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# Reforming US' High-Skilled Guestworker Program

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# INTRODUCTION—THE H-1B PROGRAM WAS FLAWED FROM ITS INCEPTION

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The H-1B is a large US guest worker program created by the Immigration Act of 1990.<sup>1</sup> In the run-up to the bill's passage, significant concerns were raised that the program could be exploited by employers to undercut US workers. To address such concerns, safeguards were included in the visa program's language. During the House of Representatives floor debate on the bill, its principal sponsor, Congressman Bruce Morrison, forcefully contended that those safeguards ensured, "This legislation protects American jobs." But, has it?

Just three years after the bill's passage, CBS' *60 Minutes* aired an exposé demonstrating how the program was being abused by one of Silicon Valley's pioneer firms, Hewlett-Packard, which hired computer programmers for \$10 per hour.<sup>2</sup> To understand the implications for US workers of such abuse, correspondent Lesley Stahl interviewed the former head of immigration policy at the US Department of Labor, Demetrios Papademetriou. Stahl asked him why any company would ever hire an American when it could hire an H-1B worker at half the rate, and whether the program had created an unlevel playing field. Papademetriou replied that the H-1B program was, "absolutely...stacking things against the Americans." It was plainly obvious that, in spite of the promises of safeguards, even leading-edge Silicon Valley firms were abusing the program to undercut US workers' wages and job opportunities.

Fast forward twenty-four years, and *60 Minutes* revisited the H-1B program, finding that nothing had improved.<sup>3</sup> Its 2017 segment profiled US workers at Northeast Utilities, New York Life, Disney, and the University of California, all of whom described being replaced by H-1B workers. Adding insult to injury, before being terminated they were forced by their employers to train their H-1B replacements. The workers experienced significant financial costs, but the wounds they suffered from the way they lost their jobs went far beyond just money.

*60 Minutes* correspondent Bill Whitaker asked Robert Harrison, a senior telecom engineer at the University of California, San Francisco (UCSF) Medical Center, how he felt about having to train his H-1B replacement.

ROBERT HARRISON: I can't wrap my mind around training somebody to take my position. You know, it's my livelihood. How am I supposed to feel?

BILL WHITAKER: I've heard some workers say that—this is like digging your own grave. (Laugh) Is that what it feels like?

ROBERT HARRISON: It feels worse than that. It feels like not only am I diggin' the grave, but I'm gettin' ready to stab myself in the—in the gut and fall into the grave.

Whitaker went on to ask now-former Congressman Bruce Morrison what he thought about the current state of the H-1B program. Morrison replied, "I'm outraged. The H-1B has been hijacked, as the main highway to bring people from abroad and displace Americans."

The *60 Minutes* segments bookend dozens of press reports in major newspapers, over more than a quarter of a century, describing how the H-1B undercuts US workers' wages and working opportunities. Yet, in all of those years, the program has never been fixed to meet the original promises made by Congress of safeguarding US jobs. Instead, the program has been expanded to allow even larger numbers of H-1B workers, admitting them for longer periods of time, while its flawed governing rules have remained as they were in 1990.

The current system not only harms Americans; it also enables H-1B workers to be exploited. H-1B workers themselves are underpaid, vulnerable to abuse, and frequently placed in poor working conditions.<sup>4</sup> Adopting safeguards to ensure H-1B workers are paid appropriate wages, provided fair working conditions, and given

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1 US Congress, "S.358: Immigration Act of 1990," November 29, 1990, [www.congress.gov/bill/101st-congress/senate-bill/358/text](http://www.congress.gov/bill/101st-congress/senate-bill/358/text).

2 "North of the Border; American Businesses Are Importing Foreign Computer Programmers While American Programmers Are Unemployed," *60 Minutes*, CBS, March 19, 1993.

3 "You're Fired," *60 Minutes*, CBS, March 19, 2017.

4 For examples of exploitation, see: Matt Smith, Jennifer Gollan, and Adithya Sambamurthy, "Job Brokers Steal Wages, Entrap Indian Tech Workers in US," *Reveal News*, October 27, 2014, <https://www.revealnews.org/article/job-brokers-steal-wages-entrap-indian-tech-workers-in-us/>; Matt Smith, "Visa Fraud in US Tech Industry Relies on Falsified Job Letters," *Reveal News*, November 21, 2014, <https://www.revealnews.org/article-legacy/visa-fraud-in-us-tech-industry-relies-on-falsified-job-letters/>.

greater employment rights would not only improve their lives, but would also better protect US workers.

Adopting adequate safeguards would also ensure the H-1B program contributes to the US economy by filling genuine shortages in the US labor market with foreign workers who possess rare skills and can be rightly characterized as the “best and brightest.”

### Calls for Changes to the H-1B Are Rebuffed

The H-1B is only one of more than twenty US guest worker programs, yet it has arguably been in the public spotlight more than all of the others combined.<sup>5</sup> This is driven by a number of factors, including its large size (there are more than half a million H-1B workers), the extraordinary profits that businesses earn from H-1B wage arbitrage, congressional mandates that H-1B data be made publicly available, and the brazen ways in which the program has been exploited by employers. Given all of the attention paid to the H-1B program, it is no surprise that a number of groups and policymakers have argued for changes.

Major business interests have argued that the H-1B program allows them to hire the “best and brightest” to fill jobs that Americans cannot do.<sup>6</sup> They have invested heavily in advocacy efforts to expand the H-1B program, and have strongly opposed adding any program safeguards, arguing that such safeguards would prevent them from selecting their preferred candidate for the job. Technology and financial services firms

have taken the lead in the public advocacy, spending millions of dollars on lobbying, creating numerous issue-specific advocacy organizations, and funding favorable studies at think tanks. Unlike traditional policy advocacy—which is typically left to the government affairs departments of corporations—pushing for H-1B expansion has seen CEOs be highly visible. Celebrity CEOs such as Bill Gates, Mark Zuckerberg, Eric Schmidt, Jamie Dimon, and Michael Bloomberg have publicly advocated for expanding the H-1B program—through op-eds, speeches, sponsoring news organizations’ events designed to influence lawmakers’ views of the program, letters to shareholders, and congressional testimony.<sup>7</sup> Both Gates and Bloomberg have argued for an infinite number of H-1Bs, calling for an end to caps.<sup>8</sup> To broaden the appeal of expanding the program, they have linked their messages to broader advocacy efforts on behalf of Deferred Action for Childhood Arrivals (DACA) recipients and the undocumented.

Immigration attorneys, who have expert knowledge about how the H-1B program operates, have also advocated for H-1B expansion and argued that current safeguards are more than adequate.<sup>9</sup> This should come as no surprise, since H-1B cases are often a large source of revenue for immigration law firms. The more H-1Bs issued, the greater the revenue earned by them.

