also *Social Network Users in Selected Countries in 2021 and 2025*, STATISTA, <https://www.statista.com/statistics/278341/number-of-social-network-users-in-selected-countries/> [<https://perma.cc/D4AX-236K>].

(1) substantial in relationship to the total cost of either purchasing an established enterprise or establishing a new one; (2) sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and (3) of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.¹¹⁰

To determine if an investment is substantial, the adjudicating officers compare the amount actually invested with the cost of either purchasing or establishing a business.¹¹¹ If the cost of the enterprise were \$100,000, then the individual's investment may need to be 75%–100% of that amount.¹¹² Most foreign influencers will likely not be able to afford to invest the capital required for this visa.¹¹³ Indeed, part of the appeal of becoming an influencer is that they can arguably act as traditional entrepreneurs, but do not have to go through the same traditional processes to get started, utilize the same methods to build up their brand, or have the same operating costs.¹¹⁴

Finally, while some foreign influencers may have an ultimate goal of running an enterprise, it is more likely that the foreign influencer wants to come to the United States to actually work as an influencer. For the purposes of the visa, the enterprise must not be “marginal,” meaning it “does not have

110. 8 C.F.R. § 214.2(e)(2); *E-2 Treaty Investors*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-2-treaty-investors> [<https://perma.cc/SNF4-ATJ4>].

111. 9 F.A.M. 402.9-6(D) (2021).

112. 2 IMMIGR. L. AND PROC. (MB) § 17.06 (2020); *Investment Amount*, L. OFF. OF BOBBY C. CHUNG, <https://e2visalawyer.net/how-to-qualify-for-e-2-visa/investment-amount/> [<https://perma.cc/3Q3S-W2WB>]; Michael Ashoori, *E2 Investor Visa Minimum Investment Amount*, ASHOORI L., <https://www.ashoorilaw.com/blog/e2-investor-visa-minimum-investment-amount/> [<https://perma.cc/K8BG-X79K>]; see *Top E-2 Visa Requirements for Investors: Do You Qualify?*, SGM L. GRP., <https://www.immi-usa.com/e2-visa-requirements-for-investors/> [<https://perma.cc/TN99-GN7F>] (Practitioners generally seem to agree that investment capital and reserves should be no less than \$100,000 in order for visa approval).

113. One of the things that makes the influencer career unique and attractive is the fact that startup costs are significantly less than those of traditional businesses. See Freddie Wilkinson, *Influencers: The Modern Entrepreneur*, NAT'L GEOGRAPHIC (Dec. 11, 2019), <https://www.nationalgeographic.org/article/influencers-modern-entrepreneur/12th-grade/> [<https://perma.cc/H2MX-V7LW>].

114. See generally *id.*

the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family.”¹¹⁵ E-2 visa holders may not simply start the enterprise and abandon it once they are lawfully in the United States.¹¹⁶ Utilizing the E-2 visa to come to the United States would in essence force the influencer to give up primarily “influencing” and being compensated for promotional work done on social media. Thus, the costs and required commitment to the enterprise makes the E-2 visa an unrealistic option for individuals who want to come to the United States to work as an influencer.

E. The O-1B Visa

The O-1B nonimmigrant visa is granted to individuals with an “extraordinary ability in the field of arts.” meaning they must have reached a “high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.”¹¹⁷ To apply for an O-1B visa, the individual must provide either “[e]vidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director’s Guild Award,” or evidence that satisfies at least three out of six criteria set forth in 8 C.F.R. section 214.2, subdivision (o)(3)(iv)(B).¹¹⁸ In addition, the individual must provide copies of written contracts between the petitioner and beneficiary, an itinerary of activities with dates, an explanation of the

115. 8 C.F.R. § 214.2(e)(15).

116. *See* 9 F.A.M. 402.9-6(C) (2020).

117. 8 C.F.R. § 214.2(o)(3)(ii).

118. *Id.* § 214.2(o)(3)(iv)(A); *see id.* § 214.2(o)(3)(iv)(B). It is of note that 8 C.F.R. section 214.2(o)(3)(iv)(C) states “[i]f the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence in order to establish the beneficiary’s eligibility.” This is of importance because achievements in the social media industry are not measured in the exact same way as other occupations that fall under this category. However, “for comparable evidence to be considered, the petitioner must explain why a particular evidentiary criterion listed in the regulations is not readily applicable to the beneficiary’s occupation, as well as why the submitted evidence is ‘comparable’ to that criterion.” *USCIS Policy Manual Chapter 4 – O-1 Beneficiaries*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 12, 2021), <https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4> [<https://perma.cc/37VZ-9EYY>].

