Center for American Progress

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Prosperous Immigrants, Prosperous Americans

How to Welcome the World's Best Educated, Boost Economic Growth, and Create Jobs

Marshall Fitz December 2009

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Contents

1 Executive summary

3 Background

7 Competing globally in the 21st century

7 Problem: Fraud and gaming the system

9 Problem: Labor mobility restrictions

12 Problem: H-1B visa caps

14 Problem: Employment-based "green card" backlogs

16 Problem: Workarounds

20 Conclusion

21 Endnotes

24 About the author and acknowledgements

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Executive summary

Immigrants who come to the United States to study at our best universities and then go to work at our nation's leading companies contribute directly and immediately to our nation's global economic competitiveness. High-skilled immigrants who have started their own high-tech companies have created hundreds of thousands of new jobs and achieved company sales in the hundreds of billions of dollars.

Yet despite the critical importance of such immigrants to the nation's economic success in a global economy, our current high-skilled immigration system is a two-fold failure: arbitrary restrictions prevent companies from effectively tapping the full potential of this talent pool, while inadequate safeguards fail to prevent against wage depression and worker mistreatment. The reforms outlined in this paper will help establish a 21st century immigration system that serves the nation's economic interests and upholds our responsibilities in a global economy.

Of course, our current immigration policies have failed the country on many fronts beyond the high-skilled policy arena. And the urgent need for comprehensive, systemic reforms is beyond question. The national debate has understandably focused up to this point on the most visible and most highly charged issue—ending illegal immigration. Solving that riddle and ending illegal immigration is indisputably a national imperative and must be at the heart of a comprehensive overhaul of our system.

But reforms to our high-skilled immigration system are an important component of that broader reform and integral to a progressive growth strategy.[1] Science, technology, and innovation have been—and will continue to be—keys to U.S. economic growth. The United States must remain on the cutting edge of technological innovation if we are to continue driving the most dynamic economic engine in the world,[2] and U.S. companies must be able to recruit international talent to effectively compete in the international innovation arena.

To be certain, educating and training a 21st century U.S. workforce is a paramount national priority and the cornerstone of progressive growth. Improving access to top-flight education for everyone in this country will be the foundation for our continued global leadership and prosperity.[3] But it is shortsighted in a globalized economy to expect that we can fill *all* of our labor needs with a homegrown workforce. In fact, our current educational demographics point to growing shortfalls in some of the skills needed in

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today's economy.[4] And as global economic integration deepens, the source points for skill sets will spread—such as green engineering in Holland or nanotechnology in Israel—the breadth of skills needed to drive innovation will expand, and global labor pools must become more mobile.

Reforming our high-skilled immigration system will stimulate innovation, enhance competitiveness, and help cultivate a flexible, highly-skilled U.S. workforce while protecting U.S. workers from globalization's destabilizing effects. Our economy has benefitted enormously from being able to tap the international pool of human capital.[5] Arbitrary limitations on our ability to continue doing so are ultimately self-defeating: Companies will lose out to their competitors making them less profitable, less productive, and less able to grow; or they will move their operations abroad with all the attendant negative economic consequences. And the federal treasury loses tens of billions of dollars in tax revenues by restricting the opportunities for high-skilled foreign workers to remain in the United States.[6]

Access to high-skilled foreign workers is critical to our economic competitiveness and growth, but facilitating such access triggers equally critical flip-side considerations, in particular the potential for employers to directly or indirectly leverage foreign workers' interests against the native workforce. Current enforcement mechanisms are too weak to adequately prevent fraud and gaming of the system.[7] And current regulations tie foreign workers too tightly to a single employer, which empowers employers with disproportionate control over one class of workers. That control enables unscrupulous employers to deliberately pit one group of workers against another to depress wage growth.[8] Even when there is no malicious employer intent or worker mistreatment, the restriction of labor mobility inherently affects the labor market by preventing workers from pursuing income maximizing opportunities.

The end goal must be a system that inherently preferences the hiring of U.S. workers, but streamlines access to needed foreign workers and treats all workers employed in the United States on a level plane. Reforms that enhance legal immigration channels for high-skilled immigrants must be complemented with reforms to ensure that a worker's immigration status cannot be used to manipulate wages and working conditions.

This paper digs deeper into the structural deficiencies and enforcement shortcomings in our high-skilled immigration system and offers a number of legislative solutions designed to:

- Target employer fraud and abuse.
- Enhance worker mobility.
- Establish market-based mechanism to set H-1B levels.
- Raise green card caps and streamline process.
- Strengthen recruitment requirements.
- Restrict job shops.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

The recommendations detailed in this report will enhance labor market mobility and promote economic growth while advancing workforce stability through enforceable labor standards and protections.

Background

The United States is the home of many of the world's finest colleges and universities, and attracts a significant number of foreign nationals who come on temporary visas to pursue Bachelor's and advanced degrees. In fact, eight of the nine Nobel Prize winners this year in chemistry, physics, and medicine, were U.S. citizens, but four of the American winners were foreign born.[9] In some academic fields like computer and information systems, foreign students receive the bulk of advanced degrees issued from U.S. universities.[10]

Foreign-born U.S. citizen Nobel Laureates

Name	Year	Field	Country of origin
Charles Kao	2009	Physics	China
Venkatraman Ramakrishnan	2009	Chemistry	India
Elizabeth Blackburn	2009	Physiology or Medicine	Australia
Jack Szostak	2009	Physiology or Medicine	United Kingdom
Yoichiro Nambu	2008	Physics	Japan
Mario Capecchi	2007	Physiology or Medicine	Italy
Oliver Smithies	2007	Physiology or Medicine	United Kingdom
Anthony Leggett	2003	Physics	United Kingdom
Riccardo Giacconi	2002	Physics	Italy
Herbert Kroemer	2000	Physics	Germany
Eric Kandel	2000	Physiology or Medicine	Austria
Ahmed Zewail	1999	Chemistry	Egypt
Gunter Blobel	1999	Physiology or Medicine	Germany

Many of these foreign students return abroad following completion of their studies, but others want to remain in the United States and seek a work-authorized visa following graduation. Indeed, these students often choose to study in the United States based in large part on the ability to pursue professional opportunities in this country after graduation. Yet annual numeric limits on the number of available employment visas create roadblocks for students seeking to remain in the United States. As the President of the Massachusetts Institute of Technology Susan Hockfield has recently argued:

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

"Our system of higher education and advanced research has been a magnet for creative talent . . . [but] we cannot count on that magnetism to last. Culturally, we remain a very open society. But that openness stands in sharp contrast to arcane U.S. immigration policies that discourage young scholars from settling in the U.S."[11]

These roadblocks have created openings for universities and employers in other countries to recruit them. A number of competitor countries have streamlined their immigration policies to make it easier for their companies to recruit international talent.[12] That has, in turn, led some prospective students to pursue educational opportunities in other countries.

