The Racialization and Exploitation of Foreign Workers by the Law

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THE RACIALIZATION AND EXPLOITATION
OF FOREIGN WORKERS BY THE LAW

by

SEIKO ISHIKAWA

A master’s thesis submitted to the Graduate Faculty in Liberal Studies in partial fulfillment of the requirements for the degree of Master of Arts, The City University of New York

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Abstract

THE RACIALIZATION AND EXPLOITATION OF FOREIGN WORKERS BY THE LAW

by

Seiko Ishikawa

Advisor: Professor Monica W. Varsanyi

Intense demand for cheap labor in the United States has resulted in a widespread effect of employing high skilled immigrants in STEM fields. Examining how companies use high-skilled visa categories to create a flexible cheaper immigrant workforce, this paper demonstrates that skilled immigrants from Asia are being exploited through neutral skills-based criteria that are *de facto* racially biased. The purpose of this paper is to raise awareness of how, from the perspective of law and society, skills-based immigration works primarily to benefit the technological industry rather than skilled immigrants.
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Introduction

As immigration to the United States has tripled between the 1990s\(^1\) and 2010s,\(^2\) bringing in diverse peoples from all around the developing world,\(^3\) immigration scholarship has carefully examined and researched elements of discrimination\(^4\) contained in the development of American immigration law and policy. In this paper, I focus on the temporary employment\(^5\) of skilled foreign workers in the American STEM (science, technology, engineering, and mathematics) fields.

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\(^1\) The 1990s was a significant period for immigration policies. During that era Congress began a serious discussion on immigration reform. The 1986 Immigration Reform and Control Act (IRCA), Pub.L.99-603, was a modified version of the Immigration and Nationality Act of 1965. It increased the totality of immigrants to 700,000 immigrants per year for the fiscal years 1992-94, and 675,000 per year after that. This act preserved family-based immigration visas, while more than doubling employment-related immigration, created five distinct employment-based visas categorized by occupation, and instituted the Diversity Visa Program, which created a lottery to admit immigrants from countries where their citizenry was underrepresented in the U.S. There were also changes in non-immigration visas, such as the H-1B visa, one of the temporary employment-based visas for skilled workers, which is the main subject of this paper. Historical Overview of Immigration Policy. Center for Immigration Studies. Retrieved from http://cis.org/ImmigrationHistoryOverview.

\(^2\) According to U.S. Homeland Security, an estimated 13.2 million lawful permanent residents (LPRs), or green card holders, were living in the United States on January 1, 2014. Sixty-four percent of the LPR population in 2014 obtained permanent residence in 2000 or later. Thirty-two percent gained LPR status between 1990 and 2004. Lee, James & Baker, Bryan. (2014, January) Estimates of the Lawful Permanent Resident Population in the United States. U.S. Homeland Security. Moreover, the Department of State (DOS) published the 2015 annual report of immigrant visa applicants, revealing an overall decrease from 9,011,295 in 2015 to 8,626,625 in 2016. This total decreases both family-based and employment-based green cards. However, only reflect petitions do not include the number of applications held with the USCIS Offices. Immigrant visa issuances during fiscal year 2017 will be limited no more 226,000 in the family-sponsored preferences and 140,000 in the employment-based preferences. Annual Report of Immigration Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2016.


\(^4\) After the Immigration and Naturalization Act of 1965 abolished a quota system based on national origin, immigrants were accused of bringing crime, stealing jobs from native-born Americans, and being tax parasites. Even though the Equal Protection Clause generally requires strict scrutiny of racial classification within the law, racism, along with economic and other social forces, has influenced the development of immigration law and policy in the U.S. For example, in the 1800s, the Supreme Court upheld discrimination on the basis of race and national origin when Chinese exclusion laws barred virtually all immigration of persons of Chinese ancestry and severely punished Chinese immigrants who violated these laws. In Fong Yue Ting v. the United States, the Court reasoned that “the right of a nation to expel or deport foreigners…is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.” Johnson, Kevin R., Aldana, Raquel., Hing, Bill Ong., Saucedo, Leticia M., and Trucios-Haynes, Enid. (2015). Understanding Immigration Law. 2nd ed. Conklin, NY: Matthew Bender & Company, Inc.

