

POLICY BRIEF **04.03.20**

Former U.S. Lawful Permanent Residents: Retired Without Benefits

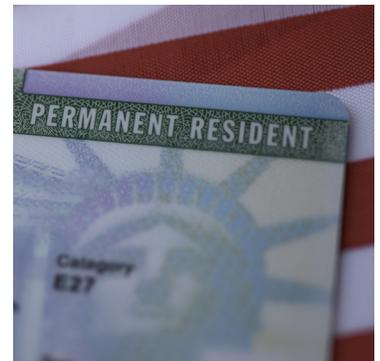
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INTRODUCTION

Mexico has been the leading country of origin for U.S. lawful permanent residents (LPRs) each year since 1978.¹ LPRs are persons the United States has granted the privilege to reside permanently in the country.² In 2015, the estimated LPR population in the United States exceeded 13 million, of which Mexicans comprised 25%.³ Though LPRs pay taxes and have many of the same rights as citizens except that they cannot vote in U.S. federal, state and most local elections,⁴ they enjoy less security than their U.S.-born counterparts when it comes to accessing and maintaining disability, retirement, and survivors' benefits (Social Security). Under U.S. law, LPRs are entitled to Social Security benefits based on their U.S. earnings but may still experience a total and abrupt loss of those benefits if later deported.⁵ An increasing number of Mexican LPRs could lose access to their U.S. contributions as a result of deportation,⁶ forming part of a growing number of legal immigrants who contributed to a Social Security scheme but cannot later benefit from or receive their contribution. To better understand what appears to be a growing phenomenon, this brief explains who LPRs are, the etymology behind the exclusionary provisions of the Social Security Act (SSA), and the implications of these policies on deported LPRs from an ethics and equity perspective.

LEGAL IMMIGRANTS: THE PERMANENT MEMBERS OF U.S. SOCIETY

The Immigration and Nationality Act (INA) outlines various paths for obtaining LPR status in the United States, including— but not limited to— foreign nationals who are sponsored by a close family member who is a U.S. citizen or LPR, and foreign nationals who are sponsored by an employer or otherwise possess certain desirable skills.⁷ Once they obtain LPR status, they are allowed to live and work permanently in the United States, attend schools and universities, own property, and be eligible for Social Security benefits upon retirement or in the event of disability.⁸ LPRs may join the Armed Forces and, if they meet certain requirements, naturalize, or apply to become U.S. citizens.⁹ Except for in 2013, the United States has admitted more than 1 million LPRs annually since 2005.¹⁰ In 2015, the most recent data provided by the Department of Homeland Security, 9 million of the estimated 13 million LPRs living in the United States met statutory eligibility requirements to acquire U.S. citizenship.¹¹ Yet compared to most immigrant groups in the United States, including immigrants from Iran, India, Ecuador, and Vietnam, who have seen record-high naturalization increases in recent years, Mexicans continue to have one of the lowest naturalization rates of any origin group.¹² Due to language barriers, cost of application (\$640), and misinformation about whether Mexicans may hold dual citizenship, less than 50% of Mexican residents eligible



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to naturalize actually do so.¹³ Without citizenship, they, like all other noncitizens living in the United States, may be subject to deportation at any time.

Under the current expansive reach of immigration enforcement policies, LPRs are among those targeted for deportation upon, for example, committing certain criminal offenses.¹⁴ Due to lack of statistics on arrests of immigrants legally in the United States, it is difficult to know exactly how many LPRs the United States deports each year or the exact reasons for it.¹⁵ In 2010, the last attempt to calculate the impact of deportations on the legal immigrant community, the American Immigration Council estimated that LPRs make up 10% of total deportations and that 68% of those were due to minor and nonviolent crimes such as traffic violations, drug offenses, and tax evasion.¹⁶ Recent reports indicate that current deportation charges can involve even very old crimes in which the person has already repented and is not a safety risk.¹⁷ In addition to their displacement from their home and family, LPRs face the potential loss of acquired Social Security benefits, the primary source of income for U.S. retirees.¹⁸ Once lost, deported LPRs may not access or maintain their benefits unless and until they can be readmitted to the United States as an LPR, a nearly impossible requirement to meet. Since their absence from Mexico makes it difficult for them to meet eligibility criteria in their home country, deported, aging and disabled Mexican LPRs are particularly vulnerable to social exclusion¹⁹ in Mexico, as their U.S. work credits may not be counted toward any other Social Security system.

