
PROTECTING THE H-1B VISA: A PROMISE TO “HIRE AMERICAN”
IN THE “NATION OF IMMIGRANTS”

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Modern U.S. employment practices necessitate reform of the H-1B sponsorship program. Reducing the number of H-1B visas available to U.S. employers could have a devastating impact on the economy and higher education. Proper expansion of the program would create additional jobs for U.S. citizens, while allowing employers to hire the most qualified candidates, regardless of their national origin. Legitimate interests surrounding national security and domestic economic growth and stability can successfully coincide with program expansion.

This Note first reviews the development of the H-1B sponsorship program, its relation to other work visas, and its foundations in immigration law. It next analyzes the Trump administration’s proposed changes to the H-1B sponsorship program and relevant legal concerns pertaining to the increased wage requirements and labor market tests for H-1B sponsorship, and the impact this has on U.S. companies. Finally, this Note recommends a practical approach to foreign sponsorship that protects the interests of U.S. citizens, while meeting the growing demand for cross-border work.

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I. INTRODUCTION

Andrew Achilleos seems to be the definition of international. Born in Bahrain to mixed-race parents, Achilleos left the Middle East to attend high school and college in England.¹ After graduating, he worked in Athens before moving to the U.S., where he studied business at Carnegie Mellon University, one of the most prominent schools in the country.² Shortly before graduating with his master's degree in business administration, Achilleos cultivated an ambitious dream to stay in the U.S. and develop a luxury retail company.³ His plan? To leverage

1. Mark Roth, *H-1B Work Visa Full of Uncertainties for Immigrants*, PITT. POST-GAZETTE (Dec. 15, 2014, 11:07 PM), <http://www.post-gazette.com/local/city/2014/12/16/H-1B-work-visa-full-of-uncertainties-for-immigrants/stories/201412160004>.

2. *Id.*; see also *MBA Rankings*, CARNEGIE MELLON TEPPER SCH. OF BUS., <https://tepper.cmu.edu/prospective-students/masters/mba/rankings/>.

3. Roth, *supra* note 1.

his newly acquired business skills to launch a company specializing in custom men's suits.⁴ His problem? The H-1B visa.

The H-1B visa is the classic route for “highly educated, foreign-born students” hoping to work in the U.S.⁵ Though Achilleos is both highly educated and foreign-born, his H-1B candidacy does not reflect traits common to most applicants of the visa program. First, Achilleos received a master's degree in business administration at a U.S. institution; most H-1B candidates receive a master's degree or higher in computer programming, engineering, or some other science.⁶ Second, Achilleos is a British citizen; most H-1B candidates in 2016—82% to be exact—were from India or China.⁷ Fortunately for him, he has already made it through what may be the most challenging aspect of the visa program; Achilleos found an employer willing to pay for the H-1B sponsorship process. After completing a summer internship with TMD Holdings, Achilleos received a full-time offer from the holding company to launch his luxury suit business.⁸ The uniqueness of his candidacy compared to typical applicants, his diverse accomplishments abroad, and his employer's financial sponsorship, however, did nothing for his chance of obtaining an H-1B visa after Carnegie Mellon. Achilleos, like thousands of others, must play the waiting game. His application will not be carefully evaluated by the government, weighed against fellow H-1B hopefuls studying engineering and science. His application will instead enter a lottery system, and he will wait to hear if he has received one of 85,000 H-1B visas available.

Achilleo's story, though unique, is relatable for most international students looking to secure employment in the U.S., with the hopes of eventually obtaining a “green card,” indicating permanent residency.⁹ Permanent residency can lead to U.S. citizenship, which is often the end goal for students who choose to live and study in the U.S. before applying to U.S.-based companies. The process, however, is anything but easy. For starters, students seeking employment in the U.S. must find an employer willing to sponsor them under the H-1B program.¹⁰

Recruiters ask the question in almost every interview for the vast majority of technical positions: “will you require H-1B sponsorship?” A candidate's answer may ultimately affect his or her ability to move forward in the interview

4. *Id.*

5. *Id.*

6. *Id.*

7. Rani Molla, *Workers from India and China Received 82 Percent of U.S. H-1B Visas Last Year*, RECODE (Apr. 13, 2017, 12:31 PM), <https://www.recode.net/2017/4/13/15281170/china-india-tech-h1b-visas>.

8. Roth, *supra* note 1.

9. *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last visited Apr. 15, 2019).

10. *See, e.g.*, Hoa Do, *4 Essential Resources For International Students Seeking Work Visas*, FINDSPARK (Apr. 27, 2012), <https://www.findspark.com/four-essential-resources-for-international-students-seeking-work-visas/>.

process because for many U.S. companies, sponsoring H-1B visa candidates is not economically feasible.¹¹

Currently, the U.S. offers visas for temporary workers under the H-1B “Specialty Occupation” program.¹² The program requires potential visa recipients and their employer to meet several requirements and complete a complicated application.¹³ If granted an H-1B visa, employees receive authorization to work in the U.S. for up to three years, which may be extended for up to six years total.¹⁴ The complexities presented by the H-1B program create obstacles for many companies seeking to hire technical talent, affecting higher education, local job markets, and diversity within many companies.

Nonetheless, the H-1B sponsorship visa is the most common way for companies to hire foreign professional workers.¹⁵ The application process is complex;¹⁶ foreign employees must meet certain criteria related to education and work experience, and employers must certify that hiring the prospective visa applicant “will not adversely affect any U.S. Citizen workers.”¹⁷ Filing a petition will cost an employer approximately \$5,000 on average,¹⁸ and simply allows the employer to participate in an annual lottery for one of the 85,000 visas available.¹⁹ Demand for these visas is high and in 2016, this cap was reached in just five business days.²⁰ This complicated and costly process poses significant challenges for smaller companies in particular, like tech start-ups, who often have limited financial resources when hiring computer programmers and other technical employees. Future changes to the H-1B visa program may impact the way in which companies hire, or do not hire, foreign employees.

Does the U.S. government’s H-1B sponsorship program currently serve the needs of companies seeking skilled professional talent, and will immigration re-

11. Tracey Lien, *Changes to H-1B Visa Policy Could Have a Chilling Effect on the Tech Industry*, L.A. TIMES (Apr. 4, 2017, 6:10 PM), <http://www.latimes.com/business/technology/la-fi-tn-silicon-valley-h1b-changes-20170404-story.html> (describing the challenges immigration attorneys face when advising low-budget, Silicon Valley tech startups seeking H-1B visas for their programmers).

12. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZEN & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (last visited Apr. 15, 2019) [hereinafter *Specialty Occupations*].

13. *Id.*

14. *Id.* Some exceptions do apply, however, in accordance with the American Competitiveness in the Twenty-First Century Act.

15. Matt Faustman, *How Does a Company Sponsor H1B Visas?*, FORBES (Apr. 7, 2014, 11:01 AM), <https://www.forbes.com/sites/quora/2014/04/07/how-does-a-company-sponsor-h1b-visas/#2db583ff384c>.

16. *Id.*

17. *Specialty Occupations*, *supra* note 12.

18. Matt Faustman, *How Much Will Sponsoring an H1-B Visa Cost an Employer?*, UPCOUNSEL BLOG (2013), <https://www.upcounsel.com/blog/what-is-the-costs-for-an-employer-to-sponsor-an-h1b-visa> (last visited Apr. 15, 2019) (summarizing the filing fees and attorney’s fees associated with H1B sponsorship and the lottery system).

19. Faustman, *How Does a Company Sponsor H1B Visas?*, *supra* note 15.

20. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 403 (8th ed. 2016).

form, coupled with President Trump's vow to review the H-1B sponsorship program with greater scrutiny, impact foreign citizens' ability to work in the U.S., affecting the job market and progress of U.S. companies?

This Note argues that the current H-1B program is flawed and should not face reductions. Instead, the H-1B sponsorship program should reflect a growing trend of globalization and cross-border work, fostering a U.S. job market that allows companies to hire the most qualified candidates, regardless of their national origin.

Part II reviews the development of the H-1B sponsorship program, its relation to other work visas, and its foundations in immigration law. Part III analyzes the Trump administration's proposed changes to the H-1B sponsorship program and relevant legal concerns surrounding the proposed increased wage requirements and labor market tests for H-1B sponsorship, and the impact this has on U.S. companies. Part IV recommends a practical approach to foreign sponsorship that protects the interests of U.S. citizens while meeting the growing demand for cross-border work.

II. BACKGROUND

A. *The History of the H-1B Visa Program*

The Immigration and Nationality Act of 1952 laid the foundation for H-1B sponsorship, regulating the work status of nonimmigrants with "distinguished merit and ability."²¹ The Act of 1952 was controversial, in part, because it ended the Asian Exclusion and the Chinese Exclusion Act, which had barred Asian immigrants from establishing residency in America.²² Further, the Act "introduced a system of preferences based on skill sets and family reunification."²³ At that point in time, economic factors were "relatively unimportant in the debate over new immigration provisions" and the U.S. sought to preference those with special skills or families already living in the country.²⁴

Immigration laws have seen continuous reform since 1952, in accordance with changing immigration policy.²⁵ In 2004, for example, the annual cap exemptions expanded significantly, allowing more foreign citizens to receive H-1B visas under the program.²⁶ Some of the most progressive changes to the H-1B program were introduced under the Obama administration, in which many of the

21. AUSTIN T. FRAGOMEN, JR. ET AL., H-1B HANDBOOK § 1:3 (2018 ed.).

22. *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T STATE, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Apr. 15, 2019).

