

A Comprehensive Analysis of the H-1B and L-1 Visa Programs in the U.S. From An IT Perspective

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ABSTRACT

This paper analyzes the experience of the H-1B and L-1 visa programs and their impact on information technology in the United States. The topics discussed are as follows: initial justification of the programs, the relationship of the programs to outsourcing and off-shoring, who is covered by the H-1B and L-1 visa programs, utilization of the visa programs by various constituencies, the impact of the visa programs on the prevailing wage, the arguments pro and con for the program, who is on either side of the lobbying effort, protectionist legislation regarding the visa programs, fraud within the visa programs, the alleged role of “body shops” and the visa programs, and the impact on homeland security as related to the visa programs.

Key words: H-1B, L-1, Visa Program, Protectionism, Legislation, Fraud, Prevailing wage.

INTRODUCTION

Both the H-1B and L-1 visa programs have created a great deal of controversy within the United States and worldwide Thibodeau (2003); Carlson (2004). We will start by defining some key terms. For our purposes, outsourcing is defined as performing some information technology functions outside of the host organization Myron (2004). When outsourcing involves transporting these information technology functions across national borders we will use the term “off-shoring”. Mears (2004); Sherman (2004).

The H-1B visa program was instituted by the United States Government in order to make it easier for organizations to staff certain positions with non-U.S. citizens. They are essentially work permits for a maximum of six years that come with several rather stringent criteria. They are set aside for foreign workers in the following occupations: computer science, architecture, engineering, mathematics, the physical sciences, the social sciences, health and medicine, education, business, accounting, law, theology, the arts and teaching. The list is quite extensive and the goal is to provide employers with a larger pool of candidates than would be available if only U.S. citizens were considered. Since we are concerned with information technology this paper will focus on the issues surrounding that area and will not address the other fields.

DETAILS OF THE H-1B VISA PROGRAM

The H-1B visa program originated in 1990. The term of this visa is for three years and is renewable for an additional three years. The program helped the IT industry hire thousands of foreign workers during the dot.com period of frenzy when U.S. universities were not turning out a sufficient number of graduates and all government forecasts indicated that there would be future shortages of IT workers. As long as the economy was growing and IT employment was strong there was not a great deal of public awareness and concern of the visa program. H-1B visas are general visas that are more restrictive than L-1 visas. Hayes (2003a) Unless H-1B visa holders get a green card they must leave at the termination of the visa period. The implication is that workers with H-1B visas are really visitors and not immigrants to the U.S. in the traditional sense. Nevertheless, many immigrants use the visa program to gain entry to the U.S. and then follow traditional naturalization policies. Case law suggests that non-U.S. citizens

who want green cards need about two years of work experience even if they have a bachelor's degree. Work experience with an applicant's first employer, however, is considered on-the-job training and does not count. Schwartz (2005a)

Several of the following non-U.S. born IT professionals of note were once H-1B visa holders: Sameer Bhatia (founder of Hotmail), Sergey Brin (co-founded Google), Alfred S. Chang (founder of BEA Systems), Vinod Khosla (co-founded Sun Microsystems), Vinod Dham (designed the Pentium chip), Linus Torvalds (invented Linux), Anders Hejlsberg (architect of C# language) and James Gosling (developed Java.). Sivakumar (2004)

Tables 1 Schroeder (2003) and 2 Dolezalek (2004) illustrate the caps and the number of visas issues during recent periods. The latter source is the U.S. Citizenship and Immigration Services.

Year	Cap Number of H-1B Visas
1998	115,000
2000	195,000
2001	195,000
2002	195,000
2003	65,000
2004	65,000
2005	65,000 + 20,000 (March 7, 2005)

Table 1: H-1B visa cap limits.

Year	Number of H1-B Visas Granted
2000	136,787
2001	201,079
2002	103,584
2003	105,314

Table 2: H-1B visas issued.

DETAILS OF THE L-1 VISA PROGRAM

The L-1 visa program was designed for employees of multinational firms that have been assigned or transferred to work in the United States. Key distinguishing features of this visa include there is no annual cap on the number of visas and no prevailing wage requirement. This type of visa has been around for nearly four decades (1970) and most people are not even aware of its existence. Vaas (2003). A major advantage of the L-1 visa is that it can be used by organizations to import a large number of workers in one action. Workers can enter on an L-1(A) visa for executive or managerial positions or on an L-1(B) visa which requires the employee to possess specialized or advanced knowledge that might not be available by only U.S. workers in an industry. Currently, all new applicants must have been employed for at least one year within the past three years prior to the submission of the application of the L-1 visa. The total allowable period of the worker to stay is seven years. L-1 visas are granted initially for one-to-three years with extensions available in two-year increments. The L-1 visa is dependent on the existence of an operating unit in the U.S. and the foreign country. Both entities must continue to exist or the visa is revoked. It should be noted that companies may apply for what is termed a blanket L-1 visa if several specific terms and conditions are met.

