

# H-1B Visa Lottery: Random Selection Process Prevents Applicants from Achieving the American Dream

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*“Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants were American history.”*

– Oscar Handlin<sup>1</sup>

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<sup>1</sup> Paul Vitello, *Oscar Handlin, Historian Who Chronicled U.S. Immigration, Dies at 95*, THE N.Y. TIMES (Sept. 23, 2011), <http://www.nytimes.com/2011/09/24/us/oscar-handlin-historian-who-chronicled-united-states-immigration-dies-at-95.html>.

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### INTRODUCTION

The American Dream: “a happy way of living that is thought of by many Americans as something that can be achieved by anyone in the United States especially by working hard and becoming successful.”<sup>2</sup> Hard work. Perseverance. Opportunity. These are words often associated with the concept that anyone who works hard, is driven, and that if one *plays by the rules*, they can achieve success and stability in America.<sup>3</sup> The original concept of the “American Dream” was founded in ideals of equality, justice, and democracy.<sup>4</sup> However, many hardworking, driven immigrants would probably disagree with the idea that a path to success in America can be paved simply through hard work and success. Across the United States, people mistakenly believe that immigrating to the country “the right way” is an easy or even attainable process.<sup>5</sup> However, there are very few ways to immigrate to the United States legally.<sup>6</sup> The United States offers green cards to four basic categories of individuals: (1) relatives of legal immigrants; (2) a limited number of skilled workers

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<sup>2</sup> *The American Dream*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/the%20American%20dream> [<http://perma.cc/3A8S-T254>] (last visited Apr. 20, 2022).

<sup>3</sup> *See American Dream*, CORP. FIN. INST., <http://corporatefinanceinstitute.com/resources/knowledge/other/american-dream/> [<http://perma.cc/ZPZ2-JCLG>] (last updated Nov. 7, 2022).

<sup>4</sup> Anna Diamond, *The Original Meanings of the “American Dream” and “America First” Were Starkly Different from How We Use Them Today*, SMITHSONIAN MAG. (Oct. 2018), <http://www.smithsonianmag.com/history/ behold-america-american-dream-slogan-book-sarah-churchwell-180970311/> [<http://perma.cc/P6JE-KA8K>].

<sup>5</sup> *See* ALEX NOWRASTEH, *THE MOST COMMON ARGUMENTS AGAINST IMMIGRATION AND WHY THEY'RE WRONG* 7 (2021) (ebook), <http://www.immigrationresearch.org/system/files/The%20Most%20Common%20Arguments%20Against%20Immigration%20and%20Why%20Theyre%20Wrong.pdf> [<http://perma.cc/D2M6-CRSF>].

<sup>6</sup> *Id.*

sponsored by U.S. employers;<sup>7</sup> (3) refugees and asylum seekers; and (4) applicants from countries that send few immigrants to the United States.<sup>8</sup>

Many immigrants must rely not only on their hard work, extensive resources, and perseverance to succeed in America, but also a great deal of luck, which plays a significant role in an immigrant's future in America. Prospective immigrants under the employment-based H-1B visa program know of this formidable game of luck all too well. Eligible H-1B applicants are the poster children for the American Dream. These applicants have the high-skill, intellect, and opportunity needed to succeed, yet most of them lack the one necessary element to work in the United States: luck. Subjecting these applicants to a feeble metric like luck fails to honor the fundamental ideal that "America is, and has always been, both a nation of immigrants and a nation of laws."<sup>9</sup>

The H-1B visa program ("H-1B") allows foreign workers to live and reside in the United States through employer sponsorship.<sup>10</sup> On its face, it is a valuable program that stimulates America's economy and protects U.S. workers. It seems to provide foreign workers with a clear and fair process to apply. However, the problem is that the H-1B requires highly specialized and qualified applicants and employers, yet it subjects these applicants and employers to an arbitrarily random selection process that makes no election for the applicants' skills or qualifications.<sup>11</sup> Relying on the lottery to ultimately decide which foreign workers are admitted to work in the United States does not protect America or foreign workers because it subjects them both to a completely randomized process. Ultimately, the H-1B is stuck in a dichotomy that does not benefit U.S. businesses or foreign workers and fails at "the goal of building a fair, humane, and well-functioning

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<sup>7</sup> Although there are other employment based visas, the H-1B visa program is largely the only available option for skilled workers attempting to work in the United States because other employment-based visas are only available for smaller categories of people like professional athletes or temporary workers.

<sup>8</sup> *See id.*

<sup>9</sup> Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019), <http://www.americanprogress.org/article/restoring-rule-law-fair-humane-workable-immigration-system/> [<http://perma.cc/8BKM-A2XJ>].

<sup>10</sup> *See Temporary Worker Visas*, U.S. Dep't of State, <http://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html> [<http://perma.cc/3SME-Q6SZ>] (last visited Nov. 11, 2022).

<sup>11</sup> *See id.*; *H-1B Electronic Registration Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process> [<http://perma.cc/CF6G-G7K9>] (last updated Apr. 25, 2022).

immigration system.”<sup>12</sup> Accordingly, the H-1B needs to evolve with the changing needs of the nation and the fundamental notions of fairness for immigrants and U.S. businesses.

Although the entirety of the U.S. immigration system poses its own unique challenges, that discussion is outside the scope of this Note. This article will focus solely on the H-1B visa program and its random selection process. More specifically, this Note will discuss the reasons why the H-1B lottery is counterintuitive to the purpose of the visa program and why that disadvantages the foreign worker, employer applicants, and the American workforce. Before detailing the proposed solution, this Note first explains the background of the H-1B. This discussion includes the problems with the H category visa pre-1990 and the creation of the H-1B category visa in the 1990 Immigration and Nationality Act. In addition, Part I of this Note explains the H-1B visa’s petition and selection process.

Part II explains the original congressional intent of the H-1B. This part explains the dueling concerns of the visa to protect U.S. workers and gain a competitive advantage in the global economy. Part III addresses complaints with the H-1B, including the yearly cap set by Congress. Although the H-1B cap is controversial, this Note does not intend to partake in an argument about the merits of the cap. Instead, addressing the complaints with the H-1B cap helps to understand the flaws of the program and how some of those flaws may be fixed with solutions outside raising the yearly cap. Part III also discusses how large companies’ abuse of the H-1B leads to offshoring, which results in fewer opportunities for U.S. workers and prospective H-1B workers.

Part IV illustrates the numerous benefits of the H-1B, including innovation benefits that result in a more competitive U.S. market and economic benefits that create stronger U.S. companies and workers. Part V lays out merit-based immigration proposals and uses the proposed 2017 RAISE Act to show why the H-1B is an ideal candidate for a merit-based selection system. Part V also discusses the recent changes to the H-1B selection process and compares it to foreign merit-based points immigration systems. Part V concludes with addressing possible solutions to addressing merit and merging the H-1B’s employer driven model with a merit-based selection process.

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<sup>12</sup> See generally Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, Ctr. for Am. Progress (July 22, 2019), <http://www.americanprogress.org/article/restoring-rule-law-fair-humane-workable-immigration-system/> [<http://perma.cc/8BKM-A2XJ>] (arguing that “the current immigration system makes a mockery of American history and ideals”).

Finally, this Note will end by addressing the benefits of merit-based selection systems, including why a new selection system will bolster the original intent of the H-1B, how the H-1B's structure makes it an ideal candidate for a merit-based selection system, and potential problems with merit. Ultimately, this Note concludes with a discussion explaining how the H-1B addresses potential merit-based system problems.

## I. OVERVIEW OF THE H-1B VISA PROGRAM

Over the past four years, hundreds of thousands of highly skilled and educated applicants registered for H-1B visas in each year.<sup>13</sup> Among those applicants, only 65,000 are issued a visa, with an additional 20,000 issued specifically to qualified applicants with a master's degree.<sup>14</sup> This particular type of visa is intended for "foreign workers in specialty occupations, often referred to as 'high skilled' occupations."<sup>15</sup> H-1B applications must show that the applicants possess highly specialized knowledge and at least a bachelor's degree in the particular specialty.<sup>16</sup> Primarily, these highly skilled applicants work in the science, technology, engineering, and math ("STEM") fields.<sup>17</sup> The Immigration and Nationality Act of 1990 ("INA") revised the H-1B to narrow the scope of qualified applicants to only those employed in specialty occupations.<sup>18</sup>

### A. H Category Visa Before 1990

Prior to the 1990 INA, the H class visa consisted of three different categories, one of which was the H1 category.<sup>19</sup> In the 1950's, the H1 category had few labor protections for foreign workers and no cap on the number of visas allowed.<sup>20</sup> The H1 category required applicants "to be 'of distinguished merit and ability'" and to perform services "of an exceptional nature requiring such merit and ability."<sup>21</sup> Originally, the H1 visa also

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<sup>13</sup> See *H-1B Electronic Registration Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process> [http://perma.cc/7Q6U-RFZU] (last updated Apr. 25, 2022).

<sup>14</sup> Mauhan M. Zonoozy, *America's Stutter Towards H-1B Immigration Reform in America*, 26 GEO. IMMIGR. L.J. 655, 655 (2012).

<sup>15</sup> *Id.*

<sup>16</sup> See 8 U.S.C. § 1184(i)(1).

<sup>17</sup> See Zonoozy, *supra* note 14, at 655.

<sup>18</sup> See Angelo A. Paparelli & Mona D. Patel, *The Immigrations Act of 1990: Death Knell for the H-1B*, 25 INT'L LAW. 995, 996 (1991).

<sup>19</sup> H. Rosemary Jeronimides, *The H-1B Visa Category: A Tug of War*, 7 GEO. IMMIGR. L.J. 367, 368–69 (1993).

<sup>20</sup> B. Lindsay Lowell, *Temporary Workers and Evolution of the Specialty H-1B Visa*, 23 DEF. ALIEN 33, 36 (2000).