Various outsourcing firms, and the trade associations that represent them, have also actively advocated for more H-1Bs.<sup>10</sup> These firms have been accused of building business models worth tens of billions of dollars

5 US Citizenship and Immigration Services, “Temporary (Nonimmigrant) Workers,” [www.uscis.gov/working-united-states/temporary-nonimmigrant-workers](http://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers).

6 Microsoft has been at the forefront of lobbying for more H-1Bs. Its general counsel, Brad Smith describes H-1B workers as the “best and brightest” in this interview: Martin Kaste, “Who’s Hiring H-1B Visa Workers? It’s Not Who You Might Think,” *National Public Radio*, April 3, 2013, <https://www.npr.org/sections/alltechconsidered/2013/04/03/176134694/Whos-Hiring-H1-B-Visa-Workers-Its-Not-Who-You-Might-Think>. FWD.US is a business lobbying organization advocating for more H-1B visas. It describes the H-1B as “a temporary work visa that incentivizes the best and brightest to come here.” FWD.US, “Best & Brightest & Stuck: Stories of Immigrants,” <https://www.fwd.us/best-brightest-stuck>

7 Examples of CEO advocacy include: Bill Gates, “Competitiveness and Innovation on the Committee’s 50th Anniversary With Bill Gates, Chairman of Microsoft,” hearing before the US House of Representatives Committee on Science and Technology, March 12, 2018, [www.gpo.gov/fdsys/pkg/CHRG-110hhrg41066/pdf/CHRG-110hhrg41066.pdf](http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg41066/pdf/CHRG-110hhrg41066.pdf); Mark Zuckerberg, “Immigrants Are the Key to a Knowledge Economy,” *Washington Post*, April 10, 2013, [www.washingtonpost.com/opinions/mark-zuckerberg-immigrants-are-the-key-to-a-knowledge-economy/2013/04/10/aba05554-a20b-11e2-82bc-511538ae90a4\\_story.html?utm\\_term=.7b91fd18f669](http://www.washingtonpost.com/opinions/mark-zuckerberg-immigrants-are-the-key-to-a-knowledge-economy/2013/04/10/aba05554-a20b-11e2-82bc-511538ae90a4_story.html?utm_term=.7b91fd18f669); Sara Ashley O’Brien, “Alphabet’s Eric Schmidt Says H-1B Visa Cap Is ‘Stupid,’” *CNN*, May 4, 2017, [money.cnn.com/2017/05/04/technology/eric-schmidt-h1b-visa/index.html](http://money.cnn.com/2017/05/04/technology/eric-schmidt-h1b-visa/index.html); “Jamie Dimon on the ‘Traumatic TARP Experience,’” *New York Times*, May 19, 2009, [dealbook.nytimes.com/2009/05/19/jamie-dimon-on-jpmorgans-finest-year/](http://dealbook.nytimes.com/2009/05/19/jamie-dimon-on-jpmorgans-finest-year/); Patrick Thibodeau, “Mayor Bloomberg Calls H-1B Visa Caps ‘National Suicide,’” *Computerworld*, September 29, 2011, [www.computerworld.com/article/2511562/it-outsourcing/mayor-bloomberg-calls-h-1b-visa-caps--national-suicide-.html](http://www.computerworld.com/article/2511562/it-outsourcing/mayor-bloomberg-calls-h-1b-visa-caps--national-suicide-.html).

8 Anne Broache, “Gates Calls for ‘Infinite’ H-1Bs, Better Schools,” *CNET*, March 7, 2007, [www.cnet.com/news/gates-calls-for-infinite-h-1bs-better-schools/](http://www.cnet.com/news/gates-calls-for-infinite-h-1bs-better-schools/); Patrick Thibodeau, “Bloomberg Champions Limitless H-1B Visas,” *Computerworld*, January 25, 2016, [www.computerworld.com/article/3026241/it-outsourcing/bloomberg-champions-limitless-h-1b-visas.html](http://www.computerworld.com/article/3026241/it-outsourcing/bloomberg-champions-limitless-h-1b-visas.html).

9 American Immigration Lawyers Association, press release, “Maintaining America’s Global Competitiveness in a Time of World Economic Crisis,” February 3, 2009, <http://www.aila.org/infonet/maintain-americas-global-competitiveness>; American Immigration Lawyers Association, press release, “AILA: Immigration Innovation Act Would Help Economy,” January 14, 2015, <http://www.aila.org/advo-media/press-releases/2015/aila-immigration-innovation-act-would-help-economy>.

10 During the 115th Congress, the top lobbying issue for Cognizant Technology Solutions, a leading US-based offshore outsourcing firm, is legislation that would add safeguards to the H-1B and L-1 visa programs. “Cognizant Technology Solutions,” *OpenSecrets.org*, <https://www.opensecrets.org/orgs/lobby.php?id=D000059096>



Office of the United States Citizenship and Immigration Services. Photo credit: Wikipedia ([https://en.wikipedia.org/wiki/United\\_States\\_Citizenship\\_and\\_Immigration\\_Services](https://en.wikipedia.org/wiki/United_States_Citizenship_and_Immigration_Services))

based on exploiting the cost advantage of the H-1B program. Adding safeguards would likely force them to make significant changes to their business models.<sup>11</sup>

On the other side, many US workers believe the program drives down their wages, harms their working conditions, and reduces their job opportunities. Most of these workers are not organized, and their advocacy is almost entirely informal—consisting of commenting on news articles, writing letters to the editor, and posting on social media outlets. This limits their influence, because the political process is designed

to respond to organized interests. The few organizations representing segments of US workers—such as the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Institute of Electrical and Electronics Engineers-USA (IEEE-USA)—have formally advocated for adding safeguards to the program, such as requiring employers to recruit US workers prior to hiring an H-1B worker and increasing wages for H-1B workers.<sup>12</sup>

Of course, H-1B workers themselves have a major stake in how the program is administered. H-1B workers

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11 Ron Hira, "U.S. Immigration Regulations and India's Information Technology Industry," *Technological Forecasting & Social Change* vol. 71, no. 8, October 2004, pp. 837-854.