nature of the events or activities, and a written advisory opinion from the appropriate consulting entity.¹¹⁹ Upon review of the itinerary, USCIS determines the amount of time that the individual is permitted to be in the United States by deciding what is “necessary to accomplish the event or activity, not to exceed 3 years.”¹²⁰

This category of visa has generally been used by traditional performers of all kinds including renowned actors and actresses like Canadian Rachel McAdams and singers like Canadian artist Justin Bieber.¹²¹ The O-1B category is also the one where influencers can best meet the required criteria. In fact, foreign influencers have been successful in obtaining O-1B visas in the past.¹²² However, foreign influencers still face challenges in getting applications approved, partly because of the inconsistent recognition of social media influencers as artists of extraordinary ability.¹²³ In addition, the requirement that the applicant be “leading in the field” means that most foreign influencers will not qualify, even if they are quite popular.¹²⁴

119. 8 C.F.R. § 214.2(o).

120. *Id.* § 214.2(o)(6)(iii).

121. Andy J. Semotiuk, *Celebrity Immigration Work Visas*, FORBES (Mar. 7, 2016, 6:11 PM), <https://www.forbes.com/sites/andysemotiuk/2016/03/07/celebrity-immigration-work-visas/#5740aca45c34> [<https://perma.cc/LZ6D-5NWX>].

122. See Amy Corcoran, *How Irish Influencers Are Securing ‘Extraordinary Ability’ Visas for the US*, IRISH TIMES (Feb. 11, 2019, 06:22 AM), <https://www.irishtimes.com/life-and-style/abroad/how-irish-influencers-are-securing-extraordinary-ability-visas-for-the-us-1.3786833> [<https://perma.cc/ZQC7-RT8Y>].

123. Fuji Whittenburg, Catherine L. Haight & G. Fabricio Lopez, *Getting to “Extraordinary” in the O and P Context for Not So Ordinary Occupations*, AILA: ATHLETICS, CULTURE, ENTERTAINMENT, AND SCIENCE (ACES) CONFERENCE (2019), <https://ailalink-aila-org.etrn.lls.edu/#documents/81756> (“O-1B adjudications, already considerably more difficult than they should be, are even more challenging when presenting a non-celebrity Not unexpectedly, the emergence of new media and non-traditional occupations has prompted a tide of confused RFEs from USCIS”).

124. Influencers can better their chances of approval by carefully defining the field of endeavor in which they can prove extraordinary ability. For example, petitioning as a “travel influencer” will narrow the field as compared to an “influencer” generally. While helpful to define the field narrowly, the standard will still be unreachable by many. See Brenda Boudreaux et al., *Influencing the New Economy: The O-1 and EB-11 for Unconventional and Emerging Occupations*, IMMIGRATION PRAC. POINTERS (2019), <https://ailalink-aila-org.etrn.lls.edu/#documents/81454>.

Moreover, being able to provide sufficient evidence for the required number of criteria may not be enough for petition approval. On September 17, 2020, USCIS issued policy guidance updating and consolidating guidance on O nonimmigrant classifications.¹²⁵ The updated USCIS Policy Manual states, “[i]f the petitioner meets the evidentiary requirements, the officer must then consider all the evidence in the record in its totality to determine if the beneficiary is a person of extraordinary ability or achievement as defined in INA 101(a)(15)(O)(i) and 8 C.F.R. 214.2(o).”¹²⁶ If the officer deems that evidence as a whole does not show that the influencer is an alien of extraordinary ability or achievement, the petition will be denied. This policy gives USCIS officers a lot of discretion in making a determination, which can be especially problematic if the officer reviewing the petition is unfamiliar with the influencer career or refuses to recognize it as a legitimate job.

Another issue, not exclusive to this category of visa, is that if the foreign influencer intends to perform paid work for multiple American employers in addition to being partnered with his or her social media platform, each employer must submit an O-1B petition on their behalf.¹²⁷ Not only would it be difficult for the foreign influencer to organize all the various petitions prior to arriving in the United States, but it would prevent them from working for a new American business until that business also submits a separate petition and the petition is approved.¹²⁸ Although agents may file on behalf of multiple employers and thereby submit one petition, they still must provide contracts between each employer and the beneficiary.¹²⁹ The law actually provides a solution to this problem: “[i]n the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended

125. U.S. CITIZENSHIP & IMMIGR. SERVS., PA-2020-14, POLICY ALERT: O NONIMMIGRANT VISA CLASSIFICATION 1 (2020).

126. *USCIS Policy Manual Chapter 4 – O-1 Beneficiaries*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 12, 2021), <https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4> [<https://perma.cc/37VZ-9EYY>].

127. 8 C.F.R. § 214.2(o)(2)(iv)(B).

