GUEST WORKER VISAS: THE H-1B AND L-1

The H-1B and L-1 guest worker programs play an important role in our economy by attracting skilled talent to the United States. Unfortunately, these programs are not living up to their original intent, and instead have become tools for many employers to lower labor costs by replacing U.S. professionals with workers who can be paid below-market wages in employment arrangements where the employer controls their ability to live and work in the United States. These programs must be reformed so that they work for U.S. professionals and the people employed on H-1B and L-1 visas.¹

This fact sheet explains the H-1B and L-1 guest worker programs, explores the current usage of these programs, and discusses the consequences of the programs for professionals.

What are Guest Worker Visas?

Guest worker or “non-immigrant” visas, including the H-1B and L-1, allow U.S. employers to hire citizens of foreign countries to temporarily work in the United States.²

The H-1B Visa: Eligibility, Use and Regulation

The H-1B visa is a non-immigrant visa that allows an employer to hire guest workers who will be employed temporarily in “specialty occupations,” which are occupations that typically require at least a bachelor’s degree or equivalent.³ The visa is held by the employer (also known as the petitioner), not the worker (also referred to as the beneficiary).⁴ H-1B beneficiaries must either have a bachelor’s degree or higher, have a state license or certification that permits practice in the specialty occupation, or have training or experience in the specialty

³ Regulations outline this requirement in four ways. 1. “A bachelor’s or higher degree or its equivalent is normally the minimum entry requirement for the position.” 2. “The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree.” 3. “The employer normally requires a degree or its equivalent for the position.” 4. “The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a bachelor’s or higher degree.” See U.S. Citizenship and Immigration Services. “Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress.” (March 2020). Retrieved from https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf
⁴ 8 CFR §214.2(h)
occupation that is equivalent to completion of a degree. While employers use the H-1B visa to hire workers in a variety of occupations, most visas go to employers hiring workers in computer-related occupations (66.1 percent in FY 2019).6

The H-1B visa is typically issued for an initial term of three years and can be renewed for another three years. If the petitioning employer sponsors the worker for permanent status, then the H-1B visa can be extended in one-year increments while the worker waits for an available immigrant visa. While beneficiaries must leave the United States upon the expiration of their visas, those who spend at least one year outside of the U.S. may be eligible to return under a new H-1B visa. However, employers involved in Department of Defense (DOD) cooperative research and development projects or co-production projects can petition for H-1B visas that are valid for five years and able to be renewed so the beneficiary can stay in the United States for up to 10 years.7

There is an annual cap of 65,000 on the number of initial H-1B visas. However, there are several exceptions, which together raised the total number of initial visas issued to 148,374 in fiscal year 2019.8 The exceptions include 20,000 additional visas available every year for beneficiaries holding a master’s degree or higher from an American institution of higher education and an unlimited number of visas available for nonprofit and governmental organizations that conduct research and for colleges and universities. In addition, the annual cap does not apply to petitions for renewals, changes to the conditions of an H-1B beneficiary’s employment, or requests for new employment for an H-1B beneficiary already in the United States.9

Employers who petition for H-1B visas are generally not required to first recruit qualified U.S. workers for available positions, nor are they prohibited from displacing existing U.S. workers in favor of lower-paid guest workers.10 H-1B employers must only attest: (1) “that they will pay H-1B workers the amount they pay other employees with similar experience and qualifications or the prevailing wage;” (2) “that the employment of H-1B workers will not adversely affect the working conditions of U.S. workers similarly employed;” (3) that no strike or

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5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.
10 Based on their usage of the H-1B program, the Department of Labor may determine that certain employers are H-1B “dependent employers.” “Dependent employers” and other employers deemed “willful violators” must attest that (1) “The employer has not displaced a U.S. worker at the time of filing an H-1B visa petition;”, (2) ”Before placing an H-1B worker at a secondary employer’s work site, the employer has inquired as to the secondary employer’s intent to displace a U.S. worker;” (3) “The employer has taken good faith steps to recruit U.S. workers;” and (4) “The employer has offered the job to any equally or better qualified U.S. worker who applies for the job for which the H-1B worker is sought.” Employers are exempt from these requirements for H-1B workers who receive annual wages equal to or higher than $60,000, or have attained a master’s or higher degree in a specialty related to their employment. See U.S. Department of Labor. “Fact Sheet #62C: Who is an H-1B-dependent employer?” (July 2008). Retrieved from https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs62C.pdf and U.S. Department of Labor. “Fact Sheet #62S: What is a willful violator employer?” (July 2008). Retrieved from https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs62S.pdf.
lockout exists in the occupational classification at the place of employment; and (4) that the employer has notified employees at the place of employment of the intent to employ H-1B workers.”