12 AFL-CIO, "Letter to Sens. Grassley and Durbin in Support of the H-1B and L-1 Visa Reform Act to Make These Programs Work Better for Working People," December 4, 2015, <https://aflcio.org/about/advocacy/legislative-alerts/letter-sens-grassley-and-durbin-support-h-1b-and-l-1-visa-reform>; IEEE USA, "Ensuring a Strong High-Tech Workforce Through Educational and Employment-Based Immigration Reforms," June 19, 2015, <https://ieeusa.org/wp-content/uploads/2017/06/SkilledImmigration0615.pdf>.

experience firsthand the consequences of their limited employment rights and precarious immigration status vis-à-vis permanent-resident status (commonly referred to as a green card). A green card liberates them from their H-1B employer by allowing them to stay permanently in the United States, without fear that employment termination would force them to leave the country. It also frees them to more easily find a job with a different employer or become self-employed, thus increasing their wages and improving their working conditions, as well as freeing them to start their own businesses. Many H-1B workers, like those working at major outsourcing firms, expect to be in the United States only temporarily, and are not engaged in advocacy. However, a key subset of H-1B workers, those who are waiting in long queues for permanent-resident status, have been active in efforts to improve their standing. This group, represented by advocacy organizations like Immigration Voice and Skilled Immigrants in America, has pushed for upgraded employment rights and a speedier path to a green card.

As the stories of H-1B exploitation have mounted, numerous newspaper editorial boards from across the ideological spectrum—the *Los Angeles Times*, *New York Times*, and *Washington Times*, to name a few—have called for adding safeguards to the program.<sup>13</sup>

The program has also received a great deal of attention from policymakers. In the past five years, there have been quite a few congressional hearings on the H-1B, as well as numerous bills introduced. Senators Charles Grassley (R-IA) and Richard Durbin (D-IL) have been the most visible lawmakers, working together for more than a decade to introduce legislation to add safeguards to the program.<sup>14</sup> On the other hand, Senator Orrin Hatch (R-UT) has pushed for a major expansion of the program.<sup>15</sup>

The H-1B became a high-profile issue during the 2016 presidential campaign. It was raised in two of the Republican presidential debates, and on the campaign trail. While campaigning in Anaheim, California, a stone's throw from Disneyland, Senator Bernie Sanders (I-VT) called out Disney's abuse of the H-1B program.<sup>16</sup> Then-candidate Donald Trump made specific proposals on his campaign website to add safeguards to the program, such as giving hiring preference to US workers and raising wages of H-1Bs.<sup>17</sup> Candidate Trump even invited some of the Disney workers who trained their replacements to speak with him at major campaign rallies.<sup>18</sup> Immediately following his November 2016 election, Trump's first formal announcement as president-elect laid out his six immediate policy priorities. One was his pledge to end visa abuse.<sup>19</sup> In April 2017, he issued the "Buy American Hire American" executive order (EO), directing key government agencies to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse..." and to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."<sup>20</sup> Yet, even a year after the issuance of the EO, no substantive changes have been made to the program.

Congress has repeatedly chosen not to advance legislation to fix the H-1B program. A major cause of this inaction is that the flawed rules governing the H-1B program are still not well understood. In spite, or maybe because, of all of the attention paid to the H-1B, there is still a great deal of confusion—especially among policy elites and the press—about how the program works in practice, and the process and rules by which H-1B visas are awarded. Once those rules are understood, it

13 "End H-1B Visa Program's Abuse," *Los Angeles Times*, February 16, 2015, [www.latimes.com/opinion/editorials/la-ed-visas-tech-workers-h1b-20150217-story.html](http://www.latimes.com/opinion/editorials/la-ed-visas-tech-workers-h1b-20150217-story.html); "A U.S. Hiring Plan Falls Short of Reform," *New York Times*, May 5, 2017, [www.nytimes.com/2017/05/05/opinion/infosys-hiring-plan-falls-short-of-visa-reform.html?\\_r=0](http://www.nytimes.com/2017/05/05/opinion/infosys-hiring-plan-falls-short-of-visa-reform.html?_r=0); "Dig Your Own Grave," *Washington Times*, February 29, 2016, [www.washingtontimes.com/news/2016/feb/29/editorial-replacing-american-workers-with-foreign/](http://www.washingtontimes.com/news/2016/feb/29/editorial-replacing-american-workers-with-foreign/).

14 Chuck Grassley, press release, "Grassley, Durbin to Introduce Reforms to Skilled Non-Immigrant Visa Programs," January 19, 2017, <https://www.grassley.senate.gov/news/news-releases/grassley-durbin-introduce-reforms-skilled-non-immigrant-visa-programs>.

15 Hatch has introduced his Immigration Innovation Act in multiple Congresses. It would expand the H-1B program dramatically and, in its most recent iteration, make merely cosmetic changes to the safeguards. US Congress, "S.2344 Immigration Innovation Act of 2018," <https://www.congress.gov/bill/115th-congress/senate-bill/2344>.

16 Nick Gass, "Sanders Dings Disney near Disneyland," *Politico*, May 24, 2016, [www.politico.com/blogs/2016-dem-primary-live-updates-and-results/2016/05/bernie-sanders-disneyland-223527](http://www.politico.com/blogs/2016-dem-primary-live-updates-and-results/2016/05/bernie-sanders-disneyland-223527).

17 Patrick Thibodeau, "The H-1B positions of Clinton and Trump: Where the Two Candidates Stand on Tech-related Immigration," *Computerworld*, July 17, 2016, <https://www.computerworld.com/article/3096103/it-careers/the-h-1b-positions-of-clinton-and-trump.html>.

18 Donald Trump, remarks at rally in Madison, Alabama, February 28, 2016, [www.youtube.com/watch?v=i9Z5fCwi6Oc](http://www.youtube.com/watch?v=i9Z5fCwi6Oc).

19 "President-Elect Donald Trump Lays Out First 100 Days," *C-SPAN*, November 21, 2016, [www.c-span.org/video/?418955-1%2Fpresident-elect-donald-trump-lays-100-days](http://www.c-span.org/video/?418955-1%2Fpresident-elect-donald-trump-lays-100-days).

20 White House, "Presidential Executive Order on Buy American and Hire American," April 18, 2017, [www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/](http://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/).



President Trump in Ypsilanti, Michigan. *Photo credit: Wikimedia Commons à Dan Scavino Jr., @Scavino45, Director of Social Media at The White House*

becomes evident that the program is highly vulnerable to exploitation, widely abused, and in serious need of a major overhaul, as *60 Minutes* and other news organizations have highlighted for decades.

This policy brief sheds light on the purpose and the structure of the H-1B program, its intended rationale and objective. It also assesses the program's shortcomings, and provides some practical recommendations to fix it.

The program's shortcomings stem from poor policy choices that could easily be corrected. The H-1B program is employer-driven. Employers decide which position to fill with an H-1B and select the particular H-1B worker. In such an employer-driven system, the rules governing the standards for selection need to be especially tight, to ensure that employers are not gaming the guest worker program. Yet, the selection standards for the H-1B program are surprisingly low. Virtually any white-collar occupation is eligible for the H-1B program, and the workers need not possess any special skills to qualify to fill an H-1B slot. Further, the front-end selection process is extraordinarily weak. It doesn't require the existence of a labor shortage. Lastly, H-1B visas are granted on a first-come, first-served basis, rather than on the basis of exceptional skills or high salaries.