128. *Id.*

129. *Id.* § 214.2(o)(2)(iv)(E) (“A United States agent may be: The actual employer of the beneficiary, the representative of both the employer and the beneficiary; or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent.”).

petition, provided the additional performances or engagements require an alien of O-1 caliber.”¹³⁰ This means that an influencer can actually take on new opportunities without having to go through the entire visa process all over again. However, the power to add performances or engagements belongs to the petitioner, and not the beneficiary influencer. Therefore, influencers are not guaranteed the freedom to take on any new engagements.

Finally, USCIS discretion in determining the amount of time that is “necessary to accomplish the event or activity” can pose additional challenges.¹³¹ This means that even if the employer and the foreign influencer wanted the visa to be valid for the maximum three years, it is ultimately in the discretion of the adjudicator, who can choose to limit the validity period for a much shorter period of time. This may not be an issue for all foreign influencers, but if they are only granted a short validity period, having to frequently reapply for extensions can be burdensome and expensive. Further, just because an individual was granted the visa once before does not guarantee they will be approved for an extension.¹³² Thus, while the O-1B visa is the best fit for foreign influencers in the petitioning process, it does not come without its share of challenges once it has been acquired.

F. The EB-1 Visa

The “EB-1” is an employment-based immigrant visa, also known as a “green card,” for “aliens of extraordinary ability.”¹³³ The EB-1’s standards are similar to those of the O-1B nonimmigrant visa except there are ten

130. *Id.* § 214.2(o)(2)(iv)(D).

131. *Id.* § 214.2(o) (The determination is based off the itinerary provided by the petitioner which includes the individual’s events and activities that must be submitted as part of the application).

132. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0151, POLICY MEMORANDUM: RESCISSION OF GUIDANCE REGARDING DEFERENCE TO PRIOR DETERMINATIONS OF ELIGIBILITY IN THE ADJUDICATION OF PETITIONS FOR EXTENSION OF NONIMMIGRANT STATUS 3 (2017) (In 2017, USCIS issued a Policy Memorandum stating that “USCIS is rescinding the policy of requiring officers to defer to prior determinations in petitions for extension of nonimmigrant status”); see also *I Am a Nonimmigrant: How Do I Extend My Nonimmigrants Stay in the United States?*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 2016), <https://www.uscis.gov/sites/default/files/document/guides/C1en.pdf> [<https://perma.cc/4C8X-GC8R>] (“An extension of stay is not automatic”).

133. 8 C.F.R. § 204.5(h)(1).

criteria available to fulfill as compared to six.¹³⁴ It also requires that the individual show that they will “substantially benefit prospectively the United States.”¹³⁵ USCIS then uses a two-step process for determining whether an applicant should be granted an EB-1 visa: (1) Evaluate whether the evidence provided meets any of the regulatory criteria; and (2) make a final merits determination.¹³⁶ If the initial petition is approved, the individual must then submit an application for adjustment to permanent residence or go through consular processing of an immigrant visa.¹³⁷ Consular processing requires the individual to attend an appointment to interview at the U.S. Consulate or Embassy in their home country.¹³⁸

An EB-1 visa is a great option for foreign influencers because it allows the recipient to live and work permanently in the United States without being dependent on having a job lined up and an employer to petition on their behalf prior.¹³⁹ In fact, “[n]either an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise.”¹⁴⁰ This is particularly helpful for foreign influencers who want to work multiple jobs since they can avoid the onerous process of having each employer submit a

134. See 8 C.F.R. § 204.5 (h)(3); see also *id.* § 214.2(o)(3)(iv).

135. 8 U.S.C. § 1153(b)(1)(A)(iii).

136. *Policy Manual, Chapter 2 - Extraordinary Ability*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/sites/default/files/document/memos/i-140-evidence-pm-6002-005-1.pdf> [<https://perma.cc/QF8R-VNRL>]; see *Kazarian v. U.S. Citizenship & Immigr. Servs.*, 596 F.3d 1115, 1119–20 (9th Cir. 2010).

137. *Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2018), <http://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing> [<http://perma.cc/BW9A-URVC>] (If the beneficiary of an approved immigrant petition and an immigrant visa number is outside of the United States, they may apply for the visa at a consulate abroad (“consular processing”) to come to the United States and be admitted for permanent residency. If the beneficiary is already in the United States, they may apply for permanent residence in the United States through “adjustment of status”).

138. *Id.*

139. See *Get a Green Card*, DEP’T OF HOMELAND SEC. (May 24, 2021), <http://www.dhs.gov/how-do-i/get-green-card> [<http://perma.cc/9FCP-B2W9>].

