AN EXAMINATION ON REGULATING THE EMPLOYMENT OF FOREIGN SKILLED WORKERS IN THE UNITED STATES

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Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore.¹

Emma Lazarus’ famous poem about the Statue of Liberty inspired generations of immigrants who came to America seeking a better life. However, once immigrant workers experienced the cold and complex system of employment immigration in the United States, they realized that the country’s tone was not necessarily as warm and welcoming as the poem suggested. Beyond the world of foreign immigrant workers, the U.S. system of employment immigration is often neglected. As a result, our assessment of the implication of immigration law on the workplace rights of foreign workers is often obscured.

This comment attempts to shed light on the current regulatory scheme governing the employment of foreign workers in the United States. This regulatory scheme primarily involves the Immigration and Naturalization Act (the Act) and the regulations promulgated thereunder. In addition, this comment will focus on the status of skilled workers who, unlike unskilled alien workers or those in the agriculture industry, have been largely absent from public attention. Finally, this comment attempts to identify the most serious problems with the employment immigration system, explain its adverse impact on the individual rights of foreign workers in the workplace, point out its friction with the policies intended to be furthered by labor and employment laws, suggest courses of action to correct the existing problems, and promote ideas for perfecting the system.

Part I of this comment provides an overview of the H-1B temporary admission visa program that is used by most foreign skilled workers in the United States. Part I also focuses on the employment-based permanent

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immigration program, which most foreign workers are subject to if they seek to stay permanently in the U.S.

Subpart A explains the criteria and application process for obtaining an H-1B visa. Subpart A also identifies the major limitations that the H-1B program imposes on the status of foreign workers and summarizes the newest amendments to the program enacted by Congress. Subpart B outlines the employment-based permanent immigration mechanism. In addition to explaining the basic features of immigration preferences and the quota system, this section summarizes the labor certification process that constitutes the most significant step for foreign skilled workers seeking permanent residence.

Part II of this comment focuses on analyzing the defects of the current system. Subpart A identifies such problems as the system's irrational departure from market reality, the inherent tension between temporary and permanent admission programs, and the unwarranted restrictions on the workplace rights of foreign employees. Subpart B evaluates and summarizes various proposals for reforming the existing framework. Also, Subpart B argues for adopting either a human capital-oriented permanent employment immigration system or a market-driven temporary employment program. Subpart B also argues for adopting measures to empower foreign skilled workers and to eliminate the legal obstacles that unnecessarily burden their bargaining positions in workplaces.

I. CHARACTERISTICS OF THE REGULATORY SYSTEM FOR EMPLOYMENT OF FOREIGN SKILLED WORKERS: AN OVERVIEW

A. Temporary Admission of Foreign Skilled Workers: Specialty Occupation Workers (H-1B)

Temporary migrant workers are individuals whom the United States conditionally admits for limited periods of time for the purpose of carrying out specific tasks. The H-1B visa program is the basic immigration and legal vehicle through which the temporary employment of foreign skilled workers is regulated. Under this program, a potential U.S. employer of an eligible foreign worker must file an H-1B visa petition with the U.S. Immigration and Naturalization Service (INS). In order to be eligible for the H-1B category, a foreign worker must come to the United States to

perform services in a specialty occupation. The term "specialty occupation" is defined as "an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's [degree] or higher degree in the specific specialty as a minimum for entry into the occupation in the U.S." This requirement makes the H-1B visa program available only to those foreign workers who have received a bachelor's degree in a specialty that is related to the job position for which they are applying. Furthermore, the job position must require a bachelor's degree as the minimum qualification for prospective candidates of the H-1B visa program.

The H-1B petition procedure consists of three phases. In the first phase, as in many other employment contexts, a foreign worker is offered a job from a U.S. employer. At this time, an employment contract can be formulated. However, the substantive terms of the contract, such as the compensation and the terms of employment, are subject to qualifications imposed by immigration law.

Next, the employer who extends an offer to the foreign worker must file a Labor Condition Application (LCA) with the Department of Labor (DOL). The LCA must contain certain attestations such as: (1) the employer will pay the H-1B workers the prevailing wage level for the occupation in the area of intended employment, (2) the employer will offer the same benefits package on the same basis to similarly employed U.S. workers and H-1B workers, and (3) the employment of H-1B workers will not adversely affect the working conditions of workers similarly employed in the area of intended employment. At the time the LCA is filed, the employer must inform the existing employees that an LCA is being filed on behalf of a prospective alien worker.