### What is an H-1B Visa?

An H-1B visa is a nonimmigrant work permit, issued by the US government, that allows employers to hire foreign workers for a limited period of time.<sup>21</sup> An employer submits an application to hire a specific worker and, when issued, the employer holds the work permit. The work visa has a duration of three years and can be renewed once for an additional three years. In 2000, Congress passed legislation allowing employers to renew H-1B visas on an annual basis indefinitely, but only for workers who have a pending green-card application.<sup>22</sup>

The H-1B program is the largest of the skilled-guest worker programs. There is an annual cap of eighty-five thousand new foreigners permitted to work on H-1B visas. A portion of the cap, twenty thousand, is set aside for foreign workers who hold advanced degrees from a US university. However, the actual flow of new H-1Bs far exceeds the cap. A certain class of employers—universities, government research organizations, and organizations affiliated with those organizations—is exempt from the annual cap. As a result, about 108,000 new H-1Bs were granted in the 2017 fiscal year, with twenty-three thousand for exempt employers on top of the eighty-five thousand cap. In addition, there were renewals for another 258,000 workers, resulting in a total of 366,000 H-1B workers approved in FY17 alone. Nearly 70 percent of H-1B approvals were for workers in computer-related occupations.<sup>23</sup> Because the visa duration is up to six years, and in some cases indefinite, the stock of H-1Bs in the country at any one time is likely more than half a million.<sup>24</sup> The exact number is unknown, as the US government does not track whether H-1B workers actually arrive in the United States or leave it.

### Low Standards for Occupations and Workers to Qualify for an H-1B

There are two criteria for visa eligibility: the position must be a *specialty occupation*, and the worker must meet minimum qualifications. The government defines a specialty occupation as one that “requires the theoretical and practical application of a body of

21 US Citizenship and Immigration Services, “H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models,” [www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models](http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models).

22 US Citizenship and Immigration Services, “Pub. L. 106-313 American Competitiveness in the Twenty-first Century Act of 2000,” [www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-22204.html](http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-22204.html).

23 US Citizenship and Immigration Services, “Characteristics of H-1B Specialty Occupation Workers,” 2018.

24 Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers Report* (Washington, DC: Economic Policy Institute, 2017), <https://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/>.

specialized knowledge and a bachelor's degree or the equivalent in the specific specialty."<sup>25</sup> That flowery language notwithstanding, in practice, virtually any white-collar occupation qualifies as a specialty occupation for the H-1B program. It is used by employers to fill a variety of occupations, from accountants to reporters to school teachers to salesmen to software developers. There is nothing particularly special about the "specialty occupations" as defined in the H-1B program.

The second criterion sets a minimum standard for the worker's qualifications. While the program is often described as only being available to the "best and brightest" or "highly skilled," the actual minimum qualifications for the worker are much more modest—a bachelor's degree or equivalent experience. Approximately one-third of the US workforce holds a bachelor's degree. So, again, these are neither rare skills nor exceptional qualifications.

The low bar that these two criteria set for occupation and worker eligibility is not widely known outside of the companies that use the program. Occupations need not be in high demand, and workers need not be highly specialized to qualify for an H-1B visa. Coupling this low bar with a weak front-end selection process, which this paper examines next, creates considerable opportunity for employers to exploit the H-1B program.

### The Front-End Selection Process is Extraordinarily Weak

Employers decide whether to apply for an H-1B visa and select the candidates. Employers also have the power to decide whether the H-1B worker can remain in the country. As a result, employer motivations and behaviors are the primary drivers of the outcomes of the program.

Labor markets work like other markets. When there is growth in demand for a particular good or service, prices (and, in this case, wages) rise, sending a signal to supply. For instance, in labor markets, workers and students respond to increases in demand by entering those fields. The rationale for the H-1B program rests on the premise that there is a failure in the US labor market that can only be remedied by government

intervention. Its intent is to correct this market failure by allowing employers to hire foreign guest workers to fill only those jobs for which US workers are unavailable. As the US Department of Labor describes it, "The intent of the H-1B provisions is to help employers who cannot otherwise obtain needed business skills and abilities from the US workforce by authorizing the temporary employment of qualified individuals who are not otherwise authorized to work in the United States."<sup>26</sup> The intent is clearly to fix a market failure, but, in practice, employers need not demonstrate such a failure exists before hiring an H-1B worker. That is, employers need not demonstrate that a shortage of US workers exists for the specific position to be filled.

The most common misconception that news editors, journalists, think-tank analysts, and even politicians have about the H-1B program is the belief that employers must demonstrate that there are no qualified US workers available before they hire an H-1B worker. They believe, and often wrongly claim, that employers hire these workers only as a last resort when no US workers can be found. For example, the Associated Press and New York Times got this wrong in recent articles explaining how the H-1B program works.<sup>27</sup> Yet, employers can fill a position with an H-1B worker without ever attempting to recruit a US worker for the job.

The rationale for not requiring active recruitment of US workers was to expedite the hiring process for an H-1B worker. The assumption was that employers would only use the program when they couldn't find an American worker, but that assumption has proven wildly incorrect. Many employers actually set aside jobs for H-1B workers through preferential hiring practices, and even replace US workers with H-1Bs. Such practices may surprise some, but they are perfectly legal—and, more importantly, perfectly logical because employment norms and firm behaviors are far different today than they were in 1990. The rise of shareholder-value-driven management means that the logic of the firm is to maximize profits. If hiring an H-1B worker instead of an equally qualified US worker increases profits, then the firm's executives will choose to do so.

The quaint notion that employers will self-regulate has been shattered by dozens of stories of household

25 US Department of Labor, "H-1B, H-1B1, and E-3 Specialty (Professional) Workers," [www.foreignlaborcert.doleta.gov/h-1bdd.cfm](http://www.foreignlaborcert.doleta.gov/h-1bdd.cfm).

26 US Department of Labor, "Wage and Hour Division (WHD): H-1B Program," [www.dol.gov/whd/immigration/h1b.htm](http://www.dol.gov/whd/immigration/h1b.htm).