140. 8 C.F.R. § 204.5(h)(5).

separate petition that is required for other visas. Moreover, permanent residency is ideal because it grants work authorization to the holder indefinitely, and cards showing proof of permanent residency generally only need to be renewed every ten years.¹⁴¹

Although the EB-1 visa offers benefits that the O-1B does not, similar challenges for foreign influencers arise in the petitioning process. USCIS officers closely scrutinize the evidence and will only approve petitions for those it finds are of extraordinary ability, meaning “the individual is one of that small percentage who have risen to the very top of the field of endeavor.”¹⁴² This standard excludes most foreign influencers, since only a few can be considered the top of the field. Additionally, the EB-1 petitioning process is an even more expensive and time-consuming process than the O-1B visa.¹⁴³ Because the social media industry and its trends change quickly, the time that it takes for the foreign influencer to be approved could potentially harm their career opportunities in the United States.¹⁴⁴ Further, if the green card holder spends more than 180 days outside of the United States,

141. *I Am a Permanent Resident: How Do I Renew or Replace My Permanent Resident Card?*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 2013), <http://www.uscis.gov/sites/default/files/document/guides/B2en.pdf> [<http://perma.cc/HY8J-ZNF4>].

142. 8 C.F.R. § 204.5(h)(2).

143. *Fee Schedule*, DEP’T OF HOMELAND SEC. (May 17, 2020), <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf> [<https://perma.cc/C68L-JX2V>] (The filing fee for an I-140 petition is currently \$700 and the I-485 is \$1,140); *I-907, Request for Premium Processing Service*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/i-907> [<http://perma.cc/97QH-VZ5L>] (increasing the premium processing fee from \$1,440 to \$2,500 for most filings on October 19, 2020); *Filing Fees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/forms/filing-fees> [<http://perma.cc/Q3KB-9WPF>] (stating that filing fees are non-refundable regardless of any action taken by USCIS); see *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://egov.uscis.gov/processing-times/historic-pt> [<http://perma.cc/ZE77-DEWQ>] (According to the table provided by USCIS, it takes about seven months on average for processing of the I-140 form, without premium processing. If the applicant pays for premium processing, the processing time significantly decreases to an average of about two weeks. This likely does not include the additional time it takes if a Request for Evidence is sent to the petitioner and further evaluated or the amount of time it takes to get an interview for the green card. Additionally, it is important to note that even after having to wait months for a response, the petition may not be approved).

144. See Elizabeth Chang, *Have Followers, Will Travel*, WASH. POST (Aug. 8, 2019), <https://www.washingtonpost.com/graphics/2019/lifestyle/travel/instagram-travel-influencers/> [<https://perma.cc/6HSY-UH9Z>].

they may be considered to have abandoned their permanent resident status.¹⁴⁵ Therefore, unless the foreign influencer intends to spend a significant amount of time in the United States for a few years or has a large number of opportunities with American businesses available to them, the process of obtaining an EB-1 visa may not be worth it.

V. PROPOSED REFORMS

A. Visitor Visa Reform: Allowing Paid Promotional Activity

Visitor visa laws are unlikely to change solely for social media influencers because of the high risk that other types of businesses will try to evade the law using the same exceptions. In addition, the United States historically has not made exceptions for entertainment-related occupations in which individuals might travel to the United States frequently but for very short stays.¹⁴⁶ For example, athletes on visitor visas are restricted to competition only and cannot be compensated at all, with the exception of prize money and reimbursement for expenses.¹⁴⁷

However, it may be worth considering revising the law to allow for paid sponsorship activity while on a visitor visa, as it will be beneficial for the influencer, American businesses, and the U.S. economy. Allowing for limited sponsored activity will not only encourage and allow foreign influencers to perform marketing activities for American businesses legally, but could also potentially allow other occupations such as athletes, actors and actresses, musicians who are commonly employed to do promotional work to do so as well.¹⁴⁸ This in turn would benefit American businesses who may not be able to afford to open a business abroad, sponsor many work visas, or would like to hire foreign influencers that cannot meet the high evidentiary standards of work visas. With the help of foreign influencers, businesses would be able to promote themselves to a larger international audience and

145. 8 U.S.C. § 1101(a)(13)(C)(ii).

146. See 9 F.A.M. 402.2-5(G)(a) (2021).

147. *Id.* at 402.2-5(C)(4), (G)(2).