The L-1 Visa

The L-1 visa is used by multinational corporations to transfer employees employed abroad to a branch, parent, affiliate, or subsidiary of that same employer in the United States. The petitioning company must have employed the L-1 beneficiary within the three preceding years and have continuously employed the beneficiary abroad for one year. There are two classes, the L-1A visa is for managers and executives and the L-1B visa is for employees with “specialized knowledge.” The L-2 visa is also available to grant employment authorization for dependents of L-1 workers.

As with the H-1B visa, the L-1 visa is held by the employer, not the worker. The L-1 visa program is uncapped. For employees entering the United States to establish a new office, the initial term of the L-1 visa is one year, while L-1 visas covering all other employees have initial terms of three years. The L-1 visa is renewable for up to seven years total for supervisors and five years for other qualified employees.

B-1 in Lieu of H-1B

The B-1 visa in lieu of H-1B (temporary visitors for business) allows employers to bring people otherwise eligible for the H-1B program from abroad to the United States even when the cap for H-1B workers has been reached. Beneficiaries of the B-1 in lieu of H must have a bachelor’s degree, perform work or receive training of an H-1B caliber (specialty work), be paid by their foreign employer (cannot be a U.S. source), and the task they are coming to America to do can be accomplished in a short amount of time. There is no information available on how many of these visas are issued each year, their duration of stay, the type of work involved, or the requesting/sponsoring employer.

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13 8 CFR § 214.2(l)
15 Ibid.
17 9 FAM 41.31 N11
In late 2011, the Boeing Company attempted to bring 18 Russian contractors from its engineering and design center in Moscow on B-1 visas in lieu of H-1B. The Russian contractors were denied entry at Sea-Tac Airport by immigration officials after the contractors admitted that they would be working at Boeing in Seattle as opposed to receiving training. The Russian engineers told investigators that they were coached by their Russian employer to tell immigration officials that they would be receiving training and not working. The union representing engineers at Boeing reported that Boeing had between 75 and 200 Russian engineers working at Boeing in Seattle at any one time on B-1 in lieu of H-1B visas. If the Russian engineers had been on H-1B visas, then Boeing would have to pay them wages set forth in the collective bargaining agreement. Instead, the Russian engineers were paid wages that were one-third to one-fifth of what the U.S. Boeing engineers made.18

Quantifying the High-Skilled Guest Worker Workforce

H-1B and L-1 workers are highly concentrated in STEM occupations. In fiscal year 2019, over 80 percent of H-1B petitions were for beneficiaries employed in STEM occupations, with 66 percent of petitions for computer-related occupations alone.19 While the vast majority of L-1A visa beneficiaries work in management occupations due to the nature of the visa, four out of the five top industries for employers applying for initial or continuing L-1A visas in FY 2019 were in computer or engineering related occupations, with these four industries accounting for 48.4 percent of L-1A visas alone. Of the applications with a known occupation listed, 63 percent of all initial or continuing L-1B visas issued in FY 2019 were for STEM occupations.20

Overall, in 2019, there were 1,681,963 non-U.S. citizens employed (7.8 percent) in STEM occupations (business and financial operations, computer and mathematical science, architecture and engineering, and life, physical, and social science occupations) and over four million non-U.S. citizens employed in all professional occupations (5.5 percent of the professional workforce).21

H-1B Visa Workforce

The U.S. government does not track how many H-1B workers are in the United States at any given time. USCIS only releases the number of initial and renewed visas that are issued each year, which makes it difficult to quantify the size and impact of the H-1B program on the labor market. The Economic Policy Institute (EPI) estimates there were 583,420 people working on H-1B visas in the United States in 2019, an increase of more than 50,000 from the estimate for 2016.22 This mirrors the long-term increase in employer reliance on the H-1B program.