As we will discuss later in the paper, the L-1 visa has been used as a tool by the so-called "body shops" to circumvent traditional U.S. employment practices. Table 3 presents the number of foreign workers on L-1 visas over a representative period from the U.S. State Department of Consular Affairs Federation for American Immigration Reform (2003). It is clear that the trend continued to increase over time even during changing economic conditions in the U.S.

Year	L-1 Visas Issued
1995	29,088
1996	32,098
1997	36,589
1998	38,307
1999	41,739
2000	54,963
2001	59,384
2002	57,721

Table 3: Number of L-1 visas issued.

UTILIZATION OF THE VISA PROGRAMS

A paper by Kumar identified the top ten occupations filled by H-1B visa holders in 2002 by using data provided by GAO analysis of Bureau of Citizenship and Immigration service data. The data is presented as Table 4. Dolezalek (2004).

Occupation	Percentage of H-1B Visas
Systems Analysis and Programming	31%
College and University Education	8%
Accountants, Auditors and related occupations	5%
Electrical/electronic engineering	4%
Computer-related, other	3%
Biological Sciences	3%
Physicians and Surgeons	3%
Misc. managers and officials, other	3%
Economics	3%
Misc. professional, technical and managerial	2%
All other IT-related occupations	2%
All other occupations	34%

Table 4: Top ten occupations filled by H-1B visa holders in 2002.

From the tables it is clear that IT has been the greatest user of H-1B visas. These workers have a higher level of education than the traditional immigrant worker. In 2002, the U.S. had about 710,000 holders of H-1B visas (Schroeder, 2003). 65% of H-1B visa holders are between 25 and 34 Chabrow (2005).

ARGUMENTS OF THE CONTROVERSY

For its duration, especially since the post dot.com bust, the visa programs have created a clear schism between supporters and detractors. Each group has armed itself with its share of highly paid lobbyists. “The H-1B visa is either a betrayal of American IT workers or a necessity of the country’s high-tech future...” Schwartz (2005c). In a 2004 *Wall Street Journal* article, the Economic Growth and American Jobs Coalition, an organization of 200 trade groups, expressed their support of expanded visa programs. Some of this organization’s members are as follows: U.S. Chamber of Commerce, Business Roundtable, American Bankers Association, National Association of Manufacturers and the Information Technology Association of America Schroeder (2004). In 2004, Geoffrey Colvin wrote in *Fortune*, “Free trade doesn’t make us poorer. It makes us richer. Lousy productivity is what makes us poorer.” Colvin (2004) Annalee Saxenian, Dean of the University of California at Berkeley’s School of Information Management and Systems articulated concerns of companies that employ high-tech workers, “The cap inhibits our ability to manage our business. Roughly half of the Intel employees with advanced degrees in electrical engineering and computer science are foreign born” Chabrow and McGee (2004).

The anti visa forces are largely associated with organized labor. An example would be the AFL-CIO. These groups tie the visa issue to the larger problem of off-shoring. Matthew Biggs, the Legislative/Political Director of the International Federation of Professional and Technical Engineers, stated the following: “To add insult to injury,

many of the U.S. jobs that still exist are being awarded to foreign guest workers who come to the U.S. on the business-friendly, government-sanctioned H-1B and L-1 visa programs” Biggs (2003). IT workers who feel that they have lost their jobs to H-1B and L-1 visa holders have set up list serves on the Internet to proclaim their cause. They have identified companies that are the major employers of visa –holding workers.

IMPACT ON THE PREVAILING WAGE

Nestled within the philosophical debate on the merits of the visa programs is the pragmatic impact on the salary structure for visa holders and the ensuing fallout on IT salaries in general. Unfortunately, one of the prime sources of data on salary and employment, the U.S. government, is not much help in this regard. “The government doesn’t track visa holders and doesn’t know the rate at which visa holders lost jobs in proportion to U.S. workers” Thibodeau (2005a). In the same article another concern expressed, “most complaints concern contractors who either paid H-1B employees below the prevailing wage or ‘benched’ them, meaning they weren’t paid between contracts.” “On March 8, 2005, the law changed to allow four tiers of pay in each prevailing wage category, enabling companies to pay H-1B visa holders something between the top and bottom levels of the prevailing wage scale” Thibodeau, (2005). There is no doubt that the wages paid to H-1B visa holders in the U.S. are higher than those that are paid in foreign countries that are the result of off-shoring (Fox, 2003); (Hoffman and Thibodeau, 2004). “Forty-two percent of H-1B visa recipients came from countries not associated with low wages according to a 2003 GAO study.” Chabrow (2005) Table 5 illustrates the average salary for programmers in selected countries.