Immigration basics

Our immigration system is a Byzantine patchwork of different visas designed to address specific needs or interests. Broadly speaking, our system is divided into temporary and permanent immigration categories. We have 70-plus different temporary visa categories and a couple dozen permanent resident categories.[13] Excluding temporary visas issued for people traveling to the United States on business trips and vacations, the Department of State issued around 1.9 million nonimmigrant visas in 2008.[14] And around 1.1 million foreign nationals obtained permanent resident status—colloquially referred to as "green card status"—in that year.[15]

The various types of employment visa categories makes any generic definition of "high-skilled immigration" inexact. For purposes of this article, "high-skilled immigration" encompasses programs authorizing individuals to work in the United States based on qualifications that include at least a bachelor's degree or equivalent experience. Only around 261,000 of the 1.9 million nonimmigrant visas issued in 2008 were issued to high-skilled professionals.[16] That number includes individuals who had already been admitted and were obtaining a new travel visa, as well as individuals who never entered. Only around 70,000 of the permanent employment-based visas issued in 2008 went to sponsored workers. In addition, 10,000 are set aside for low-skilled workers so the total number of high-skilled immigrants that were granted permanent residence in 2008 was around 60,000.[17]

An employer typically sponsors a worker for temporary employment in one of the many categories. Several of the most common examples for high-skilled workers include H-1B visas used to hire professionals; L-1 visas for intracompany transferees; O-1 visas for individuals with extraordinary ability; and J-1 visas for doctors, scholars, trainees, and researchers.[18] Each category serves discrete interests, imposes separate requirements, and creates unique obligations and limitations on the visa holder (the worker) and the sponsor (the employer). Some of these categories—such as H-1B and L-1—authorize the employer to begin the process of sponsoring the visa holder for permanent residence.

When an employer sponsors their foreign national employee for permanent residence, this normally involves first testing the U.S. labor market to assess whether there are qualified U.S. workers to perform the position in question. The employer cannot proceed with the green card process for a foreign national worker if they can find a qualified U.S. worker. It is not a requirement to first test the labor market in a limited number of cases, such as transfers of high-level managerial personnel from operations abroad.

The employment-based green card process is subject to strict numerical limits that lead to lengthy, multi-year backlogs for applicants. The annual numeric caps limit the overall number of employment-based green cards as well as the number of green cards that can go to employees in certain types of jobs, with certain types of backgrounds, and from any one country.

Our current system requires Congress to create new channels each time a new need emerges, or restrict old channels if abuse is perceived. Congress, of course, is less than nimble, and it is no easy feat to legislate new visa categories into or out of existence. The consequence is an immigration system that responds glacially to changing national interest and economic needs.

This piecemeal mishmash of visa categories lacks a unifying vision. Multiplicity, rather than flexibility, is the hallmark of our system. Uncoordinated multiplicity leads to silos, which leads to rigidity and incoherence. Think "tax code" and you start to appreciate the immigration system's complexity.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Foreign student interest in U.S. colleges and universities has indeed declined. A Council of Graduate Schools report found that international admissions to U.S. graduate schools have decreased in 2009 for the first time since 2004, and problems with obtaining work-authorized visas following graduation is one of the reasons for the decline.[19] The decline is particularly significant with students from India, which has traditionally been a source of many graduate students in the fields of science, technology, engineering, and mathematics (the "STEM" fields). Applications to advanced degree programs by Indian nationals are down by 12 percent.

The drop in foreign student enrollment, particularly in advanced degree programs in the STEM fields, raises concerns because of the effect that high-skilled foreign nationals have had on innovation and job creation. A 2007 study by Duke University and University of California, Berkeley professors found that 25 percent of the technology and engineering companies started in the United States from 1995 to 2005 had at least one key founder who was foreign-born.[20] The study further reported that in 2005 these immigrant-founded companies produced $52 billion in sales and employed 450,000 workers nationwide.

Immigrant-founded companies in 2005

Company Name	Profits	Number of people employed
Intel Corporation	$38.8 billion	99,900
Solectron Corporation	$10.4 billion	53,000
Sun Microsystems, Inc	$11.1 billion	31,000
eBay Inc.	$4.6 billion	12,600
Yahoo! Inc	$5.3 billion	9,800
Life Time Fitness, Inc.	$390.1 million	9,500
Google Inc.	$6.1 billion	5,680

Source: National Venture Capital Association, "American Made: The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness." http://www.nvca.org/pdf/AmericanMade_study.pdf

The legitimate objective behind limiting the supply of high-skilled visas is to prevent employers from using unfettered access to foreign workers to deleverage U.S. workers. But restricting the supply of such visas potentially undermines another important goal: maximizing opportunities for economic growth by enhancing our competitiveness. This article proposes targeted reforms to ensure that our high-skilled immigration policies lift up economic growth and worker protection as twin goals rather than competing alternatives.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

The politics of high-skilled immigration

The main protagonists in this struggle over high-skilled immigration are business and labor, and their competing narratives cleave along obvious ideological lines. Labor: "Employers just want a cheap exploitable workforce. If they just raised wages, there would be more than enough native workers." Business: "Government should get out of the way and let the 'invisible hand' guide the labor market. That is the only way we can effectively compete in this global economy."

The reality is that both sides articulate legitimate concerns with the current system. Unsurprisingly, some employers *do* game the system by exploiting these workers to gain a competitive advantage. They are a distinct minority, but their practices nonetheless infect the integrity of the system. On the flip side, it is also true—and equally unsurprising—that our current immigration system fails to provide the flexibility and access to foreign talent needed by bona fide employers to compete in a global economy.