\(^5\) Temporary employment refers to an employment condition, which is limited to a certain period of time or project based on the needs of the employing firm and may work full-time or part-time. According to Steven Grechenhouse in the New York Times, temporary traditionally employment has followed the business cycle. “Temps are disproportionately thrown out of work when there is a slowdown, but when the economy starts...
technology, engineering, and mathematic) fields who, being useful, low-wage, flexible laborers, become perpetual outsiders. Further, U.S. immigration law often energetically perpetuates this exploitation. This paper argues that the deeply complicated relationship between immigration law, economic development, and ethnic preferences can make racially neutral *de jure* immigration law and policy lead to *de facto* discriminatory outcomes.

By focusing directly on skilled non-immigrants, I will argue that the motivation to increase high-skilled foreign workers through seemingly racially neutral skills-based criteria re-establishes racial selection, which then influences the ethnic make-up of

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8 I would like to elaborate on the distinction between race and ethnicity. Association of race with biology and ethnicity within culture is a perennial concept in the U.S. Ethnicity is not just a question of affiliation but also one of group membership. People do not have control over their race, such as to be essentially white or black, etc. Race is institutionalized, creating social consequences for members of different groups. There is an argument that historically, both ethnicity and race are socially constructed according to influences of power and inequality. But racial categories have had a much more concrete impact on peoples’ lives, because they have been used to discriminate and to unequally distribute resources, thereby setting up different standards for protection under the law. Both public policy and private institutional and communal actions have created inequalities based on race. Groups defined as ethnically different have been discriminated against in the U.S. and the setbacks suffered continue unresolved even today. (Higham, John. 1983. *Stranger in the Land: Patterns of American Nativism 1860-1923*).

9 If not a U.S. citizen, a person who enters the U.S. has either an immigrant or nonimmigrant status. An immigrant is a person who lives permanently in the U.S. Synonymous terms for immigrant status are permanent resident, immigrant, green card holder, and resident alien. Non-immigrants are people with permanent residence outside the U.S. who are in the U.S. on a temporary basis for tourism, medical treatment, business, as temporary workers, or to study. There are more than 20 different categories of non-immigrant visa classifications. In addition, most nonimmigrant visas excepting H-1 category with its dual intent are issued only to applicants who can demonstrate their intention to return to their home country. *U.S. Department of State, Bureau of Consular Affairs*. Directory of Visa Categories.
immigration streams by controlling “facially non-ethnic selection” (Joppke, 2005, p69),

or by bestowing “honorary white” (Haney Lopez, 2006, p.230) status to skills-based immigrants. Moreover, the ascent of skills-based non-immigration signifies a new nativism and a demand for more flexible, and ultimately disposable workers.

Yet, the growing polarizing convictions surrounding high skilled non-immigration in STEM fields must be emphasized. Information technology (IT) companies like Facebook, IBM, and Microsoft, are lobbying to increase the number of H-1B visas, which are temporary immigration permits for skilled workers, because they

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10 Joppke, Christian. (2005). Selecting by Origin: Ethnic Migration in the Liberal State. Cambridge, MA: Harvard University Press. Joppke examines Marshall’s contributions to the conception of social citizenship, the meaning of national citizenship and membership in an ethnic group. Joppke also argues how immigrants are allowed to enter a state if they meet requirements for qualities and skills. His work is about the differential impact of racially neutral policies on different ethnic groups.


12 I choose to utilize the word “nativism.” In 2002, John Higham (Strangers in the Land: Patterns of American Nativism, 1860-1925. New Brunswick, NJ: Rutgers University Press) explained that the new nativism intends for the anti-immigrant movement to preserve whiteness by encouraging Asian immigration while guarding against brown-skinned immigrants. Appended assertions that immigrants must either assimilate to the majority culture or be integrated reflect the basis on which the majority population will accept a given number of immigrants. New nativism is based on the racial concern belonging to the anti-immigration movement, which has a policy of favoring native inhabitants over immigrants.

13 One of neoliberalism’s ideas is to encourage “labor market flexibility,” which is code for letting companies fire capriciously. According to “Disposable Workers: Immigration after NAFTA and the Nation’s Addiction to Cheap Labor” (2011) by United Nations World Food Program and the Latino Research Center, the North American Free Trade Agreement (NAFTA) has created a decline in working wages and opportunities in Mexico, which in turn has led to an increase in migration. Meanwhile, the U.S. has experienced an economic expansion, creating a demand for workers, in particular cheap, exploitable workers – which contributed to a huge migration at the end of the twentieth century. Strangers in the Land: Patterns of American Nativism (Sanchez, Hector E. (2011). Disposable Workers: Immigration after NAFTA and the Nation’s Addiction to Cheap Labor. Border-Lines Journal, ISSN: 1945-8916 Vol. V, pp. 44-68.)