23. *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP'T STATE, <https://history.state.gov/milestones/1945-1952/immigration-act> (discussing the controversial actions of the 1952 act, led by Democratic Senator Patrick McCarran from Nevada, who maintained a balanced view of opening immigration while "ensur[ing] the preservation of national security and national interests").

24. *Id.*

25. See generally FRAGOMEN, JR. ET AL., *supra* note 21.

26. *Id.* § 1:12.

rules surrounding jobs for foreign workers were eased.²⁷ The Obama administration aimed to simplify the process and directed the Department of Homeland Security to develop plans that would “enabl[e] U.S. businesses to retain and develop highly-skilled workers, reducing the burdens of lengthy immigrant visa backlogs on employment-based adjustment applicants, and removing restrictions on job mobility.”²⁸

B. Current H-1B Criteria

The H-1B visa falls under a broader category for business and entrepreneurial nonimmigrants who are “visiting the U.S. temporarily for business.”²⁹ Although the U.S. Citizenship and Immigration Services (“USCIS”) characterizes the H-1B visa as a nonimmigrant visa, the H-1B is unlike other nonimmigrant visas in that it does not require applicants to show “non-immigrant intent.”³⁰ In other words, individuals filing for an H-1B visa may intend to immigrate and obtain permanent residency after their temporary visa expires or is no longer available for renewal.

The Department of Labor (“DOL”) oversees the H-1B sponsorship program as part of its wage and hour division.³¹ Employers must satisfy wage requirements, provide certain working conditions, and certify that they “took good faith steps” to recruit U.S. workers for the job opening at hand.³² Good faith in this context often requires a showing that the employer publicized the opening among internal employees and members of the public. Criteria for employees is also limiting; prospective H-1B sponsored employees must be in a “specialty occupation” or be a “fashion model[] of distinguished merit and ability”³³ to be considered eligible for the program. Often referred to as the “Einstein Category,”³⁴ the provision of distinguished merit and ability is not to be taken lightly.

27. *Id.* § 1:16.

28. *USCIS Proposes Rules Changes for Employer-Sponsored Foreign Nationals*, FRAGOMEN (Jan. 4, 2016), <https://www.fragomen.com/insights/alerts/uscis-proposes-rules-changes-employer-sponsored-foreign-nationals>.

29. *B-1 Temporary Business Visitor*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-visitors-business/b-1-temporary-business-visitor>.

30. *Specialty Occupations*, *supra* note 12.

31. *H-1B PROGRAM*, DEP’T. OF LABOR, <https://www.dol.gov/whd/immigration/h1b.htm> (last visited Apr. 15, 2019).

32. *Work Authorization for Non-U.S. Citizens*, DEP’T. OF LABOR, <http://webapps.dol.gov/elaws/elg/h1b.htm> (last visited Apr. 15, 2019).

33. *Id.*

34. Jenna Johnson & Mary Jordan, *Melania Trump Shares More Immigration Information but No Documentation*, WASH. POST (Sept. 14, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/14/melania-trump-shares-more-immigration-information-but-no-documentation/?utm_term=.ee9a153fbb4c (“Immigration attorney Bruce Morrison, who wrote the extraordinary ability provision of federal law when he was a Democratic congressman from Connecticut, said it was known as the ‘Einstein category.’ ‘It wasn’t always good enough to be a player in the starting lineup of major league baseball, you had to be the most valuable player. The expectation was that you had to be truly extraordinary in your field,’ Morrison said, adding: ‘[i]f someone came to me with her ability, I would be dubious that she would get it.’”) (internal citations omitted).

Bruce Morrison, who wrote the provision as a Democratic congressman, compared the category to being “truly extraordinary in your field” and the “most valuable player” on the team, not merely in the starting lineup.³⁵

Experts say that the green card’s “extraordinary ability” category is used by people with “exceptional and renown talent, including those who win Nobel Prizes and Oscars.”³⁶ This notion has raised questions about one particularly notable H-1B recipient: First Lady Melania Trump. The president’s wife immigrated to the U.S. in 1996 and received an H-1B visa from the U.S. embassy in Slovenia to work as a model.³⁷ She applied for permanent residency in 2000, based on her “extraordinary ability” in modeling, and received her green card in 2001.³⁸ During this time, Melania Trump was a working model best known for her relationship with Donald Trump, but some have claimed she “was not a top international model.”³⁹ Morrison, who wrote the federal law, claims that “if someone came to [him] with her ability, [he] would be dubious that she would get [an H-1B visa] [under the extraordinary ability provision].”⁴⁰ First Lady Melania Trump’s H-1B candidacy and immigration to the U.S. are often used to combat the sometimes harsh, anti-immigration rhetoric that hallmarked her husband’s presidential campaign.

Aside from the “extraordinary ability” provision of the H-1B application, the sponsorship process itself places a substantial financial burden on employers seeking to hire international citizens. The average total cost of filing an H-1B petition is approximately \$5,000 and does not guarantee that an employer will actually be able to hire the prospective foreign employee.⁴¹ Though the H-1B filing fee is only around \$3,000, immigration attorney fees typically cost upwards of \$2,000 per H-1B application.⁴² The DOL has a set number of H-1B visas available each year, which employers compete for in an annual lottery system.⁴³ The current cap was set by Congress at 65,000 H-1B visas, though exemptions exist for nonprofit organizations and governmental research organizations.⁴⁴ In addition, an exemption for up to 20,000 H-1B visas exists for individuals with a master’s degree or above.⁴⁵ In 2017, however, the total annual H-1B application

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Faustman, *How Much Will Sponsoring an H1-B Visa Cost an Employer?*, *supra* note 18.

42. *Id.*

43. *Work Authorization for Non-U.S. Citizens*, *supra* note 32 (stating that there are 65,000 total H1B visas available each year, plus an additional 20,000 visas for individuals who received a master’s degree or higher from a U.S. institution).

44. *H-1B Fiscal Year (FY) 2019 Cap Season*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2019-cap-season> (last updated Apr. 11, 2019).

45. *Id.*

cap was reached in just five days.⁴⁶ The program is popular, to say the very least. This lottery process creates a substantial risk for companies who hope to obtain or retain international employees with an H-1B visa, forcing them to weigh significant costs against a chance of success.

C. *Effect on Employer's Hiring Practices*

The H-1B program influences hiring decisions across the country. Ideally, U.S. learning institutions would produce highly qualified American citizens to fill the large number of open jobs in the “science/technology/engineering/math (“STEM”) realm.”⁴⁷ One reason why they do not is discussed below. As prestigious institutions produce more diverse student bodies, the number of graduates will invariably include a sizeable percentage of foreign students. The potential pool of candidates available for hire, therefore, is largely characterized by foreign citizens.

Shoeb Mogul is a prime example. He came from India to study computer science at Northeastern University in Boston, and when he graduated, his skills were in high demand.⁴⁸ He had twenty interviews in one week, and within two weeks, he had three job offers.⁴⁹ Mogul’s story is common among international graduate students working in technical capacities, like engineering. Mogul says that many tech companies seek people with a background like his, with hopes of attaining an H-1B visa to allow them to work in the U.S long-term. From a student perspective, Mogul thinks there are easily more international engineers than American engineers; he can think of “over 100 friends” on H-1B visas with tech companies.⁵⁰

The realities of international student bodies affect employers directly. The majority of students in STEM degrees at U.S. institutions are international students, therefore requiring some sort of visa or sponsorship to work in the U.S. upon graduation.⁵¹ According to a new report from the National Foundation for American Policy, “81 percent of full-time graduate students in electrical and petroleum engineering programs at U.S. universities are international students, and

46. Neha Alawadhi, *USCIS Sees H-1B Applications Cap Reached in Five Days*, ECON. TIMES (Apr. 7, 2017), <https://economictimes.indiatimes.com/nri/visa-and-immigration/uscis-sees-h-1b-applications-cap-reached-in-five-days/articleshow/58070884.cms>.

47. Editorial, *The Case for Importing Skilled Foreign Workers: Trump's Kenosha Doctrine Is Good for America*, CHI. TRIB. (Apr. 20, 2017, 6:00 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-visa-worker-program-trump-edit-0421-md-20170420-story.html> (arguing that the visa program exists to boost the economy and that the “retooled program should also make sure smaller firms, including startups, have a chance to participate”).

48. Asma Khalid, *H-1B Visas: Stealing American Jobs or a Solution to a Tech Shortage?*, BOSTONMIX (Mar. 1, 2017, 4:45 PM), <http://www.wbur.org/bostonmix/2017/02/23/h1b-visas-debate> (sharing the story of Shoeb Mogul, a recent graduate working in Boston, to illustrate common practices and experiences of employers and candidates attempting to secure an H-1B work visa).

49. *Id.*

50. *Id.*

51. Frances Kai-Hwa Wang, *Study: International Students Outpace Americans in STEM Degrees*, NBCNEWS (June 23, 2015, 8:19 AM), <https://www.nbcnews.com/news/asian-america/china-india-top-list-international-students-america-n378521>.

