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Article

Understanding Proposed Changes to the H-1B Visa: Protecting American Government Interests, Improving the Opportunities for American Companies, or Potentially Hurting Hopeful Immigrants?

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Abstract: This paper will examine the US government's proposed changes to the H-1B visa, a dual-intent visa meant to bring highly-skilled individuals to the US labor market. It will first explain what the H-1B visa is and is not and what might happen to the H-1B visa in the future. The focus of the paper, however, will be on how the H-1B visa program is failing. The thesis of this article is that reform to the H-1B visa may be very good for the US employer and the US economy. However, the proposed legislation keeps a number of disadvantageous features for H-1B holders intact, rather than addressing them.

Keywords: immigration; H-1B; United States

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1. Introduction

As the United States (US) national government attempts to reform its immigration system, a number of different visa programs require examination. This paper will analyze the current use of and proposed changes to the H-1B visa, a dual-intent visa meant to bring highly-skilled individuals to the US labor market. The paper will explain the H-1B visa, its probable future changes and its problems. The thesis of this article is that reform to the H-1B visa may be very good for the US employer and the US economy. However, the proposed legislation keeps a number of disadvantageous features for H-1B holders intact, rather than addressing them.

2. How the H-1B Visa Worked in the Past

The US government created the H-1B visa in 1990 to help employers find specialized labor pools. Individuals with higher education in advanced fields could be brought to the US to work for employers when employable Americans could not be found. The visas did two things: first, they helped American employers find talented individuals; second, they allowed highly-trained individuals to live and work in the US for a specified period of time.

Employers' responsibilities vary. For example, employers who are dependent on H-1B workers, those employing 15% or more of their workforce through H-1B holders, must make a good faith effort to find equally capable and qualified American individuals to fill each position before offering it to others [1]. The H-1B visa grants an employee working status for three years; however, that working status is generally applied to only one specific employer. That is, the employee is tied to an employer. The original three years may be extended for a maximum visa stay of six years.

Under the immigration doctrine of dual intent, a possibility of a longer-term opportunity in the US exists. The doctrine of dual intent puts H-1B visa holders, and certain others, into a special class of immigrants. For most visitors to the US, they cannot have the intent to both visit and stay. However, with certain categories of immigrants, specifically those who are highly-educated, dual intent allows them to both work in the United States and attempt the process of applying for, and receiving a green card (*i.e.*, lawful permanent residence.) For example, the US government first permitted dual intent in 1990 for both H-1 and L visas [2].

3. What the H-1B Visa is not

The H-1B visa is often confused with other types of visas in the United States' myriad of options. First, the H-1B visa is not the 'green card lottery.' The very popular 'green card lottery' or the diversity visa, was a program set-up in the 1990s by the late Senator Edward Kennedy. This program allowed citizens of countries with comparably low numbers of immigrants the opportunity to come to the US, to work, and to live as permanent residents. Though millions apply annually, it has only granted status to about 50,000 applicants each year [3].

The H-1B visa is also distinguishable from L visas in terms of length of employment and reciprocity agreements. For example, L-1 visas give temporary work permits to applicants to work in the United States from three months to five years, depending on the reciprocity agreement with the home country. The L visa is focused on employees of US companies abroad who have worked for that US company for more than a year. Correspondingly, however, the L-1 visa may also be used by those interested in obtaining a green card under the doctrine of dual intent.

The H-1B is different from the H-2A visa in the type and length of work being done. The H-2A visa involves those who wish to do temporary or seasonal agricultural work in the US. About 30,000 temporary agricultural workers annually take advantage of this option. The H-2B visa is also temporary, but it works with nonagricultural services or businesses which need temporary aid to supplement their business needs.

The W-visa contrasts with the H-1B in the type and length of labor as well. With the 2013 proposed immigration reform, one new program called the W-visa or worker visa, will give temporary workers

the chance to work for three years in the US. It is similar to the H-2A visa, but it hopes to bring in more short-term laborers. As the Senate proposal stands, the workers' visas will be capped at 20,000 the first year, increased to 75,000 by 2018, and brought up to 200,000 annually [4].

Finally, the H-1B visa is not the proposed merit visa. Under the Senate's new proposal for immigration reform, merit visa applicants may receive green cards through an analysis of their background. For example, once an immigrant applies, she will be assigned points according to her education, employment, length of residence in the US, *etc*. At least 120,000 applicants with the most points each year will be given the visa annually and more if unemployment is under 8.5%. People who qualify for the merit-based visas include those who have a pending employment-based visa over three years, family-based petitions longer than five years, and others.