Country	Salary
Brazil	\$12,500
Canada	\$37,500
China	\$7,500
Hungary	\$10,500
Ireland	\$24,500
Poland	\$8,100
Singapore	\$30,950
U.S.	\$65,000

Table 5: Average salary in dollars for programmers 2004 (Hoffman and Thibodeau, 2004).

Clearly, there is enormous economic pressure by organizations to balance the key factors in determining where the programming project will be completed. As the costs in India rise, then businesses will look for other less-costly havens to get their projects completed. Many economists argue that the true benefit of a generous visa program is that the jobs stay in the U.S. and all of the relevant benefits to the economy accrue. Contrast this with the case where jobs go overseas and there are no direct benefits to the U.S. economy. In a survey completed by 252 senior and corporate IT managers in 2003, it was said, “reducing and controlling costs was the No. 1 reason for outsourcing to non-U.S. locations” King (2003). “The L-1 visa is being used to bring high-tech workers to do U.S. jobs similar to the temporary worker H-1B visa program. However, unlike the H-1B visa, the L-1 visa does not require that the employer pay the worker in the U.S. the prevailing wage for the type of work being performed.” Federation for American Immigration Reform (2003). Thea Lee, Assistant Director of the AFL-CIO’s International Economics Department has a different point of view. “Money and energy could be better spent to keep jobs at home rather than to try to convince people that there isn’t a problem” Schroeder (2004). “More than 500,000 U.S. technology workers lost their jobs between January, 2001 and December, 2002. During the same period, companies sponsored more than this number of high-tech workers on H-1B and other temporary visas. According to the INS, the median salary for an H-1B worker is 25 percent less than that of an American’s” Worthen (2003).

CONCERNS ABOUT FRAUD AND MISUSE IN VISA PROGRAMS

Sometimes what starts out as a program to fulfill a need for supplementing a shortage of highly skilled workers turns into something quite different. Robert Reich, former Secretary of Labor, stated before Congress, “It has become increasingly evident that the H-1B program is being utilized by some as the basis for building businesses which are dependent on the labors of foreign workers, in some cases in unfair competition with U.S. workers and those U.S. businesses that employ mostly domestic workers” Reich(1995). The major justification of the H-1B visa program was to augment the inadequate supply of technology graduates from U.S. universities. Bill Gates stated, “In 2001, India graduated almost a million more students from college than the United States did. China graduated twice as

many students with bachelor's degrees as the United States and has six times as many graduates majoring in engineering" Friedenbergl (2005). ITAA states, "Foreign students comprise more than 50 percent of many advanced math, science and engineering programs. Preventing American companies from hiring these students would give overseas competitors an edge." Carlson (2004) Thom Stohler of the American Electronics Association argues, "Most of the H-1Bs that U.S. companies are hiring are coming out of our own schools" Thibodeau (2004).

The greatest concern stems from what is referred to as "body shops." Body shops hire large numbers of programmers and then assign them on a project basis to different contracts. Ron Hira, chair of the IEEE-USA's R&D Policy committee stated to Congress that "...now they (visas) are being used as a way for firms to hire low-wage foreign engineers in this country and then begin the process of sending these jobs back to the workers' home countries." Seeley (2004) "When Congress approved the Visa Reform Act of 2004 in November, it increased the H-1B application fee by \$2,000 and earmarked \$500 of each payment for antifraud efforts." Thibodeau (2005b) In some cases, "companies have U.S. employees or contractors train their replacements, who come here on L-1 visas." Hayes (2003a) According to N. Sivakumar, "The major body shops employ about 10% to 15% of the H-1Bs, but big companies like Microsoft, Oracle, and Cisco hired the rest - those folks don't abuse them. Those folks pay the right salaries and give all the benefits." Thibodeau (2005a) In 2003, India based Tata Consultancy Services (TCS) was said to be the largest user of L-1 visas. Other Indian companies are Wipro and Infosys. Rajawat and Dattagupta (2003) To put it into perspective, "Wipro, the biggest outsourcer, with over 40,000 workers in 35 countries (about 75% of them in India), has resorted to some novel strategies for retaining people." Fisher (2005) Critics argue, "The L-1 visa hurts U.S. workers in two ways. It brings in foreign workers who then directly or indirectly displace American workers. Later these workers may be transferred back abroad, permanently taking those U.S. jobs with them. Federation for American Immigration Reform (2003). In 2003, Senator Dodd of Connecticut stated to Congress "During the economic boom of the 1990's, when jobs were easy to find, evidence now suggests that abuses of L-1 and H-1B visas often went unchecked. Dodd (2003).

