



# Visa Pages:

## U.S. TEMPORARY FOREIGN WORKER VISAS

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### B-1 VISA

Updated Dec. 2015

The B-1 business visitor visa is available for a wide variety of business travelers, including domestic workers who are employed by U.S. citizens or nonimmigrants, trainees (B-1 in lieu of H-3), and high-skilled workers employed by foreign companies (B-1 in lieu of H-1B).

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## I. B-1 VISA

The B-1 visa allows foreign nationals to visit the United States on business but generally prohibits work at a U.S. job.<sup>1</sup> This visa is often used by travelers for short-term trips for meetings, conferences or business transactions. There is no annual cap or numerical limit on the number of B-1 visas available each year. It is not a work visa, and, generally speaking, it is not a standard avenue allowing foreign workers to come to the United States.<sup>2</sup> However, it is broadly defined and the U.S. Department of State (DOS) routinely authorizes several categories of workers to labor in the United States.<sup>3</sup> The categories are listed in the DOS's Foreign Affairs Manual, which contains guidance and operating procedures for consular officials.<sup>4</sup>

Among the types of individuals who may work on a B-1 visa are domestic workers employed by either U.S. citizens who reside abroad or other nonimmigrants, trainees, and high-skilled temporary workers who are paid by their foreign employer.<sup>5</sup> B-1 domestic workers are required to have an employment contract promising a required wage as a prerequisite to getting the visa.<sup>6</sup> B-1 trainees and workers with the B-1 in lieu of H-1B distinction, however, are not.<sup>7</sup> None of these categories require the employer to submit a labor certification application or otherwise obtain prior approval from either the U.S. Department of Labor or the U.S. Department of Homeland Security.<sup>8</sup> There are no regulations or procedures in place to address or prevent the displacement of U.S. workers. Courts have noted that B visas are obtained through a faster and less scrutinized process than the H visas for temporary work or training.<sup>9</sup>

The number of individuals who are working in the United States with B-1 visas under any of DOS's FAM-specified categories is unknown. The government maintains information on the number and nationality of individuals receiving B-1 visas and the number of B-1 visa holders who are admitted to the United States; and the DOS surely knows the reasons why B-1 visitors come to the United States, because those questions are asked during visa interviews. However, the number of B-1 visas issued and the number of B visitors admitted is not disaggregated by categories that allow work, or by any other specific measure, such as industry or occupation. Even though DOS's consular officials obtain all this information as part of the visa issuance process it does not publish data broken down by category.

Indeed, the only public information is the number of visas issued and admissions of B-1 visitors as a whole. Government officials have in the past indicated that up to 20,000 of the B-1 visas issued annually enable visa holders to engage in paid work.<sup>10</sup> But the publicly available information does not reveal this information. The public does not have access to information on how many B-1 visa holders work, where they work, for what purpose, and for how long. The lack of concrete data on these categories allowing work is significant considering that each year there are over 35,000 B-1 visas issued and over 3 million B-1 admissions.

### DIGGING DEEPER: B-1 BUSINESS TRAVEL

To qualify for a B-1 visitor visa, applicants must show that they have [legitimate business activity](#) in the United States.<sup>11</sup> Generally, the business visitor's income must originate abroad and no payment may come from a U.S. source.<sup>12</sup> The U.S. Department of State notes "[i]t can be difficult to distinguish between appropriate B-1 business activities," that are allowed while in B-1 status, and activities that "constitute[s] skilled or unskilled labor" in the U.S., which are not permitted.<sup>13</sup>

### DIGGING DEEPER: B-2 TOURIST VISAS AND THE B-1/B-2 COMBINATION VISA

B-2 visas are available for tourists and never authorize employment in the United States.<sup>14</sup> The U.S. Department of State (DOS) issues a combination visa labeled B-1/B-2 to the vast majority of short-term business visitor applicants because many of them also plan to travel within the U.S. as tourists during their stay.<sup>15</sup> In DOS's data, the B-1/B-2 visa is counted as a category separate from the B-1 and B-2 categories.<sup>16</sup> However, the U.S. Department of Homeland Security (DHS) only counts two separate classes for purposes of admissions: B-1 and B-2.<sup>17</sup> When an individual presents for admission at a port of entry with a combination B-1/B-2 visa, the DHS's U.S. Customs and Border Patrol inspector will ask about the purpose of the visit. Based on the information gathered at that time the individual will be admitted as either a B-1 business visitor or a B-2 tourist.<sup>18</sup>

### DIGGING DEEPER: THE VISA WAIVER PROGRAM AND VISITORS FROM MEXICO AND CANADA

Special rules apply to short-term business visitors who are nationals of the 37 countries participating in the [Visa Waiver Program](#).<sup>19</sup> The Visa Waiver Program allows business travel for a maximum of three months.<sup>20</sup> Border Crossing Cards are available to some Mexican and Canadian business visitors.<sup>21</sup> Under the terms of the North American Free Trade Agreement, special rules apply to workers from Mexico and Canada who visit the U.S. temporarily in the course of their jobs, for example in the fields of research and design, marketing, sales and distribution, and certain tour bus operators and translators.<sup>22</sup>

## A. B-1 DOMESTIC WORKERS

According to the DOS Foreign Affairs Manual, B-1 nonimmigrant visas are available for certain experienced domestic workers.<sup>23</sup> U.S. citizens who reside abroad and are visiting the U.S. temporarily, whether for work or pleasure, may bring their existing foreign domestic workers with them to the United States.<sup>24</sup> Also eligible for a B-1 visa are domestic workers who join U.S. citizen employers that are temporarily assigned to the United States for a period of not more than six years or nonimmigrant employers.<sup>25</sup> In any case, all employers of B-1 domestic workers must either have regularly employed domestic workers outside of the United States or already have an employment relationship with the worker.<sup>26</sup> Unlike other B-1 visa holders that work in the U.S., domestic workers may receive payment from an employer who is based in the United States.<sup>27</sup>

All B-1 domestic workers must have the intent to return to their home country after their U.S. stay and present to the consulate an employment contract that is signed by both the domestic worker and the employer.<sup>28</sup> All B-1 domestic workers should be paid the higher of the minimum or prevailing wage; however, the DOS has not published their

standard procedures for consular officers to follow when evaluating what the prevailing wage would be.<sup>29</sup>

Requirements: B-1 Domestic Worker

	Employer is USC residing abroad coming to visit U.S. temporarily	Employer is USC on temporary assignment in U.S.	Employer is nonimmigrant
<b>Employment relationship: Two choices</b>	Domestic worker has been employed abroad by the employer for at least six months prior to the date of the employer's admission to the United States – OR	Domestic worker has been employed abroad by the employer for at least six months prior to the date of the employer's admission to the United States – OR	Domestic worker has been employed abroad by the employer for at least one year prior to the date of the employer's admission to the United States – OR
	Employer can show that while abroad, it has regularly employed a domestic worker	Employer can show that while abroad, it has regularly employed a domestic worker	Employer can demonstrate that it has regularly employed (either year-round or seasonally) a domestic worker over a period of several years preceding the application
<b>Experience</b>	The domestic worker can demonstrate at least one year experience by producing statements from previous employers attesting to such experience	The domestic worker can demonstrate at least one year experience by producing statements from previous employers attesting to such experience	The domestic worker can demonstrate at least one year experience
<b>Employment contract</b>	Employment contract signed by employer and domestic worker	Employment contract signed by employer and domestic worker	Employment contract signed by employer and domestic worker
<b>Wage guarantee and benefits</b>	Greater of minimum or prevailing wage for eight hour work-day and "any other benefits normally required for U.S. domestic workers in the area of employment"	Greater of minimum or prevailing wage for eight hour work-day and "any other benefits normally required for U.S. domestic workers in the area of employment"	Greater of minimum or prevailing wage
<b>Travel</b>	n/a	Round trip airfare	Employer must pay domestic worker's initial travel expenses to the U.S., and outbound travel to either next assignment with employer or back to worker's country of origin
<b>Housing</b>	n/a	Free room and board	Free room and board
<b>Exclusive employment</b>	n/a	Employer will be only provider of employment to domestic worker	Employer will be only provider of employment to domestic worker
<b>Termination notice</b>	At least 2 weeks termination notice by employer; no more than 2 weeks termination notice necessary by domestic worker	At least 2 weeks termination notice by employer; no more than 2 weeks termination notice necessary by domestic worker	n/a

Source: 9 FAM 41.31 N9.3.

The B-1 visa itself does not authorize employment. Rather, the visa enables the worker to apply for an Employment Authorization Document (EADs) from the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services once the worker is in the United States.<sup>30</sup> The numbers and nationality of individuals receiving B-1 domestic worker visas are not published and their admissions are not tracked. The numbers of B-1 domestic workers who apply for and receive EADs is also not published.<sup>31</sup>

### 1. DURATION

Consular officials set the duration of a B-1 domestic worker visa based on the employer's stay in the United States.<sup>32</sup> The initial time may exceed one year as long as the stay "is not indefinite in nature."<sup>33</sup> Indeed, DOS contemplates a longer stay for certain B-1 domestic workers who are employed by U.S. citizens temporarily stationed in the United States for up to 4 years.<sup>34</sup> B-1 visas generally are valid for up to one year with the possibility of extension in six-month increments.<sup>35</sup> There is no specified limit to the number of extensions a B-1 domestic worker may receive.

### Requirements: B-1 in Lieu of H-3

- ✓ Trainee has nonimmigrant intent (foreign residence to which he or she must return)
- ✓ **Trainee must clearly be employed and paid by an overseas company**
- ✓ Training program is not designed primarily to provide productive employment
- ✓ **Any productive employment is only incidental and necessary to the training and pursuance of a career outside of the United States**
- ✓ Training program is not available in the alien's home country
- ✓ **Trainee will not be placed in a position that is normally occupied by U.S. workers**
- ✓ Generally, training program is less than six months

Source: 9 FAM 41.53 N11.9; 9 FAM 41.53 N4.5; 8 C.F.R. 214.2(h)(7); U.S. State Department, B-1 in Lieu of H, Unclassified Cable 12 State 101466 (Oct. 12, 2012).

### B. B-1 TRAINEES IN LIEU OF H-3

B-1 visitor visas for business are also available for individuals who need training in the United States and who would otherwise qualify for the H-3 visa.<sup>36</sup> The trainee must have nonimmigrant intent and be clearly employed and paid by a foreign company. The training program must not be available in the trainee's home country and the training

program generally must be less than six months in duration. Productive work in the United States is allowed if it is incidental to the training itself and if the trainee remains an employee of an overseas company and is paid from a source abroad.<sup>37</sup> Furthermore, the trainee should not be placed in a position normally occupied by U.S. workers.<sup>38</sup>

Unlike B-1 domestic workers, no employment contract is required for the B-1 in lieu of H-3 subclass and no prevailing wage is required, i.e. they are paid the regular wages in their home country while being trained in the United States.<sup>39</sup> The B-1 visa is not intended to be a way to avoid the more time-consuming H-3 visa process. There is no limit to the number of B-1 visas. Neither DOS nor the U.S. Department of Homeland Security publishes the number of B-1 in lieu of H-3 visas issued or the nationality of these workers.

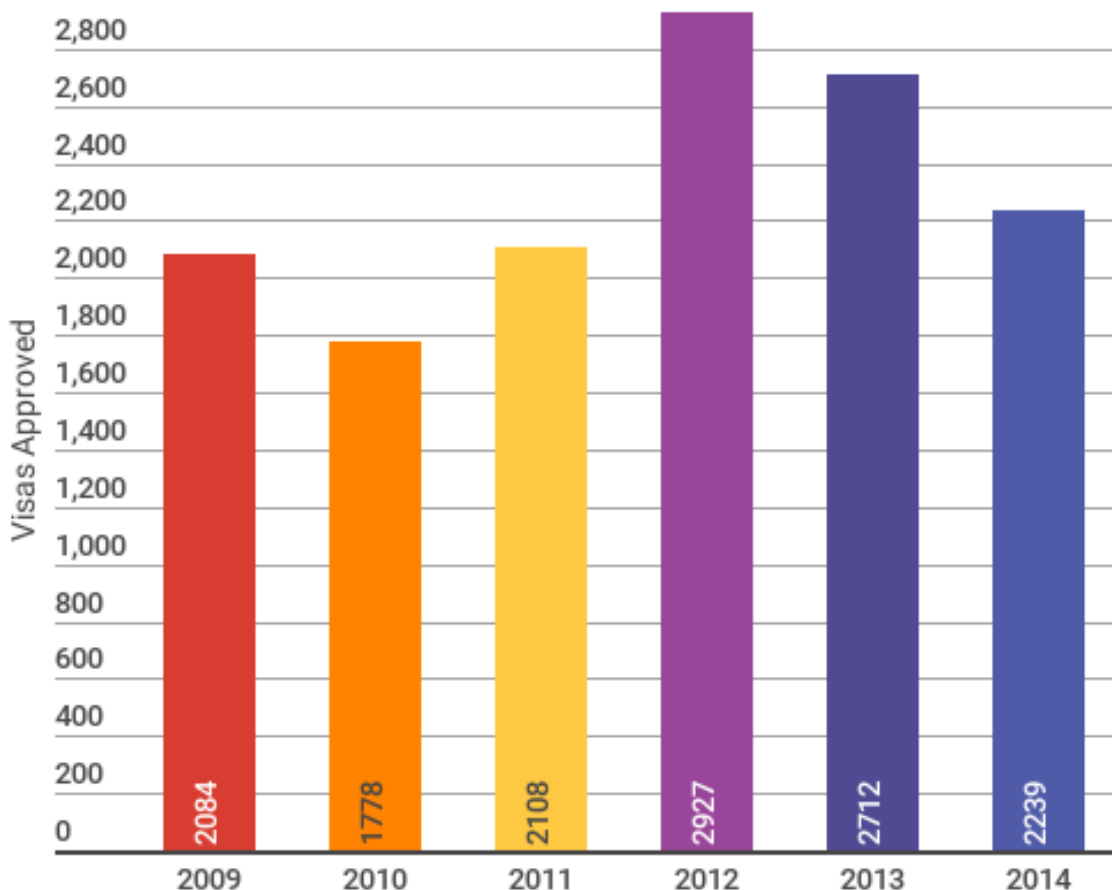
### 1. DURATION

Immigration regulations state that B-1 visas are initially valid for up to one year with the possibility of six-month extensions.<sup>40</sup> With regard to the B-1 in lieu of H-3 visa in particular, however, DOS advises that the duration should generally be for less than six months.<sup>41</sup> However, some practitioners comment that intended stays of more than two weeks face scrutiny during the visa application process.<sup>42</sup> Even so, there is no regulation or guidance prohibiting extensions. Neither is there a limit to the number of possible extensions or maximum duration for visas in this subclass.

