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Leah Phelps Carpenter

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## THE STATUS OF THE H-1B VISA IN THESE CONFLICTING TIMES

*Leah Phelps Carpenter*<sup>†</sup>

### I. INTRODUCTION

*"Immigration is not a problem to be solved. It is a sign of  
a confident and successful nation."*<sup>1</sup>

When President Bush spoke these words, America had a sense of innocence and security that vanished following the terrorist attacks of September 11, 2002. Procedures regarding all aspects of immigration came under close scrutiny. Those procedures that just days earlier were criticized as being too restrictive, inhibiting business' ability to continue to grow, now were being criticized for being too lax. On September 10, 2001, the New York Times ran an article critical of U.S. consular officials in China. The Department of State officials were "denying nonimmigrant visa applications after interviewing the applicants for only a few minutes. How could they reasonably DENY a visa with so little information?"<sup>2</sup> In the course of one day, this thinking was turned upside down. How could they reasonably approve a visa in that small amount of time?<sup>3</sup>

Post-September 11, 2001, the entire field of immigration and naturalization law changed, including the H-1B visa program. Resulting changes in the economy further compounded concern over the need for

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<sup>†</sup> J.D., University of Tulsa College of Law, Tulsa, Oklahoma, May 2004; B.S., Environmental Design, University of Oklahoma, Norman, Oklahoma, May 1994. The author wishes to thank her husband, Scott, for his support and encouragement.

1. President George W. Bush, Remarks by the President at INS Naturalization Ceremony (July 10, 2001).

2. Steven C. Bell, *Where Are We Now? A Year Since September 11, 2001*, IMMIGR. BUS. NEWS & COMMENT, Sept. 15, 2002, available at 2002 WL 2020091 (emphasis added). See also Elisabeth Rosenthal, *Tough U.S. Visa Policy Riles Shut-Out Scholars in China*, N.Y. TIMES, Sept. 10, 2001, at A1, available at <http://query.nytimes.com/search>.

3. Bell, *supra* note 2.

the H-1B visa program. Fear of foreigners, fear of a continued downturn in the economy, fear over losing American jobs to "outsiders," and fear of an all-encompassing economic unknown, has gripped the U.S. business community and workforce.

This comment analyzes the current state of the H-1B visa program by beginning with a brief historical look at the creation of the immigration policy in the United States. Because immigrants founded this great nation, the struggle between America's past and continuing immigration has been a controversial subject throughout U.S. history as we seek to find a balance between the fundamental ideals that created the United States and the practical aspects of establishing a societal structure in which all citizens can excel. Part II will provide an overview of the significance of each recent legislative action taken by Congress. Part III lays a foundation of the components and requirements of the H-1B visa program, in context with other immigration law, explaining the process of attaining H-1B visa status for employers and nonimmigrant employees. Part IV focuses on enforcement of the H-1B program analyzing the structure Congress put in place to manage and enforce immigration law and the ramifications of that structure. Part V addresses specific areas of concern and the sources of those concerns. Additionally, several individual cases of abuse will be discussed.

This comment seeks to trace the validity of the criticisms of the H-1B visa to determine if the policy in place is addressing the needs of business, nonimmigrant aliens, and the U.S. workforce. Finally, since immigration law has changed following the acts of terrorism on September 11, 2001, and the economy is continuing to decline, this comment concludes with an analysis of the current economic environment in light of the recent shift in political power to determine how these changes may affect the H-1B visa program.

## II. HISTORY OF U.S. IMMIGRATION LAW

### A. *An Overview of U.S. Immigration Policy*

To better understand immigration law in the United States as it exists today, a brief look at the history of U.S. immigration law is beneficial. Prior to the late 1800s, there was no immigration policy of the United States.<sup>4</sup> Immigration was unrestricted.<sup>5</sup> However, over time, "very basic controls were established to prevent (exclude) the entry of criminals, the

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4. LITTLER MENDELSON, THE 2003 NATIONAL EMPLOYER HANDBOOK 1180 § 738, available at <http://www.littler.com/publications/ch22.pdf>.

5. *Id.*

diseased, and the insane.”<sup>6</sup> Due to the increasing number of immigrants coming into the U.S. at the time, Congress enacted a general quota system in 1921, entitled The Quota Law of 1921,<sup>7</sup> which established the first quantitative restriction on immigration into the United States.<sup>8</sup>

The framework for present-day U.S. immigration law was established in the Immigration and Nationality Act of 1952.<sup>9</sup> Congress has amended immigration law since 1952 through many legislative acts, though most notably in the Immigration Reform and Control Act of 1986,<sup>10</sup> the Immigration Act of 1990,<sup>11</sup> the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>12</sup> the American Competitiveness and Workforce Improvement Act of 1998,<sup>13</sup> and most recently, with the American Competitiveness in the Twenty-First Century Act of 2000.<sup>14</sup> Following the implementation of a national procedure to handle nonimmigrant employees in the U.S., three Acts have most significantly changed the H-1B program: The Immigration and Nationality Act of 1952, the Immigration Act of 1990 and the American Competitiveness in the Twenty-First Century Act of 1998, have most significantly changed the H-1B program.<sup>15</sup>

#### B. *The Significance of Each Act to Immigrant Employment*

The Immigration and Nationality Act of 1952 (INA) was the first legislation to extensively revise immigration procedure in the United

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6. *Id.*

7. 3A AM. JUR. 2D *Aliens and Citizens* § 3 (1998).

8. *Id.*

9. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1101 (2002)); Brian John Halliday, *In Order to Hire the Best Person for the Job, We Have to Do What?*, 11 U. FLA. J.L. & PUB. POL’Y 33, 35-36 (1999).

10. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1101 (2003)).

11. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1101 (2003)).

12. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1101 (2003)).

13. See American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-691 (1998) (codified as amended at 8 U.S.C. § 1101 (2003)).

14. See American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (codified at 8 U.S.C. § 1101 (2003)).

15. Immigration and Naturalization Service, *Questions and Answers: Changes to the H-1B Program* (Nov. 21, 2000), at <http://www.ins.usdoj.gov/graphics/publicaffairs/questions/H1Bchang.htm>.

States.<sup>16</sup> The INA divided immigration into three general categories: immigration intended to reunite families, immigration based on employment, and immigration for humanitarian reasons.<sup>17</sup> The INA enacted both major and minor changes in U.S. immigration law that continue to be good law today.<sup>18</sup> Immigration laws, for the most part beginning with the Immigration and Nationality Act in 1952 and subsequent amendments, control the admission, exclusion, and deportation of illegal immigrants. More importantly for the purposes of this discussion, the INA implemented the labor certification requirement<sup>19</sup> and expanded previous quota systems implementing preferences for persons with certain skills and occupations.<sup>20</sup>

The Immigration Reform and Control Act of 1986 (IRCA) significantly changed certain aspects of the employment of immigrants and the responsibilities of the employer.<sup>21</sup> Under the IRCA, it became illegal for U.S. employers to knowingly hire aliens not authorized by the Immigration and Naturalization Service to work in the U.S.<sup>22</sup> This increased burden on employers came in the form of new procedures requiring employers to verify documents of identity and permission to work.<sup>23</sup>

The Immigration Act of 1990 (IA90) marked a "fundamental shift in immigration thinking and priorities towards stronger consideration of labor-market-oriented policies. Much of this shift in thinking can be traced to the increasingly competitive global environment of the late 1980s."<sup>24</sup> By requiring additional documentation and attestation, the Immigration Act of 1990 significantly increased the burden on employers and conferred greater power and additional duties on the Department of Labor.<sup>25</sup>

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16. MENDELSON, *supra* note 4.

17. Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 214 (2002).

18. 3A AM. JUR. 2D *Aliens and Citizens* § 5 (1998).

19. See Immigration and Nationality Act of 1952 § 212(a)(5) (codified as 8 U.S.C. § 1182(a)(5) (2003)).

20. 3A AM. JUR. 2D *Aliens and Citizens* § 5 (1998).

21. MENDELSON, *supra* note 4, at 1180.

22. *Id.*

23. *Id.*

24. Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States Under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 797 (1997).

25. Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 68 NO. 2 INTERPRETER RELEASES 29, 30 (1991).

The Immigration Act of 1990 substantially revised the categories of employment separating out "specialty occupations," defined as occupations requiring highly specialized knowledge and a bachelor's degree or its equivalent.<sup>26</sup> Previously grouped occupations such as aliens with extraordinary ability, accompanying aliens, and athletes and entertainers, were given new "O" and "P" visa categories.<sup>27</sup> The IA90 prolonged the time a nonimmigrant can work in the U.S. allowing for an initial period of three years with a three-year extension, not to exceed six years.<sup>28</sup> Previously, Immigration and Naturalization Service regulations allowed for a maximum of five years and a theoretical sixth year justified only under "extraordinary circumstances."<sup>29</sup>

Most significantly, the Immigration Act of 1990 increased the cap for H-1B visas to 65,000 annually, almost doubling the initial numbers allowed under this category.<sup>30</sup> In creating the additional categories for the occupations previously grouped under the H-1B classification, the legislation not only increased the overall number of visas available, but also excluded previously included groups to allow for greater numbers of skilled workers in "specialty occupations."

The Illegal Immigration Reform and Responsibility Act of 1996 (IIRRA) passed the legislature during a time of intense political pressure to tighten immigration laws.<sup>31</sup> The purpose behind the legislation was to curb illegal immigration by adding administrative procedures for deportation, employment verification, border patrol and the administration of public benefits to illegal immigrants.<sup>32</sup> Congress reasoned that restricting access to U.S. employers would result in lower numbers of illegal immigrants entering the U.S. workforce and a decrease in wage competition.<sup>33</sup> Additionally, this legislation sought to achieve other socioeconomic goals to reduce crime rates and decrease the burden

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26. Immigration and Nationality Act of 1952 § 214(i)(1) (codified at 8 U.S.C. § 1184(i)(1) (2002)).

27. Immigration Act of 1990 § 207 (creating INA, §101(a)(15)(O)-(P)).

28. Immigration and Nationality Act of 1952, § 214(g)(4) (codified at 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(15)(ii)(B)).

29. See 8 C.F.R. § 214.2(h)(15)(ii)(A).

30. See Jung S. Hahm, Note, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa program*, 85 CORNELL L. REV. 1673, 1675 (2000).

31. Hiep D. Truong, Comment, *The Illegal Immigration Reform and Responsibility Act of 1996: A Cost-Effective Measure for the U.S. Citizens or a Punishment for Immigrants Seeking the American Dream?*, 3 DEPAUL DIG. INT'L L. 54 (1997).