The philosophical divide between the two camps has prevented them from adequately acknowledging the other side's concerns. CAP's recommendations help Congress bridge this divide with practical reforms that advance the nation's dual interests in growing the economy while protecting workers.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Competing globally in the 21st century

Our high-skilled immigration policies fail to adequately promote and protect important national interests. Restoring the system's integrity and functionality through a combination of strong enforcement and structural reforms is a necessary component of our innovation agenda.

Arbitrary numeric limitations and other programmatic restrictions diminish economic efficiency and stymie growth while preventing labor mobility. They also lead companies to pursue workarounds that can warp business practices, precipitate offshoring, and limit the ability of U.S. workers to compete. Layered on top of a weak enforcement regime, these problems undermine the benefits provided by a robust and flexible high-skilled immigration system.

The recommendations in the following pages will help realign our high-skilled immigration policies with our responsibility to U.S. workers and our national interest in global competitiveness. They are designed to restore the integrity of the system while enhancing mobility for workers and flexibility for employers. The goal is to make the system more efficient, enable employers to be more competitive and productive, and empower workers to compete on a level playing field rather than being pitted against one another in a race to the bottom.

Several basic premises underlie the following recommendations: (1) Global economic integration will continue to deepen; (2) this integration can have destabilizing effects on certain sectors of the workforce; (3) sustainable economic growth depends on our ability to remain on the cutting edge of technology and innovation; (4) the global marketplace for international talent is expanding, not shrinking, and we refuse to shop there at our competitive peril; and (5) we must help our home grown workforce develop 21st century skills so changes to immigration policy are only one small response to the economic challenges we face.

Problem: Fraud and gaming the system

As with any highly regulated government program, some participants seek to game the immigration system for competitive advantage. Given the complexity of the regulatory scheme, some employers run afoul of rules inadvertently, others find loopholes that

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

make them compliant with the letter but not the spirit of the rules, and still others commit outright fraud.

Fraud is a serious problem in the system, even if the incidence is fairly low. Willful violations that go undetected and unpunished clearly undermine both the integrity and the policy objectives of our immigration programs for the highly-skilled. Workers are not provided the protections required by law, and legitimate employers must compete on an uneven playing field. Fraud undermines public confidence in visa programs whose proper functioning is a crucial component of the country's economic strength. And public and political revulsion at visa program abuses can lead to policy proposals that exceed the scope of the problem and run counter to national interests.

The Department of Homeland Security determined in a recent assessment of fraud in the H-1B program that violations are predominantly committed by small, new companies, rather than well-established companies.[21] It concluded that many of the identified violations are in areas where enforcement of existing rules could curb abuses, or where small changes to the rules would allow proper enforcement.

Unsurprisingly, most employers (80 percent) fully comply with program requirements. And many of those who are not in complete compliance have committed only minor and unintended violations of complex rules that do not reflect an intention to game the system (7 percent). Yet an evaluation of those employers (13 percent) who were identified as willful violators makes clear that more deliberate steps are necessary to restore the integrity of the system.[22]

Recent arrests for visa fraud by a small company in Iowa are an example of the kinds of abuses that can occur and that need to be stopped.[23] The IT services firm Visions Systems Group was indicted on 10 federal counts involving submitting falsified documents in support of their workers' visa applications.[24] In addition, H-1B visa workers were allegedly placed in locations on the East and West coasts while claiming employment in Iowa where wage minimums would be lower, thereby violating existing wage laws.

The prosecution of several recruiting companies in 2004 highlighted another vein of fraud and abuse. Starting in 2001, hundreds of teachers recruited from the Philippines on H-1B visas were falsely told they had jobs waiting for them and could gain permanent residence in the United States. The recruiters allegedly confiscated their documentation and housed them in substandard housing, required them to seek permission to leave the premises, and barred them from having their own transportation. Despite these circumstances, the most serious charges were dropped in a plea bargain, and the companies were only sentenced to three months probation. We clearly need to prevent this type of fraud and abuse with more serious penalties for violators.[25]

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Solution: Target fraud and abuse

The government has already initiated and dedicated substantial resources toward a number of fraud detection initiatives.[26] The results of those efforts can help point the way toward a more robust and effective enforcement regime.

U.S. Citizenship and Immigration Services made public an H-1B Benefit Fraud and Compliance Assessment over a year ago. This assessment identified clear trends of fraud and other program violations, typified by such problems as nonexistent or "shell" petitioning employers; employers not paying salaries they had promised—and been required—to pay; employees not having the promised degrees or other qualifications; and employees not performing qualifying responsibilities. The assessment concluded that violations were more common among smaller—newer—more poorly capitalized employers.

The assessment indicated that these violations were overwhelmingly susceptible to detection through site visits—a fairly straightforward and easily available form of investigation and enforcement. USCIS has begun a more robust site visit program,[27] but there have been no congressional hearings or other similar public evaluations to examine ways to achieve better targeted enforcement policies on the basis of these official findings.

Enforcement policy reform should be based on lessons already learned. It should be forceful and targeted as closely as possible at identified problems so that it does not undermine responsible and careful program users. Congress can help protect all workers against abuse and good-faith employers against unfair competition. It should:

- Provide authority for the Department of Labor to do a more thorough, but still timely, review of the "labor condition application" that employers submit to initiate an H-1B petition.
- Eliminate unnecessary restrictions on DOL investigative authority and increase DOL enforcement resources.
- Require DOL to conduct investigations of employers whose workforce is made up of more than 15 percent H-1B workers.
- Require proof of payment of required wages before a visa can be renewed.
- Facilitate improved coordination among the relevant agencies, especially DHS and DOL, so that information provided to one agency in the process can be checked against that provided to another.
- Strengthen agency authority to impose effective penalties against violators.