Finally, after the DOL certifies the LCA, the employer files a nonimmigrant employment status petition with the INS. It is through this petition that the employer must establish that the alien will be employed in a qualifying specialty occupation and that the alien has the necessary qualifications for the position. The INS must approve the petition before the H-1B alien worker begins performing services. On average, a typical H-1B petition will take three to five months to complete.

4. § 1184(i); § 214.2(h)(4)(ii).
6. § 655.734.
7. § 1184(c).
8. Id.; § 214.2 (h)(1).
Restrictions on the H-1B program circumscribe the legal status of foreign skilled workers in the domestic workplace. First, the foreign workers are only allowed to work for U.S. employers "temporarily." Initially, the H-1B petition may only be approved for a maximum three-year period. Extensions may be obtained up to an additional three years for a total maximum period of six years. Generally speaking, without applying for permanent resident status within this six-year period, a foreign worker must depart the United States upon expiration of the authorized time period.

Second, the Immigration Act imposes an annual limit on the H-1B petitions—65,000 new admissions. An H-1B number must be available at the time a new petition is adjudicated. The INS will not approve an H-1B petition once the cap has been reached during a fiscal year.

Third, the H-1B visa is job specific, as opposed to worker specific. Thus, an H-1B foreign worker is required to file a new H-1B petition if the worker changes to a job position offered by another U.S. employer. Such a change-of-job application involves exactly the same procedures as the initial one; the new job offer must satisfy the same "specialty occupation" and "prevailing wages" requirements. Furthermore, even if a foreign worker is promoted to a different position with the same employer, the worker is still obligated to go through the petition process and obtain a new approval from the DOL and the INS.

Congress passed two statutes in the late 1990s that substantially amended the H-1B program of the Immigration Act. These legislative actions largely responded to the claimed shortage of information technology workers at the height of the Internet boom. In the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Congress increased the number of available H-1B visas from 65,000 per year to 115,000 per year in 1999 and 2000, and then to 107,500 in 2001.

10. § 214.2(h).
11. Id.
12. § 1184(g)(1)(A).
13. Id.
14. § 214.2(h)(2).
15. Id.
As a trade-off, Congress imposed additional worker protection requirements on "H-1B dependent" employers, which target those employers most likely to unfairly exploit the program. Congress also enhanced the DOL’s authority on investigating the abusive use of the program. In the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Congress once again increased the H-1B cap to 195,000 for fiscal years 2001, 2002, and 2003. The cap will revert to 65,000 in fiscal year 2004, absent further congressional increases. Moreover, AC21 improved the portability of H-1B visas so that a worker may begin new employment immediately upon the filing of a change-of-job petition by a new employer and need not wait months for the actual approval by the INS. This obviously facilitates job transfers to foreign workers.

Foreign skilled workers have very few legal alternatives to H-1B visas for pursuing temporary employment in the United States. A few other visa programs afford work authorization, often to very specific types of foreign workers. The "E" visa is available for investors and traders who enter via a bilateral treaty arrangement; the "F" and "J" visas are for foreign students and exchanged scholars who may accept study-related employments for a very short period of time for practical training purposes; the "L" visa is for intra-company transfers of executives and managers; and the "TN" visa is for professionals who enter under the North American Free Trade Agreement. Due to their limited applicability, these visa programs are not widely available to the majority of foreign skilled workers.

B. Permanent Admission of Foreign Skilled Workers

"There is nothing as permanent as a temporary worker." Estimates indicate that at least half and possibly as many as two-thirds of H-1B workers intend to stay in the United States permanently. This shows that most H-1B workers use the temporary employment visas as bridges leading to permanent residency, a status that permits permanent work in the United

19. § 1182(n)(2)(G).
20. § 1184(g)(1)(A)(iv-vi).
22. § 1184(m).
States. Under the Immigration Act, employment-based immigration is separately regulated, applying a scheme virtually unrelated to the temporary admission of foreign workers. Such a scheme also determines to some extent the legal status of foreign skilled workers in the domestic workplaces. This section outlines the basic legal vehicle through which the permanent admission of foreign skilled workers is implemented.


The Immigration Act sets forth three basic preference categories of immigrant visas—"green cards," for example—that are issued based on aliens undertaking employment in the United States. The first preference is for priority workers of extraordinary ability in the sciences, arts, education, business, or athletics. The law imposes the fewest restrictions on the admission of aliens in this category, which includes Nobel Prize winners and Olympic gold medalists. Most foreign skilled workers, however, fall into the second and the third preferences, which both require a specific job offer and a lengthy process of labor certification application. The second preference is for aliens with exceptional ability in the sciences, arts, or business, and advanced-degree professionals. The third preference is for skilled workers or professionals without advanced degrees.