79 percent in computer science are.”⁵² International students make up the large majority of engineering-related programs, and their enrollment has been “rising much faster than the number of domestic students” at U.S. universities.⁵³

1. *The Importance of OPT*

Naturally, this pool of talent affects employers seeking to hire engineers from the nation’s leading programs. Though international students may legally stay in the U.S. after graduation to work under the Optional Practical Training (“OPT”) program, recent graduates in STEM can only obtain such authorization for three years, before they must pursue another avenue to permanent residency, such as the H-1B visa.⁵⁴ The standard period of OPT authorized stay is twelve months, but regulations in 2015 extended the OPT length to three years for students in STEM fields.⁵⁵ The OPT program is codified in Section 214.2(f) of the Immigration and Nationality Act and specifies that the student’s employment must be directly related to their field of study.⁵⁶ Non-STEM students may still apply for OPT, but will not be eligible for an extension, thereby receiving authorization to work in the U.S. for only one year.⁵⁷

The OPT program itself has also been a subject of concern for many employers, since “[m]any believe the program is vulnerable to being ended or changed by the Trump administration.”⁵⁸ For employers, the OPT program is a temporary crutch and can be relied on to quickly and efficiently hire recent graduates, without the burden or fees associated with H-1B sponsorship. The OPT program is critical for nearly every international student hoping to obtain employment in the U.S. after graduation, allowing them to work with a company in their technical capacity to gain “real world” experience. The OPT visa, however, is legally characterized as a nonimmigrant visa and therefore requires an intent to return to one’s home country.⁵⁹

52. Elizabeth Redden, *Foreign Students and Graduate STEM Enrollment*, INSIDE HIGHER ED (Oct. 11, 2017), <https://www.insidehighered.com/quicktakes/2017/10/11/foreign-students-and-graduate-stem-enrollment> (discussing a newly-released report of 2015 data that found 81% of full-time graduate students in electrical engineering programs to be international, 79% of graduate students in computer science programs to be international, and 75% of graduate students in industrial engineering programs to be international).

53. *Id.*

54. *Optional Practical Training (OPT) for F-1 Students*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/optional-practical-training> (last updated May 6, 2019) [hereinafter *Optional Practical Training*].

55. *Id.*

56. INA § 214.2(f)(10)(ii)(A) (“[A] student may apply to USCIS for authorization for temporary employment for optional practical training directly related to the student’s major area of study.”).

57. *Optional Practical Training*, *supra* note 54.

58. Redden, *supra* note 52.

59. See INA § 214.2 (f)(10) (classifying OPT visas under “nonimmigrant” status); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., NONIMMIGRANT-BASED EMPLOYMENT 12, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Applicant%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf.

For many recent-graduates, the OPT period with a company allows them to grow professionally and demonstrate their ability to succeed in a business environment, which can ultimately lead to their career development at that company, or further opportunities elsewhere.⁶⁰ The OPT program often serves as a stepping stone to U.S.-based employment across various industries, so it is curious, then, that the program is classified as a nonimmigrant visa.⁶¹ Nonimmigrant visas are just that—visas for individuals not interested in immigrating to America. This classification demonstrates an interesting conflict in U.S. immigration law, because it suggests that the motives of individuals applying for nonimmigrant visas are ignored. The practical effect of “non-immigrant” programs like OPT is to assist foreign citizens hoping to live and work in the U.S.—hoping to immigrate.

Though the OPT process does not place a particularly heavy financial burden on employers seeking to hire recent graduates, the program still affects hiring practices.⁶² Companies know that recent graduates can legally work in the U.S. through the OPT program, and therefore pursue international students like Mogul. If the OPT program were to be eliminated, it is difficult to predict how recent graduates of STEM programs would obtain legal employment with U.S. companies. Students may be required to apply for the H-1B visa directly, which would limit the number of graduates hired.

D. Challenges Presented by H-1B Criteria

Hiring foreign “technical” individuals with STEM degrees does not come without challenges. For employers, it is certainly more economically efficient to hire an American citizen, rather than spending money to sponsor a foreign worker through the H-1B visa program.⁶³ This option is not, however, feasible in today’s educational landscape, where a majority of STEM graduates from American universities are foreign citizens.⁶⁴ Tech companies already compete with each other in an uphill recruiting battle, offering generous salaries out of school and wooing candidates with some of the world’s best and most creative

60. If the OPT employee performs well in his or her job, the employer may choose to sponsor that individual for an H-1B visa in order to reduce turnover rates and keep the individual within the company. Students may also seek to develop their professional skills before returning home or seeking another position outside the United States. *See, e.g.,* Kelly Mae Ross, *What To Know About Optional Practical Training*, U.S. NEWS (July 2, 2018, 10:25 AM), <https://www.usnews.com/education/best-colleges/articles/2018-07-02/what-to-know-about-optional-practical-training-work-authorization>.

61. Section 214 of the INA is titled “Nonimmigrant Classes” in the Code of Federal Regulations. *See* INA § 214.2.

62. STEM OPT candidates face unique restrictions and, for example, cannot be sent to third-party client sites for work under the current regulations. This affects hiring, given that some employers must take such restrictions into consideration when hiring. *See* Roy Maurer, *USCIS Restricts Third-Party Placement of STEM OPT Students*, SOC’Y HUM. RESOURCE MGMT. (Apr. 27, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/uscis-restricts-third-party-placement-stem-opt-students.aspx>.

63. Assuming all graduate level candidates expect the same salary, sponsoring an international candidate through the H-1B program is costly. *See, e.g.,* Faustman, *How Much Will Sponsoring an H-1B Visa Cost an Employer?*, *supra* note 18.

64. Redden, *supra* note 52.

benefits.⁶⁵ The competition is fierce, and nearly every graduate of high-demand programs, like computer science, has multiple job offers.⁶⁶ The demand for technical talent in these fields exceeds the number of qualified applicants,⁶⁷ which seems to explain why some employers are willing to incur additional costs for things like H-1B sponsorship and attorney fees.

Though most employers are willing to accept the associated costs and burdens of hiring international employees, their willingness does not necessarily guarantee their success. Because the H-1B sponsorship program operates on a lottery system, employers assume some risk when hiring international post-graduates using the OPT program.⁶⁸ The company trains and compensates an employee who may provide long-term solutions to the company's needs, but whose ability to do so depends on the luck of the draw of the H-1B visa lottery. These risks are accepted by nearly every technology company, regardless of their size or specific industry, and can potentially shape a company's operations, like hiring budgets and recruiting practices.⁶⁹

Though some argue that many of the H-1B users are tech companies outsourcing talent,⁷⁰ the visa program affects nearly every company seeking to hire the best talent from diverse student bodies at leading U.S. institutions. Small start-ups seem to carry the heaviest burden, since they tend to have less capital and must adopt financially lean operation procedures.⁷¹ This lack of cash may exclude them from the H-1B sponsorship process, ultimately causing an inability to hire foreign STEM graduates.

Some larger, established companies, however, may have an even greater burden imposed by statute.⁷² Congress classifies some companies as "H-1B-dependent" and requires them to pay higher fees and provide additional assurances when filing an H-1B petition.⁷³ This classification applies to three types of employers, including those with more than fifty full-time employees for which H-

65. See, e.g., Monica Nickelsburg, *The Top 20 Most Impressive Employee Benefits—and the Unusual Perk That Landed Zillow On the List*, GEEKWIRE (Feb. 3, 2016, 4:11 AM), <https://www.geekwire.com/2016/here-are-the-top-20-most-impressive-employee-benefits-and-perks/>.

66. See, e.g., Khalid, *supra* note 48.

67. Sarah Kessler, *You Probably Should Have Majored in Computer Science*, QUARTZ (Mar. 10, 2017), <https://qz.com/929275/you-probably-should-have-majored-in-computer-science/>.

68. Faustman, *How Does a Company Sponsor H1B Visas?*, *supra* note 15.

69. To examine the broad range of companies who accept the "risk" of the H-1B lottery and petition for the visa, see *Number of H-1B Petition Filings Applications and Approvals, Country, Age, Occupation, Industry, Annual Compensation (\$), and Education FY2007 – FY 2017*, U.S. CITIZEN AND IMMIGR. SERVS. (Jun. 30, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1b-2007-2017-trend-tables.pdf>. For smaller companies or startups, the cost of filing an H-1B petition can impact hiring strategies—namely whether or not the company can afford to hire an international employee requiring sponsorship. See, e.g., Faustman, *How Does a Company Sponsor H1B Visas?*, *supra* note 15.

70. Editorial, *The Case for Importing Skilled Foreign Workers: Trump's Kenosha Doctrine Is Good for America*, CHI. TRIB. (Apr. 20, 2017, 6:00 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-visa-worker-program-trump-edit-0421-md-20170420-story.html>.

71. Faustman, *How Does a Company Sponsor H1B Visas?*, *supra* note 15.

72. 8 U.S.C. § 1182(n)(1)–(3) (2018).

73. *Id.*

IB nonimmigrants constitute at least 15% of the workforce.⁷⁴ It also includes employers with twenty-six, but not more than fifty, full-time employees, when more than twelve of them are H-1B nonimmigrants.⁷⁵ Lastly, an employer with twenty-five or fewer employees may be considered H-1B-dependent if more than seven employees are H-1B nonimmigrants.⁷⁶ Employers falling under this category must attest that the H-1B workers are not and will not displace U.S. workers ninety days before or after filing an application.⁷⁷ H-1B-dependent employers are penalized in this sense, which makes the process more costly and arduous for many of the country's largest tech companies.