Problem: Labor mobility restrictions

Other elements of the employment-based immigration system can also warp the labor market. A primary concern rests in the potential for a sponsoring employer to exert disproportionate leverage over foreign workers. When a worker is bound to a single employer,

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

it affects other similarly situated workers employed by the same employer or competitors. As noted Princeton Economist Alan Krueger has written:

> *"Job shopping is an essential protection against exploitation and inefficient allocation of resource… If [temporary workers] do not have the opportunity to change jobs with minimal administrative burden, other workers in the U.S. will potentially suffer because employers will have some scope to exploit guest workers and lower labor conditions more generally."*[28]

If an employer is able to significantly constrain a worker from exercising his or her rights or competing for the best job opportunity, it creates an advantage for the employer.

As noted above, the different visa categories carry different restrictions. Some employment visas permit more job mobility than others, but for the most part, a foreign worker is tied to a single employer until he or she receives legal permanent residence. For example, an employer must sponsor a foreign worker on an H-1B visa to work in a specific position at a specific salary. In order for that worker to change jobs within the company, the employer must file a new H-1B petition with the government authorizing the change of position. In order for that worker to change employers, he or she must wait until the new employer files a petition on his or her behalf.

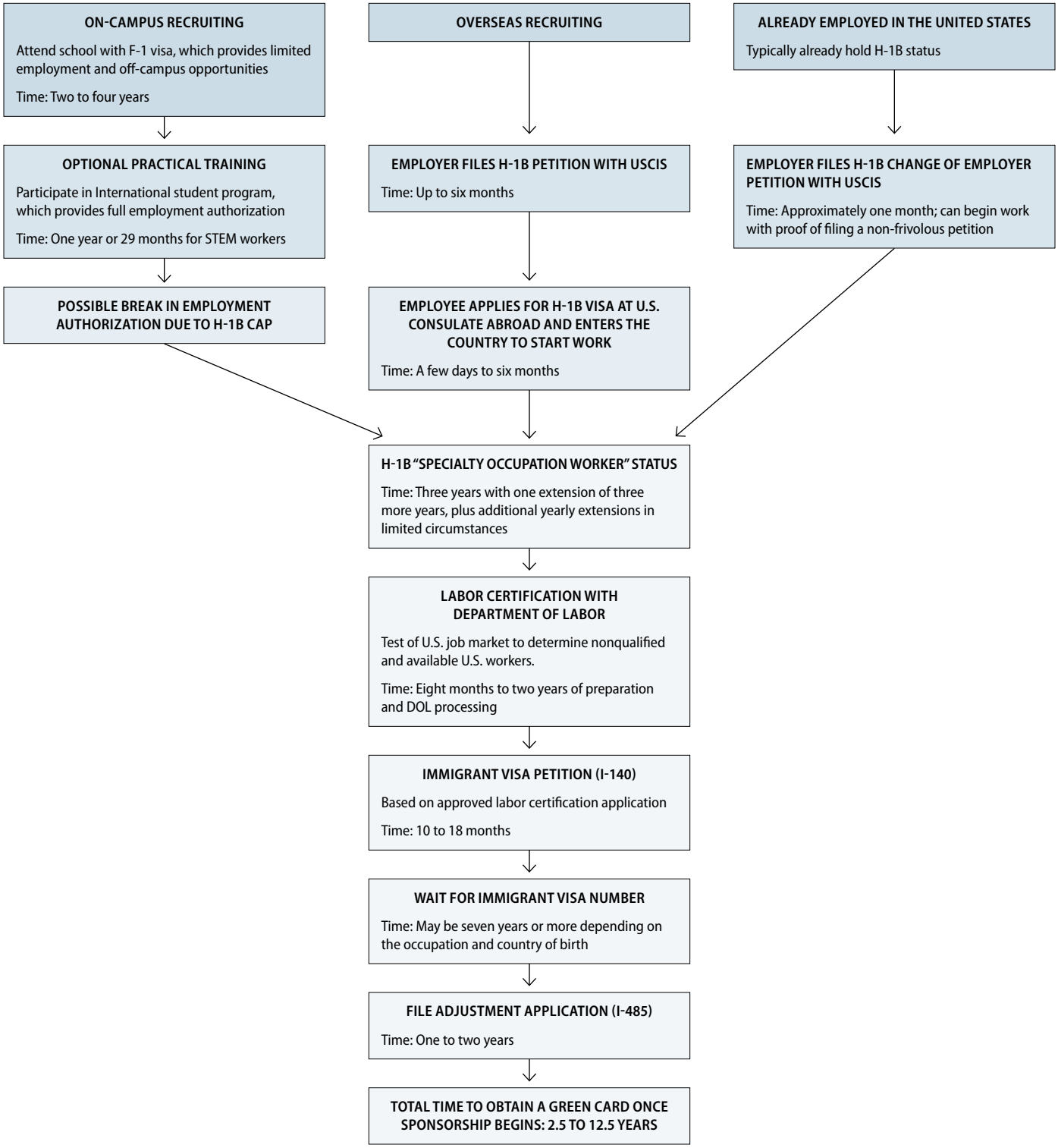
Two factors diminish the foreign worker's mobility. First is the requirement that visa holders maintain their immigration status or be subject to long-term repercussions, including in some cases bars on re-entering the United States. An H-1B visa holder who quits his or her job or is terminated must secure immediate sponsorship from a new employer or risk falling out of status. If he or she fails to secure such sponsorship and does not leave in timely fashion, a subsequent petition filed by a new employer will be denied and other consequences may attach. In short, H-1B visa holders remain tied to their employers unless and until a new employer files a petition. This diminishes visa holders' ability to assert their rights by walking away from an abusive employer.

This is not a problem in most circumstances because most employers are not abusive and most workers will not leave a current job until a new one is lined up. But the extra steps that are required to obtain new sponsorship and the interim limitations on mobility do establish a dynamic in which employers possess greater influence over their employees than in traditional "at will" employment situations. That dynamic in turn hurts all workers and undermines employer competitiveness.

The second feature of the current system that diminishes worker mobility is the general requirement that an employer sponsor a foreign worker for permanent residence. The sponsorship process can take years because of the disparity between the number of temporary and permanent visas available annually. And in most cases, if the worker leaves to join another employer, he or she must start the green card process all over again.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Immigration steps for most high-skilled workers



AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

This lengthy process accords the employer another axis of leverage over the worker. The most obvious concern is that an unscrupulous employer can exert excessive control over the visa holder by lording permanent residence over his or her head. But even in the normal course, the inability to freely change employers—or even jobs with the same employer—and maximize earning potential during that time can have a depressing wage effect.