Except for priority workers who fall into the first preference, a foreign worker typically has three hurdles to overcome. First, a green card sponsor such as an employer must obtain a statement from the DOL certifying that qualified U.S. workers are unavailable to fill the offered position and that the foreign worker's employment will not adversely affect the wages or working conditions of similarly employed U.S. workers. Upon receiving the DOL certification, the employer applies to the INS for immigrant visa approval. Finally, if the INS approves this petition and the foreign worker is already present in the country, as most H-1Bs are, she then

27. 8 U.S.C. § 1153(b) (1994). The fourth and fifth preference categories (applying to religious workers and millionaire investors) are rarely used and are therefore omitted from the discussion here.
28. § 1153(b)(1).
29. Compare 8 C.F.R. § 204.5(h) (2000), with § 204.5(k), and § 204.5(l).
30. § 1153(b)(2), (3).
31. Id.
32. Id.
34. § 1153(b)(2)(B) (providing a waiver to the job offer, therefore the labor certification requirement but this exception is only applicable to aliens whose admission is in the national interest and to certain physicians).
applies to the INS for adjustment to permanent resident status when the immigrant visa number becomes available.\textsuperscript{35}

Even if a foreign worker passes the first two obstacles, she may not be able to adjust her status to that of permanent worker right away because an immigrant visa may not be available. The immigrant visa numbers are subject to a statutory numerical cap.\textsuperscript{36} The Immigration Act provides 140,000 annual immigrant visas for employment-based immigrants, each of the three preference categories having 40,040 per year plus any number not required by the higher-ranked preferences.\textsuperscript{37} The Immigration Act also provides that no more than 7\% of employment-based immigrants may come from a single country.\textsuperscript{38} This means that no more than 9,800 immigrants per year, including their immediate family members, can arrive from any given country, regardless of that foreign country's size or population.

The entire application process may be time consuming. According to current estimates, a labor certification application takes from 12 to 36 months to process,\textsuperscript{39} an immigrant visa petition 3 to 10 months,\textsuperscript{40} and an adjustment of status application 15 to 24 months, depending on the availability of immigrant visa numbers.\textsuperscript{41} The lengthy process for green card applications creates a serious problem for foreign skilled workers. Most of these workers are holding H-1B visas which are subject to the six-year limit. Because of the processing delay, only 61,000 out of 140,000 permanent employment slots are being used each year.\textsuperscript{42} At the same time,

\begin{footnotesize}
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\item[37.] § 1151(d).
\item[38.] 8 U.S.C. § 1152(a), (e) (2000).
\item[40.] Law Offices of Carl Shusterman, INS Service Centers Processing Times, available at http://www.shusterman.com/toc-sc.html (last visited Feb. 18, 2003). An immigrant visa petition is designated as a Form 1-140 application. \textit{Id.}
\item[41.] \textit{Id.} An adjustment of status petition is designated as an I-485 application. Ms. Jenny Yan pointed out in our interview that many applicants from populous China and India who filed adjustment of status applications in 1997 waited for nearly 30 to 36 months to receive INS approvals, largely because the per-country quota limited the availability of immigrant visa numbers for those two countries during that period. \textit{Id.; see also} Interview with Ms. Jenny Yan, immigration lawyer, Judith G. Cooper, P.C., Houston, Tex. (Oct. 25, 2002).
\item[42.] See B. Lindsay Lowell, \textit{H-1B Temporary Workers: Estimating the Population} (2000), available at http://www.ieeeusa.org/forum/issues/h1bvisa/h1breport.pdf (last visited on Oct. 27, 2003). For the five-year period ending in 1996, 307,670 out of 700,000 employment-based permanent resident statuses were granted, with approximately 61,534 each year. It was estimated that, at an annual admission rate of 61,701, no significant increase would occur from 2003 going forward.
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although many H-1Bs would want to permanently immigrate, the long waiting period in excess of the duration of the stay permitted on the H-1B visa makes it impossible for them to do so.\textsuperscript{43} Congress responded to this concern with AC21 by allowing certain qualified H-1B workers to extend their statuses past the six-year limit if their permanent residency petitions are delayed.\textsuperscript{44} Further, Congress eliminated the per-country ceilings to allow unused employment-based immigrant visas to be made available to the nationals of oversubscribed countries.\textsuperscript{45}

2. The Prerequisite to Permanent Admission of Foreign Skilled Workers: Labor Certification Procedure

The most critical part of the permanent admission process is the labor certification application. The application includes a set of detailed measures to protect the domestic workforce. As a result, this part constitutes the most difficult legal hurdle for foreign workers to overcome.

