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## Supply and Demand: Immigration of the Highly-Skilled and Educated in the Post-9/11 Market, 48 J. Marshall L. Rev. 419 (2015)

Julia Funke

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# SUPPLY AND DEMAND: IMMIGRATION OF THE HIGHLY SKILLED AND EDUCATED IN THE POST-9/11 MARKET

JULIA FUNKE<sup>1</sup>

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Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute . . . . Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street.<sup>2</sup>

—Former Attorney General John Ashcroft, in remarks given weeks after the September 11, 2001, terrorist attacks

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2. John Ashcroft, Attorney Gen., Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* [http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

## I. UNDER NEW MANAGEMENT: REORGANIZATION OF THE U.S. IMMIGRATION SYSTEM

In the aftermath of the September 11, 2001, (9/11) terrorist attacks, the United States (U.S.) immigration system was completely overhauled.<sup>3</sup> Since then, the federal government has relied heavily on immigration law and policy to prosecute the “War on Terror.”<sup>4</sup> The focus on immigration, in large part, has been due to the discovery that the 9/11 hijackers were legally in the U.S. on visas that should have never been granted.<sup>5</sup> Thus, as a direct response to those terrorist attacks, the U.S. replaced the existing immigration system. Immigration and Naturalization Services (INS), which had handled U.S. immigration functions for decades, was replaced by the much more expansive Department of Homeland Security (DHS).<sup>6</sup>

Within DHS, immigration functions were divided among three sub-agencies: U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE).<sup>7</sup> These three agencies were tasked with the oversight of three distinct areas of immigration. CBP was given the authority to oversee customs and border security, including the U.S. Border Patrol (USBP).<sup>8</sup> USCIS was given the authority to oversee various aspects of legal immigration, such as naturalization, visa processing, and the granting of legal residency.<sup>9</sup> ICE, on the other hand, was given the responsibility of overseeing immigrant detention and deportation and carrying out immigration enforcement policies.<sup>10</sup>

In addition to these newly formed agencies, the restructuring of the U.S. immigration system was accompanied by dramatic increases in both staffing and budget. DHS’s workforce grew from 181,875 in fiscal year (FY) 2004 to 230,000 in FY 2010 (with

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3. Michelle Mittekstadt, Burke Speaker, Doris Meissner & Muzaffar Chishti, *Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11*, MIGRATION POLICY INSTITUTE (Aug. 2011), <http://migrationpolicy.org/research/post-9-11-immigration-policy-program-changes>.

4. Sameer Ahmed, *Targeting Highly-Skilled Immigrant Workers in A Post-9/11 America*, 79 UMKC L. REV. 935, 950–51 (2011).

5. Muzaffar Chishti & Claire Bergeron, *Post-911 Policies Dramatically Alter US Immigration landscape*, MIGRATION POLICY INSTITUTE (Sept. 8, 2011), <http://www.migrationpolicy.org/article/post-911-policies-dramatically-alter-us-immigration-landscape>.

6. *Id.*

7. Mittekstadt, Speaker, Meissner & Chishti, *supra* note 3.

8. *Id.*

9. *Id.*

10. *Id.*

thirty-nine percent dedicated to immigration functions).<sup>11</sup> CBP's budget more than doubled (to \$11.5 billion) from FY 2002 to FY 2010, while its staffing saw a forty-three percent increase over that same period.<sup>12</sup> USBP staffing on the northern border increased by more than 565% between 2001 and 2011.<sup>13</sup> ICE's budget also more than doubled (to \$5.74 billion) from FY 2002 to FY 2010, with its staff growing by just under forty percent between FY 2004 and 2010.<sup>14</sup> All together, the creation of DHS was followed by an "avalanche of federal funding."<sup>15</sup> In fact, in 2013, a pair of economists estimated that the creation of DHS cost the U.S. \$589 billion from 2001 to 2011.<sup>16</sup>

The restructuring of the U.S. immigration system ushered in drastic changes in both policy and enforcement. As former Attorney General John Ashcroft stated, the U.S. has adopted a zero-tolerance approach in the enforcement of immigration law and policy.<sup>17</sup> To a large extent, since the 9/11 terrorist attacks, immigration law has been the primary avenue for prosecuting individuals suspected of national security concerns.<sup>18</sup> In the U.S., the government's ability to arrest, detain, and investigate an individual is significantly easier under immigration law than under criminal law.<sup>19</sup> The fine lines between these two distinct areas, criminal law and immigration law, have therefore begun to blur in the pursuit of national security concerns. This convergence has been labeled "crimmigration law" by scholars in this rapidly emerging field.

Under the U.S. criminal legal system, a suspect has various rights and procedural protections. These include the right to an attorney, the right to a speedy trial before a jury, and the necessity to prove guilt beyond a reasonable doubt, which is the highest burden of proof.<sup>20</sup> In immigration court, on the other hand, a noncitizen is permitted to have counsel, but the government does not provide an attorney for indigent persons.<sup>21</sup> As a result, eighty percent of individuals in removal proceedings are *pro se*.<sup>22</sup> In immigration court, an immigration judge is both judge and jury. Additionally, "a noncitizen can be mandatorily detained for months, even years, before being released or removed from the

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11. Chishti & Bergeron, *supra* note 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. Ted Hesson, *Five Ways Immigration System Changed After 9/11*, FUSION (Sept. 11, 2012), [http://abcnews.go.com/ABC\\_Univision/News/ways-immigration-system-changed-911/story?id=17231590](http://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590).

16. *Id.*

17. Ashcroft, *supra* note 2.

18. Ahmed, *supra* note 4.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

U.S.”<sup>23</sup> Further, DHS only has to prove an individual is removable by clear and convincing evidence instead of beyond a reasonable doubt.<sup>24</sup> The substantive and procedural barriers to deportation are thus far less than to a criminal conviction. For these reasons, U.S. immigration law has served as a much stronger tool for fighting the “War on Terror” than criminal law.

The impact of stricter immigration law and policy has obviously affected immigrants residing in the U.S. unlawfully. In the past decade, deportations have risen and immigration violations, including the overstaying of various visas, have been heavily prosecuted.<sup>25</sup> However, post-9/11 immigration law and policy has also had a significant impact on immigrants residing in the U.S. lawfully. Specifically, individuals applying for and immigrating using nonimmigrant employment and education visas have seen a markedly changed environment. Since this directly affects the U.S. economy, its impact cannot be underestimated. Therefore, the sections that follow will address the immigration of the highly skilled and educated in the post-9/11 market, specifically focusing on H-1B visas. Section II will begin with an explanation of the current U.S. immigration system, highlighting the restrictions on employment-based visas. Next, Section III will provide an overview of the H-1B visa, which is the most commonly utilized visa for highly skilled and educated workers coming to the U.S. Sections IV and V will illustrate the importance of the intangible skill sets these immigrants bring into our markets and describe the losses we are suffering through the forfeiture of these valuable assets. Section VI will then provide an in-depth analysis of the problems with the H-1B numerical cap as it stands in 2015. Finally, Sections VII and VIII will explain the most recent developments in this area and propose possible, long-term solutions to remedy this hot-button issue in immigration today.

## II. CURRENT “TRADE BARRIERS”

In many ways, the immigration of highly skilled and educated workers can be seen as a trade issue, since it deals with the trade of services. Highly skilled workers crossing borders have a similar impact on the U.S. economy as other services do. These immigrants bring important skill sets and expertise into the U.S. market, which fuel both industry and innovation. However, under

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23. *Id.*

24. *Id.*

25. See Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. deportations of immigrants reach record high in 2013*, PEW CENTER RESEARCH (Oct. 2, 2014), available at <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/> (reporting that 438,421 unauthorized immigrants were deported in fiscal year 2013).

current U.S. immigration law and policy, there are several restrictions in place that regulate the immigration of these types of workers.

Under current law, there are a number of employment-based (EB) visas available that authorize highly skilled and educated noncitizens to work legally in the U.S.<sup>26</sup> Some of these visas provide for permanent U.S. residence, such as EB-1, EB-2, and EB-3 visas.<sup>27</sup> Other visas only authorize temporary residency, such as the H-1B visa.<sup>28</sup> In addition to these employment-based visas, there is also an F-1 student visa available for those seeking higher education in the U.S.<sup>29</sup> However, these visas are not without restrictions. Both permanent and temporary employment-based visas for skilled workers are subject to numerical limits.<sup>30</sup> These limits, in conjunction with the “statutory provisions designed to safeguard existing jobs and prevailing wages, reveal the concerns that shape the employment-based visa process.”<sup>31</sup>

The numerical limitations currently in place represent the quota-based immigration system the U.S. uses in 2015.<sup>32</sup> This system has been in place for nearly a century, beginning with the Emergency Quota Act of 1921.<sup>33</sup> Following World War I, Congress feared the U.S. would be overwhelmed with a flood of immigrants from Europe.<sup>34</sup> With the Emergency Quota Act of 1921, Congress imposed an annual ceiling on the number of new immigrants, which totaled about 350,000.<sup>35</sup> However, this ceiling was later lowered to 150,000 annually by the Immigration Act of 1924, which adopted a national origins formula that created a “quota of allowable immigrants” from each country based “on the number of persons of their national origin in the United States in 1920.”<sup>36</sup> When the Immigration & Nationality Act of 1952 (INA) was enacted, Congress again stayed with the existing quota formula, making few substantive changes.<sup>37</sup> The subsequent amendments abolished special national origin quotas and established quota

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26. 8 C.F.R. § 204.5 (2006).

27. 8 C.F.R. § 204.5(h)–(l).

28. 8 C.F.R. § 214.2(h) (2013).

29. Michele R. Pistone & John J. Hoeffner, *Rethinking Immigration of the Highly-Skilled and Educated in the Post-9/11 World*, 5 GEO. J. L. & PUB. POL'Y 495, 496 (2007); 8 C.F.R. § 214.2(f).

30. 8 U.S.C § 1153(b) (2006).