15 “IT” is commonly used as a synonym for computers (hardware) and computer networks, but I use “IT” to refer to information and communications technology, which includes computer hardware, electronics, telecom equipment, engineering, and computer services.


17 In 2003, Katie Hafner & Daniel Preysman brought up a similar work visa issue about L-1. Their article, “Special Visa’s Use for Tech Workers is Challenged” published on May 30, 2003 in The New York Times, stated that the L-1 visa – used to bring in a large percentage of workers from India – has become a popular
argue there are not enough American STEM graduates to meet their needs. On the other hand, some reports suggest just the opposite and claim that is that the STEM crisis is a myth perpetuated by tech companies to bring wages down and to replace Americans with foreign workers.¹⁸ I would like to reveal what is behind all these arguments that they have a shortage mean something slightly different that than what economists mean.¹⁹

This paper is concerned with the abuses and exploitation facing foreign non-immigrant visa, in particular H-1B visa workers. Focusing on H-1B visa program provided fascinating cases studies of the many responses to ethnic prejudice and racial subordination. This visa program caters exclusively to the special skills of all immigrants with advanced STEM²⁰ degrees, but favor high-skilled Asian workers,²¹ particularly

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¹⁹ The story of shortage is used as an argument for more skilled immigration, and it is used as case for structural unemployment. A common counterargument to this is that if there is shortage, wages should rise in these industries but for STEM workers and manufacturers in general do not, ergo there is no skill shortage. This is true of the normal definition of shortages.

²⁰ Since the end of the twentieth century, the STEM acronym has been used not only in education, but also in immigration debates when referring to United States work visas for immigrants with skills in STEM fields. Jones, Michael D. & McBeth, Mark K. (2010, May). A Narrative Policy Framework: Clear Enough to be Wrong? *2010 Policy Studies Journal*. Volume 38, Issue 2, 329-353. U.S. Census defines STEM workers who are employed in science, technology, engineering, and mathematics occupations. This includes computer and mathematical occupations, engineers, engineering technicians, life scientists, physical scientists, social scientists, and science technicians. STEM is subject-matter driven. It includes managers, teachers, practitioners, researchers, and technicians. Liana Christin Landivar. (2013, September). Disparities in STEM Employment by Sex, Race, and Hispanic Origin. *American Community Survey Reports*.

²¹ “Fact Sheet: The President’s Immigration Accountability Executive Actions & Their Impact on Asian American Immigrant Communities” reports that Asian Americans come through the employment-based visa system as temporary workers through high-skill visa programs, which made up over 75 percent of all H-1B visa beneficiaries in 2012. According to the Census of 2013, about 41 percent of Asians with a science or engineering degree are currently employed in a STEM occupation.
Asian students. More than eight out of every ten foreign graduate students in the U.S. is in a STEM program with over half of these students coming from Asian countries. According to the NSF’s 2016 Science & Engineering Indicators, Asians work in science and engineering occupations at higher rates (17%) than their representation in the U.S. working-age population (5%). Asians are particularly highly concentrated in computer and information science occupations. A de facto ethnic selection is that Asians are much more likely than other ethnic minority groups to have earned a bachelor’s degree and to work in the STEM occupations. In addition, the Department of Homeland Security has granted a working authorization for international students with STEM degrees. Since March 2016, the Optional Practical Training (OPT) permits them to qualify for a 36-month extension. During 2015 fiscal year, there were over 140,000 students who were approved.

The purpose of this paper is to explore some of the fundamental flaws in explicitly on the legislative responses to a far-reaching revision of immigration policy...
and a complex combination of public perceptions, I discuss how the lawmaking process is not free of bias, and how the gap between law-on-the-books and law-in-action reveals how a racially neutral law can cause discriminatory outcomes. These arguments frame the problems inherent in current immigration policy, the ways target groups are perceived, and the logical policy solutions.