### DIGGING DEEPER: THE H-3 TRAINEE NONIMMIGRANT VISA PROGRAM

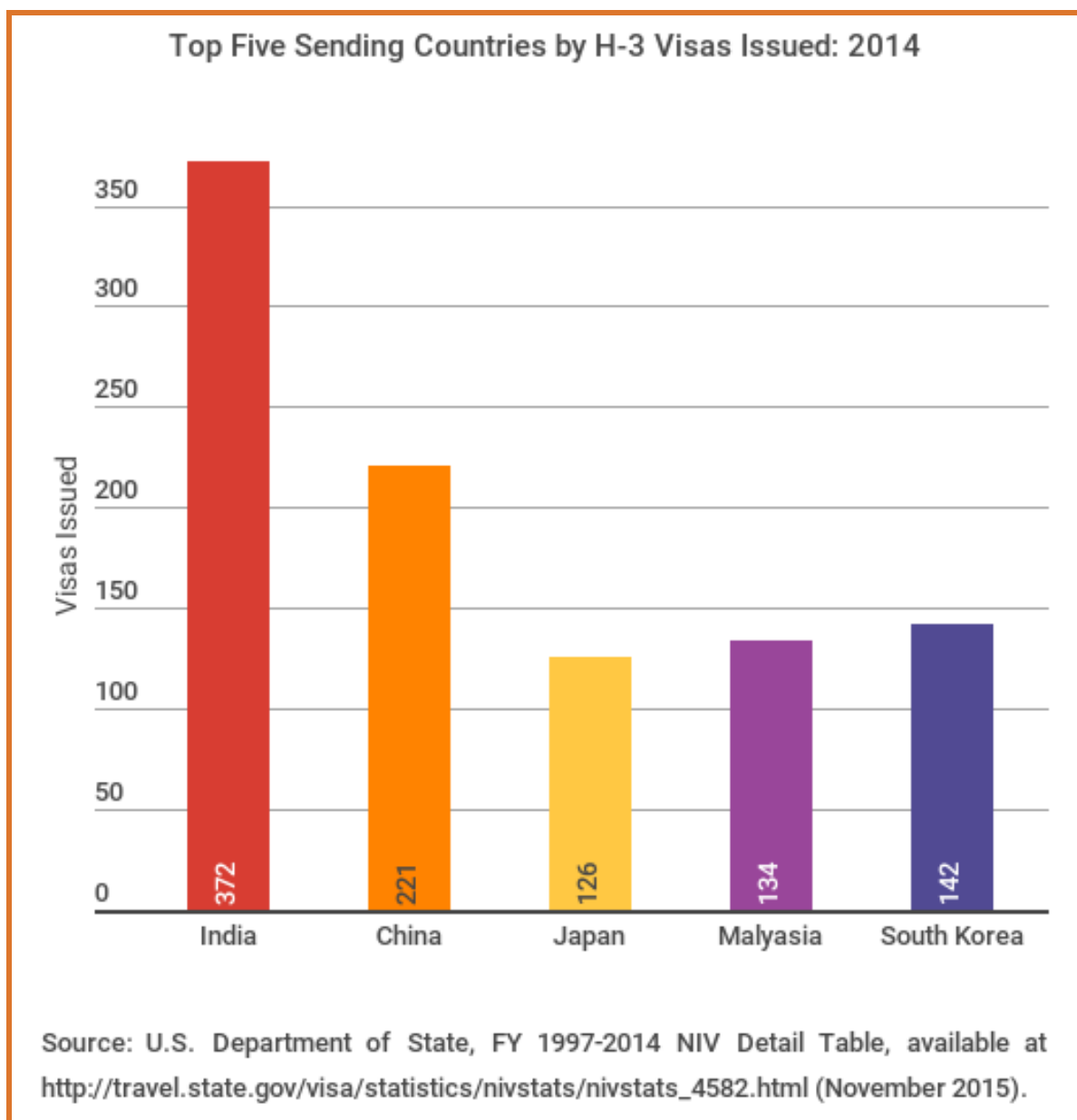
An individual is eligible for the B-1 in lieu of H-3 visa if the H-3 requirements are met. H-3 nonimmigrant visas are available for foreign individuals who come temporarily to the United States for professional training.<sup>43</sup> There is no limit to the number of H-3 visas that are available annually. In 2014, 2239 H-3 trainee visas were issued by the U.S. Department of State.<sup>44</sup> More than a third of those visas were issued to trainees from India.<sup>45</sup> Not much information is published on the nature of the training programs that import H-3 trainees, or whether they work, or where. The U.S. Department of Homeland Security tracks nonimmigrant admissions and notes that the top states of destination for H-3 visa holders are Texas, New York, California, Illinois and Florida.<sup>46</sup>

H-3 Visas Approved by State Department



U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).





H-3 trainees come “at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment.”<sup>47</sup> H-3 trainees must have a foreign residence and return there after the training program.<sup>48</sup> H-3 trainee visas are valid for the duration of the training program, up to a maximum of two years.<sup>49</sup>

The first step is for the U.S. business or training organization to file a petition for H-3 classification on behalf of the trainee. The U.S. entity files the [Form I-129](#), Petition for Nonimmigrant Worker, with the U.S. Department of Homeland Security’s U.S.

Citizenship and Immigration Services (USCIS).<sup>50</sup> Form I-129 must be filed with an explanation of the training program, including:

- the type of training and supervision to be given, and the structure of the training program;
- the proportion of time that will be devoted to productive employment;
- the number of hours that will be spent in both classroom instruction and in on-the-job training;
- the career abroad for which the training is preparation;
- the reasons why the training is not available in the trainee's home country and why it is necessary for this particular trainee to come to the United States; and
- the source of any trainee compensation, and whether the petitioner will benefit from the training, and how.<sup>51</sup>

If training will occur in more than one place, the itinerary with the dates and locations must be listed on the petition.<sup>52</sup> If the trainee will receive training from more than one entity, each must file a separate petition with USCIS.<sup>53</sup> More than one trainee may be included in an H-3 petition if all will receive the same training, for the same period of time, and in the same location.<sup>54</sup> However, each trainee must be named individually.<sup>55</sup>

USCIS will not approve H-3 trainee status in certain circumstances.<sup>56</sup> For example, if the training program is too general, does not have a fixed schedule or a means of evaluation, or if it is incompatible with the nature of the petitioner's business or enterprise; if the trainee already has expertise in the field; if it is unlikely that the trainee will use the skill outside the U.S.; if the training program is really just productive employment; if the program is designed to recruit and train foreign workers for eventual staffing of U.S. operations; if the trainer does not have the wherewithal to provide the training; or if the training program is intended to get around the maximum allowed under the F-1 student visa program.<sup>57</sup>

After the H-3 status is approved by USCIS, the trainee [applies for the visa](#) from the U.S. Department of State at a U.S. embassy or consulate in his or her home country. The prospective H-3 trainee must demonstrate that he or she has nonimmigrant intent and will return home when the training period ends.<sup>58</sup> The U.S. Department of State has the final say about whether to approve visas and the applications are scrutinized. In 2012 the adjusted refusal rate for H-3 visas was 12%.<sup>59</sup> With the H-3 visa in-hand, the trainee must pass immigration inspection at the border or port of entry. The visa itself does not guarantee entry to the United States. The DHS's Customs and Border Protection will either permit or deny entry after their [own inspection](#) and will determine the permitted time allowed in the U.S., which may be less time than what is listed on the visa itself.<sup>60</sup>

The U.S. Department of Labor has no role in reviewing the petitions or approving whether a U.S. employer may import a worker for the purposes of training and there are no worker protection standards or wage requirements for H-3 trainees. The reason for this may be because the H-3 visa is not actually designed for workers, even though

some productive work incidental to the training is allowed.<sup>61</sup> Nevertheless, the visa should not be used for training programs “primarily designed to provide productive employment.”<sup>62</sup> Indeed, USCIS should not grant petitions for H-3 trainees if they will be placed in a position normally filled by U.S. workers.<sup>63</sup> However, there is no labor market test and no government oversight of the actual training programs once the visa is issued and the trainee is admitted to the United States.

## C. B-1 SKILLED WORKERS IN LIEU OF H-1B

B-1 visas are also available for workers in specialized jobs who would otherwise qualify for an H-1 visa.<sup>64</sup> They are intended to allow foreign nationals who are employed by a business entity located abroad to work temporarily in the United States.<sup>65</sup> Such work may include performing tasks for U.S. employers who have business relationships with the business entity located abroad. Unlike B-1 domestic workers, the DOS Foreign Affairs Manual does not require that prospective B-1 in lieu of H-1B workers present a signed employment contract. Some business immigration lawyers describe the process as a flexible choice for international employers who want to avoid the complex and costly H-1B visa process.<sup>66</sup> Unlike the H-1B program, there is no limit to B-1 visas and employers are not required to meet any prevailing wage requirements. Neither DOS nor DHS publish either the number of B-1 visas issued for individuals in this subclass or the nationality of individuals who obtain this visa.

### Requirements: B-1 in Lieu of H-1B

✓	Non-immigrant intent
✓	<b>Employed by overseas firm</b> - May be foreign branch of U.S. company - Difficult for new employees whose first assignment is direct to the U.S.
✓	Specialty occupation plus Bachelor’s degree or equivalent experience
✓	<b>Paid by overseas firm</b> - Expense allowance may come from U.S. company
✓	No employment contract required by DOS

Source: 9 FAM N11.

#### 1. DURATION

B-1 visas generally are only valid for up to one year with the possibility of six-month extensions.<sup>67</sup> The duration of the initial B-1 in lieu of H-1B visa should be less than six months.<sup>68</sup> There is no regulation or guidance prohibiting extensions. Apparently, there is no limit to the number of possible extensions or maximum duration for visas in this subclass.

### DIGGING DEEPER: HISTORY OF B-1 IN LIEU OF H-1

The B-1 in lieu of H-1B subclass is not mentioned in the Immigration and Naturalization Act, the law that creates nonimmigrant visas.<sup>69</sup> Neither do regulations specify a particular B-1 in lieu of H-1B distinction.<sup>70</sup> DOS's Foreign Affairs Manual, which guides consular officers with visa processing matters, specifies a subclass for the B-1 in lieu of H-1, along with other types of B-1 visa-holders who are allowed to work in the United States.<sup>71</sup> While it is unclear when that subclass was first delineated, the "concept" was created in the 1960s in a joint effort of the Immigration and Naturalization Service and the U.S. Department of State (DOS).<sup>72</sup>

The B-1 in lieu of H-1 subclass was further explained in a cable issued by the Immigration and Naturalization Service (INS) in 1982.<sup>73</sup> That cable apparently referred to a case in which the agency had denied B-1 visitor visas to computer workers from India and apparently was hoping to disavow that decision.<sup>74</sup> The agency clarified that a B-1 visitor visa could be issued to foreign workers as long as their compensation comes from their foreign employer, they do not intend to immigrate to the U.S., they would otherwise qualify for H-1 status, and "[t]he services to be provided are necessary to the integrated international production, marketing, and service system of the corporation, its subsidiaries, and affiliates, and so [does] not involve the reassignment of an alien to an employer in the United States."<sup>75</sup>

In 1990, Congress had passed the Immigration Act of 1990, which created the H-1B visa, imposed an annual cap and added the requirement that employers submit a labor condition application.<sup>76</sup> A few years later, federal agencies proposed regulations which would have eliminated the B-1 in lieu of H subclass.<sup>77</sup> Some perceived the proposed regulations as an effort to stop employees of so-called "body shops" from obtaining B-1 visas.<sup>78</sup> When nonimmigrant workers are employed at a third party worksite that is not owned, operated or controlled by the direct employer, the primary employer is in the role of a middleman, and is commonly referred to as a staffing company or "body shop" or "job shop." Several large Information Technology (IT) companies routinely place thousands of their H-1B workers at third-party worksites instead of at their own places of business.<sup>79</sup> This practice has been problematic.<sup>80</sup> Nevertheless, the 1993 rule changes were never passed.