31. Pistone & Hoeffner, *supra* note 29.

32. Ajay Malshe, *From Obsolete to Essential: How Reforming Our Immigration Laws Can Stimulate and Strengthen the United States Economy*, 3 ALB. GOV'T L. REV. 358, 362–63 (2010).

33. *Id.*

34. *Id.*

35. Emergency Quota Act, Pub. L. No. 67-5, 42 Stat. 5 (1921).

36. Malshe, *supra* note 32, at 362; Immigration Act of 1924, Pub. L. No. 68-139, §§ 11(a)–(b), 43 Stat. 153, 159.

37. Immigration and Nationality Act, Pub. L. No. 82-414, §§ 201(a)–(b), 202(b), 66 Stat. 163, 175–76, 177 (1952).

preferences based on familial relationship and national needs.<sup>38</sup> Over the next four decades, Congress made various changes to the INA.<sup>39</sup> These changes included adjusting quotas, creating new preference categories, and setting a quota for the number of refugees admitted each year.<sup>40</sup> The Immigration Act of 1990 “established an annual worldwide limit for immigration of 700,000 immigrants a year,” which was then decreased to 675,000 in 1993.<sup>41</sup> In 2015, the number of annually allowable permanent immigrants remains at 675,000, with certain exceptions for close family members.<sup>42</sup>

While the U.S.’s quota-based immigration system has many critics, immigration policy in the post-9/11 market is dominated by one underlying concern: national security. This is particularly true in considering the entry of skilled foreign workers into the U.S. labor market, where the quotas have become increasingly restrictive. This area of immigration is now marked by conservative policies and heightened scrutiny in considering applications for employment-based visas. Interestingly, the post-9/11 efforts to tighten immigration in the interest of national security actually provided a possible rationale for liberalizing employment-based immigration.<sup>43</sup> In the wake of 9/11, the shortage of scientists, engineers, and other highly skilled workers could have raised major concerns, since these kinds of workers are needed for sophisticated government research and defense projects.<sup>44</sup> However, compelling policy arguments aside, this was not the reaction that followed.

Following the 9/11 terrorist attacks, the U.S. began scrutinizing the immigration of highly skilled and educated laborers in a way it never had before. Denials of highly skilled employment visa applications nearly doubled and J-1 visas (used by university professors and other researchers) more than doubled.<sup>45</sup> In addition to the increased denials, the number of H-

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38. Malshe, *supra* note 32, at 362.

39. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305.

40. Malshe, *supra* note 32, at 363.

41. *Id.*; Immigration Act of 1990, Pub. L. No. 101-649, § 101, 104 Stat. 4978, 4980–82.

42. American Immigration Counsel, *How the United States Immigration System Works: A Fact Sheet*, IMMIGRATION POLICY CENTER (March 1, 2014), <http://www.immigrationpolicy.org/just-facts/how-united-states-immigration-system-works-fact-sheet>.

43. Pistone & Hoeffner, *supra* note 29.

44. *Id.*

45. *Id.* at 497.

1B visas authorized annually decreased from 195,000 to 65,000, where it remains in 2015.<sup>46</sup> The effects of 9/11 on immigration did not end there. The number of non-immigrant visas flagged for special review under the Visa Mantis program, a program intended to help “prevent the unlawful transfer of certain sensitive technologies,” increased from 1,000 in 2000 to 14,000 in 2002 and 20,000 in 2004.<sup>47</sup>

While certainly the most prominent, nonimmigrant workers were not the only group affected by the strengthened immigration regulations. The tighter visa restrictions also created new barriers for students trying to enter into the U.S., which resulted in a “significant drop in foreign applications to U.S. universities, especially among graduate students.”<sup>48</sup> This, in turn, had other effects. With fewer foreign applications, U.S. universities suffered a loss of income and diversity at their schools.<sup>49</sup> The decrease in foreign student visas also had a direct effect on the employment-based visa programs, since “[a] typical path for many H-1B visa holders . . . is first to attend a U.S. university.”<sup>50</sup>

While cumbersome for foreign students, the new restrictions on student visas were not entirely unforeseeable. One of the 9/11 hijackers was in the U.S. legally on a student visa, while two other hijackers were issued visas six months before the attacks.<sup>51</sup>

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46. *Id.*

47. *Id.*; See generally Jim Endrizzi, Simone Kueltz, and Ivana Hrga-Griggs, *Visas Mantis Security Advisory Opinions*, NAFSA, <http://www.nafsa.org/find/resources/Default.aspx?id=8645> (last visited March 30, 2015) (explaining the Visa Mantis program); See also Tien-Li Loke Walsh, *The Technology Alert List, Visa Mantis and Export Control: Frequently Asked Questions*, WOLFSBORO (2003), available at <http://www.wolfsboro.com/articles/TAL2.pdf> (explaining that INA § 212(a)(3)(a) renders aliens inadmissible where there is reason to believe they are seeking to enter the United States to violate or evade U.S. laws prohibiting the export of goods, technology, or sensitive information from the United States). The Visa Mantis program focuses on the “sensitive information” portion of the regulation and consists of a security review procedure, which involves multiple U.S. government agencies. *Id.* The program is designed to identify visa applicants who pose a threat to U.S. national security by illegally transferring sensitive technology. *Id.* Therefore, when a foreign national applies for a nonimmigrant visa at a U.S. consulate or embassy, the officer may screen the applicant to determine whether he or she is involved in any dual-use technologies that may fall within a field listed on the Technology Alert List (TAL). *Id.* This list is designed to assist in preventing the transfer of sensitive technology or material from falling into the wrong hands. *Id.* If an officer determines that the planned activities of the applicant raise concerns relating to the TAL and possible ineligibility under INA § 212(a)(3)(A), the officer must submit a security advisory opinion (SAO) in the form of a Visa Mantis check. *Id.*

48. Pistone & Hoeffner, *supra* note 29, at 497.

49. *Id.*

50. *Id.*

51. Mary E. Pivec, *A Practitioner’s Observations on U.S. Immigration Policy Changes in Response to 9/11 and the War on Terror*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 9, 10–11 (2006); see also Robert Farley, *9/11 Hijackers and Student Visas*, FACTCHECK.ORG (May 10, 2013), <http://www>.



Understandably then, policymakers immediately focused their attention on student visa programs. As a result, Title V of the Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVERA Act), provided for greater scrutiny of all student visa applicants.<sup>52</sup> This created delays in travel to the U.S., “particularly for foreign students pursuing graduate level studies, teaching or research in areas on the Technology Alert List published by the U.S. State Department.”<sup>53</sup> Unsurprisingly, the areas regulated include “conventional munitions, nuclear technology, rocket systems, navigation and avionics, chemical engineering, biomedical engineering, and biotechnology.”<sup>54</sup>

In addition to the EBSVERA Act, Congress also passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).<sup>55</sup> These laws represented a restrictive shift in U.S. immigration law, with a heightened focus on ensuring national security. While the PATRIOT Act expanded the definition of terrorism<sup>56</sup> and authorized the detention of noncitizens,<sup>57</sup> while increasing the scrutiny involved in background checks and security clearances,<sup>58</sup> the EBSVERA Act focused on enhancing security measures.<sup>59</sup> For example, the EBSVERA Act “prohibits the issuance of nonimmigrant visas, including student visas, to any national of a country that is designated as a state that

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factcheck.org/2013/05/911-hijackers-and-student-visas/ (explaining that of the nineteen 9/11 hijackers, one was in the U.S. on a student visa while the rest were on tourist and business visas); Government Accountability Office, *Overstay Enforcement: Additional Mechanisms for Collecting, Assessing, and Sharing Data Could Strengthen DHS’s Efforts but Would Have Costs*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Apr. 15, 2011), available at <http://www.gao.gov/assets/320/317762.pdf> (noting that five of the nineteen 9/11 hijackers overstayed their visas in the U.S. for terrorist-related activities).

52. Pivec, *supra* note 51; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501–02, 116 Stat. 543, 560–63.

53. Pivec, *supra* note 51.

54. *Id.*

55. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

56. USA PATRIOT Act, § 802.

57. USA PATRIOT Act, § 412.

58. USA PATRIOT Act, § 411.

59. Enhanced Border Security and Visa Entry Reform Act of 2002, §§ 101–02, 203, 302, 305, 401–03; Katherine L. Porter, *Retain the Brains: Using A Conditional Residence Requirement to Keep the Best and Brightest Foreign Students in the United States*, 40 HOFSTRA L. REV. 593, 603–04 (2011); See also *How the USA Patriot Act Redefines Domestic Terrorism*, AMERICAN CIVIL LIBERTIES UNION (Dec. 6, 2002), <https://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism> (explaining that Section 802 of the USA PATRIOT Act expanded the definition of terrorism to cover “domestic,” as opposed to international, terrorism).

sponsors terrorism.”<sup>60</sup>

Further, the EBSVERA Act worked to improve the Student and Exchange Visitor Information System (SEVIS) for foreign students studying in the U.S.<sup>61</sup> The SEVIS system for tracking the enrollment and whereabouts of foreign students had been in development since the Illegal Immigration Reform and Immigration Responsibility Act of 1996<sup>62</sup> was passed, but Congress and the INS were apparently never very serious about implementing it.<sup>63</sup> Following the terrorist attacks of 9/11, that changed. The knowledge that several of the 9/11 participants and conspirators had attended flight-training schools here in the U.S. on F-1 student visas resulted in a new motivation behind its immediate implementation.<sup>64</sup> The EBSVERA Act accomplished that goal.<sup>65</sup>

In sum, the immigration of the highly skilled and educated post-9/11 became increasingly restricted. In the aftermath of the terrorist attacks, the careful balancing of productivity and growth with the number of jobs available was modified to reflect a new, primary concern: national security. The immediate result was heightened restrictions on entry by the highly skilled and educated into the U.S.

### III. A CURRENCY OF SORTS: THE H-1B NONIMMIGRANT VISA

In 2015, the H-1B visa is the most commonly utilized visa for highly skilled, educated foreign workers seeking temporary employment in the U.S.<sup>66</sup> In order to understand the hot button

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60. Porter, *supra* note 59; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 306 (defining the term “state sponsors of international terrorism” to mean “any country the government of which has been determined by the Secretary of State . . . [t]o repeatedly provide support for acts of international terrorism”).