In the first chapter, I review scholarship on discriminatory criteria in the field of law and society known as “the gap between law-on-the-books and law-in-action.” This chapter focuses on the limited, but increasing body of work at the intersection of discrimination, immigration, and law. Chapter Two provides an overview of the features of the H-1B visa for skilled workers and explains how skills-based proposals are constructed and presented in a discriminatory-neutral de jure way. The third chapter reveals that the demographics of skills-based immigrants – particularly from Asian-Pacific countries – and selective minority immigration for the sake of economic competitiveness and discriminatory-neutral job classification have brought about de facto discrimination. In addition, this chapter examines the motivations behind the push for skills-based immigration, and how H-1B visas create a state of servitude in which ownership of the visa belongs to employers rather than workers. Chapter Four explores the debate over STEM job shortage and the issue of skills shortages versus aggregate

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27 The term “bias” refers to an inclination that interferes with impartiality. Prejudice implies a preconceived and unreasonable judgment or opinion marked by suspicion, fear, intolerance, or hatred. Webster’s New World Dictionary (2d ed. 1984).
28 Foreign guest worker status is a temporary, non-immigrant status that ties workers to particular employment and makes their ability to obtain a visa dependent on the willingness of the employer to make a request to the U.S. government. History has shown that foreign guest workers who hold restricted status in the U.S. are vulnerable to workplace abuse. For example, the Bracero program (1942-1964) became notorious for abuse and exploitation as well as racism and retribution inflicted upon workers. It is an example of how a racially neutral policy constructed discriminatory outcomes. Bracero History Archive.
demand. This chapter also discusses the correlation between employers’ demand and cumulative non-immigration visas for the high-skill labor market. Chapter Five explores the effects of *de jure* and *de facto* discrimination on skills based immigration and ways that immigration policies are enforced. Finally, the sixth chapter makes a case for how immigration policies have moved away from explicit preferences of certain racial groups or nationalities to a largely unspoken ethnic rebalancing via skills-based and family-based flows.

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30 One of the most cited arguments in recent debates comes from the 2011 Georgetown University report by Anthony P. Carnevale, Nicole Smith, and Michelle Melton of the Center on Education and the Workforce. This report estimated that there will be slightly more than 2.4 million STEM job openings in the U.S. between 2008 and 2018, with 1.1 million newly created jobs, and the remaining meant to replace workers who retire or move on to non-STEM fields. It concludes that there will be roughly 277,000 STEM vacancies per year. The claims of a STEM workers shortage has been contradicted by many studies, including reports from Duke University, the Rochester Institution of Technology, Alfred P. Sloan Foundation, and the Rand Corp. For example, a 2004 Rand study stated that there was no evidence “that such shortages have existed at least since 1990, nor that they are on the horizon.” Butz, William P., Kelly, Terrence K., Adamson, David M. Bloom, Gabrielle A. Fossum, Donna, & Gross, E. Mihal. (2003). Will the Scientific and Technology Workforce Meet the Requirements of the Federal Government? The RAND Corporation 2003.

31 Expert in economic development Gerry Rodgers argues that labor market flexibility in developing countries needs a wider framework of policies and institutions to promote decent work and that increasing labor market flexibility leads to lower unemployment rates and higher GDP. He advocates putting the power in the hands of the employer. Labor Market Flexibility and Decent Work. (2007, July). United Nations Department of Economic and Social Affairs (DESA) Working Paper, No. 47.
Chapter One: Literature Review

1.1 Introduction

In this chapter, I apply a central concern of law and society research, namely, the gaps between de jure and de facto law, to an evaluation of how current skilled-immigration policies have an influence over foreign STEM workers. I also explore and shed light on the logic that leads to a discrepancy. The chapter is organized into five parts: the gap between law on the books and law in action, the current national origins formula, diversity in high tech fields, skilled immigrants and de facto discrimination, and Asian immigrant in de jure immigration law.

1.2 The Gap between law on the books and Law in Action

The gap between law on the books and law in action is an important concept for understanding how the institutions legally engage or deny social freedom. Studies of this gap identify those instances in which the reality and practice of law fails to measure up to a legal ideal, and provide numerous examples of how law on the books is inconsistent with law in action.

For example, in her article, “The Diversity Visa Lottery: A Cycle of Unintended Consequences in United States Immigration Policy,” Anna Law argues that the DV lottery program was created in the 1980s by particular group American members of Congress in order to benefit their European ethnic groups – a reaction to the changed immigration patterns wrought by the Immigration Act of 1965, which explicitly

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prohibited the use of race, ethnicity, and national origin as selection criterion. After the 1965 policy, the law opened up to immigrants of all countries with a yearly maximum of 20,000 permanent immigrants per country, which unintentionally increased immigration from Latin America and Asia while the number of western European immigrants downsized dramatically.\(^4\) In her paper, Law explains that potential Irish struggled to get sponsorship to move to the U.S. in the 1970s and 1980s. Thus, the racially neutral \textit{de jure} act of 1965 caused unintended \textit{de facto} outcomes. Following this, another neutral \textit{de jure} immigration policy was created by the Irish\(^5\) members of Congress in order to benefit exceptional ethnic constituents, laying the groundwork for what is today the Diversity Visa (DV) lottery program.\(^6\) The lottery was introduced as part of the Immigration Act of 1990, but was modeled 5,000 visas in 1987 for western Europeans,\(^7\) including Irish, who were mobilized to submit their applications early. The program was extended for three years. Congress agreed to increase the number of available visas from 5,000 to 15,000


