

The case for a foreign worker advisory commission

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Abstract

This paper outlines the case for an independent Foreign Worker Advisory Commission (FWAC) to assemble and develop data and research to assist the administration and Congress make better and more timely decisions on employment-based migration (EBM), a relatively small (14 per cent in 2010) component of total immigration. An independent, professional FWAC should be an important component of comprehensive immigration reform. Indeed, the FWAC should be established and operational before any substantive changes are made in current foreign worker programs. The United States should, however, immediately improve the enforcement of the rights of foreign and domestic workers, simplify and modernize administrative procedures, and strengthen data relevance and reliability.

Keywords: Migration policy making, advisory commission, US, labour shortage.

Introduction

This paper outlines the case for an independent Foreign Worker Advisory Commission (FWAC) to assemble and develop data and research to assist the administration and Congress make better and more timely decisions on employment-based migration (EBM), a relatively small (14% in 2010) component of total immigration.¹ The FWAC also would recommend the numbers and composition of temporary foreign workers (TFW) admitted each year, which constituted about 1.7 million (of 46.5 million) US foreign visitors in 2010.²

Until the 1980s and 1990s, United States migration policies were similar to those of other immigration nations in that immigration was heavily family based. But with globalization, other nations shifted more to economic immigration, mainly EBM, while the US continued to provide most (over 60%) of its immigrant visas for family reunification and fewer (less than 20%) for economic and employment purposes. This divergence occurred because most other countries—especially Canada and Australia—responded to globalization by adopting value-added (productivity and quality) competitiveness policies that

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¹ The ideas in this paper come from my experiences with and study of employment-based migration in the United States and other countries, especially Canada, Australia, and the United Kingdom (see Ray Marshall 2011).

² These are admissions data, which have been inflated in the past few years by DHS counting methods. For example, Mexican workers living in Mexico and entering the US every day with H-2A visas, as during the Arizona vegetable harvest, are counted as an admission every day that they enter the US.

stressed upgrading workers' skills and minimizing wage competition that would lead to lower and more unequal wages for workers in high-income countries.

Immigration supports domestic economies by providing skills not readily available in domestic labour markets, compensating for declining native labour force growth, and contributing to creativity, innovation, and entrepreneurship, all critical requirements for value-added economic policies.

Immigration has positive impacts if foreign workers (a) complement, not substitute for, domestic workers or depress wages and working conditions and (b) successfully integrate into labour markets and societies. Unsuccessful integration, by contrast, can lead to deadly and disruptive racial, ethnic, and religious conflicts. The challenge for migration managers, therefore, is to ensure that foreign worker flows maximize the enormous potential advantages of migration while minimizing the disadvantages, which requires increasingly sophisticated data, research and metrics more readily available in other immigration countries than in the United States.

The case for a foreign worker advisory commission

An essential agency to help ensure an effective EBM system is an independent research, evaluation, and advisory body to give legislators and migration officials objective, evidence-based advice about such matters as labour shortages, whether migration is the most sensible way to fill those shortages, and the characteristics of foreign workers most likely to succeed. A commission can also make recommendations to better match the supply of foreign workers with job vacancies, evaluate the employment implications of immigration reform proposals, and assess how to balance the interests of workers, employers, and the nation.

There is, therefore, growing support for an independent migration commission, including from the Independent Task Force on Immigration and America's Future, co-chaired by Lee Hamilton and Spencer Abraham; the Council on Foreign Relations' (CFR) Task Force on U.S. Immigration Policy, co-chaired by Jeb Bush and Thomas McLarty III; the Brookings-Duke Immigration Policy Roundtable; and the Migration Policy Institute (Papademetriou et al. 2009).

There is, in addition, ample precedent for such entities. As the CFR task force observed:

Although immigration is every bit as important as trade for the US economy, the institutional expertise on immigration policy is a fraction of that of the trade world. Trade policymakers call on a staff of several hundred economists and other experts at the independent US Trade Commission for background investigations into the effects of trade on specific industries and segments of the economy (Council on Foreign Relations (2009:93).