SOCIAL EXCLUSIONARY PROVISIONS: ORIGINS AND IMPLICATIONS

In 1954, Congress amended the Social Security Act (Amended Act) to deny payment to deported foreign nationals who become eligible for Social Security based on their U.S. work history. In the United States, noncitizens can qualify for payment, and can, under certain circumstances, receive those payments outside of the United States. To become eligible for Social Security, a

mandatory government insurance program, immigrants must have worked in the United States and contributed to Social Security for at least the equivalent of 10 years. As a result of the 1954 change, deported immigrants with acquired benefits and those in the process of acquiring benefits may not access or maintain those benefits unless and until they can legally return to the United States.²⁰ Section 202(n) applies to foreign nationals deported for illegal entry, conviction of certain crimes, and subversive activity.²¹ Persons deported but unaffected by the exclusionary provisions include those who become public charges within five years of entry, those who fail to maintain their nonimmigrant status, and those who, prior to or within five years after entry, aid other foreign nationals to enter the country illegally.²²

Section 202(n) passed during a period of anti-immigrant and anticommunist hysteria in the United States. Eager to root out certain immigrants, the government resorted to repressive and punitive tactics against Mexicans and alleged Communists, taking away their civil rights and expelling them from the country.²³ Alleged radicals were jailed, lost their jobs, their work licenses, and their immigration status. Through violent union raids and a militaristic campaign titled Operation Wetback, alleged Communists, their sympathizers, and over 1.1 million Mexican laborers were deported from the country.²⁴ It was in this hostile environment that the 1954 exclusionary provisions passed denying these foreign nationals any remaining government-funded privileges and entitlements that could still be claimed in Social Security benefits.²⁵

Although the amended provisions aroused very little discussion in Congress when passed, litigants later questioned their constitutionality arguing that Social Security amounted to a type of property that, once acquired, could not be taken away without just compensation.²⁶ The Supreme Court disagreed and in 1960, the court upheld Section 202(n), which remains valid law today.²⁷ The exclusionary provisions now count among numerous Social Security amendments enacted over the years to squeeze out eligible foreign nationals and

other deported workers deemed unfit by the government to receive Social Security protection, regardless of their years of contribution. It is difficult to know the exact number of foreign workers, and in particular Mexican workers, who have received Section 202(n) denials since 1954, or their immigration status at the time of deportation. In 2015, the SSA recorded savings of \$606,240 in withheld funds from eligible workers and their dependents or survivors based on Section 202(n) denials that year.²⁸ While helpful for giving context, recorded yearly savings do not represent the total amount of withheld funds on all suspended accounts for a particular year,²⁹ and so the total annual amount withheld from eligible workers and their dependents or survivors for any given year is not known but is estimated to be at least in the tens of millions, based on known amounts for years 2010, 2012, and 2015.

LABOR RIGHTS OF MEXICAN LEGAL WORKERS

Historically, Mexican nationals have formed a significant part of the U.S. formal and informal economies.³⁰ While Mexican legal workers experience more labor protection rights than their undocumented counterparts, even permanent, formal Mexican workers who have become part of U.S. society can still lose all accumulated privileges and entitlements, if later deported. The loss of Social Security rights and benefits means that deported Mexican LPRs will not enjoy even a basic level of protection due to the lack of adequate non-contributory social assistance available in Mexico. Owing to the interposition of immigration laws on U.S. Social Security determinations, in addition to the lack of a bilateral agreement that guarantees their protection, deported Mexican LPRs now count among the 4 billion people worldwide without adequate coverage and susceptible to elderly ill health, poverty, and social exclusion.