\(^5\) According to Anna Law, the Irish faced a tense political problem in their country, and they were motivated to migrate. In the 1970s and 1980s, these Irish immigrants struggled to get sponsorship to move to the U.S. Although they applied for asylum, most of them were rejected. They then resorted to coming to the U.S. as tourists and overstaying their visas. The lottery was initially created to fix this problem. Law, Anna O. (2002). The Diversity Visa Lottery – A Cycle of Unintended Consequences in United States Immigration Policy. Journal of American Ethnic History.

\(^6\) According to the U.S. Department of State, Bureau of Consular Affairs, the annual Diversity Visa (DV) program run by the Department of State, makes available up to 55,000 diversity immigrant visas each year randomly selecting entrants from eligible countries. The DV lottery is run once a year, usually in October, and selectees are randomly chosen by computer, who then may apply for a diversity immigrant visa. Section 203 (c) of the INA provides for a class of immigrants known as “diversity immigrants,” from countries with historically low rates of immigration to the U.S. A limited number of visas are available each fiscal year. The DVs are distributed among six geographic regions and no single country may receive more than seven percent of the available DVs in any one year.

\(^7\) The first visa lottery was called NP-5, and was proposed as a temporary measure designed to increase the immigrants entering the U.S. Dunn, Ashley. U.S. Plans Lottery with Jackpot of Legal Residency: Immigration: Official brace for Deluge of applicants for 40,000 visas. Critics say the process favors Europeans. Los Angeles Times on September 06, 1991.
each year. Irish immigrants won 40 percent of the available visas because they were awarded on a first-come, first-served basis. The lottery was merely a way to get more western Europeans through the door – a reaction to fears about Asian and Hispanic predominance. Despite its name, the motivation behind the program is far from an aspiration to true diversity in immigration populations.

Since Mexico always goes over the cap, it is not included in the DV program, while countries like India and China also tend not to qualify because of the large numbers of immigrants they already send to the U.S. from outside of the lottery system. Currently, the DV lottery acts as an implement of diversity because it enables people without family ties who have almost no opportunity to legally immigrate, to enter the U.S. This includes underrepresented groups, such as Africans immigrants. The diversity visa lottery has provided a new avenue for African who have fewer opportunities to preferred choice for immigration. In 2015, over 37 percent of new African immigrants had diversity visas, with more than 400,000 of them gaining access to the U.S. through this lottery.

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10 Supporters believe the program is essential in keeping the U.S. a multicultural society, because it provides an opportunity for people from communities that aren’t largely represented in recent immigration flows. Others say that the U.S. is taking in too many immigrants who are without professional skills. In their opinion, cutting the DV program would be a good way to cut back on the number of low-skilled immigrants and give 55,000 green cards to skilled immigrants. North, David. (2015, February 2). Visa Lottery Winners Run Up $1.3 Million in Bad Debts. Center for Immigration Studies.
This further illustrates how de facto outcomes can be very disparate from the intended design of de jure policy.

Sociolegal scholars contend that the law as written is considerably ambiguous and open to interpretation when implemented. Often, the law is exploited in order to influence legal meanings accordant with conceptual, institutional, economic, or practical mechanisms. For example, Janet Gilboy examines U.S. immigration customs officers who decide whether to admit foreign nationals to the country. Her article describes the criteria primary inspectors use to define travelers who can enter the country and provides an in-depth look at how the behavior and implementation of front-line customs officers affects immigration outcomes, regardless of the law as written. Gilboy shows how heavily some officials rely on shared categorization schemes about people and events in responding to real-life cases. In fact, legal actors may evaluate and respond to cases not individually but with some large unit in mind. Law and policy may also implant personal ideas as the society’s ideals because law is frequently not clear about what action specific behavior demands.

When the gap between the stated purpose of the law and its outcomes persists across time and place, a structural pattern emerges. Such correlations with the present-day H-1B visa program stems not merely from the inevitably vague nature of the law on

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the books nor simply from the ambiguities of language, but is more fundamentally related to a series of contradictions associated with prevailing assumptions about exploitable workers. Underlying the exploitation by employers who pay them less than the prevailing wage is the claim that H-1B workers have subsisted on below subsistence wages. This then helps formulate the conviction that these workers are unfair competitions to American workers.