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19 “FY 2019 Characteristics of H-1B Specialty Occupation Workers.”
22 “Temporary work visa programs and the need for reform.”
L-1 Visa Workforce

The L-1 visa is largely a black box. There is no data available showing how much L-1 workers are paid or the duration of their stays. In FY 2019, USCIS approved approximately 30,000 L-1 visa petitions filed by 12,000 employers. It is unknown precisely how many are working in the country at any given time, but EPI estimates that companies employed 337,164 L-1 workers in 2019.

Limited Regulations Promote Misuse

Low Pay and Minimal Protections

The H-1B and L-1 visa programs provide no real protections for guest workers or U.S. workers. The programs’ wage standards are so low (or non-existent) that it is easy for employers to replace existing U.S. workers with guest workers, saving employers hundreds of thousands of dollars.

While wage standards do exist for the H-1B visa, they are so low that there is still a significant cost incentive for employers to displace U.S. professionals. The program’s prevailing wage standard is set by three factors: occupation, location, and skill level. For an H-1B beneficiary, in a given job and in a given location, the employer can pay one of four levels based in part on the job requirements, which is determined by the employer. Analysis from EPI and Howard University Professor Ron Hira shows that 60 percent of H-1B positions were paid at the lowest two levels in fiscal year 2019, below the median wage for the given occupation and location. All types of companies, including big-name tech firms, take advantage of these low

23 “Summary of Approved L-1 Petitions by Employers.”
24 “Temporary work visa programs and the need for reform.”
25 Hira, Ron. “New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program.” (February 2015).
wage requirements. For example, Amazon and Microsoft each had three-fourths or more of their H-1B positions assigned as Level 1 or Level 2 and Google had over one-half assigned as Level 2.26

<table>
<thead>
<tr>
<th>Wage level</th>
<th>Percentile of surveyed wages by occupation &amp; region</th>
<th>Description of wage level</th>
<th>FY 2017</th>
<th>FY 2018</th>
<th>FY 2019</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>17th</td>
<td>Entry-level</td>
<td>32%</td>
<td>16%</td>
<td>14%</td>
</tr>
<tr>
<td>2</td>
<td>34th</td>
<td>Qualified</td>
<td>30%</td>
<td>47%</td>
<td>46%</td>
</tr>
<tr>
<td>3</td>
<td>50th</td>
<td>Experienced</td>
<td>11%</td>
<td>19%</td>
<td>19%</td>
</tr>
<tr>
<td>4</td>
<td>67th</td>
<td>Fully competent</td>
<td>6%</td>
<td>10%</td>
<td>12%</td>
</tr>
<tr>
<td>Other</td>
<td>N/A</td>
<td>Other wage surveys, including privately financed surveys</td>
<td>21%</td>
<td>8%</td>
<td>9%</td>
</tr>
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From an employer’s perspective, L-1 visas are desirable, because there are no minimum wage requirements, allowing employers to legally pay well below the market wage, offshore work, and displace U.S. workers. Employers only face consequences when they are caught failing to meet the lowest of labor standards. For example, in late 2013, a Fremont, California, tech company, Electronics for Imaging, was fined by the U.S. Department of Labor (DOL) and ordered to pay back wages to guest workers who were paid just $1.21 per hour to install computer systems. The employees were likely on L-1 visas. Since there is no prevailing wage requirement, Electronics for Imaging was only required to pay its foreign employees the state minimum wage (note: since there is no prevailing wage L-1 employers have to pay the higher of the state or federal minimum wage, consistent with standard employment law).28

Another factor that enables H-1B employers to take advantage of guest workers is that the H-1B beneficiaries can lose their legal status and be forced to return to their home country if they are terminated by their employer. The GAO noted that “[a]ccording to agency officials, H-1B workers are likely to be reluctant to file complaints against employers for fear that the company might be disbarred, which in turn could result in the complainant and fellow H-1B workers at the company losing their jobs and potentially having to leave the United States.” The H-1B workers are also reluctant to cooperate after a complaint has been filed “for fear of similar repercussions.”


27 Ibid.

DOL has cited numerous obstacles to its ability to protect H-1B workers, including lack of authority to initiate investigations, inability to access the Labor Condition Application database, inadequate fines for employer noncompliance with a DOL investigation, and lack of subpoena authority to obtain employer records.