THREAT OF PROTECTIONIST LEGISLATION

It is only natural that the downturn in the U.S. economy, the rise of off-shoring and the visibility of the visa programs would collide and generate a firestorm of public outrage. The cry of how can you bring in high-tech foreign guest workers while at the same time IT unemployment is on the rise would quickly get the attention of politicians in the U.S. Phillips (2004). The inevitable result is the normal life cycle of public policy. Special interest groups lobby for their side. Lawyers and IT employers want few limitations on matching high-tech jobs with available candidates wherever they may originate. The desire to hire the best in any field requires the ability to use a global supply of talent. Besides, many of these potential visa holders are already enrolled in U.S. masters and doctoral programs. The visa program is an opportunity to keep that brain power in the U.S. Unemployed IT workers unite into groups that make their case to legislators at both the local and national levels. They argue that the U.S. does not need a special visa program targeting high-tech workers when many highly educated citizens are either unemployed or underemployed.

From California to Connecticut, lawmakers are trying to restrict the visa programs or the broader off-shoring question. Some examples include prohibiting contractors from performing work outside the U.S., giving contracts only to U.S. citizens or people authorized to work in the U.S., attempts to restrict the H-1B and L-1 visa caps, attempts to stop federal grants and loans and loan guarantees from being granted to companies that lay off more workers in the U.S. than in other countries. Every opportunity to cite specific hardship cases and abuses is used to make the case for restrictive legislation.

President Bush signed into law the L-1 Visa and H-1B Visa Reform Act as part of the Fiscal 2005 Omnibus Appropriations Bill. The Act amends previous legislation by addressing the issue of outsourcing. The purpose of the Act was to ensure the visa program is more consistent with the spirit and intent of the original legislation. This would involve greater oversight of intra-company transfers to ensure visa holders are actually working in the specific role, with the specialized knowledge and for the specific subsidiary in which they were granted the visa in the first place.

There are several new restrictions to the legislation. For example, an L-1B employee must remain under the control and supervision of the L-1 employer. For instance, Company X can't place its L-1 visa employee at Company Y to install an ERP system designed by Company X unless a manager from Company X oversees the project. Past abuses of the program involved assigning visa holders to third-party, off-site locations as contract labor-for-hire.

The new law also establishes a new fraud prevention and detection fee of \$500 when applying for an H-1B or L type of visa. The revenues from this fee are distributed to the Department of State, the Department of Homeland Security and the Department of Labor. This applies to petitions filed after March 8, 2005. The U.S. must seek a delicate balance in its attempts to regulate the immigration of highly skilled technology workers. The issue is very complex and emotionally volatile but it strikes at the very essence of the U.S. being a nation of immigrants.

THE VISA PROGRAMS AND HOMELAND SECURITY

“Homeland Security’s Citizenship and Immigration Services manages several databases containing sensitive information about people who have applied for permission to live and work in the United States.” Greenemeier (2005) Since 9/11 there has been a very emotional debate raging in the U.S. concerning the balance between security and privacy. The right to privacy is viewed very differently by various cultures. For instance, the right to privacy is different between the U.S. and the European Community. Moscato and Robinson (2002) The issue is further complicated when the differences between U.S. citizens and non-citizens are taken into consideration. If a person is deemed a security threat, then that person is assumed not to be allowed to stay in the U.S. Violating a visiting worker’s rights might end up in litigation. It is relatively easy to see how the fears of unemployment and homeland security can flame the passions of people on both sides of the debate. The link can be used by those who demagogue the issue for their own personal cause or gain.

SUMMARY AND CONCLUSIONS

In this paper we have looked at both the H-1B and L-1 visa programs from many different but related perspectives. It is a very complicated issue that has both philosophical and pragmatic dimensions. In a global marketplace, competition for the best talent means that the fewer restrictions on the mobility of the high-tech worker the better. In the pursuit of producing goods and services at the most competitive cost structure, companies often decide to take measures that are best for themselves but that result in structural tension among the resulting unemployed. The converse of this argument can be summarized by those who feel, “The real advantage of foreign workers over U.S. citizens may be nothing more than cheap labor” Schwartz (2005b). The role of the government as the overseer must balance a situation that includes foreign relations with other countries. There is no clear good or bad regarding the visa programs discussed in this paper. It comes down to your view on the economic model of your choice, the appropriate role of government and the ability to mitigate the negative externalities that can accrue to your citizens Irwin (2004).

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