In 2011, a manager with Infosys alleged that the company was bringing its employees to the U.S. with B-1 visas specifically to [circumvent the H-1B protections](#) and raise profits.<sup>81</sup> [Congressional scrutiny](#) followed. DOS [pledged a thorough review](#). In October 2012, the agency sent an [explanatory cable](#) to consular officers regarding the B-1 in lieu of H-1B subclass. As a result of the Infosys manager's case, the federal government investigated that company for B-1 visa fraud and reached a [record \\$35 million settlement](#) in October 2013.

## II. B-1 HIRING PROCESS

Employers who hire B-1 nonimmigrants do not petition the government for special permission. Employers are not required to make any application with either the U.S. Department of Labor or the U.S. Department of Homeland Security. Rather, the workers are hired abroad and apply for the visa through the U.S. embassy or consular post.<sup>82</sup> Along with the visa application, the worker must present proof of eligibility for the visa and undergo a personal interview. Because the U.S. Department of State (DOS) does not report statistics for each particular B-1 subclass, the approval rates for domestic workers, trainees (in lieu of H-3) and skilled workers (in lieu of H-1B) are unknown. Once the worker has the visa, he or she travels to the U.S. and presents for admission at the U.S. border or port of entry. The U.S. Department of Homeland Security's Customs and Border Protection makes the final decision about whether the individual may enter the United States and for how long he or she may stay. B-1 domestic workers must apply for an Employment Authorization Document (EAD) from the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, before they can start work.<sup>83</sup> B-1 trainees and B-1 in lieu of H-1B workers do not require an EAD.<sup>84</sup>

### A. STEPS FOR EMPLOYERS

Employers locate and hire B-1 workers abroad. There is little information about this process or the extent to which recruiting agencies or other third parties are involved. In the case of domestic workers, the employer must sign an employment contract before the worker applies for the visa.<sup>85</sup> Employers are required to pay for the domestic worker's transportation to and from the United States.<sup>86</sup> Employers of B-1 trainees and high skilled workers are not required to have an employment contract or pay for the worker's travel to the United States. However, to obtain the visa, these trainees and high skilled workers must show that they are employed by the foreign employer and will continue to be paid from a source outside of the United States. Not much is known about this process, but presumably, the international employer will be assisting, if not handling outright, the B-1 visa application process for their foreign employees.

### B. STEPS FOR WORKERS

The prospective B-1 worker applies for the visa through DOS at the U.S. Consulate or embassy abroad. The first step is to complete the [Form DS-160](#) through an [online application](#) and upload a photo. The fee to apply for a B-1 visa is \$160.<sup>87</sup> Generally, B-1 applicants must have an interview and bring confirmation of the Form DS-160, a receipt that the fee has been paid, a passport, and any additional documents that show eligibility for the visa, including the purpose of the trip and evidence of a temporary stay in the United States.

Domestic workers must present their signed employment contract.<sup>88</sup> Individuals applying for B-1 in lieu of H-1B visas should show ongoing work for the overseas employer and clearly show employment with the company or firm abroad.<sup>89</sup> If the B-1 applicant is a new employee with the company and their first work assignment is in the U.S., however, it may be difficult to show eligibility for the visa. The worker must prove

that payment will not come from a U.S. employer.<sup>90</sup> The job or training pursued in the U.S. must be a type which would qualify the worker for an H-1B visa. In other words, it must be a specialty occupation and the worker must have a bachelor's degree or equivalent experience. The U.S. Department of Labor has no role in reviewing the job or the applicant.

As with other work visas that require nonimmigrant intent, the B-1 applicant must show a permanent residence abroad.<sup>91</sup> The consular officer evaluates whether the applicant truly intends to return to his or her home country after the U.S. stay by examining the nature of the employment abroad, family, social, cultural and economic ties, and evidence of funds to cover expenses.<sup>92</sup>

### 1. B-1 DOMESTIC WORKERS RECEIVE ANTI-TRAFFICKING BROCHURE

Consular officers must educate B-1 domestic workers about their basic legal rights under immigration, labor, and employment laws.<sup>93</sup> This is accomplished at the time of the visa interview when B-1 domestic workers receive the DOS's [anti-trafficking brochure](#). The information describes various work protections and directs aggrieved workers to call 911, a toll-free hotline for victims of trafficking, or the U.S. Department of Justice when there are serious issues. DOS must train its consular officers about the labor protections described in the brochure; these officers must note that it has been received, read, and understood by the applicant.<sup>94</sup>

### 2. ADMISSION TO THE UNITED STATES

A visa does not guarantee admission to the United States. The U.S. Department of Homeland Security's Customs and Border Protection (CBP) will either permit or deny entry after [their own inspection](#) and will determine the time permitted in the U.S., which may be less time than what is listed on the visa itself.<sup>95</sup>

### 3. B-1 IN LIEU OF H NOTATION

When the consulate issues the B-1 in lieu of H-3 or H-1B visa, the officers usually mark the visa with a notation "in lieu of H."<sup>96</sup> However, some business immigration lawyers advise that this is not always common practice.<sup>97</sup> Apparently, the purpose of the annotation is to facilitate the individual's admission by giving CBP information about the visitor's purpose.<sup>98</sup>

### 4. B-1 DOMESTIC WORKERS NEED EMPLOYMENT AUTHORIZATION DOCUMENT

B-1 domestic workers must obtain an employment authorization document (EAD) prior to starting work for their employer.<sup>99</sup> Workers must submit [Form I-765](#) to the U.S. Citizenship and Immigration Services (USCIS) along with the filing fee of \$380.<sup>100</sup> Workers may not apply for the EAD until they are present in the United States and USCIS will either approve or deny the application within 90 days.<sup>101</sup> Once the worker receives the EAD, he or she may apply for a Social Security Number and driver's license.<sup>102</sup>

## C. EXTENSION AVAILABLE THROUGH USCIS

All B-1 visa holders who want to extend their stay in the United States must apply for an extension from USCIS by submitting [Form I-539](#) with a fee of \$290 USD.<sup>103</sup>

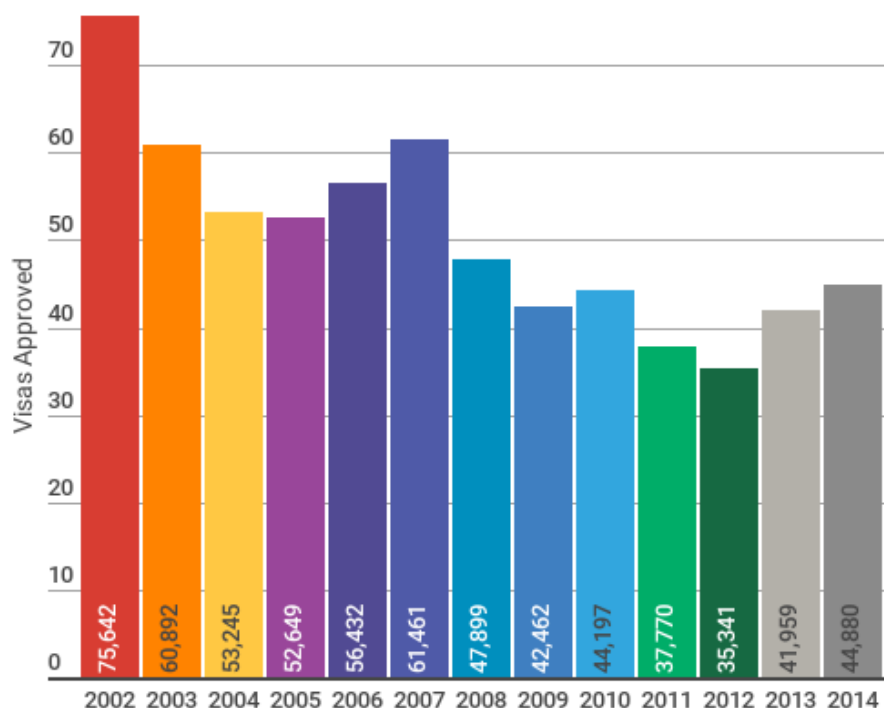
### III. B-1 WORKERS IN THE U.S. – DATA

The U.S. government keeps track of individuals who are issued B-1 visas and admitted to the United States in the B-1 visa category. However, neither the U.S. Department of State nor the U.S. Department of Homeland Security breaks down that information with respect to the particular B-1 subclasses that authorize employment. For example, from available information, it is impossible to know the number of domestic workers or trainees who have received B-1 visas. There is no information on where they come from, their age, or their gender. Likewise, there is no available data on the number of individuals with B-1 in lieu of H-1B visas, or any other demographic information. Because the U.S. Department of Labor has no role in either of these three B-1 subclasses, that agency does not have any data pertaining to the program either. Furthermore, no federal agency publishes information about employers of B-1 workers.

#### A. NUMBER OF B-1 VISITORS IN THE U.S.

The number of new B-1 visas issued annually has steadily declined over the last ten years, from 75,642 in 2002 to 44,880 in 2014.<sup>104</sup>

B-1 Visas Approved by State Department



Source: U.S. Department of State, FY 1997-2014 NIV Detail Table, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).



## 1. U.S. DEPARTMENT OF HOMELAND SECURITY

The U.S. Department of Homeland Security has two sub agencies that may be involved in the B-1 program and thus may be sources of data. At the border or port of entry, the U.S. Customs and Border Patrol (CBP) interviews workers who have received B-1 visas, decides whether to grant their admission, and issues the electronic I-94. These admissions are tracked and data is published annually. Unlike certain other nonimmigrant work visa programs, the U.S. Citizenship and Immigration Services (USCIS) has no role prior to the issuance of a B-1 visa. USCIS is involved, however, when the B-1 domestic worker applies for her Employment Authorization Document after her arrival, or when any B-1 visa holder applies for an extension of the visa. While USCIS publishes information on EAD applications and extensions generally, the information is not disaggregated by nonimmigrant visa category.

### A) U.S. CUSTOMS AND BORDER PATROL - ADMISSIONS

DHS annually publishes the number of admissions of individuals with B-1 visas.<sup>105</sup> In 2013, there were 3,498,688 admission events for individuals with a B-1 visa.<sup>106</sup> This number is much higher than the number of B-1 visas issued by the U.S. Department of State for two reasons. First of all, each time a nonimmigrant worker enters the United States, CBP counts the entry as an admission. That is, one single individual could be counted many times if they are admitted more than once. More importantly, however, the B-1 admissions numbers include individuals who are issued B-1 visas as well as individuals who are issued a combination B-1/B-2 visa. DHS does not have a category for the combined B-1/B-2 visa. Instead, the CBP inspector will decide whether to count the individual as either a B-1 business visitor or a B-2 tourist depending on questioning at the port of entry.<sup>107</sup>

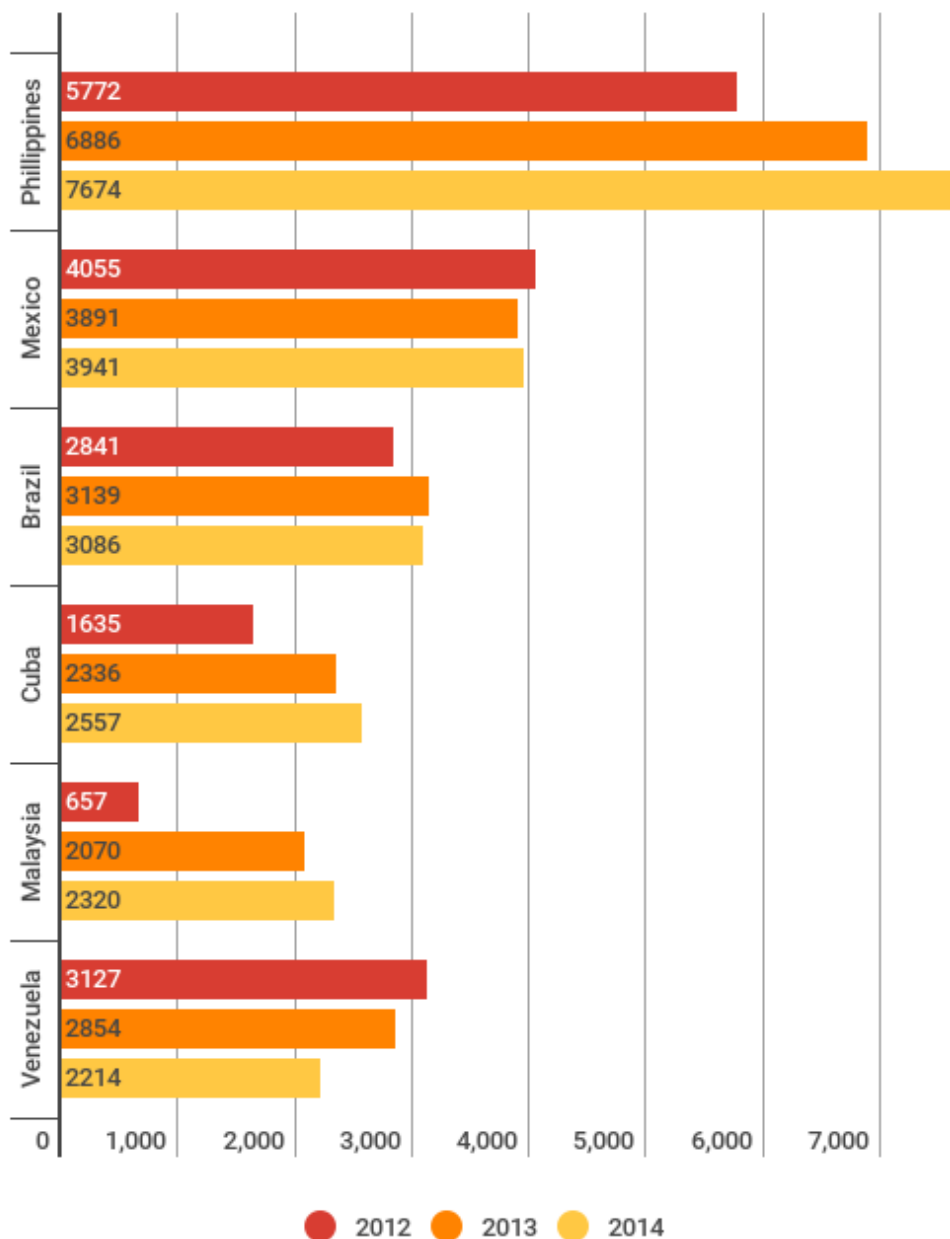
#### **DIGGING DEEPER: USCIS'S B-1A AND B-1B SUBCLASSES FOR DOMESTIC WORKERS**

When B-1 domestic workers are in the United States and want to apply for an extension of their visa from USCIS, they must classify themselves as either B-1A or B-1B on Form I-539.<sup>108</sup> The first subclass is for domestic workers employed by nonimmigrants and the second is for domestic workers employed by U.S. Citizens.<sup>109</sup> USCIS does not publish how many visa extensions are sought or approved for either of the B-1A and B-1B subclasses in particular. It is unclear if USCIS uses these B-1A and B-1B distinctions in any other context, such as when issuing Employment Authorization Documents to B-1 domestic workers. Because USCIS does not publish any data with respect to B-1 domestic workers, this is unknown territory. Neither the DOS nor DHS's Customs and Border Patrol make use of any distinctions in the data they publish with respect to individuals with B-1 visas.