An individual labor certification from the Department of Labor is required for employers wishing to employ a foreign worker on a permanent basis.\textsuperscript{46} The DOL must certify to the INS that there are no qualified U.S. workers available and willing to accept the job at the prevailing wage.\textsuperscript{47} In reviewing the applications, the DOL applies the following qualifying criteria: (1) there must be a bona fide job opening; (2) job requirements must adhere to occupational customs and may not be unduly restrictive nor tailored to the foreign worker's specific qualifications; and (3) the employer must pay at least the prevailing wage.\textsuperscript{48}

The DOL utilizes two mechanisms in determining whether these standards are met. In a regular processing method, the employer is required to conduct an active recruitment campaign for the job openings for which foreign workers are sought, under the close supervision of the State Workforce Agencies (SWA).\textsuperscript{49} The SWA will work with the employer to develop a job advertisement.\textsuperscript{50} The employer must interview all candidates

\textsuperscript{43} Id. at 16 (estimating that no more than 20\% of the H-1B workers admitted between 1996 to 1998 would adjust to permanent status within their six-year duration of stay because of the record average waiting time).

\textsuperscript{44} 8 U.S.C. § 1184(g)(4) (2000).


\textsuperscript{49} Id. at 32.

\textsuperscript{50} See Department of Labor, Permanent Labor Certification, at http://www.ows.doleta
who apply and submit a recruitment report to the SWA. The SWA will then forward the report to the DOL regional offices that conduct the final reviews. If any qualified U.S. workers are identified, the application will be denied.

In response to criticism that the supervised recruitment is too time consuming and costly, the DOL developed the streamlined process of Reduction in Recruitment (RIR). With the RIR method, an employer may receive labor certification by showing that within the past six months it has engaged in a pattern of recruitment in an effort to hire U.S. workers for the position, but has been unsuccessful in identifying qualified and available U.S. workers. If the certifying officer concludes that the pattern of recruitment is appropriate, the application will be approved with no need for the SWA to do a supervised recruitment process.

The processing time for labor certification varies from state to state. The regular processing method may take up to two years or more to complete. The DOL estimates that using the RIR method could reduce the processing time to less than one year.

II. DIAGNOSIS OF THE CURRENT REGULATORY SYSTEM AND POLICY ARGUMENTS FOR IMPROVEMENT

An effective and equitable regulatory framework for employment of foreign skilled workers should be able to achieve two major objectives. First, it should generate a competitive workforce for the economic growth of the country while protecting domestic labor markets from unfair competition with efficient administrative channels available to implement such ends. Second, the individual rights of foreign workers should be sufficiently protected against undue coercion.

Two major branches of law are assigned the task of achieving such objectives. Immigration law is designed mainly with regard to the U.S. employer and domestic labor market; the rights of foreign workers are


51. Id.
52. Id.
53. Id.
56. Id.
rarely addressed. But foreign skilled workers should be able to resort to the general principles of labor and employment law in order to protect their individual rights in U.S. workplaces. Although the current system is generally up to the challenge, certain problems arise where the rights of immigrant workers are needlessly compromised yet fail to enhance an effective and efficient immigration system.

A. Analysis of Existing Problems

1. Regulatory Requirements in Conflict with Market Reality

One major problem lies in the issue of how to determine whether the admissions of foreign workers will have adverse effects on the domestic workforce. In particular, there are always competing arguments for and against more admissions of H-1Bs, which are the driving forces that shape the current system. The adopted checking measures, such as the six-year limits, annual numerical caps, restricted portability of visas, and permanent labor certification applications, are designed to protect the domestic workforce. Such measures seem to be based on the premise that the government is a planner of the marketplace and can accurately predict the cyclic shifts in supply and demand.

However, this premise is very problematic. The government that chooses to intervene in the market directly is often unable to respond to the changing economic conditions. For instance, Congress dramatically increased the H-1B quota for fiscal years 1998 to 2003, from 65,000 per year to 195,000 per year, in response to the “new economy” booming in late 1990s and to the computer industry’s outcry for more information technology professionals. These measures are obviously becoming unjustifiable in light of the Internet bust and the economic recession that emerged in 2000 and 2001. The increased inflow of foreign information technology workers and the rising unemployment rate nationwide aroused hostility from domestic workers, and worsened the conditions of H-1Bs who suddenly found themselves unemployed and forced to choose between

59. See B. Lindsay Lowell, Temporary Workers and Evolution of the Specialty H-1B Visa, in 23 IN DEFENSE OF THE ALIEN 33, 33 (Lydio F. Tomasi ed., 2001) (arguing that “the proposed increase in the H-1B cap has serious consequences for the individual H-1B visaholder and the permanent system”).