There is also evidence that this overly cumbersome process discourages immigration among the talented foreigners who have the most potential for scientific breakthroughs. The United States has had many successes among its foreign-born scientists, but it is alarming that foreign enrollment in graduate sciences and engineering has dropped 20 percent from 2001-2004, and foreign graduate students are increasingly faced with a harder and more expensive road to staying in the United States.[29]

Solution: Enhance worker mobility

Workers' ability to change employers at will promotes efficiency in the labor market and helps prevent employer abuse. If employers underpay, overwork, or otherwise mistreat workers, the workers can leave and the employers eventually lose their workforce or cease their unscrupulous practices. The corollary, of course, is that when workers are not free to change jobs, their employers have undue leverage over wages and working conditions.

A central problem with current high-skilled immigration programs is that they bind workers too tightly to a single employer. Even though most employers do not intentionally misuse their leverage over these workers, the power differential it creates can affect both foreign workers and similarly situated U.S. workers. The net result can be a slight depression of wages.[30]

Enhancing the portability of foreign workers should be relatively uncontroversial for employers that hire based on who is best for the job and not based on who they can exert the most control over. It is true that the employers have invested in the worker by paying the costs of sponsorship, but that should be considered part of the cost of hiring foreign workers, not a premium that allows the employer to exert special control over the worker.

To balance the playing field for workers and employers, Congress should:

- Establish a statutory grace period for fired workers to find a new job rather than maintaining the current rules, which make them immediately deportable and subject to additional penalties for unlawful presence.

- Revise the rules regarding the permanent residence process to allow sponsored workers to change to a different employer earlier in the process.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

- Permit expanded categories of high-skilled temporary workers to self-petition for permanent residence. One possibility that Congress should consider is to authorize self-petitioning after a certain time, such as 18 months.[31] Another possibility is to authorize self-petitioning for individuals working in high-employment industries with, for example less than 2 percent unemployment.

Problem: H-1B visa caps

The most widely used high-skilled immigration classification for temporary workers is the H-1B visa. The availability of H-1B visas in our current system is regulated by a congressionally established annual numeric ceiling—or "cap" as it is commonly called. The current annual allotment of new H-1B visas is set at approximately 85,000, including 20,000 that are reserved for individuals with an advanced degree from a U.S. college or university.[32] That number was drawn from the political ether, not from any concrete policy analysis or any specific economic indicators. And the last decade has clearly demonstrated just how arbitrary these numbers are.

We have repeatedly seen over the last decade that demand in the H-1B program tracks the business cycle, and not in a way that would indicate that employers rely on the program to hire cheap labor. When the economy is humming and job growth is robust, demand for high-skilled foreign workers rises despite the additional costs and the time it takes to hire a worker permanently. When the economy is in retreat and losing jobs, the demand for such workers declines significantly. If employers thought these workers were a good source of cheap labor, one would expect usage to rise during belt-tightening periods. The opposite appears to be true.

From temporary worker to green card

Fees	Cost to employer
H-1B petition for FY 2010	$2,320
H-1B application cost	$131
Visa petition filed with USCIS	$475
H-1B extension	$1,820
AC21 extension	$320
Spouse's work authorization and visa application	$262
Applications to adjust status to that of permanent resident	$2,020
Extend H-1B status	$320
Legal fees	$10,000
Total	**$17,668**

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

The current cap has clearly proven insufficient to meet employer demand in a booming economy. When the economy ran hot in recent years, there was so much demand for these foreign professionals that the cap was exceeded on the first day of the filing period.[33] For fiscal year 2008, some 150,000 petitions were filed on the first day, April 1, 2007, for 85,000 slots.[34]

This supply-demand mismatch creates two problems, each economically self-defeating. First, when the H-1B supply is exhausted in April, no petitions can be filed for students who will receive bachelor's degrees in May or June. This excludes an entire year's worth of graduates from access to visas after four years of U.S. education.[35] We have invested in their education; we should at least have the *opportunity* to see a return on that investment.

Second, the immigration service had to create a lottery system to determine who can receive a visa due to the surge of petitions that were filed on the first day. The terms "sound economic planning" and "lottery" rarely fit well together. Requiring employers to organize their often-complex recruitment and hiring processes in order to file a petition on a specific day each year—six months in advance of a potential hire, with no guarantee that they will actually be able to hire the person—creates obvious and enormous inefficiency. This artificial timeline and the attendant uncertainty of the lottery process render employers unable to hire foreign workers in real time to respond to real and changing needs.[36] That in turn may stall or kill business projects that could create jobs and economic opportunities, which is plainly contrary to our national interest.[37]

Weakness in the economy appears to serve as a reasonably effective governor on H-1B filings. As in prior economic downturns, there has been a precipitous drop off in H-1B filings during the recent recession. Nearly double the annual allotment of applications were filed on April 1, 2008, the first day of the FY2009 filing period. Yet six months after the FY2010 filing period opened, nearly 20,000 visas remained unallocated.[38]

The linkage between demand for H-1B workers and the ebb and flow of the business cycle does not in itself prove the existence of skills shortages or that H-1B workers are not sometimes used to deleverage U.S. workers. It does, however, rebut the simplistic narrative that employers are only looking to these foreign workers as a source of cheap labor. It is undoubtedly true that some employers view the hiring of H-1B workers as a less permanent human resource investment and thus a preferable, less costly alternative even in a down economy. But it is equally true that many employers sponsor a large percentage of their H-1B employees for permanent residence,[39] layering substantial additional costs onto long-term worker investment and negating the "cheaper alternative" argument.

In short, while there is clearly a supply-demand disconnect, no general conclusions about the motivation for hiring H-1B workers can be elucidated from demand cycles. It appears more likely that employers pursue such workers for a multiplicity of reasons, some more consistent with our national interest than others. Instead of using an arbitrary annual cap

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

that limits both good and bad program usage, we recommend a basket of reforms to ensure that employers using the program primarily hire high-skilled foreign workers because they are the best recruits for their enterprise, not because they are a cheaper alternative.