32. *Id.*

33. *Id.*

on legal U.S. workers who pay taxes for public assistance programs of education, welfare, and health services utilized by illegal immigrants.<sup>34</sup> Though some studies show this concern to be unfounded, it was a major concern for supporters of the IIRRA.<sup>35</sup>

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) introduced additional regulation intended to protect U.S. workers while allowing for a temporary increase in the number of available H-1B visas.<sup>36</sup> The significant changes set forth in the ACWIA set aside additional funds for U.S. worker education and training.<sup>37</sup> The Act established that employers seeking to utilize the H-1B visa program must pay for this through enhanced filing fees.<sup>38</sup> The American Competitiveness and Workforce Improvement Act came about as a direct response to intense political pressure – from business in the midst of an economic boom needing skilled employees, and from organized labor focused on protecting U.S. workers.<sup>39</sup>

The American Competitiveness in the Twenty-First Century Act (AC21) was a continuation of the American Competitiveness and Workforce Improvement Act reform. The AC21 increased the enhanced filing fee paid by employers utilizing the H-1B visa program and provided for a marked temporary increase in the number of H-1B visas available.<sup>40</sup> The AC21 significantly increased the cap for the years immediately following the legislation: 195,000 for FY2001, FY2002, and FY2003.<sup>41</sup> The AC21 also addressed the backlog within the Immigration and Naturalization Service processing by authorizing an additional fee the

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34. *Id.* Concerns over immigrants using social services paid for by U.S. citizens and all workers in the United States reportedly are unfounded. The enactment of Immigration Reform and Control Act of 1986 was the result of this type of fear over massive immigration through our southern border with Mexico in the 1980s. To counter this concern, studies show immigrants experience economic inequality because though they pay taxes in the United States, they are essentially contributing money to a system that does not return benefits to them. Immigrants, who make up 10.2% of the population, pay about 10.6% in taxes, which totals about \$7.2 billion . . . according to the Urban Institute, the money paid by taxpaying immigrants more than offsets the costs of any public services they might use, including education, welfare benefits, social security, and health services. *See id.* at 58.

35. *Id.*

36. *See* 8 C.F.R. § 103.7(b) (1998).

37. *See* American Competitiveness and Workforce Improvement Act of 1998 § 414.

38. *Id.*

39. Hyacinth Leus, *Using the H-1B Visa to Fill Staffing Needs with Foreign Professionals*, 23 LOS ANGELES LAW, Oct. 2000, at 25.

40. Hahm, *supra* note 30, at 1675.

41. American Competitiveness in the Twenty-First Century Act of 2000 § 102.

employer may pay to obtain faster service.<sup>42</sup> The increase in the enhanced filing fee charges a premium of \$1,000 for faster service and guarantees the employer a final decision on each case within fifteen days or less.<sup>43</sup> Additionally, the law exempted any H-1B petition filed before September 1, 2000, from the cap and exempted any nonimmigrant employed by an institution of higher education or certain research organizations.<sup>44</sup> These exemptions resulted in additional H-1B visas available to business for the inaugural year.

### III. THE H-1B VISA AND RECENT LEGISLATION

#### A. *The Economic Environment During Recent Legislative Reform*

Historically, the U.S. has permitted foreign workers to come to the U.S. on a temporary basis to fill jobs that U.S. employers could not fill with American workers.<sup>45</sup> There has been long-standing conflict between the legal U.S. workforce and the government's efforts to satisfy employers' demand for inexpensive, reliable labor, historically for agricultural labor.<sup>46</sup> This need has flourished into other sectors of the economy in recent times, namely the technology and health care sectors.<sup>47</sup> Based on the general public's fear that "immigrants will depress the economy by taking jobs and exhausting social security and other benefits,"<sup>48</sup> the general U.S. policy of closed borders conflicts with the need of business for skilled workers. Such conflicting shifts in ideology have led to inconsistent policy, implementation, and enforcement of immigration law.<sup>49</sup>

The dramatic expansion of the nonimmigrant visa program by Congress in the IA90 was enacted to meet the technological explosion of the 1990's.<sup>50</sup> The legislation was generally met with positive feedback from

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42. See 8 U.S.C. § 1356(u) (2002).

43. *Id.*

44. See American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. 106-313.

45. Diane Rezendez Khirallah, *Where Does H-1B Fit*, INFORMATION WEEK, Feb. 4, 2002, at <http://www.informationweek.com/story/lwk2002020150021>.

46. Catherine Halliday, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders*, 36 VAL. U. L. REV. 181, 186 (2001).

47. Brian John Halliday, *In Order to Hire the Best Person for the Job, We Have to Do What?*, 11 U. FLA. J.L. & PUB. POL'Y 33, 38 (2002).

48. C. Halliday, *supra* note 46, at 185.

49. See *id.*

50. B. Halliday, *supra* note 47, at 36.



the public and business sectors.<sup>51</sup> At the time, the economy was growing rapidly, especially in technology and the computer sciences, and U.S. employers had a large number of professional-level vacancies that could not be filled by U.S. workers.<sup>52</sup> Technology employers claimed the needed personnel were not available.<sup>53</sup> In the decade following the expansion of the H-1B visa program, the role of the program became clear: if employers could not find skilled technology and other trained personnel, employers could use the H-1B visa program to open up the global labor market for these vacant positions.<sup>54</sup>

The H-1B visa is of particular interest to technology employers because it is a means of obtaining foreign professional workers for temporary employment.<sup>55</sup> The Immigration and Nationality Act outlined this type of visa by defining the required employment as: "a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States."<sup>56</sup> When originally enacted, the H-1B process was a straightforward process;<sup>57</sup> however, recent legislation, namely the American Competitiveness and Workforce Improvement Act of 1998 and subsequent acts, have added complexity to the process in an attempt to protect U.S. workers.<sup>58</sup>

Following the definition of the type of occupation that an H-1B visa worker can fill, the basic requirements for a foreign worker to qualify for the H-1B visa are: (1) full state licensure, if required for practice in a state;

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51. *Id.*

52. Hahm, *supra* note 30, at 1674-75.

53. *Id.*

54. B. Halliday, *supra* note 47, at 38. Within U.S. immigration law, there exists a sophisticated system of allowing immigrants from other nations into the U.S. based on many factors in the overall system of immigration law. Specifically addressing the H-1B users, "the majority of H-1B visas are granted to skilled workers from Asia: in 1999, 55,047 were granted to Asian Indians, 5,779 were granted to Chinese, 3,339 were granted to Japanese, and 3,065 were granted to Filipinos." Sabrina Underwood, Note, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1B Visa Program*, 15 GEO. IMMIGR. L.J. 727, 731 (citing Hanna Rosin, *A Worn-Out Welcome Mat*, WASH. POST, Sept. 16, 2000, at A1). Additionally, "[s]ix out of the seven most ravenous users [businesses] of the H-1B visa program are companies that are either owned by Indian nationals, or which are subsidiaries of companies headquartered in India." B. Halliday, *supra* note 47, at 51-52.

55. B. Halliday, *supra* note 47, at 38.

56. 8 C.F.R. 214.2(h)(4)(i)(A)(1) (2002).

57. See Leus, *supra* note 39, at 24.

58. *Id.*

(2) a U.S. institution baccalaureate degree (or its foreign equivalent) in the specific specialty or a related field as a minimum entry into the occupation; or (3) education, training, or experience in the specialty equivalent to the completion of a baccalaureate degree.<sup>59</sup>

An employer must first demonstrate that the position the employer seeks to fill requires a professionally degreed person or one possessing professional-level experience.<sup>60</sup> Additionally, there must be a connection between the applicant's degree, knowledge and the vacant position.<sup>61</sup> The H-1B category typically includes professionals engaged in engineering, architecture, computer programming, accounting, university-level research, and medical science.<sup>62</sup>

### *B. Components of the H-1B Visa*

There are three primary attestations required of an employer seeking to utilize the H-1B visa program under the reform put in place by the Immigration Act of 1990.<sup>63</sup> The first is the prevailing wage requirement.<sup>64</sup> The Act requires U.S. employers seeking to utilize H-1B nonimmigrant employees to attest that the employer will pay the H-1B nonimmigrant at least ninety-five percent of the prevailing wage for the specialty occupation.<sup>65</sup> The employer can meet the prevailing wage requirement of the Act by documenting the prevailing wage for the position sought or the actual wage the employer currently pays to other workers if the position currently exists. The actual wage is required if the wage is higher than the prevailing wage in that labor market area.<sup>66</sup> The employer can use either the Department of Labor (DOL) wage figures compiled at the state level or the employer may conduct a private wage survey for the prevailing wage for positions of similar skill, education, and training in the geographic area.<sup>67</sup>

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59. Immigration and Nationality Act of 1952, § 214(i)(2)(C)(ii) (codified as 8 U.S.C. § 1184(i)(2)(C)(ii)); 8 C.F.R. § 214.2(h)(4)(v), (iv).

60. See 8 U.S.C. § 1184(i)(1)(B).

61. Leus, *supra* note 39, at 24.

62. Jim Herron Zamora, *INS Turns Blind Eye to Visas For High Tech*, SAN FRANCISCO EXAMINER, Feb. 25, 2000, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/examiner/archive/2000/02/25/NEWS16145.dtl>.

63. See 20 C.F.R. §§ 655.731-732 (2002).

64. See *id.* § 655.731(a) (2002).

65. See *id.* § 655.731(a)(2)(iii).

66. Paparelli & Patel, *supra* note 25, at 34.

67. 20 C.F.R. § 655.731(a)(2). It is often difficult for employers to establish prevailing wage levels, especially for technology sector jobs where the duties are often individualized or pioneering. An employer can elect to use Department of Labor (DOL) wage figures

The second component of the program is that employers are required to attest that the hiring will not adversely affect working conditions of workers "similarly employed."<sup>68</sup> Much of the past debate concerning these required attestations centered on the shift from in-house employees to outsourcing non-core services,<sup>69</sup> a phenomenon that has occurred in all sectors of the U.S. economy over the past two decades.

The third component of the program is the attestation that hiring the H-1B worker is in the absence of any lockout or strike.<sup>70</sup> The employer must review the application with the union representative or, if there is no collective bargaining present in the workplace, the employer must post the application for the current employees to review.<sup>71</sup> Additionally, employers must instruct employees on how to file a complaint with the DOL concerning the H-1B employer or employee.<sup>72</sup>

In addition to these attestations existing under the IA90, the American Competitiveness and Workforce Improvement Act provided for additional protection for U.S. workers by creating the distinction of an "H-1B dependent" employer.<sup>73</sup> This classification is determined by taking an employer's total number of employees against the number of H-1B visa workers.<sup>74</sup> For companies that are H-1B dependent under the guidelines,

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established by occupational classifications defined in the DOL's Dictionary of Occupational Titles. However, these are typically generalized categories of mainstream occupations – not what an H-1B employer needs. If the occupation is easily categorized, the employer is less likely to need a foreign specialty-skilled employee. Another drawback for an employer using DOL figures is that once an employer requests the prevailing wage from its state employment agency, the employer must use that figure. There is no procedure for protest. Alternately, the employer can commission a wage survey privately. However, this can be costly and carries with it similar problems of reliability regarding difficulty in classifying occupations. Additionally, competitors and other employers are often reluctant to share wage information. Paparelli & Patel, *supra* note 25, at 36.