Structure and purpose

The FWAC's structure and composition should ensure independence, professionalism, and credibility. Members should be appointed by the President and confirmed by the Senate, and the President should appoint the chair. Commissioners must have expertise in migration-related disciplines, be supported by a professional staff, and be authorized to commission research and support advisory networks. The FWAC would develop data and research, supplemented by input from trade, occupational, industry, labour, professional, and regional organizations, and the public.

Specific mandates

A US FWAC would have three specific mandates:

- (1) Provide data, research, advice, and recommendations on foreign worker matters to Congress and the President.
- (2) Recommend more rational and flexible flows of foreign workers. With present US policies, changing foreign worker quotas – some of which were established over two decades ago – requires highly contentious and inflexible Congressional action unsupported by credible data and analyses. This process cannot meet the changing needs for foreign workers in dynamic, diverse, and highly competitive labour markets.
- (3) Conduct and commission research to improve EBM. It would be extremely bad policy, for example, to expand temporary foreign worker flows before fixing the seriously flawed existing programs, assessing the labour market impact of pending reforms, and developing both effective processes to determine labour shortages and better market tests for qualified Americans.

The FWAC would elevate EBM on the national policy agenda; reduce political conflict over immigration; and increase public support for this important function, provided, of course, that the system was sufficiently transparent and well managed to convince the public that federal immigration authorities were promoting national interests as well as those of the principal stakeholders.

It is important to specify that the FWAC would not make final decisions about annual EBM compositions and levels; this is a political responsibility best left to elected officials. The commission would make recommendations, which Congress could modify, reject, or allow to take effect in a specified time, as is now done, for example, with the annual goals for refugees. Similarly, the commission would provide data, research, and advice to the federal officials responsible for EBM, but would not administer foreign worker programs.

Policy context

To be most effective, the FWAC should operate within a system that included:

A. *Clear goals.*

The most sustainable goals would be to (a) minimize wage competition and maximize value added and (b) promote broadly shared prosperity. A migration system guided by these objectives would clearly be better than one either based on direct cost, mainly wage, competition or guided by macro or per-capita economic growth with little regard for distributional effects.

B. *High-level federal responsibility.*

The advantages of having high-level federal EBM responsibility include:

1) *Better coordination between migration and other economic and social policies.* Without coordination, employers and public officials too often neglect this important activity and substitute migration for education, training, and other functions. Coordination also highlights sensible alternatives to the importation of foreign workers.

2) *Greater visibility for employment-based migration.*

3) *Strengthened protection of foreign and domestic workers.* This is more likely if a Department of Labor official has responsibility for EBM, but the FWAC could facilitate the process by formulating and evaluating innovative approaches to worker protections or faster and more flexible adjustment of foreign workers to domestic labour markets.

C. *Policies and programs to ensure that migrants are successfully integrated into labour markets and communities.* This requires that foreign workers succeed on the job, have adequate English-language skills, and understand and accept American values, institutions, and laws.

D. *An effective immigration management system.* Administrative efficiency, in turn, requires clear *accountability* for outcomes, which is greatly facilitated by high-level federal EBM responsibility. Administrative efficiency would facilitate the flexible adjustment of foreign worker flows to the needs of American employers. The FWAC could, in addition, provide the data and analyses to continuously improve EBM programs.

E. *Well-designed immigration law.*

One of the most glaring defects of US migration policy is that it is not based on transparent, fair, enforceable, sensible, or evidence-based legislation. As a result, these laws not only have been ineffective, but have produced serious unintended consequences.

Resolving disputes over labour shortages

One of the FWAC's major responsibilities would be to identify and measure labour shortages, currently a very contentious issue. There is basic agree-

ment over broad trends, but strong disagreement over specific shortages. Indeed, there is not even a generally accepted definition of shortages.

College-educated workers

Based on current economic and demographic trends, most analysts project a strong demand for college graduates, partly because of the need for higher cognitive skills in a more competitive and knowledge-intensive economy and partly because slack labour markets and declining real wages for college graduates enable employers to hire overqualified workers. The McKinsey Global Institute, for example, projects a 2020 deficit of 1.5 million workers with bachelor's degrees (Manyika et al. 2011). Workers with lower levels of education will continue to face higher unemployment, partly because employers prefer college graduates for many jobs that do not actually require college-level competencies.