<sup>21</sup> Jeronimides, *supra* note 19, at 369.

required applicants to establish an intent to return to their home country.<sup>22</sup> By 1970, employers were allowed to hire for permanent positions.<sup>23</sup> After the introduction of the H-1B visa in 1990, employees no longer had to maintain an intent to return home, so they could stay permanently.<sup>24</sup> Congress sought to prevent abuse of the H1 Visa, while also protecting foreign workers with safeguards for their wages and working conditions.<sup>25</sup> Additionally, the H1 category's requirement that applicants be of distinguished merit and ability created an implied limit on the number of beneficiaries awarded the visa.<sup>26</sup> Thus, the requirements prior to 1990 highlight the foundation of the H1 category visas: distinguished skill, qualifications, and ability.<sup>27</sup>

Debates around enacting the 1990 INA included a concern that the H1 program was no longer serving its original purpose.<sup>28</sup> These debates included a growing issue that the merit-based requirements of the H1 program were becoming diluted as applicants no longer needed even a college degree for visa eligibility.<sup>29</sup> As a result, many interest groups called for a change to rectify the dilution issue and clarify what distinguished merit actually meant.<sup>30</sup> During the proposal of the 1990 INA, safeguarding the merit-based requirements of the H1 visa was crucial to honor Congress's initial intent of the program and prevent a decrease in the number of jobs available to workers from the United States.<sup>31</sup> Overall, "Congress's intent in approaching the 1990 Act reforms consisted of a balancing of dual concerns: establishing a more efficient immigration system which is responsive to labor needs, while simultaneously according greater protection to both domestic and alien workers."<sup>32</sup>

#### B. Inception of the H-1B Category

In the 1990 INA, the H1 program visas were split into two categories: H-1A and H-1B.<sup>33</sup> As a result, those petitioning as entertainers, athletes, and other "prominent" people were placed into a new category.<sup>34</sup> The new H-1B category limited applicants

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<sup>22</sup> Lowell, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Jeronimides, *supra* note 19, at 370.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.* at 371.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.* at 373–74.

<sup>32</sup> *Id.* at 374.

<sup>33</sup> *See id.* at 374 n.48.

<sup>34</sup> *See* Paparelli & Patel, *supra* note 18, at 996.

to those in “specialty occupations,” which are occupations that demand “highly specialized knowledge and a bachelor’s degree or its equivalent.”<sup>35</sup> Prior to the enactment of the 1990 INA, a focus intensified to create a distinction between applicants who truly have unique and specialized skills and applicants who are mere laborers.<sup>36</sup> Although the INA changed the requirement from distinguished merit to specialty occupations, the logistic requirements remained virtually the same.<sup>37</sup> This Act required H-1B petitioners to show their employment fit into the specialty occupation definition and established the controversial yearly 65,000 cap on the visa, not including the 20,000 allotted solely for master’s degree applicants.<sup>38</sup>

These new categorization standards and procedures aimed to tackle the complaints of the formerly known H category visas as well as provide greater safeguards for American workers.<sup>39</sup> Among some of these safeguards, the labor condition application required H-1B petitioner employers to submit to the government assurances that the employer will provide the employee with wages greater than or equal to prevailing wages to protect the foreign and U.S. workers.<sup>40</sup> Additionally, the INA required the Secretary of Labor to establish a process to receive and investigate complaints if employers failed to meet the requirements.<sup>41</sup> Once again, the intent behind these safeguards and penalties was to protect both American and foreign workers while simultaneously “[r]ecognizing the hardship these new provisions might impose on the entry of foreign workers, and recognizing the value that foreign professionals might bring to American businesses.”<sup>42</sup> The INA attempted to honor both of these intents through the petition and selection process.

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<sup>35</sup> See *id.*; see also *H-1B Visa for Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models (Temporary Workers)*, U.S. CITIZENSHIP & IMMIGR. SERVS. [hereinafter *H-1B Visa for Specialty Occupations*], <http://www.uscis.gov/forms/explore-my-options/h-1b-visa-for-specialty-occupations-dod-cooperative-research-and-development-project-workers-and> [http://perma.cc/Q9JT-U3UL] (last updated May 18, 2022) (defining specialty occupation as a job that requires a bachelor’s degree or higher, is so complex that only a person with at least a bachelor’s degree can perform it, the employer typically requires a degree for the position, or the duties are so specific and complex that they are typically associated with attaining a bachelor’s degree or higher).

<sup>36</sup> See *How H-1B Visas Have Been Abused Since the Beginning*, CBS NEWS (Aug. 13, 2017), <http://www.cbsnews.com/news/how-h-1b-visas-have-been-abused-since-the-beginning/> [http://perma.cc/462N-2554].

<sup>37</sup> See Paparelli & Patel, *supra* note 18, at 998.

<sup>38</sup> See Jeronimides, *supra* note 19, at 375; Zonoozy, *supra* note 14, at 655.

<sup>39</sup> See Jeronimides, *supra* note 19, at 375.

<sup>40</sup> See *Labor Condition Application (LCA) Specialty Occupations with the H-1B, H-1B1, and E-3 Programs*, U.S. DEPT. OF LABOR, <http://flag.dol.gov/programs/lca> [http://perma.cc/LZ2C-6Z5V] (last visited Apr. 30, 2022).

<sup>41</sup> See Jeronimides, *supra* note 19, at 377.

<sup>42</sup> See *id.* at 378.

### C. H-1B Petition and Selection Process

Before filing a petition, an applicant must ensure that they meet the requirements for the H-1B visa. To qualify for the H-1B, an employee must: (1) have an employer-employee relationship with the petitioning U.S. employer; (2) work at a job that qualifies as a specialty occupation; (3) have a job in a specialty field related to their field of study; (4) be paid the higher of the actual or prevailing wage in their field; and (5) have their employer file a labor condition application with the U.S. Department of Labor (DOL).<sup>43</sup> If an applicant is eligible for the H-1B, their employer must follow a specific process before registering the employee for an H-1B petition because the H-1B is employer-driven.<sup>44</sup> First, the employer must complete a labor condition application with the DOL to certify, among other things, that the H-1B worker will receive wages not lower than the prevailing or actual wages paid to similarly employed U.S. workers.<sup>45</sup>

Next, the employer must file a Form I-129 with the United States Citizenship and Immigration Services (“USCIS”) to verify certain information about the job, including employer and employee information.<sup>46</sup> Employers bear the majority of the costs for an employee-applicant; employers pay the registration fee, filing fee, processing fee, and all other required costs and fees.<sup>47</sup>

Once this petition is approved, the H-1B application is submitted and the USCIS determines if the applicant qualifies. When more petitions are received than the allotted 85,000 visas available for both master’s degree applicants and bachelor’s degree applicants, the USCIS uses a random selection process to fulfill the available visas.<sup>48</sup> Before the 2020 amendment to the order of selection in the lottery, the USCIS randomly selected the 65,000 applicants followed by a random selection of the 20,000 master’s degree applicants. The two pools of applicants were kept separate. Now, the USCIS uses the lottery system to fulfill the 20,000 visas allotted for applicants with master’s degrees first.<sup>49</sup> Then, the remaining unchosen master’s degree applicants and the entire

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<sup>43</sup> See *H-1B Visa for Specialty Occupations*, *supra* note 35.

<sup>44</sup> See Nicole Torres, *The H-1B Visa Debate, Explained*, HARV. BUS. REV. (May 4, 2017), <http://hbr.org/2017/05/the-h-1b-visa-debate-explained> [<http://perma.cc/3KBC-9YTE>].

<sup>45</sup> See Raymond Lahoud, *Arbitrary H-1B Nonimmigrant Visa Denials Have Employers Thinking Federal Litigation Rather than Administrative Review*, 67 FED. LAW. 50, 51 (2020).

<sup>46</sup> See *I-129, Petition for a Nonimmigrant Worker*, U.S. CITIZENSHIP & IMMIG. SERVICES, <http://www.uscis.gov/i-129> [<http://perma.cc/X9YQ-326Z>] (last updated Sept. 23, 2022).

<sup>47</sup> See *What are the H1B Visa Costs?*, NNU IMMIGR. (Jan. 3, 2022), <http://www.nnuimmigration.com/h1b-visa-cost> [<http://perma.cc/Y9MR-84ZL>].

<sup>48</sup> See Stephanie L. Dalecki, *New H-1B Process for a New Year: Does the New System Address the Multiple H-1B Filings for the Same Employee Problem?*, 44 T. MARSHALL L. REV. 141, 151 (2020).

<sup>49</sup> *Id.*

bachelor's degree applicants are put into one pool and randomly selected to fulfill the remaining 65,000 open slots.<sup>50</sup> Once an applicant is selected through the lottery, they are issued the visa for three years, with an option to extend for an additional three years.<sup>51</sup>

The quota for the H-1B visas has been met each year since the cap was set.<sup>52</sup> Since 2014, the limit was reached within a week of the filing period.<sup>53</sup> The USCIS is also required to issue the visas in the order in which the petitions are filed.<sup>54</sup> With a new electronic registration process, the USCIS will open registration for fourteen days.<sup>55</sup> At the close of the fourteen-day period, all properly submitted electronic registrations will be subject to the selection lottery.<sup>56</sup> Under this process, all petitions filed within the period are considered filed at the same time “to ensure the fair and orderly administration of the numerical allocations.”<sup>57</sup> However, the lottery process “brings anxiety to hundreds of thousands of employees and employers across the country, and the immigration attorneys and paralegals who assist them.”<sup>58</sup> In part, this anxiety stems from the fact that specific rules and procedures for administering the H-1B visas can change each year and applicants have no way to increase their chances of selection.

In 2020, the USCIS announced a new rule to amend the H-1B registration process as well as change the order of petitions selected, resulting in a likely increase in the amount of master's degree or higher applicants chosen to fill the 65,000 slots.<sup>59</sup> This new rule switched the order in which petitioners were selected by requiring the USCIS to fulfill the 20,000 master's degree or higher H-1B slots before fulfilling the 65,000 slots.<sup>60</sup> This way, all of the unselected

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<sup>50</sup> *See id.*

<sup>51</sup> *See* Karen Jensen, *Barriers to H-1B Visa Sponsorship in the IT Consulting Industry: The Economic Incentive to Alter H-1B Policy*, 35 *FORDHAM INT'L L.J.* 1027, 1033 (2012).

<sup>52</sup> Dalecki, *supra* note 48, at 147.

<sup>53</sup> *Id.* at 148.

<sup>54</sup> *See* 8 U.S.C. § 1184(g)(3).

<sup>55</sup> *See H-1B Electronic Registration Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process> [<http://perma.cc/9KUP-C76K>] (last updated Apr. 25, 2022).