68. See 20 C.F.R. § 655.730(d)(2) (2002).

69. Stuart Anderson, *Widespread Abuse of H-1Bs and Employment-Based Immigration? The Evidence Says Otherwise*, 73 NO. 19 INTERPRETER RELEASES 637, 649 (1996).

70. See 20 C.F.R. § 655.733(a) (2002).

71. 20 C.F.R. § 655.730(d)(4).

72. B. Halliday, *supra* note 47, at 45.

73. *Id.*

74. 8 U.S.C. §§ 1182(n)(3)(A)(i)(I) and (II) define an H-1B dependent employer as either: (I) A company that has twenty-five or fewer "full-time equivalent" employees employed in the United States and employs more than seven H-1B non-immigrants. (II) A company that employs twenty-six to fifty full-time equivalent employees in the United States and employs more than twelve H-1B non-immigrants. 8 U.S.C. §§ 1182(n)(2)(A)(ii)(I) and (II) define an H-1B dependent employer for companies that employ fifty-one or more full-time equivalent employees in the United States. The

or those classified as “willful violators”<sup>75</sup> at any time while employing an H-1B employee, the ACWIA requires two additional attestations.<sup>76</sup> The first attestation is designed to protect the U.S. worker from lay-offs by requiring the employer to attest that the employer has not laid off any U.S. worker ninety days prior to or following the filing for a H-1B visa.<sup>77</sup> The second requirement is that the employer must have attempted to recruit U.S. workers for the position to be filled by the H-1B nonimmigrant worker.<sup>78</sup>

These attestations comprise the underlying documents required to determine eligibility for the H-1B visa program, beginning with the Labor Condition Application (LCA).<sup>79</sup> The LCA is a short form from the DOL necessary to begin the process for obtaining H-1B status for nonimmigrant employees.<sup>80</sup> The DOL established that the labor certification process involving the mandatory requirement that H-1B dependent employers must attempt to locate a qualified U.S. worker to fill the position is under the supervision of the state department of labor where the employer is located.<sup>81</sup> This requires the employer to recruit U.S. workers using advertisements in newspapers or trade journals and by placing a job order with the state employment service.<sup>82</sup> The H-1B dependent employer must evaluate, possibly interview the respondents, and report the results of the search to the DOL.<sup>83</sup> The Department of Labor will only certify a Labor Condition Application for a nonimmigrant employee if the employer cannot find a willing, qualified U.S. worker within a prescribed recruitment period.<sup>84</sup> If the DOL certifies the application, the employer’s next step in the process is to petition the Immigration and Naturalization Service (INS) for H-1B status for a particular nonimmigrant employee.<sup>85</sup>

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company is considered H-1B dependent if the number of its H-1B visa nonimmigrant employees reaches fifteen percent of the company’s full-time equivalent employees.

75. Willful violators are companies that intentionally fail to meet the LCA attestations or willfully misrepresent a material fact in filing the LCA. See 8 U.S.C. §§ 1182(n)(2)(C)(i)(I)-(II), (ii)(I)-(II), (iii)(I)-(II), (2)(F).

76. See American Competitiveness and Workforce Improvement Act of 1998 § 412.

77. *Id.*

78. *Id.*

79. See 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) (2002).

80. See 20 C.F.R. § 655.730(a) (2002); B. Halliday, *supra* note 47, at 42.

81. See generally MENDELSON, *supra* note 4.

82. *Id.*

83. *Id.*

84. *Id.*

85. B. Halliday, *supra* note 47, at 45. The INS is a division of the Department of Justice.

Once the U.S. employer has determined the prevailing wage for the job(s) it seeks to fill and has obtained a certified Labor Condition Application from the Department of Labor, the employer may prepare and file the actual H-1B petition with the INS.<sup>86</sup> The petition consists of two Department of Justice (DOJ) forms: Form I-129 and the H Classification Supplement.<sup>87</sup>

Department of Justice Form I-129 requires the employer to submit information about itself including its location and financial information.<sup>88</sup> The form also requests information on the current nonimmigrant status of the employee,<sup>89</sup> a brief description of the job to be filled,<sup>90</sup> the duration of the intended employment including dates,<sup>91</sup> and the salary to be paid.<sup>92</sup>

The second DOJ form is the H Classification Supplement.<sup>93</sup> This requires a complete job description,<sup>94</sup> the employee's current occupation,<sup>95</sup> and a summary of the employee's employment history.<sup>96</sup> Additionally, the employer must also include a letter of support for the employee,<sup>97</sup>

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86. *Id.*

87. See 20 C.F.R. § 655.700(b)(2) (2002). Concerns voiced by business over required confidential disclosures led to the use of two different forms. Potential employers had legitimate concerns that competitors could obtain trade secrets or confidential information in public documents required in the filings. To address this issue, the INS separated the information in the I-129 more general form, and the H Classification Supplement requiring full disclosure of confidential employee information. Paparelli & Patel, *supra* note 25, at 38.

88. 20 C.F.R. § 655.700(b)(2).

89. This requirement ties into another aspect of the Act regarding the use by employers to petition for permanent labor certification. This use of the H-1B program by employers has been highly criticized, though this usage was clearly allowed in the IA90. In the IA90, Congress allowed "dual intent" for H aliens. This classification allows a nonimmigrant to enter on an H-1B petition and subsequently petition for permanent status. Employers may sponsor foreign nationals who are already in the U.S. for H-1B or permanent status. The H-1B visa allows an employer to obtain an employee within a reasonable amount of time while the petition for permanent status typically take as long as two years. Rarely would an employer be able to wait two years to fill an opening. Anderson, *supra* note 69, at 638-39.

90. See *Petition for Nonimmigrant Worker, Form I-129, available at* <http://www.ins.gov/graphics/formsfee/forms/index.htm> (last visited Feb. 15, 2003).

91. *Id.*

92. *Id.* An employer may use Form I-129 to petition for an extension of stay for all classifications of business nonimmigrant employees, including the H-1B classification.

93. See H Classification Supplement, *available at* <http://www.ins.gov/graphics/formsfee/forms/index.htm> (last visited Feb. 15, 2003).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

including: a description of the company,<sup>98</sup> the specialty occupation being offered to the potential employee,<sup>99</sup> and the individual's qualifications for the position.<sup>100</sup> Other documentation must accompany the petition to demonstrate the employee's specialty skills required for certification under this program.<sup>101</sup> Such documentation must demonstrate that the beneficiary possesses necessary licensure (if required), and documentation of a post-baccalaureate degree, or its equivalent.<sup>102</sup> To complete this petition to the INS, the employer must again include the certified Labor Condition Application along with the Form I-129, H Supplement, the employer letter of support, and all documentary evidence.<sup>103</sup>

Once the U.S. employer has compiled the necessary forms, the employer may file the petition in one of four regional Immigration and Naturalization Service offices that has jurisdiction over the intended H-1B visa employee's place of employment.<sup>104</sup> The petition must be accompanied by the required filing fee, a bifurcated fee consisting of a base fee and an enhanced filing fee.<sup>105</sup> Enhanced filing fees were established in the American Competitiveness and Workforce Improvement Act which increased the base filing fee to \$110 and incorporated the additional enhanced filing fee of \$500 to be used for job training and education programs for U.S. workers.<sup>106</sup> Subsequent legislative reform in the American Competitiveness in the Twenty-First Century Act has increased the base filing fee to \$130 and the enhanced filing fee to \$1,000.<sup>107</sup>

The additional enhanced filing fee must come from the employer.<sup>108</sup> The beneficiary cannot pay this fee, nor can the beneficiary be required to reimburse the petitioner in any way.<sup>109</sup> This provision has been at issue in

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98. *Id.*

99. See H Classification Supplement, *supra* note 93.

100. *Id.*

101. 8 C.F.R. § 214.2(h)(4)(iv)(A) (2002).

102. See *id.* § 214.2 (h)(4)(iv)(A), (v).

103. See 20 C. F.R. § 655.730(b) (2002).

104. See 8 C.F.R. § 214.2(h)(2)(i)(A).

105. See *id.* § 103.7(b)(1).

106. *Id.*

107. *Id.* The Code of Federal Regulations establishes the following fee structure in Form I-129: Form I-129. For filing a petition for a nonimmigrant worker, a base fee of \$130. For filing an H-1B petition, a base fee of \$130 plus an additional \$1,000 fee in a single remittance of \$1,130. The remittance may be in the form of one or two checks (one in the amount of \$1,000 and the other in the amount of \$130).

108. See 8 C.F.R. § 214.2(h)(19)(ii).

109. See *id.* § 214.2(h)(19)(i).

complaints filed by H-1B visa holders against contract employers utilizing H-1B visas.<sup>110</sup> More recent legislation<sup>111</sup> allows for the enhanced filing fee to be waived if the employer is an "institution of higher education,"<sup>112</sup> a "non-profit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education,"<sup>113</sup> or a "research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research."<sup>114</sup>

Congress created the enhanced filing fee in the enactment of the ACWIA.<sup>115</sup> The enhanced H-1B filing fee amounted to a tax on employers and served as a political compromise. Congress intended for the revenue collected to fund scholarships and training endeavors for U.S. workers.<sup>116</sup> This provision addressed the political concerns of those backed by organized labor battling the replacement of U.S. with foreign workers, opposing others who believed the labor crunch in the U.S. was holding back economic growth.<sup>117</sup> The addition of the enhanced filing fee demonstrated the dual agenda of Congress that continues today with the recently enacted increase in the enhanced filing fee in the American Competitiveness in the Twenty-First Century Act.<sup>118</sup>

While the AC21 increased the number of available H-1B visas, it also provided additional protection for U.S. workers through the additional funding from the enhanced filing fee.<sup>119</sup> Congress addressed the short-term, immediate goals of business by increasing the cap for H-1B visas over the following three years (through 2003).<sup>120</sup> While at the same time addressing long-term goals of many by increasing the funding for training and workforce development of U.S. workers apparently unequipped to fill the needs of technology employers.<sup>121</sup> Estimates in February 2002 by a

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110. *Babu Thanu Chellen, et al. vs. John Pickle Co. Inc.*, No. 02-CV-85 EA (N.D. Okla. filed Feb. 1, 2002).

111. *See American Competitiveness and Workforce Improvement Act of 1998* § 415.

112. 8 C.F.R. § 214.2(h)(19)(iii)(A).

113. *Id.* § 214.2(h)(19)(iii)(B).

114. *Id.* § 214.2(h)(19)(iii)(C).

115. *American Competitiveness and Workforce Improvement Act of 1998* § 414.

116. *See id.*

117. *Leus, supra* note 39, at 25.