Offshoring and Displacement

Offshore outsourcing is a term used to describe the practice of a U.S. company contracting with a foreign corporation to move in-house professional and technical jobs to a lower-cost foreign country. H-1B and L-1 visas are used to facilitate the movement of U.S. jobs offshore.

Nearly 40 percent of all H-1B visas are issued to just 30 employers, 17 of which are companies where the primary business model is based on outsourcing. These firms alone were issued 20,000 H-1B visas, nearly one-quarter of the total 85,000 annual limit for cap-subject visas.29

While there are many stories of employers using the H-1B program to displace existing workers, one of the most recent egregious examples of H-1B abuse was carried out by a public university. In February 2017, the University of California, San Francisco (UCSF) laid off 79 IT professionals and replaced them with H-1B workers who work for the Indian outsourcing company HCL Technologies. And to add further insult to injury, the UCSF employees were required to train their replacements before they were laid off.30

High profile cases at Disney, Southern California Edison, and AT&T further illustrate the misuse of the H-1B visa program. In 2015, the Walt Disney Company laid off an estimated 250 IT professionals at Disney World, many of whom were subsequently replaced by H-1B beneficiaries hired through an outsourcing company. Some of the laid off employees were even required to train their replacements in order to be eligible for severance payments.31 These high-profile layoffs were part of a pattern of outsourcing at different Disney corporate divisions. However, public scrutiny in the wake of the Disney World layoffs led the company to reverse course with one planned layoff of approximately 35 IT professionals at Disney/ABC Television in New York City and Burbank, California.32

Between 2014 and 2015, Southern California Edison (SCE), a highly profitable utility company, said it would shed 500 of its information technology professionals and replace them with H-1B workers, with some of the work going offshore. Before the SCE professionals were laid off they were required to train their guest worker replacements and sign a non-disparagement agreement in order to receive their severance packages. SCE essentially said it was contracting with India-based Infosys and Tata Consultancy Services, because other companies are adopting the same business strategy.\(^{33}\)

In 2019, telecommunications giant AT&T announced a series of agreements with outsourcing companies Accenture, IBM and Tech Mahindra, which are some of the most prodigious users of the H-1B visa. Just one of these contracts resulted in the transfer of an estimated 3,000 jobs to Accenture. However, after these professionals were “rebadged” as Accenture employees, many were instructed to train their guest worker replacements. As one impacted worker said after being transferred to an outsourcing company, “You’re at the mercy of a company that doesn’t really want you.”\(^{34}\)

The L-1 visa is also often used by companies to facilitate “knowledge transfer.” This means employers have guest workers come to the United States to learn new skills and then the employer has the guest worker take the knowledge and skills they’ve learned back to their home country. For example, Intel uses the L-1 visa so that American workers can “train L-1 workers who staff the company’s offices in Russia, India, China and other high-growth markets.”\(^{35}\)

Policy Recommendations

The United States should adopt policies that protect and promote the investment our country has made in its skilled workforce and ensure that opportunities are available for the young adults we have urged to enter STEM professions. DPE recommends the following six reforms be made to the high-skilled guest worker visa programs:

1. Require employers to advertise the job to U.S. workers and offer the job to a qualified U.S. applicant before seeking a nonimmigrant through the H-1B, L-1, or OPT programs.
2. Prohibit contractors and direct employers from laying off, terminating, or demoting a U.S. worker in order to replace that worker with a nonimmigrant.
3. Increase the wage floor for the H-1B program to no less than the median wage for the relevant occupation and area and establish minimum wage standards for the L-1 program. This would also create an incentive for employers to invest in training U.S. workers and better ensure that guest workers earn a fair return on their work.

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4. Adopt a wage-based visa allocation process that prioritizes international graduates who earned advanced degrees from U.S. colleges and universities while physically present in the United States and offered jobs at the highest wage level.

5. Ensure nonimmigrants and U.S. workers are able to report workplace violations without fear of retaliation and conduct regular audits to ensure employer compliance with visa program rules.

6. Allow H-1B and L-1 nonimmigrants to self-petition for permanent status and have the freedom to change jobs while waiting for available immigrant visas.

The Department for Professional Employees, AFL-CIO (DPE) comprises 24 national unions representing over four million people working in professional and technical occupations. DPE’s affiliates represent teachers, physicians, engineers, computer scientists, psychologists, nurses, university professors, actors, technicians, and others in more than 200 professional occupations.

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