148. See generally Dale Barnett, *Celebrities or Athletes? The Future of Sports Endorsements*, INFLUENCER INTEL., <https://www.influencerintelligence.com/blog/KF/celebrities-or-athletes-the-future-of-sports-endorsements> [<https://perma.cc/8WP3-HFRT>] (discussing various celebrities' and athletes' sponsorship deals).

potentially profit from it. The U.S. government may possibly be able to collect taxes from the influencer¹⁴⁹ and payroll taxes from the businesses, which could end up being a significant amount of money. But if the law remains the same, foreign influencers may only contract with foreign branches of American companies or avoid performing any promotional work while in the United States. The United States will generally not be able to collect taxes on the money earned by the foreign influencer for work performed in the United States if it comes from a foreign employer.¹⁵⁰

A glaring concern of reforming the B-1/B-2 visa and allowing for limited paid employment is the possibility of abuse of the exception by employers and the loss of job opportunities for Americans. Though these issues were contemplated by IRCA, it would not be a problem in the context of influencers because foreign influencers are likely to be hired for different reasons than American influencers. While there will certainly be overlap between what American influencers and foreign influencers can do for businesses as an employee, foreign influencers can help American businesses reach markets which American influencers have difficulty reaching. Under a B1/B2 visa, the foreign influencer would also in theory have a limited length of stay in the United States that would prevent them from taking away too many opportunities from American influencers. Further, businesses will still need to hire American influencers to appeal to the American public.

149. See *Taxation of Nonresident Aliens*, I.R.S., <https://www.irs.gov/businesses/taxation-of-nonresident-aliens-1> [<https://perma.cc/KF5P-AG7E>]. Whether foreign influencers are taxed on their income earned in the United States by the IRS depends on factors such as: 1) what country the influencer is a national of; 2) the influencer's visa status; 3) how many days they have spent in the United States; and 4) what kind of income they have earned. This means that the U.S. government is not guaranteed to be able to collect taxes from an influencer just because any work was performed in the United States at all. *Id.*

150. *Publication 519 (2020), U.S. Tax Guide for Aliens*, I.R.S., https://www.irs.gov/publications/p519#en_US_2019_publink1000222278 [<https://perma.cc/FX6C-N84Y>] (If paid by a foreign employer, income for personal services performed in the United States as a nonresident alien is not considered to be from U.S. sources and is tax exempt unless all of the following conditions are met: "1) You perform personal services as an employee of or under a contract with a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in a trade or business in the United States; or you work for an office or place of business maintained in a foreign country or possession of the United States by a U.S. corporation, a U.S. partnership, or a U.S. citizen or resident; 2) You perform these services while you are a nonresident alien temporarily present in the United States for a period or periods of not more than a total of 90 days during the tax year; and 3) Your pay for these services is not more than \$3,000.").

To alleviate concerns, DHS could limit this exception to influencers or allow pre-approved promotional activity only. The agency could require influencers and employers to submit an itinerary for their trip, which is something they already request in O-1B visa petitions and often do ask for with B visas. It may also reserve the right to conduct interviews, ask the influencer questions at customs upon arrival in the United States, and hold employers and employees liable for reporting any employment done in such capacity. To prevent confusion, it could set standards defining “promotional activity” and provide criteria for what kind of “promotional activity” is acceptable while visiting the United States.¹⁵¹ For example, a limited number of sponsored posts on Instagram during a short trip would be acceptable promotional activity, but selling products at a company’s store every day during a longer trip would not be.

B. O-1B Reform: Consistent Recognition

Immigration attorneys have recently stated it has been harder for artists and performers to be approved for the O-1B and O-2 visas, especially for those who do not have signed contracts yet or are relatively new to the industry.¹⁵² It is even more difficult when the individual is working in a newer occupation that USCIS is unfamiliar with, as it can be hard to fathom a famous Twitch streamer and a Grammy winning singer being classified under the same category.¹⁵³ Consistent recognition of social media influencers by

151. Cf. Genie Doi & Samuel Johnson, *Foreign Players Join American Teams for the American Dream but Can't American Stream*, 2020 ESPORTS BAR ASS'N J. 1, 6–10 (2020). The authors propose a compelling “Promotional Activity Test” to resolve any ambiguities between authorized and unauthorized promotional activities for athletes holding a P-1A visa. *Id.* Although this proposed test specifically would not apply to foreign influencers who are on a visitor visa, its framework could be used as a starting point for a promotional activity test for influencers who want to perform incidental paid sponsorship work for American companies while on a visitor visa. *Id.*

152. See Daniel Grant, *How Trump's Immigration Crackdown Is Targeting Artists*, OBSERVER (Sept. 13, 2018, 7:00 AM), <https://observer.com/2018/09/o1b-o2-artist-visas-harder-under-trump-uscis-immigration-lawyers/> [<https://perma.cc/22ZX-FAEW>].

153. See Fuji Whittenburg, Catherine L. Haight & G. Fabricio Lopez, *Getting to “Extraordinary” in the O and P Context for Not So Ordinary Occupations*, AILA: ATHLETICS, CULTURE, ENT., AND SCI. (ACES) CONF. (2019), <https://ailalink-aila-org.etrn.ils.edu/#documents/81756>; see Zain Dhanani, *Why Social Influencers Outsell Celebrities*, FORBES (Oct. 31, 2017, 9:00 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2017/10/31/why-social-influencers-outsell-celebrities/?sh=1020d07e425b> [<https://perma.cc/Z98Q-E4AJ>] (discussing the distinction between influencers and celebrities and the differences in marketing tactics used).