60. See supra note 16.

leaving the country or facing severe immigration penalties.62

In the arena of permanent admission of foreign workers, the labor certification application also exemplifies the gap between the promises of government intervention and the market reality. The supervised recruitment process becomes a sham in situations where the employer advertises a job position that has already been filled by a foreign worker whose performance the employer is so pleased with that it is willing to sponsor the worker's green card application. Thus, ironically, the job advertiser is actually avoiding potential job seekers, afraid that an applicant may answer the advertisement and make the process of getting a green card petition more troublesome. Facing such a situation, a U.S. worker who applies for the advertised job may find that, strangely enough, the potential employer is trying its best to disqualify the applicant. More often, the advertisement itself is flagged as immigration related, with language such as "apply to the state workforce agency instead of the employer," so seasoned job applicants know it would be a waste of time to apply. Thus, the entire recruiting process mandated by the government becomes largely wasteful, both for U.S. employers and workers.

The newly initiated RIR process brings the labor certification application one step closer to the market reality. It requires an employer to justify the hiring of foreign workers through documenting a pre-filing pattern of recruitment that locates no qualified U.S. workers.63 This step more likely mirrors the actual recruiting process, creating no need to reproduce a sham recruitment. However, potential conflicts still exist. An employer often decides to sponsor a green card until a couple of years after hiring the foreign worker. Since the RIR process requires a showing of the recruiting pattern only during the six-month period immediately before filing for the labor certification application, an overburdened duplicate of recruitments is still unavoidable in testing the labor market in most employment-based immigration cases.


63. See Department of Labor, supra note 54 and accompanying text; see also Basic Labor Certification Process, 20 C.F.R. § 656.21(i) (2000).
2. Tension Between Temporary and Permanent Admission Programs

Another problem arises from the inherent tension between temporary and permanent admissions of foreign skilled workers. A lack of clarity on the admission policies governing the two categories largely contributes to this problem. The H-1B program aims to meet the temporary demand for labor in a specific sector of the economy and within a specific period of time. In the last decade, this program was shaped largely by competing lobbying efforts and political concerns. Employment-based immigration, on the other hand, more sensibly focuses on building human capital for the future, based on the nation's long-term and strategic needs. The current system does not distinguish between the two programs.

The employment-based immigration program basically duplicates the H-1B program, but makes it more complicated and costly to administer. The permanent labor certification process emphasizes the current labor shortage of a specific occupation in the intended area of employment, without adopting a forward-looking perspective. Moreover, tension exists because most temporary workers seek permanent admission through the path of the H-1B program. Therefore, the increased H-1B cap will generate more than 710,000 foreign workers. However, the permanent admission system is estimated to absorb no more than 25,000 H-1Bs each year. It could be harmful for both business and foreign skilled workers to lose those workers who have been fully integrated to the economic production system during the H-1B period, but are unable to stay permanently when their visas expire.

3. Foreign Workers' Rights Compromised

All of the above-discussed drawbacks interplay to generate troubling issues with regard to the workplace rights of foreign skilled workers. The rights of legally admitted workers are rarely addressed in contrast to the rights of undocumented aliens. As to the latter, the Supreme Court held in *Sure-Tan, Inc. v. NLRB* that the definition of "employee" under the National Labor Relations Act included undocumented workers who were discriminated against by unscrupulous employers. The Court made clear

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66. *Id.* at 17.
that these workers were entitled to the same statutory protection as all workers.\textsuperscript{68} The same reasoning should apply to legally admitted foreign workers as well. Intuitively, the problem may appear to be less serious with regard to foreigners who have work authorization in the country because legal aliens are generally perceived to have more rights than illegal aliens. However, the problem resulting from the policy frictions in a broader sense does exist and often takes a more subtly disguised form.

Under the current system, the immigration measures adopted for protecting the domestic workforce hamper foreign workers' individual rights that are guaranteed by the principles of labor and employment law. "The premise [of such laws] is that individual workers lack the bargaining power in the labor market necessary to protect their own interests."\textsuperscript{69} Therefore, the law "would come to their aid as the weaker party and shield them from the over-reaching economic strength of the employer."\textsuperscript{70} In this sense, labor and employment laws can be viewed as tools to protect two basic mechanisms for dealing with problems in the workplace: 1) the market mechanism of exit-and-entry, in which individual workers respond to a dissatisfying working condition by quitting and switching jobs; and 2) the political mechanism of voice, in which dissatisfactions are articulated through democratic processes in the workplace.