27 The *Associated Press* falsely claimed that US workers must recruit US workers before hiring an H-1B in an "explainer" article about the program. It issued a correction after the error was identified by one of the authors of this piece. "Correction: AP Explains-High-Tech Visas Story," *Associated Press*, February 2, 2017, <https://apnews.com/9167c94a9aba46e89bfab3c9438d49df/ap-explains-tech-companies-worry-about-cherished-tech-visas>; The *New York Times* made a similar inaccurate claim in an explainer article, and corrected it after the error was identified by one of the authors of this piece. Vinu Goel, "How Trump's 'Hire American' Order May Affect Tech Worker Visas," *New York Times*, April 18, 2017, <https://www.nytimes.com/2017/04/18/technology/h1b-visa-facts-tech-worker.html>.

names replacing US workers with H-1Bs. This common practice has reportedly been used by Disney, Southern California Edison, New York Life, Abbott Labs, Fossil Group, and many other leading firms.<sup>28</sup> Perhaps the most stunning case was when UCSF forced Robert Harrison and his colleagues to train their H-1B replacements. UCSF is part of the University of California (UC) system, one of the largest public university systems in the country. According to Senator Dianne Feinstein (D-CA), the UC system received \$8.5 billion in grants and subsidies from the federal government.<sup>29</sup> More astounding, Janet Napolitano, UC's president, previously served as secretary of the Department of Homeland Security, the agency that administers the H-1B program. During an oversight hearing before Congress in 2009, Senator Durbin asked then-Secretary Napolitano what she was doing to ensure that US workers were not being displaced by H-1B workers. She responded, "Our top obligation is to American workers, making sure American workers have jobs...We are going to keep at this to make sure that the intent of that program is fulfilled."<sup>30</sup> Remember, the intent is that H-1B workers are filling positions for which there is a bona fide labor shortage. After the UC H-1B scandal became public in late 2016, about a dozen members of Congress sent letters to Napolitano, urging her to reverse course.<sup>31</sup> In spite of this public admonition, she went forward with replacing her US workers with H-1Bs. The lure of lower-cost, hassle-free workers was too tempting for even for a public university like UC to pass up.

Some have argued that a requirement of the active recruitment and hiring of US workers is too bureaucratic and slow, especially given the fast pace of technology. Such claims are dubious at best, given the current hiring practices of H-1B employers. Employers apply for H-1B workers in April, a full six months before the H-1B worker can begin working. Six months is more than ample time for an employer to show it has actively recruited US workers and offered positions to qualified applicants.

While the H-1B program is often referred to as "highly skilled" or "requiring specialized knowledge," the actual skills needed to qualify for an H-1B visa are surprisingly low. As discussed earlier, there's nothing particularly special about the occupations, nor with the skills that qualify workers for an H-1B. By every objective measure, most H-1B workers have no more than ordinary skills, skills that are abundantly available in the US labor market. That means they are likely competing with (and substituting for) US workers, rather than complementing them as was the program's intention.

As Demetrios Papademetriou aptly put it in his 1993 60 Minutes interview, "These are basically run-of-the-mill people with a degree and some skills, and it seems to me that it is important that we distinguish between people who are truly skilled—who have unique, specialized skills—and people who simply provide labor." Yet, the current H-1B program rules make no such distinction. Workers who are barely eligible for an H-1B, with the lowest possible skill levels and wages, can squeeze out someone with unique skills and a very high salary.

The process used to allocate H-1B visas is also flawed. H-1B visas are allocated on a first-come, first-served basis, and there is no limit to the number of visas an individual employer receives, until the annual cap runs out. In every year since FY2014, the annual cap was immediately oversubscribed when the application window opened in April. For example, for FY2019, United States Citizenship and Immigration Services (USCIS) received 190,000 cap-eligible petitions for the eighty-five thousand slots by April 6, 2018.<sup>32</sup> The USCIS conducted a random lottery to select which of the petitions were selected, meaning each of the petitions had an equal chance of being selected. So, an application for an H-1B worker earning \$50,000 had the same chance as one for someone with a \$300,000 salary. Further skewing the results many outsourcing firms have a business model that is tailor-made to beat the odds and win the lottery. Most of their workforce is located in low-cost countries, providing a very large

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28 Julia Preston, "Pink Slips at Disney. But First, Training Foreign Replacements," *New York Times*, June 3, 2015, [www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html](http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html); Michael Hiltzik, "A Loophole in Immigration Law Is Costing Thousands of American Jobs," *Los Angeles Times*, February 20, 2015, [www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html](http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html); Julia Preston, "Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas," *New York Times*, September 29, 2015, [www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html](http://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html); Ameet Sachdev, "Abbott's IT Layoffs Draw Fire from Sen. Durbin," *Chicago Tribune*, August 31, 2016, [www.chicagotribune.com/business/ct-abbott-layoffs-durbin-0302-biz-20160301-story.html](http://www.chicagotribune.com/business/ct-abbott-layoffs-durbin-0302-biz-20160301-story.html); Mitchell Schnurman, "Schnurman: Fossil Sells out Its Tech Workers," *Dallas News*, May 16, 2015, [www.dallasnews.com/business/business/2015/05/16/schnurman-fossil-sells-out-its-tech-workers](http://www.dallasnews.com/business/business/2015/05/16/schnurman-fossil-sells-out-its-tech-workers).

29 Michael Hiltzik, "How the University of California Exploited a Visa Loophole to Move Tech Jobs to India," *Los Angeles Times*, January 6, 2017, [www.latimes.com/business/hiltzik/la-fi-hiltzik-uc-visas-20170108-story.html](http://www.latimes.com/business/hiltzik/la-fi-hiltzik-uc-visas-20170108-story.html).

30 Janet Napolitano, remarks at a hearing before the Committee on the Judiciary United States Senate, May 6, 2009.

31 Lauren Holt, "U.S. Legislators Send Napolitano Letters Against Outsourcing UCSF Tech Jobs," *UCSD Guardian*, November 7, 2016, [ucsdguardian.org/2016/11/06/u-s-legislators-send-napolitano-letters-against-outsourcing-ucsf-tech-jobs/](http://ucsdguardian.org/2016/11/06/u-s-legislators-send-napolitano-letters-against-outsourcing-ucsf-tech-jobs/).

32 US Citizenship and Immigration Services, "H-1B Fiscal Year (FY) 2019 Cap Season," [www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2019-cap-season](http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2019-cap-season).

and ready pool of potential H-1B applicants. In the past three years, any one petition has a 36- to 46-percent chance to be approved. If a firm projects that it needs an additional two thousand actual H-1B workers for the next year, it will apply for three times that amount, six-thousand, playing the roughly one-in-three odds of the lottery. Because there is no limit on the number of visas an individual employer receives, it can get all the H-1Bs it needs. On the other hand, a small startup applying for a specific worker with specialized skills has roughly a 40 percent chance to be granted an H-1B, and must apply during that narrow window at the beginning of April.

The upshot is that the current allocation scheme advantages firms that are mass users of the H-1B program over those using it for that rare worker with special skills. As a result, the allocation process actually biases the program toward H-1B workers with low skills and low salaries, at the expense of those who have exceptional skills and high salaries. The mass H-1B employers can easily crowd out those that use the program the way it was intended.

Given that there's no labor-market test and a poor allocation scheme, the front-end screening process for the H-1B program does almost nothing to ensure it is admitting highly specialized workers to fill genuine labor-market shortages. Most H-1B workers have ordinary skills and are filling ordinary jobs. In many cases, they are filling jobs already held by US workers.