The H-1B visa is something quite different, however. It aims to bring in the best and brightest to the US when comparable US employees cannot be found. The treatment of this specific class of people is the focus of this research.

4. Relevant Highlights of the Proposed Changes to the US Immigration System

The US immigration system is riddled with problems. It is extremely complicated, burdensome, and inefficient. In 2013, the so-called Gang of Eight, a group of eight senators on both the right and left sides of the aisle, created Senate Bill 744 for review by the US Senate. Meeting in secret, the men proposed a total re-haul to the US immigration system. On 31 May, 2013, the Senate decided to review the Gang of Eight's proposed bill and submit it for an eventual vote. At over 800 pages long [5]; the document leads to many major changes [6].

Whatever the final outcome, the new immigration bill will undoubtedly have increased border security at the top of its list. This is a priority for many Americans and for its lawmakers [7]. More controversy surrounds the Senate's proposal to grant provisional status to the millions of illegal immigrants currently residing in the US. Estimates of 11 million people who arrived illegally before 31 December, 2011 could have provisional status, basically a protectionary status for them to live and work legally in the US. After 10 years of provisional recognition, they could apply for a green card.

The US Senate is delicately dancing around the issue of who should receive permanent residency, or green cards, and when. Many conservative and southern legislators specifically disagree with giving amnesty, or freedom to live and work in the US despite illegal entry. The illegal immigrants' protracted schedule, in addition to a fine and a lack of government benefits for some time, is meant to assure those who disagree with amnesty that the path to permanent residency will not be easy or without cost.

Connected to this is a continuing cry for enforcement. That is, both to stem the influx of illegals and to protect our nation against terrorists, increasing border patrols and surveillance in general remains a critical concern for those against reform. Proposals for additional funding, boots on the ground, and drone surveillance are meant to work on this issue [7]. It remains to be seen how these allocations will persuade those against reform.

While the debate regarding illegal immigration persists, there are many other immigrants who go through the green card process legally—some successfully and others not. Every year, approximately one million people become permanent residents in the US. Two-thirds of those gain their status

through family ties. Under the proposed reforms, this number would be lessened. The US Senate bill would reduce the number of family green cards by disallowing certain groups, such as siblings, from applying for each other [8].

In addition to family-based applications, permanent residency is currently granted to other groups. Historically, approximately five percent of permanent residents gained their status through the diversity visa program, refugees/asylees received 10 percent of green cards, and employer-based permanent residencies counted for approximately 13 percent of all grantees ([4], p. 235). The Senate plan could potentially reduce family-based permanent residency while increasing those given to other groups.

5. Proposed Changes to the H-1B Visas

One group that could benefit from permanent residency changes is H-1B holders. Proposals to change the H-1B visa are numerous. First, the H-1B proposed reforms would actually re-set the number of visas available to pre-2003 levels. In the early 1990s, H-1B visas were limited to approximately 65,000. This increased in 1999 to 115,000, expanding to 195,000 annually in the early 2000s, and decreasing in 2004 to 65,000.The proposed H-1B legislation would increase the current limit from 65,000 H-1B recipients to at least 110,000 and later up to 180,000. The number will vary depending on a sliding scale program utilizing the number of applicants in the previous year and the percent of Americans unemployed in the given fields. The maximum change in recipients in a given year would be 10,000. US industry desire for more H-1B visas is evident. In 2013, the applicants for H-1B visas filled their annual quota in five days. 65,000 won through a lottery, and 39,000 requests were denied until the next year's round.

In addition to increasing the number of H-1B visas, the Senate's proposed changes do have many upsides for potential H-1B applicants. For example, spouses of H-1B applicants could obtain work authorizations in the US if their home country offers reciprocal employment. H-1B employees would also have some protections if they lose their jobs, something they currently lack. Instead of going immediately 'out-of-status' when terminated, the H-1B recipients would have a 60-day grace period—essentially temporary legal status—after the loss of a job. During this grace period, they could find alternative H-1B employment or be able to wrap up their lives in the US before departure [9].

The early version of the Senate reform bill would also require employers to pay higher wages for H-1B workers. Previous H-1B laws said that employers should pay the 'prevailing wage' of native-born workers [10]. This meant that H-1B workers often received the lowest wage within a given market [11]. For example, in 2005, 47% of H-1B computer programmers received wages lower than the prevailing wage as required of their employers [12]. It hurt them, and also potentially drove down wages for their American counterparts. If the new legislation goes through, it would raise earning capacity and bargaining power across the board. However, this is difficult to do in a free market society where specifics on payment and monitoring of equal wages by the government are more challenging to ascertain or enforce [12].