61. Porter, *supra* note 59.

62. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009, 3704–07.

63. Donald S. Dobkin, *The Diminishing Prospects for Legal Immigration: Clinton Through Bush*, 19 ST. THOMAS L. REV. 329, 342 (2006); *SEVIS Stems from Crucial Moments in US History*, AMERICAN IMMIGRATION CENTER (Sept. 27, 2010), <http://www.us-immigration.com/us-immigration-news/us-immigration/sevis-stems-from-crucial-moments-in-us-history/>.

64. Dobkin, *supra* note 63.

65. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 502; Exchange Visitor Program, 22 C.F.R. pt. 62 (2014).

66. Katie Foreman & Randall Monger, *Nonimmigrant Admissions to the United States: 2013*, DHS OFFICE OF IMMIGRATION STATISTICS (July 2014) available at [http://www.dhs.gov/sites/default/files/publications/ois\\_ni\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2013.pdf) (providing most recent statistics on nonimmigrant admissions and showing that other than North American Free Trade Agreement (NAFTA) professional workers (“TN”), the H1B is the most utilized temporary worker visa).

issues currently facing H-1B employers and employees alike, one must first understand what an H-1B visa is. The H-1B nonimmigrant classification is a visa through which qualified individuals may seek admission to the U.S. to work in their field of expertise for a temporary period of time.<sup>67</sup> The H-1B petition is filed by the U.S. employer on behalf of the qualified individual so that the worker may come to the U.S. to (1) perform services in a specialty occupation, (2) perform services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, or (3) perform services of distinguished merit and ability in the field of fashion modeling.<sup>68</sup> Most commonly, the H-1B classification is used to bring a qualified individual to the U.S. to perform services in a specialty occupation.<sup>69</sup>

To qualify as a specialty occupation for H-1B purposes, the position offered to the alien must meet one of the following requirements:

- (1) a bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position;
- (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree;
- (3) the employer normally requires a degree or its equivalent for the position; or
- (4) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a bachelor's or higher degree.<sup>70</sup>

Examples of specialty occupations include, but are not limited to, computer systems analysts, computer programmers, professors, physicians, engineers, and accountants.<sup>71</sup>

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67. 8 C.F.R. § 214.2(h).

68. 8 C.F.R. § 214.2(h)(1)(i).

69. U.S. Citizenship and Immigration Services, *Report on H01B Petitions: Fiscal Year 2012 Annual Report to Congress October 1, 2011–September 30, 2012*, DEPARTMENT OF HOMELAND SECURITY (2013) available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-12-petitions.pdf> [hereinafter USCIS] (explaining that there is a limit of no more than 100 aliens in the U.S. at any time performing services in a DOD cooperative research and development projects or coproduction projects in accordance with 8 C.F.R. § 214.2(h)(8)(i)(B)); Frank Bass & Kartikay Mehrotra, *H-1B Models Strut Into U.S. as Programmers Pray For Help*, BLOOMBERG (May 20, 2013, 11:03 AM), <http://www.bloomberg.com/news/articles/2013-05-20/h-1b-models-strut-into-u-s-as-programmers-pray-for-help> (noting that models receive fewer than one percent of the non-immigration H-1Bs and explaining that while there were 478 initial applications made for fashion models in 2010 according to DOL data, USCIS approved 250). That same year, USCIS received 325,000 H-1B petitions for specialty occupations. *Id.*

70. 8 C.F.R. § 214.2(h)(4)(iii)(A).

71. USCIS, *supra* note 69.

Beyond the requirements of the position itself, the alien must also meet certain requirements to be considered qualified to perform services in the specialty occupation. Specifically, the alien must meet one of the following criteria:

(1) the alien must hold a U.S. bachelor's or higher degree as required by the specialty occupation from an accredited college or university; (2) the alien must possess a foreign degree determined to be equivalent to a U.S. bachelor's or higher degree as required by the specialty occupation from an accredited college or university; (3) the alien must have any required license or other official permission to practice the occupation in the state in which employment is sought; or (4) the alien must have education, specialized training, or progressively responsible experience that is equivalent to completion of a U.S. bachelor's degree or higher in the specialty occupation, and have recognition of expertise through progressively responsible positions directly related to the specialty occupation.<sup>72</sup>

These criteria, which are strictly enforced by USCIS, ensure that any alien admitted on an H-1B visa is well qualified for the U.S. position at stake.

As mentioned earlier, the H-1B visa is granted for only a temporary period of time. A qualified individual may hold the H-1B status for a maximum of six years, issued in increments of up to three years by USCIS, who adjudicates the petitions for H-1B visas.<sup>73</sup> It may be extended beyond the six years, but only under certain circumstances.<sup>74</sup> If the H-1B holder is in the process of applying for employment-based permanent residence (commonly referred to as a "green card"), then the H-1B visa can be extended without the alien leaving the U.S.<sup>75</sup> Otherwise, after the six years in H-1B status are completed, the qualified individual must leave the U.S. for at least a year before another H-1B petition can be filed on their behalf.<sup>76</sup> The H-1B visa is thus a mechanism through which U.S. employers seeking highly skilled workers to fill various specialty occupations can utilize foreign labor on a temporary basis.

While many Americans have concerns that competition from

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72. 8 C.F.R. § 214.2(h)(4)(iii)(C).

73. 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), 214.2(h)(15)(ii)(B)(1).

74. Interoffice Memorandum from William R. Yates, Associate Director for Operations, United States Citizenship and Immigration Services, to Regional Directors & Service Center Directors, (May 12, 2005) (on file with author), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2005/ac21intrm051205.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm051205.pdf) (explaining ways to extend beyond the H-1B six-year limitation). Under Section 106(a) of the Twenty-First Century Act of 2000 ("AC21"), an alien may obtain an extension of H-1B status beyond the six-year maximum period, when (1) 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or (2) 365 days or more have passed since the filing of an EB immigrant petition. *Id.*

75. *Id.*

76. USCIS, *supra* note 69.

imported foreign labor will bring negative consequences, such as wage suppression and substandard work conditions, the H-1B visa program has specific mechanisms in place to protect U.S. workers from these dangers.<sup>77</sup> In order to file an H-1B visa petition process, an employer must submit a labor condition application (LCA), which must then be certified by the Department of Labor (DOL), before hiring foreign workers under the H-1B program.<sup>78</sup> When filing the LCA, the petitioner must include the job title and DOL occupation code.<sup>79</sup> In addition, the petitioner must provide information regarding the rate of pay, the prevailing wage and its source, the duration of the proposed employment, the petitioner's location and any other locations the H-1B nonimmigrant worker will work, and the number of H-1B workers being sought under the LCA certification.<sup>80</sup>

The LCA requires further attestations of employers who are H-1B dependent. An employer is H-1B dependent if it falls under any of the following categories: (1) if the employer employs less than twenty-five full time employees, it will be considered H-1B dependent if eight or more of those employees are H-1B visa holders; (2) if the employer employs between twenty-six and fifty full time employees, it will be considered H-1B dependent if eight or more of those employees are H-1B visa holders; or (3) if the employer employs at least fifty-one full time employees, it will be considered H-1B dependent if fifteen percent of those employees are H-1B visa holders.<sup>81</sup> If an employer falls under any of these categories, two additional attestations must be made during the LCA process.<sup>82</sup> First, the H-1B dependent employer must attest that it has no knowledge that any U.S. workers were displaced at any of its locations during the ninety days before and the ninety days after filing the H-1B petition.<sup>83</sup> Second, the H-1B dependent employer must attest that no H-1B employee will be placed with another employer without verifying that the employer has not displaced and does not intend to displace any worker and that the employer had taken good faith steps to recruit for the position within the U.S.<sup>84</sup> This means that the employer must attest that it has offered the job to any U.S. worker who has applied and is "equally or better qualified for the job" as the H-1B worker.<sup>85</sup> Finally, in submitting the LCA application, an H-1B dependent

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77. Malshe, *supra* note 32, at 363–66.

78. 8 U.S.C. § 1182(n) (2013).

79. 8 U.S.C. § 1182(n)(1)(D).

80. 8 U.S.C. § 1182(n)(1).

81. 8 U.S.C. § 1182(n)(3)(A).

82. 8 U.S.C. § 1182(n)(1)(E)–(G).

83. 8 U.S.C. § 1182(n)(1)(E).

84. 8 U.S.C. § 1182(n)(1)(F)–(G).

85. 8 U.S.C. § 1182(n)(1)(G)(i)(II).

employer pledges that H-1B employees will not be paid below market, that the employer will provide acceptable working conditions for the H-1B employees, and that the employer will keep detailed records of compliance with the certified LCA.<sup>86</sup>

These mechanisms should give Americans peace of mind that the utilization of foreign labor under this visa will not damage American work conditions and, further, that qualified Americans will not lose available jobs to foreign labor. However, while the H-1B program has been designed to protect the interests of both U.S. workers as well as the H-1B employees, the program is significantly flawed in other ways. Namely, while demand for H-1B visas has exceeded the quota for a number of years, creating a shortage, it remains strictly regulated by the same quota system the U.S. has been using for nearly a century.<sup>87</sup>

In the past two decades, Congress has both increased and decreased the H-1B quota, depending on economic need as well as political pressure.<sup>88</sup> During the early years of the H-1B program, the quota was rarely reached every year.<sup>89</sup> However, by mid-1990, the quota began filling up and many new H-1B petitions were being denied or delayed at least one year.<sup>90</sup> As a result, in 1998, Congress increased the quota to 115,000 and, in 2000, agreed to another temporary increase to 195,000.<sup>91</sup> However, the 195,000 quota was never reached and was thus subsequently decreased to 65,000 in 2004, where the H-1B cap remains in 2015.<sup>92</sup> Over the past five years, the quota has again begun filling up, with tens of thousands of H-1B petitions not even being considered.<sup>93</sup>

In 2008, there were 163,000 petitions for H-1B visas.<sup>94</sup> The recession dampened demand slightly, but there were still 124,000 H-1B petitions filed in 2013.<sup>95</sup> In 2014, the U.S. received around 172,500 applications for H-1B visas for the 2015 quota.<sup>96</sup> That number is more than double the current numerical cap, meaning the restrictions in place cannot possibly fulfill the demand. It is

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86. 8 U.S.C. § 1182(n).