The need to protect the Social Security rights of foreign workers has been recognized by international organizations and instruments since 1935. In the

same year that the Social Security Act of 1935 passed, the International Labour Organization (ILO), the UN agency setting international labor standards, created the right by which workers who resided in more than one country during their lives could maintain their social security rights under multiple pension insurance schemes.³¹ The right to social security was later recognized formally in the Universal Declaration of Human Rights in 1948 as a fundamental right necessary for persons to enjoy a dignified life.³² As further espoused in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the “right of everyone to social security, including the right to social insurance” guarantees the right of every person to family protection and assistance, an adequate standard of living, and adequate access to health care.³³

Natural cooperative efforts have resulted in some economically integrated regions out of the need to harmonize Social Security legislation across states and to provide for the portability of benefits based on these concepts. Member states of ASEAN (Southeast Asia), Mercosur (South America), the Caribbean Community, and the European Union have implemented rules of coordination to provide labor migrants and their families access to Social Security benefits for work completed in the region.³⁴ Outside of available regional mechanisms, countries have independently entered into bilateral agreements or totalization agreements to reconcile a worker’s total work history between the two countries for eligibility purposes and apportionment of liability.³⁵ Such agreements cover legal workers and offer a balancing of interests of sending and receiving states of migrant workers.

In the United States, totalization agreements originate from the executive branch and are automatically approved when signed by the president unless Congress acts to prevent an enactment, which it has never done.³⁶ Since the 1970s, the United States has signed totalization agreements with 30 nations, including, in Latin America, Brazil– and Uruguay, where the United States has strong economic

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and commercial ties.³⁷ Despite historically strong U.S. reliance on Mexican labor, no agreement exists for the protection of legal workers in the North American region. In 2004, the two countries initiated talks to coordinate social insurance policies for the benefit of American and Mexican workers who earn income in both countries.³⁸ The then-Social Security (SS) commissioner, Jo Anne Barnhart, signed a totalization agreement with her Mexican counterpart.³⁹ The agreement, however, met immediate political resistance due to perceptions that the agreement would award illegal work, and, as a result, has never become politically binding on the United States.⁴⁰

Without an agreement in place, Mexican legal workers cannot benefit from the provisions meant to protect them by providing for the totalization of their U.S. work credits for eligibility purposes in Mexico. Nor does any other provision of any trade, tax, or other labor agreement between the United States and Mexico, including the proposed 2004 totalization agreement, specifically preempt the 1954 deportation statute to allow immigrants access to their U.S. Social Security contributions.

RECOMMENDATIONS

Failure by either country to address the unique situation of deported persons has resulted in significant social protection gaps for disabled and retired workers deported to Mexico. Their increasing number suggests the need to strengthen and adapt social protection systems so that those systems fulfill their purpose of preventing and reducing poverty, enhancing income security, and limiting inequality. As the country of employment where significant Social Security contributions have been made, the United States has a unique role in closing the protection gap. The following broad principles can help to guide U.S. policymakers in strengthening and improving labor protections for workers in the North American region.

Equality and fairness

Where non-national permanent workers contribute to a workers-funded social security scheme, they should be able to benefit from that contribution or receive their contribution based on their work history alone. Fairness in benefits determination leads to better protection for all workers.

Universality of protection and accessibility

As permanent workers contribute to the U.S. Social Security system in the same way as their U.S. counterparts, conditions on access not applicable to eligible U.S. citizens likewise should not apply to eligible non-citizens.

Transparency

Legal frameworks should provide for clear and predictable outcomes so that legal workers who intend to remain in the United States permanently are fully aware of their rights and responsibilities and can plan for their future. -Where access is conditioned on meeting a requirement not in the worker's control, non-covered workers should be allowed the option to transfer their mandatory contributions to a private investment account.-

Maintenance and transferability

Coordinative efforts should recognize labor market mobility and provide for the transferability of rights and benefits for those working within the North American region.

Good Governance

The Social Security system must be financed in a sustainable and equitable way that considers the resource implications of meeting the needs of all workers and residents of a nation.