### H-1B Workers Are Cheaper Than US Workers—Low Wages and Monopsony

The program rules create strong and straightforward incentives for employers to prefer an H-1B worker over a US worker. Simply put, H-1B workers can be substantially cheaper. These cost savings come from two key H-1B program rules. First, wage rules allow employers to legally pay their H-1B workers salaries far lower than what a US worker would command. Second, the H-1B work permit is held by the employer rather than the worker, making it a de facto monopsony—the worker essentially has no choice in selecting their employer. As a result, the employer can exercise its monopsony power in bargaining with the H-1B worker over wages and working conditions.

The program's key safeguard is its rules governing the minimum wage H-1B workers must be paid. The goal

of the wage rules is to ensure that employers are not using the program for cheap labor. To set the wage floor for a particular worker, the employer must attest that it is paying the “prevailing wage” or the “actual wage,” whichever is higher.<sup>33</sup> Rather than prevent the H-1B program from being used for cheap labor, these rules allow employers to easily pay rates far below market. The “actual wage” requirement has never been enforced, is likely unenforceable, and, therefore, is not a constraint for employers when determining wages. So, the “prevailing wage” essentially becomes the sole binding constraint.

The prevailing wage is set by the US Department of Labor. Employers plug in the following three variables to determine the minimum, or prevailing, wage: geographic location, occupation, and the skill level required to fill the position. Geographic location is used to adjust for variations in the cost of living. Hiring someone for a job in Detroit is generally cheaper than in New York City. The second variable, occupation, is also logical. For example, a physician is typically paid higher wages than a journalist. The final variable is meant to correspond to the skills required to fill the position. There are four skill levels, ordered from lowest to highest, with Level 1 corresponding to an entry-level position and Level 4 to a supervisory one.<sup>34</sup> The employer has discretion in defining the occupation and skill level, and the government never validates whether an employer has made a fair definition. Based on the values for each of these three variables, the Department of Labor provides a prevailing wage.

The DOL has set the following position on the wage-scale distribution for a specific occupation in a particular geographic location:

WAGE LEVEL	WAGE PERCENTILE
1	17 <sup>th</sup>
2	33 <sup>rd</sup>
3	Median
4	66 <sup>th</sup>

As can be seen from the table, only Level 4 wages are higher than the average US worker's wages for that job.

The table below shows an example of the H-1B prevailing wage for the occupation of computer systems

<sup>33</sup> US Department of Labor, “Wage and Hour Division (WHD),” [www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62g.htm](http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62g.htm).

<sup>34</sup> Employment and Training Administration, “Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs,” November 2009, [www.flcdatacenter.com/download/nphwc\\_guidance\\_revised\\_11\\_2009.pdf](http://www.flcdatacenter.com/download/nphwc_guidance_revised_11_2009.pdf).

analyst in Silicon Valley, an area where the median price of a home now tops \$1 million.<sup>35</sup> Computer systems analyst is the most common H-1B occupation, and it typically consists of IT workers who maintain the back-office computer systems of medium- and large-sized corporations.<sup>36</sup>

<b>Area Title:</b>	San Jose-Sunnyvale-Santa Clara, CA MSA
<b>OES/SOC Code:</b>	15-1121
<b>OES/SOC Title:</b>	Computer Systems Analyst
<b>Level 1 Wage:</b>	\$36.98 per hour—\$76,918 per year
<b>Level 2 Wage:</b>	\$46.50 per hour—\$96,720 per year
<b>Level 3 Wage:</b>	\$56.02 per hour—\$116,522 per year
<b>Level 4 Wage:</b>	\$65.54 per hour—\$136,323 per year
<b>Mean Wage (H-2B):</b>	\$56.02 per hour—\$116,522 per year

The above data makes clear that the Department of Labor has set its wage scales far too low, enabling employers to pay H-1B workers much less than Americans. Level 3 is the average wage paid to computer systems analysts in Silicon Valley. Employers that select a Level 1 wage reap a \$40,000 discount on what the average American is paid. Offered the opportunity by the government to save \$40,000 per year by hiring an H-1B worker over an American, which business wouldn't pursue such a windfall? The government data show that many do.

Employers routinely select the lowest skill levels and pad their profits by hiring H-1Bs at the lowest possible "prevailing wage" levels. In FY2017, 41 percent of the

workers approved by the government were at wage Level 1. In its guidance to employers, the US DOL describes a wage Level 1 job as:

job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment...Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level 1 wage should be considered.<sup>37</sup>

Clearly, if Level 1 worker positions are equivalent to a "worker in training" or an "intern," the worker is offering the United States few special skills. So, why are a plurality of H-1B positions identified as Level 1? It is obvious that employers wish to save on costs. While cost savings vary by occupation and location, but Level 1 wages are typically 40 percent below the average US wage.

An additional 37 percent of H-1B applications approved in FY17 were at Level 2, which is typically 20 percent below the average US worker's wages. So, nearly four in five H-1B applications approved by the US Department of Labor were for the lowest two wage levels, far below the average US worker's wage.

But, the costs savings run much deeper than just lower wages. Employers have enormous leverage over their H-1B workers, who are, in effect, indentured.

A number of economists have recently described how rising monopsony power in the labor market is an important factor in explaining US wage stagnation. One of those economists, Princeton University's Alan Krueger, who served as chairman of the Council of Economic Advisors in the Barack Obama White House, has described how the executives of Silicon Valley technology firms were especially eager to use their monopsony power to keep their engineers' wages low by limiting their opportunities to leave.<sup>38</sup> The executives—including Google's Eric Schmidt, a vocal advocate of H-1B expansion—went so far as to collude with one another by agreeing not to poach each other's engineers.<sup>39</sup> So, especially in the technology industry, employers see

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35 Zillow, "San Jose Home Prices & Values," April 30, 2018, [www.zillow.com/san-jose-ca/home-values/](http://www.zillow.com/san-jose-ca/home-values/).

36 Employment and Training Administration, "Office of Foreign Labor Certification: H-1B Temporary Specialty Occupations Labor Condition Program - Selected Statistics, FY 2017," [www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-1B\\_Selected\\_Statistics\\_FY2017.pdf](http://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-1B_Selected_Statistics_FY2017.pdf).

37 Employment and Training Administration, "Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs."

38 Alan B. Krueger, "The Rigged Labor Market," *Milken Institute Review*, April 28, 2017, [www.milkenreview.org/articles/the-rigged-labor-market](http://www.milkenreview.org/articles/the-rigged-labor-market).