## B. NATIONAL ORIGIN

The Philippines was the largest sending country for B-1 visas in 2014, followed by Mexico, Brazil, Cuba and Malaysia.<sup>110</sup> However, because the B-1 visa is not broken down into subclasses that allow work, this information tells us nothing about the nationality of individuals who are working in the United States with B-1 visas.

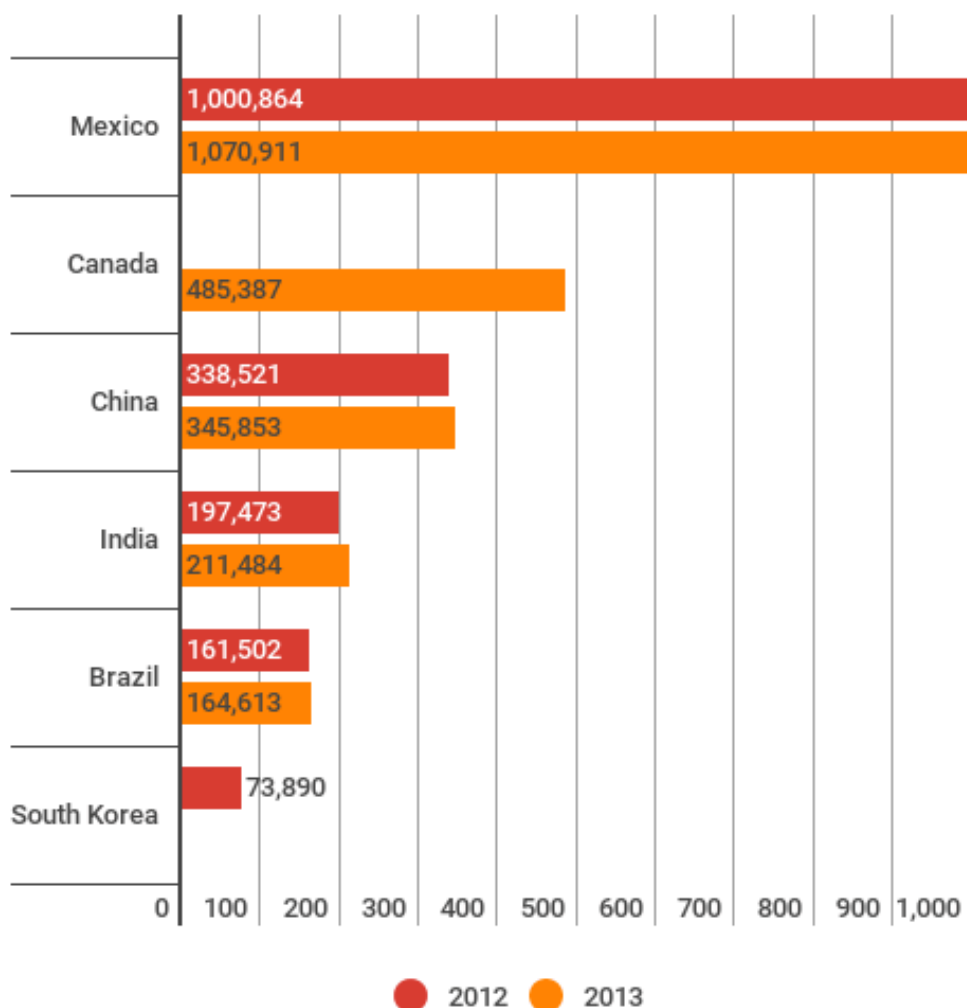
### Top Six Sending Countries: B-1 Visas Issued 2012-2014



Source: U.S. Department of State, FY 1997-2014 NIV Detail Table, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).

Based on admissions flow, the leading sending countries are Mexico, Canada, China, India, and Brazil.<sup>111</sup> However, in any case, because the B-1 visa is not broken down into subclasses, this information tells us nothing about the nationality of individuals who are working with B-1 visas.

### Top Five Sending Countries: B-1 Visas by Admissions Flow - 2012-2013



SOURCE: U.S. Department of Homeland Security, *Nonimmigrant Admissions by Class of Admission and Country of Citizenship: Fiscal Year 2013 (Supplemental Table 1)*, available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-nonimmigrant-admissions> (November 2015).

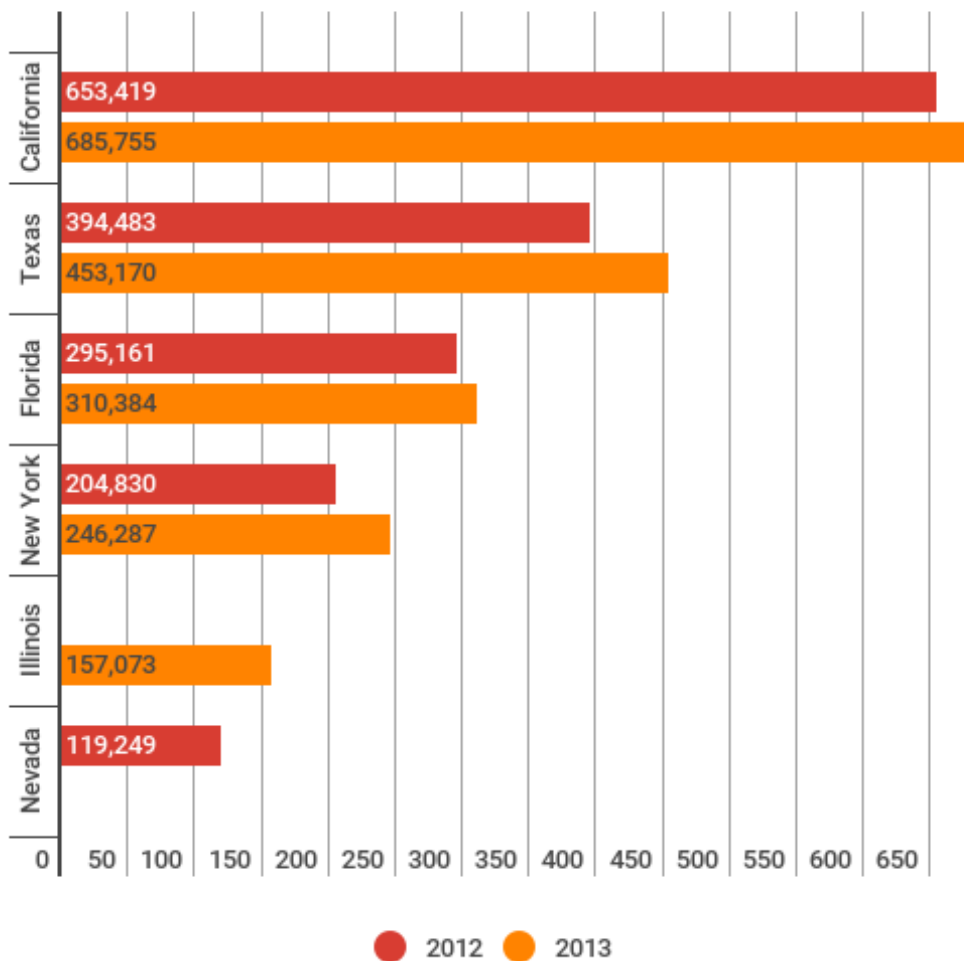
#### **DIGGING DEEPER: AGE AND GENDER DATA NOT PUBLISHED**

Information about the age and gender of B-1 workers is not published. DOS gathers and records the gender and age of every individual as part of the visa application process. However, there is no data collection or reporting requirement with respect to the B-1 visa subclasses which allow work, and DOS does not otherwise publish this information.

### DIGGING DEEPER: JOB LOCATION

DHS publishes information about the destination states of nonimmigrants based on information provided to CBP when B-1 business visitors are admitted into the country. However, because the B-1 visa is not broken down into subclasses, this information tells us nothing about where individuals with B-1 visas are working. The five destinations receiving the largest flow of B-1 business visitors are California, Texas, Florida, New York and Illinois.<sup>112</sup>

**B-1 Admissions Flow by Top Five Destination States: 2012-2013**



Source: U.S. Department of Homeland Security, Nonimmigrant Admissions (I-94 Only) by Class of Admission and State or Territory of Destination: Fiscal Year 2012, available at <http://www.dhs.gov/yearbook-immigration-statistics-2012-nonimmigrant-admissions> (October 2013); and U.S. Department of Homeland Security, Nonimmigrant Admissions (I-94 Only) by Class of Admission and State or Territory of Destination: Fiscal Year 2013, (Supplemental Table 3), available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-nonimmigrant-admissions> (November 2015).

## IV. B-1 WORKERS' RIGHTS

There are no regulations setting out protections for workers who are present in the United States with a B-1 visa, probably due to the fact that the B-1 visa is not supposed to be for work. Nevertheless, there are some protections for B-1 domestic workers outlined in the U.S. Department of State's Foreign Affairs Manual (FAM).<sup>113</sup> The FAM requires individuals applying for a B-1 domestic worker visa to have a signed employment contract with their employer; this is a prerequisite for the visa.<sup>114</sup> The required contract terms depend on the immigration status of the B-1 domestic worker's employer.<sup>115</sup> In all cases, the B-1 domestic worker's contract must specify that the wage paid will be the higher of the minimum or the prevailing wage.<sup>116</sup> The consular officer reviewing the domestic worker's B-1 visa application is the only government official charged with making sure that the contract exists and complies with the FAM's requirements. The FAM itself is not enforceable in court and does not mention any mechanism for B-1 domestic workers to enforce their contract terms. However, because there is an employment contract the domestic worker may bring a legal action in court to enforce its terms if the employer does not comply with them. Enforcement rights in a particular case will depend on state contract law.

There are no worker protections in the FAM for either trainees and high-skilled workers who have a B-1 visa in lieu of H designation. Whether those workers will have an employment contract depends on the particular situation; while the FAM does not require it, there is nothing to preclude the creation of a contract when the parties wish to do so. As with B-1 domestic workers, a B-1 trainee or high-skilled worker's enforcement rights in a given case will depend on state contract law.

Just like any workers in the United States, individuals with a B-1 visa have employment rights under any federal and state statutes and common laws that apply to them, including potentially the Fair Labor Standards Act, the Age Discrimination Employment Act, the Civil Rights Act, the Trafficking Victims Protection Act, the Racketeer Influenced Corrupt Organizations Act, and state wage and hour and discrimination laws. Whether certain laws apply to specific nonimmigrant workers depends on the facts of each particular situation.<sup>117</sup>

### A. SPECIAL PROTECTIONS FOR B-1 DOMESTIC WORKERS

In order to qualify for a B-1 domestic worker visa, the applicant must possess an employment contract signed by both the employer and the worker.<sup>118</sup> Some U.S. Consular processing posts have sample employment contract templates on their websites.<sup>119</sup> The rules about what terms must be included vary slightly depending on whether the employer is a U.S. citizen or a nonimmigrant.

#### 1. U.S. CITIZEN EMPLOYERS

The required employment contract must guarantee that the employer will pay either the minimum or prevailing wage, whichever is greater, for an eight-hour work-day.<sup>120</sup> Moreover, the contract must provide any other benefits "normally required for U.S. domestic workers in the area of employment."<sup>121</sup> Furthermore, employer must give at

least two weeks' notice before terminating the contract. Workers are only required to give their employers two weeks' notice before quitting.<sup>122</sup> U.S. citizen employers must pay for their domestic workers' roundtrip airfare and must provide free room and board while they are in the United States.<sup>123</sup> Additionally, the employment contract must state that the domestic worker will only work for that specific employer.<sup>124</sup>

## 2. NONIMMIGRANT EMPLOYERS

Nonimmigrant employers have similar requirements. Their B-1 domestic workers must have an employment contract as well, which also guarantees payment of the greater of the applicable minimum or prevailing wage.<sup>125</sup> The employer must provide free room and board and pay for the worker's initial travel expenses to the United States, and at the end of the assignment, for subsequent travel to the employer's onward assignment, or for the return trip back to the worker's country of normal residence.<sup>126</sup> The contract must state that the worker will only work for that employer.<sup>127</sup>

### **DIGGING DEEPER: COMPARING B-1 WITH A-3 AND G-5 DOMESTIC WORKERS**

Unlike with domestic workers of diplomats and international organization employees, the DOS's Foreign Affairs Manual does not require that B-1 domestic workers' employment contracts include terms relating to overtime, manner of payment, possession of passports or personal property, overall compliance with other laws, or whether the contract must be written in a language understood by the domestic worker. Another difference is that A-3 and G-5 workers are authorized to work immediately upon arrival in the United States whereas B-1 domestic workers must apply to the USCIS for employment authorization prior to performing work. There is no fee for A-3 and G-5 workers who apply for an extension of their visa whereas B-1 domestic workers must pay a fee for any extensions.