87. Roy Maurer, *Experts Predict Record Breaking H-1B Visa Demand*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Feb. 20, 2015), <http://www.shrm.org/hrdisciplines/staffingmanagement/articles/pages/h1b-visa-demand.aspx>.

88. Ahmed, *supra* note 4, at 941.

89. *Id.*

90. *Id.*

91. *Id.*; American Competitiveness and Workforce Improvement Act of 1998, Pub.L. No. 105-277, 112 Stat. 2681; American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251.

92. Ahmed, *supra* note 4, at 941.

93. Maurer, *supra* note 87.

94. Patrick Thibodeau, *H-1B Applications surge to 172,400, twice the cap*, COMPUTERWORLD, INC. (Apr. 10, 2014, 5:10 PM), <http://www.computerworld.com/article/2488167/it-careers/h-1b-applications-surge-to-172-500-twice-the-cap.html>.

95. *Id.*

96. *Id.*

therefore unsurprising that government officials, immigration advocates, and business officials alike have heavily criticized the cap.<sup>97</sup> Those in the high-tech industry have been particularly vocal, contending that “the current quota discourages needed highly skilled workers to come, work, and stay in the U.S. and does not reflect the demand for services from U.S.-based employers.”<sup>98</sup>

In 2015, the number of noncitizens who may be offered H-1B nonimmigrant employment status each fiscal year under the H-1B Regular Cap remains at 65,000.<sup>99</sup> Due to free trade agreements, “1,400 of the 65,000 cap is reserved for Chileans, while 5,400 is reserved for Singaporeans.”<sup>100</sup> As a result of the H-1B Reform Act of 2004, an additional 20,000 H-1B visas are available for individuals who obtain a master’s degree or higher from an accredited, non-profit U.S. university.<sup>101</sup> This is referred to as the U.S. Master’s Cap, which is separate from the H-1B Regular Cap. Workers at universities and government research laboratories are exempt from all quotas.<sup>102</sup>

The numerical limits described above represent the current U.S. policy, which seek to strike a balance between “limit[ing] the entry of foreign nationals to protect the employment opportunities and wages of U.S. citizens, and promot[ing] more open business immigration in the interests of economic growth and economic competitiveness.”<sup>103</sup> However, these interests are not the primary interests at stake in the U.S. Following the tragic events of 9/11, national security remains the most important concern in considering the entry of skilled foreign workers into the U.S. labor market. As a result, despite increased demand for H-1B visas and outcry from both U.S. employers and foreign workers alike, the cap has remained stagnant.

#### IV. HOT COMMODITY

While national security concerns remain crucial, the restrictions placed on highly skilled workers and foreign students have not been without consequence. As stated earlier, these non-immigrants bring much-needed skill sets and expertise critical to the U.S. market. As a result, there has been much discussion about increasing the availability of H-1B visas, which are still

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97. Ahmed, *supra* note 4, at 942.

98. *Id.* at 942–43.

99. *Id.* at 941.

100. *Id.*

101. H-1B Reform Act of 2004, Pub. L. No. 108-441, § 1, 118 Stat. 2630–31.

102. Ahmed, *supra* note 4, at 942.

103. Pistone & Hoeffner, *supra* note 29.

capped at 65,000.<sup>104</sup> The congressionally mandated quota remains the most debated area of the H-1B program, with much controversy over how many visas USCIS should approve each year.<sup>105</sup>

The critics of the quota have been resoundingly clear about their concerns. Simply put, the current system has created a shortage because the demand is higher than the supply. The American Immigration Lawyers Association (AILA) “has described the current situation as a crisis, with many companies not receiving enough H-1B visas to meet their significant staffing needs.”<sup>106</sup> Bill Gates, Chairman of Microsoft Corporation, stated before Congress in 2007 that “the annual cap should be eliminated altogether and warned of the danger to the U.S. economy if employers cannot bring in skilled workers to fill their job gaps.”<sup>107</sup> In September 2010, Google Chief Executive Officer (CEO) Eric Schmidt took things one-step further, characterizing the United States’ failure to “automatically provide H-1B visas to foreign graduates” of U.S. universities as “the stupidest thing we’ve ever done.”<sup>108</sup> The critics are justified in their concerns. The U.S. needs to reach equilibrium to balance supply and demand. In the growing global competition for talent and human capital, the U.S. is losing the race.<sup>109</sup>

The H-1B cap has negative implications for not only the highly skilled, but also foreign students. Currently, H-1B visas are essentially the only visas “through which foreign students can stay and work in the United States after graduation.”<sup>110</sup> However, demand for those visas has exceeded their availability for over a decade, creating a shortage of H-1B visas. The consequences of the quota thus raise clear cause for concern. Companies are being left without highly skilled workers to meet their needs in specialty occupations and foreign students are being forced to take their talents and U.S. educations elsewhere. The failure of the U.S. to retain such a hot commodity within our borders therefore becomes not only an immigration problem, but also an economic problem. We are sending American-educated young people, and the valuable skill sets they possess, directly into the hands of our global competition.

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104. Laura Meckler, *Bipartisan Senate Bills Would Increase Visas and Green Cards for High-Tech Workers*, WALL ST. J. (Jan. 13, 2015, 6:29 PM), <http://www.wsj.com/articles/bipartisan-senate-bills-would-increase-visas-and-green-cards-for-high-tech-workers-1421191748>.

105. Ahmed, *supra* note 4, at 941.

106. *Id.* at 942–43.

107. *Id.*; *Strengthening American Competitiveness for the 21st Century: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. (2007) (statement of Bill Gates, Chairman, Microsoft Corporation).

108. Ahmed, *supra* note 4, at 942–43.

109. Porter, *supra* note 59, at 603–04.

110. *Id.*



Beyond the shortage of H-1B visas, which provide a temporary mechanism for recent graduates to stay in the U.S., there are very few options available to H-1B holders to remain in the U.S. permanently. Employers may sponsor H-1B visa holders for green cards by filing an application for Alien Labor Certification with the DOL.<sup>111</sup> Once the labor certification is approved, the employer files an I-140 petition with USCIS.<sup>112</sup> When the I-140 is approved, the noncitizen files the I-485 Adjustment of Status application to obtain lawful permanent status.<sup>113</sup> However, this process is not without delay and often burdensome complications, making it discouraging for many.<sup>114</sup>

Similarly, foreign students are left with few options to adjust their status and become permanent residents in the U.S. post-graduation. Currently, only 140,000 employment-based green cards are processed every year in the U.S.<sup>115</sup> These green cards are made available to immigrants in a variety of employment-based categories, “not just categories through which foreign students may apply.”<sup>116</sup> The lack of available green cards can often be disheartening. Following 9/11, foreign students faced heightened restrictions, including possible visa denials at consular interviews for dual intent, Visa Mantis delays, and SEVIS tracking system complications.<sup>117</sup> When faced with limited options for permanent immigration to the U.S. after completing their studies, foreign students are understandably discouraged.<sup>118</sup> Even President Obama has been critical, explaining in his 2011 State of the Union address that as soon as foreign students in American universities “obtain advanced degrees, we send them back home to compete against us. It makes no sense.”<sup>119</sup> And he’s right; it doesn’t make any sense.

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111. United States Citizenship and Immigration Services, *Green Card through a Job Offer*, DEPARTMENT OF HOMELAND SECURITY, <http://www.uscis.gov/green-card/green-card-through-job/green-card-through-job-offer> (last updated Dec. 7, 2009).

112. *Id.*

113. *Id.*

114. Dustin Walsh, *Green card delays create problems for legal immigrants, employers*, CRAIN’S DETROIT BUSINESS (June 1, 2014, 8:00 AM), <http://www.crainsdetroit.com/article/20140601/NEWS/306019992/green-card-delays-create-problems-for-legal-immigrants-employers>.

115. Porter, *supra* note 59, at 610–11.

116. *Id.*

117. *Id.*

118. *Id.* at 604.

119. Barack Obama, President of the United States, State of the Union Address (Jan. 25, 2011) (transcript *available at* <https://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>).

## V. HUMAN CAPITAL AND INTANGIBLE ASSETS

From an economic standpoint, the globalized world now views humans as a form of capital. Human capital is defined as the “measure of the economic value of an employee’s skill set.”<sup>120</sup> The concept of human capital recognizes that “not all labor is equal.”<sup>121</sup> Because human capital is seen as highly valuable, countries around the world have begun relaxing their immigration systems to better capture this resource. Many countries, including Canada, the United Kingdom, and Australia have developed and modified point systems to attract highly skilled, educated workers to their countries.<sup>122</sup> This new focus on human capital as a valuable resource marks a major shift in immigration policy on the global stage.<sup>123</sup> While immigration policy has been traditionally dominated by family reunification, humanitarian or otherwise noneconomic goals (such as asylum), this shift represents a worldwide recognition of the value the skill sets of highly educated immigrants bring to receiving countries.<sup>124</sup>

While highly skilled and educated workers make many intangible contributions to a nation’s “intellectual pool of resources,” it is the economic contribution these workers bring that is attractive to countries around the world.<sup>125</sup> As explained by George Borjas, an economist at Harvard University, “skilled immigrants earn more, pay higher taxes, and require few[er] social services than less-skilled immigrants.”<sup>126</sup> In other words, highly skilled and educated workers increase economic output and contribute to the tax base, while using very few U.S. benefits.<sup>127</sup> Many of these immigrants also go on to start businesses, which generate more jobs and increases the national wealth for the U.S.<sup>128</sup> It is therefore not surprising that other countries around the world are encouraging this type of immigration. In today’s world, money talks.