<sup>56</sup> *See id.*

<sup>57</sup> Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 896 (Jan. 31, 2019) (to be codified at 8 C.F.R. pt. 214).

<sup>58</sup> Brent Renison, *H-1B Lottery is Illegal*, *ENTRY LAW* (Mar. 31, 2016) <http://www.entrylaw.com/blog/h-1b-lottery-is-illegal> [[perma.cc/V4F6-EFZ5](http://perma.cc/V4F6-EFZ5)] (last updated Apr. 12, 2016).

<sup>59</sup> *See* Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 888 (Jan. 31, 2019) (to be codified at 8 C.F.R. pt. 214).

<sup>60</sup> *See supra* notes 48–49 and accompanying text; accord Roy Maurer, *USCIS Replaces H-1B Lottery with Salary-Based Selection*, *SHRM* (Jan. 7, 2021), <http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/uscis-replaces-h1b-lottery-with-salary-based-selection.aspx> [<http://perma.cc/CY7C-BPZZ>].

master's degree applicants will fall into the pool of bachelor's degree applicants, thus increasing a master's degree applicant's odds of being selected. The Department of Homeland Security ("DHS") declared that this reversal in the selection process was consistent with the congressional intent behind the H-1B program to award H-1B visas to applicants who are the highest skilled.<sup>61</sup> This is an attempt to lessen the randomized nature of the selection process; however, the lottery remains a gamble on percentages for employers and employees alike. The 2020 rule change merely makes the percentages smaller for bachelor's degree applicants and higher for master's degree applicants, but each must subject their fate to a random selection process.<sup>62</sup>

In 2022, the USCIS received over 308,000 registrations for the 65,000 available H-1B visas and the extra 20,000 master's degree visas combined.<sup>63</sup> In 2021, applicants had a thirty-two percent chance of being selected that season, without including the 6,800 petitions automatically set aside for workers from Chile and Singapore, which made the average applicant's chances even lower.<sup>64</sup> The exact percentages will change each year depending on the number of applicants and the qualifications of each, but overall, the chances for each applicant are quite low.<sup>65</sup>

## II. INTENT OF THE H-1B PROGRAM

At the heart of the 1990 INA are multiple goals: facilitate the entry of immigrants to the United States to meet labor demands and protect opportunities of U.S. workers.<sup>66</sup> This balancing act presents difficulties considering "immigrants created the nation we live in today."<sup>67</sup> By establishing the 65,000 cap on the H-1B visas, Congress intended to protect the competitive interests of the U.S. economy by encouraging market adjustments like better wages, more training, higher quality working conditions, and innovation.<sup>68</sup> Before 1990, Democratic Congressman Bruce Morrison expressed concerns that the government gave out H-1

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<sup>61</sup> See Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 896 (Jan. 31, 2019) (to be codified at 8 C.F.R. pt. 214).

<sup>62</sup> See *What H-1B Lottery Results Says About Odds?*, HERMAN LEGAL GRP., <http://www.lawfirm4immigrants.com/what-h-1b-lottery-results-says-about-odds/> [<http://perma.cc/5963-H33G>] (last visited Mar. 10, 2022) (noting that candidates within the advanced degree exemption have a higher chance of selection because they are entered into both applicant pools).

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

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> Jeronimides, *supra* note 19, at 380.

<sup>67</sup> Tracy Halliday, *The World of Offshoring: H-1B Visas Can Be Utilized to Curb the Business Trend of Offshoring*, 25 *HAMLINE J. PUB. L. & POL'Y* 407, 419 (2004).

<sup>68</sup> Lowell, *supra* note 20, at 36.

visas to foreign workers that were not highly skilled or necessary to the U.S. economy.<sup>69</sup> Because of this, the 1990 INA attempted to mitigate the abuse of the system and curtail the visa program to reflect the system's intent.<sup>70</sup> Additionally, the visa cap was Congress's answer to a growing fear that employers would exploit the weaker bargaining power of temporary foreign workers, thus displacing U.S. workers.<sup>71</sup>

According to the DOL, the purpose of the H-1B is to "help employers who cannot otherwise obtain needed business skills and abilities from the U.S. workforce by authorizing the temporary employment of qualified individuals."<sup>72</sup> Furthermore, Congress's intent for the H-1B was to aid American businesses by making them more competitive in the global economy while enhancing opportunities and wages of U.S. workers.<sup>73</sup> When the 1990 INA took effect, it heightened the burdens on employers applying for H-1Bs on behalf of employees.<sup>74</sup> In part, Congress enacted these burdens to address concerns that H-1B applicability and authorization would be overly generous, thus diluting the prestige and skill of the program.<sup>75</sup> Members of the U.S. Senate expressed an immediate need for high skilled workers coupled with a need for greater innovation in STEM during a hearing before the Committee on the Judiciary concerning comprehensive immigration reform legislation.<sup>76</sup> Additionally, one senator emphasized that STEM provisions need to be more responsive to the economic conditions of the country.<sup>77</sup> That same senator raised concerns over the lack of visas granted for economic reasons.<sup>78</sup>

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<sup>69</sup> *How H-1B Visas Have Been Abused Since the Beginning*, *supra* note 36.

<sup>70</sup> *See id.*

<sup>71</sup> Arthur Yaskey, *H-1B Visa: Why Market Forces Should Dictate Employment*, 29 IMMIGR. & NAT'L REV. 895, 899 (2008).

<sup>72</sup> *H-1B Program*, U.S. DEPT OF LABOR, <http://www.dol.gov/agencies/whd/immigration/h1b> [<http://perma.cc/GA2K-RJDE>] (last visited Mar. 23, 2022).

<sup>73</sup> *See Jensen*, *supra* note 51, at 1033 (arguing that Congress sought to balance the needs of U.S. workers with the need for high-skilled foreign labor while creating the H-1B program).

<sup>74</sup> Paparelli & Patel, *supra* note 18, at 1001 (noting that the new law subjected employers to an elaborate enforcement mechanism and required petitioners to confirm that the employer would pay prevailing wages and provide prevailing working conditions).

<sup>75</sup> *See id.*

<sup>76</sup> *See Comprehensive Immigration Reform Legislation: Hearing Before the Comm. on the Judiciary*, 113th Cong. 13 (2013) (statement of Sen. Orrin Hatch) (explaining that an act that addresses the immediate short-term need for greater access to high-skilled workers as well as the long-term need to invest in America's STEM education will provide the United States with the tools to compete in the global economy).

<sup>77</sup> *See id.* at 22 (statement of Sen. Amy Klobuchar) (pointing to studies showing that the immigration policies that make it easier for professionals with special skills to work in the country result in more jobs for American workers).

<sup>78</sup> *See id.* at 23 (statement of Sen. Amy Klobuchar) ("[U]nder 10 percent of the core visas granted are for economic reasons . . . [a]nd given the paramount need for economic growth that cuts across our ability to deal with all of our policy challenges . . .").

### III. ISSUES WITH THE H-1B PROGRAM

Misuse of the H-1B program is not rare, especially in the IT industry. Exploitation of foreign workers obtaining H-1Bs poses significant problems, including the risk that employers will use the visa program for unskilled laborers, thus preventing the entry of numerous skillful applicants who might benefit the U.S. economy.<sup>79</sup> However, this also exposes a significant issue for the H-1B program itself: it makes the extensive qualification, petition, and application process seemingly useless by allowing misuse that severely counteracts the very purpose of the program itself.

#### A. Issues with the H-1B Yearly Cap

For over twenty years, there has been a continuous, widespread debate over increasing the H-1B cap.<sup>80</sup> The 1990 INA arbitrarily set the cap on H-1B visas as a precautionary means to reassure skeptics that the government would not dole out an unlimited amount of visas.<sup>81</sup> Critics of the cap argue that the IT industry alone begs the need for more visas as it maintains such a large portion of STEM careers.<sup>82</sup> In 1998, Congress enacted the American Competitiveness and Workforce Improvement Act (“ACWIA”), which raised the H-1B cap for five years to compete in the global market and prevent a labor shortage.<sup>83</sup> After restoring the 65,000 cap in 2004, Congress added additional protections to the program, most notably a requirement that H-1B salaries and benefits were on par with U.S. workers in similar careers.<sup>84</sup> Opponents of the cap also argue that the cap deters work from the U.S. market by compelling employers to offshore work when they cannot fulfill their needs domestically with either skilled foreign or U.S. employees.<sup>85</sup>

Additionally, these numbers may be severely disheartening to foreign students looking to study in the United States. With such meager chances of success, even after securing sought-after employment opportunities, foreign students have little incentive to waste their resources on American universities. Since

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<sup>79</sup> See Jensen, *supra* note 51, at 1040 (arguing that using the H-1B for unskilled laborers is especially concerning in light of the limited number of H-1B visas available each year).

<sup>80</sup> See Lowell, *supra* note 20, at 38 (“Several bills have been considered that variously increase the numbers by at least 40 to 75 percent[] [and] introduce an unlimited H-1 for foreign graduates of U.S. schools[] . . .”).

<sup>81</sup> Halliday, *supra* note 67, at 422.

<sup>82</sup> Lowell, *supra* note 20, at 38–39 (noting that the IT sector accounts for approximately one-third of all STEM jobs).

<sup>83</sup> Yaskey, *supra* note 71, at 900 (explaining that at this time, it was the first time the H-1B cap had been reached).

<sup>84</sup> See *id.* at 900.

<sup>85</sup> See *id.* at 901 (arguing that the cap “compels U.S. employers to move jobs outside the U.S. to new operations abroad.”).