Comparison Chart: A-3 and G-5/B-1 Domestic Workers

Worker protections to be contained in employment contract required by DOS	A-3 and G-5 [1]	B-1 domestic workers nonimmigrant employer [2]	B-1 domestic workers USC employer living abroad visit temporarily [3]	B-1 domestic workers USC employer temporary assignment [4]
Signed employer-employee contract	Yes	Yes	Yes	Yes
Employer must pay higher of minimum or prevailing wage	Yes	Yes	Yes	Yes
Work hours per day must be specified	Yes	No	8 hour workday	8 hour workday
USDOL prevailing wage required	Yes	Yes	Yes	Yes
U.S. worker recruitment required	No	No	No	No
Employer may not restrict worker's movement	Yes	No	No	No
Employment restricted to single employer	Yes	Yes	Yes	Yes
Employer may not hold passport or personal property	Yes	No	No	No
Contract must be in English and in a language understood by the employee	Yes	No	No	No
Payment by check or electronic transfer	Yes	No	No	No
Employer payment of round trip transport costs	Yes	Yes	No	Yes
Free room and board	Yes	Yes	No	Yes
Comply with U.S. federal, state and local law	Yes	No	No	No
DOS provides Wilberforce anti-trafficking pamphlet of legal rights to visa applicant	Yes	Yes	Yes	Yes

Sources: [1] 9 FAM 41.21 N6. [2] 9 FAM 41.31 N9.3-3. [3] 9 FAM 41.31 N9.3-1. [4] 9 FAM 41.31 N9.3-2.

### 3. DOMESTIC WORKERS AND THE FAIR LABOR STANDARDS ACT

All domestic workers are entitled to an hourly minimum wage and protection from retaliation under the Fair Labor Standards Act (FLSA).<sup>128</sup> Many private household employers are exempt from FLSA's overtime requirements when domestic workers live in their employer's home.<sup>129</sup> As of January 2015, however, when third-parties (such as staffing agencies) are involved, live-in domestic workers are usually entitled to overtime pay.<sup>130</sup>

#### A) COUNTING THE HOURS WORKED

As of January 2015, new USDOL rules require that employers keep track of the number of actual hours worked by live-in domestic workers.<sup>131</sup> The amount of sleeping time, mealtime and other periods of complete freedom from all work tasks is generally not included as time worked.<sup>132</sup> Employers do not have to pay for the domestic worker's free time when it is sufficiently long enough for the worker to make effective personal use of the time. However, if such time is spent on-call and subject to interruptions for work, employers must pay for the entire time.

#### **DIGGING DEEPER: LIMITED COVERAGE FOR DOMESTIC WORKERS UNDER CERTAIN FEDERAL LAWS**

Like most domestic workers, B-1 nonimmigrants often fall outside the scope of critical federal labor, health and safety, and anti-discrimination provisions, including the National Labor Relations Act (NLRA) which protects workers' right to organize, and the Occupational Safety and Health Act (OSHA) which protects health and safety on the job. The NLRA does not cover domestic workers.<sup>133</sup> Neither does OSHA.<sup>134</sup> Due to minimum employee requirements in several federal civil rights laws, domestic workers who work in isolation may not be covered by certain anti-discrimination laws,<sup>135</sup> the Americans with Disabilities Act<sup>136</sup> or the Family Medical Leave Act.<sup>137</sup> State discrimination laws, however, may provide protection for domestic workers in many instances.

#### B. B-1 TRAINEES AND THE FAIR LABOR STANDARDS ACT

The fact that an individual is in the United States as a B-1 trainee does not preclude his or her treatment as an employee under the Fair Labor Standards Act (FLSA).<sup>138</sup> Internships and training programs in the for-profit private sector almost always amount to employment under the FLSA and therefore must be paid according to its minimum wage and overtime provisions. Under the FLSA, an "employee" is "any individual employed by an employer."<sup>139</sup> "Employ" means "suffer or permit to work."<sup>140</sup> All individuals who are "suffered or permitted" to work must be compensated for the services they provide for their employer: this definition is broad.



### DIGGING DEEPER: NARROW CIRCUMSTANCES ALLOW UNPAID INTERNSHIPS

Nevertheless, under certain narrow circumstances, trainees and interns are not considered employees. The inquiry is fact-specific. There are six factors used to determine whether a trainee is not within the definition of employee and thus not covered by the FLSA. The factors which must be met for a B-1 trainee to not be considered an employee under the FLSA include the following:

- the training is similar to that which would be given in a vocational school, even though it includes actual operation of the facilities of the employer;
- the training is for the benefit of the trainee;
- the trainees do not displace regular employees, but work under close observation;
- the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded; The trainees are not necessarily entitled to a job at the completion of the training period; and
- the employer and trainees understand that the trainees are not entitled to wages for the time spent in training.<sup>141</sup>

Generally, the more a program is structured around an academic experience, the more likely the internship will be viewed as an extension of the individual's education rather than an employment relationship. If the skills developed can be used in multiple settings, as opposed to just for the employer's operation, it is more likely the intern or trainee is not an employee under the FLSA.<sup>142</sup> However, if the program is a mere continuation of the employer's actual operations, and the employer benefits from a trainee performing productive work, then the fact that they may be receiving some benefits in the form of a new skill or improved work habits does not exclude them from the FLSA. Furthermore, if an employer uses trainees to augment its existing workforce, they are employees.<sup>143</sup>

There is a different rule for trainees or interns who are also non-profit volunteers.

*The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sector.<sup>144</sup>*

## V. B-1 ENFORCEMENT

Because there are no worker protection regulations pertaining to B-1 workers, there is no specific administrative enforcement scheme. There is no formal complaint procedure and no anti-retaliation protection. There is no regulatory mechanism to hold B-1 employers in particular responsible for lost wages and benefits. The U.S. Department of Labor's enforcement authority with regard to B-1 workers is limited to when a federal law – which it has authority to enforce -- applies. State agencies customarily will have the authority to enforce any state laws that may be implicated. B-1 workers may attempt to enforce their rights in court if there is an employment contract or applicable federal or state statute allowing a private lawsuit.

### A. U.S. DEPARTMENT OF HOMELAND SECURITY

The U.S. Department of Homeland Security's (DHS) enforcement role is not directed toward B-1 worker cases in particular. However, DHS does focus some attention on trafficking, which is an issue for many domestic workers, including those working with a B-1 visa. For example, DHS runs a project known as the [Blue Campaign](#). Designed to help combat human trafficking, the awareness campaign includes multi-lingual public service announcements, billboards, newspaper advertisements, victim assistance materials, and indicator cards for law enforcement. DHS has also expanded its online resources, including social media, and distributed a virtual toolkit to employers in the lodging, transportation, entertainment, agricultural, manufacturing and construction industries.

#### **DIGGING DEEPER: LIMITED ROLE FOR U.S. DEPARTMENT OF LABOR**

The U.S. Department of Labor (USDOL) does not have any statutory or regulatory role with respect to workers who hold B-1 visas. Since these employers are not required to conduct any labor certification test, USDOL plays no role in the process. B-1 workers could file an administrative complaint with USDOL about unpaid wages under the [federal wage law \(Fair Labor Standards Act\)](#).<sup>145</sup> Because USDOL does not always inquire about the complaining workers' immigration status, it is difficult to track the extent of complaints filed by B-1 workers specifically.

### B. PRIVATE LITIGATION

B-1 workers may file a lawsuit to enforce their rights and have their day in court just like any other U.S. worker, as long as there is a valid claim under U.S. law and the employer is subject to U.S. courts. The individual worker does not have to be present in the United States in order to file a lawsuit.

#### 1. ACCESS TO COUNSEL

B-1 workers have similar access to counsel issues as other groups of nonimmigrant workers in that lawyers may not be as willing to take their cases due to cultural differences, language barriers, and the often-short duration of work in the United States. Because B-1 domestic workers are typically low-wage earners, the amount of money owed may be small relative to the cost and complication of transnational litigation. Furthermore, because usually there is only one domestic worker per household, there is no possibility of collective representation; class action lawsuits are generally more

appealing to take on because they yield higher damages awards. Foreign workers who have a B-1 in lieu of H-1B or H-3 visa may not be as vulnerable as other nonimmigrants that work in isolation or in rural areas.

#### A) LEGAL SERVICES LAWYERS

Federally funded lawyers may represent individuals with an income below a certain financial level (usually between 125-200% of the federal poverty guideline depending on the legal services organization) and only certain classes of immigrants.<sup>146</sup> In many cases individuals with B-1 visas will not be eligible for legal services because of these immigration and financial restrictions. However, there are exceptions when the worker is a victim of domestic violence, sexual assault, human trafficking, fraud in foreign labor contracting or another crime.<sup>147</sup>

## VI. B-1 WORKERS IN THE U.S. – ISSUES

Government studies and advocacy reports on B-1 workers specifically are either nonexistent or hard to find. In 2001 Human Rights Watch published [a report](#) on the abuse of foreign domestic workers, including B-1s. However, looking at the extent of labor exploitation in the B-1 program as whole is uncharted territory. Perhaps the most pressing issue is the fact that the government does not seem to track the use of the B-1 visa for work. The lack of basic data makes it difficult to analyze the extent to which these subclasses are utilized by businesses to fill their labor needs, not to mention the issues faced by workers. Indeed, transparency is needed to examine the potential for visa fraud as well as labor exploitation. This is especially troubling with regard to B-1 domestic workers, given documented abuse of domestic workers generally. With B-1 in lieu of H-3 trainees, the primary concern is gross underpayment of wages. With the B-1 in lieu of H-1B subclass, the primary concern stems from the fact that the workers are not paid at a level commensurate with their H-1B or American counterparts, because there are no wage requirements, and the possible misuse of the program to displace U.S. workers.

### A. LITTLE-KNOWN B-1 DOMESTIC WORKERS VULNERABLE TO HUMAN TRAFFICKING

The fact that there is so little information available about the B-1 domestic worker program adds to these workers' vulnerability. Because neither the number of B-1 domestic workers nor their nationality is published, the public has no access to information about the use of this visa program enabling B-1 domestic workers to remain a truly hidden workforce. In January 2015, the National Domestic Workers Alliance launched their [Beyond Survival campaign](#) to end human trafficking of domestic workers, including B-1 workers and highlighted several trafficking cases brought against former employers. Indeed, while there have been some accounts of B-1 domestic workers who have suffered as victims of human trafficking, the issue has not been widely studied.<sup>148</sup>

#### 1. CASE EXAMPLE: *FERNANDES V. HAYES*

A case brought in federal court in Texas illustrates the potential for severe labor exploitation and human trafficking that exists within the B-1 domestic worker visa program. In *Fernandes v. Hayes*, a B-1 domestic worker from India who was employed by U.S. citizen employers in Kuwait was offered the opportunity to continue in her job with them when they decided to return to the United States.<sup>149</sup> They promised to pay her just under \$2000 per month for 48 hours of work per week; however, she alleged they never paid her that amount.<sup>150</sup> Over the course of several years, Ms. Fernandes alleged she worked 17 hour-days 7 days a week without pay and was subjected to routine humiliation, including being made to sleep on a couch or in the same bed with the children.<sup>151</sup> She alleged that the couple she worked for kept her passport, restricted her movement and led her to believe she could be imprisoned or deported if she attempted to leave; she finally escaped and suffered from serious post-traumatic stress disorder.<sup>152</sup>

She eventually found lawyers to help her and filed a lawsuit against the couple, alleging violations of the Fair Labor Standards Act and the Trafficking Victims Protection Act. After several years of litigation, the court entered a default judgment against the couple and ordered them to pay Ms. Fernandes over \$800,000 in money damages.<sup>153</sup>

## B. B-1 TRAINEE WORKER EXPLOITATION

The lack of any worker protections, government oversight, or transparency in the B-1 trainee program creates circumstances allowing for severe worker exploitation and even human trafficking.<sup>154</sup> Even though B-1 visas were not designed to allow productive work in the U.S., and B-1 trainees are not supposed to be engaging in productive work for an employer, the reality is often starkly different. Any program that potentially allows work but does not require a certain wage is problematic. There is great potential for unchecked misrepresentations especially when international recruitment is involved.