While many other countries have adjusted their immigration policy to compete in the global race for human capital, the U.S. has remained at the starting line. In stark contrast to the countries that have modified their immigration systems to attract a greater number of highly skilled workers, the U.S. has chosen to retain its

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120. *Human Capital*, INVESTOPEDIA, <http://www.investopedia.com/terms/h/humancapital.asp> (last visited Jan. 14, 2015).

121. *Id.*

122. Carla Tabag, *The Point of A Points System: Attracting Highly Skilled Immigrants the United States Needs and Ensuring Their Success*, 46 *VAND. J. TRANSNAT’L L.* 271, 272–73 (2013).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

decades old employment-based, quota-regulated immigration regime. The prime example is the H-1B visa.

The H-1B quota, capped at 65,000, interferes with American competitiveness on the global stage. The National Foundation for American Policy conducted a survey which found that

[s]eventy-four percent of company respondents said [their] inability to fill positions because of the lack of [available] H-1B visas has potentially affected their “company’s competitiveness against foreign competitors or in international markets.” Forty-six percent of companies said they “delayed or changed plans for projects” in response to the lack of H-1B visas. Thirty-eight percent responded that they “needed to alter the plans, location or growth of a product or service . . . .”<sup>129</sup>

These statistics, when considered in light of the large percentage of companies that indicated a need to outsource work to countries with more liberal immigration policies, clearly demonstrate that the inability to hire highly skilled foreign labor is hurting U.S. business.<sup>130</sup> When U.S. businesses cannot reach their full potential, they cannot remain competitive, either locally or on the global stage.

The value of immigrant labor in the U.S. cannot be underestimated. Immigrant labor isn’t just beneficial to the U.S. economy—it is vital. While foreign-born individuals only account for twelve percent of the U.S. population, twenty-five percent of “public venture-backed U.S. companies” started between 1990 and 2005 were founded by foreign-born individuals.<sup>131</sup> Immigrants have also started twenty-five percent of the “new high-tech companies with more than one million dollars in sales in 2006.”<sup>132</sup>

Immigrant entrepreneurship does not end there. According to the Partnership for a New American Economy, immigrants started twenty-eight percent of all new businesses in 2011.<sup>133</sup> In addition to helping the U.S. economy by generating capital, immigrant entrepreneurship also creates jobs. According to the Fiscal Policy Institute, small businesses owned by immigrants employed an estimated five million people in 2010.<sup>134</sup> Further, immigrants have co-founded many major companies in the U.S., such as Google,

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129. Malshe, *supra* note 32, at 376.

130. *Id.*

131. *Id.*

132. *Id.*

133. The Partnership for a New American Economy, *Open for Business: How Immigrants are Driving Small Business Creation in the United States*, RENEW OUR ECONOMY (2012), <http://www.renewoureconomy.org/sites/all/themes/pnae/openforbusiness.pdf>.

134. Fiscal Policy Institute, *Immigrant Small Business Owners: A Significant and Growing Part of the Economy*, FISCAL POLICY INSTITUTE (June 2012), <http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-2012-0614.pdf>.

Intel, eBay, and Yahoo.<sup>135</sup> Immigrant entrepreneurs have also started many of the U.S.'s most recognizable companies, "such as AT&T, Kraft, Proct[e]r & Gamble, Goldman Sachs, Kohl's, Nordstrom and Capital One."<sup>136</sup> These major companies have created jobs for millions of Americans.<sup>137</sup>

In the technological era in which we live, it is notable that immigrants have served as either the CEO or lead technologists in one of every four technology or engineering startups in the U.S. from 1995 to 2005.<sup>138</sup> Immigrants have also served as the CEO or lead technologists in fifty-two percent of Silicon Valley startups.<sup>139</sup> These startups have employed 450,000 workers and "generated \$52 billion in revenue in 2006 alone."<sup>140</sup> In light of numbers like these, the benefits immigrants bring to the U.S. economy and job markets could not be clearer.

In a knowledge-based economy, entrepreneurs play a central role in creating new companies and commercializing new ideas. Until this point, the U.S.'s advantage on the global stage has been due, in large part, to the innovation that immigrant entrepreneurs bring to the U.S. Job creation has naturally followed and the result has been a stimulated economy. However, this advantage is quickly disappearing as other countries relax their immigration systems to make it easier for highly skilled workers to come to their countries at the same time the U.S. is making its system more restrictive than ever. An unreasonable visa cap, record-setting levels of denials, and few opportunities for permanent immigration has caused many foreign-born workers to settle elsewhere.

It is undeniable that immigrant entrepreneurship has played a large role in the U.S.'s economic growth from the inception of America until today.<sup>141</sup> From starting companies to sparking innovation in science and technology, immigrants have become a cornerstone of the U.S. economy. However, despite the benefits startups and small businesses have brought to job creation and economic growth, the U.S. new business startup rate is now declining.<sup>142</sup> In 2010, it reached an all-time low.<sup>143</sup> While

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135. Malshe, *supra* note 32, at 376–78.

136. Yasser Killawi, *Preserving an Entrepreneurial America: How Restrictive Immigration Policies Stifle the Creation and Growth of Startups and Small Businesses*, 8 OHIO ST. ENTREP. BUS. L.J. 129 (2013).

137. *Id.*

138. Malshe, *supra* note 32, at 376–78.

139. *Id.*

140. *Id.*

141. *Id.*

142. Killawi, *supra* note 136. See generally John Haltiwanger, Ron Jarmin, & Javier Miranda, EWING MARION KAUFFMAN FOUNDATION, *Business Dynamics Statistics Briefing: Where Have All the Young Firms Gone?* U.S. CENSUS BUREAU (May 2012), [http://www.census.gov/ces/pdf/BDS\\_StatBrief6\\_Young\\_Firms.pdf](http://www.census.gov/ces/pdf/BDS_StatBrief6_Young_Firms.pdf). (providing census data for new businesses and startups).

143. *Id.*

immigrant entrepreneurship can help fill this gap, U.S. immigration policy has to be reformed to make that possible.

## VI. TERMS OF USE: HOW THE H-1B CAP RESTRICTS ECONOMIC GROWTH

Widely criticized and highly controversial among immigration practitioners, politicians, and U.S. businesses alike, the H-1B cap remains one of the most debated areas of immigration. The insufficient number of H-1B visas available has led to frustration among both highly skilled immigrants and their employers, many of which have been vocal about their grievances.<sup>144</sup> The consequences, however, go past mere frustration. The shortage of H-1B visas also impedes growth among small businesses, inhibits the creation of startups, stifles entrepreneurship, and forces bigger companies to either manage without the foreign labor they require or outsource operations and company functions elsewhere. The economic repercussions of each of these consequences are devastating.

While many large companies have the resources to find alternative solutions, the insufficient number of H-1B visas available today “stifles the creation and growth of startups and small businesses.”<sup>145</sup> In fact, many entrepreneurs have stated that the “difficulty of finding and attracting . . . highly skilled, entrepreneurial workers” as possibly the “most significant constraint on both their growth and that of future entrepreneurs.”<sup>146</sup> These complaints are not unfounded. The Small Business Administration released a report in which entrepreneurs specifically identified “current U.S. immigration policy as one of the barriers inhibiting their ability to start and grow companies.”<sup>147</sup> While larger companies have the capacity to “outsource functions and place personnel abroad in an effort to cope with the inadequate quotas and the resulting difficulty in bringing over key foreign hires,” small businesses often do not have this luxury.<sup>148</sup> Because the cap is particularly detrimental to small companies and startup companies, American economic and job growth suffers.

The consequences of the cap are expansive and come at a dangerous time for the U.S. economy. Expanding job growth in

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144. Charlsie Dewey, *Scarcity of H1B visas presents employers with conundrum*, GRAND RAPIDS BUSINESS JOURNAL (Mar. 15, 2013), <http://www.grbj.com/articles/76393-scarcity-of-h1b-visas-presents-employers-with-conundrum>.

145. Killawi, *supra* note 136, at 145–46.

146. *Id.*

147. *Id.*

148. *Id.*

STEM (Science, Technology, Engineering, and Math) fields has created a high demand for engineers, scientists, and other skilled professions that cannot be filled by the American workforce alone.<sup>149</sup> With the H-1B cap preventing companies from filling these positions with foreign labor, companies are left with no other choice but to fall behind in these areas. While Americans do pursue degrees in STEM fields, they do so at a much lower rate than foreign-born students. Based on statistics collected by the National Science Foundation, researchers at Duke University and the University of California at Berkley concluded that immigrant students “received nearly 60 percent of all engineering doctorates and over 50 percent of all doctorates in engineering, mathematics, computer science, physics, and economics” awarded by U.S. universities.<sup>150</sup> These statistics are cause for alarm. The majority of U.S. degrees in STEM fields are awarded to foreign-born, immigrant students. However, with a shortage of H-1B visas, the natural stepping-stone for many immigrant students on F-1 visas, students in the STEM disciplines have no viable option to stay in the U.S. This is problematic, as researchers consider education in a STEM field as “an indicator of innovation” and have found “a correlation between advanced education in a STEM field and high rates of entrepreneurship and innovation.”<sup>151</sup> In fact, research has shown that highly skilled immigrants are “innovative and entrepreneurial,” especially in STEM fields and that they possess “a striking propensity to start and grow companies in these sectors.”<sup>152</sup>

Because the STEM fields directly correlate to high rates of entrepreneurship, which enables the creation of startups and the growth of small businesses, highly skilled immigrant workers are of particular importance to the U.S. economy. While many critics are quick to assume that the utilization of foreign labor means that available jobs will be taken away from Americans, often these critics overlook that the American workforce cannot actually fill these jobs, as Americans are not pursuing degrees in these fields.<sup>153</sup> Beyond possessing the requisite degrees, highly skilled immigrant workers are “often able to recognize opportunities and innovative ideas that American-born entrepreneurs cannot” and they often may recognize “potential markets or supply chain relationships in their native lands that may not be visible to their American-born counterparts.”<sup>154</sup> Further, the American labor force benefits from “intellectual cross-pollination and interaction with foreign workers plying in the same trade,” which stimulates

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149. *Id.*

150. *Id.* at 142.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

creativity and increases technological advancement.<sup>155</sup> In the end, the value that highly skilled workers bring to the U.S. is critical to economic growth in these important STEM fields.