118. *Id.*

119. *Id.*

120. *See id.*

121. *See Hahm, supra* note 30, at 1674.

pro-business lobbyist group favoring increases in the H-1B visa cap reported that employers in the H-1B program have “contributed more than \$100 million” through the enhanced filing fee to retrain U.S. workers.<sup>122</sup>

After the employer files the necessary forms and documentary evidence with the proper Immigration and Naturalization Service processing center, the INS will process the application.<sup>123</sup> This process timeline varies depending on many factors, the most important of which is the regional INS processing center that handles the application.<sup>124</sup> Under the best of circumstances an application takes sixty days, though some processing centers (namely Texas and California) can take much longer.<sup>125</sup> Provided the federal cap has not been reached,<sup>126</sup> under the best of circumstances the Immigration and Naturalization Service notifies the employer that the H-1B visa has been approved.<sup>127</sup> The certification of the Labor Condition Application by the Department of Labor and approval by the Immigration and Naturalization Service is generally thought to be a rubber-stamp process resulting in little more than paper shuffling.<sup>128</sup>

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122. Harris N. Miller, *Do We Still Need As Many H-1B Visas?: Yes*, OPTIMIZE MAG., Feb. 2002, at [http://www.optimizemag.com/issue/oo4/squareoff\\_yes.htm](http://www.optimizemag.com/issue/oo4/squareoff_yes.htm).

123. B. Halliday, *supra* note 47, at 45.

124. The INS service centers in Texas and California, which handle cases in the southern half of the country, are known to have slow processing times. B. Halliday, *supra* note 47, at 43, 45.

125. B. Halliday, *supra* note 47, at 45. Some sources claim application processing times approach three to four years. Benson, *supra* note 17, at 301.

126. Prior to the American Competitiveness and Workforce Improvement Act of 1998, the annual cap stood at 65,000. In 1998, the H-1B visa cap was reached for the first time, leaving many business in need of skilled workers. To address this, Congress passed the American Competitiveness and Workforce Improvement Act of 1998, which increased the number of H-1B visas for the following three years (115,000 in FY1999; 115,000 in FY2000; and 107,500 in FY2001). American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, § 411, 112 Stat. 2681, 2681-642. The trend is toward reducing the number of H-1B visas in coming years. On October 17, 2000, the American Competitiveness in the Twenty-First Century Act, Pub. L. 106-313, established the following number of H-1B visas: 195,000 for FY2001, FY2002, and FY2003, before returning to 65,000 in FY2004.

127. Leus, *supra* note 39, at 24.

128. Anderson, *supra* note 69, at 639; Paparelli & Patel, *supra* note 25, at 42. In a debate over technical corrections in reform to the INA, Sen. Alan K. Simpson (R-Wyo.) declared on the Senate floor that “[t]he H-1B corrections underscore that enforcement of the program’s labor condition application process is complaint driven and that the Department of Labor’s responsibility is to check applications they receive only for completeness and obvious inaccuracies.” Anderson, *supra* note 69, at 644.



The third and final governmental agency that must review the application following the Department of Labor and the Immigration and Naturalization Service is the Department of State (DOS).<sup>129</sup> Upon approval by the INS of the employer's petition, the foreign worker must visit the U.S. consulate or embassy under the Department of State in their country of origin and obtain a H-1B visa stamp on his or her passport.<sup>130</sup> If they are currently in the U.S., the foreign worker must visit the regional INS processing center and go through an "adjustment of status."<sup>131</sup> Following approval by the DOS, the worker can then arrive in the U.S. to begin employment with the employer that filed the H-1B visa petition.<sup>132</sup>

#### IV. ENFORCEMENT

##### A. *Congressional Intent for Implementation and Enforcement*

Enforcement is a key area of criticism of the H-1B program.<sup>133</sup> Congress intended in the Immigration Act of 1990 that the initiation to investigate H-1B violations would be complaint-driven.<sup>134</sup> Proponents of the H-1B program have interpreted this to mean that the Department of Labor should respond to specific complaints rather than broadly investigate on its own.<sup>135</sup> However, in the final rule created by the DOL, the DOL granted itself broad authority to investigate companies without having received specific complaints.<sup>136</sup>

Congress built safeguards into the LCA intending to protect U.S. workers in the American Competitiveness and Workforce Improvement Act.<sup>137</sup> The additions of *requiring* notice to union representatives in the

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129. Leus, *supra* note 39, at 25.

130. *Id.*

131. Benson, *supra* note 17, at 220.

132. Leus, *supra* note 39, at 25.

133. See B. Halliday, *supra* note 47, at 48.

134. Anderson, *supra* note 69, at 644. In addition to enforcement driven by complaints, Congress enacted heavy penalties in an effort to deter abuse such as: upon finding an employer has not paid wages at the required wage level, the DOL may order the employer to pay back wages; if a H-1B employee is dismissed prematurely, the employer must pay reasonable costs of the alien's return transportation abroad; and perhaps, the most severe sanction is the minimum one-year ban on future INS approvals of employer-sponsored business visas if the employer violates agency regulations regarding the H-1B visa requirements. 8 C.F.R. § 214.2 (h)(4)(i)(A)(5); Paparelli & Patel, *supra* note 25, at 37.

135. *Id.*

136. Anderson, *supra* note 69, at 644.

137. Hahn, *supra* note 30, at 1676.

LCA process,<sup>138</sup> or *publicizing* the LCA in conspicuous locations giving notice to existing employees if no union exists,<sup>139</sup> and *posting* of contact information on how to notify the Department of Labor of complaints<sup>140</sup> were intended to provide for a means to report complaints or non-compliance with the program. By making the program complaint-driven, Congress wanted to incorporate a safeguard that would neither burden the employer with excessive reporting measures, nor require governmental surveillance of their employment practices.<sup>141</sup> Congress designed the reporting requirements in obtaining a H-1B visa along with the complaint-driven enforcement for administrative ease for both the employers and governmental agencies, with the overall goal to provide safeguards for existing U.S. workers.<sup>142</sup>

Congress' selection of particular agencies reflects some of the complex policy goals of the Immigration and Naturalization Act. The Department of Labor protects U.S. labor and provides expertise on labor conditions.<sup>143</sup> The Department of State operates as a pre-screener of immigrants before they reach our shores and aids in the identification of undesirable aliens based on the consular officer's understanding of a foreign country's conditions.<sup>144</sup> The Immigration and Naturalization Service identifies aliens entitled to immigration benefits and removes those persons not authorized to reside in the United States.<sup>145</sup> Because Congress established in the act that three federal agencies were to implement immigration laws "without any one agency having authority over the other two, Congress laid the foundation for conflict and confusion."<sup>146</sup>

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138. Anderson, *supra* note 69, at 643; Immigration Act of 1990 § 205(c)(3) (creating Immigration and Nationality Act of 1952 § 212(n)(2)(A)); 20 C.F.R. § 655.730(d)(4)(i)(A) (2002).

139. 20 C.F.R. § 655.730(d)(4)(i)(A) (2002).

140. *Id.* Additionally, the Immigration Act of 1990 as well as the Administrative Procedure Act requires "the Secretary of Labor to establish a procedure to hear and decide complaints from persons or organizations alleging that any of the foregoing conditions has not been satisfied, or that the employer's LC Application contains a material misrepresentation of fact." Paparelli & Patel, *supra* note 25, at 36. *See generally* 5 U.S.C. § 556. *See* 8 U.S.C. § 1182(n)(2)(C)(i)(I), (i)(II), (ii)(I), (ii)(II), (iii)(I), (iii)(II), (F) for procedures regarding agency hearings.

141. Anderson, *supra* note 69, at 643-644.

142. *Id.* at 644.

143. Benson, *supra* note 17, at 218.

144. *Id.*

145. *Id.* at 218-19. Additionally, this article offers excellent further discussion of the bureaucratic "three-headed monster" created by Congress. *Id.* at 315.

146. *Id.* at 274.

Enforcement of the H-1B visa program can occur either through the efforts of the Department of Labor or the Immigration and Naturalization Service.<sup>147</sup> The requirements of the Labor Condition Application are the most often-cited reasons for reporting abuse, which is within the scope of enforcement under the Department of Labor.<sup>148</sup> The complaint is the underpayment of wages, which typically comes from the H-1B employee himself.<sup>149</sup> This contradicts the often-cited stereotype by H-1B opponents of foreign-born workers as docile, indentured servants that must be avidly protected.<sup>150</sup> Co-workers, as well as business competitors of the employer, are other sources for LCA-related complaints.<sup>151</sup> Congress specifically built these safeguards into the legislation to result in this type of reporting.

The Immigration and Naturalization Service's role in enforcement focuses on the employee's status.<sup>152</sup> While the majority of H-1B enforcement is incidental to the LCA requirements, which falls within the duties of the Department of Labor, the Immigration and Naturalization Service also has a role in enforcement.<sup>153</sup> Generally, the INS acts as a gatekeeper of U.S. borders in addition to initiating investigations.<sup>154</sup> Historically, their role has revolved around activities such as: "smuggling, fraud, terrorism, detention and the patrol of our borders."<sup>155</sup> However, through the Immigration Reform and Control Act, Congress delegated enforcement and investigative powers concerning the employment of individuals to the INS.<sup>156</sup>

Enforcement of the H-1B visa requirements appear to be lower on the INS's priority list. Prior to the terrorist attacks of September 11, 2001, the INS's mandated priorities were mostly based on political pressure. With regard to foreigners, the INS was focused on "finding foreigners who ha[d] expired student and tourist visas or who pose[d] a criminal threat."<sup>157</sup> In 2001, an employer utilizing H-1B employees realized the INS's lack of enforcement when he was forced by the market to terminate six of twelve

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147. *Id.*

148. *Id.*

149. Anderson, *supra* note 69, at 644.

150. *Id.*

151. *Id.*

152. See B. Halliday, *supra* note 47, at 46.

153. *Id.*

154. *Id.*

155. *Id.* See IMMIGRATION AND NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS § 103.1 (1999).

156. B. Halliday, *supra* note 47, at 46.

157. Khirallah, *supra* note 45.

H-1B consultants.<sup>158</sup> After unsuccessful attempts to find them other assignments, he offered to pay for airline tickets home.<sup>159</sup> “Most said they were going to stay in the United States,” according to the employer.<sup>160</sup> As required by law, the employer reported to the INS that his sponsorship of the H-1B visa holders was over, though he says it made no difference.<sup>161</sup> He claimed the report disappeared “into a black hole” once sent to the INS, claiming the foreign workers stayed in the U.S. illegally.<sup>162</sup>

*B. Congressional Structure of Agencies Overseeing Immigration*

By enacting vague legislation, Congress can appear tough on immigration and at the same time insulate itself from the complaints of its constituents.<sup>163</sup> In the organic statutes enacted by Congress regarding different types of business immigration, confusion and duplication have created delay and redundancy.<sup>164</sup> The immigration laws created by Congress have rendered lawyers, immigrants, and employers confused and frustrated.<sup>165</sup> How can the employers or employees have trust in the system<sup>166</sup> if immigration lawyers struggle to keep up with the politically pressured shifts in focus and priorities within the agencies as dictated by Congress?<sup>167</sup> The procedure and enforcement of the components of the H-1B visa remains a moving target that lacks predictable results.<sup>168</sup> An administrative law scholar described the INA and subsequent legislation as:

In business immigration, Congress has done little beyond delegating responsibility to a three-headed monster. It has not only failed to specify details of the adjudicatory system, but also has left to the agencies the job of delineating the specific content and definition of far too many vague substantive categories. Vague standards necessitate a process to determine who qualifies under the standard.<sup>169</sup>

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158. *Id.*

159. Khirallah, *supra* note 30 (Jim Ziegler, CEO of Pace consulting firm).

160. *Id.*

161. *Id.*

162. *Id.*

163. Benson, *supra* note 17, at 274.

164. *Id.* at 262.