### 1. CASE EXAMPLE: *JOHN PICKLE CO.*

One case highlights the [B-1 visa's potential for severe worker abuse](#).<sup>155</sup> In 2001 a U.S. company, John Pickle Co. ("Pickle") recruited several dozen Indian workers to work in their Oklahoma manufacturing plant as B-1 trainees in anticipation of eventual employment at a newly created operation in Kuwait.<sup>156</sup> Pickle contracted with an Indian company to recruit the workers, handle their visa applications, and pay the workers while they were being "trained" in the United States.<sup>157</sup> The workers, however, were led to believe that they would be working only in the United States and paid large sums of money for the opportunity.<sup>158</sup> The Indian recruiter promised the workers free room and board, medical insurance, at least two years of employment, initial wages of \$650 per month plus overtime, which would be increased to \$1,200 per month after 18 months. Pickle himself traveled to India and with the contractor, confirmed the terms of work in the United States adding that the workers would be afforded "promised amenities according to American standards."<sup>159</sup> When inconsistencies during the visa application process arose, the foreign recruiter brushed aside any concerns.<sup>160</sup>

Upon their arrival in Oklahoma, the workers' immigration documents were confiscated.<sup>161</sup> They were required to eat and sleep at the dormitory at the manufacturing plant. Armed guards restricted the workers' ability to leave the facility. They received between \$2.89 and \$3.17 per hour for their work as welders, pipe fitters, and roll/brake operators at Pickle's steel fabrication plant.<sup>162</sup> The workers received their wages via direct deposit from the Indian contractor, who received the money for wages from Pickle.<sup>163</sup>

Several of the workers escaped and were identified by the U.S. government as [victims of human trafficking](#).<sup>164</sup> In the lawsuit that followed, the workers alleged wage violations of the Fair Labor Standards Act (FLSA), national origin discrimination under the Civil Rights Act, and several claims under state common law (false imprisonment, etc.).<sup>165</sup> The judge found that [Pickle owed the workers more than \\$1.24 million dollars](#) in back wages and damages for their suffering.<sup>166</sup> Prior to reaching this decision, the judge found that the Indian workers were "employees," rather than trainees under the FLSA, in

part because the employer controlled almost every aspect of their work and intended to create a competitive advantage and profit for itself by hiring the Indians, who possessed specialized skills, at low wages, for productive work to fill the needs of customers and generate income for a business.<sup>167</sup>

## C. VISA FRAUD IN B-1 IN LIEU OF H-1B

The lack of government oversight and transparency in the B-1 in lieu of H-1B program creates a situation ripe for fraud. B-1 visas were not designed to allow productive work in the U.S. Indeed, the B-1 in lieu of H-1B visa is supposed to be for individuals who are already employed by the foreign company and are only in the United States for a short time. However, because it is oftentimes much cheaper to hire a foreign worker earning foreign wages, there is a great incentive to take advantage of the B-1 in lieu of H-1B program and use it to staff a company.<sup>168</sup> Within the information technology specifically, foreign job contractors have long provided engineers to U.S. employers for foreign wages.<sup>169</sup> In some cases, using the B-1 visa for high skilled workers is fraudulent.

### 1. CASE EXAMPLE: *INFOSYS*

In October 2013, federal prosecutors reached a [record \\$34 million settlement with Infosys](#) after a two year visa fraud investigation. The U.S. government found that the information technology company hired workers with B-1 visas to avoid the higher costs of the H-1B visa program, which gave it an unfair competitive edge and undercut U.S. workers.<sup>170</sup> The case began in 2011, when a manager working for Infosys in the U.S. filed a [whistleblower lawsuit against Infosys](#) alleging the company retaliated against him for identifying potential visa fraud.<sup>171</sup> Infosys is one of the top H-1B-users. It provides on-site information technology consulting to corporate clients on a temporary basis and its U.S. workforce is mostly comprised of nonimmigrant workers from India.<sup>172</sup> The whistleblower claimed that Infosys aimed to boost profits by importing foreign workers with B-1 visas instead of H-1B visas, which require adherence to strict worker protection rules.<sup>173</sup> Infosys farmed out its B-1 workers to clients such as Wal-Mart, Goldman Sachs, American Express and Johnson Control.<sup>174</sup>

The [whistleblower's congressional testimony](#) explained how Infosys paid the Indian B-1 workers a stipend of \$15,000 per year, which is the salary they received in India, rather than the U.S. prevailing wage of \$65,000 that would have been required under H-1B prevailing wage rules. In order to help disguise Infosys' scheme from U.S. immigration authorities, the company created an internal website of "do's and don'ts," including specific written warnings such as not to "mention activities like implementation, design and testing, consulting, etc., which sound like work."<sup>175</sup>

The [court dismissed the manager's retaliation lawsuit](#) under Alabama state employment law, without passing judgment on whether the company had in fact committed visa fraud.<sup>176</sup> Another whistleblower complaint regarding visa fraud at Infosys was filed in 2012.<sup>177</sup> That separate case was resolved through mediation that same year.<sup>178</sup> In

October 2013, Infosys reached a \$34 million dollar settlement in a U.S. federal lawsuit against the company for the visa fraud.<sup>179</sup>

## ENDNOTES

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<sup>1</sup> 8 U.S.C. § 1101(a)(15)(B) (a B-1 applicant may not enter the U.S. “for the purpose of . . . performing skilled or unskilled labor”); 22 C.F.R. § 41.31 (a B-1 visa holder may not engage in “local employment or labor for hire”); 9 FAM 402.2-5(A).

<sup>2</sup> *Id.*

<sup>3</sup> 9 FAM 402.2-5; see also M. Jaidi, *The Many Legitimate Uses of the B-1 Visa* (April 24, 2011) and C. Mehta and O. Thuma, *Analyzing the “B-1” Business Visa* (July 5, 2004), both available at <http://www.cyrusmehta.com/News.aspx?Subldx=ocyrus201142475017&Month=&Fro...>

<sup>4</sup> 1 FAM 011.1a. (“The functional statements or organizational responsibilities and authorities assigned to each major component of the Department are described in this volume of the Foreign Affairs Manual. They comprise the basic organizational directive of the Department of State.”).

<sup>5</sup> There are numerous other categories of B-1 visitors for business which may involve work in the United States. See generally 9 FAM 402.2-5. Some examples of these categories include professional athletes (9 FAM 402.2-5(C)(4)), investors (9 FAM 402.2-5(C)(7)), foreign airline employees (9 FAM 402.2-5(E)(2)), and artists (9 FAM 402.2-5(F)(10)), among other professions.

<sup>6</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>7</sup> See 9 FAM 402.2-5(F)(1), (2), and (9). The FAM does not set out any requirements for an employment contract for B-1 visitors normally classifiable as H-1 or H-3.

<sup>8</sup> Compare the H visa programs which require approval from both the Department of Labor and the Department of Homeland Security.

<sup>9</sup> *Chellen v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278, 1282 (N.D. Okla. 2004).

<sup>10</sup> A. Sukthakar, *Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Foreign Labor System*, p. 11, fn 5, Global Workers Justice Alliance (2012), available at [http://globalworkers.org/sites/default/files/VisasInc\\_FINAL.pdf](http://globalworkers.org/sites/default/files/VisasInc_FINAL.pdf).

<sup>11</sup> 9 FAM 402.2-2(B).

<sup>12</sup> C. Miller, Ed., U.S. Department of Homeland Security, *U.S. Customs and Border Protection Inspector’s Field Manual*, at 47-50, (2008) available at <http://www.ilw.com/immigrationdaily/news/2008,0513-cbp.pdf>.

<sup>13</sup> 9 FAM 402.2-5(A).

<sup>14</sup> 8 U.S.C. § 1101(a)(15)(b)(2).

<sup>15</sup> 9 FAM 402.2-6(A).

<sup>16</sup> 22 C.F.R. § 41.12, Classification Symbols; see, e.g., U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).

<sup>17</sup> U.S. Department of Homeland Security, Nonimmigrant Admissions (I-94 Only) by Selected Category of Admission and Region and Country of Citizenship: Fiscal Year 2011, available at <http://www.dhs.gov/yearbook-immigration-statistics-2011-2>.

<sup>18</sup> Email correspondence with Office of Immigration Statistics employees, U.S. Department of Homeland Security (2013).

<sup>19</sup> 8 C.F.R. § 214.2(b)(3).

<sup>20</sup> 9 FAM 201.1

<sup>21</sup> For instance, the B-1/B-2-BCC is issued to Mexican citizens who are eligible for a B-1 visa and who seek to enter the U.S. as a temporary visitor for business or pleasure. BCC stands for Border Crossing Card. 9 FAM 402.2. See also 8 C.F.R. § 214.2(b)(4) and 22 C.F.R. § 41.32.

<sup>22</sup> 8 C.F.R. § 214.2(b)(4).

<sup>23</sup> 9 FAM 402.2-5(D).

<sup>24</sup> 9 FAM 402.2-5(D)(1).

<sup>25</sup> 9 FAM 402.2-5(D)(2) (“b. The U.S. citizen employer is subject to frequent international transfers lasting two years or more as a condition of the job as confirmed by the employer’s personal office and is returning to the United States for a stay of no more than six years.”). See also 9 FAM 402.2-5(D)(3). Nonimmigrants with a B, E, F, H, I, J, L, M, O, P or Q visa are eligible to employ B-1 domestic workers. Legal permanent residents (individuals with a green card), may not employ B-1 domestic workers because by definition they are residing in the U.S. permanently. See 9 FAM 402.2-5(D)(4). The B-1 domestic worker visa is meant to be temporary.

<sup>26</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>27</sup> 9 FAM 402.2-5(D)(5) (source of payment to a B-1 personal or domestic employee or the place where the payment is made or the location of the bank is not relevant).

<sup>28</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>29</sup> *Id.* The FAM does not address the basis for determining the prevailing wage or how the consular officers will determine whether this requirement is met. However, in the past DOS’s apparent policy is to consult the U.S. Department of Labor statistics. See U.S. Department of States, *Determining Prevailing Wage Requirement for Visas*



of Domestic Workers, Unclassified Cable 00141634 (August 2005), available at <http://www.fosterglobal.com/news/PrevailingWageRequirement.pdf>.

<sup>30</sup> 8 C.F.R. § 274a.12(c)(17); see also U.S. Department of Homeland Security, *B-1 Temporary Business Visitor*, available at <http://www.uscis.gov/working-united-states/temporary-visitors-business/b-1-temporary-business-visitor> (November 2015).

<sup>31</sup> This information may be available through a Freedom of Information Act request directed to DHS's sub-agency, the U.S. Citizenship and Immigration Services (USCIS). While the application for an Employment Authorization Document requires the nonimmigrant to list their visa status, it may or may not be broken down into the particular B-1 subclass. USCIS does require B-1 domestic workers who apply for extensions on Form I-539 to break down their subclass. This fact makes these numbers difficult for the public to track.

<sup>32</sup> 9 FAM 403.8, 402.2.

<sup>33</sup> 9 FAM 402.2-2(D).

<sup>34</sup> 9 FAM 402.2-5(D)(2).

<sup>35</sup> C. Miller, Ed., U.S. Department of Homeland Security, U.S. Customs and Border Protection Inspector's Field Manual, at 47, (2008) available at <http://www.ilw.com/immigrationdaily/news/2008.0513-cbp.pdf>.

<sup>36</sup> DOS calls this category "Aliens Normally Classifiable H-1 or H-3;" see 9 FAM 402.2-5(F). The in lieu of H-3 designation is further detailed in 9 FAM 402.2-5(F)(9); see also 9 FAM 402.1 and U.S. Department of State of State, *B-1 in Lieu of H*, Unclassified Cable 12 State 101466 (Oct. 12, 2012).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> However, B-1 trainees may be entitled to the minimum wage under the Fair Labor Standards act if in reality they are employees engaging in productive work in the United States. See *Chellen v. Pickle*, 344 F.Supp. 2d 1278 (N.D. Okla 2004).

<sup>40</sup> 8 C.F.R. § 214.2(b)(1); C. Miller, Ed., U.S. Department of Homeland Security, U.S. Customs and Border Protection Inspector's Field Manual, 2008 at 47, available at <http://www.ilw.com/immigrationdaily/news/2008.0513-cbp.pdf>.

<sup>41</sup> U.S. Department of State, *B-1 in Lieu of H*, Unclassified Cable 12 State 101466 (Oct. 12, 2012).

<sup>42</sup> See, e.g., *Fragomen India 2012*, U.S. Visa Adjudication Trends B-1, L-1, H-1B, available at <http://fragomenindia2012.com/Downloads/Fragomen-India-Symposium-2012-US-...>

<sup>43</sup> 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) (the H-3 visa is not for graduate medical training or training provided at or by an academic or vocational institution). H-3 visas are also available for participants in a special education exchange visitor program. 8 CFR § 214.2(h)(1)(ii)(E)(2).

<sup>44</sup> U.S. Department of State, FY 1997-2014 NIV Detail Table, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).

<sup>45</sup> *Id.*

<sup>46</sup> U.S. Department of Homeland Security, *Nonimmigrant Admissions (I-94 Only) by Class of Admission and State or Territory of Destination: Fiscal Year 2012*, available at <http://www.dhs.gov/publication/yearbook-immigration-statistics-2012-nonimmigrant-admissions> (last visited December 2015).

<sup>47</sup> 8 C.F.R. § 214.2(h)(7)(i). This category shall not apply to physicians, who are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.

<sup>48</sup> 8 C.F.R. § 214.2(h)(7)(i); 9 FAM 402.1.