“international students are becoming increasingly important to keep[ing] our classes full, our tuition revenue up, and our institutions thriving,” the ability, or lack thereof, of these students to stay in the United States is concerning for the American economy.<sup>86</sup> These considerations become increasingly alarming in light of the fact that international students contribute around \$39 billion to the national economy and support an estimated 400,000 jobs.<sup>87</sup> However, it is becoming more difficult for these students to come to and remain in the United States.<sup>88</sup>

Furthermore, the H-1B cap is criticized for its negative impact on the U.S. economy and, specifically, American workers.<sup>89</sup> Studies show that when companies are restricted in their ability to hire foreign workers due to the fact that foreign workers are unable to attain a visa through the H-1B lottery, American jobs are lost.<sup>90</sup> For example, in areas that are not lucky enough to house the winners of the random H-1B lottery, careers in the computer industry decrease following the denials of H-1B visas.<sup>91</sup> Whereas cities that are “lucky” enough to house more foreign workers experience an increase in careers for American workers in the computer industry.<sup>92</sup>

This research aligns with Microsoft’s experience. Microsoft previously vouched for these research findings, estimating that it adds around four employees to support every one H-1B hire.<sup>93</sup> This demonstrates a positive correlation between H-1B approvals and American job growth. This also demonstrates the harsh truth that “employers of computer-related workers [do] not hire more natives when the foreign workers they intended to hire [are] denied H-1B visas.”<sup>94</sup> The 65,000 H-1B cap has sustained challenges and the test of time somewhat due to the fear that foreign workers will displace American workers. However, the evidence overwhelmingly indicates that if substitution of an American worker for a foreign

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<sup>86</sup> Marvin Krislov, *Why International Students Are Good for Colleges, Universities, and America*, FORBES (Mar. 22, 2019), <http://www.forbes.com/sites/marvinkrislov/2019/03/22/why-international-students-are-good-for-colleges-universities-and-america/?sh=962dd95f496f> [<http://perma.cc/AEN2-YC3X>].

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* (noting the decline in international student enrollment in U.S. universities).

<sup>89</sup> *See* Liya Palagashvili & Patrick O’Connor, *Unintended Consequences of Restrictions on H-1B Visas*, *Mercatus Ctr. Geo. Mason Univ.* 2 (2021).

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* (“[T]he researchers find that foreign STEM workers stimulate new wage growth for both college-educated and non-college-educated Americans.”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (“[M]ore American jobs are lost when companies’ ability to hire foreign workers is restricted.”).

worker does occur, then it occurs among low-skilled laborers who, in theory, are not a part of the H-1B program.<sup>95</sup>

Increasing the H-1B cap is a meritorious argument and one that deserves strong consideration. But if Congress and the USCIS are unwilling to make this change, they should consider an alternative solution that gives applicants some agency over their outcomes rather than the current, almost hopeless, random thirty percent chance of success. Although this Note does not aim to explore arguments on raising the H-1B cap, proponents of raising the cap highlight that the problems with H-1B selection are deeper than a mere lack of availability. Overall, these problems indicate that restrictions on U.S. companies' abilities to hire the right type of foreign workers eliminates jobs for the U.S. economy, Americans, and foreign workers petitioning to work in America.<sup>96</sup> Arbitrary restrictions on the H-1B do not assist any of the goals of the visa program.

#### B. Misuse of the H-1B Program

Misuse of the H-1B program undermines the purpose of the visa and unmasks a critical need to alter the selection process. Large companies such as Disney, Southern California Edison, and Pfizer abuse the H-1B program by displacing American workers, hiring less experienced and lower-skilled foreign workers, paying the H-1B workers less, and outsourcing American work.<sup>97</sup> Certain outsourcing firms account for nearly one-third of the available H-1B visas, yet these firms do not "use the H-1B visa as a way to alleviate a shortage of STEM-educated U.S. workers; they use it primarily to cut labor costs."<sup>98</sup> For example, foreign outsourcing firms utilizing the H-1B aim to maximize wage savings while outsourcing entry to mid-level tech jobs.<sup>99</sup> Moreover, employers often take advantage of loopholes in wage requirements by hiring the foreign worker through a third-party service.<sup>100</sup> In 2014, one study estimated that one-third of H-1B visas went to third-party outsourcing firms.<sup>101</sup>

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<sup>95</sup> See *id.* at 3.

<sup>96</sup> See *id.* at 8.

<sup>97</sup> See Sharon Florentine, *5 Shocking Examples of H-1b Visa Program Abuse*, CIO (July 9, 2015), <http://www.cio.com/article/244471/5-shocking-examples-of-h-1b-visa-program-abuse-2.html> [<http://perma.cc/4KNJ-FJAG>].

<sup>98</sup> See *id.* (exposing Southern California Edison's tactics of replacing its original employees that made around \$110,000 per year with overseas workers who were paid around \$65,000 per year); see also Torres, *supra* note 44.

<sup>99</sup> See RON HIRA & DANIEL COSTA, *New Evidence of Widespread Wage Theft in the H-1B Visa Program*, 5 (Econ. Pol'y Inst., 2021).

<sup>100</sup> See Torres, *supra* note 44.

<sup>101</sup> See *id.*

In addition, senators across party lines have worked to reveal the harm that these outsourcing firms bring to the H-1B, considering the fact that outsourcing firms are one of the biggest users of the visa program.<sup>102</sup> In 2015, the Senate Judiciary Committee held a hearing to address the H-1B abuse, highlighting that “[a]lthough a small number of workers and students are brought in as the ‘best and brightest,’ most high-skill guest workers are here to fill ordinary tech jobs at lower wages.”<sup>103</sup> Additionally, economists have reported significant research finding that these specific H-1B workers restrain wage growth, resulting in average employee earnings that are much less than they would be without the H-1B.<sup>104</sup> This makes sense when a substantial number of the limited amount of visas are given to low skilled workers, who never actually fit the intended requirements for the visa. Complaints about H-1B abuse specifically target the IT industry.<sup>105</sup> IT is the leading occupation field for the H-1B, yet many of these H-1B employees are low-skilled IT workers, making it difficult to believe that an actual shortage of these workers exists in America.<sup>106</sup> As Nicole Torres explained:

Here’s a simplified way to explain how this plays out: Say you’re a big company with your own IT department. To reduce overhead, or to cut costs, or to increase efficiency, you decide to contract out (outsource) some or all of your IT work. So you hire an IT services firm to do that work on a temporary, as-needed basis. That firm sends workers, many of whom are on H-1B visas, to do those tasks. Sometimes, these contract workers supplement your IT staff; other times, you lay off your IT staff and the contractors effectively replace them.<sup>107</sup>

The IT industry’s abuse of the program dilutes the talent, skill, and innovation the H-1B intended to bring to America. Because these IT firms successfully receive so many H-1Bs for unqualified workers, there are fewer visas available for in-demand, highly skilled applicants.<sup>108</sup> Since the H-1B program is not working the way it was intended, the U.S. economy is

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<sup>102</sup> See HIRA & COSTA, *supra* note 99, at 7 (“Outsourcing firms have consistently dominated the program . . .”).

<sup>103</sup> See Byron York, *Silenced Workers Who Lost Jobs to H-1B Visa Abuse (Quietly) Speak Out*, WASH. EXAM’R (May 8, 2022), <http://www.washingtonexaminer.com/silenced-workers-who-lost-jobs-to-h-1b-visa-abuse-quietly-speak-out> [<http://perma.cc/N36N-P4CU>] (explaining that tech giants misuse the H-1B to fire well-paid American workers and replace them with much lower paid foreign workers).

<sup>104</sup> See Derek Thompson, *Is the H-1B Program a Cynical Attempt to Undercut American Workers?*, THE ATLANTIC (Feb. 15, 2017), <http://www.theatlantic.com/business/archive/2017/02/the-dark-side-of-the-h-1b-program/516813/> [<http://perma.cc/V4T2-BP9Z>].

<sup>105</sup> See Torres, *supra* note 44.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See *id.*

negatively impacted in the global market.<sup>109</sup> Structurally, the H-1B created a “one-size-fits-all” system, but this lottery system does not combat the companies’ misuse. Instead, the lottery switches the focus from an applicant’s skill and the company’s need for the foreign worker to reward companies that have learned how to game the system, benefiting those that have “learned how to take advantage of loopholes.”<sup>110</sup> Thus, an arbitrary lottery is not responsive to the misuse of the program, nor is it responsive to sorting through the enormous pools of applicants.<sup>111</sup>

#### IV. BENEFITS OF THE H-1B PROGRAM

Despite complaints, the H-1B creates important benefits for the country. Even with the abuse of the H-1B, the numbers do not lie. For example, the Department of Labor received 269 complaints on abuse of the H-1B in 2001, yet only fifty-four cases were found in violation.<sup>112</sup> Furthermore, “[c]onsidering the number of H-1B workers employed in the United States, the number of complaints is still relatively small.”<sup>113</sup> Moreover, the H-1B has made the United States “the beneficiary” of the most talented and acclaimed scientists, engineers, economists, and other professionals in the world.<sup>114</sup>

##### A. Innovation Benefits

The H-1B provides foreign students studying in the United States with one of the only avenues to gain employment and remain in the United States.<sup>115</sup> Without the H-1B, se talented students will have to take their talent and potential innovation elsewhere, which means U.S. universities’ resources would be wasted as well.<sup>116</sup> Moreover, scientists and engineers make up around one-fourth of total productivity growth in the United States, and the majority of H-1B applicants work in STEM fields.<sup>117</sup> Also, the “one thing that has helped maintain [the United States’s] technological leadership is innovation and technical research, and immigration has helped [the United States] do

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<sup>109</sup> *See id.*

<sup>110</sup> Daniel Aobdia, *Companies Want to Hire the Best Employees. Can Changes to the H-1B Visa Program Help?*, KELLOGG INSIGHT (Feb. 6, 2017), <http://insight.kellogg.northwestern.edu/article/how-to-revamp-the-visa-program-for-highly-skilled-workers> [<http://perma.cc/7KME-42T7>].

<sup>111</sup> *Id.*

<sup>112</sup> Halliday, *supra* note 67, at 430.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 426.

<sup>115</sup> Jasiqvinder Gill, *Immigration Reform = False Hope: Examining the Current and Proposed Immigration Laws Regarding H-1B Visas*, 83 UMKC L. REV. 233, 233 (2014).

<sup>116</sup> *See* Thompson, *supra* note 104.