The absence of agreed-upon definitions and measures makes it difficult to resolve disagreements over shortages. As evidence for shortages of college-educated workers, for example, employers, politicians, and editorial writers often cite the rapid exhaustion of the annual 85,000 H-1B visa allotment. This, however, is evidence of a high demand for indentured foreign workers willing to accept below-market wages, not a shortage of skilled workers. Moreover, a large percentage of H-1B visas is captured by multinational outsourcing firms, which do not have a US labour shortage because their business models largely exclude American workers, depending instead on the importation of low-wage workers from India and other developing countries. Ron Hira, a leading authority on these visas, concludes: "There are only two reasons that firms hire H-1Bs instead of Americans: 1) an H-1B worker can legally be paid less than a US worker and 2) the H-1B worker learns the job and then rotates back...home...and takes the job with him." (Hira 2013a and 2013b).

Business, academic, and media commentators likewise often grossly understate the supply of available foreign workers by focusing on particular visa limitations rather than the total supply of migrant workers. Thus, despite the 85,000 limitation, approximately 130,000 H-1B visas were granted each year between 2006 and 2012,³ and H-1B workers who have exhausted their six-year eligibility can remain in the United States while awaiting permanent residency but are not counted as H-1B visa renewals. In addition, an annual average of 71,330 L visas for intra-company transfers (which have no numerical limit, but compete with H-1Bs and are authorized to work in the US for five to seven years) were granted between 2008 and 2012.⁴ There is thus a large

³ http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html;
<http://www.travel.state.gov/pdf/FY12AnnualReport-TableXVIB.pdf>;
[http://www.travel.state.gov/pdf/FY08-AR-TableXVI\(B\).pdf](http://www.travel.state.gov/pdf/FY08-AR-TableXVI(B).pdf)

⁴ Ibid.

(probably over one million), but unfortunately unknown, number of college-educated temporary foreign workers in the United States at any time.

This supply is augmented by significant numbers of international students who remain in the United States after completing their studies on Optional Practical Training (OPT) visas for 12 months for each degree; science, technology, engineering and mathematics (STEM) graduates are eligible for an additional 17 months (i.e., 29 months total).

Advocates for increasing visas for college-educated workers, or “stapling green cards to their diplomas,” often argue that it is irrational for the United States to educate foreign students and force them to leave after they graduate (see for example, Wadhwa 2008). However, according to work by Michael Finn for the National Science Foundation, about two-thirds of foreigners who receive US science and engineering PhDs stay in the United States for 10 years or longer (Finn 2012:1). Finn concludes: “The data...do not support the view that the best and the brightest have been returning home because of visa difficulties in the United States” (2012:13)

Focusing on a particular visa category is misleading because there are alternative ways for former students to acquire permanent residence. For example, Mark Rosenzweig (2006) found that in 2003 56% of foreign graduates who acquired green cards did so by marrying US citizens while only 20% were sponsored by employers.

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Other evidence casts doubt on a general shortage of college-educated workers: high unemployment and underemployment rates for college graduates, a more than doubling of the unemployment rate for science and engineering workers between 2007 and 2010 (from 2.6% to 5.6%), stagnant or declining real median incomes for college-educated workers, the difficulty many graduates—including STEM majors—have finding jobs in occupations for which they are trained, the fact that about two-thirds of engineering graduates work in non-engineering fields, and the large percentage (almost half, according to some assessments) (Beaudry et al. 2013) of college graduates in jobs that do not require college degrees.

According to one assessment, an increase in foreign-born scientists who will work for relatively low wages by American standards has contributed to a glut of science and engineering PhDs and has caused “a growing aversion of America’s top students...to enter scientific careers. Increasingly, foreign-born technical and scientific personnel on temporary visas staff America’s university labs and high-tech industries” (Benderly 2013).

Richard Freeman, a leading authority on science and engineering labour markets, also rejects the assertion that there are shortages of qualified workers in these fields. He argues that “huge increases in supply [of foreign students] make these careers less attractive to the native-born.” Moreover, “the potential that the country will experience a genuine labour market shortage seems remote... (Freeman 2007:7-8).”

Thus, although media and business reports often warn of “looming” general shortages of science and engineering graduates, there are ample grounds for scepticism because these claims usually evaporate under objective scrutiny. Most such assessments confirm Michael Teitelbaum’s conclusion: “...no one who has come to the question with an open mind has been able to find any objective data suggesting ‘shortages’ of scientists and engineers” (Teitelbaum 2007).