Moreover, the current visa processing system is slow and immigrant categories are often backlogged, which causes serious delays.⁷⁸ This is problematic for employers who have immediate hiring needs but cannot hire a candidate due to administrative inefficiencies.

E. Proposed Changes to the H-1B Program Under the Trump Administration

1. Increased "Vetting" Procedures

The Trump administration put into place a policy barring certain individuals from targeted countries from the H-1B program.⁷⁹ Increased vetting procedures have been promised to advance and preserve U.S. jobs for citizens, while simultaneously preventing the abuse of work visas and fraudulent behavior.⁸⁰

Preventing the abuse of immigration visas is hardly controversial, since Congress imposes limitations and standards on employment-based candidacy and such measures are necessary for our nation's operation. Some have argued, however, that the Trump administration's proposed changes to the H-1B program are covert attempts to limit foreign workers altogether,⁸¹ which mirrors the immigration rhetoric used throughout Trump's presidential campaign.

As president, Trump has maintained his stance on limiting immigration to the U.S. through various actions. The travel ban against six Muslim-majority countries⁸² received enormous attention from supporters and critics alike.⁸³ The

74. *Id.* § 1182(n)(3)

75. *Id.*

76. *Id.*

77. *Id.* § 1182(n)(1).

78. ALENIKOFF ET AL., *supra* note 20, at 394.

79. Patrick Thibodeau & Sharon Machlis, *Trump's Ban Becomes an H-1B Fight*, COMPUTERWORLD (Feb. 6, 2017, 2:32 PM), <https://www.computerworld.com/article/3165392/it-outsourcing/trumps-ban-becomes-an-h-1b-fight.html>; see also Sara Ashley O'Brien, *Trump Administration Toughens H-1B Visa Renewal Process*, CNN (Oct. 25, 2017, 6:04 PM), <http://money.cnn.com/2017/10/25/technology/business/h1b-visa-renewal-uscis/index.html> (discussing the Trump administration's orders to the U.S. Citizenship and Immigration Services surrounding the H1B visa program in relation to the existing renewal process).

80. O'Brien, *supra* note 79.

81. *Id.*

82. Laura Jarrett & Sophie Tatum, *Trump Administration Announces New Travel Restrictions*, CNN (Sept. 25, 2017, 5:15 PM), <http://www.cnn.com/2017/09/24/politics/trump-travel-restrictions/index.html>.

83. Compare Lyric Lewin, *In Support of a Travel Ban*, CNN, <https://www.cnn.com/interactive/2017/03/politics/travel-ban-supporters-cnnphotos/> (last visited Apr. 15, 2019), with Lyric Lewin, *These Are the*

White House called the restrictions a “critical step toward establishing an immigration system that protects Americans’ safety and security in an era of dangerous terrorism and transnational crime.”⁸⁴

The presidential proclamation banned individuals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia from entering into the U.S.⁸⁵ The proclamation made an exception for individuals from Iran who have a valid student visa (F or M visa), though it does not address the H-1B visa for post-graduate employment.⁸⁶ Any students from Iran, therefore, could not obtain the appropriate visa to work in the U.S. after graduate school, regardless of whether or not their employer provides sponsorship. Amidst critical voices in the media, it is important to recognize that the Trump administration’s travel restrictions have little impact on international students, since most students have a “bona fide relationship” with a U.S. entity (their university or vocational school of choice) and are therefore exempt.⁸⁷ When it comes to continuing a strong recruitment of international students, however, the travel ban may play a slightly bigger role. One could imagine numerous situations where foreign citizens, such as friends and family members of international students, would not be able to obtain the proper travel visa to enter the U.S., in turn affecting a student’s decision to attend school in the U.S.⁸⁸

The travel ban restrictions recognize possible exceptions, however, and may subject certain foreign nationals to “enhanced screening and vetting requirements” in order to allow entrance into the U.S.,⁸⁹ something seemingly overlooked by a majority of the media and various critics of the travel ban. Though the exceptions are perhaps a practical response to the problems students face under the newly imposed travel ban, it seems to be an unlikely long-term solution. The government should not be presumed to have the resources available to process travel ban “exceptions,” particularly if they require enhanced screening, to accommodate the vast student bodies of institutions across the country.

Faces of Trump’s Ban, CNN, <https://www.cnn.com/interactive/2017/01/politics/immigration-ban-stories/> (last visited Apr. 15, 2019).

84. Jarrett & Tatum, *supra* note 82.

85. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,164 (Sept. 27, 2017) (“Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats”) [hereinafter Proclamation].

86. *Id.* at 45,165 (“The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.”).

87. Kyle Sumter, *Revised Travel Ban to Have Little Impact on International Students, Experts Say*, USA TODAY (June 29, 2017, 6:08 PM), <https://www.usatoday.com/story/college/2017/06/29/revised-travel-ban-to-have-little-impact-on-international-students-experts-say/37433663/> (“The U.S. will allow entry of citizens from those countries who have a ‘bona fide relationship’ with a U.S. entity (school, job, etc.) or a relationship with a U.S. citizen (spouse or close family).”).

88. *Id.*

89. Proclamation, *supra* note 85, at 45, 165.

2. *America First*

Hiring foreign employees is undoubtedly important to the U.S. economy, but there is a “fundamental tension” between allowing noncitizens into the workforce and protecting U.S. workers from foreign competition.⁹⁰ The Trump administration has vowed to review the H-1B program with greater scrutiny to ensure that jobs are going to U.S. citizens.⁹¹ In April of 2017, President Trump issued the “Buy American and Hire American” executive order, calling for “the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security [to], as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”⁹² Although the Trump administration has made clear that U.S. companies should “hire American,” there are not enough qualified individuals in the U.S. to fill open positions.⁹³ In 2015, for example, there were almost “10 times more computer science jobs than students graduating with computer science degrees.”⁹⁴ The Trump administration’s aim to preserve jobs for American citizens is not completely flawed; naturally, it is important to decrease the unemployment rate across the nation. Many economists suggest, however, that these technical openings, which require technical degrees, are not the openings that most affect unemployment statistics.⁹⁵

Social scientists have also researched the lack of STEM candidates available in the U.S., narrowing the problem to deficiencies in the educational system.⁹⁶ Malcom Gladwell, an internationally-acclaimed author and social psychologist, claims that at the university level, “more than half of all American students who start out in [STEM] drop out after their first or second year.”⁹⁷ Even though technical degrees are valuable in today’s society, young people often switch into less competitive majors where the workload is easier to manage.⁹⁸

90. ALEINIKOFF ET AL., *supra* note 20, at 394.

91. Tony Romm, *Trump Signed an Executive Order to Review High-Skilled H-1B Immigration Visa*, RECODE (Apr. 19, 2017, 1:38 PM), <https://www.recode.net/2017/4/17/15334662/trump-h1b-visa-immigration-order> (discussing President Trump’s plan to conduct “site visits” to determine whether H-1B employers are abusing the program and intentionally avoiding the opportunity to hire U.S. workers).

92. Exec. Order No. 13788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

93. Grace Donnelly, *New Data Shows Foreign Interest in American Jobs May Be Declining Under Trump*, FORTUNE (Aug. 2, 2017), <http://fortune.com/2017/08/02/new-data-shows-foreign-interest-in-american-jobs-may-be-declining-under-trump/> (noting that there are simply not enough qualified workers in the U.S. to fill open technical positions in the tech sector, and that in 2015, there were nearly ten times more computer science jobs than students).

94. *Id.* In 2015, the National Center for Education Statistics reported that there were a total of 519,698 computer science jobs, yet only 59,581 individuals with computer science degrees. *Id.*

95. Charles Stockdale, *15 College Majors with the Highest (and Lowest) Unemployment*, MSN (Aug. 26, 2017), <https://www.msn.com/en-us/money/careersandeducation/15-college-majors-with-highest-and-lowest-unemployment/ar-BBCHmCV> (“The unemployment rate for those with a four-year bachelor’s degree is 2.7% lower than the national unemployment rate of 4.9% for all workers. In comparison, the rate for those with a regular high school diploma is 5.2%.”).

96. MALCOM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 81 (2013).

97. *Id.*

98. *Id.*

Students often evaluate their educational options with success in mind, choosing universities and majors where they will have the opportunity to achieve.⁹⁹ “The more elite an educational institution is, the worse students feel about their own academic abilities.”¹⁰⁰ This phenomenon has a massive effect on students, shaping their willingness to “tackle challenges and finish difficult tasks,” which is crucial for success in STEM.¹⁰¹ While U.S. students face continuous pressure to be great, they can fall behind at academically selective schools, causing them to change their majors and thereby decreasing the pool of national talent.¹⁰²

This problem carries significant weight in the STEM context yet has not been specifically targeted by the Trump administration. Some prestigious higher educational institutions, like Harvard University, have tackled this phenomenon themselves by awarding higher grades to the majority of students.¹⁰³ The argument stands that students at Harvard have already demonstrated their ability to withstand incredible academic rigor by earning admission to the university in the first place.¹⁰⁴ This right allows them to obtain better grades in any field of study, working hard in the subjects they are truly passionate about versus the subjects they feel they can be successful in. Approaches like Harvard’s suggest that the lack of STEM talent in schools is not purely political and cannot be remedied through government action alone. The root of the problem, however, remains; hiring American will only work if there are *actually* Americans to hire.