Beyond stifling growth in the form of small businesses and startups, the H-1B cap has further economic implications. On February 15, 2008, as a direct response to the economic crisis facing the U.S., Congress passed the American Recovery and Reinvestment Act of 2009 (Recovery Act), commonly referred to as the “stimulus package.”<sup>156</sup> Four days later, the Recovery Act was signed into law, with three specific goals: (1) to create new jobs and save existing ones, (2) to spur economic activity and invest in long-term growth, and (3) to foster unprecedented levels of accountability and transparency in government spending.<sup>157</sup> In 2011, the original expenditure estimate of \$787 billion was increased to \$840 billion, where it has remained.<sup>158</sup> While many of the Recovery Act projects were focused on “jumpstarting the economy,” others were expected to “contribute to economic growth” for years to come and, therefore, there was no end date written into the Recovery Act.<sup>159</sup>

Through the stimulus package, billions of dollars were allocated to scientific research.<sup>160</sup> However, due to the 65,000 cap placed on H-1B visas, the U.S. cannot properly spend the billions of dollars apportioned to scientific research because there are simply not enough highly skilled workers to take advantage of the allocated funds.<sup>161</sup> The current U.S. work force cannot meet the demand for these kinds of highly skilled workers because the U.S. work force is not pursuing STEM degrees.<sup>162</sup> While education reform may eventually provide the U.S. with a “native labor force capable of meeting the demand for highly skilled workers” in STEM fields, these changes will not take place immediately. In the meantime, the U.S. must continue to rely on highly skilled foreign workers “to use the stimulus funding effectively and help renew its commitment to groundbreaking research.”<sup>163</sup> However, since the U.S. currently caps the number of highly skilled workers that may be admitted to the U.S. each year, our ability to utilize these workers is severely limited.

The consequences of the U.S.’s restrictive immigration

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155. Malshe, *supra* note 32, 378–79.

156. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

157. *The Recovery Act*, RECOVERY.GOV, [http://www.recovery.gov/arra/About/Pages/The\\_Act.aspx](http://www.recovery.gov/arra/About/Pages/The_Act.aspx) (last visited March 30, 2015).

158. *Id.*

159. *Id.*

160. Malshe, *supra* note 32, 378–79.

161. *Id.*

162. *Id.*

163. *Id.*

policies on American research and innovation have not gone unnoticed. Diana Furchtgott-Roth, the former chief economist at the DOL, contends that had Congress not imposed such a “tight lid” on immigrant visas, the U.S. “might have had up to 300,000 more highly educated engineers and graduate students performing path breaking research” in the U.S. today.<sup>164</sup> These immigrants “would have added about \$23 billion to GDP and the deferral government would have gained [an additional] \$5 billion in tax revenues.”<sup>165</sup> While the economic benefits these workers would have brought are undeniable, the risks, in comparison, were very low. Because these workers tend to be “young, self-selected, highly educated, and have excellent employment opportunities,” there is an extremely low likelihood that they would receive federal benefits such as Medicare, Social Security, or Medicaid, in the near term.<sup>166</sup> As far as risk management and protectionism concerns go, this was a no-brainer. However, Congress has taken no action to eliminate the barriers facing highly skilled workers in the U.S. and the restrictive H-1B cap, which continues to inhibit economic growth, has remained steadfast.

For these reasons, the H-1B cap is the most debated area of legal immigration policy.<sup>167</sup> By capping the number of highly skilled workers allowable each year to a number that cannot possibly meet the demand for such workers, the U.S. has created a hurdle for American companies, particularly small businesses and startups. In doing so, the U.S. has stifled innovation and prevented economic growth in critical areas. As a result, the U.S. is falling behind in the STEM areas and the U.S. has not properly spent the money allocated by the stimulus package. The long-term effects of these consequences are alarming and raise serious questions about what should be done to prevent further economic implications. The solution, however, is obvious: Congress must act.

## VII. RECENT DEVELOPMENTS

With so many hot button immigration issues and a realization on both sides of the spectrum that the current system is broken, the clear answer, for many years now, has been comprehensive immigration reform. Immigration reform has been on the table for decades, with nearly every administration promising change. Unfortunately, in 2015, America is still waiting for such reform. In the past year and a half, although there have been glimpses of hope, Congress has not yet come together to pass the reform

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164. *Id.*

165. *Id.*

166. *Id.*

167. Karen Mills, *What's missing in America's immigration debate*, FORTUNE (Feb. 3, 2015), <http://fortune.com/2015/02/03/whats-missing-in-americas-immigration-debate/>.



needed to fix the broken system. However, in recent months, there have been some notable developments in regards to the immigration of the highly skilled and educated.

In April 26, 2013, the Senate “Gang of Eight,” a group of Republican and Democrat senators, formally introduced Senate Bill S. 744, an 844-page comprehensive immigration bill.<sup>168</sup> On June 27, 2013, the Senate voted 68–32 to approve the immigration bill.<sup>169</sup> For the next year, the House refused to vote on the bill. In fact, Speaker of the House, John Boehner said on July 8, 2013, “I’ve made it clear and I’ll make it clear again: the House is not going to take up the Senate Bill. The House is going to do its own job in developing an immigration bill.”<sup>170</sup> Speaker Boehner reiterated these sentiments on November 13, 2013, when he said that House Republicans “have no intentions of ever going to conference” with the Senate on the Bill passed by the Senate in June.<sup>171</sup>

On November 20, 2014, 511 days after the Senate passed the immigration bill and in the absence of any action by the House, President Obama made his announcement on executive action.<sup>172</sup> While the majority of President Obama’s executive action relates to illegal immigration, he did take some action to improve the immigration system for highly skilled workers in the U.S. President Obama took the executive initiative to ensure that highly skilled workers in the process of obtaining a green card, and certain spouses, are able to obtain a portable work authorization to allow them to accept promotions, change positions or employers, or start new companies while they wait to receive their green cards and ultimately become Americans.<sup>173</sup> This action was taken in acknowledgment that most highly skilled immigrants begin on an H-1B or other temporary work visa and that although the

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168. Democrats Charles E. Schumer (N.Y.), Richard Durbin (Ill.), Robert Menendez (N.Y.) and Michael Bennet (Colo.) and Republicans John McCain (R-Ariz.), Lindsey O. Graham (S.C.), Marco Rubio (Fla.), and Jeff Flake (Ariz.); Rachel Weiner, *Immigration’s Gang of 8: Who are they?*, THE WASHINGTON POST (Jan. 28, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/>.

169. David Nakamura and Ed O’Keefe, *Timeline: The Rise and Fall of Immigration Reform*, THE WASHINGTON POST (June 26, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/26/timeline-the-rise-and-fall-of-immigration-reform/>.

170. *Id.*

171. Daniel Gonzalez and Dan Nowicki, *Timeline: Immigration Reform*, AZ CENTRAL (Nov. 23, 2014, 11:05 AM) <http://www.azcentral.com/story/news/politics/immigration/2014/06/22/immigration-reform-timeline-notch/11232797/>.

172. See 160 CONG. REC. S6175 (daily ed. Nov. 20, 2014) (quoting Mr. Leahy, “We have been waiting now for 511 days since the Senate passed immigration reform.”).

173. *Taking Action to Attract Highly-Skilled Immigrants, Graduates, and Entrepreneurs*, 2014 WL 6657756, at \*1–2 (Nov. 25, 2014).

employers can sponsor these immigrants for an employment based green card, this process often takes years.<sup>174</sup> During this time, the worker is effectively locked into one position at the sponsoring company. President Obama's action on this matter works to eliminate this problem.

President Obama's action also provides that spouses of certain H-1B holders, those on the path to lawful permanent residency, are able to obtain work authorization. Currently, the dependent spouses of H-1B holders, who reside in the U.S. on what is called H-4 status, are not authorized to work. President Obama's initiative seeks to remedy this problem, with USCIS expected to finalize a rule on this matter sometime in the future. While at first glance this action may not seem to remedy the H-1B cap problem, it does in fact provide some relief. Under the current system, if the dependent of an H-1B wants to work, he or she must also seek H-1B status. By allowing these dependents, H-4 spouses, to gain work authorization in the U.S., President Obama has sought to reduce the number of people applying under the H-1B cap. Since President Obama cannot eliminate or raise the H-1B cap without congressional approval, this action helps make the cap more manageable. However, because the final rule will only apply to dependents of an H-1B holder in the process of obtaining a green card, rather than all H-1B dependents, the beneficial effects of this action will be limited.

In taking executive action, President Obama took a step in the right direction for legal immigration. His actions aim to "make it easier and faster for high[ly]-skilled immigrants, graduates, and entrepreneurs to stay and contribute to our economy."<sup>175</sup> These actions were taken in recognition of the value immigrants bring to our nation. As noted by Jeffrey Zientes, Director of the National Economic Council and Assistant to the President for Economic Policy, "we need to build on our strengths—after all, over one-quarter of all U.S.-based Nobel laureates over the past 50 years were foreign-born, and more than 40 percent of Fortune 500 companies were founded by immigrants or children of immigrants."<sup>176</sup> The actions taken by President Obama on November 20, 2014, are common sense steps on the path to comprehensive reform. However, President Obama's actions are not a long-term solution. Congress must finish the job.

## VIII. THE BOTTOM LINE: SOLUTIONS FOR THE ECONOMIC SHORTAGE

While the H-1B cap has remained an area of hot debate in the past decade, there is a common ground between all parties

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174. *Id.*

175. *Id.*

176. *Id.*

concerned: something must change. In order to foster innovation and supply the U.S. market with the diverse, highly skilled labor force demand requires, the H-1B cap simply cannot remain at 65,000. Accordingly, this section will outline possible solutions, considered in light of the existing problems, as well as the most recent developments in this area.