<sup>117</sup> Gill, *supra* note 115, at 244.

that.”<sup>118</sup> The H-1B aids American employers because it allows them to fill in the gaps in the domestic workforce.<sup>119</sup> In turn, this enables U.S. employers to compete in the global economy.<sup>120</sup>

Without the H-1B, the United States cannot meet its demand for workers, and companies will have to ship their operations offshore.<sup>121</sup> Furthermore, Congress arguably implemented proper safeguards to reduce H-1B abuse and to protect U.S. workers.<sup>122</sup> This extensive application process makes hiring U.S. employees easier and more accessible, increasing the likelihood that qualified U.S. workers will fill those positions first.<sup>123</sup>

## B. Economic Benefits

The H-1B provides numerous economic benefits. First, the H-1B stimulates the economy by increasing opportunities within the United States.<sup>124</sup> Large tech companies have emphasized that a lack of H-1B availability causes them to shift work overseas, or even as close as Canada.<sup>125</sup> Offshoring harms the U.S. economy and U.S. workers alike because it takes the opportunities, profits, and innovation out of the country. Thus, the availability of H-1B workers “creates a positive externality for the companies that hire them and the economy because the workers create new products, and in some instances, new sectors of an industry, which creates opportunities for other workers.”<sup>126</sup> While some opponents of the H-1B argue that it leads to offshoring, the result is the opposite; the program may prevent high-skilled workers from taking their skills elsewhere and instead allows the U.S. job market to grow for foreign and domestic workers.<sup>127</sup> The problem arises when corporations cannot find either qualified American or qualified foreign workers to fill needed positions because they are forced to offshore positions elsewhere or when employers are not allowed to hire qualified foreign workers.<sup>128</sup>

Additionally, H-1B workers contribute to the American economy through taxes.<sup>129</sup> On average, H-1B workers earn

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<sup>118</sup> Torres, *supra* note 106.

<sup>119</sup> Halliday, *supra* note 67, at 422.

<sup>120</sup> Yaskey, *supra* note 71, at 899.

<sup>121</sup> See Halliday, *supra* note 67, at 426.

<sup>122</sup> See *id.* at 428.

<sup>123</sup> See *id.* at 428–29.

<sup>124</sup> See Yaskey, *supra* note 71, at 901.

<sup>125</sup> *Id.*; see also Halliday, *supra* note 67, at 432–33.

<sup>126</sup> Yaskey, *supra* note 71, at 901.

<sup>127</sup> See Halliday, *supra* note 67, at 432.

<sup>128</sup> See *id.* at 432–33.

<sup>129</sup> See *Economic Benefits of H-1B Visa Program*, HERMAN LEGAL GRP., <http://www.lawfirm4immigrants.com/economic-benefits-of-h-1b-visa-program/> [<http://perma.cc/X8WK-WJ36>] (last visited Mar. 10, 2022).

between \$100,000 and \$120,000 and pay taxes between twenty and forty percent.<sup>130</sup> It is estimated that the current three million H-1B visa holders contribute, on average, \$27.1 billion to American programs that they cannot benefit from, while also contributing around \$76.7 billion annually to the U.S. economy.<sup>131</sup>

The benefits of the H-1B have the potential to greatly outweigh its criticisms. Nevertheless, the random selection process does not reinforce any of the benefits the program creates. Arguably, the random selection does the opposite by thwarting the program's ideals, purposes, and benefits with a lottery selection. In addition, the USCIS receives criticism for the random selection process and the lack of information available on the process's implementation.<sup>132</sup> Critics brought suit in 2016 against the USCIS intending "to pry open that box and let the American public and those most directly affected see how the lottery system works from start to finish, and to learn whether the system is operating fairly and all the numbers are being used as the law provides."<sup>133</sup> Moreover, petitioners of the H-1B sued the USCIS over the "arbitrary and capricious" randomized lottery selection system.<sup>134</sup> Employers argued against the selection process, "as it results in a potentially never ending game of chance for petitions filed . . . with some unlucky individuals trying and failing each year to obtain a quota number, while some lucky lottery winners obtain a visa number in the very first year a petition is filed on their behalf."<sup>135</sup>

Clearly, employer sponsors and foreign workers are fed up with remaining in the dark over the selection process that determines their futures. The focus of these lawsuits is to find a solution that gives applicant employees and employers a fair and orderly system.<sup>136</sup> Many employers and foreign workers know that raising the H-1B cap is likely a losing battle; all they are calling for is a selection process that is transparent, logical, and beneficial to everyone involved in the program. The government went through great pains and deliberations to create a sophisticated

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<sup>130</sup> *Id.*

<sup>131</sup> Frank Gogol, *The True Economic Impact of H1B Visa Holders*, STILT (Apr. 28, 2022), <http://www.stilt.com/blog/2020/06/the-true-economic-impact-of-h1b-visa-holders/> [<http://perma.cc/KCM2-4TJH>].

<sup>132</sup> See Natalie Olivo, *FOIA Suit Seeks to Peek into 'Black Box' of H-1B Lottery*, LAW360 (May 23, 2016), <http://www.law360.com/articles/799213/foia-suit-seeks-to-peek-into-black-box-of-h-1b-lottery> [<http://perma.cc/AJ3V-2AU6>].

<sup>133</sup> *Id.*

<sup>134</sup> Suevon Lee, *Rejected H-1B Visa Applicants Slam 'Arbitrary' Lottery*, LAW360 (June 2, 2016), <http://www.law360.com/articles/802633/rejected-h-1b-visa-applicants-slam-arbitrary-lottery> [<http://perma.cc/79MZ-VUTJ>].

<sup>135</sup> *Id.* (quoting Complaint, Tenrec, Inc. et al. v. U.S. Citizenship & Immigration Servs. et al., No. 3:16-cv-00995 (D. Or. 2016)).

<sup>136</sup> See *id.*

and detailed eligibility process for the H-1B. However, the intricacy of the petition process is obliterated by the random selection process, and the government needs to acknowledge the flaws within the system and make the necessary changes as to how it handles these sought-after and necessary visas.

## V. MERIT-BASED SOLUTION

In order to accurately honor the intent of the H-1B and ensure that the annual 85,000 visas are granted to qualified applicants, the random selection process needs to recognize various levels of merit between applicants. Merit-based means qualifying applicants based on various levels of skill, experience, and capability.<sup>137</sup> Numerous other countries have implemented merit-based immigration systems, and many American politicians have proposed the same.<sup>138</sup> Merit-based solutions include wage-based selection, points-based selection, and employer-driven selections models.

### A. Wage-Based Selection

Rather than using a random selection process, a wage-based selection system prioritizes the highest salary levels. In January 2021, the USCIS announced a final rule that would change the H-1B lottery selection process.<sup>139</sup> The aim was to shift to a wage-based selection system.<sup>140</sup> This new wage-based selection system is set to take effect in the 2023 selection process.<sup>141</sup> The USCIS modified the selection process in hopes that it would “incentivize employers to offer higher salaries, and/or petition for higher-skilled positions, and establish a more certain path for businesses to achieve personnel needs and remain globally competitive.”<sup>142</sup> However, this modification of the selection system is just a start, as wage-levels do not address all the problems nor enhance the benefits of the H-1B. Moreover, prioritizing wage fails to acknowledge numerous other important factors that play a role in the success of foreign workers and the competitiveness of the

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<sup>137</sup> See Catherine Shoichet, *What ‘Merit-Based’ Immigration Means, and Why Trump Keeps Saying He Wants It*, CNN POL., <http://www.cnn.com/2019/05/16/politics/merit-based-immigration-explainer> [<http://perma.cc/X73C-UTFJ>] (last updated May 16, 2019).

<sup>138</sup> See *id.*

<sup>139</sup> See USCIS *Modifies H-1B Selection Process to Prioritize Wages*, USCIS (Jan. 7, 2021), <http://www.uscis.gov/news/news-releases/uscis-modifies-h-1b-selection-process-to-prioritize-wages> [<http://perma.cc/X458-CZUT>].

<sup>140</sup> See *What H-1B Lottery Results Says About Odds?*, *supra* note 62.

<sup>141</sup> Frank Gogol, *Biden Delays Wage Based H1B Selection*, STILT, <http://www.stilt.com/blog/2020/06/the-true-economic-impact-of-h1b-visa-holders/> [<http://perma.cc/XE9R-9QEQ>] (last updated Aug. 24, 2022)

<sup>142</sup> *Id.*

United States in the global economy. Focusing on wage alone negatively impacts foreign talent coming straight out of college.

Wage prioritization fails to appreciate the skill and innovation entry-level workers may bring to the American workforce. Entry-level workers may still be viable H-1B applicants because entry-level does not correlate to low-skill, and these applicants may still possess the required education in a specialty occupation.<sup>143</sup> The United States needs foreign students because of their positive financial impact on American universities, as “international students are a vital source of revenue.”<sup>144</sup> Yet, these students will likely be left with few options to remain in the United States past their education if the H-1B focuses solely on wage levels. Many international students looking to study in the United States will now likely look to the U.S. neighbor, Canada. Employment laws in Canada aid international students, while international students in the United States must hope their luck runs strong in the H-1B lottery.<sup>145</sup> Furthermore, prioritizing H-1Bs based on wage could “harm start-ups, small businesses, nonprofits, and rural businesses that do not have the resources to offer the highest wages.”<sup>146</sup> These businesses have the need for H-1B workers, but prioritizing based on wage will likely wipe out an entire market that exists for skilled workers, replacing them with large tech companies that can afford to keep up with this new rule.<sup>147</sup>

A mere change of the order in which petitions are “randomly” selected demonstrates a much larger need: merit-based decision making for a distinguished visa. Many have argued, lobbied, and even begged for a change within the H-1B; some have called for an increase in the annual visas available, while others have criticized the USCIS’s adjudicatory actions or lack thereof.<sup>148</sup> Replacing the now semi-random selection process with a complete merit-based selection process would meet the underlying concerns coming from both sides of H-1B debates. Proposals for a merit-based immigration system are not new; however, this proposal focuses

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<sup>143</sup> See Roy Maurer, *The DOL Increases H-1B Wage Minimums, Again*, SHRM (Jan. 14, 2021), <http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-increases-h-1b-wage-minimums-again.aspx> [<http://perma.cc/JUJ6-6WB8>].

<sup>144</sup> Niall Hegarty, *Where We Are Now – The Presence and Importance of International Students to Universities in the United States*, 4 J. INT’L STUDENTS 223, 227 (2014).

<sup>145</sup> See *id.* at 229.

<sup>146</sup> Leslie Dellon, *Lawsuits Challenge Change to H-1B Lottery Selection That Would Hurt Small Businesses, Start-ups*, IMMIGR. IMPACT (May 26, 2021), <http://immigrationimpact.com/2021/05/26/change-h1b-lottery-selection-lawsuits/> [<http://perma.cc/8FSY-9AQS>].