H-1B workers, however, are substantially precluded from making use of either exit-and-entry or voice mechanisms due to a number of reasons. First, the portability of employment benefits coming with the temporary visas is heavily restricted. H-1B workers cannot easily change jobs without going through sometimes complex administrative procedures.

Second, H-1B workers are afraid of losing their jobs. If they lose their jobs, H-1B workers are forced to leave the country or risk exposure to the severe penalties inflicted by immigration law. If employment is terminated, foreign workers' H-1B visas technically expire.\textsuperscript{71} If they overstay, they are then subject to deportation and civil detention.\textsuperscript{72} If they overstay longer than one year, they can be barred from reentering the United States for ten years.\textsuperscript{73} Although the INS rarely enforces these provisions, the possibility of such consequences still functions to effectively weaken H-1B workers' bargaining power. Thus, foreign workers are more vulnerable to potential exploitative employment

\begin{itemize}
\item \textsuperscript{68} Id. at 892.
\item \textsuperscript{69} Clyde W. Summers, Labor Law as the Century Turns: A Changing of the Guard, 67 NEB. L. REV. 7 (1988).
\item \textsuperscript{70} Id.
\item \textsuperscript{71} See AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LAW AND BUSINESS § 2:45 (2001) (explaining that ambiguity exists as to how long an H-1B worker is allowed to stay in the United States searching for a new job after being laid off).
\item \textsuperscript{72} 8 U.S.C. § 1182(a)(9)(B) (2000).
\item \textsuperscript{73} Id.
\end{itemize}
conditions, and in turn, domestic workers are more likely subjected to unfair competition.74

Third, although permanently admitted foreign workers are entitled to full package rights, H-1B workers’ attempts to obtain permanent residency can be extremely difficult. As discussed above, a majority of the current H-1B workforce will not obtain their green cards within the six-year limit of their temporary stay due to the huge administrative backlogs developed at the DOL and the INS.75 In order to start their green card applications as early as possible, temporary foreign workers are pressured not to voice their other concerns to employers.

B. Arguments for Improvement

Various proposals have been made to improve the regulatory framework of the employment of foreign skilled workers. Keeping in mind the main problems of the current system, I will evaluate such proposals and identify a set of solutions aiming to achieve the two-fold objectives of an ideal system. Essentially, one goal is to create a flexible, market friendly temporary and permanent admissions mechanism without sacrificing the interests of domestic workers. The other goal is to empower foreign skilled workers in their economic bargaining with employers.

1. Reformation of Alien Selection Process for Permanent Admission Purposes

A radical long-term solution calls for fundamentally reforming the permanent admission system. The current labor certification process focuses solely on the immediate needs of the labor market. However, immigrants are permanent additions to the workforce. Thus, a well thought out plan is much more desirable. An ideal system should seek to admit those individuals who have a proper reservoir of skills and attributes that increase the probability of future success.

Some scholars propose to apply a point system for admitting employment-based immigrants, which has been adopted in part in Canada and Australia.76 The proposed system would not concentrate on matching a

75. B. Lindsay Lowell, H-1B Temporary Workers: Estimating the Population 15 (2000), available at http://www.ieeeusa.org/forum/issues/h1bvisa/h1breport.pdf (last visited Oct. 27, 2003) (estimating that less than 40% of the H-1Bs admitted in 2002 would adjust to permanent status within their duration of stay and the rate reaches just more than 50% by the end of the decade).
76. DEMETRIOS PAPADEMETRIOU & STEPHEN YALE-LOEHR, BALANCING INTERESTS:
particular alien to a particular employer, but would value certain human capital attributes such as language proficiency, age, skill, educational level, net worth, job experience, existing job offers, and the like. An alien would have to receive a specified number of points to be eligible for permanent admission. Such a system could be easily adjusted to changing economic and labor market conditions through the imposition of realistic requirements or demanding characteristics. Therefore, the point system would protect U.S. workers more sufficiently.

Still other scholars have advocated for a more liberal immigration policy in admitting foreign skilled workers by following the principles of free trade. In line with the arguments for free trade, they suggest that the United States could utilize the resources it spends on monitoring immigration in a much more effective fashion by investing in making U.S. workers more competitive rather than in erecting barriers. As an alternative to the current immigration system, Professor Chang recommends substituting a head tax or optimal immigration tariff as preferable methods of selecting immigrants.