<sup>49</sup> 8 C.F.R. § 214.2(h)(9)(iii)(C)(1). Petitions on behalf of special education trainees are valid up to 18 months. See (9)(iii)(C)(2). If the program's initial duration is less than two years, an extension is available, but only up to a two-year maximum total period of stay. See 8 C.F.R. § 214.2(h)(15)(ii)(D); 9 FAM 402.1. The total period of stay as a participant in a special education training program not to exceed 18 months. An H-3 alien trainee who has spent 24 months in the United States with any type of H visa or a previous L visa may not seek an extension or a change of status, or be readmitted to the United States with another type of H or L visa unless he or she "has resided and been physically present outside the United States for the immediate prior 6 months." 8 C.F.R. § 214.2(h)(13) (iv). There is an exception for H-3 trainees who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. See 8 C.F.R. 214.2(h)(13)(v).

<sup>50</sup> 8 C.F.R. § 214.2(h)(2)(i)(A); U.S. Department of Homeland Security, USCIS, *H-3 Nonimmigrant Trainee or Special Education Exchange Visitor*, available at <http://www.uscis.gov/working-united-states/temporary-workers/h-3-nonimmigrant-trainee/h-3-nonimmigrant-trainee-or-special-education-exchange-visitor> (November 2013).

<sup>51</sup> 8 C.F.R. § 214.2(h)(7)(ii)(B)(1)-(6); see also See Form I-129 Instructions, p. 10, available at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>.

<sup>52</sup> 8 C.F.R. § 214.2(h)(2)(i)(B).

<sup>53</sup> 8 C.F.R. § 214.2(h)(2)(i)(C).

<sup>54</sup> 8 C.F.R. § 214.2(h)(2)(ii).

<sup>55</sup> 8 C.F.R. § 214.2(h)(2)(iii).

<sup>56</sup> 8 C.F.R. § 214.2(h)(7)(iii)(A)-(H).

<sup>57</sup> *Id.*

<sup>58</sup> Non-immigrant intent is required for individuals applying for H-3 visas. See 8 U.S.C. § 1101(a)(15)(H).

<sup>59</sup> U.S. Department of State, *NIV Workload by Category 2012*, available at

<http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2012NIVWorkloadbyVisaCategory.pdf> (last visited December 2015); Adjusted Visa Refusal Rate = (Refusal – Overcome) / ((Refusal-Overcome) + Issuances). See U.S. Department of State, *Guidelines of the Visa Waiver Program*, available at <http://www.travel.state.gov/pdf/refusalratelanguage.pdf> (June 2013)

<sup>60</sup> 8 U.S.C. § 1225; 8 C.F.R. Part 235, Inspection of Persons Applying for Admission; see also A. Fragomen, Jr., A. Del Rey, Jr., and S. Bernsen, *IMMIGRATION LAW AND BUSINESS* § 2:11 (2010) (“The issuance of a nonimmigrant visa gives the alien permission to apply for admission to the United States at a port of entry... The visa does not assure an alien that he or she will be admitted to the United States, however; it merely indicates that a consular officer has found the alien eligible for temporary admission to the United States and not inadmissible under § 212(a) of the INA, 8 U.S.C.A. § 1182(a).”).

<sup>61</sup> 8 C.F.R. § 214.2(h)(7)(ii)(A)(1)-(4); 9 FAM 402.1. There are different requirements for trainees in a special exchange visitor program. 8 C.F.R. § 214.2(h)(7)(iv); 9 FAM 402.1.

<sup>62</sup> *Id.*; 9 FAM 402.1. There is an exception for participants in a special education exchange program. See 9 FAM 402.1.

<sup>63</sup> *Id.*

<sup>64</sup> DOS calls this category “Aliens Normally Classifiable H-1 or H-3;” see 9 FAM 402.2-5(F); see also U.S. Department of State, *B-1 in Lieu of H*, Unclassified Cable 12 State 101466 (Oct. 12, 2012).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., C. Mehta and M. Jaidi, *B-1 in Lieu of H-1B Visa in Jeopardy: Don't Throw the Baby Out with the Bathwater*, (May 26, 2011) available at [http://www.ilw.com/articles/2011\\_0718-mehta.shtm](http://www.ilw.com/articles/2011_0718-mehta.shtm) see also Murphy Law Firm, *News Brief: B-1 in Lieu of H-1B – Will this Useful Category Survive?* (July 1, 2011) available at <http://www.murthy.com/2011/07/01/b-1-in-lieu-of-h1b-will-this-useful-category-survive/>.

<sup>67</sup> 8 C.F.R. § 214.2(b)(1); C. Miller, Ed., U.S. Department of Homeland Security, *U.S. Customs and Border Protection Inspector's Field Manual*, at 47 (2008) available at [http://www.ilw.com/immigrationdaily/news/2008\\_0513-cbp.pdf](http://www.ilw.com/immigrationdaily/news/2008_0513-cbp.pdf).

<sup>68</sup> U.S. Department of State, *B-1 in Lieu of H*, Unclassified Cable, 12 State 101466 (Oct. 12, 2012). However, according to one immigration law firm, the U.S. embassy in London has made changes in the way it issues B-1 in lieu of H-1 visas. Instead of issuing a visa with an annotation specifying “in lieu of H-1” the practice is now to issue a standard ten-year B-1/B-2 visa (where the applicant qualifies) and enter information regarding the applicant's B-1 in lieu of H-1 status on the applicant's records, which are available to CBP officers at Ports of Entry. (The Embassy recommends that B-1 in lieu of H-1 applicants take their full set of documents demonstrating their eligibility on each trip to the U.S.), available at <http://www.goldsteinvisa.com/r-changes.html> (last visited December 2015).

<sup>69</sup> 8 U.S.C. § 1101(1)(15)(b).

<sup>70</sup> See, e.g., 8 C.F.R. § 214.1(b), Visitors, and 22 C.F.R. § 41.31, Temporary visitors for business or pleasure.

<sup>71</sup> 9 FAM 402.2-5.

<sup>72</sup> S. Bernsen, *The Proposed Restriction of the “B-1 in Lieu of H-1” Concept*, 70 Interpreter Releases 35, 1189-92 (September 13, 1993). The author of that article, Sam Bernsen, worked for INS at that time and was involved in creating the concept.

<sup>73</sup> *Id.*, footnote 8; see also A. Paparelli and S. Wehrer, *Business Visitors from Abroad - Tips and Traps for the HR Department*, Immigration Daily, available at [http://www.ilw.com/articles/2000,1018\\_Wehrer.shtm](http://www.ilw.com/articles/2000,1018_Wehrer.shtm).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); for a thorough listing of legislative history of the H-1B program see also GAO-11-26, Appendix V., at 100-102.

<sup>77</sup> 58 Fed. Reg. 40024-30 (July 26, 1993).

<sup>78</sup> K. Hodkinson, R. Pacis and E. Rios, *CBP/Consular Processing Issues*, American Immigration Lawyers Association (2012), available at <http://www.aialoads.org/seminars/seminar120911resources.pdf> (last visited August 2013).

<sup>79</sup> P. Chakravarty, *Weak Winners of Globalization: Indian H-1B Workers in the American Information Economy*, AAPI Nexus, Vol. 3, No. 2, p. 59, 64-67 (Winter 2005) (Describing first-hand exploitation of Indian H-1B employed by body shops).

<sup>80</sup> *Id.* When multiple places of employment are contemplated by an employer importing H-1B workers, the U.S. Department of Labor (USDOL) regulations state that “[a]ll intended places of employment shall be identified on the [Labor Condition Application (LCA)]; the employer may file one or more additional LCAs to identify additional places of employment.” 20 C.F.R. § 655.730(c)(5). Because USDOL has no role in the B-1 program, this regulation does not apply to any B-1 workers.

<sup>81</sup> See D. Rather, *Visa Loophole*, Huffington Post (March 25, 2011), available at [http://www.huffingtonpost.com/dan-rather/business-visitor-visa-fraud\\_b\\_840633.html](http://www.huffingtonpost.com/dan-rather/business-visitor-visa-fraud_b_840633.html) J. Preston and V. Bajaj, *Indian Company Under Scrutiny Over U.S. Visas*, N.Y. Times (June 21, 2011), available at <http://www.nytimes.com/2011/06/22/us/22infosys.html?pagewanted=1&ref=us>.

<sup>82</sup> Short-term business visitors from an authorized group of about 35 countries also can use the Visa Waiver Program without need to obtain a B-1 visa. Different rules apply for citizens of Mexico and Canada.

<sup>83</sup> 8 C.F.R. § 274a.12(c)(17). U.S. Department of Homeland Security, *B-1 Temporary Business Visitor: Certain B-1 Activities that Require an Employment Authorization Document*, available at <http://www.uscis.gov/working-united-states/temporary-visitors-business/b-1-temporary-business-visitor> (November 2015) (“The following types of B-1 business visitors require employment authorization: A personal or domestic service who is accompanying or following to join [certain nonimmigrants]. A domestic servant of a U.S. citizen accompanying or following to join his or her U.S. citizen employer who has a permanent home or is stationed in a foreign country, and who is temporarily visiting the United State”).

<sup>84</sup> See Form I-765 Instructions for a list of the B-1 visitor categories requiring EADs, available at <http://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf> (November 2015). This difference may be due to the fact that B-1 in lieu of H-1B workers are not intended to be earning money from sources within the United States.

<sup>85</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>86</sup> *Id.*

<sup>87</sup> U.S. Department of State, *Fees for Visa Services*, available at <http://travel.state.gov/content/visas/en/fees/fees-visa-services.html> (August 2013).

<sup>88</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>89</sup> 9 FAM 402.2-5(F).

<sup>90</sup> 9 FAM 402.2-5(F)(1); U.S. Department of State, Consulate General of the U.S., Mumbai, India, *Nonimmigrant Visas: B-1 in Lieu of H-1B*, available at [http://mumbai.usconsulate.gov/b1\\_in\\_lieu\\_of\\_h1b.html](http://mumbai.usconsulate.gov/b1_in_lieu_of_h1b.html) (August 2013).

However, a U.S. company may provide an expense allowance to the B-1 worker.

<sup>91</sup> 9 FAM 402.2-2(C).

<sup>92</sup> 9 FAM 402.2-2(C)(b), and 402.2-2(E)(b).

<sup>93</sup> 9 FAM 402.2-5(D)(6), and 402.3-9(C); see also 8 U.S.C. § 1375c(b)(3), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (WWTVPRA) (including “information on the illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and worker exploitation in the United States.”).

<sup>94</sup> *Id.* Consular officers must add a mandatory case note in the visa applicant computer system stating the pamphlet was provided and the applicant indicated that s/he understood its contents. This section of the FAM contains additional consular officer responsibilities with respect to anti-trafficking measures.

<sup>95</sup> 8 U.S.C. § 1225; 8 C.F.R. Part 235, Inspection of Persons Applying for Admission; see also Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., and Sam Bernsen, *Immigration Law and Business* § 2:11 (2010) (“The issuance of a nonimmigrant visa gives the alien permission to apply for admission to the United States at a port of entry...The visa does not assure an alien that he or she will be admitted to the United States, however; it merely indicates that a consular officer has found the alien eligible for temporary admission to the United States and not inadmissible under § 212(a) of the INA, 8 U.S.C.A. § 1182(a).”).

<sup>96</sup> U.S. Department of State, *B-1 in Lieu of H*, Unclassified Cable 12 State 101466 (Oct. 12, 2012) (“These paragraphs were edited in order to clarify activities that will permit a B-1 in lieu of H annotation”).

<sup>97</sup> K. Hodkinson, R. Pacis and E. Rios, *CBP/Consular Processing Issues*, American Immigration Lawyers Association (2012) (noting that “many consular officers are still refusing to annotate” creating “potential issues when the individual arrives at the Port of Entry with an unannotated B-1 and explains that they are coming to work in the U.S.”), available at <http://www.aildownloads.org/seminars/seminar120911resources.pdf>.

<sup>98</sup> *Id.*

<sup>99</sup> 8 C.F.R. § 274a.12(c)(17).

<sup>100</sup> See Form I-765, Application for Employment Authorization, available at <http://www.uscis.gov/i-765> (November 2015).

<sup>101</sup> 8 C.F.R. § 274a.13(d) (“Failure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days. . . . [I]f USCIS adjudicates the application prior to the expiration date of the interim employment authorization and denies the individual’s employment authorization application, the interim employment authorization granted under this section will automatically terminate as of the date of the adjudication and denial.”)

<sup>102</sup> 9 FAM 402.2-5(H)(b).

<sup>103</sup> See Form I-539 instructions (<http://www.uscis.gov/sites/default/files/files/form/i-539instr.pdf>). If biometrics (fingerprint) are required, the total fee is \$375.

<sup>104</sup> U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).

<sup>105</sup> U.S. Department of Homeland Security, *Nonimmigrant Admissions by Class of Admission and Country of Citizenship: Fiscal Year 2013 (Supplemental Table 1)*, available <http://www.dhs.gov/publication/yearbook-immigration-statistics-2013-temporary-admissions-nonimmigrants> (November 2015).

<sup>106</sup> *Id.* As of December 2015, DHS has not yet published data for 2014.

<sup>107</sup> Email correspondence with Office of Immigration Statistics employees, U.S. Department of Homeland Security (2013).

<sup>108</sup> See Form I-539 Instructions, page 2.

<sup>109</sup> *Id.*

<sup>110</sup> U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (November 2015).

<sup>111</sup> U.S. Department of Homeland Security, *Nonimmigrant Admissions by Class of Admission and Country of Citizenship: Fiscal Year 2013 (Supplemental Table 1)*, available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-nonimmigrant-admissions> (November 2015). As of December 2015, DHS has not published data for 2014.