Solution: Establish market-based mechanism to set H-1B levels

Arbitrary numeric limitations in the H-1B program serve no clear national interest except to prevent the *possibility* of widespread employer abuse of the program. The federal government should adopt instruments to minimize the risk of misuse as described elsewhere in this paper, but the artificial visa ceiling should be adjusted to respond to the demands of the U.S. economy and avoid forcing those we educate in this country to compete with us abroad. Congress should:

- Establish a market-based mechanism that allows the H-1B supply to grow and shrink as the demand for additional workers fluctuates. Such a "market-based escalator" will not be perfect in that annual increases and decreases would lag slightly behind the demand curve, but it would establish a more realistic band of ranges. An annual floor and ceiling should be established that would not fluctuate absent further congressional action to serve as an additional check on excessive increases or decreases in supply.[40]

- Maintain and expand exemptions for those with advanced degrees from U.S. universities and for those entering certain high-demand fields.

- Create a "pre-immigrant" visa for professionals whose employers intend from the start to sponsor them as permanent residents. This visa must be accompanied by wage and working condition requirements to protect U.S. workers, and must require the employer to begin the green card sponsorship process promptly. This visa would help diminish the artificial use of temporary visas.

Problem: Employment-based "green card" backlogs

A significant disconnect exists between the annual allocation of temporary and permanent employment-based visas. That disconnect has generated enormous dysfunction throughout the system. Only 140,000 employment-based permanent visas, or "green cards," are available each year for workers *and* their spouses and children.

Most employment-based green cards are granted to foreign professionals who are already here and working on a temporary visa. But the short supply, which has not been updated in nearly two decades, has created years-long backlogs. Employment-based green card numbers have been unavailable to professionals holding bachelor's degrees during most of the past year, for example, no matter how long ago they started the green

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

card process.[41] Even individuals with advanced degrees face backlogs of up to a decade if they hail from certain countries.

These backlogs mean that sponsored workers can be stuck in the same job for years—in some cases as many as eight or nine years. Tied to a single sponsoring employer, these workers are prevented from asserting their right to pursue income-maximizing opportunities. That stagnation creates a depressing effect on the labor market, hurting all workers. Moreover, spouses of the sponsored principal are prohibited from working throughout the entire period. That obviously creates an unhealthy dynamic in which one spouse's career must remain in abeyance until the protracted green card process concludes.

Legitimate employers feel the effect as well. Because sponsored workers must typically remain in the position for which they were sponsored, employers are not able to move workers into more productive capacities.

Personal, company, and government resources are wasted as temporary visas, travel documents, and other similar items must be constantly renewed. And workers and their families face tremendous difficulties in securing loans to purchase homes, enrolling in universities as in-state residents, and pursuing career opportunities for spouses.

What this increasingly means is that highly talented, highly productive professionals who have been educated in U.S. schools take their brainpower elsewhere.[42] This ultimately harms the U.S. economy and the American worker.

Solution: Raise caps and streamline the process

The annual allocation of permanent residence visas should be realigned to reflect the reality that many workers on temporary visas intend to remain in the country permanently. Enabling them to become permanent residents more quickly and with fewer attachments to a single employer enhances their productivity and minimizes their ability to be unfairly leveraged against U.S. workers. Congress should:

- Increase overall green card numbers to clear the existing multiyear backlog of high-skilled professionals awaiting permanent residence.

- Raise or eliminate per-country quotas on employment-based green cards. It makes little sense to subject nationals from high-sending countries such as India to the same annual limitations as nationals from Liechtenstein.

- Exclude derivatives (family members) from counting against the annual cap. There is an annual cap of 140,000 on employment-based green cards, and only around 60,000 visas actually go to workers. The rest of the allocation is absorbed by derivative family members who count against that 140,000 ceiling.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

- Exempt graduates of U.S. universities with advanced degrees in science, technology, engineering, and math (STEM) from the annual green card cap.

- Provide employment authorization to spouses of principals who have been stuck in the green card backlogs for more than three years.

- End the requirement that foreign students may study here only if they can prove they intend to leave after graduation. Some may object to putting these foreign students on even footing with U.S. students in competing for jobs after graduation. But that competition already exists in one shape or form anyway, since companies are increasingly opening offices abroad. The more difficult we make it for U.S. companies to compete for international talent, the more jobs will move beyond our borders. Putting all advanced degree graduates from U.S. universities on a more even footing ensures that native-born students can compete on a transparent playing field. The alternative is for American workers to try and compete in a warped talent market where businesses contort their operations to access talent in different parts of the world. Instead of bringing the workers to where the jobs are, companies will increasingly be forced to move the jobs to where the workers are.

Problem: Workarounds

When no legal avenue exists to hire a specific worker, but there is a manifest need to do so, some employers will accept defeat and scale back their plans. That can mean forgoing development of a new product or delivery of a new service that could create more jobs. Other employers will search for workarounds to the hiring obstacle either by trying to push the limits of the law or by ignoring it altogether.

The workaround has been hiring undocumented workers on the low-skilled end of the spectrum where employers have confronted a shrinking U.S. workforce keyed to those jobs and virtually no legal channels to hire foreign workers.[43] The knowing hire of such workers is a clear and direct violation of the law. The more typical situation is that employers turn a blind eye to suspicions because the alternative is to leave positions unfilled.

Workarounds on the high-skilled end assume different forms. Some employers will try to shoehorn a worker into a visa category that has available slots, but doesn't really fit. That creates extra work for the government in the adjudications process and potentially dilutes those other visa categories from their actual purpose.[44] Other employers will conclude that the business impediments to hiring the necessary workforce are severe enough that they move some or all of their operations abroad.[45] There has been some debate about the economic impact of offshoring,[46] but it is difficult to argue that it does not hurt U.S. workers.

Other employers are technically compliant with program rules but are conducting operations that contravene policy goals—such as high-volume job shops where most of the

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

company's operations are actually abroad.[47] Companies are able to hire H-1B visa workers in the United States to serve as an on-site presence while they coordinate mainly offshore activities.[48] Nothing in the law stops companies who want to use H-1B visas as a training program for future outsourcing. Some U.S. companies have required laid off workers to train H-1B visa holders as part of the company's "knowledge transfer" operations and as a condition of their severance pay.[49] These workers subsequently return to headquarters in India and are farmed out to off-shored U.S. companies with their newfound skills.[50]

Offshoring of some jobs is inevitable in a global economy. But our national regulatory policy should not promote the practice. Making it too difficult to hire workers from the global talent pool and driving companies abroad is an anti-growth strategy that diminishes U.S. workers' ability to compete. That is flatly contrary to our national interest.