<sup>147</sup> *Id.*

<sup>148</sup> See Jeronimides, *supra* note 19 at 385–86.

specifically on a merit-based selection system in replacement of the H-1B random selection process.

## B. Points-Based Selection System

Many countries have successfully implemented merit-based selection processes through a points system.<sup>149</sup> Points-based selection systems reflect merit because they allocate points based on valued skills, education, and experience.<sup>150</sup> Prior proposals for merit-based immigration usually mimic the merit-based approaches used in Canada, Australia, and New Zealand.<sup>151</sup> Although Canada, Australia, and New Zealand are the most commonly cited examples of merit-based immigration systems, almost every EU country, as well as many others, use some form of a merit-based system.<sup>152</sup> In 2017, the Reforming American Immigration for Strong Employment (“RAISE”) Act was introduced to the Senate as an amendment to the 1990 INA, advocating for a point-based immigration system.<sup>153</sup> Under this system, an applicant would receive more points based on their level of degree.<sup>154</sup> Currently, employment-based immigrants may enter the U.S. in the following five different ways:

- (1) “persons of extraordinary ability” who can document high-level accomplishments in their field, a tough standard for most workers to meet, particularly early in their careers; (2) professionals with advanced graduate degrees or exceptional ability; (3) professionals, skilled workers (those with at least a two-year college degree), and unskilled workers (for whom just 5,000 green cards are allocated yearly); (4) certain special immigrants who meet U.S. national interests; and (5) immigrant investors, who invest at least \$500,000.<sup>155</sup>

Under this system, applicants who qualify for the H-1B fit into at least categories (2) and (3), with the possibility of fitting into more. Under the RAISE Act, applicants with the following eligibility criteria are given higher priority (more points): 26-30

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<sup>149</sup> *Merit Based Immigration and How it's Measured*, ALLCleared (Mar. 6, 2020), <http://allcleared.com/blog/merit-based-immigration/> [<http://perma.cc/5KFS-7XT8>].

<sup>150</sup> See Julia Gelatt & Jeremy L. Neufeld, *Should the U.S. Adopt a Merit-Based Immigration System*, SHRM (May 28, 2020), <http://www.shrm.org/hr-today/news/hr-magazine/summer2020/Pages/should-the-US-adopt-a-merit-based-immigration-system.aspx> [<http://perma.cc/4UNZ-SMBP>].

<sup>151</sup> *US Merit Based Immigration*, VISAGUIDE.WORLD, <http://visaguide.world/us-visa/merit-based-immigration/> [<http://perma.cc/PT82-4KAU>] (last visited Apr. 5, 2022).

<sup>152</sup> *Merit Based Immigration and How it's Measured*, ALLCleared (Mar. 6, 2020), <http://allcleared.com/blog/merit-based-immigration/> [<http://perma.cc/5KFS-7XT8>].

<sup>153</sup> See RAISE Act, S. 354, 115th Cong. (2017).

<sup>154</sup> *US Merit Based Immigration*, *supra* note 151.

<sup>155</sup> Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System*, MIGRATION POLY INST. (Aug. 2017), <http://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system> [<http://perma.cc/8J2Q-XXAZ>].

years old, holds a U.S. STEM degree, proficient in English, extraordinary achievements, job offers and salary, and the applicant's likelihood to invest in the U.S. economy.<sup>156</sup> The points-based selection proposed under the RAISE Act emphasizes many of the same skills and characteristics that U.S. employment-based visas already require.

The RAISE Act proposed this points-based system as a response to an influx of low-skilled labor, resulting in lower wages for foreign workers—as well as American workers.<sup>157</sup> Ultimately, the RAISE Act failed, as it sought a complete overhaul of the American immigration system, including non-employment visas.<sup>158</sup> Additionally, the RAISE Act proposed eliminating any existing employment categories, remodeling the entire system already set in place.<sup>159</sup> Other drawbacks of the RAISE Act included the possibility that an applicant's points could decrease if their spouse immigrated with them.<sup>160</sup> However, the RAISE Act also proposed a recurring scheduled re-evaluation of the points system to ensure that the points awarded continued to meet the needs of the United States.<sup>161</sup>

At these RAISE re-evaluation meetings, proposed changes in points would be based on concerns in four main areas: “(1) increasing the United States’ per capita growth in gross domestic product; (2) enhancing the chances of financial success for point-based immigrants; (3) cultivating the ‘fiscal health’ of the United States; and (4) maintaining or increasing wages for domestic workers.”<sup>162</sup>

H-1B applicants would also fit into most of the categories proposed under a points-based system, as they also must have a job offering prevailing wages that requires at least a bachelor's degree in a specialized field (usually STEM).<sup>163</sup> Furthermore, the majority of petitioners are between 25 and 34 years old.<sup>164</sup> On its own, the H-1B is already somewhat of a merit-based program, yet it subjects its applicants to a meager chance of success within a completely

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<sup>156</sup> See *US Merit Based Immigration*, *supra* note 151.

<sup>157</sup> Grace H. Parsons, *An Overview of the US Immigration System and Comparison with Merit-Based Immigration Systems in Light of the Proposed RAISE Act*, 35 ARIZ. J. INT'L & COMPAR. L. 469, 482 (2018).

<sup>158</sup> See *id.* at 483.

<sup>159</sup> See *id.* at 484.

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 485.

<sup>162</sup> *Id.*

<sup>163</sup> See Preston Huennkens, *H-1B Program: 10-Year Trends*, CTR. FOR IMMIGR. STUD. (Oct. 25, 2017), <http://cis.org/Huennkens/H1B-Program-10Year-Trends> [<http://perma.cc/5MVW-J6B9>].

<sup>164</sup> *Id.*

arbitrary selection process.<sup>165</sup> Given that the number of H-1B applicants outnumber the H-1Bs granted by an extraordinary amount, it is unfair to assess a candidate who merely meets the criteria in the same manner as a candidate that contributes to U.S. industries and the American economy in a more meaningful way.

### C. Foreign Points-Based Immigration Models

Some countries, such as Canada, use a points-based immigration system to favor factors including formal education and language proficiency.<sup>166</sup> Alternatively, Australia's system favors specific skills on an as-needed basis and contributions to public finances.<sup>167</sup> Additionally, New Zealand uses a points-based program that grants skilled workers more points when they have already gained relevant work experience in the country.<sup>168</sup> Moreover, these countries adjust the points system based on the market needs of that year.<sup>169</sup> The success of these merit-based programs is reflected in the fact that talented international students are looking to study in other English-speaking countries like Australia and Canada.<sup>170</sup> Aside from Australia, Canada, and New Zealand, a number of other countries employ a form of merit-based immigration—including Austria, Denmark, Germany, Japan, South Korea, and the United Kingdom.<sup>171</sup>

Canada has become a leading country for international students, partially due to the fact that the Canadian visa process is simpler and shorter.<sup>172</sup> In Canada, international students have a higher chance of obtaining permanent residency compared to the United States.<sup>173</sup> Canada is not the only country gaining competitive status in the race for higher education international students; Australia has promoted its educational system and gained nearly \$16 billion in income for that industry.<sup>174</sup> In contrast to the RAISE Act proposals, Canada's points-based

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<sup>165</sup> See Stuart Anderson, *H-1B Visa Denial Rates Plunge After Trump Immigration Policies End*, FORBES (Jan. 12, 2022, 9:29 AM), <http://www.forbes.com/sites/stuartanderson/2022/01/12/h-1b-visa-denial-rates-plunge-after-trump-immigration-policies-end/?sh=3c007a60444a> [http://perma.cc/TYT5-6F8N].

<sup>166</sup> See Massimiliano Tani, *Using a Point System for Selecting Immigrants*, IZA WORLD OF LAB. 1, 2–3 (May 2014), <http://wol.iza.org/articles/using-a-point-system-for-selecting-immigrants/long> [http://perma.cc/79SL-2MCX].

<sup>167</sup> See *id.* at 4.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 5.

<sup>170</sup> See Krislov, *supra* note 86.

<sup>171</sup> Parsons, *supra* note 157, at 485.

<sup>172</sup> See *Why Studying in Canada is Better than Studying in US?*, COLLEGEDUNIA, <http://collegedunia.com/canada/article/why-studying-in-canada-is-better-than-studying-in-us> [http://perma.cc/272N-VL3C] (last visited Apr. 23, 2022).

<sup>173</sup> See *id.*

<sup>174</sup> See Hegarty, *supra* note 144, at 229.

system applies only to its designated economic class of visas.<sup>175</sup> Comparatively, Australia's system is separated into two programs: a Migration Program and a Humanitarian Program.<sup>176</sup> The Migration Program deals with skilled foreign workers, similar to the U.S. H-1B.<sup>177</sup> Countries like Australia and Canada that have adopted points-based systems, were able to create immigration systems that balance a need for skills-based workers, family-based immigration, and low-skilled worker visas. These systems balance those interests by creating different selection processes based on the specific visa.<sup>178</sup> This is specifically where the RAISE Act fell flat—proposing to eliminate different family immigration categories and replacing them completely with the skills-based points system.<sup>179</sup>

Some of the foreign merit-based systems focus on employer demand and potential economic benefits of select visa holders.<sup>180</sup> Specifically, Australia has tailored its program to prioritize employer-specific needs.<sup>181</sup> Canada's program uses an online service to assess an applicant's initial eligibility, and once an applicant is deemed eligible, they are awarded points based on different factors of an adjustable scale.<sup>182</sup> These factors include "human capital, the transferability of [an applicant's] skills and their ability to integrate successfully."<sup>183</sup> In many of these skills-based points systems, foreign workers give general information regarding their qualifications, education, experience, and identity, while only the highest-ranked applicants are given an opportunity to apply.<sup>184</sup> Canada's system has received praise "both for its transparency, since it involves clear and objective selection criteria, and its flexibility, as policymakers can adjust the system's criteria and distribution of points in response to changing estimates of labor demand."<sup>185</sup> Many countries using some form of a merit-based points system have to find a balance between economic qualifications and human capital.<sup>186</sup> This balance of economic qualifications includes weighing factors like education, experience, and job offers against human capital

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<sup>175</sup> Parsons, *supra* note 157, at 488.