Nonetheless, the Trump administration continues its efforts to incentivize the hiring of U.S. citizens by restricting H-1B visas. In October 2017, following the Trump administration’s direction, USCIS “advised its officers to ‘apply the same level of scrutiny’ to extension requests for the H-1B visa”¹⁰⁵ as they apply to initial H-1B applications. Extension requests remain a vital part of the H-1B program, allowing professionals to legally stay in the U.S. under a renewed visa while planning for permanent residency. The instruction given to USCIS differs from the previous practice of renewing visas, which automatically granted extensions as long as there were no substantial changes to the “key elements” of the application or any evidences of fraud.¹⁰⁶

99. *Id.* at 68–81 (discussing the story of Caroline Sacks, who abandoned her love for science and technology when she faced cutthroat competition at an Ivy League school). Gladwell coins the phenomenon the “Big Fish–Little Pond Effect” to describe that “[t]he more elite an educational institution is, the worse students feel about their own academic abilities.” *Id.* at 80.

100. *Id.* at 80.

101. *Id.*

102. *Id.* at 80–81.

103. Eleanor Barkhorn, *So What If Everyone at Harvard Gets an A?*, ATLANTIC (Dec. 5, 2013), <https://www.theatlantic.com/education/archive/2013/12/so-what-if-everyone-at-harvard-gets-an-a/282053/>.

104. *Id.*

105. O’Brien, *supra* note 79 (discussing the extended effects of the Trump administration’s order on H1B visas, including greater scrutiny of the renewal process for current H1B holders).

106. *Id.*

III. ANALYSIS

A. *The Trump Administration Approach to Immigration Visas Is Misguided*

The Trump campaign vowed to “keep America first” by restricting immigration and removing the “bad” people. As president, Trump made these remarks in a joint address to Congress:

At the same time, my administration has answered the pleas of the American people for immigration enforcement and border security. By finally enforcing our immigration laws, we will raise wages, help the unemployed, save billions and billions of dollars, and make our communities safer for everyone. We want all Americans to succeed, but that can’t happen in an environment of lawless chaos. We must restore integrity and the rule of law at our borders. For that reason, we will soon begin the construction of a great, great wall along our southern border. As we speak tonight, we are removing gang members, drug dealers, and criminals that threaten our communities and prey on our very innocent citizens. Bad ones are going out as I speak, and as I promised throughout the campaign.¹⁰⁷

Months after this statement was made to Congress, the Trump administration specifically addressed the H-1B program, promising “greater scrutiny” in April of 2017 to determine whether U.S. employers are “evading their obligation to make a good faith effort to recruit U.S. workers.”¹⁰⁸ Experts on this matter saw the administration’s promises as “attempts to crack down on Indian outsourcing companies, like Infosys and Tata Consultancy Services,”¹⁰⁹ in an effort to discourage outsourcing and instead promote the hiring of U.S. citizens. Additionally, the U.S. Department of Justice issued a “stern warning” to U.S. employers about misusing the H-1B visa process in a way that discriminates against U.S. citizens.¹¹⁰

The Trump administration made it clear in early 2017 that the H-1B visa program would face changes and that employers would face consequences if they discriminated against U.S. employees and prospective candidates.¹¹¹ Concern over potential discrimination against U.S. workers is not new to the political arena. In the 1850s, Chinese immigrants came to the U.S. to work in the gold mines and eventually became the majority of workers on the railroad system.¹¹² As the population of Chinese immigrants grew substantially, many of the workers took on entrepreneurial roles in society, sparking debate among other workers

107. Donald Trump, President of the U.S., Joint Address to Congress (Feb. 28, 2017) (transcript available at <https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress>).

108. Romm, *supra* note 91.

109. Donnelly, *supra* note 93 (“More than 70% of all H-1B visas over the last 10 years went to Indian applicants working mostly these computer science or IT positions, according to data from the US Citizenship and Immigration Services.”).

110. Romm, *supra* note 91.

111. Trump, *supra* note 107.

112. *Chinese Immigration and the Chinese Exclusion Acts*, *supra* note 22.

who were concerned about economic safety.¹¹³ Congress ultimately passed legislation to prevent Chinese immigrants from entering the U.S. and therefore protected the labor workforce.¹¹⁴ This harsh stance on Chinese immigration, known as the Chinese Exclusion Act, prompted outcry.¹¹⁵ Chinese merchants and the Chinese government supported Anti-American boycotts, straining the relationship between the U.S. and China. This led to crucial changes in U.S. immigration law and the eventual abolishment of the Chinese Exclusion Act.¹¹⁶

Anti-immigrant sentiments in the U.S. are anything but new and concerns over the economic labor workforce are often justified; preserving jobs for America's unemployed citizens is essential. There is a difference, however, between discriminating against U.S. workers and lacking qualified U.S. citizens for the job.

As discussed above, significant ink has been spilled in both academic and economic settings over the drastic lack of American talent in the science, technology, engineering, and math realm. The Trump administration's threats surrounding the H-1B program focus on discrimination against U.S. citizens, when they should instead focus on the gap such employees fill in the workforce. Although it is, of course, important to ensure that U.S. companies are not discriminating against Americans, it is unrealistic to ignore the statistics surrounding international STEM students and foreign workers in similar technical roles. There has been a steady increase in the number of Americans in STEM programs, though they remain a complete minority.¹¹⁷

Since ordering U.S. employers to "hire American"¹¹⁸ requires a pool of American talent to hire from, developing this pool of domestic talent could, and perhaps should, be a priority for politicians on both ends of the political spectrum. Treating immigration visas as if this pool already exists, however, does not address the root of the issue itself.

Greater scrutiny of the H-1B program would arguably harm the U.S. job market more than it would help. The cap on H-1B visas limits the nation's ability to compete globally.¹¹⁹ The Partnership for a New American Economy, a well-respected bipartisan organization supporting immigration reform, conducted significant research on the H-1B visa program and its impact on the tech industry.¹²⁰ In 2007 and 2008, immigration authorities received so many H-1B visa applications that they were forced to hold a lottery to determine which ones they could

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Wang, *supra* note 51 (noting the drastic difference between the number of international and U.S. students in STEM programs across the country's most prestigious educational institutions).

118. Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

119. Giovanni Peri et al., *Closing Economic Windows: How H1-B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession*, P'SHIP FOR NEW AM. ECON. 1, 26 (June 2014), http://research.newamericaneconomy.org/wp-content/uploads/2014/06/pnae_h1b.pdf.

120. *Id.*; *see also* NEW AM. ECON., <https://www.newamericaneconomy.org/about/>.

process.¹²¹ Taking advantage of the randomness created in both years, researchers studied how denial of H-1B visas for computer workers in that period impacted job and wage growth for U.S.-born tech workers in subsequent years.¹²² The study found that the rejection of 178,000 H-1B visa applications in 2007 and 2008 caused U.S. metropolitan areas to miss out on creating as many as 231,224 “highly sought after tech jobs” for U.S.-born workers.¹²³ The study also found that with such additional employment, the total number of U.S. workers with computer-related jobs would have exceeded 2 million by 2010.¹²⁴

The comprehensive study broke down employment and wage growth data using various factors, categorizing U.S.-born tech workers with and without college degrees.¹²⁵ This is particularly pertinent, given misperceptions about the tech industry mainly employing highly skilled workers.¹²⁶ In reality, out of every five U.S.-born individuals working in technology, two do not have four-year college degrees.¹²⁷

Many critics argue that allowing H-1B workers into the workforce will displace U.S.-born workers.¹²⁸ Ron Hira, immigration expert and policy advocate, gave testimony before the U.S. Senate Judiciary Committee in 2015, arguing that “[m]ost of the H-1B program is . . . used to import cheaper foreign guestworkers, replacing American workers, and undercutting their wages.”¹²⁹ By breaking down the groups of individuals with and without degrees, researchers at New American Economy were able to show that U.S.-born high skilled workers, like engineers and programmers, received no benefit when they had less competition from foreign nationals.¹³⁰

One of the best illustrations is Detroit, Michigan. Researchers noted that after being at the core of the American auto industry for decades, Detroit struggled to adapt to an innovative, tech-driven economy.¹³¹ Unemployment rates in Detroit skyrocketed at the start of the recession and the city was “particularly hard hit by the H-1B lotteries.”¹³² Detroit employers were denied 5,300 H-1B visa applications in 2007 and 2008.¹³³ Researchers estimate that approving those H-1B visa applications would have generated as many as 14,999 jobs for U.S.-

121. Peri et al., *supra* note 119, at 4.

122. *Id.*

123. *Id.* at 5.

124. *Id.*

125. *Id.*

126. *Id.* at 12.

127. *Id.* (discussing the data from 2006, shortly before the randomized 2007 lottery data became available).

128. Ronil Hira, *Immigration Reforms Needed to Protect Skilled American Workers*, ECON. POL’Y INST. (Mar. 17, 2015), <https://www.epi.org/publication/congressional-immigration-reforms-needed-to-protect-skilled-american-workers/> (giving testimony before the U.S. Senate Judiciary Committee).

129. *Id.*

130. Peri et al., *supra* note 119, at 12.

131. *Id.* at 20.

132. *Id.* at 23.

133. *Id.*

born workers in computer related fields¹³⁴—this number being *in addition* to the foreign national workers granted visas.