For migration management purposes shortages must be defined with much greater precision. If properly measured, there could well be shortages of college-educated workers in some specific fields and geographic locations, but advocates for larger foreign worker flows rarely, if ever, present credible evidence about the duration or size of shortages, the occupations involved, the geographic distribution, or other characteristics needed to determine if it were sensible to use immigration to overcome those shortages.

Less-skilled workers

It likewise is highly questionable that the United States faces a general shortage of workers with sub-baccalaureate education. The McKinsey research cited earlier, for example, projects 2020 surpluses of 5.9 million high school dropouts and 800,000 high school graduates (Manyika et al. 2011:39).

Furthermore, wage and employment data do not suggest a general shortage of less-skilled workers. The unemployment rate of young high school graduates was 21% in 2011, more than double that of young college graduates. And the real median income for male high school graduates 25 and older fell 11.5% between 2000 and 2009; it fell 16.3% for those with 9 to 12 years of education and no diploma (Marshall 2012: 376-387).

For a variety of reasons, most other high-income immigration countries greatly restrict the number of less-educated temporary foreign workers (LETFW). First, low-income workers generally have negative fiscal implications for countries with costly health care, social support and education systems (Rowthorne 2008:560). Second, these countries have generally adopted value-added economic strategies to avoid low-wage jobs (with 25 per cent of its jobs classified as low wage, the United States had the highest proportion of such jobs among the OECD countries surveyed; Denmark, with 8.5 per cent, had the lowest) (Gautie and Schmitt 2010). These countries also import more college-educated workers in order to minimize the political, economic, and social consequences of growing inequality of wealth and income (Aydemir and Borjas, 2008 and Marshall 2011). Most high-income countries likewise give preference for work requiring less education to resident youth, older people, and other qualified workers. Foreign workers are imported in highly restricted categories and for specific time periods, like summer jobs, agricultural harvesting, holiday maker programs, and other jobs for which domestic workers are not available at the times and places where they are needed.

A significant negative deterrent to importing LETFWs is their vulnerability to exploitation. Indeed, even countries like Canada and Australia, with strong worker protections and labour market institutions, have found it difficult to protect the LETFWs or the domestic workers with whom these migrants compete. Their inherent vulnerability makes it hard to enforce typical complaint-driven labour protection regimes (Marshall 2011 and Nakache and Kinoshita 2010). It is, in addition, hard for countries to prevent LETFWs from becoming unauthorized immigrants.

Those who advocate a large new LETFW or “guest worker” program likewise focus on the caps for particular visas, like the H-2b, and ignore other ways authorized foreign workers enter the United States, especially via permanent immigrant visas for purposes of family reunification, which are more than triple those issued for economic purposes. According to the Mexican Migration Project, for example, in 2010, 517,000 Mexicans entered the United States as authorized temporary workers, while net illegal immigration from Mexico had fallen to virtually zero (Castaneda and Massey 2012).

Finally, it is hard to imagine general labour shortages of less-educated workers in the future when we already have a large supply of unemployed and underemployed low-income workers who would be the main losers from a large-scale LETFW program. If we adjust the status of millions of unauthorized immigrants along with their immediate family members, as we should, the United States could have a continuing flow of less-educated workers. A value-added, shared-prosperity strategy would give high priority to improving opportunities for these and other low-wage workers, not to importing people to compete with them.

Again, there might be specific shortages of less-educated workers that migrants could sensibly fill, but this will not be revealed by current methodologies, data sources or market processes. An independent professional agency is needed to produce much better data, measurements, and labour market assessments before we change the limits on LETFWs. We should, however, reform existing programs to more effectively meet employers’ legitimate needs while protecting the interests of foreign and domestic workers and the public.

Defining and Measuring Shortages

A major cause of the controversies over labour shortages is the absence of agreed-upon definitions and measures, permitting antagonists to make their case with assertion instead of objective evidence. A major mandate for the FWAC therefore would be to build consensus for definitions and measurements to help adjust the flow of migrants to jobs that cannot sensibly be filled by domestic workers.