USCIS for the O-1B visa is the most realistic option for change that would be beneficial to foreign influencers. Doing so would require less drastic reform of current law while still giving foreign influencers a better chance of obtaining the opportunity to do their jobs legally. This can be done through establishing additional optional criteria that is tailored towards influencers or setting forth the specific types of acceptable evidence that specifically influencers can use to prove extraordinary ability.

Employers may avoid hiring foreign influencers because of the increasing difficulty of obtaining an O-1B visa and visas in general,¹⁵⁴ which potentially prevents American companies from reaching certain foreign markets.¹⁵⁵ There is also a risk that employers will instead just discreetly let the influencer perform unauthorized work, which can lead to negative consequences once discovered for both the influencer and employer.¹⁵⁶ However, as long as USCIS consistently recognizes that the “social media influencer” falls under the O-1B category, employers may be more willing to do the work to obtain a visa for the influencers it hires, which in turn reduces the possibility of foreign influencers performing unauthorized work in the United States. This will not resolve all the challenges with immigration law that foreign influencers face, but it would be helpful for them and their employers to at least know that “influencing” as an occupation will be taken seriously when their petition is reviewed.

C. A New Influencer Visa

Adjusting policies within an established system of law may be preferable and easier for legislators than creating new laws altogether. However,

154. Grant, *supra* note 152 (explaining that immigration attorneys have struggled to obtain visas for foreign artists under the Trump administration); see León Rodríguez, *The Trump Administration Is Making Legal Immigration Harder, Too*, WASH. POST (July 29, 2019), <https://www.washingtonpost.com/outlook/2019/07/29/trump-administration-is-making-legal-immigration-harder-too/> [<https://perma.cc/W73K-MPWb>] (article written by former director of USCIS describing how the Trump administration has made immigration application processes longer and has redirected resources toward non-application processing assignments).

155. Aliah D. Wright, *The Ups and Downs of Hiring Foreign Workers*, SHRM (June 19, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/the-ups-and-downs-of-hiring-foreign-workers.aspx> [<https://perma.cc/2N6N-EXD2>] (“When determining whether or not to sponsor applications, the company should consider risks . . . time [to hire], cost [of hire] and qualified candidate pipeline”).

156. 8 U.S.C. §§ 1227(a)(1)(C), 1182(9)(A)(i), 1255(c)(2); see 8 C.F.R. § 274a.

it is clear that existing law is not well suited to attracting foreign influencers and allowing them to conduct their career in a way that is standard for the occupation. While the O-1B visa is the best current option for influencers and reform would be helpful, many influencers still will not be able to obtain one. Significant reform would be required both in the petitioning process and the terms of stay in order to better accommodate influencers, and legislators may not be willing to apply those changes for other occupations that would fall under the same O-1B category. Therefore, a new visa specifically tailored to the social media occupation may be the best option.

A new visa category for foreign influencers could be a hybrid of the B-1/B-2 and O-1B visas. To avoid the complications seen in other visa categories that arise from having more than one employer, the influencer may self-petition and work for multiple employers without each having to submit a separate petition. But in order to ensure that the influencer is actually doing promotional work for a real employer, the visa should require proof of at least one guaranteed opportunity and require that employer to provide evidence of the opportunity, such as a contract. This visa could have a lower standard than that of O-1B's "extraordinary ability" standard to allow for more foreign influencers to come to the United States and promote tourism and American goods. But because the standard is lower, the maximum length of stay permitted should be shorter and more akin to that of the B-1/B-2 visa.

D. Addressing Concerns over Reform for Influencers

There will certainly be concerns that an influx of foreign influencers will overcrowd the market and take away job opportunities from American influencers. To address this issue, DHS could place a reasonable cap on the number of visas issued to foreign influencers. Further, as discussed previously, foreign influencers are likely to be used for a different target audience than American influencers.

Another concern likely to be raised is that the influencer market is largely unregulated and the industry is facing a number of ethical issues.¹⁵⁷ Influencers have been criticized for being money-hungry and engaging in fraudulent activity such as false advertising and buying followers to appear

157. Simon Owens, *Is It Time to Regulate Social Media Influencers?*, N.Y. MAG: INTELLIGENCER (Jan. 17, 2019), <https://nymag.com/intelligencer/2019/01/is-it-time-to-regulate-social-media-influencers.html> [<https://perma.cc/878H-WYA2>].

as though they have a large following.¹⁵⁸ It has also become harder for consumers to determine whether their favorite influencers' posts are sponsored or not.¹⁵⁹ There may be fears that encouraging foreign influencers to come to the United States will only heighten these problems and increase their prevalence. However, these problems are largely already being addressed by other government agencies such as the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC), as well as social media platforms and advertising agencies.¹⁶⁰ While there is still work that needs to be done to mitigate these problems, it is clear that combatting them is a priority. Additionally, businesses that want a good return on their investments should be responsible for knowing who they are hiring, especially if they plan to go as far as sponsoring a visa for them. Thus, although an increased number of influencers will not come without its share of problems, there are various safeguards in place to address them and more are being considered for future implementation.