Top 10 H-1B employers in 2008

Foreign outsourcing firms U.S. companies

Rank	Company	Number of visas
1	Infosys Technologies Limited	4,559
2	Wipro Limited	2,678
3	Satyam Computer Services Limited	1,917
4	Tata Consultancy Services Limited	1,539
5	Microsoft Corporation	1,037
6	Accenture, LLP	731
7	Cognizant Tech Solutions U.S. Corp.	467
8	Cisco Systems, Inc.	422
9	Larsen & Toubro Infotech Limited	403
10	IBM India Private Limited	381

Source: Computer World, "List of H-1B visa employers for 2008." http://www.computerworld.com/s/article/9128436/List_of_H_1B_visa_employers_for_2008.

These workarounds—shoehorning and offshoring—are by-products of an inflexible system. And forcing companies to make a choice between forgoing opportunity and engaging in workarounds indisputably harms our nation's economic interests. We obviously want businesses to seize growth opportunities. But forcing them to do so through workarounds is inefficient and warps the playing field for U.S. workers.

Solution: Strengthen recruitment

Employers make a variety of nuanced but important judgments in their hiring processes that can't be distilled to a comparison of resumes. Employers must be prohibited from considering impermissible factors such as race, ethnicity, and gender in making hiring

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

decisions. But the government also should not be placed in the untenable position of micromanaging judgments about who the best candidate is for a private sector job.

Requiring companies to hire "equally qualified" U.S. workers over foreign workers makes sense in principle. But putting such a requirement into practice transforms the real world hiring process into an artificial exercise. Employers would be in the position of having to justify to a government investigator—for years after the fact—why one individual was hired over every other applicant. Such a process would give employers an incentive to make a decision on who is best for the job and then build paper benchmarks as a bulwark to justify decisions against government scrutiny.

This doesn't mean that we shouldn't strongly encourage employers through incentives to train and hire U.S. workers. We definitely can and must.[51] The massive investment in jobs included in the economic stimulus was just one example of the national commitment we need to continue growing jobs for U.S. workers.[52] Investment in clean energy presents another opportunity to advance the quality and range of jobs available to U.S. workers.[53] And the education and training revenues generated from the H-1B user fees should be augmented and leveraged to increase opportunities for U.S. workers to seize these new opportunities.[54]

What it does mean is that empowering the government to second-guess basic hiring decisions is inefficient and will undermine our pro-growth objectives without actually protecting U.S. workers. The solution is therefore to require employers who seek to hire high-skilled foreign workers to demonstrate that they truly are making meaningful and effective efforts overall to hire U.S. workers when filling open positions.

The Labor Department can effectively review whether an employer has an overall recruitment process that shows it is engaged in serious and sufficient labor market recruitment. If employers are mandated to show real recruitment that meets or exceeds industry standards, it will prevent a race to the lowest possible wage.

Congress should:

- Require employers to establish and document an overall system of recruitment that first targets U.S. workers and that meets or exceeds industry standards for recruitment of similarly situated workers.[55]

- Create a severe penalty scheme for employers who fail to pay the prevailing or actual wage for the position.

- Increase the H-1B education and training user fees and reassess allocation of such fees between the National Science Foundation and Department of Labor to ensure that the funds are maximizing opportunities for U.S. students and workers to compete for high-skilled jobs.[56]

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Solution: Restrict job shops

The basic goal of our high-skilled immigration regime should be to enhance the competitiveness of U.S. employers by enabling them to tap top-flight international talent and workers with specific skill sets. The goal is not to provide a limitless pool of entry-level workers who, in the aggregate, can drive down the native born workforce's wages. But companies who identify specific needs that they cannot fill with the native workforce should be able to access foreign workers while guaranteeing wages that protect against wage deflation for all workers.

One business model that comports with the letter of the law but not its spirit is the job shop.[57] These businesses provide a staging ground for foreign workers to come to the United States, develop skills, and then go home to facilitate operations that compete with U.S. companies. In a sense, they help train foreign workers in the United States with skills needed to offshore information technology services and U.S. jobs.

Of course, individuals who come to the United States for education or experience will always be entitled to take that knowledge home and put it into practice in a way that leads to competition with the United States. There is nothing inherently wrong with that. Indeed, it is in our interest that some individuals who train in the United States and are exposed to our country's values eventually return home to share that understanding. But it contravenes our national interest to explicitly permit a practice that trains foreign workers to replace U.S. workers.

Congress should adopt the following restrictions to ensure that the H-1B program promotes the goal of enhancing U.S. competitiveness:

- Prohibit the use of visas by staffing companies. Companies filing an H-1B petition should be required to attest that the H-1B worker will be supervised and controlled by the H-1B employer, thus preventing so-called "job shops" or "body shops" from participating in the H-1B program.

- Bar companies with more than 50 employees whose workforce is comprised of more than 50 percent foreign workers from the H-1B program unless they can establish to the satisfaction of the Department of Labor that they pay all of their employees more than 125 percent of the prevailing wage and can establish a recruitment program for U.S. workers that exceeds industry standards.

- Prevent temporary work visas, such as H-1B visas and L-1 visas, from being made available to foreign nationals who will use those visas to "shadow" U.S. workers in order to allow the jobs performed by those U.S. workers to be moved offshore.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Conclusion

Talented immigrants have made crucial contributions to the development of next generation technologies and have founded some of the most innovative businesses in the United States. They have created jobs, fueled productivity, and driven economic expansion. And as global economic integration deepens, sustainable growth will depend in part on our continued ability to attract the best and brightest innovators and entrepreneurs.

Simply put, enhanced labor mobility is a 21st century reality and ultimately an economic imperative. But as the global talent pool expands and becomes more fluid, it also creates instability in some sectors of our homegrown labor force. Our policy makers must strive to minimize those effects and prevent employers from leveraging the interests of immigrant and native workers against each other.