### *A. Double the H-1B Regular Quota*

First and foremost, the H-1B Regular Cap (the 65,000 available visas for beneficiaries who do not hold a U.S. master's degree or higher) should be permanently doubled to 130,000. Until 2004, Congress had taken the appropriate steps to increase or decrease the cap as necessary, based on anticipated demand.<sup>177</sup> However, since 2004, Congress has refused to increase the 65,000 cap, despite growing need for more H-1B workers.<sup>178</sup> The trends have been undeniable, as detailed in Figure 1. For FY 2004, the cap was reached by February 18, 2004.<sup>179</sup> The next year, for FY 2005, the cap was reached by November 23, 2004.<sup>180</sup> For FYs 2006 and 2007, the cap was reached by August 10, 2005 and May 26, 2006, respectively.<sup>181</sup> Each year, the date the cap was reached moved closer and closer to the opening date of April 1.

In 2007, H-1B applications reached the cap for FY 2008 on the very first day the H-1B season opened, April 2, 2007.<sup>182</sup> The next year, the cap was reached by April 7, 2008.<sup>183</sup> While 2009–2012 saw the cap stay open longer due to the recession and economic hardship, in 2013 and 2014, the H-1B cap was again filled within 7 days.<sup>184</sup> These statistics show that the demand for H-1B visas has continued to grow since 2003. However, despite the undeniable supply problem this has created, Congress has refused to adjust the cap to keep up with demand.

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177. Courtney L. Cromwell, *Friend or Foe of the U.S. Labor Market: Why Congress Should Raise or Eliminate the H-1b Visa Cap*, 3 BROOK. J. CORP. FIN. & COM. L. 455, 456–57 (2009).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

**Figure 1: Number of H-1B Applications Received and Date the Cap Was Reached<sup>185</sup>**

Year	Number of H-1B Visas Available	Date Cap Reached	Number of H-1B Applications Received <sup>186</sup>
H1B 2003 (FY 2004 cap)	65,000	February 18, 2004	312,200
H1B 2004 (FY 2005 cap)	65,000	November 23, 2004	264,474
H1B 2005 (FY 2006 cap)	85,000 <sup>187</sup>	August 10, 2005	295,915
H1B 2006 (FY 2007 cap)	85,000	May 26, 2006	304,877
H1B 2007 (FY 2008 cap)	85,000	April 2, 2007	288,764
H1B 2008 (FY 2009 cap)	85,000	April 7, 2008	246,674
H1B 2009 (FY 2010 cap)	85,000	December 21, 2009	247,617
H1B 2010 (FY 2011 cap)	85,000	January 26, 2011	267,654
H1B 2011 (FY 2012 cap)	85,000	November 22, 2011	307,713
H1B 2012 (FY 2013 cap)	85,000	June 11, 2012	134,000
H1B 2013 (FY 2014 cap)	85,000	April 5, 2013	124,000
H1B 2014 (FY 2015 cap)	85,000	April 7, 2014	172,500

Ultimately, while Congress at one point raised and lowered

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185. Data compiled from the following:

USCIS, *Report on H-1B Petitions: Annual Report to Congress October 1, 2011–September 30, 2012* (2013);

USCIS, *Fiscal Year 2010 Annual Report October 1, 2009–September 30, 2010* (2011);

USCIS, *Fiscal Year 2009 Annual Report October 1, 2008–September 30, 2009* (2010);

USCIS, *Fiscal Year 2006 Annual Report October 1, 2005–September 30, 2006* (2008);

Mark Koba, *Wanted: Foreign Workers. H-1B visa requests leap*, CNBC (March 3, 2014, 3:34 PM), <http://www.cnbc.com/id/101456282#>;

H1Base, *H1Base Reviews: H1B Visa Cap Statistics*, <http://www.h1base.com/visa/work/h1basereviewsh1bcapstatistics/ref/1698/>.

186. These numbers represent total number of H-1B applications received for that fiscal year, including cap exempt applications, except FY 2013–2015, for which USCIS has yet to release the FY Petition Reports. Rather, for FY 2013–2015, these number represent only the total number of H-1B petitions received between April 1 and the day the cap was filled, not petitions received throughout the remainder of the year (for extensions, transfers, or otherwise cap-exempt petitions).

187. The Master's Cap of an additional 20,000 visas was implemented in 2005 (FY 2006).

the cap according to that year's projected demand, this kind of ever-changing, arbitrary system is not the right solution. Rather, the H-1B cap needs to be permanently adjusted to accommodate growing demand for these kinds of highly skilled workers, with other solutions available in times of lower demand (such as a possible H-1B pooling program, as detailed in the following section). Accordingly, the first step Congress should take is to permanently double the H-1B Regular Cap. Demand for H-1B visas has been at least double since 2003, the last time Congress acted. As such, doubling the cap is a logical first step in remedying the H-1B supply and demand problem.

### *B. Create a Recapture Program and Pool Unused H-1Bs*

In addition to doubling the H-1B Regular Cap, Congress should establish a program for recapturing unused H-1B visas during years of low demand. While demand has been high in recent years, there will be years where demand for highly skilled foreign labor may be lower. For instance, demand has historically been lower during economic recessions. During years of lower demand, Congress should implement a recapture program to pool the unused visas in order to supplement years when the demand is higher than the cap allows. This would enable Congress to utilize the H-1B program to its full extent, by eliminating the waste of available visas during years of lower demand and providing a buffer for years of higher demand. By creating a recapture program in addition to doubling the cap, Congress would eliminate the necessity of frequent changes to the cap on a year-by-year basis and instead provide a permanent mechanism through which the market can ebb and flow naturally, without disturbing the integrity of the existing quota-based system.

### *C. Eliminate the Master's Cap Altogether, or, Alternatively, Exempt All Holders of U.S. Advanced Degrees in STEM Subjects*

Currently, 20,000 H-1B visas are reserved for petitions in which the beneficiary holds a U.S. master's degree or higher. These 20,000 H-1B visas are granted exemption from the regular 65,000 quota, as long as the U.S. master's degree was conferred by a non-profit, accredited institution. While the Master's Cap was a step forward by Congress, since it recognizes that holders of U.S. advanced degrees should have easier access to work in the U.S., limiting these visas to 20,000 does not make sense from an economic investment standpoint.

As a practical matter, there should be no limit on how many holders of U.S. advanced degrees can stay and work in the U.S. As

these individuals have U.S. educations, it is nonsensical to send them home, directly into the hands of our competitors. If an individual has come to the U.S. and earned an advanced degree at a qualifying U.S. institution, that person should not be discouraged from staying in the U.S. due to the H-1B cap or other immigration restraints. As such, the H-1B Master's Cap should be eliminated altogether, with all holders of U.S. advanced degrees exempt from filing under the cap. There are already safeguards in place to ensure that the U.S. advanced degrees are from accredited, non-profit universities and these restrictions have been strictly enforced by USCIS. It simply does not make sense to allow foreign-born students to come to the U.S., pursue an advanced course of study at a U.S. university, and then send them home with those degrees. Not only is this a missed opportunity from an economic standpoint, it's also a return on investment issue. The U.S. has invested time and effort into educating these students—our laws should encourage them to stay.

However, eliminating the Master's Cap altogether may raise concerns that individuals will come to the U.S. to pursue advanced degrees in less difficult academic areas simply to qualify for the Master's Degree exemption. An alternative solution, therefore, would be to exempt all holders of U.S. advanced degrees from applying under the cap as long as their degree is in a particular, congressionally-approved field, such as the STEM subjects discussed earlier. This additional safeguard would ensure that the best and brightest foreign students have easier access to H-1B visas in order to stay and work in the U.S., contributing to the U.S. economy and ensuring a return on U.S. investment.

#### *D. Provide H-1B to Any F-1 Student Who Completes a U.S. Degree—Cap Exempt*

Currently, while the U.S. Master's Cap sets aside 20,000 visas for holders of advanced U.S. degrees, other U.S.-educated individuals must still apply under the cap. For the same reasons set forth in the previous section, this makes little sense. Each year, thousands of foreign students enter the U.S. on F, M, and J visas to attend U.S. universities.<sup>188</sup> However, when these students graduate, their path to staying and working in the U.S. is limited. For many, the lack of opportunity to stay in the U.S. after graduation is discouraging.<sup>189</sup> The impact on the U.S. economy is thus twofold: first, the attendance of foreign students at U.S. universities is beneficial to the economy as it injects capital

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188. Cromwell, *supra* note 173, 473–74; 8 C.F.R. § 214.2(f), (j), (m).

189. Claire Groden, *Dear International Student, Thanks for Your Tuition. Now Go Home. Love, Uncle Sam*, NEW REPUBLIC (Dec. 2, 2014), <http://www.newrepublic.com/article/120463/immigration-law-discourages-international-students-working>.

through tuition and living expenses.<sup>190</sup> By discouraging foreign students from coming to the U.S. due to the lack of options to stay and work, the U.S. deprives itself of the economic gains the attendance of these students alone creates. Second, by not providing an easy pathway to stay and work in the U.S., the U.S. deprives itself of the long-term economic gains these students bring to the U.S. In today's modern economy, creativity drives innovation. By expelling young foreign talent, the U.S. deprives itself of the intellectual capital created by these individuals. In short, instead of retaining foreign talent, U.S. immigration policies today send such individuals back to their home countries, "where they have contributed to local workforces' ability to compete on a national basis with the United States."<sup>191</sup> In plain terms, it's economic suicide.

To remedy this problem, Congress should create a separate cap for holders of U.S. bachelor's degrees in STEM subjects from qualifying U.S. institutions (Bachelor's Cap). While U.S. advanced degrees, even if limited to certain subjects, should be exempt completely, holders of U.S. bachelor's degrees in STEM subjects should likewise have easier access to H-1B visas. As such, Congress should create a U.S. Bachelor's Cap of 45,000. This number would represent approximately a third of the H-1B Regular Cap (if it were doubled to 130,000). This separate cap would ensure that foreign students are not deterred from attending U.S. universities and that students who complete degrees in STEM subjects at these schools have an easier path to stay and work in the U.S.