165. *Id.*

166. *Id.* at 264.

167. *Id.* at 262.

168. *Id.* at 265.

169. Benson, *supra* note 17, at 265.

The challenge of each governmental agency creating regulations implementing the organic statute is that each has interpreted Congressional intent in a different way creating very different adjudication procedures based on their agency history and habit.<sup>170</sup> The Department of Labor rarely issues formal rules, yet the procedure to review the denial of labor certifications is the most formal procedure outlined by any of the three agencies.<sup>171</sup> Following the denial of a labor certification by a regional officer, the employer may appeal to an Administrative Law Judge who hears Department of Labor appeals only.<sup>172</sup>

In contrast to the Department of Labor formal appeal procedures, "the Department of State routinely promulgates regulations under the full rule-making procedures of the ADA [Administrative Procedure Act] and publishes a Foreign Affairs Manual (FAM) containing instructions regarding the application of the regulations."<sup>173</sup> The DOS regularly communicates changes in procedure or special emergencies to its field offices, as opposed to the INS where open communication and documentation are rare.<sup>174</sup>

In contrast to both the Department of Labor and Department of State, the Immigration and Naturalization Service historically has a pattern of failing to adopt regulations altogether.<sup>175</sup> The INS has been very inconsistent in adopting rules creating standards of procedure.<sup>176</sup> For example, the INS proposed a rule establishing "as a matter of discretion" standards to determine when an applicant should be granted adjustment of status. Prior to approval, the INS withdrew its own proposal for fear that any list of factors would be unnecessarily rigid and impossible to foresee.<sup>177</sup> Their concern was primarily based on the fear that clearly stated standards would increase litigation, preferring instead to remain flexible by utilizing discretion. Administrative law experts contend however, that the Immigration and Naturalization Service could achieve greater uniformity operating more efficiently if there were clearly established rules in place.<sup>178</sup> Further, administrative law experts argue that by creating clearer rules,

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170. *Id.*

171. *Id.* at 266.

172. *Id.*

173. *Id.* at 265.

174. *Id.* at 266.

175. Benson, *supra* note 17, at 267.

176. *Id.*

177. *Id.* at 268.

178. *Id.*

they would provide stronger precedent and reduce the amount of litigation.<sup>179</sup>

Congress failed to specify the nature of the procedure for implementation of the Immigration and Naturalization Act, severely undermining the system.<sup>180</sup> An example of this is the labor certification.<sup>181</sup> The Immigration and Naturalization Act states that the Secretary of Labor grants a labor certification, but is silent as to the adjudication process the agency must follow.<sup>182</sup> As a result, the agency has developed a cumbersome, bureaucratic process for determining wage information, and shortages of the occupation in question.<sup>183</sup> The statute is regularly challenged by employers opposing agency procedure because it generally refers to the certification of no "able, willing, qualified . . . and available" U.S. worker.<sup>184</sup> The employers successfully argued that unless the Department of Labor could specifically point to an available worker to fill the position, the employer should receive the certification.<sup>185</sup> To this perceived loophole getting much attention from employers, the DOL responded by requiring additional procedure.<sup>186</sup> The additional procedure required a case-by-case consideration of the recruitment process utilized by the employer to ensure that no such worker existed.<sup>187</sup> This is just one example of the results of Congress' failure to carefully consider the procedural implications of its legislation, which resulted in additional, cumbersome procedure.<sup>188</sup>

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179. *Id.*; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 76-77 (1983).

180. Benson, *supra* note 17, at 271.

181. *Id.*

182. *Id.*

183. *Id.*

184. See 8 U.S.C. § 1182(a)(5)(A)(i)(I) (2002).

185. See, e.g., *Digilab, Inc. v. Sec'y of Labor*, 495 F.2d 323 (1st Cir. 1974) (a specialized applicant applied twice for H-1B status and was denied based on the DOL's determination that there were available U.S. workers. However, the court found the agency had no proof of the available workers qualified to meet the specialized needs of the employer.), *cert. denied* 419 U.S. 840 (1974); *Reddy, Inc. v. Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974) (the visa was improperly denied where the administrator based the decision on a national market for engineers of a different kind. The court remanded for reconsideration of the application based upon the availability of civil engineers with plaintiff employee's specialization within the area of the alien's intended residence).

186. Benson, *supra* note 17, at 272.

187. *Id.*

188. *Id.*

Processing in some parts of the U.S. can take, in the extreme case, up to four years.<sup>189</sup> As a result, Congress has implemented budget reductions out of frustration with the Department of Labor's lengthy process for reviewing applications.<sup>190</sup> DOL has responded with new systems of computerized review that measure applications with proscribed Department of Labor employment criteria. Ideally, automation should result in approval without participation from the DOL or state agency personnel speeding up the application process.<sup>191</sup>

The difficulty with one agency becoming less restrictive and allowing more applicants through with less review potentially conflicts with the other two agencies involved. As more concern over the Department of Labor process grows, the Immigration and Naturalization Service and the Department of State are more likely to lose trust in DOL certification approvals and step up their procedures to ensure integrity in the application process.<sup>192</sup> Thus, procedures become muddled resulting in less understanding of and trust in the system overall.

There are many examples of direct conflict between the three agency interpretations of the legislative intent regarding procedure.<sup>193</sup> Decisions by one agency can affect another compounding the problems of inefficiency and redundancy. An example of this is a decision by the INS to process business immigration at its regional service centers, as opposed to one centralized location as in the past.<sup>194</sup> By doing this, the INS in effect separated the filing into a two-step process (one step processed at the central office and the additional step processed at the regional center) of naturalization petition adjudication and adjustment of status procedures with the existing staff resources.<sup>195</sup> This slowed down the overall process by duplicating many of the agency procedures.<sup>196</sup> As delays compounded, petitioners began avoiding the common adjustment of status application and instead switched to overseas immigrant processing through the Department of State.<sup>197</sup>

The difficulty in avoiding the Immigration and Naturalization Service procedures by applying for different status under the Department of State is that at the time of the initial filing, the employer and immigrant indicate

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189. *Id.*

190. *Id.* at 273.

191. *Id.*

192. Benson, *supra* note 17, at 263-73.

193. *Id.* at 277.

194. *Id.* at 279.

195. *Id.*

196. *Id.*

197. *Id.*

that they seek an adjustment of status (the final processing sought).<sup>198</sup> Because of this designation, the INS does not send a formal notice of the I-140 approval to the DOS.<sup>199</sup> Before the DOS will accept jurisdiction, the employer must request that the INS send the written notice (I-140) to the DOS confirming their approval. In going down an alternate path, the employer adds processes to the already backed up procedure of obtaining a change in status for their employee.<sup>200</sup> As a result, longer waiting periods compound the problem by requiring additional processing and communication between the agencies.<sup>201</sup>

Due to the delay in processing, employers are utilizing alternative avenues to bring workers into the U.S.<sup>202</sup> Alternative methods used by employers and immigrants have created unintended consequences in other agencies. The growth and tremendous backlog in the adjustment of status claims has created a sharp increase in the Department of State's processing of immigrant visas.<sup>203</sup> By Congress' decision to delegate power to three governmental agencies in the INA and subsequent legislation, "Congress failed to consider the good operation of the system as a whole. When no agency is in control of the entire process, the decision of one to require a new filing or original approval notices, complicates and expands the work of another agency."<sup>204</sup> Attorneys and employers have attempted to minimize the delay and confusion by filing duplicate petitions and subsequently abandoning the slower track, which creates even more work for the agencies.<sup>205</sup> While this is understandable in representing one's client zealously, this was not what Congress intended.

### C. Controls on Agency Function

Much of the responsibility for agency inefficiency and confusion lies with Congress. With each amendment to the Immigration Naturalization Act, Congressional mandates implied or expressed new priorities and threaten to reduce funding or impose new statutory requirements.<sup>206</sup> This shift in priorities can have several effects on agencies. One such effect is

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198. Benson, *supra* note 17, at 279.

199. *Id.* "Form I-140. For filing a petition to classify preference status of an alien on the basis of profession or occupation under section 204(a) of the Act— \$135.00." 8 C.F.R. § 103.7(b)(1) (2002).

200. Benson, *supra* note 17, at 279.

201. *Id.*

202. *Id.*

203. *Id.* at 281.

204. *Id.*

205. *Id.*

206. Benson, *supra* note 17, at 282.



an agency's mission can change rapidly and often. Each new mandate is presented as a crisis, an emergency that must be tackled full-force.<sup>207</sup> Thus, employees are pulled from other required areas to manage the crisis and implement the change, which in turn creates a backlog in other areas of the agency.<sup>208</sup> These amendments and priority shifts create frustration and a decline in morale in agency employees.<sup>209</sup>

In addition to obstacles placed by Congress on agency procedure, an overriding fear that people are "getting through" the system is prevalent throughout the agencies.<sup>210</sup> Because H-1B visas are limited in number, the fear is held throughout the system of false positives, foreigners and employers committing fraud or being admitted mistakenly.<sup>211</sup> Fear within an administrative agency can greatly affect agency efficiency.

## V. CRITICISMS OF THE H-1B VISA PROGRAM

### A. *Criticism Centered on Enforcement*

Criticism has centered on enforcement for good reason – there appears to be very little. Because much of the emphasis in the past has been on the Labor Condition Application portion of the H-1B visa procedure, little resources have been focused on enforcement of the program.<sup>212</sup> However, following the terrorism attacks of September 11, 2001, there has been a dramatic shift. There now exists a "zero tolerance" policy on all immigration violations.<sup>213</sup> Prior to September 11, 2001, few claims of abuse were made when compared with the number of visas issued, with little verification of compliance by employers and employees. Of the abuse that is reported, much centers on the prevailing wage requirement.<sup>214</sup>

The following case is an example of a nonimmigrant attempting to benefit personally by fraudulently using the H-1B visa program. A native of India, Ravishanker Balakrishna waged a Department of Labor complaint regarding the prevailing wage requirement against his employer,

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207. *See id.* at 286.

208. *Id.*

209. *Id.* at 284.

210. *Id.* at 289.