In analyzing such unique recessionary circumstances that provided raw data, researchers clearly found that approving H-1B applications does not hurt the U.S. economy, or U.S.-born workers.¹³⁵ In promising to “hire American,”¹³⁶ the Trump administration has failed to consider unbiased research, such as that of New American Economy, in addressing immigration. There is widespread abuse of the H-1B program, as Ron Hira points out,¹³⁷ though from an economic perspective, H-1B visas are vital to the U.S. economy, particularly the U.S. technology industry.

B. *The Trump Administration Approach to Immigration Requires Clarity*

In his April 2017 presidential order regarding the H-1B visa program, Trump “order[ed] federal agencies to review and propose reforms to the . . . system.”¹³⁸ Trump’s use of the executive order was compared to his use of the social media platform Twitter: a way to “vaguely state broad policy intended without actually changing policy.”¹³⁹ The executive order sent a strong message to his supporters and the leaders of federal agencies, but did not effectively change the existing H-1B visa program.¹⁴⁰ President Trump’s message points out the importance of having an effective program, free from misuse, while threatening the current program being used by tens of thousands of foreign workers. The Trump administration H-1B policy itself requires further clarity.

For now, indirect effects on the H-1B process, including immigration changes such as the travel ban discussed above, are the only measures being used to indicate the future progression of work visas in America. Though indirect effects on the process are important to hiring practices and public policy, they are difficult to evaluate and cannot be relied upon when crafting helpful tools to navigate the ever-changing immigration landscape.

C. *The Ripple Effect of H-1B Changes on Student Visas and Education in*

134. *Id.*

135. *Id.* at 26.

136. Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

137. Hira, *supra* note 128, at 3.

138. Michael Paarlberg, *Are Trump’s H-1B Visa Reforms Just a Dog-Whistle for His Base?*, GUARDIAN (Apr. 20, 2017, 5:43 PM), <https://www.theguardian.com/commentisfree/2017/apr/20/h-1b-visas-trump-opposes-immigration-executive-order> (questioning whether or not President Trump’s executive order surrounding the H1B visa program made any actual changes to immigration policy).

139. *Id.*

140. *Id.*

America

Many foreign citizens travel to the U.S. to study at some of the world's most prestigious universities.¹⁴¹ To reside in the U.S. while completing their studies, students must obtain a student visa or exchange visa, often classified as F1 or J1 visas.¹⁴² Many students attend college in the U.S. with the sole purpose of remaining in the country and finding suitable employment post-graduation, positioned to ultimately apply for H-1B sponsorship and then permanent residency.¹⁴³ If the H-1B visa was no longer a feasible pathway to citizenship for international citizens on student visas, U.S. education would no longer act as an incentive.

If international students had fewer incentives to apply to U.S. institutions, knowing U.S. citizenship was no longer likely to be attainable through the H-1B program, what ripple effects might the economy face? In general, universities would likely receive fewer international applications. Those empty international slots could be occupied by U.S. nationals, though tuition rates would be lower, which would inevitably lead to a loss of revenue. Alternatively, universities could offer scholarships as incentives to a larger percentage of international applicants, even if their qualifications may not have otherwise guaranteed them admission. This would also negatively impact universities, as it would lessen the sense of competition and dilute academic rigor.

Apart from economic and academic effects, universities would also settle for less diverse student bodies. Diversity is often celebrated among college campuses, given the weight universities place on varying perspectives and different cultures.¹⁴⁴ Eliminating the H-1B program would affect the student visa program, which in turn would create a less diverse student body at many universities. These effects, though often speculative, must be considered. The H-1B program effectively operates as an incentive and changing its functionality would impact student visas at large.

D. Allowing Companies to Hire Foreign Employees Will Foster Cross-

141. NEIL G. RUIZ, BROOKINGS INST., *THE GEOGRAPHY OF FOREIGN STUDENTS IN U.S. HIGHER EDUCATION: ORIGINS AND DESTINATIONS 2* (2014), https://www.brookings.edu/wp-content/uploads/2014/08/Foreign_Students_Final.pdf.

142. *Studying at U.S. Universities and Colleges: F-1 Versus J-1 Visas*, U.S. DEPT. OF STATE, <https://j1visa.state.gov/basics/other-u-s-visas/studying-at-u-s-universities-and-colleges-f-1-versus-j-1-visas/> (last visited Apr. 15, 2019).

143. Bryce Loo, *Education in the United States of America*, WENR (June 12, 2018), <https://wenr.wes.org/2018/06/education-in-the-united-states-of-america>.

144. Seb Wainwright, *Why Diversity Matters for Colleges and Its International Students*, SI NEWS (Aug. 28, 2017), <https://www.studyinternational.com/news/diversity-matters-colleges-international-students/>.

Border Work and Its Benefits

Globalization of business has been studied and developed over the years, promulgating substantial dialogue on cross-border work and the benefits it imposes on society.¹⁴⁵ “As the world becomes increasingly global, the need for true global citizens to lead organizations in business, nonprofits, and government is far greater than in decades past.”¹⁴⁶ Today’s companies recognize the importance of fostering a cross-border environment and “many global companies have formal international rotation programs” to sculpt their leaders.¹⁴⁷ Henkel, a German chemical and consumer goods company, actually requires that certain managers live in two countries before a promotion will be considered.¹⁴⁸ With a growing need for global integration and solutions, many firms, like Henkel, place an emphasis on hiring and developing employees with a global perspective.¹⁴⁹ Employing individuals with a global perspective and careful attention to cultural sensitivities, whether at the executive or lower levels, may allow businesses to form international partnerships that would not be attainable otherwise.

Globalization, and information technology in particular, has “restructur[ed] the work environment . . . integrating the production and marketing of foods and services across national borders.”¹⁵⁰ In addition to companies like Henkel valuing global perspectives, there are also logistical benefits of globalization. Working across borders allows companies to integrate production globally to achieve even greater economic transactions that would be unobtainable otherwise.¹⁵¹ Firms conducting global business have unique considerations, such as mass customization and sensitivity to cultural diversity, which in turn facilitates international liaisons and alliances.¹⁵² This concept of globalization and integrated productivity has changed the fundamentals of the workplace in more ways than one. “The new economy has precipitated a dramatic face lift in the workplace structure. It has replaced the rigid, hierarchical, top-down structure with a more flexible, horizontal, integrated work place model.”¹⁵³

145. Constantine E. Passaris, *The Business of Globalization and the Globalization of Business*, 9 J. COMP. INT’L MGMT. 3, 9–11 (2006) (discussing twenty-first century transformation of “the economic, social, educational, and political landscape” as it relates to globalization).

146. John Coleman & Bill George, *Enhance Your Overseas Experience*, HARV. BUS. REV. (Mar. 6, 2012), <https://hbr.org/2012/03/enhance-your-overseas-experience> (noting the values of working overseas and various company practices regarding international cooperation).

147. *Id.*

148. *Id.*

149. *Id.*

150. Passaris, *supra* note 145, at 9.

151. *Id.* at 6.

152. *Id.* at 10.

153. *Id.* This observation is not new, although it continues to spark debate among academics and business people alike.

Technological advances have made globalization possible and “defin[e] the new parameters and advanc[e] the frontiers of economic connectivity.”¹⁵⁴ Connectivity signals capitalistic ideals, which arguably should be included in immigration policy. One author explained it as such:

The free flow of capital, labour, goods and services within free trade regions, the development of new financial instruments and institutions, and instantaneous access to information and communication through the new digital networks, have created a fully integrated global economic system of tremendous scope and opportunity, and achieved a higher level of international economic inter-dependence and linkages than ever before.¹⁵⁵

It is also recognized that utilizing an international workforce allows companies to conduct business with foreign languages and knowledge, provides creativity and new perspectives, and creates a rich workplace culture.¹⁵⁶ Additionally, hiring international employees often fills the gap created by a shortage of highly-skilled workers.¹⁵⁷ STEM industries “often lack the necessary home-grown talent these businesses need to succeed.”¹⁵⁸ Allowing foreign employees to work in these highly skilled areas will boost the job market, promote healthy competition, and allow U.S. companies to fill critical positions that contribute to their overall success.

Some critics of cross-border work prioritize the need to “hire American” and focus on devising practical means to do so. For example, it may seem more feasible, long-term, to adequately train U.S. citizens for highly-skilled positions or provide incentives for companies to prioritize U.S. citizens. Unemployment rates pose a legitimate political issue and providing long-term systemic support to U.S. citizens is imperative. The disconnect lies between hiring Americans and failing to hire foreign nationals. The benefits of hiring an international workforce seem to substantially outweigh the benefits of simply expanding a preference for U.S. citizens over foreign nationals, which may not yield visible effects. As economists and sociologists alike have pointed out, fostering a richly diverse workforce, if done properly, could greatly benefit the U.S. job market.¹⁵⁹

154. *Id.* at 5.

155. *Id.* at 6–7.

156. Russell Ford, *4 Benefits of an International Workforce for Your Business*, FORDMURRAY (Sept. 23, 2017), <https://fordmurraylaw.com/4-benefits-of-an-international-workforce-for-your-business/> (presenting the benefits of a global workforce from a business perspective).

157. *Id.*

158. *Id.*

159. One example is from Dr. Constantine E. Passaris, Professor of Economics at the University of New Brunswick. *See generally* Passaris, *supra* note 145 (arguing that the best new entrepreneurs will utilize an international workforce). Another example is from sociologist Cedric Herring, who conducted research on workplace diversity resulting in positive business outcomes. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 219–20 (2009).