6. Benefits to the US

The proposed changes to the H-1B visa are good for the American government and employer. First, the US does gain taxable income from H-1B employees. For example, H-1B employees who are substantially residing in the US are expected to pay for Social Security, Medicare, and all general taxes, even though they may not reap those benefits in old age if they do not receive permanent residency and are forced to leave the US. This is good for the US, but seems unfair for H-1B employees.

The American employer also benefits. When she cannot find a suitable employee for an advanced position, she may look abroad. The number of H-1B visas will increase, and the pool of talented individuals will continue to expand.

Competitive American workers may also benefit. If Senator Grassley has his say, both the H-1B and L-1 Visas would be more protective of American workers. First, employers would need to publicly post their jobs to ensure American workers have access to them. Second, employers will be encouraged to hire Americans first as fees for hiring H-1B workers will increase, and companies will not be allowed to have more than 75% of their workers on H-1B or L-1 visas in 2014. This limit will decrease to 65% in 2015 and 50% in 2016 [13]. This decreases the number of foreign workers employed by a given company and encourages Americans to excel in and take positions in fields where foreigners usually reside.

Finally, the US government stands to gain financially from companies which overuse the H-1B system. Companies which primarily bring H-1B or L visa applicants to the US would be penalized an additional $5,000 per person or $10,000 per person if those represented were over 50% of the company's overall workers—specifically if they do not have green card petitions pending. This leads to a few outcomes. First, the US government gains penalty fees. Second, American companies are encouraged to hire more people locally. Third, employers would be incentivized to apply for green cards for their foreign employees to avoid the financial penalty [10].

7. Problems for Employees Utilizing the H-1B Visas

Despite the potential benefits that come with H-1B reform, a number of problems remain and are not addressed by the current proposals. They include a lack of court protections, a system which encourages delays in filing, low wages, incorrect interference by the US government, and a mis-allocation of H-1B visas.

7.1. No Court Protections

One key problem with the immigration reform bill is that immigrants still lack court protections granted to American citizens. On paper, legal immigrant workers should receive prevailing wages. The law also says that H-1B victims should not suffer from retaliation and discrimination by their employer; however, use of the court system is not possible [14]. H-1B workers who feel that their rights have been violated, *i.e.*, through the withholding of wages, discrimination, *etc.*, may file complaints with the federal government, but no further substantial legal rights belong to them.

The problem is that there is little recourse for H-1B visa holders who are let go or pass six years without receiving permanent residency. First, H-1B visa holders have few protections when their

positions are terminated. The US government requires that H-1B workers be notified of termination, that the US Citizenship and Immigration Services also be notified, and that the company offers to pay the H-1B worker for the costs of return abroad [15]. If an employee feels that this is not done correctly, she cannot ask a court for help. She may file a complaint with the US Citizenship and Immigration Services (USCIS), but USCIS is not required to enforce these employer obligations nor are there any regulatory mechanisms for the employee's protections [16]. This essentially means that when an H-1B holder loses her job, she receives a letter and a ticket back to her home country, with no other protections for her or her family.

While a ticket back home may sound generous, the timing is not. While no general rule exists, a common misnomer is that H-1B visa holders have only 10 days to leave the country. It is true that an H-1B employee falls out of immigration status as soon as she is terminated from employment. It is possible that another company could hire the individual or that she could file for another visa status such as a visitor to the US. However, there are no guarantees, and by staying in the US, the out-of-status immigrant lacks protections, and the potential for future legal entrance to the US [16].

7.2. Employer Delays to Apply for Permanent Residency Status

The only option then is for H-1B visa holders to hope that their employers will keep them and help them to successfully apply for permanent residency. This causes further complications. First, employers know that they have a six-year window in which to utilize a foreign employee. During that time, the employee must stay with the company if she wishes to remain in the US. This may lead to a delay by companies to file for permanent residency. In other words, they can keep foreigners at low pay for up to six years or until the person receives permanent residency. With permanent residency, the H-1B holder can look for other jobs. Therefore, the best option is to delay filing for employees as long as possible.