39 Mark Ames, "The Techtopus: How Silicon Valley's Most Celebrated CEOs Conspired to Drive Down 100,000 Tech Engineers' Wages," *Pando*, January 23, 2014, <https://pando.com/2014/01/23/the-techtopus-how-silicon-valleys-most-celebrated-ceos-conspired-to-drive-down-100000-tech-engineers-wages/>.

limiting worker mobility as an important human-resource strategy to keep wages low.

The H-1B rules provide even greater ability for employers to exercise monopsony power over workers. H-1B workers have limited labor-market options, since only a subset of employers is willing to sponsor a work visa. Further, like many others, H-1B workers are subject to noncompete agreements and, in some cases, are even subject to employment bonds.<sup>40</sup> They are afraid to complain of violations, and can be sued for liquidated damages if they leave, even by employers found to violate H-1B rules.<sup>41</sup>

Employers can further tighten the reins on some of their H-1B workers when they sponsor them for green cards, essentially locking them in for years to come. Due to the per-country limits for employment-based green cards, H-1B workers from India and China who are sponsored for green cards may have to wait for five to ten years after their paperwork has been approved before they are issued one.<sup>42</sup> While many such workers can switch employers and keep their place in the queue, doing so is risky. They are, first, trusting their new employer to follow through by filing the new green-card application and, second, hoping that the government will not reject the new application.<sup>43</sup>

The combination of these factors creates monopsony conditions for H-1B workers, ensuring they are underpaid even if their employer elects not to exploit the prevailing-wage rules.

The wage and employment rules have far-reaching, deleterious effects for workers and the US economy. H-1B workers are underpaid and placed in substandard working conditions, while US workers' wages are depressed, and they lose out on job opportunities. Rather than fixing a market failure, the rules significantly distort the market and its price signals. It lowers incentives for workers and students to enter certain fields,

and reduces job mobility in sectors key to driving innovation in a regional economy. In sum, instead of fixing market failures, the H-1B program does just the opposite. It creates new market failures and exacerbates existing ones.

### Reforms Must Apply to All Employers—The “Bad Actor” Theory Is Deeply Flawed

Some have argued that the H-1B program is fundamentally sound, with a few bad actors spoiling the reputation of an otherwise effective system. They dismiss the evidence of widespread abuse and assert that a few simple steps—such as increased enforcement and minor program tweaks targeted at those bad actors—would fix the few cosmetic problems.

This is a flawed approach to fixing a program with so many obvious shortcomings. First, most of the abuses—whether the low wages for H-1Bs or even the replacement of US workers with H-1Bs—are legal under the current laws and regulations. Increased efforts at enforcement are ineffective when abuse is legal. Even in the high-profile cases of Disney and Southern California Edison, where US workers had to train their H-1B replacements, government investigations found the practices perfectly legal, leaving US workers with no recourse.<sup>44</sup> Any government investigation of the widespread use of the H-1B for cheap labor would prove similarly fruitless since it too is legal.

Second, and more importantly, the program flaws are endemic to its design, irrespective of the employer. There is no way to draw a bright line to separate good and bad actors. For instance, those arguing for limited reforms claim that all bad actors are exclusively a subset of the H-1B-Dependent category of employers.<sup>45</sup> The evidence plainly demonstrates otherwise. Many outsourcing firms—which are obviously abusing the program on a large scale for cheap labor—are, in fact, not H-1B-Dependent employers. So, reforms

40 Matt Smith, Jennifer Gollan, and Adithya Sambamurthy for the Center for Investigative Reporting, “Job Brokers Steal Wages and Entrap Indian Tech Workers in US,” *Guardian*, October 28, 2014, [www.theguardian.com/us-news/2014/oct/28/-sp-jobs-brokers-entrap-indian-tech-workers](http://www.theguardian.com/us-news/2014/oct/28/-sp-jobs-brokers-entrap-indian-tech-workers).

41 Ibid.

42 US Department of State, “Visa Bulletin for June 2018,” June 2018, [travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-june-2018.html](http://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-june-2018.html).

43 Laura D. Francis, “Job-Hopping Lands Skilled Worker Without a Visa,” *Bloomberg Law*, June 25, 2016, <https://news.bloomberglaw.com/daily-labor-report/job-hopping-lands-skilled-worker-without-a-visa>

44 Julia Preston, “Judge Says Disney Didn’t Violate Visa Laws in Layoffs,” *New York Times*, October 14, 2016, [www.nytimes.com/2016/10/14/us/judge-says-disney-didnt-violate-visa-laws-in-layoffs.html](http://www.nytimes.com/2016/10/14/us/judge-says-disney-didnt-violate-visa-laws-in-layoffs.html); Leslie Berestein Rojas, “Feds Find No Wrongdoing in Case of Outsourced Edison Workers,” *Southern California Public Radio*, December 6, 2016, [www.scprr.org/news/2015/10/22/55178/feds-conclude-investigation-into-firm-that-provide/](http://www.scprr.org/news/2015/10/22/55178/feds-conclude-investigation-into-firm-that-provide/).

45 H-1B-Dependent firms are those with more than 15 percent of their US-based workforce on H-1Bs. US Department of Labor, Wage and Hour Division, “Fact Sheet #62C: Who is an H-1B-Dependent Employer?” <https://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62C.pdf>.

targeted at H-1B-Dependent firms would leave such abusers untouched. The bad-actor approach gets even more complicated to implement for companies that use visas in both good and bad ways—to solve legitimate market failures for some positions, but to obtain cheap, hassle-free labor for others. Since the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998 created the H-1B-Dependent category, attempting reforms based on identifying good and bad firms has a two-decade track record of dismal failure.<sup>46</sup>

Rather than attempting to differentiate between good and bad employers, reforms should be designed around good and bad uses of the visas being granted. There is no reason that the H-1B program should ever be used, whether by a “good” or “bad” employer, when there are sufficient numbers of US workers ready, willing, and able to do the job. Most importantly, the H-1B program should never be used for cheap labor. The sensible way to design an effective program is to center safeguards around the visas themselves, ensuring each visa is being granted for the right reasons—to fill a true labor shortage with a foreign guest worker who possesses truly specialized skills. Implementing and administering such a system would create consistent and effective H-1B performance.

### The Path Forward— Fix Fundamental Program Rules

Three key reforms are needed to repair the H-1B program. Most importantly, these reforms should apply to all employers, not simply a subset of them.

The first, and most important, reform is to substantially raise the wages of H-1B workers. If the United States is going to invite in the “best and brightest” workers, they ought to be paid in the top quartile. The statute requires there to be four wage levels, but it doesn’t specify how the DOL calculates those wage levels.<sup>47</sup> The Labor Department should raise the Level 1 wage to the 75th percentile, to ensure that the workers being recruited are indeed highly skilled and are not undercutting US workers. This can be done through an administrative procedure, either via policy guidance or a regulation.