E. Hiring Foreign Workers Through the H-1B Program Is a Mere Fraction of Immigration Policy

1. Immigration as a Whole

U.S. immigration policy consists of numerous issues, each complex and intertwined. To avoid falling prey to a reductionist view of immigration, it is important to note that the H-1B visa program, and President Trump's rhetoric surrounding it, is not representative of America's "immigration problem" by any means.¹⁶⁰ Reducing U.S. immigration policy to the H-1B program alone presents an improper focus on the path to citizenship, creating a bald assertion that work visas themselves shape comprehensive political policies. Many immigration topics surrounding citizenship, naturalization, removal, and refugee laws work alongside the H-1B program to establish policies affecting foreign students, employees, and their family members.

Immigration concerns in the U.S. span broad topics, including, *inter alia*, legal and illegal immigration, economic costs of immigration, national security, population, environment, wages, jobs, and poverty.¹⁶¹ Many of these concerns are legitimate. The Center for Immigration Studies, a nonprofit, nonpartisan research organization, maintains that "current, high levels of immigration are making it harder to achieve such important national objectives as better public schools, a cleaner environment, homeland security, and a living wage for every native-born and immigrant worker."¹⁶² These objectives are necessary for the survival and success of the United States, representing a wider view of immigration and its importance to society. Preserving public education, security, and living wages should be at the forefront of political agendas. To accomplish this, however, immigration policies must adapt to changing social norms and corporate realities.

2. The H-1B Visa Program in Relation to Immigration Policy

Though the H-1B visa program is an important aspect of U.S. immigration policy, it does not represent a significant portion. The H-1B visa program falls under a small subset of employment immigration, which is itself a subset of the national immigration policy.¹⁶³ Though it represents a fraction of important political ideals, the H-1B program has an enormous impact on the U.S. economy and society at large.

160. The immigration problem in America is bigger than H-1B visas and also encompasses, *inter alia*, topics like border security and terrorism prevention. See Claire Felter & Danielle Renwick, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL. (July 2, 2018), <https://www.cfr.org/backgroundunder/us-immigration-debate-0>; see also ALEINIKOFF ET AL., *supra* note 20.

161. *Immigration Policy Topics*, CTR. FOR IMMIGR. STUD., <https://cis.org/Immigration-Policy-Topics> (last visited Apr. 15, 2019).

162. *About the Center for Immigration Studies*, CTR. FOR IMMIGR. STUD., <https://cis.org/About-Center-Immigration-Studies> (last visited Apr. 15, 2019).

163. ALEINIKOFF ET AL., *supra* note 20.

As discussed above, the H-1B work visa follows the OPT visa, which itself succeeds F1 and J1 student visas.¹⁶⁴ This is important to consider when determining the impact of the H-1B program, given the correlating impact of proposed reform. Additionally, the H-1B visa often leads to permanent residency, for which foreign nationals can apply after legally working in the U.S.¹⁶⁵

Altering the H-1B program will produce a ripple effect on student visas and permanent residency, though the exact impact on overarching immigration policies remains unclear. The Trump administration's commitment to immigration reform may be carried out via other avenues, like continued DACA reform or deportation solutions.¹⁶⁶ Chartering substantial reform to the H-1B visa program is particularly aimed at professionals hoping to work in the U.S. based on meritorious conduct and academic or professional achievements, which draws distinction when compared against the backdrop of other immigration topics.

Because of the difficult H-1B application process, however, incentives to circumvent the system plague business practices.¹⁶⁷ The L-1 visa, for example, is an alternative to the H-1B visa that does not require STEM related work.¹⁶⁸ The nonimmigrant visa is meant to enable companies to transfer an executive or manager from one of its foreign offices to one of its U.S. offices.¹⁶⁹ To qualify for the visa, the employer must "have a qualifying relationship with a foreign company" and be "doing business as an employer in the United States and at least one other country."¹⁷⁰ The key requirement of this visa provision is that the individual must be employed in a capacity that is managerial, executive, or involving specialized knowledge.¹⁷¹

The opportunity for abuse lies in the "specialized knowledge" requirement, which allows a company to transfer any "professional employee with specialized knowledge relating to the organization's interests."¹⁷² This is a relatively low burden, compared to the H-1B visa,¹⁷³ and may fit the needs of many foreign

164. RUIZ, *supra* note 141, at 3–5.

165. *Id.* at 4.

166. Grace Donnelly, *Donald Trump, DACA and the Arguments Being Made for and Against Immigration Reform*, FORTUNE (Jan. 25, 2018), <http://fortune.com/2018/01/25/trump-daca-citizenship/> (discussing Trump administration DACA changes scheduled to take effect and the impact such reform will have on deportation).

167. See *Applying for an "O" Visa to Get Around H1B Restriction*, H1B.IO (Dec. 29, 2017), <https://www.h1b.io/blog/applying-o-visa-get-around-h1b-restrictions/>; see also Bill Snyder, *How Tech Giants Beat H-1B Visa Cap: They Call 'Em Students*, INFOWORLD (Mar. 13, 2014), <https://www.infoworld.com/article/2610433/how-tech-giants-beat-h-1b-visa-cap--they-call--em-students.html>.

168. *L-1A Intracompany Transferee Executive or Manager*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager> (last updated Oct. 31, 2018).

169. *Id.*

170. *Id.* (emphasis omitted).

171. *Id.*; *L-1B Intracompany Transferee Specialized Knowledge*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge> (last updated Oct. 31, 2018).

172. *L-1B Intracompany Transferee Specialized Knowledge*, *supra* note 171.

173. The H-1B threshold requires petitioners to fall under a "specialty [occupation]" or be a "fashion [model] of "distinguished merit and ability." *H-1B Program*, DEP'T. OF LABOR., <https://www.dol.gov/whd/immigration/h1b.htm> (last visited Apr. 15, 2019).

professionals seeking relocation to America. Although the L-1 program usually requires that professionals work for their sponsoring company at least one year in the preceding three years, it offers a three-year stay period.¹⁷⁴ It also allows spouses of recipients to obtain a similar visa, without restrictions on whether or not the spouse may work.¹⁷⁵ These benefits, coupled with the ease and relatively low burden for employers, makes the L-1 visa popular among business professionals.¹⁷⁶ Options like the L-1 visa, however, illustrate the potential for abuse, since low thresholds invite widespread misuse.

IV. RECOMMENDATION

A. *The Trump Administration Should Not Seek to Reduce the Number of H-1B Visas Offered to Employees*

Taking the issues presented above seriatim, this Part first examines the current political directives positioned against the H-1B program. The question of how many visas should be allotted to foreign workers was made a priority by the Trump administration with its Hire American initiative, promising to prevent discrimination against U.S. citizens in the workforce.¹⁷⁷ Reducing the number of available visas would be catastrophic for many companies who depend on the H-1B program to retain and develop technical talent, like computer programmers and engineers. In addressing and defining the appropriate number of visa spots available, the Trump administration points specifically to IT sourcing as evidence of H-1B program abuse, arguing the number of H-1B visas should be reduced to incentivize hiring U.S. citizens for these roles.¹⁷⁸ Abuse concerns are not unfounded and cast doubt over the role of IT sourcing in America. The problem of IT outsourcing, however, should be dealt with separately, not incorporated into, the argument for restricting the H-1B sponsorship program. Statistics on IT sourcing, with relation to H-1B recipients from India in particular, should be further analyzed.

For social policy reasons, the U.S. should encourage a diverse, multinational learning environment for students at leading U.S. institutions, and should not preclude the world's best talent from seeking the same employment opportunities as their classmates. The U.S. boasts some of the world's most prestigious universities and accordingly, the government should accommodate diverse student bodies entering the workforce to a reasonable extent.

174. *L-1B Intracompany Transferee Specialized Knowledge*, *supra* note 171. The program also offers blanket petitions for employers who meet certain criteria, such as being involved in "commercial trade or services." *Id.*

175. *Id.*

176. Susan Ladika, *The Use—And Abuse—Of L-1 Visas*, SOC'Y HUM. RESOURCE MGMT. (July 1, 2006), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0706ladika.aspx>.

177. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).

178. *Id.*; Tracy Jan, *Under Fire from Trump for Stealing American Jobs, This Outsourcing Firm Says it Will Create 10,000 New Jobs in U.S.*, WASH. POST (May 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/05/02/under-fire-from-trump-for-stealing-american-jobs-this-outsourcing-firm-says-it-will-create-10000-new-jobs-in-u-s/?utm_term=.9dae19206b7d.

As discussed above, the U.S. should not reduce the number of H-1B visas available, because doing so would not help U.S.-born workers. The current cap on the number of H-1B visas issued to noncitizens, coupled with the problematic application process and the burden it places on candidates and employers alike, prevents qualified individuals from seeking appropriate work in highly competitive industries.

B. The H-1B Criteria Should Be Expanded to Reflect Growing Trends in Globalization

The growing globalization of business has presented a uniquely diverse workforce, ready to tackle a robust set of professional roles in global firms and entrepreneurial settings. To promote international cooperation, economic alliances, and global integration, the H-1B criteria should be expanded to include specialized positions outside of STEM. Andrew Achilleos, discussed above, is a prime example of someone typically classified as unlikely to receive H-1B sponsorship, given his nontechnical background. His entrepreneurial aspirations, however, suggest future success in the U.S., arguably equal to that of a young computer programmer. Students like Achilleos should be given similar opportunities to compete with STEM students for work visas, though their professional ambitions differ.