The commission should start by benchmarking international experiences and adapting them to American conditions. While all immigration nations

have developed shortage concepts to guide EBM, the definitions and processes developed by the UK's Migration Advisory Committee (MAC) are particularly transparent, well thought out, and evaluated.

In performing its calculations, MAC identifies four labour shortage categories:

1. **Cyclical**, when, especially during periods of rapid economic growth, wages or suitable labour supplies cannot keep pace with rising demand because of market frictions like “sticky wages.”

2. **Structural**, when occupational or sectoral labour supplies do not match demand for reasons unrelated to economic cycles. If there are no market adjustment restrictions, rising wages should ultimately overcome these shortages.

3. **Public sector wage restraints** can cause long-run shortages because wages are not allowed to rise enough to attract resident workers to these occupations. In the UK, as in the US, this kind of shortage is common in education, research, and social and health care where public employers rely heavily on foreign workers who find these wages and conditions attractive.

4. **Rare skills shortages** occur when there are global shortages of workers with the skills demanded, either because of small numbers with specific innate abilities or because those skills are attained in connection with innovations that have not yet reached the country experiencing the shortages.

In identifying and measuring specific job or occupational shortages, MAC uses a top-down, bottom-up methodology. Top-down statistics on particular occupations checked against submissions from employers, unions, statistical agencies, and others at the national, regional and local levels. Top-down statistics provide rigor and continuity, while the bottom-up assessments help refine the top-down data, which are always too general and less timely and specific than needed for migration decisions. This process permits continuous refining and updating and is greatly enhanced by information technology.

MAC uses the concept of **dovetailing** to identify shortages confirmed by both the top-down and bottom-up evidence. This is an important step because top-down indicators do not by themselves provide incontrovertible evidence for or against a shortage. For example, not all job titles within an occupation showing a shortage might be in short supply, and top-down evidence might conceal shortages within particular job titles. Before adding an occupation to the shortage occupations list (SOL), MAC applies a *sensibility test*, asking if migration is the most sensible way to overcome the shortage. This test forces an extensive examination of alternatives to migration. If, for example, employers are not making adequate efforts to recruit and train resident workers, the occupations applied for will not be added to the SOL.

It should be noted, however, that the SOL is not used for all EBM categories. Tier 2 of the UK's points-based migrant worker program is for skilled workers with a job offer and is the main component of the British EBM sys-

tem. Tier 2 has five routes: shortage occupations (SO), resident labour market test (RLMT), intra-company transfers (ICT), sportspeople and ministers of religion. The advantages of an SO occupation is that it gains the applicant enough points (70) for entry: 50 for being on the SOL and 10 each for mandatory English language competency and income support requirements.

Migrants entering through the RLMT, the most important non-ICT route, get 30 points for a job offer and an additional 40 points from the mandatory 20 points, qualifications (5-15 points) and prospective earnings (5-15 points). As the name implies, employers using the RLMT must test the market to ensure that no British workers are available for the jobs.

Since the ICT route (comparable to L-1 visas in the US) has been very problematic, MAC helped the UK Border Agency devise a new system to identify, eliminate, and prevent abuses. In reforming the much-criticized L-1 visa program, the United States could benefit from the British ICT experience.

MAC's work has produced a number of advantages:

1. It has made decisions more evidence-based, thereby improving the government's ability to meet labour market needs while promoting the national interest and protecting foreign and domestic workers.

2. The top-down, bottom-up methodology has improved the data used to measure labour shortages, as well as for labour market and EBM research. Because they participate in the bottom-up process, stakeholders are more inclined to accept MAC's methods and recommendations.

3. MAC's transparency and credibility has depoliticized contentious debates over whether or not there are shortages (Martin and Ruhs 2011).

4. The transparency of the process, driven by the UK's national interest in value-added economic policies, has caused economic migration to have broad public acceptance, though other migration categories remain extremely contentious.

5. The sensibility test has forced better coordination between migration, education, health, economic, and social policies.

A Response to Critics

Employers often contend that they, not an appointed commission, are better suited to select foreign workers to meet their needs. However, the power to select foreign migrants should not be delegated to employers who, even according to competitive business doctrine, are unlikely to protect the interests of workers or the nation. Instead, adjusting foreign worker flows is a sovereign responsibility best left to the legislative and executive branches. A professionally staffed, properly resourced FWAC would enable Congress to optimize migration policies' benefits for workers, employers, and the nation while simultaneously easing the divisiveness this issue generates.