<sup>176</sup> *Id.* at 490.

<sup>177</sup> *See id.*

<sup>178</sup> *See id.* at 491.

<sup>179</sup> *See id.* at 483.

<sup>180</sup> See Roy Maurer, *Are 'Merit-Based' Immigration Systems the Answer?*, SHRM (June 4, 2019), <http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/trump-merit-based-points-immigration-systems-canada-australia.aspx> [<http://perma.cc/B5W7-9BAV>].

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*

<sup>183</sup> *Id.*

<sup>184</sup> See Parsons, *supra* note 157, at 492.

<sup>185</sup> See Maurer, *supra* note 180.

<sup>186</sup> See *Merit Based Immigration and How it's Measured*, *supra* note 152.

factors, such as needs of the industry.<sup>187</sup> Without this balancing act, countries face the problem of highly qualified immigrants working in jobs that they are overqualified for.<sup>188</sup> Thus, how a system defines merit is crucial for its success.

#### D. Employer-Driven Models

Other proposals to improve the H-1B include replacing the lottery with an auction, so supply and demand dictate the value of a worker.<sup>189</sup> This would mean employers would bid on employees, and employers with the highest bids “win” the employee.<sup>190</sup> However, an auction-like solution fails to appreciate the importance of foreign workers having agency over their employment. An auction would take a visa that is already employer-focused and completely eliminate the employee from the process. Furthermore, this selection process leaves foreign workers “at the mercy of th[e] company” that successfully bids on them.<sup>191</sup> The employer-driven model of the H-1B benefits the United States because employers have better qualifications to choose workers best suited for the company and the country. Overall, the high-skilled H-1B workers tend to earn more, produce more patents, and outperform workers who enter on green cards.<sup>192</sup> Therefore, any changes in the H-1B selection process should not diminish or significantly alter the benefits of this model. With an employer-driven model, employers guide the beginning of the H-1B process, as they determine what applicants get in the door initially; however, a successful model will honor the qualifications of the employer along with the agency of the immigrant worker.

#### E. Measuring Merit Depending on the Country’s Immigration System

Other countries’ merit-based immigration systems confirm that every program does not function the same, and countries need adaptable systems to fit their specific needs. For example, the United Kingdom’s system grants points for specific skills, professions, salaries, and qualifications; moreover, applicants

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<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See Aobdia, supra* note 110.

<sup>190</sup> *See id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See* Jennifer Hunt, *Analysis: Would the U.S. Benefit from a Merit-Based Immigration System?*, PBS (Aug. 3, 2017, 1:47 PM), <http://www.pbs.org/newshour/economy/analysis-u-s-benefit-merit-based-immigration-system> [<http://perma.cc/L5RU-7HV6>].

must have a job offer from an approved employer.<sup>193</sup> Canada's program awards points for English or French language skills, education, and relevant work experience, while an employment offer merely grants an applicant additional points.<sup>194</sup> Australia's points-based system prioritizes skilled employment experience and education by requiring that all applicants have their skills assessed.<sup>195</sup> New Zealand's system closely imitates Australia's but places more focus on the market needs of the country by requiring that an applicant has skills the country currently needs.<sup>196</sup> Each of these systems has its own benefits and deficiencies, but each system also shows a global development in the merit-based immigration arena. The H-1B's history recognizes that the program "endeavored to facilitate the ability of American businesses to compete in the global economy."<sup>197</sup> While other countries are leveling up to create employment-based visas that entice skilled foreign workers with clear guidelines and formulas for success, America's H-1B falls flat with its randomized lottery. Some of these countries enacted points-based systems as recently as 2020, a sign that America needs to follow the global trends to remain a top global competitor.<sup>198</sup>

## VI. BENEFITS OF MERIT-BASED PROGRAMS

A merit-based system enables a country to select immigrants more likely to earn higher amounts and contribute more to the government.<sup>199</sup> Canada's merit-based system shows that these high-skilled workers admitted under a points system have better qualifications, higher education, more robust employment rates, and are more likely to make higher contributions to the government.<sup>200</sup> Similarly, the U.S. labor market benefits when workers perform jobs that meet their specializations.<sup>201</sup> Much of the criticism surrounding the H-1B includes mistreatment of the requirement that workers coming through the program must be highly-skilled.<sup>202</sup> A merit-based points selection process clarifies what "high-skilled" means and redefines the concept of merit.<sup>203</sup>

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<sup>193</sup> *Points-Based Immigration System: Why More Countries Are Adopting It*, Y-AXIS, (Feb. 26, 2020), <http://www.blog.y-axis.com/points-based-immigration-system-countries/> [<http://perma.cc/5U98-JH68>].

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.*

<sup>197</sup> Paparelli & Patel, *supra* note 18, at 997.

<sup>198</sup> *See Points-Based Immigration System: Why More Countries Are Adopting It*, *supra* note 193.

<sup>199</sup> Hunt, *supra* note 192.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See* Palagashvili & O'Connor, *supra* note 89, at 2.

<sup>203</sup> *See* Aobdia, *supra* note 110.

This creates a more streamlined process because it refines the necessary requirements and raises the bar for selection. A higher bar for selection would allow the most high-skilled H-1B applicants to improve their chances of success from the meager thirty percent chance they currently face.<sup>204</sup> The points system would allow applicants to assess where they fall on the spectrum and give them metrics to improve upon to set themselves apart from other applicants.

#### A. Merit-Based Selection Process Bolsters Intent of the H-1B Program

The requirements of the H-1B itself, as opposed to the requirements for the visa selection process, are already merit-based. The eligibility requirements in the proposed 2017 RAISE Act include much of what is already required for any applicant under the H-1B. Much like the proposal under the RAISE Act, the H-1B already prioritizes those with higher level degrees by running the lottery first on the 20,000 master's degree applicant pool before conducting the lottery for the remaining 65,000.<sup>205</sup>

Currently, the H-1B is employer focused as it enables employers to seek out and apply for foreign workers.<sup>206</sup> However, employers and applicants lose all their agency in the selection process for the H-1B.<sup>207</sup> Certainly, employers and applicants cannot have complete control over the selection process because the government ultimately regulates entry for foreign workers. However, giving employers greater agency in the selection process reinforces the idea that employers are best suited to understand the market needs and pick employees who will fulfill those needs. Replacing the lottery with a merit-based selection process also incentivizes employers to find applicants who are best suited for the position and possess important skills and qualifications, instead of scouring the foreign worker market for cheaper labor.

Furthermore, prioritizing applicants with truly valuable skills disincentivizes abuse of the program.<sup>208</sup> Employers who previously found loopholes to use the H-1B as a means to hire lower-skilled workers and pay them less will not be granted competitive visas because more desirable, higher-skilled applicants will have more points. Moreover, adding guidelines to the selection process “would reduce stress and uncertainty for the most desirable foreign

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<sup>204</sup> See *What H-1B Lottery Results Says About Odds?*, *supra* note 62.

<sup>205</sup> See Zonoozy, *supra* note 14, at 655.

<sup>206</sup> See Hunt, *supra* note 192.

<sup>207</sup> Nita Nicole Upadhye, *H-1B Visa Lottery (How Does it Work?)*, NNU IMMIGRATION (Apr. 1, 2021), <http://www.nnuimmigration.com/h1b-visa-lottery/> [<http://perma.cc/5UM4-M7YM>].

<sup>208</sup> See *id.*

applicants, many of whom graduate from top-tier MBA, PhD, and engineering programs hoping to stay in the country, as well as for the companies that wish to invest in these employees.”<sup>209</sup> If the intent of the program is to aid the competition of American businesses in the global economy and enhance the opportunities and wages of U.S. workers, then the selection process should reflect that intent. A random selection process certainly does not enhance opportunities on either side of the visa.

#### B. H-1B’s Structure is an Ideal Candidate for Merit-Based Selection

Comparisons of other countries’ merit-based immigration systems highlight why the H-1B is an ideal candidate for a merit-based selection system. The United Kingdom, for example, requires that skilled foreign workers have employer sponsorship, whereas Australia admits applicants based on their points earned.<sup>210</sup> Debates around points-based systems have heavily focused on the advantages and disadvantages of employer sponsorship. The majority of countries that use points-based systems differ in their requirements that an applicant is sponsored by an employer.<sup>211</sup> Points-based systems often do not require job offers, so there is no guarantee that a “high points” foreign applicant is employable in the necessary market or that the host country needs that type of work.<sup>212</sup> The H-1B circumvents this problem because the visa’s petition requirements are employer-driven and require that the foreign worker has employer sponsorship. Without this employer-driven system, points-based systems must rely on the government to decide what skills the country values.<sup>213</sup> Employers are better suited than the government to assess the needs of the market and their companies and to evaluate what type of worker will best fit their needs.

Employers rely on this visa to employ foreign workers because it provides the most streamlined process for an applicant to become a permanent resident.<sup>214</sup> This means employers utilize H-1Bs with long-term goals in mind, keeping high-skilled foreign workers in the

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<sup>209</sup> *Id.*

<sup>210</sup> See Madeleine Sumption, *The Australian Points-Based System: What Is It and What Would Its Impact Be in the UK?*, THE MIGRATION OBSERVATORY 2, 5 (July 22, 2019), <http://migrationobservatory.ox.ac.uk/resources/reports/the-australian-points-based-system-what-is-it-and-what-would-its-impact-be-in-the-uk/> [<http://perma.cc/RP6M-78Y5>].

<sup>211</sup> See *id.* at 7.

<sup>212</sup> See *id.*

<sup>213</sup> See *id.* at 5.

<sup>214</sup> Lauren Wingo, *How Does a Company Sponsor H-1B Visas?*, U.S. CHAMBER OF COM., <http://www.uschamber.com/co/run/human-resources/sponsor-h1b-visas> [<http://perma.cc/FPA8-CXNR>] (last visited Apr. 25, 2022).

U.S. market.<sup>215</sup> The government is not equipped to make these decisions for employers, and it removes decision-making skills from employers when they use the lottery to grant H-1Bs. The government does not currently incentivize employers to choose those who will best contribute to the market because the H-1B selection process does not differentiate between applicants. As of now, the H-1B selection process differentiates applicants on two measures: salary and degree level. Regarding degree level, applicants with a master's degree or higher have preferential selection because the lottery runs first for applicants in this pool.<sup>216</sup> The applicants not chosen receive an additional opportunity in the lottery for applicants with at least a bachelor's degree.