211. *Id.*

212. Benson, *supra* note 17, at 285.

213. Bell, *supra* note 3, at 1.

214. *See* Department of Labor, Labor Condition Applications, at <http://www.oalj.dol.gov> (last visited Feb. 10, 2003).

Seymour Electric.<sup>215</sup> The case involved a nonimmigrant alien who conspired with Seymour Electric to apply for a H-1B visa as a computer programmer, an occupation well within the required "specialty occupation" requirement of the H-1B visa classification.<sup>216</sup> Balakrishna claimed he was paid far below the prevailing wage established in the Labor Condition Application completed by Seymour Electric.<sup>217</sup> The employer, however, never intended to hire him as a nonimmigrant employee and was able to prove this in a hearing before an administrative law judge.<sup>218</sup>

Balakrishna answered an advertisement Seymour Electric ran for an accounting position. He was hired to work in accounting and as a favor, Seymour Electric agreed to sponsor him for an H-1B visa in order for him to obtain permission to work in the U.S.<sup>219</sup> While an employer is required to comply with the terms and conditions established in the LCA, the nonimmigrant employee cannot seek vindication under the Act for a situation resulting from his own misconduct.<sup>220</sup> Because Balakrishna was not a victim, but rather a perpetrator of fraud, the court would not allow him to benefit from his wrongdoing.<sup>221</sup> Therefore, the presiding administrative law judge ruled in favor of Seymour Electric against requiring the payment of back wages.<sup>222</sup> Additionally however, the Department of Labor administrative law judge forwarded the matter to the Immigration and Naturalization Service for appropriate disposition in the action of both Balakrishna and Seymour Electric.<sup>223</sup>

Another case regarding the prevalent wage requirement is *Yano Enterprises v. Department of Labor*.<sup>224</sup> The employer, Yano Enterprises, underpaid the employee a total of \$102,797 over a six-year period.<sup>225</sup> Yano filed a labor condition application stating an annual salary of \$30,000, but paid the non-immigrant H-1B worker only \$5.00 per hour.<sup>226</sup> An additional issue appealed in the case was whether the court could apply a housing

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215. Ravishanker Balakrishna v. Seymour Elec., Inc., 2000-LCA-6 (Dec. 22, 2000), available at <http://www.oalj.dol.gov/public/ina/decsn/001ca06a.htm>.

216. 8 U.S.C. § 1184(i)(1) (2002).

217. *Balakrishna*, *supra* note 215.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Balakrishna*, *supra* note 215.

224. *Yano Enter., Inc. v. U.S. Dep't of Labor*, ARB No. 01-050, ALJ No. 2001-LCA-1 (ARB Sept. 26, 2001), available at <http://www.oalj.dol.gov/public/decsn/01lca01b.htm>.

225. *Id.*

226. *Id.*

offset to the damages assessed because the employee lived with the employer, a former college roommate, during this time.<sup>227</sup> The agency administrator ordered a housing credit of \$10,500 reflecting the value of the housing provided.<sup>228</sup> However, the administrative law judge<sup>229</sup> noted that under 20 C.F.R. § 655.731(c)(7)(iii), a deduction is only allowed if it is made voluntarily in a written authorization from the employee.<sup>230</sup> No such writing existed between the parties. Accordingly, the administrative law judge directed Yano to pay the total amount of back wages due without allowing for the housing deduction.<sup>231</sup>

An interesting fact in this case is the occupation Yano sought to fill: "Personnel Manager." This occupation does not appear to fit the "specialty occupation" classification required in the Act. Nor does it seem likely that a U.S. worker could not be found to fill the vacant personnel manager position. Because employment classification is addressed in the LCA, which was seemingly approved by the DOL, this fact was not discussed in the case.

#### *B. Criticism Based on the Protection of U.S. Workers*

Much of the criticism of the H-1B program focuses on claims of oppression by U.S. businesses attempting to find cheap labor to replace higher paid U.S. workers.<sup>232</sup> Over the past decade, the criticism has generally fallen among political party lines.<sup>233</sup> During the Clinton

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227. *Id.*

228. *Id.*

229. The Department of Labor has established that the standard of review for immigration proceedings is governed by the Administrative Procedure Act. *See generally* 5 U.S.C.A. § 557 (2002). The acting Administrator determines the validity of the claim and assesses the amount due the parties, if any. An appeal goes to a panel comprised of a two-member board, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 § 5 (May 2, 1996) (codified at 29 C.F.R. § 2.8 (1996)). If the party seeks to appeal the decision by the panel, it goes to an Administrative Law Judge for the Department of Labor for a hearing on the matter. *Yano*, ALJ No. 2001-LCA-1 at nn.1, 4.

230. 20 C.F.R. § 655.731(c)(9)(iii)(A) (2002).

231. *Yano*, ALJ No. 2001-LCA-1.

232. Critics of the H-1B program claim that "University studies have shown that H-1B programmers and engineers are paid 15% to 33% below the U.S. average, and the Wall Street Journal has reported that holders of H-1Bs are paid \$20,000 to \$25,000 less annually than comparably skilled Americans." Tom Tancred, *Do We Still Need As Many H-1B Visas?: No*, OPTIMIZE MAG., Feb. 2002, at [http://www.optimize-mag.com/issue/004/squareoff\\_.htm](http://www.optimize-mag.com/issue/004/squareoff_.htm).

233. *See* Anderson, *supra* note 69, at 637. However, one non-partisan research organization, the Employment Policy Foundation, examined California records on H-1B petitions in the computer industry. They reported that the actual average wage paid H-1B workers was fifteen percent higher than the prevailing wage, and in some specialized areas

administration, Senator Edward M. Kennedy (D-Mass.) and Secretary of Labor Robert Reich worked to keep the issue in the forefront by pushing for legislation to provide greater “worker protection.” They alleged that the programs in place for the employment of foreign workers have had an adverse impact on the American worker.<sup>234</sup>

Countering the perception that employers use the H-1B program to hire cheap labor, a governmental affairs consultant for Hewlett-Packard says it is not a bargain to utilize the H-1B option for locating and hiring employees.<sup>235</sup> “HP found that the relocation, applications, and legal fees to convert an H-1B worker to permanent-resident status with a green card averaged \$15,000 to \$20,000 per worker,” says Mary Dee Beall.<sup>236</sup> However, while HP may employ H-1B workers with the intention of converting their status to a permanent status, this is not the case with many users of the program who instead look for highly skilled, temporary labor.<sup>237</sup>

To negate common claims that employers and employees misuse H-1B visas (specifically, the requirement of “specialty skilled” employees and the prevailing wage requirements), the Immigration and Naturalization Service published a report in 2002 documenting the demographics of H-1B users.<sup>238</sup> The report, entitled “Report on Characteristics of Specialty Occupation Workers (H-1B),” was as mandated by the American Competitiveness and Workforce Improvement Act.<sup>239</sup> It detailed usage for FY 2001 and contained the following information on the users of the H-1B visa: “98.7% of all H-1B visa holders have at least a Bachelor’s degree,

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as high as twenty-nine percent higher. This report indicates that the market sets the wage rates, rather than government regulations. Additionally, the group found no evidence to conclude that large numbers of H-1B temporary workers have any “measurable impact on wages or job opportunities of native workers.” *Id.* at 640.

234. *Id.* at 637.

235. Khirallah, *supra* note 45.

236. *Id.* The CIO and senior VP for Owens Corning, based in Toledo, Ohio, says H-1B workers are not cheaper than American workers. He instead says they focus on finding the most qualified worker for the job and then look at the immigration status of the individual. *Id.* Information Technology Association of America president Harris N. Miller claims that by factoring in the “additional costs of visa-processing, legal, and other fees . . . employers actually pay more, not less, for H-1B workers.” Miller, *supra* note 122.

237. See Ramachandran v. Blue Star Infotech, 2002-LCA-8 (June 4, 2002), available at <http://www.oalj.dol.gov/public/ina/decsn/02lca08a.htm>.

238. Austin T. Fragomen, Jr. & Steven C. Bell, *H-1B Admissions for FY 2002 Less Than Half of FY 2001’s Levels*, IMMIGR. BUS. NEWS & COMMENT, Sept. 15, 2002, available at 2002 WL 2020096.

239. See American Competitiveness and Workforce Improvement Act of 1998 § 418.

confirming that H-1B's are on the whole highly educated and skilled."<sup>240</sup> The report stated 58% of H-1B users are working in computer-related occupations. Data on compensation was also reported, stating the median income for computer-related professionals was \$58,000, and the overall median income for FY 2001 was \$55,000, with the 75th percentile earning \$72,000.<sup>241</sup>

An outspoken critic of immigration based in Washington D.C. is the Federation for American Immigration Reform (FAIR).<sup>242</sup> FAIR is a non-profit, public interest group of "concerned citizens who share a common belief that the unforeseen mass immigration that has occurred over the last 30 years should be curtailed."<sup>243</sup> FAIR states it is not alone in its campaign against programs like the H-1B visa, contending that the need of American big business for specialty skilled employees is unsubstantiated.<sup>244</sup>

Principles set forth by FAIR disagree with U.S. policy of creating programs, like the H-1B visa, that make it very attractive for specialty-skilled laborers to leave their home countries to work in the U.S. FAIR opposes this policy, stating "the United States should not contribute to a brain drain that entices away the skilled and talented who are desperately needed in their homelands; we should meet our need for skilled professionals by training and retraining our own."<sup>245</sup> Interestingly, another vocal opponent to the H-1B visa program, Rep. Tom Tancredo (R-Co.), argues the "brain drain" is happening to U.S. workers in reverse. Rep. Tancredo with charges employers are practicing ageism by replacing older U.S. workers with younger foreign workers thereby wasting American talent.<sup>246</sup>

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240. Fragomen & Bell, *supra* note 238.

241. *Id.*

242. FAIR: *About Us*, at <http://www.fairus.org/html/aboutus.html> (last visited Feb. 10, 2002).

243. *Id.*

244. *Id.*

245. FAIR: *Our Principle*, at <http://www.fairus.org/html/02001710.htm> (last visited Feb. 10, 2002).

246. Rep. Tancredo claims that a large pool of foreign H-1B workers, unwilling to make too many demands on their employers in hopes of obtaining a green card, are replacing older American workers resulting in careers cut unnaturally short. He claims it is often difficult for programmers to obtain programming work after the age of forty. "Thus, older programmers, who have the potential for more productive years of work, are forced into other kinds of work, in a kind of domestic 'brain drain' that wastes the talents of American workers." This brain drain is caused by U.S. employers' brain drain from overseas, especially China and India, fostering a dependence on foreign workers. Tancredo, *supra* note 232.