<sup>112</sup> U.S. Department of Homeland Security, *Nonimmigrant Admissions (I-94 Only) by Class of Admission and State or Territory of Destination: Fiscal Year 2013 (Supplemental Table 3)*, available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-nonimmigrant-admissions> (November 2015). As of December 2015, DHS has not published data for 2014.

<sup>113</sup> The Foreign Affairs Manual is the organizational directive for the U.S. Department of State. Chapter 9, entitled Visas provides guidance to consular officials who issue the visas but is not binding or enforceable in and of itself. See U.S. Department of State, *Foreign Affairs Manual*, available at <https://fam.state.gov/> (November 2015).

<sup>114</sup> 9 FAM 402.2-5(D).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> The relevancy of a plaintiff's immigration status to remedies available under substantive employment laws is nuanced and has been widely discussed elsewhere. See, e.g., K. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 Cornell J.L. & Publ. Pol'y 611, 615-26 (2012) (comprehensively outlining the "pressing need for a more integrated understanding of the sometimes complementary, sometimes conflict prone, relationship between immigration law and employment policies"); and K. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 Comp. Lab. L. & Pol'y J 125, 141-155 (2009) (providing background on the intersection of immigration and employment law as they pertain to migrant workers' rights and specifically the effect of immigration status on what claims and remedies are available).

<sup>118</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>119</sup> See, e.g., U.S. Department of State (Manila post), available at [http://photos.state.gov/libraries/manila/279923/Consular\\_NIV/Contents%20of%20an%20Employment%20Contract%20for%20B-1%20Domestic.pdf](http://photos.state.gov/libraries/manila/279923/Consular_NIV/Contents%20of%20an%20Employment%20Contract%20for%20B-1%20Domestic.pdf) (November 2015).

<sup>120</sup> 9 FAM 402.2-5(D)(1)-(3).

<sup>121</sup> *Id.* The FAM does not specify the manner of determining other benefits that are normally required. However, the U.S. Department of Labor would be a source for that information.

<sup>122</sup> Damages for quitting without giving notice are not specified in the FAM.

<sup>123</sup> 9 FAM 402.2-5(D)(1)-(2).

<sup>124</sup> *Id.*

<sup>125</sup> 9 FAM 402.2-5(D)(3).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 29 C.F.R. § 552.102(a); see also 29 U.S.C. § 215(a)(3)(protection from retaliation); see also U.S. Department of Labor, WHD, *Fact Sheet #79: Private Homes and Domestic Service Employment Under the Fair Labor Standards Act (FLSA)* (Sept. 2013), available at <http://www.dol.gov/whd/regs/compliance/whdfs79.pdf>.

<sup>129</sup> *Id.*; 29 U.S.C. § 213(b)(21); see U.S. Department of Labor, WHD, *Fact Sheet #79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA)* (Sept. 2013), available at <http://www.dol.gov/whd/regs/compliance/whdfs79b.htm>

<sup>130</sup> See 78 Fed. Reg. 60453 (Oct. 1, 2013); see U.S. Department of Labor, WHD, *Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA)* (June 2014), available at <http://www.dol.gov/whd/regs/compliance/whdfs79e.htm>.

<sup>131</sup> 29 C.F.R. § 552.110(b); see 78 Fed. Reg. 60453 (Oct. 1, 2013). see U.S. Department of Labor, WHD, *Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA)* (Sept. 2013), available at <http://www.dol.gov/whd/regs/compliance/whdfs79c.htm>.

- <sup>132</sup> 29 C.F.R. § 785.23. U.S. Department of Labor, WHD, *Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)* (July 2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs21.htm>
- <sup>133</sup> 29 U.S.C. § 152(3) (NLRA) (“The term ‘employee’ shall include any employee . . . but shall not include any individual employed . . . in the domestic service of any family or person at his home.”).
- <sup>134</sup> 29 C.F.R. § 1975.6 (OSHA excludes private employers who hire workers for what are “commonly regarded as ordinary household tasks, such as house cleaning, cooking and caring for children”).
- <sup>135</sup> 42 U.S.C. § 2000e(b).
- <sup>136</sup> 42 U.S.C. § 12111 sec. 5(A).
- <sup>137</sup> 29 C.F.R. § 552.109(a).
- <sup>138</sup> See, e.g., *Chellen v. John Pickle Co., Inc.*, 344 F.Supp. 2d 1278 (N.D. Okla. 2004).
- <sup>139</sup> 29 U.S.C. § 203(e)(1).
- <sup>140</sup> 29 U.S.C. § 203(g).
- <sup>141</sup> See also U.S. Department of Labor, *Field Operations Handbook 10b99(b)*, available at [http://www.dol.gov/whd/FOH/FOH\\_Ch10.pdf](http://www.dol.gov/whd/FOH/FOH_Ch10.pdf); *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1026-27 (10th Cir. 1993); *Chellen v. Pickle*, 344 F.Supp. 2d 1278, 1292 (N.D. Okla. 2004). The trainee exemption does not come from FLSA. The agency enforcing the FLSA, the U.S. Department of Labor’s Wage & Hour Division and interpreting case law have determined the six criteria to consider.
- <sup>142</sup> U.S. Department of Labor, WHD, *Fact Sheet #71*, available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>
- <sup>143</sup> *Id.*
- <sup>144</sup> *Id.*
- <sup>145</sup> 29 U.S.C. §§ 201, et seq.
- <sup>146</sup> 45 C.F.R. Part 1611 (Financial Eligibility) and Part 1626 (Restrictions on Legal Assistance to Aliens).
- <sup>147</sup> 45 C.F.R. § 1626.2 et seq (2014); Legal Services Corporation, *Program Letter 14-3* (Oct. 29, 2014) and *Program Letter 05-2* (Oct. 6, 2005).
- <sup>148</sup> D. North, *Proposal: Let’s Look at All the Foreign Worker Programs as a Whole*, Center for Immigration Studies (June 7, 2012), available at <http://www.cis.org/north/proposal-lets-look-all-foreign-worker-programs-whole>.
- <sup>149</sup> *Fernandes v. Hayes, Plaintiffs’ Original Complaint*, Case 6:11-cv-00137-WSS (WD Tex. Filed May 26, 2011).
- <sup>150</sup> *Id.*
- <sup>151</sup> *Id.*, *Fernandes v. Hayes, Plaintiffs’ Motion for Default Judgment, Exhibit 6 Declaration of Aurelia Fernandes*, Case 6:11-cv-00137-WSS (WD Tex. Filed April 4, 2012).
- <sup>152</sup> *Id.*
- <sup>153</sup> *Fernandes v. Hayes, Order Granting Plaintiffs’ Motion for Default Judgment*, Case 6:11-cv-00137-WSS (WD Tex. Filed April 22, 2012).
- <sup>154</sup> M. Scaperlanda, *Human Trafficking in the Heartland: Greed, Visa Fraud, and the Saga of 53 Indian Nationals “Enslaved” by a Tulsa Company*, 1 LOY. U. CHI. INT’L L. REV. 219, 238-243 (2004) (offering a detailed explanation of how misuse of B-1 in lieu of H-3 trainee visa effectuates trafficking).
- <sup>155</sup> *Chellen v. John Pickle Company, Inc.*, 344 F. Supp. 2d 1278 (N.D. Okla. 2004) (*Chellen I*).
- <sup>156</sup> *Id.* at 1280-81. The company had previously trained foreign workers in the United States and then used them to launch their Middle East business venture. The employer indicated that “the training program was also a “good deal” for JPC because the trainees provided “cheap labor.” While court documents apparently do not clarify whether the workers received B-1 or B-2 visas, it seems unlikely that they would have been B-2 visas because they are for tourists and by all accounts, the visa applications were clear these workers were being imported for training.
- <sup>157</sup> *Id.*
- <sup>158</sup> *Id.* 1280-82. The workers did not believe they were being hired for a training program and invested large sums of money and left professional jobs in India for the opportunity.
- <sup>159</sup> *Id.*
- <sup>160</sup> *Id.*
- <sup>161</sup> *Id.* The employer’s wife took the passports, visas, return-trip airline tickets, and I-94s and placed them in a safe.
- <sup>162</sup> *Id.*
- <sup>163</sup> *Id.* The U.S. employer set up separate bank accounts for each worker and the Indian recruiter deposited money into these accounts. The U.S. employer reimbursed the Indian company for payment of the workers’ salaries via a series of monthly wire-transfers set forth in a written agreement that was to be in effect for two years.
- <sup>164</sup> Several of the workers received T-visas, available for victims of human trafficking. See 8 U.S.C. § 1101(a)(15)(T). The workers did not bring claims under the Trafficking Victims Protection Act, 22 U.S.C. §§ 7101, et seq. because at the time their claims arose that law did not allow for a civil private right of action for victims (enacted in 2003).
- <sup>165</sup> *Chellen I*, 344 F. Supp. 2d at 1279.
- <sup>166</sup> *Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247, 1294 (N.D. Okla. 2006) (*Chellen II*).

<sup>167</sup> Chellen I, 344 F. Supp. 2d at 1287-92 (relying on factors enumerated in Reich v. Parker Fire Protection District, 992 F.2d 1023, 1026 (10th Cir.1993) (quoting the Wage & Hour Manual (BNA) 91:416 (1975)).

<sup>168</sup> See, e.g., D. Papademetrious and S. Yale-Loehr, *Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants*, at 173 (1996) (“The B-1 temporary business category is generally fine in concept, as it facilitates international commerce and trade . . . however, the B-1 in lieu of H-1B concept raises some concerns. . . . Abuses of the B-1 visa category should be controlled through better regulations and more active enforcement. . . .”).

<sup>169</sup> See, e.g., J. Gentry and K. Kennedy-Luczak, *HR how-to: foreign workers: everything you need to know about employing foreign workers*, at 47 (2004) (citing “[a]buse of the ‘B-1 in lieu of H-1B policy by foreign job contractors providing computer engineers to U.S. employers under a consulting agreement”).

<sup>170</sup> J. Preson, *Deal Reached in Inquiry into Visa Fraud at Tech Giant*, The New York Times (October 30, 2013), available at <http://www.nytimes.com/2013/10/30/us/indian-tech-giant-infosys-said-to-reach-settlement-on-us-visa-fraud-claims.html>. P. Thibodeau, *Infosys ran ‘unlawful’ visa scheme, U.S. alleges in settlement*, Computerworld (October 30, 2013), available at [http://www.computerworld.com/s/article/9243672/Infosys\\_ran\\_unlawful\\_visa...](http://www.computerworld.com/s/article/9243672/Infosys_ran_unlawful_visa...)

<sup>171</sup> The initial case was filed in Alabama state court but was thereafter removed to federal court. For background of Palmer’s case and connection to the October 2013 settlement, see The Economic Times, *Infosys whistleblower could get \$5-8 mn from settlement* (Oct. 31, 2013), available at [http://articles.economicstimes.indiatimes.com/2013-10-31/news/43561373\\_1\\_...](http://articles.economicstimes.indiatimes.com/2013-10-31/news/43561373_1_...).

<sup>172</sup> For a U.S. worker’s perspective of Infosys’s hiring practices, see *Koehler v. Infosys*, Class Action Complaint, Case No. 2:13-cv-00885 (E.D. Wis., filed Aug. 1, 2013) (Alleging that out of 15,000 U.S. employees, 90% are of South Asian descent), available at <http://www.pbclaw.com/2013/08/02/proposed-class-action-complaint-filed-a...>

<sup>173</sup> J. Preston and V. Bajaj, *Indian Company Under Scrutiny Over U.S. Visas*, The New York Times, (June 21, 2011) available at <http://www.nytimes.com/2011/06/22/us/22infosys.html?pagewanted=all>.

<sup>174</sup> M. Bahree and M. Jordan, *Infosys Employee Testifies on Alleged Visa Fraud*, The Wall Street Journal, (July 28, 2011) available at <http://blogs.wsj.com/indiarealtime/2011/07/28/infosys-employee-testifies...>

<sup>175</sup> One document uncovered states: “DO NOT TELL THEM YOUR [sic] WORKING.” See D. Rather, *Visa Loophole*, Huffington Post (March 25, 2011) available at [http://www.huffingtonpost.com/dan-rather/business-visitor-visa-fraud\\_b\\_8...](http://www.huffingtonpost.com/dan-rather/business-visitor-visa-fraud_b_8...)

<sup>176</sup> J. Preston, *Judge Dismisses Whistle-Blower Suit Against Infosys*, The New York Times (August 20, 2012), available at <http://www.nytimes.com/2012/08/21/us/alabama-judge-dismisses-infosys-whi...>

<sup>177</sup> P. Thibodeau, *Infosys faces new visa fraud allegation*, Computerworld (August 9, 2012), available at [http://www.computerworld.com/s/article/9230100/Infosys\\_faces\\_new\\_visa\\_fr...](http://www.computerworld.com/s/article/9230100/Infosys_faces_new_visa_fr...)

<sup>178</sup> D. Thoppil, *Infosys Settles Harassment Suit With Former Employee*, Wall Street Journal (Dec. 14, 2012), available at <http://www.wsj.com/articles/SB10001424127887323981504578178953567641868>. Tripuraneni vs Infosys case settled, Deccan Herald (Dec. 14, 2012), available at <http://www.deccanherald.com/content/298586/tripuraneni-vs-infosys-case-s...>

<sup>179</sup> T. Schoenberg, David McLaughlin and Tom Korosec, *Infosys Settles with U.S. in Visa Fraud Probe*, Bloomberg Technology (October 31, 2013), available at <https://www.bloomberg.com/news/articles/2013-10-30/infosys-settles-with-u-s-in-visa-fraud-probe>.