#### *E. Allow EADs for All H-1B Holders' H-4 Dependents*

Finally, Congress should act to allow employment authorization to dependents of H-1B holders if they meet certain conditions. On November 20, 2014, President Obama took action to grant Employment Authorization Documents (EADs) to certain H-1B Holders' H-4 dependents. This executive action worked to decrease the number of individuals who must apply under the cap, as H-4 dependent spouses will now be able to work in the U.S. with their EADs without having to seek an H-1B visa of their own. Practically speaking, this makes sense. The dependents of H-1B holders reside in the U.S. with the H-1B holder already. There is no reason to block these individuals from working in the U.S. and contributing to the tax base while they are here. Since they are already legally in the U.S. and will continue to be, the requirement of an H-1B visa is unnecessary and should be permanently

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190. Cromwell, *supra* note 177, 473-74.

191. *Id.*

eliminated for these individuals.

Although President Obama's action on this matter was a step in the right direction, its impact will be limited. The executive action taken by President Obama only applies to certain H-1B holders on the path to permanent residence. Other H-1B holders will not have access to this benefit for their dependents. However, the number of H-1B holders being sponsored for employment-based visas is only a small percentage. This means that the positive impact from President Obama's action will be limited and does not fully address an area of the H-1B program that desperately needs change.

As it stands, most H-4 visa holders are not entitled to employment authorization and cannot operate a business venture.<sup>192</sup> Further, a student on a H-4 visa is not eligible for scholarships, student loans, or part time work.<sup>193</sup> This has created frustration among H-4 dependents, who feel trapped in the U.S. without any access to jobs or schooling.<sup>194</sup> Many of these visa holders feel anxious that a six-year gap in their employment will adversely affect them when they return home.<sup>195</sup> While President Obama's action is certainly progress, it leaves the majority of H-4 dependents in the same position they were before.

While providing employment authorization to all H-4 visa holders may be an attractive solution at first glance, it is important to recognize the rationale behind President Obama's action. An H-1B holder is only entitled to a position deemed to be a specialty occupation under the legislative criteria.<sup>196</sup> Conversely, immigrants with employment authorization can work in any position. Thus, should all H-4 dependents be allowed employment authorization, there would be a sizeable increase in the number of individuals competing against Americans for available jobs. President Obama's action recognizes that dependents of H-1B holders on the path to permanent residence will be in the U.S. indefinitely, meaning they will eventually compete in the job market anyway. As such, there is no reason to block them from working until a later date. However, while there may be concerns with offering employment authorization to H-1B dependents not

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192. Zenobia Khaleel, Work permits for H4 visa holders will end mental anguish for almost 100,000 spouses in the U.S., *The American Bazaar* (June 10, 2014), <http://www.americanbazaaronline.com/2014/06/10/h4-visa-prisoners-visa-privileged-visa/>.

193. *Id.*

194. Kayla Webley, *Beyond Borders*, MARIE CLAIRE (Oct. 28, 2013), <http://www.marieclaire.com/politics/news/a8218/h4-visa-debate-beyond-borders/> (explaining that H-4 visas are nicknamed "depression visas"); Tejasvini Prasad, *Help is finally on the way for holders of America's 'prisoner visa'*, PUBLIC RADIO INTERNATIONAL (Sept. 16, 2014), <http://www.pri.org/stories/2014-09-16/help-finally-way-holders-americas-prisoner-visa> (discussing H-4 "prisoner visa" and the career gaps suffered by these visa holders).

195. *Id.*

196. 8 C.F.R. § 214.2(h)(4)(ii).



on the path to permanent residence, there are alternative solutions available.

In order to more fully address the current problems facing H-4 visa holders while still protecting U.S. workers, Congress should act so that any H-4 dependent who holds a STEM degree is allowed access to employment authorization while in the U.S. Notably, many H-1B holders' dependents hold degrees in STEM subjects.<sup>197</sup> However, as these dependents cannot work while in the U.S., their degrees go untouched. More important, allowing these individuals employment authorization would not harm the American job market. As explained earlier, Americans do not pursue these degrees at a high rate and, therefore, we cannot fill these jobs without foreign labor.<sup>198</sup> By allowing employment authorization for H-4 holders with STEM degrees, Congress would accomplish two things: First, this would reduce the number of individuals applying for H-1B visas under the cap, which is currently the only option available for H-4 dependents who want to work in the U.S. Second, this would allow highly skilled H-4 dependents to contribute to the economy during their tenure in the U.S. This solution minimizes the risks, while capitalizing on available economic gains. It just makes sense.

In all, these proposals represent a plan of action to remedy the issues currently facing both employers and highly skilled foreign workers today. A plan for fixing the H-1B cap should seek to not only increase the number of H-1B visas available, but to also reduce the number of individuals who must apply under the cap in the first place. The proposed Bachelor's Cap, Master's degree exemption, and H-4 employment authorization discussed above do just that. Further, the creation of a recapture program recognizes that demand changes as the market and economy fluctuate and accommodates these changes without requiring yearly adjustments to the cap. These proposals, in conjunction with a higher H-1B Regular Cap, would help remedy the H-1B dilemma facing the U.S. in 2015.

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197. Ruchika Tulshyan, *The Dark Costs Of Denying Highly-Skilled Immigrant Spouses The Right to Work*, FORBES (May 23, 2014), <http://www.forbes.com/sites/ruchikatulshyan/2014/05/23/the-dark-costs-of-denying-highly-skilled-immigrant-spouses-the-right-to-work/>.

198. Forbes Leadership Forum, *America Desperately Needs More STEM Students: Here's How to Get Them*, FORBES (July 9, 2012), <http://www.forbes.com/sites/forbesleadershipforum/2012/07/09/america-desperately-needs-more-stem-students-heres-how-to-get-them/> (explaining that according to the DOL, only five percent of U.S. workers are employed in STEM field and that according to the President's Council of Advisors on Science and Technology, forty percent of college students planning to major in engineering and science end up switching to other subjects).

## IX. RETURN ON INVESTMENT

Over the past decade, U.S. immigration has undergone drastic changes in both law and policy. On March 1, 2003, the entire landscape of U.S. immigration changed. DHS was created and, in one fell swoop, U.S. immigration became a national security concern. The creation of DHS represented the largest U.S. government restructuring since World War II and the change it ushered in was undeniable.<sup>199</sup> The terrorist attacks of 9/11 brought a justifiably heightened concern for U.S. national security and the changes in U.S. immigration policy clearly reflected this shift in focus.

Since 9/11, immigration reform has become a hot button issue. There have been drastic changes in policy, but the system remains outdated and unable to accommodate current U.S. needs. Although reform has become a major topic, the emphasis on national security has remained steadfast. In 2006, Senator John Cornyn emphasized that the national dialogue on immigration reform is “first and foremost about our Nation’s security. In a post-9/11 world, border security is national security.”<sup>200</sup> It is undeniable that national security is critical for the U.S. However, it should not completely override other interests at stake. Immigration laws must also reflect other concerns, like the U.S. economy and global trade.

Numerous commentators and studies have demonstrated the negative impact that post-9/11 immigration policies have had on the American economy.<sup>201</sup> The broadly written laws passed in the aftermath of the attacks have “hampered useful trade and travel, impaired scientific and scholarly exchange, [and] imposed competitive disadvantages on many American businesses.”<sup>202</sup> Due to the increased difficulties for noncitizens to enter into the U.S., the U.S. has been steadily losing tourists, businesses, and international students to other countries, which has had an undeniably adverse effect on the U.S. economy.<sup>203</sup> In this regard, the U.S. must reconsider its immigration laws and strike a balance between protecting homeland security and fostering U.S. economic growth.

In the end, U.S. economic growth depends on maintaining a competitive advantage in science and technology. Historically, it is the highly skilled scientists, engineers, and physicists that have delivered economic success to the U.S. and continue to drive innovation today. The impact the post-9/11 changes in

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199. Donald Kerwin & Margaret D. Stock, *The Role of Immigration in A Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 388 (2007).

200. Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 171 (2007).

201. *Id.*

202. Ahmed, *supra* note 4, at 984.

203. *Id.*

immigration pertaining to highly skilled workers and foreign students has had on the U.S. economy has been palpable. While the skilled and educated continue to come to the U.S., albeit in fewer numbers, they are not staying here long term. As Senator Dick Durbin pointed out in a statement on the floor of the U.S. Senate, “[t]he H-1B visa job lasts for 3 years and can be renewed for 3 years. What happens to those workers after that? Well, they could stay. It is possible[,]” but many return back to their home countries “to work for the companies that are competing with American companies.”<sup>204</sup> Senator Durbin makes a good point: the current laws and regulations make it difficult to obtain an H-1B visa in the first place, let alone stay long term. The result of these discouraging laws is clear: highly skilled workers have little choice but to leave, taking their talent and skills elsewhere.

In order to stay competitive in the global market, the U.S. needs to examine the restrictive immigration laws currently in place. The U.S. needs to relax the stringent restrictions on temporary nonimmigrant work visas and carve out an easier path to permanent residence for both foreign students and highly skilled workers. Many other countries are already engaged in the immigration “race for talent” and have “created paths for highly skilled immigrants and foreign students to attain permanent residence after working and studying in their countries.”<sup>205</sup> In order to remain competitive on the global stage, the U.S. must keep up. As President Obama stated in his State of the Union Address in January 2011, “[l]et’s stop expelling talented, responsible young people, who could be staffing our research labs or starting a new business, who can be further enriching this Nation.”<sup>206</sup> In the end, we simply cannot afford not to. Retaining specialized skill sets and talent in the U.S. is not only a step towards our future, it’s a return on our investment. That’s just good business.

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204. *Id.* at 944–45.

205. Porter, *supra* note 59, at 624.

206. 157 CONG. REC. H459 (daily ed. Jan. 25, 2011) (statement of President Barack Obama, State of the Union Address).