Despite the enforcement provisions set forth in the law intended to deal with abuse, formal complaints appear to be rare and the Department of Labor admittedly has not given proper oversight to the program participants.<sup>247</sup> As previously discussed, the Congress intended a complaint-driven process for investigating H-1B violations.<sup>248</sup> Accusations by H-1B opponents continue concerning violations of the program including such practices as “benching,” the removal of an H-1B employee from the payroll when his or her services are temporarily not required;<sup>249</sup> the use of H-1B visas by “job-shops;”<sup>250</sup> prevailing wage violations;<sup>251</sup> and other LCA violations.<sup>252</sup>

### C. Job Shop Violations

Job shops are the primary source of complaints of abuse of the Labor Condition Application and H-1B program.<sup>253</sup> Job shops are companies who hire personnel with skills in specific areas and send those employees to perform services for clients, usually at the client’s location.<sup>254</sup> Job shops are similar to the more commonly known staffing companies, and specialize in foreign workers. The job shop receives a fee from the client for placing employees and pays the employee a salary, often taking an additional fee from the employee for placement.<sup>255</sup> “Frequently, the employee is required to enter into an adhesion contract with the job shop, which contains substantial penalties for breaching the term of the employment contract, or for going to work for one of the job shop’s clients.”<sup>256</sup> Additional legislation enacted by Congress in the American Competitiveness and Workforce Improvement Act prohibits an employer from requiring the nonimmigrant employee to pay the enhanced filing fee,<sup>257</sup> a common practice prior to the legislative reform when an employee terminated employment prematurely.

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247. B. Halliday, *supra* note 47, at 50.

248. See Anderson, *supra* note 69, at 644.

249. B. Halliday, *supra* note 47, at 50.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 50.

255. B. Halliday, *supra* note 47, at 51.

256. *Id.*

257. See American Competitiveness and Workforce Improvement Act of 1998 § 414 (codified at 8 C.F.R. § 214.2(h)(19)(i) (2002)).

Such was the case with a complaint filed by fifty-three former employees of the John Pickle Company based in Tulsa, Oklahoma.<sup>258</sup> The employees were Indian nationals employed under the H-1B visa program by the John Pickle Company (Pickle) through Al Samit International (Al Samit), a job shop located in Bombay, India.<sup>259</sup> Pickle contracted with Al Samit to supply Indian nationals to do welding in a manufacturing facility in Tulsa.<sup>260</sup> Al Samit allegedly "lured" the Indian Nationals to the U.S. with promises of long-term employment at high wages.<sup>261</sup> The job shop recruited the workers through advertisements in India.<sup>262</sup> The workers were required to pay a fee up to \$2,500 to the job shop for placement with a U.S. employer.<sup>263</sup>

The workers claim in their suit that they were not paid the prevailing wage set forth in the labor condition application, in addition to allegations of false imprisonment in the factory.<sup>264</sup> It appears that Pickle paid the employees substantially below the rate set forth in the Labor Condition Application and minimum wage requirements per federal law.<sup>265</sup> The claims made regarding the wage paid to the employees range between \$2.31 to \$3.17 hourly.<sup>266</sup> An independent observer commented, "It seems that the company was flagrantly ignoring the minimum-wage laws . . .

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258. *Babu Thanu Chellen, et al. v. John Pickle Co. Inc.*, No. 02-CV-85 EA (N.D. Okla. filed Feb. 1, 2002).

259. Tony Blizzard, *H1-B Visas Shaft U.S. Workers, Enslave Others, Recent Case of Abuse of H-1B Visa Workers in the United States Overlooks Bigger Issue*, at [http://www.americanfreepress.net/Free\\_Trade/H1-B\\_Visas\\_Shaft\\_U\\_S\\_Workers/h1b\\_visas\\_shaft\\_u\\_s\\_workers.html](http://www.americanfreepress.net/Free_Trade/H1-B_Visas_Shaft_U_S_Workers/h1b_visas_shaft_u_s_workers.html) (last visited Feb. 10, 2003).

260. *Id.* This type of work does not seem to comply with the required "specialty occupation" or the requirement that the H-1B employees have either a Master's Degree or earn at least \$60,000 annually as set forth in 20 C.F.R. § 655.737(b). If the employees do meet these requirements, the employer is not obligated to the additional requirements described in 20 C.F.R. §§ 655.738-739.

261. Michael Overall, *Pickle Co. Inquiry: Judge Sets Date to Hear Case of Workers*, TULSA WORLD, June 12, 2002, at A9.

262. *Id.*

263. Blizzard, *supra* note 259. This is in direct conflict with the AWCIA requirement that the employer must pay the enhanced filing fee required in the legislation for training of U.S. workers. While the job shop may argue they will pay the enhanced filing fee and this fee paid by the employee sets off other fees incurred in placing the applicant, it is difficult to reconcile the two. Additionally, the \$2,500 fee amounts to a fortune for the average Indian where the average annual income (GNI per capita) in 2002 was \$450.00. *India At A Glance*, at <http://www.worldbank.org/data/countrydata/countrydata.html> (last visited Feb. 13, 2003).

264. *Chellen*, No. 02-CV-85.

265. Blizzard, *supra* note 259.

266. *Id.*

[y]ou can't just introduce a middle-man and say 'they aren't our employees.'"<sup>267</sup> Pickle claims the job shop employed the nonimmigrant employees, citing a contract with Al Samit to provide workers; therefore they were not directly employed by Pickle.<sup>268</sup>

This case is currently being litigated. However, a recurring theme, not addressed in many of the reported complaints with the Department of Labor, is the type of employment the nonimmigrant visa workers are contracted to perform. The allegations and formal complaints mostly center on the employer not complying with the prevailing wage requirement, but the complainant, agency and administrative law judges routinely ignore the type of worker obtaining a visa. While this is addressed in the Labor Condition Application and presumably, if the occupation is not determined to be a "specialty occupation" for which a H-1B classification is appropriate, the LCA would not be approved by the DOL. However, much of the publicity surrounding the Pickle complaint has centered on the employment of the Indian workers in welding--a trade common in the U.S.<sup>269</sup> Therefore, one can logically conclude that the perception of the LCA as a rubber-stamp process is correct or the position was improperly described in the LCA and there was no enforcement by the DOL or INS.

In contrast to the complaint filed against the John Pickle Company is a complaint filed by a nonimmigrant employee against her employer, India-based Blue Star Infotech.<sup>270</sup> The complainant, Ms. Ramachandran, worked for USIN International (USIN), a U.S. subsidiary of an Indian corporation, Blue Star, headquartered in Bombay, India.<sup>271</sup> She unsuccessfully filed a wide range of complaints against Blue Star, including failure to comply with the prevailing wage requirements, denial of benefits and wage increases, discrimination and retaliation following her complaint, along with various other INA violations, resulting in her working as a "Sales Manager," outside the classification applied for in the LCA.<sup>272</sup> The administrative law judge who heard her complaint categorically went through each charge and supported the finding of the Department of

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267. Overall, *supra* note 261.

268. Blizzard, *supra* note 259.

269. *Id.*

270. Ramachandran v. Blue Star Infotech, 2002-LCA-8 (June 4, 2002), *available at* <http://www.oalj.dol.gov/public/ina/decsn/02lca08a.htm>.

271. *Id.* at 2.

272. *Id.* at 4.



Labor administrator that Blue Star did not violate any provision of the LCA process.<sup>273</sup>

More important than the court's findings, this case provided a thorough walk-through of how foreign corporations contract with U.S. companies to provide foreign workers on a temporary basis, specifically in the technology sector.<sup>274</sup> This case shows how employers can lawfully act within the perimeters of the H-1B visa program. While these employers are commonly referred to as job shops, this case is a good illustration of how such derogatory generalizations can be unfounded.<sup>275</sup>

Blue Star's U.S. company is USIN, a "U.S. marketing subsidiary" of Indian-based Blue Star.<sup>276</sup> USIN "provides software consulting services to major corporations around the world."<sup>277</sup> Ms. Ramachandran was paid \$67,200 per year as a sales manager doing sales activities in addition to supervising other employees, processing INS documents, and finance work.<sup>278</sup> She was responsible for "overseeing and evaluating the performance of personnel assigned to work at customer locations as well as administering their direction and operations in accordance with local laws and regulations in matters pertaining to visas [and] work permits."<sup>279</sup>

When a company such as Blue Star, in the business of supplying temporary workers to act as consultants inside U.S. corporations, places an employee, the non-immigrant's employment must comply with local prevailing wage requirements.<sup>280</sup> In addition, if the job shop is an H-1B dependent employer, the company must comply with the requirement to search for an available U.S. worker to fill the position prior to placing a H-1B nonimmigrant employee.<sup>281</sup> As one can imagine, this process is cumbersome and bureaucratic for companies often based on the east or west coasts while placing employees throughout the country. However, it is necessary for the employer to comply with the INA requirements.<sup>282</sup>

The administrative law judge found Blue Star complied with the INA requirements.<sup>283</sup> While there is certain to be abuse by job shops, this is a documented example of a job shop operating well within the perimeters of

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273. *Id.* at 12.

274. *Id.*

275. *Id.*

276. *Ramachandran*, 2002-LCA-8, at 2.

277. *Id.*

278. *Id.* at 6.

279. *Id.* at 5.

280. *Id.* at 6.

281. *Id.* at 10.

282. *Ramachandran*, 2002-LCA-8, at 10.

283. *Id.*

the INA by providing a service to U.S. corporations and paying its employees who possess the required specialty occupational skills the prevailing wage.<sup>284</sup>

*D. Is the Criticism Founded?*

The negative attitude of the public towards immigration and temporary nonimmigrant workers is in part a result of socioeconomic concerns of “a tightening job market, with the increased competitiveness among labor, frustration over the cost and value of available housing, anxiety about . . . the catalysts of those concerns . . . not related to immigration trends, the political powerlessness of recent immigrants makes them a prime target for scapegoating.”<sup>285</sup>

While much of the criticism focuses on job shops and comes from big labor or isolationist organizations, it remains unclear how much of the criticism is valid.<sup>286</sup> “The Labor Department received 269 complaints involving abuse of H-1B workers in 2001, up from 140 the year before. It found violations in 54 cases and ordered companies to pay more than \$1.3 million in back wages.”<sup>287</sup> Taking the large number of visas processed and the number of nonimmigrant workers employed in the U.S.,<sup>288</sup> 269 complaints is relatively insignificant. From the number of reported cases, one can draw many conclusions. Possibly employers and employees for the most part comply with the requirements of the program to the extent that any differences can be addressed between the parties. Some critics suggest that the lack of complaints filed is due to the disparity of power

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284. *Id.* at 12.

285. Sabrina Underwood, Comment, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1B Visa program*, 15 GEO. IMMIGR. L.J. 727, 735 (2001) (quoting Susanne Jonas, *Rethinking Immigration Policy and Citizenship in the Americas: A Regional Framework*, in IMMIGRATION: A CIVIL RIGHTS ISSUE FOR THE AMERICAS 147 (Susanne Jonas & Suzie Dod Thomas eds., 1999)).