### C. Measuring Merit

A merit-based solution for the H-1B selection process should not be a complete overhaul of the existing system. Currently, highly educated immigrants perform better in the United States than in Canada, and the H-1B is already tailored to these immigrants.<sup>217</sup> Overall, a points system should decide on desirable characteristics, assign each characteristic a different point value, and remain flexible enough to consider market needs. A successful system would honor the value and needs of foreign workers, the American workforce, and U.S. employers. Thus, a complete restoration of the H-1B is unnecessary because parts of the system already work well. The following should be considered when crafting the ideal merit-based system:

The ideal merit-based system is not simply points-based . . . . “It is a dynamic, agile system that is actively operated by a hands-on government and carefully calibrates the profile of the future workforce. Many countries with points-based systems have been moving away from just selecting people on the basis of human capital attributes and giving more value to an employment offer.” . . . “Ultimately keeping employer sponsorship and/or heavily weighting a job offer under the point system will be extremely important, along with clearing the green card backlogs.”<sup>218</sup>

The H-1B is structured to bring in high-skilled applicants with an education, related job offers, and valuable skills. This program already does what many merit-based immigration systems aim to do, so it makes sense to slightly alter the selection process to stay consistent with these goals.

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<sup>215</sup> *See id.*

<sup>216</sup> *See What H-1B Lottery Results Says About Odds?*, *supra* note 62.

<sup>217</sup> *See* Hunt, *supra* note 192.

<sup>218</sup> Maurer, *supra* note 181.

#### D. Problems with Merit-Based Systems

Critics of merit-based immigration argue that points-based selection systems ignore the potential of an “immigrant superstar,” the “entrepreneur with a billion-dollar idea [who] may generate more value than thousands of dependable, hardworking, high-skilled workers.”<sup>219</sup> Because merit-based points systems value “reliable” metrics like education, experience, and career opportunities, these systems risk undervaluing those who could theoretically generate more value from riskier endeavors like start-ups and entrepreneurs.<sup>220</sup> In theory, a successful start-up could offer more employment opportunities for foreign and U.S. workers, generate more profit than a “traditional” H-1B worker, and offer more to the U.S. economy overall.<sup>221</sup> However, these problems were addressed under the RAISE Act proposal—which proposed a system that accounted for the U.S.’ gross domestic product, the chances of financial success for the admitted immigrant, the overall fiscal health of the United States, and increasing wages of the whole workforce.<sup>222</sup> Specifically, the system under the RAISE Act would award points for things like an investment in a business, an extraordinary achievement—and playing an active role in management of a new commercial enterprise.<sup>223</sup> Additionally, the current H-1B random selection process does not offer any better of a chance for foreign-born startup founders, as they may be subject to the lottery year after year without success and with no chance of better odds the next year.

However, some current skills-based points systems used in Australia and Canada do not recognize the importance of employment opportunities, as they decrease the number of points offered to an applicant for a job offer.<sup>224</sup> This creates a system that values skill, without considering opportunity—resulting in high-skilled, foreign workers competing for unskilled jobs, which in turn creates problems for the workers and the economy.<sup>225</sup> Thus, systems that fail to recognize the significance of a current employment opportunity lead to a problem called “brain waste”—the problem of foreign-trained doctors driving taxis.”<sup>226</sup>

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<sup>219</sup> Julia Gelatt & Jeremy L. Neufeld, *Should the U.S. Adopt a Merit-Based Immigration System*, SHRM (May 28, 2020), <http://www.shrm.org/hr-today/news/hr-magazine/summer2020/Pages/should-the-US-adopt-a-merit-based-immigration-system.aspx> [<http://perma.cc/4UNZ-SMBP>].

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

<sup>222</sup> Parsons, *supra* note 157, at 485.

<sup>223</sup> Robert Koons, *How the RAISE Act Promotes Urban America’s Economic Growth over Rural America’s*, 15 S.C. J. INT’L L. & BUS. 133, 137 (2019).

<sup>224</sup> Parsons, *supra* note 157, at 492.

<sup>225</sup> *Id.* at 492–93.

<sup>226</sup> Gelatt & Neufeld, *supra* note 219.

Therefore, a better merit-based system would understand and utilize the importance of employers choosing their desired workers.<sup>227</sup> The RAISE Act also failed to accurately appreciate that an employer-driven immigration model allows employers to select the skilled workers they need.<sup>228</sup> The RAISE Act proposed taking the power away from employers, who are best suited to understand the needs of the market, whereas the H-1B program already recognizes this importance.

The demise of the RAISE Act included concerns that the agricultural, hospitality, and manufacturing industries would face severe labor shortages because of the points-based selection system.<sup>229</sup> Overall, the RAISE Act faced criticism, and ultimately failure, because its points system worked at the expense of lower skilled, laborer immigrants—cutting off family-based categories and significantly reducing the number of immigrants admitted to the United States.<sup>230</sup> Nevertheless, the merit-based points system proposed by the RAISE Act was not the issue. The issue was that the visa systems the RAISE Act proposed changing did not need to address merit. However, the H-1B is already structured to address merit, making it an ideal candidate to enact a similar merit-based points system proposed under the RAISE Act. Unlike the RAISE Act’s proposal, this is a narrow solution to a very specific problem.

#### E. H-1B Program Answers the Problems of Merit in its Structure

Although the U.S. H-1B selection process does not currently use a merit-based points system, the program already avoids the issue of “brain waste” because the visa is employer-driven; a U.S. job offer is a prerequisite to apply. Furthermore, an applicant’s job offer must be one that qualifies as “highly skilled.”<sup>231</sup> Therefore, implementing a merit-based system in lieu of the current lottery would not risk the issues of “brain waste” other merit-based systems face because the H-1B requirements have already accounted for this issue. The H-1B requirements already consider the fact that employers are in the best position to recognize what talent is best suited in their lines of work, so the selection process should mirror “[a] broader, more flexible merit-based immigration stream [that] would supply employers with needed workers, support U.S. workforce growth amid an aging population and

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<sup>227</sup> *Id.*

<sup>228</sup> Koons, *supra* note 223, at 146–47.

<sup>229</sup> *Id.* at 149.

<sup>230</sup> See *The RAISE Act: What Lies Beneath the Proposed Points System?*, AM. IMMIGR. COUNCIL (Aug. 11, 2017), <http://www.americanimmigrationcouncil.org/research/raise-act> [<http://perma.cc/V58A-KZJU>].

<sup>231</sup> See 8 U.S.C. § 1184(c)(6)(A)(ii).

bolster overall U.S. economic growth.”<sup>232</sup> Currently, the random selection process fails to achieve either of those goals. At this time, employers and employee applicants are subjected to strenuous requirements to show merit, but then must leave their fate up to a random selection process that does not provide employee applicants with higher chances at staying in the United States.

Replacing the H-1B lottery with a merit-based points selection process will honor the original intent of the program, retain the employer-driven model of the visa, and give employers and applicants greater agency over the process—creating an overall more equitable and valuable system. Maintaining the employer-led and demand-driven structure of the H-1B is important to the success of the program because it facilitates economic growth and competitiveness.<sup>233</sup> A points-based and skills-focused model, without components of a demand-driven model, runs the risk of high-skilled immigrants unable to find jobs that fit their prominent skill sets.<sup>234</sup> Without focusing on demand, the value of a high-skilled immigrant working in the United States is not accurately reflected onto the American economy.<sup>235</sup> The H-1B is demand-driven because the employers are in the driver’s seat; foreign workers cannot work in the United States under an H-1B without employer sponsorship.<sup>236</sup> Data comparisons between the U.S. demand-driven model and Canada’s point-based model demonstrates that points-based systems are more effective in obtaining higher educated foreign workers.<sup>237</sup> Coincidentally, this is precisely the intent of the H-1B. However, Canada’s system fails to honor these high-skilled workers’ skills because many of them end up working in jobs they are substantially overqualified for.<sup>238</sup> Thus, a merit-based selection system creates a best-of-both-worlds situation because it maintains the employer-driven demand model for H-1B eligibility while implementing a “best and brightest” selection system.

Countries like Canada, Australia, and New Zealand that have adopted merit-based immigration systems prove that merit-based immigration is not a one-size-fits-all. For instance, Australia’s system is a hybrid system, combining a points-based system with

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<sup>232</sup> Gelatt & Neufeld, *supra* note 219.

<sup>233</sup> See *The RAISE Act: What Lies Beneath the Proposed Points System?*, *supra* note 230.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See Rey Koslowski, *Selective Migration Policy Models and Changing Realities of Implementation*, 52 INT’L MIGRATION 26, 27 (2013).

<sup>237</sup> See *id.* at 31–34.

<sup>238</sup> See *id.* at 34.

a demand-based employer model.<sup>239</sup> Although these countries provide a framework for what a merit-based system could look like, most of these countries have amended their systems to combine the need for employer-driven demand and pure points.<sup>240</sup> The U.S. H-1B program should follow suit.

#### CONCLUSION

The H-1B should not be another contributor to the failed American Dream. The American Dream fills skilled H-1B applicants with a false sense of hope that their hard work, perseverance, and dedication to honoring the system will end in success. For many H-1B applicants, around 70% per year, this is simply not true. H-1B applicants represent most of what the government says the United States wants and needs, yet the government ties the hands of all prospective applicants and expects them to accept the random lottery as the holder of their fate. As Oscar Handlin said, “the immigrants were American history,”<sup>241</sup> but they are also the future. America needs to honor this with a H-1B selection process that reflects the merit, influence, and importance of the applicants.

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<sup>239</sup> *Examining Merit-Based Immigration and How it Might Work in the U.S.*, BIPARTISAN POL’Y CTR., at 5:20 (Feb. 5, 2018), <http://bipartisanpolicy.org/event/examining-merit-based-immigration-and-how-it-might-work-in-the-u-s/> [<http://perma.cc/M88S-PH3F>] (recapping comments from Daniel Griswold, Michael Willard, and André Valotaire).

<sup>240</sup> See Hunt, *supra* note 192.

<sup>241</sup> Vitello, *supra* note 1.