Perhaps a more practical approach is to rely on incremental improvements that can be achieved within the current system. The labor certification process easily becomes the most visible target. The lengthy and costly procedure is hardly justifiable if we evaluate its impact against the big picture. Given that the Immigration Act restricts the available employment-based immigrant visas to an annual quota of 140,000, among which the allocation of only 110,000 (the total of second and third preferences) is subject to labor certification, the impact of this process in an economy of hundreds of millions of jobs is almost negligible. Also, the DOL approves a significant majority of the submitted applications.

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77. Id. at 152-53.
78. Id. at 139.
79. Id. at 138-39.
81. See Howard F. Chang, Migration as International Trade: The Economic Gains From the Liberalized Movement of Labor, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 380 (1998) (suggesting that unskilled immigrants would pay a high tariff while skilled immigrants would pay a lower tariff, and arguing that the private sector would benefit from elimination of all restrictions on immigration of labor).
82. During our interview, Ms. Jenny Yan estimated that about 70% of the filed labor certification applications are approved. See Interview with Ms. Jenny Yan, supra note 41;
casts further doubt on the necessity of retaining a complex labor certification procedure.

Even though the elimination of the entire process is politically unlikely, a reformed system with more realistic approaches and streamlined procedures would be very helpful. For instance, the simplified RIR process should become the norm instead of the exception. In addition, blanket waivers or pre-certifications should be established for highly qualified petitioners, thereby eliminating enormous administrative hurdles for a huge portion of applicants. Workers in such pre-certified categories may include those holding advanced degrees from universities in the United States and those who have been working for a considerable period of time and have been fully absorbed into the U.S. workforce.83 There can be no question that working within the country gives rise to a presumption of belonging. In the words of Professor Gerald Lopez:

It is not possible ... to have persons live, work, and participate in a community over many years without creating in them a sense of entitlement to some benefits of community membership and a moral obligation based on their reasonable expectations. No matter how strongly our formal laws deny it, our conduct creates the obligation.84

For these workers who have experienced a period of “earning” the right to permanent residency, the labor certification process becomes extremely unnecessary and redundant.

2. Restructure of Government’s Role in Temporary Admission Program

Several revisions are also necessary for a successful temporary admissions program. First of all, a temporary system must remain “temporary” in its real sense as a response to the ongoing labor shortage. A market friendly mechanism should rely on authoritative labor market signals to objectively determine the scope of the temporary workforce

PAPADEMETRIOU & YALE-LOEHR, supra note 76, at 102-06 (explaining that past approval rates have been very high).

83. See U.S. Department of Homeland Security, Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2002 (Sept. 2003), available at http://www.bcis.gov/graphics/shared/services/employerinfo/FY2002charact.pdf (estimating that 30% of the H-1B workers earned a master’s degree, 17% earned a professional degree or doctorate degree, and 34% of initial petitions were filed by aliens in the U.S., which normally indicates that such aliens either studied or worked in the U.S. before they applied for H-1B status).

needed. This type of mechanism would adjust to changing market conditions, thus relieving Congress from highly unreliable speculations on setting up fixed quotas. Also, instead of intervening in a normally functioning market, the government should take an active role in correcting market malfunctions. In the temporary worker context, the government should aim at preventing employers from hiring foreign workers as cheap labor to replace qualified U.S. workers. In addition, the government should ensure that legally admitted foreign workers are employed under legal conditions.

One critical step to achieve this goal is to go after the violators and investigate the complaints filed by both U.S. and foreign workers. However, the current system fails to meet either objective. On the one hand, it subjects hiring decisions of employers to extensive INS examination. On the other hand, its bureaucratic practice often makes the government examination toothless, and implementation weaknesses leave the system vulnerable to abuse. The INS scrutinizes each foreign worker's qualifications and the employer's job requirements, and second-guesses the employer's hiring decision on the merits. These practices are at odds with the fundamental principles of a capitalist market economy, allocating limited governmental resources to tasks that would be more efficiently accomplished through self-enforcing market mechanisms. Such misplacement results in leaving the government with insufficient resources to detect and prosecute the abusive uses of the temporary employment program. The protection for domestic and foreign workers is illusionary if abuses go unpunished. A more sensible approach would call for absolving government from numbers speculation or merit-based reviewing.

Commentator Sarah Jain has suggested adopting a non-capped pilot project in which admissions of temporary workers are not subject to arbitrary quotas, but the project period is extendable upon periodic reviews of worker shortage by both government and industry in a seamless process.