VI. RECOMMENDATIONS BASED ON OTHER FIELDS OF LAW

A. Taxes

The nontraditional nature of the influencer career has led to a similar issue in tax law. Foreign influencers do not necessarily fall under the category of "entertainer" for tax purposes and thus cannot benefit from the tax treaties and exemptions that other traditional "entertainers" like actors and musicians may receive.¹⁶¹ The primary purpose of the activities being performed determines if the taxpayer should be taxed as an "entertainer", and oftentimes the influencer's work is seen as marketing.¹⁶² While it is true that influencers are performing marketing services for employers, there is

158. *Id.*

159. *Id.*

160. *See id.* (explaining that most of the social industry regulation is done by federal agencies and that the platforms themselves have attempted to regulate influencer marketing).

161. *See* Carli Marcello, *I'm Entertained, but Who's Doing the Entertaining? A Look at the International Tax Consequences for International "Entertainers"*, 28 TUL. J. INT'L & COMPAR. L. 125, 145 (2019).

162. *Id.* at 130.

arguably an entertainment aspect to their work.¹⁶³ Yet, they are not guaranteed recipients of the exemptions granted to foreign entertainers.¹⁶⁴

This issue in taxation closely mirrors the problem with applying immigration law to influencers: the influencer occupation does not fit into the categories of traditional careers that were contemplated when immigration laws were written. Similar to how influencers do not clearly fall under the category of “entertainer” for the purpose of taxation, they also do not neatly fit into a visa category. With tax authorities becoming increasingly aware of the value of the influencer industry,¹⁶⁵ it would be in the interest of the Internal Revenue Service (IRS) and DHS to work together to take advantage of the potential benefits that foreign influencers pose to the American economy. A collaborative effort between the IRS and DHS to determine how to categorize and address foreign influencers and how they work and earn money in the United States could simplify the system for both the government and the foreign influencer and better ensure consistent adjudications in both areas of the law.

B. FTC Disclosure

Another area where the law has struggled to keep up with the growth of social media is in that of FTC disclosure laws.¹⁶⁶ The FTC requires influencers to disclose their relationship with brands in order to protect consumers from deceptive behavior.¹⁶⁷ In 2019, the FTC released “Disclosures 101 for Social Media Influencers” to provide guidance on when influencers needed

163. *Id.* at 142.

164. *See id.* at 126, 130, 145.

165. *See* Sony Kassam, *Social-Influencer Freebies Worth Billions Present Tax Temptation*, BLOOMBERG TAX (May 23, 2019, 1:46 AM), <https://news.bloombergtax.com/daily-tax-report-international/social-influencer-freebies-worth-billions-present-tax-temptation> [https://perma.cc/KTW5-A36P].

166. *See* Tisha James, *The Real Sponsors of Social Media: How Internet Influencers Are Escaping FTC Disclosure Laws*, 11 OHIO ST. BUS. L.J. 61, 85 (2017).

167. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [https://perma.cc/K74K-BABJ].

to provide disclosures about sponsorships.¹⁶⁸ DHS should issue a comprehensive immigration guide that is easy for foreign influencers to understand, similar to the guides issued by FTC.

Given the non-traditional nature of the career in that the work is not usually done in a set place of business and that the work product can look like an innocuous social media post, it is easy for foreign influencers to be oblivious to the fact that they have performed unauthorized work. Foreign influencers have probably done so without realizing they have broken the law, and it is likely to go unnoticed by U.S. officials at the time the foreign influencer is “doing work” because social media is frequently used for personal, non-employment related use such as to share information and connect with family and friends.¹⁶⁹

If immigration laws will not be reformed or provide for more exceptions, then DHS should at least make it clear how foreign influencers can meet the requirements for various visas and what they can and cannot do while visiting the United States. Although guides exist for immigration generally,¹⁷⁰ it would be helpful to have one that is directed specifically at foreign influencers since it is not exactly straightforward how rules and application standards apply to them. Further, it would be ethically sound to do so to prevent foreign influencers from unknowingly violating immigration law and having to face harsh consequences. Creating a guide may also force DHS to better understand the social media marketing industry and the impact influencers can have on the economy.