Employers are also incentivized not to apply for their employee's permanent residency by the actual government procedure. Most companies must hire expensive [17] attorneys to file the paperwork, and the actual application process requires much oversight and dedication by a company's HR personnel. In addition, the rate of success is quite low. H-1B petitions are often denied by the US government. Since 1999, only 56% of H-1B petitions for long-term permanent residency status were approved [18]. With the legal and HR costs involved, a 56% percent return may not be enough for many employers.

With this in mind, immigrants are caught in a Catch-22 situation. If they apply for the visa and are denied, their employer will be less willing to do the paperwork and pay the costs of applying again. Second, if an employee wishes to stay in the US to make a better financial future for herself, she may also delay application for permanent residency—especially if she knows her company lacks the incentive to apply again. This means that she is stuck with the lower wages her company offers her for six years and the knowledge that she is probably leaving the US at the end of her term.

7.3. Low Wages for Highly-Skilled Immigrants

While employers lack incentives to apply for permanent residency for their H-1B holders, they do have an incentive to give their workers low wages. While H-1B employees in the US are supposed to

receive 'prevailing wages,' a 2011 US Government Accountability Report said that this is not necessarily the case, as little oversight exists, and worker protections cannot be fully enforced [11].

Indeed the 'prevailing wage' requirement is often not met until after H-1B employees become permanent residents. In 2007, an unpublished article by Gass-Kandilov, analyzed the increase of income for immigrants after they received permanent residency. Her research indicated that immigrants had a jump from 18–25% from their first US job to their first job after a green card [18]. This means that the market is being stilted by employers. Employees lack mobility to change positions or advocate for increased pay. Therefore, the employer keeps their salaries low.

A comprehensive 2012 study by S. Mukhopadhyay and D. Oxborrow found that if an employer-sponsored immigrant was able to attain a green card, her overall wage increased by an average of $11,860 ([18], p. 219). The study found that H-1B visa holders or temporary workers are paid less for a few reasons. The first is the cost of legal and processing fees, which averaged $6,000 in 2006. More disquieting though is that H-1B employees do not have the ability to move and search for other jobs. In essence, their wages are fixed, and they do not have the ability to advocate for their increased earning potential either within their companies or outside them—until they have their green cards ([18], p. 221). The point is that H-1B holders are at a financial disadvantage to comparable American workers (could they be found) for the same positions.

7.4. The Wrong Type of Oversight/Interference by the US Government

Oversight of H-1B employers can also be an issue. As it stands, the burden is very high on companies, specifically H-1B dependent companies, to prove that no other American individual can satisfy the employment needed by the immigrant. This means that the federal government has wide latitude to deny an H-1B dependent company in its application for residency of an H-1B holder. The proposed Senate legislation makes this burden even more difficult. For example, the Department of Homeland Security will now be able to investigate sister-visa L-1 employers without citing a cause [9]. In effect, this dis-incentivizes companies from pursuing international employees, especially if they know they can be put under investigation without any cited cause. For H-1B employers, it also dis-incentivizes their willingness to pursue a permanent residency application for their foreign employees, as no company wishes to have a federal government investigation at their doorstep.

7.5. Allocation of Visas

The goal of the H-1B program was to bring people with specialized skills to the US, specifically when there was a lack of employable people in the US with the needed skill set. The individuals typically might have specialty education or work experience in engineering, mathematics, architecture, *etc*.

In recent years, however, the people who are receiving H-1B visas may not fit the original goal. Today, most of the H-1B visas go to Indian and Chinese technology professionals, specifically in computer software design and technology application firms [19]. The top recipients of H-1B visas were computer system analysts, computer programmers, other computer occupations, software developers, and computer and information systems managers. Their numbers far exceeded any other group of H-1B worker requests with over 66% of all total applicants coming from these five fields [4].

With this in mind, National Public Radio (NPR) and *Forbes India* offered another critique of the H-1B program. During an NPR interview, Public Policy Professor Ron Hira noted that many firms use temporary work visas like the H-1B to limit their expenses. They do this in two ways. First, they employ cheaper employees in computer technology in the US. Second, they create overseas work centers where they can send their newly-trained H-1B recipients back to—essentially creating large outsourcing operations.

For example, Cognizant, a New Jersey firm received 9,000 H-1B visas in 2012. Three other Indian firms received the next largest amount of visas, leading to an image of training people for outsourcing jobs overseas [11]. This keeps wages low for people in the US and abroad. As *Forbes India* related, the current H-1B system financially rewards competitive off-shoring efforts from India via the H-1B program [20]. Essentially, the US employer can pay an outsourced Indian less in India. The Indian's underlings are also paid less than people who would work in the US in the same positions. At the same time, the US worker becomes less competitive than the Indian, as her job can now be done overseas for a lower wage, decreasing her income potential.