Of course, an effective migration policy must respond to employers' legitimate interests in recruiting foreign workers for jobs that cannot be readily filled by domestic workers at prevailing wages, benefits, and working conditions. And the FWAC, like the British MAC, would seek active input from employers and other labour market participants. Indeed, managing foreign worker flows effectively would include policies that induce as much self-regulation by employers and workers and their organizations as is consonant with the national interest. And EBM programs recognize employers' interests by giving major credit for job offers and characteristics employers value.

A US Chamber of Commerce official opposes a commission because, he argues, "It would never be able to determine shortages in a timely manner that reflects the always-changing realities of the market place"(Greenhouse 2013:1). The issue, however, is not perfection, but whether a commission could help significantly improve the existing system. Logic, as well as experience in other countries, leaves little doubt that a commission could make the current migration selection process, with congressionally mandated caps, more flexible, timely, transparent, and useful. Moreover, the process would calculate the kind of persistent shortages the Chamber and other employer organizations complain about, not less important temporary shortages. As noted, moreover, shortage calculations would be only one of the FWAC's functions. Shortage lists accelerate the migrant hiring process by making it possible avoid time-consuming market tests for available resident workers.

Finally, an independent commission can help resolve disputes about whether or not there are shortages of qualified domestic workers. It clearly would not be good policy to accept employers' or domestic workers' word for whether or not there are shortages. Indeed, there are few, if any, objective academic, foundation, or non-profit analysts of immigrant labour markets using generally acceptable methodologies and appropriate data. Given the subject's growing importance for workers, employers, labour market and education institutions, more objective and evidence-based analyses benefit all parties—especially where, as proposed here, all parties have an opportunity to make their case based on evidence produced by sound methodologies.

Some sceptics doubt that the FWAC could avoid being politicized or captured by special interests. That challenge deserves serious analysis, discussion, and debate. It would be particularly useful to examine why some US and foreign commissions and boards have been more politicized and co-opted than others.

However, the evidence suggests that independence could be strengthened by creating a highly professional, evidence-based culture, as, for example, the Bureau of Labor Statistics, the International Trade Commission, and the Federal Reserve Board have done. Independence also is strengthened through selecting highly respected professional members who serve for long, staggered terms that do not coincide with those of any administration, and ensuring a

high level of visibility, transparency, and professionalism in the commission's deliberations.

This does not mean that the FWAC's deliberations, as emphasized earlier, can or should be divorced from politics. Not only must decisions about immigration reconcile conflicting interests, but also is a sovereign responsibility. That is the reason the final decision on the FWAC's recommendations should be left to democratic political processes.

Concluding remarks

An independent, professional FWAC should be an important component of comprehensive immigration reform. Indeed, the FWAC should be established and operational before any substantive changes are made in current foreign worker programs. The United States should, however, immediately improve the enforcement of the rights of foreign and domestic workers, simplify and modernize administrative procedures, and strengthen data relevance and reliability.

A note on the 2013 bipartisan Senate immigration reform bill

The Senate reform bill provides for a Bureau of Immigration and Labor Market Research (BILMR), located in the Department of Homeland Security (DHS), to perform some of the functions I propose for the FWAC, but would restrict its recommendations to a three-year W visa, renewable for an additional three years, for non-seasonal LSTFWs "or guest workers." I believe my proposal for a FWAC is superior for the following reasons:

1. An independent commission would have greater autonomy and visibility than a DHS bureau.
2. Even if this entity remains a bureau, it should be located in the Department of Labor and given at least as much independence as the Bureau of Labor Statistics. As stressed in this paper, employment-based migration is a labour market, not a law enforcement of national security, function.
3. The BILMR's responsibilities should extend to all EBMs, not just the new W visa. It is logical to have a separate non-seasonal, non-agricultural visa, but W visas should not be issued until an objective case is made for them, employers have tested the domestic labour markets, and there are adequate protections for foreign and domestic workers.
4. The name of the BILMR would more appropriately be the Bureau of Migration and Labor Market Research; TFWs are migrants, not immigrants, though a strong case can be made for allowing all migrants to earn immigrant status.

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