C. Other Countries' Approaches

Although there have not been any reported cases of countries cracking down on foreign influencers for visa violations, influencers have been on the radar of various countries. Saudi Arabia and Colombia have actually paid for foreign influencers' trips to their countries for the purpose of boosting

168. *FTC Releases Advertising Disclosures Guidance for Online Influencers*, FED. TRADE COMM'N (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers> [<https://perma.cc/UBJ7-T93H>].

169. See Aaron Smith, *Why Americans Use Social Media*, PEW RSCH. CTR. (Nov. 15, 2011), <https://www.pewresearch.org/internet/2011/11/15/why-americans-use-social-media> [<https://perma.cc/E4PG-7YWK>].

170. See *How Do I Guides*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 27, 2018) <http://www.uscis.gov/tools/how-do-i-guides> [<http://perma.cc/Q3UN-UDMA>].

tourism.¹⁷¹ On these government-sponsored trips, the influencers are not permitted to engage in activities outside of the pre-assigned itinerary, though it is not clear if they were allowed to be compensated in other ways, such as compensation for advertising merchandise.¹⁷² However, it is noteworthy that other countries recognize the positive impact foreign influencers can have on the economy and are trying to take advantage of it, rather than banning them from doing any social media-related work. The United States may have no interest or need to pay foreign influencers directly to visit, but the law can make it easier for them to come and spread the economic benefits.

Other countries like Germany have actually adapted their immigration law to address growing industries and occupations. In 2020, after recognizing the significance of the rapid growth and value of esports, Germany became the first country to adopt a visa dedicated entirely to esports athletes.¹⁷³ Interestingly, unlike the United States, where esports athletes generally apply for the P-1 “athlete visa” used by traditional sports athletes,¹⁷⁴ Germany chose not to recognize esports as a “sport” and instead created an entirely separate category of visa.¹⁷⁵ Germany has not yet made a visa specifically for influencers, but it is compelling that it created a visa for a relatively new occupation in a rapidly growing industry after recognizing that traditional German immigration law was making it difficult for them to come to the

171. See Bill Bostock, *Saudi Arabia Is Enlisting Instagram Travel Influencers to Help Repair Its Tattered Reputation*, INSIDER (Sept. 30, 2019, 3:21 AM), <https://www.insider.com/saudi-arabia-lavish-trips-instagrammers-2019-8> [<https://perma.cc/8FQQ-P9NA>]; see *Foreign Social Media Influencers Visit Colombia to Show the Best of Each Region*, COLOM. CO., <http://www.colombia.co/en/updates/special-contents/foreign-social-media-influencers-visit-colombia-show-best-region/> [<http://perma.cc/TWU7-FDNY>].

172. See, e.g., Bostock, *supra* note 171.

173. Adam Fitch, *Germany Introduces Dedicated Visa for Esports*, ESPORTS INSIDER (Dec. 22, 2019), <http://esportsinsider.com/2019/12/germany-esports-visa/> [<https://perma.cc/D6RU-Q9P9>].

174. See Khuong N. Nguyen, Amy L. Peck & Gregg E. Clifton, *Visas For eSports Gamers on the Rise*, NAT'L L. REV. (Mar. 25, 2019), <https://www.natlawreview.com/article/visas-esports-gamers-rise> [<https://perma.cc/AJ6A-HPJ3>].

175. Fitch, *supra* note 173.

country.¹⁷⁶ It would be in the interest of the United States to similarly adapt and take advantage of changes in the world, rather than resisting them.

VII. CONCLUSION

Social media has become heavily relied on by businesses for marketing and will continue to be a key revenue driver for the foreseeable future. Because of its incredible ability to spread a message across the world in mere seconds, social media has been and could be even more beneficial to the United States by promoting travel and American products and services. In fact, during the COVID-19 pandemic, businesses have still been able to successfully promote their brands through influencers, due to the increased amount of time individuals spend online and engaging with influencers.¹⁷⁷ The convenience and accessibility of social media has allowed the influencer industry to continue to thrive during a time when many other industries have struggled.¹⁷⁸

DHS should adopt immigration policy that accounts for the rapid growth of social media and technology, the rise of the influencer occupation, and the value of the influencer industry. The current law makes it difficult for foreign influencers to obtain the requisite permission to work in the United States and it is also inflexible and prevents them from being able to carry out all the unique aspects of their job once they arrive. Foreign influencers have the potential to persuade their foreign followers to purchase American products and services, promote tourism, and boost the U.S. economy, but cannot do so if they are kept out of the country. If U.S. immigration policy does not try to keep up with an ever-changing world, it may lose out on this significant economic opportunity.

176. *See id.*

177. *See* García-Hodges, *supra* note 18.

178. *See id.*