8. Steps Forward

The US is not doing enough to change current legislation in regard to H-1B holders. The following propositions offer potential ideas to the problems posed in Section 7. None of these answers will solve every problem, but they are meant to move the H-1B system in a positive direction.

8.1. No Court Protections

The primary way that an H-1B holder can gain protection is to give her access to the US court system. Today, she only has administrative recourse to change a situation involving discrimination, unpaid wages, *etc*. Instead, she should be able to file complaints as a US citizen does in the US court system. Absent this, she should be able to use immigration courts as an alternative way to protect herself without facing the potential threat of a one-way ticket back to her home country without recourse.

This type of change might inhibit employers from hiring new H-1Bs. They may believe that legal recourse hurts their business. However, as a basic right of recourse, employees should understand what rights they have and be able to utilize judicial tools to advocate for themselves.

8.2. Employer Delays to Apply for Permanent Residency Status

A few ways to deal with employer delays exist. First, the new legislation could require employers to state in their contracts with employees whether and when they will apply for permanent residency for their H-1B employees. However, as many businesses do not wish to have the government interfering in their contracts, a few other options remain. A very simplistic way to solve the problem of permanent residency is to have a definitive end to working for one employer. That is, if an H-1B holder successfully lives and works for a US employer for six years, he should have an automatic right to permanent residency [21]. He should also be able to file for permanent residency without the support of his employer. He has fulfilled his contractual obligation and should now be able to freely traverse the field to find other employment. He should no longer be tied to an employer's goodwill after six years.

Contractual requirements on the employer would potentially interfere with a company's right to contract. Therefore, an automatic right to permanent residency seems like the best option. The employee then understands what his future plans might involve, and he also understands that his status for the first six years is dependent on successfully working for his current company. That encourages benefits for both the employee and the original business.

8.3. Low Wages for Highly-Skilled Immigrants

Next, government oversight should be re-focused on encouraging the 'best and brightest' to come to the US rather than penalizing good employers. This can be done through encouraging universities to work with employers in hiring international employees. Second, wage requirements should be more closely followed, perhaps through annual re-evaluations of prevailing wages sent to the US government by employers. When employers do not pay their H-1B employees the prevailing wages, they could be penalized. This continual monitoring may cause headaches for employers, but it serves to protect the interests of international employees.

8.4. The Wrong Type of Oversight/Interference by the US Government

Finally, employers who ship out employees should be penalized, and the law should more clearly indicate who can receive H-1B visas. If a company sends a majority of its H-1B employees back home to work for the same country, the company's future applications should be limited. As the goal is to bring qualified individuals to the US, other companies will take the open slots and fill them with the intended beneficiaries. With these changes in place, the US will benefit as will those who are legally working for a better future here.

8.5. Allocation of Visas

The current legislation does not go far enough. Instead of simply increasing the number of H-1B petitions accepted, the US must also increase the percentage of successful permanent residency applications. This can be done through re-allocating which sectors receive H-1B visas. It might also benefit US business to try to divide the number of companies receiving visas. This will diversify the pool of applicants and advocate for a more diverse workforce of H-1Bs.

In addition, the US government must increase the number of green cards being given to H-1B employees from its current rate of 56%. There is a tremendous amount of talent which could benefit the US economy. With the current rate, employers are hesitant to apply, and the available talented pool remains limited. If the number of H-1B employees rose, wages would increase, mobility would increase, and the US would benefit from long-term, highly-skilled individuals in the workforce [21].

9. Conclusions

Increasing the number of H-1B visas is a good idea. The US government and employers do see a financial benefit. However, problems in the continuation of the current system remain, leaving the possibility of poor treatment. That is, when the US offers more temporary visas but fails to give

opportunity for permanent residency, immigrant employees are trapped to some extent. They cannot apply for a green card on their own, and they are dependent on potentially low-paying employers.

The federal government should be focused on making sure that current H-1B immigrant populations are being paid fairly and are having an opportunity under the dual intent doctrine to pursue a better life in the US. These immigrants should receive court rights to pursue their economic interests, and they should be able to improve their own lives in America just as American business is benefitting from their knowledge and expertise.

Conflicts of Interest

The author declares no conflict of interest.

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