Second, employers should demonstrate they have actively recruited US workers, and offered positions to

qualified ones, prior to turning to the H-1B program. The rationale of the H-1B program is to fill labor gaps, not simply to swell the pool of candidates for employers. Most guest worker and green-card programs already require recruitment as part of the application process, so the practices are well understood by employers and the government and are not an undue burden. Where the H-1B program is widely used, as in the technology sector, it should be quite easy to meet these rules if the complaints of widespread labor shortages are authentic. A recruitment requirement would also stamp out the preferential hiring practices used by many mass H-1B employers.

Third, the program needs an effective and efficient enforcement mechanism. Current program compliance is complaint-driven, resting almost entirely on whistleblowers to reduce fraud. This is a poor design for two reasons. First, fraud is often difficult for someone, even a program participant, to detect without access to proprietary information. Second, even if a potential whistleblower identifies the fraud, there are strong incentives not to come forward. The deck is stacked against blowing the whistle; it is very risky, with very little upside. The worker risks losing not only their job, but also future employment in the industry. US workers who blow the whistle risk being blackballed from the industry, and there are no cases to date in which US workers have been successful. H-1B whistleblowers risk alienating their employer, which also holds their visa and ability to stay in the country, with the payoff simply some backpay. Even when successful, the worker can still be sued for liquidated damages by the offending employer. This dysfunctional, complaint-driven process should be replaced with a random auditing system. The government can randomly select a small percentage of employers to audit each year for program compliance. To ensure compliance by all employers, sufficient punishments should be meted out, with significant consequences such as debarment for willful violators.

In addition to these three core reforms, there should be adjustments to the allocation process. It makes no sense to allocate H-1B on a first-come, first-served basis or, even worse, by random lottery—as occurs when the program is immediately oversubscribed. Instead, as the Buy American Hire American EO suggests, visas should be allocated to the best and brightest first. This

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<sup>46</sup> ACWIA is Title IV of US Public Law 105-277, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. US Congress, “Public Law 105-277,” <https://www.gpo.gov/fdsys/pkg/PLAW-105publ277/html/PLAW-105publ277.htm>.

<sup>47</sup> The exact language for wage levels is: “(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.” US Congress, “Pub. L. 108-447 Consolidated Appropriations Act, 2005 (Includes L-1 Visa and H-1B Visa Reform Act, and the H-1B Visa Reform Act of 2004),” December 8, 2004, <https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/O-0-0-28233.html#O-0-0-3623>.



The United States Capitol Building in Washington, DC. *Photo credit: Wikipedia ([https://en.wikipedia.org/wiki/113th\\_United\\_States\\_Congress](https://en.wikipedia.org/wiki/113th_United_States_Congress))*

can easily be done by allocating the visas to the highest-salaried workers. The highest salary could be calculated in one of two ways. First, simply by a rank order of the salary offered. Or, second, ranking the visas from highest to lowest skill levels, with workers being offered Level 4 wages getting to the front of the line. The former system would maximize salaries, while the latter would ensure geographic and occupational diversity. Additional preferences could be included in the selection criteria, such as educational attainment (e.g., advanced degrees) and whether the applicant studied at a US university.

Also needed is a deeper examination of how the H-1B guest worker program is connected to permanent-immigration programs. Multiple guest worker programs feed into the employment-based (EB) green-card program, which is oversubscribed, creating long backlogs. The H-1B serves as one of those important feeders, but there are significant misalignments between the two programs. First, H-1B program flow, at roughly 120,000 per year, is much larger than the EB program, which is effectively about sixty-five thousand per year. The EB program cannot accommodate the number of H-1B applicants for it, let alone the many other sources of EB applicants from the L-1, O-1, and F-1 visas, as well as

applicants coming directly from abroad. Another serious mismatch is the country-of-origin rule for H-1Bs and EB green cards. H-1Bs have no country-of-origin limits, while EB green cards are limited to 7 percent per country. Over the past decade, roughly 70 percent of H-1B recipients have come from India, creating a large EB bottleneck for Indian workers. According to the State Department, the EB wait time in June 2018 for workers from India is more than ten years, and for workers from China, it is about three years.<sup>48</sup>

The upshot of this system is to create a de facto permanent guest worker program. Until this incompatibility can be resolved, H-1B workers should be allowed to more easily switch jobs. This will reduce the monopsony power of employers, helping the H-1B workers, US workers, and the US economy.

Some have argued that job mobility is the salve for all of the problems that plague the H-1B program, but the United States had a natural experiment with this kind of portability—the Optional Practical Training-STEM (OPT-STEM) program extension system, which allows international students in STEM disciplines (which include everything from semiconductor engineering to economics to ventilation technicians) to work for

<sup>48</sup> US Department of State, Bureau of Consular Affairs, “Visa Bulletin for June 2018,” <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-june-2018.html>.

thirty-six months in the United States.<sup>49</sup> The results show it's clearly no panacea.

The OPT-STEM work authorization is broad, with the student holding the work permit and few selection standards. The front-end screening process amounts to whether the international student is enrolled in a STEM discipline or graduated with a STEM degree, and whether the job being offered has some relation to the degree. There is no cap on the number of OPTs granted, and the wage standards are weak. The international student population in the United States is large and its quality is varied. While many of the very best students from abroad study at US universities, they are far outnumbered by unexceptional international students. Any and all of these students can qualify for an OPT-STEM, as long as they can find a willing employer.

OPT-STEM workers have significant job portability, since they hold their work permit. Given this portability, one would expect them to command market salaries, but in reality, they are often trapped in second-tier

labor markets with low wages and poor working conditions. This pushes them to accept jobs easily available to them so that they may stay in the country.<sup>50</sup> Simply put, job portability is not a substitute for fixing the wage rules and the front-end screening process.

Much of the public discussion over the H-1B program is based on false impressions about program rules and ignorance about how the program operates in practice. This is why so many people, even elites who one would expect to be well-informed, were shocked by the H-1B scandals at Disney and UCSF, even though these were neither new nor rare. The Disney and UCSF stories are simply symptoms of deeper program flaws, rooted in poorly designed, or even nonexistent, governing rules. This paper has described those rules and their flaws, and has argued that a major overhaul of those rules is essential to ensuring the program's practice meets the promises lawmakers have been making for the past three decades.

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49 US Immigration and Customs Enforcement, "STEM Designated Degree Program List," May 10, 2016, [www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf](http://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf).

50 Nikhil Swaminathan, "Inside the Growing Guest Worker Program Trapping Indian Students in Virtual Servitude," *Mother Jones*, September 5, 2017, [www.motherjones.com/politics/2017/09/inside-the-growing-guest-worker-program-trapping-indian-students-in-virtual-servitude/](http://www.motherjones.com/politics/2017/09/inside-the-growing-guest-worker-program-trapping-indian-students-in-virtual-servitude/).





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