286. Historically, organized labor has been a leading critic of allowing foreign labor in the U.S. based on well documented concerns mostly regarding wage competition leading to lower wages. However, during the recent debate (summer 2001) led by President Bush, regarding the grant of amnesty to illegal aliens presently working in the U.S., “[a]fter years of viewing immigrants as a threat, competing for jobs and depressing wage levels, the A.F.L.-C.I.O. last year called for amnesty for all illegal workers, seeing immigrants as potential union members.” Eric Schmitt, *Ambivalence Prevails in Immigration Policy*, N.Y. TIMES, May 27, 2001, at A12.

287. Khirallah, *supra* note 45.

288. *Id.* (some estimate the current number of H-1B visa holders employed in the U.S. has reached one million).

between the employees and employer.<sup>289</sup> While another possible explanation lies in the use of the program by the employee as a means to entering the U.S. workforce all the while understanding that non-compliance by employers is part of the price to be paid to participate in the U.S. economy.<sup>290</sup> With the enforcement structure currently in place, it is difficult to determine whether the criticism is founded.

*E. The Effects of the Recent Economic Downturn and September 11, 2001*

Media reports of fear and hatred of foreigners quickly followed the terrorist attacks of September 11, 2001.<sup>291</sup> "Everyone talks about the security of the Homeland, and now I find out that the majority of the software that runs my telephone is developed and supported from India, where they could damage or place a bug into the code unknowingly," remarked a concerned New Yorker.<sup>292</sup> Another New Yorker commented, "How are we supposed to tell the difference between a legitimate [H-1B] visa person and a terrorist?"<sup>293</sup> Opponents to the H-1B visa also stepped up their dialogue, becoming more malicious in their criticism of how special interests affect legislation since the general suspicion of foreigners increased following September 11.<sup>294</sup> Concerns over foreigners following the terrorists attacks have subsided. However, concerns over the economic changes following the attacks and impending war have increased the debate over the need for the H-1B visa and a push is on to reduce the availability of large numbers of foreign workers.<sup>295</sup>

Rep. Tom Tancredo recently squared off with a leading lobbyist association for information technology employers, led by Harris N. Miller, to debate the need for H-1B visas in the declining information technology sector.<sup>296</sup> Miller cites "anti-immigration fervor" and "job protectionism" as the leading voices opposed to H-1B visas. Historically, similar cries have been heard during economic downturns.<sup>297</sup>

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289. Underwood, *supra* note 285, at 736.

290. Tancredo, *supra* note 232.

291. John Soat, "Why Don't We Replace Corporate CEOs with [Foreigners] on the H-1B Visa Program? Hey, They'd Save Millions of Dollars!," INFORMATION WEEK, Nov. 26, 2001, at <http://www.informationweek.com/story/1WK20011121S0012>.

292. *Id.*

293. *Id.*

294. Khirallah, *supra* note 45.

295. See Miller, *supra* note 122; Tancredo, *supra* note 232.

296. Miller, *supra* note 122; Tancredo, *supra* note 232.

297. Miller, *supra* note 122.

In 1798, the Alien and Sedition Acts targeted immigrants considered politically incorrect by the John Adams administration. The Know-

Rep. Tom Tancredo believes the “H-1B program is not necessary and actually is harmful to our nation’s interests. The sooner Congress scales it back, the better.”<sup>298</sup> Tancredo claims “the ‘temporary stopgap while we retrain workers’ line is a ruse.”<sup>299</sup> It is an attempt by industry to continue to deceive Congress and the public into continuing the availability of cheap and docile foreign labor.<sup>300</sup> However, as discussed previously, his concerns are not supported by recent applications and issuances of H-1B visas as reported in the September 2002 INS report.<sup>301</sup>

In a report issued by the Immigration and Naturalization Service dated September 15, 2002, during the first three quarters of the 2002 fiscal year (October 1, 2001 through June 30, 2002), 60,500 H-1B petitions were approved against the cap of 195,000.<sup>302</sup> The number of petitions for the third quarter FY 2001 was 130,700, making the 2002 visa count less than half of the previous year total.<sup>303</sup> This number does not reflect the same calculations as the previous years. Due to recent legislation, the number of H-1B petitions does not include extensions and new employer petitions, nor does it include the exemptions provided for non-immigrants working for educational institutions or nonprofit research organizations.<sup>304</sup> However, taking these considerations into account, the overall number of petitions and issued H-1B visas is significantly lower than in prior years.<sup>305</sup> The cap remains at 195,000 until the cap returns to the 65,000 level at the end of FY 2003.<sup>306</sup> It is likely the cap will not be reached based on the

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Nothing political party of the 1850s sought to bar foreigners from public office and expand the period of naturalization from five to 21 years. The Alien Contract Labor Law of 1885 prevented foreigners from working under contract in the United States, and the Expatriation Act of 1907 rescinded the citizenship of American women who married foreign nationals. The United States virtually shut the door on immigration during the Great Depression of the 1930s, and the last restrictions against Chinese immigrants weren’t eliminated until 1964.

*Id.*

298. Tancredo, *supra* note 232 (referring to the additional enhanced filing fee collected during the H-1B application process for workforce training).

299. *Id.*

300. *Id.*

301. Fragomen & Bell, *supra* note 238.

302. *Id.*

303. *INS Announces Decline in H-1B Filings*, 79 NO. 33 INTERPRETER RELEASES 1239 (Aug. 19, 2002).

304. *Id.*

305. *Id.*

306. *See id.*

technology sector economy until FY 2004 (assuming the cap reverts back to 65,000).<sup>307</sup>

Professionals that work intimately with employers who utilize H-1B visa employees cite slumping economic conditions, as opposed to concerns and reluctance to hire foreign workers following September 11, as the reason for the decrease in need for H-1B workers.<sup>308</sup>

Another effect of the concern over foreigners following the terrorists attacks is the resulting delays in processing all paperwork related to foreigners entering the U.S.<sup>309</sup> Quick action on applications is no longer realistic, personal interviews are commonplace and visa refusal rates are higher.<sup>310</sup> Recent legislation passed the U.S. House and Senate in response to concern of the processing delays. On October 3, 2002, the U.S. Senate passed a measure that allows H-1B nonimmigrants nearing the permitted six-year limit (commonly referred to as "maxing out") to extend the period of stay if a labor certification was filed and has been pending for at least 365 days.<sup>311</sup>

While it is expected to decrease, the anticipated use of the H-1B visa in this period of economic downturn remains uncertain. "H-1Bs are more likely to be used in jobs for which it's hard to find U.S. workers, such as programming in Arabic or Chinese," says David Pritchard, a senior director of technology staffing for Microsoft.<sup>312</sup> However, Microsoft reports they plan to hire fewer H-1B employees due to the increased domestic talent-pool available now following industry cutbacks in the technology sector.<sup>313</sup> Another company who intends to continue to use H-1B workers despite the slow down is Hewlett-Packard.<sup>314</sup> During the past two years, HP used the H-1B visa program to hire many software engineers.<sup>315</sup> It now plans to focus its use of the program in areas requiring more specialized skills such as scientists involved in certain research

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307. *Id.*

308. Tischelle George, *But as Economy Declines, Requests Have Already Fallen Off*, INFORMATION WEEK (Sept. 9, 2002), at <http://www.informationweek.com/story/IWK20020906S0032>.

309. See Bell, *supra* note 3.

310. *Id.*

311. Austin T. Fragomen, Jr. & Steven C. Bell, *Congress Approves Expansion of Provision for H-1B Extension Beyond Six Years; President to Sign the Measure into Law Shortly*, IMMIGR. BUS. NEWS & COMMENT, Oct. 15, 2002, available at 2002 WL 31296091.

312. Khirallah, *supra* note 45.

313. *Id.*

314. *Id.*

315. *Id.*

projects or specialists with unique talents often found at technology conferences.<sup>316</sup>

## VI. CONCLUSION

The current economy may make the continuing debate over allowing increased numbers of nonimmigrant workers under the H-1B visa program unnecessary. As the debate grew exponentially just two years ago while a new industry-friendly administration took office, factors such as September 11, 2001 hastened the economic recession. In turn, the need for H-1B workers declined, quieting the debate as attention turned elsewhere.

A significant change in immigration policy as a whole followed September 11, 2001. To cite but a few examples of the dramatic shift in focus: legislation nearing passage to enable "individuals who have fallen out of status but who had been sponsored based on qualifying employment or familial relationship, to nonetheless apply for permanent residence"<sup>317</sup> now appears exceedingly unlikely; talk of negotiations for possible amnesty programs has ceased; opponents to the H-1B program have increased and stepped up organized efforts to roll back the program; additional oversight and obligations on educational institutions regarding student visa programs is now required; and Congress has recently expanded the "INS's authority to detain immigrants through the passage of the PATRIOT Act."<sup>318</sup>

There is much left unsettled in the area of immigration law in the United States. While many who work in immigration employment law on a daily basis hope reorganization of the Immigration and Naturalization Service is high atop Congress' list, following the events of September 11, 2001 and the war on terrorism, it is unlikely with other pressing issues at hand.<sup>319</sup> In the coming months with the new Republican-led executive and legislative branches,<sup>320</sup> many involved in immigration law expect Congress

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316. *Id.*

317. Beth Peters & Marshall Fitz, *To Repeal or Not to Repeal: The Federal Prohibition on In-State Tuition For Undocumented Immigrants Revisited*, 168 WEST'S EDUC. L. REP. 2 (Oct. 24, 2002).

318. *Id.* The USA PATRIOT Act was enacted on October 26, 2001 in an attempt to dramatically tighten controls on suspected terrorists.

319. Namely, the apparent imminent war with Iraq, the worldwide search for terrorists, and slumping economy.

320. CNN, November 5, 2002 Elections, available at <http://www.cnn.com/ELECTION/2002/> (last visited Nov. 23, 2002).

to take up immigration reform, restructuring and reprioritizing the U.S. immigration bureaucracy.<sup>321</sup>

There has been much public debate to split the INS into two different agencies, with one focused on the procedural aspects of immigration services and the other focused on enforcement duties.<sup>322</sup> Much remains to be seen how this or other proposals will affect the employers and employees who utilize the H-1B visa program. With the election of President Bush in 2000 and the recent shift in the control of Congress to the Republican Party,<sup>323</sup> many hope the shift of power will solidify Bush's ushering in a "pro-immigrant wing of the Republican Party."<sup>324</sup> With the pending threats of war and international terrorism all too real in the daily lives of Americans, maintaining a political and ideological balance between the creation of our nation by immigrants, the ideal of the "American Dream," and the reality of the world as it exists today, will continue to shape immigration law and policy.

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321. Scott M. Borene, *Globalizing the High-Tech Workforce, Recent Federal Legislation has Eased the Burden for Employers Seeking to Hire and Retain Top-Flight Talent From Abroad*, 58 BENCH & B. MINN. 21, 23 (Dec. 2001).

322. *Id.*

323. November 5, 2002 elections created a Republican majority in both the U.S. Senate (Republicans 51, Democrats 46) and House of Representatives (Republicans 226, Democrats 204). See CNN, *supra* note 320.

324. Schmitt, *supra* note 286.