86. According to a 1996 Labor Inspector General report, 75% of H-1B workers were working for employers who did not adequately document the proper wage on the [Labor Condition Application] and, when the actual wage could be determined, 19[?] of H-1B workers were paid less than the wage specified on the LCA. Id. at 22-23. Assuming this percentage remains constant, violations of the prevailing wage requirements of the H-1B program that go unpunished could be very substantial. In 1999, about 137,000 H-1B workers were approved, yet only 135 complaints were received. Id. at 20.

87. Sarah Jain, Note, Looking to the North While Playing Doctor: Solving the H-1B Visa Problem by Following Canada's Lead, 10 Minn. J. Global Trade 433, 452-54
encouraged to utilize available dispute resolution procedures to challenge employers’ decisions on hiring foreigners if they deem the substantive requirements of H-1B laws are not satisfied or are unjustifiably used to discriminate. The government, in turn, should focus on reviewing the implementation of the law by employers, and on vigorously initiating regular audits of their compliance. In this way, the government could convert its limited resources from examining the merit of each employment decision by employers to enforcing, investigating, and adjudicating allegations of temporary program abuse.

3. Empowering Foreign Workers

Finally, better protection for workplace rights of foreign skilled workers will serve the interests of domestic workers and reduce unscrupulous employers’ reliance on exploitative employment. Therefore, an effective application of labor and employment laws to foreign workers serves the policy of immigration laws as well. It helps to ensure that the wage and employment conditions of domestic workers are not adversely affected by the competition of foreign workers who are not subject to the standard terms of employment. With the advantage of preferring undercompensated foreign workers minimized, U.S. employers’ hiring of foreign workers would more likely naturally result from a diminished domestic workforce. That is, if the market demand for foreign skilled workers is generated for the “right” reason, there may be less undermining of immigration policies and fewer violations of immigration laws.

One important way to empower workers in disadvantaged bargaining positions is to minimize the burdens that the government unnecessarily imposes on a worker exercising her individual rights. A foreign skilled worker is better protected if able to freely negotiate and leave an employer if she so chooses. Aided by the above discussed improvements on the immigration system, foreign skilled workers could gain substantial leverage in negotiating with an employer without fearing too much that the employer could dominate the employment relationship by controlling the green card application. Foreign skilled workers should be free from confusion about available options; they should be able to expect their permanent resident statuses through the revised permanent admission system within a reasonable period of time. Otherwise, these workers should benefit solely under the revised temporary admission program that can be flexibly adjusted according to the changing labor shortage conditions.

Moreover, Jain has suggested achieving improved protection for
foreign workers by separating a foreigner's visitor status from the employment authorization, modeling the Canadian system of admissions. Under such a system, a foreigner could gain general entry into the country as a visitor, and if the visitor would like to work and secures employment, the government then grants work authorization through its temporary admission program. If foreign workers become unemployed, they would not automatically lose the legal right to stay and therefore face severe consequences as the existing system mandates. The visitor's status could remain valid, allowing the visitor to stay in the country without work authorization. This method would effectively remove foreign workers' constant fear of immigration penalties as a result of losing their jobs.

III. CONCLUSION

In summary, this comment examines many of the frustrating aspects of the current regulatory framework for employing foreign skilled workers. In addition to being subject to labor and employment laws, the employment of foreign skilled workers is largely regulated by immigration laws. The H-1B visa program admits a limited number of foreign workers filling specialty occupations in the United States for a maximum period of six years. A majority of H-1B workers, however, seek permanent residency during their allowed temporary stay through employer-sponsored immigration petitions. As part of such petitions, a labor certification application is designed to generate a government-supervised recruitment process in order to ensure that no qualified U.S. workers are replaced by the foreign workers. The existing immigration regulatory scheme substantially restricts foreign skilled workers' workplace rights in light of such problems as: arbitrarily imposed numerical caps, limited portability of employment benefits, a lengthy and costly permanent admission processes, and the harsh effect on workers' immigration statuses in connection with job security.

Ironically, these restrictions on foreign skilled workers' rights do not necessarily work to serve the best interests of domestic businesses and workforces. Limited government resources are diluted through unwarranted interference with private business decision-making and are diverted from effectively enforcing the law. To better address these challenges, policymakers need to adopt more flexible and clearly defined employment immigration policies. As to the permanent admission program, the government needs to develop a sensible framework for determining which immigrants are to be admitted based on the nation's

88. Id. at 456-57.
89. Id.
strategic needs. As to the temporary admission program, the government needs to develop more market-oriented procedures to fill labor shortages and more efficiently enforce measures to deter violations. Only when unnecessary burdens inflicted by the insensible system are lifted can both immigrant and domestic workers adequately enjoy their individual rights and truly reap the benefits provided by immigration and diversity, two exceptional characteristics of the great American society.