As the nation emerges from the shadows of this great recession, we must embrace a progressive growth strategy that enhances our global competitiveness. The reforms to our high-skilled immigration policies outlined in this paper will help promote the nation's dual interest in growing the economy and protecting workers.

AILA InfoNet Doc. No. 10061830. (Posted on 06/18/10).

Endnotes

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2 Jonathan Sallet, Ed Paisley, and Justin Masterman, "The Geography of Innovation: The Federal Government and the Growth of Regional Innovation Clusters" (Washington: Science Progress, 2009), available at http://www.scienceprogress.org/wp-content/uploads/2009/09/eda_paper.pdf.

3 Louis Soares, "Working Learners," (Washington: Center for American Progress, 2009), available at http://www.americanprogress.org/issues/2009/06/working_learners.html; Louis Caldera, "Educational Tools for the 21st Century," Center for American Progress, July 28, 2009, available at http://www.americanprogress.org/issues/2009/07/educational_tools_memo.html.

4 65 percent of Computer Science PhDs, 57 percent of mathematics PhDs, 58 percent of physics PhDs, 68 percent of engineering PhDs and 32 percent of biological sciences PhDs from U.S. universities are foreign born, see http://www.nsf.gov/statistics/infbrief/nsf08301/.

5 Immigrants founded 1 in 4 of the publicly traded companies that were started from 1990-2005; Immigrant founded publicly traded US venture-backed companies generated more than $130 billion and employed 220,000 U.S. workers; Prominent companies: Intel, Solectron, Sun, eBay, Inc, Yahoo, Google; Foreign nationals in U.S. were inventors or co-inventors of 25 percent of all patents filed in U.S. in 2006, see http://www.sandhill.com/grafix/content/NVCA.pdf, pg. 32.

6 See http://www.techpolicyinstitute.org/files/the%20budgetary%20effects%20of%20high-skilled%20immigration%20reform.pdf

In the absence of green card and H-1B constraints, roughly 182,000 foreign graduates of U.S. colleges and universities in STEM fields would likely have remained in the United States over the period 2003-2007. They would have earned roughly $13.6 billion in 2008, raised the GDP by that amount, and would have contributed $2.7 to $3.6 billion to the federal treasury.

In the absence of green card constraints, approximately 300,000 H-1B visa-holders whose temporary work authorizations expired during 2003-2007 would likely have been in the United States labor force in 2008. These workers would have earned roughly $23 billion in 2008, raised the gross domestic product by that amount, and would have contributed $4.5 to $6.2 billion to the federal treasury.

Similar results are obtained when analyzing legislation considered by Congress during the last few years. For example, under reasonable assumptions, the relaxation of green card constraints proposed in the Comprehensive Immigration Reform Act of 2006 could have increased labor earnings and GDP by approximately $34 billion in the 10th year following enactment and had a net positive effect on the budget of $34 to $47 billion over 10 years.

Relaxation of H-1B caps under the Comprehensive Immigration Reform Act of 2007 could have increased labor earnings and GDP by $60 billion in the tenth year following enactment and improved the federal budget's bottom line by $64 to $86 billion over 10 years.

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9 Susan Hockfield, "Immigrant Scientists Creat Jobs and Win Nobels," *The Wall Street Journal*, October 19, 2009, available at http://online.wsj.com/article/SB10001424052748704322004574477700761571592.html?mod=googlenews_wsj.

10 These statistics, most recently reported for the academic year ending in 2007, show that foreign students made up: 57 percent of doctorals, 39 percent of masters, and 40 percent of all graduate degrees (combining the doctoral and masters numbers), see http://nces.ed.gov/pubs2009/2009020.pdf (tables 288 and 291); Arlene Holen, "The Budgetary Effects of High-Skilled Immigration Reform,"Technology Policy Institute, March 2009, available at http://www.techpolicyinstitute.org/files/the%20budgetary%20effects%20of%20high-skilled%20immigration%20reform.pdf, p. 28.

11 Hockfield, "Immigrant Scientists Creat Jobs and Win Nobels."

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13 Ingrid K. Brey and William B. Schiller, "Employment-Based Immigration: The First Three Preferences," American Immigration Lawyers Association, reprinted from *Navigating the Fundamentals of Immigration Law 89* (2009), available at http://www.aila.org/Content/default.aspx?docid=29972.

14 U.S. Department of State, "Nonimmigrant Visas Issued by Classification," Fiscal Years 2004-2008, available at http://www.travel.state.gov/pdf/FY08-AR-TableXVI(B).pdf.

15 US DHS, Office of Immigration Statistics, "U.S. Legal Permanent Residents: 2008," March 2009, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

16 See D. Papademetriou and others, "Aligning Temporary Immigration Visas with US Labor Market Needs: The Case for a New System of Provisional Visas," Migration Policy Institute, July 2009. See also "Nonimmigrant Admissions by Class of Admission," Fiscal Years 1999 to 2008, available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table25d.xls.

17 Congress authorizes 140,000 employment-based visas annually although for reasons not entirely clear approximately 166,000 were issued in 2008. Approximately 86 percent of those visas go to individuals who could be in high-skilled jobs minus 10,000 that are set aside for low-skilled immigrants. That figure includes dependents, however, which average more than 1 per high-skilled immigrant. So the total number of sponsored high-skilled workers receiving permanent visas was around 6,000.

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32 INA Sections 214(g)(1)(A), 214(g)(5)(C).

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47 http://www.informationweek.com/news/global-cio/outsourcing/showArticle.jhtml?articleID=199602025

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50 In addition to these "job shops," other problems with recruitment of high-skilled workers have been identified. A 2009 report by the American Federation of Teachers, for example, described foreign teachers being placed at public schools without actually being public employees. These teachers were not only paid drastically below the prevailing wage and were without the safety nets afforded to most teachers, but they also could not be clearly held accountable for their actions. Even when these teachers were unionized and wage protected, the recruiters often exacted unscrupulously high premiums from the foreign workers in order to be placed. American Federation of Teachers, "Importing Educators: Causes and Consequences of International Teacher Recruitment" (2009).

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