The current H-1B program allows for some nontechnical candidates to apply, based on their merits and qualifications, including models, actors, and other foreign citizens who are clearly excluded from the STEM categories often associated with H-1B visas.¹⁷⁹ These allowances should be expanded to recognize and encourage nontechnical applicants. Though the U.S. already has a larger pool of citizen candidates for many nontechnical jobs,¹⁸⁰ exceptions should be available for extraordinarily talented individuals. These exceptions provide companies with greater flexibility in hiring the best person for an open position, taking into account experience, expected salary, and personality.

The current criteria surrounding highly specialized workers has not failed the U.S. in recent years and should be maintained. The U.S. should embrace its history in being a “nation of immigrants” because its “self-image is forever intertwined with the melting pot.”¹⁸¹ Allowing individuals to pursue their dreams in the land of the free is the foundation of America, and those dreams should not be contingent on STEM interests. The DOL should ensure the standard of specialty occupations by maintaining requirements, such as advanced degrees, to reserve H-1B visas for truly exceptional candidates.

179. *Work Authorization for Non-U.S. Citizens*, *supra* note 32.

180. *See, e.g.*, GLADWELL, *supra* note 96, at 68–81.

181. Jerry Schwartz, *US: A Nation of Immigrants, but Ambivalent About Immigration*, WASH. TIMES (Feb. 2, 2017), <https://www.washingtontimes.com/news/2017/feb/2/us-a-nation-of-immigrants-but-ambivalent-about-imm/>.

C. H-1B Lottery System

The H-1B lottery system is fairly straightforward. In modern political climates, where government resources are severely limited, it seems appropriate to have a randomized, fair, equal opportunity process for individuals competing for H-1B visas. A reformed alternative might include a more holistic approach, such as personal review of applications. Although such a process would certainly be ideal, it would come at an extremely high administrative cost and is not economically feasible. The lottery system creates an even playing field for all H-1B candidates, eliminating discrimination. Though other factors, like additional visas and lower fees, play an important role in the H-1B program, the lottery system itself should remain intact.

D. H-1B Application Process Reform

The difficulty surrounding the H-1B application process has created a barrier to entry of sorts for many companies, particularly smaller businesses and start-ups with fewer financial resources. In reforming the application process, the DOL should consider the burden employers face in sponsoring a prospective H-1B candidate. In many cases, the burden is too great; companies are forced to operate without the foreign candidate, or hire someone who is legally authorized to work in the U.S. but may possess fewer or lesser qualifications.

One potential area for reform is the ease and clarity associated with applying for H-1B sponsorship. Employers utilize immigration attorneys to assist them with the complicated process, which costs the employer almost the same amount they will pay to file.¹⁸² By making the process easier for nonlegal experts, the DOL could eliminate legal fees, thereby making the process more affordable. Attorneys may still be consulted, of course, for challenging or unique situations. The DOL cannot and should not be expected to provide a seamless process for every type of possible future H-1B candidate. Given the data on typical candidates, however, the DOL could create an application that requires less legal assistance.

Another area for reform is requiring employers to prove they attempted to hire a U.S. citizen before hiring a foreign citizen. This is an aspect of the application often requiring legal assistance, due to the potential consequences for failing to comply with DOL regulations. The burden of proof should be reduced to a lesser standard, because employers already have a natural incentive to hire the best candidate available; they seek to boost productivity, company morale, and economic profitability by hiring the right employee. Companies accept the burden of responsibility in hiring a new employee, and therefore have an incentive to hire the best fit. Moreover, falsifying recruitment efforts is not difficult and the DOL requirement does not offer legitimate protection. If the U.S. pool of

182. Faustman, *How Much Will Sponsoring an H1-B Visa Cost an Employer?*, *supra* note 18.

technical talent grows, promoting a more neoliberal, laissez-faire stance in support of globalization would ensure a fair outcome, absent discrimination of U.S. citizens.

E. Aiding Start-Ups and Small Businesses in Light of Changing Workplace Environments

The ever-changing nature of technology companies, and start-ups in particular, have reshaped the traditional framework of employment. For example, tech companies now offer many engineers the ability to work from home, utilizing technologies like “WebEx” and other platforms to communicate with their colleagues from remote locations.¹⁸³ Such flexibility was not always offered in the workplace.¹⁸⁴

The U.S. may see remote work trends extended to international employees. Many companies have expanded globally and operate in a way that promotes collaboration among international offices.¹⁸⁵ Although working with colleagues across the globe can be beneficial, time differences and other barriers do not always make this option practical. Technology has connected colleagues today more than ever, but there remains a substantial benefit derived from working with a diverse group of colleagues face-to-face.

With these changes in individual roles and company structures, the government should afford smaller companies the same opportunities as larger companies, who often have the resources to sponsor international employees for H-1B visas. When interviewing, students and prospective employees should not have to prioritize large, corporate firms with the financial resources to sponsor H-1B visas over smaller companies doing, perhaps, even more interesting work. The decision to pursue employment with a particular group of people should not be dominated by the harsh realities of the H-1B program. Revising the temporary worker visa program would allow prospective employees to make better decisions, ultimately affecting the quality of their work and turnover rates.

F. Reforming the Use of Collected H-1B Application Fees

Currently, the fees collected from the H-1B visa application process are distributed to the National Science Foundation and the DOL, which are then used to fund education and training programs for U.S. workers.¹⁸⁶ The overarching aim of this policy is remarkable. Using H-1B funds to educate the U.S. workforce

183. Jason Quesada, *Debunking Remote Work Myths*, CISCO: WEBEX BLOG (Oct. 23, 2017), <https://blog.webex.com/2017/10/debunking-remote-work-myths> (discussing the benefits, costs, and struggles of working remotely from home for an employer).

184. *Id.*

185. For example, Accenture operates in more than 120 countries and boasts globalization across many of their platforms, including consulting and business operations. *About Accenture*, ACCENTURE, <https://www.accenture.com/us-en/company> (last visited Apr. 15, 2019).

186. See LINDA LEVINE, CONG. RES. SERV., RL31973, EDUCATION AND TRAINING FUNDED BY THE H-1B VISA FEE AND THE DEMAND FOR INFORMATION TECHNOLOGY AND OTHER PROFESSIONAL SPECIALTY WORKERS 2 (2005), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1186&context=key_workplace.

will help to eliminate systemic disparities, equipping current members of the labor market with the skills today's jobs demand. Providing support to the National Science Foundation, in particular, takes aim at solving the lack of STEM talent available in the U.S., which in turn affects hiring and the advancement of society at large.

Although this use of funds is appropriate, improvement to the re-investment of H-1B fee revenue could allow the program to have a targeted impact on H-1B-related issues. A Brookings Institute report offers support for the program while pointing to practical reform that could lead to systemic change on a much larger scale.¹⁸⁷ Ruiz and Wilson argue that the distribution of visa revenue should be focused on metropolitan areas with a high demand for H-1B workers.¹⁸⁸ They claim that funds have been distributed disproportionately to areas with a much lower demand for H-1B workers, which does not correct the shortage of skilled U.S. workers in H-1B-related jobs.¹⁸⁹ Tweaking the program to target specific needs would make the reinvestment of H-1B fee revenue stronger, while also growing the pool of American talent.

V. CONCLUSION

Global expansion and shifting definitions of the American workplace require a reformed perspective on immigration visas. The Trump administration has legitimate concerns about the future of immigration, given the inherent interests of the executive branch in preserving national security and conjuring the right conditions for economic growth and stability. Despite these concerns, however, the Trump administration should tread carefully when reforming the H-1B visa program. Reducing the number of H-1B visas available, reviewing applications with greater scrutiny, and attempting to push U.S. employers towards U.S. citizens over foreign citizens, irrespective of their merits, could have devastating impacts on more than just the economy. Improper H-1B reform could decrease the number of foreign students applying to U.S. institutions under F1 and J1 student visas, diminish the diversity and competitiveness of graduate programs, negatively impact hiring practices by limiting the pool of candidates available to employers, and strain the development of talented employees long-term, should they be denied visa privileges after using OPT eligibility.

To combat the possibility of negatively impacting educational institutions, employers, and the U.S. economy, H-1B reform should reflect realistic expectations and data-driven hiring trends. First, application criteria should incorporate the continued globalization of business with nontraditional merit qualifications. Second, the sponsorship process should be less burdensome to employers and prospective employees alike. Third, filing fees paid by employers should be

187. Neil G. Ruiz & Jill H. Wilson, *Invest but Reform: Better Align H-1B Visa Fee Revenues to Local Workforce Needs*, BROOKINGS 1 (Mar. 2013), https://www.brookings.edu/wp-content/uploads/2016/06/13_h1b_visa_fee_revenues_ruiz_wilson.pdf.

188. *Id.*

189. *Id.*

based, in part, on company size and ability to pay, taking into account the number of H-1B visas each company has already sponsored.

The H-1B visa program is a crucial piece of U.S. immigration policy, as recognized by its historical impact on the construction of the U.S. railroad system and development of the “American Dream.” Creating a more flexible and practical H-1B program will not only benefit employers, but will also foster healthy competition in the workforce, trickling down through U.S. educational institutions. Reforming the H-1B program will solidify our foundation and pride in truly being a “nation of immigrants.”