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CONCLUSION

Despite the fact that permanent Mexican workers contribute fully to the economy of their host country, deported Mexican LPRs may have no future expectation of receiving benefits in the United States or in their home country. The confluence of immigration, labor, and Social Security laws has increased the long-term insecurity of legal, permanent workers by occluding their full inclusion in social protection programs. As insured workers whose benefits have accrued are deported year after year, the 1954 exclusionary provisions of the Social Security Act continue to have prejudicial implications on workers who have lost their benefits for reasons unrelated to their rights as legal workers. While this brief offers recommendations on how the United States can strengthen its social protection system, Mexico, too, as the top receiving country of U.S. deportees, must account for an increasing number of noncontributory workers requiring income assistance. Due to the history of trade and labor relations between the United States and Mexico, and the consistent contributions of Mexicans to the U.S. economy, it is of great interest that the United States and Mexico coordinate their state insurance policies by formalizing a totalization agreement that fully protects workers who split their time within the North American region. As Social Security again takes front stage in U.S. political debates, the rights of LPRs and other foreign workers must be included in those discussions rather than brushed aside for lack of political will.

ENDNOTES

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3. Department of Homeland Security, “Population Estimates: Lawful Permanent Resident Population in the United States: January 2015,” May 2019, 4, https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015.pdf.

4. U.S. Citizenship and Immigration Services, “Rights and Responsibilities of a Green Card Holder (Permanent Resident),” <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-a-green-card-holder-permanent-resident>. See also 18 U.S.C. § 611(a); David M. Howard, Potential Citizens’ Rights: The Case for Permanent Resident Voting, 95 Tex. L. Rev. 1393, 1398–1401 (2017).

5. See Social Security Act §202(n).

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7. DHS Annual Flow Report at 2.

8. *Ibid.*

9. *Ibid.* Among other requirements, immigrants who wish to become U.S. citizens must be at least 18 years old, have resided in the United States for at least five years as an LPR or three years if married to a U.S. citizen, and demonstrate good moral character and U.S. civics knowledge.

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13. Gonzalez-Barrera, "Recent Trends in Naturalization," 10.
14. Daniel Shoer Roth, "Even with a Green Card, an Immigrant Can Be Deported Under New Guidelines," *Miami Herald*, July 13, 2018, <https://www.miamiherald.com/news/local/immigration/article214844345.html>; United States General Accounting Office, "Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans," 2019, <https://www.gao.gov/assets/700/699549.pdf>. Although citizenship status, including removal history, is not considered in determining a veteran's eligibility for Department of Veterans Affairs (VA) benefits and services, veterans living abroad can and do experience ineligibility for certain VA benefits and services, as well as challenges accessing certain benefits and services, such as slower disability claim processing.
15. Alex Nowrasteh, "Illegal Immigrants and Crime—Assessing the Evidence," CATO Institute, March 4, 2019, <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence>.
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19. "Social exclusion" refers to a situation of economic and social disadvantage that, in the context of social security, can occur when older persons have no income security and, as a result, cannot meet basic needs such as shelter and housing, water and sanitation, food, or access to essential health care. See International Labour Organization, Social Protection Floors Recommendation, 2012 (No. 202).
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26. See *Flemming v. Nestor*, 363 U.S. 603 (1960), <https://www.oyez.org/cases/1959/54>. In that case, the plaintiff, Ephram Nestor, emigrated from Bulgaria in 1913 and lived continuously in the United States until 1956, when he was deported for Communist affiliation. Notably, the United States did not criminalize membership in

the Communist Party until 1954, long after Nestor had quit the party. By 1956, Nestor was retired and receiving benefits based on his 19-year work record in the United States. Though Nestor had already begun receiving his benefits, the court nevertheless held that those benefits could be taken away or terminated as long as the reasons for doing so did not “manifest a patently arbitrary classification, utterly lacking in rational justification,” a much lower standard than would have applied had the court recognized Social Security as a property and, therefore, fundamental right. According to the court, as long as a plausible rational justification existed, Nestor could not argue that Congress had acted with intent to punish persons of certain political belief. Nestor lost his case in a 5–4 opinion and was ultimately sent back to Bulgaria.

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34. See ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration (2006), https://www.ilo.org/wcmsp5/groups/public/--ed_protect/---protrav/---migrant/documents/publication/wcms_178672.pdf, pp. 63–64.

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