1.3 The Current National Origins Formula

“In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently”

- Justice Harry Blackman

Critical Race Theory scholarship has revealed the race is a social construction, historically defined and implemented by the law. Ian Haney Lopez examines historical evidence of the many different facets of the legal construction of race as well as the more subtle constitutive processes at play today. He documents law has played in the construction of race in the U.S.: “The United States is ideologically a White country not by accident, but by design at least in part affected through naturalization and immigration laws.”

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Racial barriers have ensured the continuation of “color-based hierarchy” in the U.S. A group’s racialization as nonwhite and whether or not its nonwhite label is upwardly mobile is based on the material and economic interests of the labeling societies. This racial hierarchy is stratified, so that the greatest power and authority is concentrated within the socially designated upper racial groups. The arrival of diverse non-white immigrants has significantly changed the racial composition of the American population based on physical and perceived characteristics. More precisely, where immigrants stand in the economic hierarchy of a society determines their racialization in as white or nonwhite. These categories have shifted over time to accommodate de facto law. For example, most ethnic European immigrants “became white” by the middle twentieth century, according to shifting legal categories. Meanwhile, many members of new groups are assimilating into mainstream American-ness through intermarriage, economic mobility, and acculturation. According to this binary, immigrants who are not succeeding or who are unable to enter mainstream society are non-white groups.

Furthermore, Haney Lopez (2006) argues that on the apparently opposite end of the political spectrum, for the first half of the 20th century, the idea of “colorblindness”

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represented a radical aspiration to attain *de facto* racial subordination.\(^{28}\) He explains that “colorblindness” claims antiracist pretensions and progress toward a racially equal society, all the while effectively maintaining what he describes as “colorblind white dominance” (p.62).\(^{29}\) Further, he (Haney Lopez, 2006) states that “the laws supposedly protecting against racial discrimination are partly to blame, for they no longer contribute to racial justice but instead legitimate continued inequality” (p.223).\(^{30}\) What changed over the course of the century, however, is how the concept of whiteness is defined. Non-whites are racialized into a highly stratified system that imposes minority status. Skilled immigrants can shed their imposed racial minority status if they melt into the mainstream of the white grouping. If becoming white means convergence toward the middle class, highly skilled immigrants can achieve that relatively shortly after arriving in the U.S.\(^{31}\) Immigrants been preconceived notions about intrinsic qualities of class, race, and identity, and go on to a relationship between prevailing assumptions and complex social reality to which the law is applied. Although Asians have been racialized as non-white as a matter of law and social practices, the model-minority myth\(^{32}\) and professional success has been freed some Asian-American from their negative racial label. Individuals and


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communities with the highest levels of acculturation, achievement, and wealth increasingly “become white” as measured by professional integration, residential patterns, and intermarriage rates.\textsuperscript{33}

\textbf{1.4 Demographic Diversity in High Tech Fields}

The high tech sector is notoriously criticized for employing strikingly few black and Hispanic workers,\textsuperscript{34} but employers blame the lack of diversity in the lack of available,\textsuperscript{35} qualified minorities.\textsuperscript{36} Yet, senior management commitment is key in driving a successful diversity strategy implementation, and diversity attitudes are predictive of effective equal employment.\textsuperscript{37}

In its report, “Diversity in High Tech,” the U.S. Equal Employment Opportunity Commission (EEOC) examines the high tech sector’s lack of diversity and highlights its employment patterns. The report analyzes a 2014 summary of employment information data that collected the composition of workforces by sex and by racial/ethnic categories.\textsuperscript{38} The EEOC found that compared to all industries in the U.S. private sector, high tech had a relatively larger share of whites – 68.5 percent to 63.5 percent – and the next larger share of Asian Americans – 14 percent to 5.8 percent. Other groups, including African

\textsuperscript{35} Cole, S., & Barber, E. (2003), \textit{Increasing Faculty Diversity: The Occupational Choices of High–Achieving Minority Students}. Cambridge, MA: Harvard University Press. They argue that the shortage is function of the small number of available minority group professionals. The pipeline is defined as the supply of qualified minority group individual problem may be determined by a number of factors including the absolute number of minority-group members, their aspirations, the availability of role models, and access to professional development opportunities.
Americans (7.4 percent to 14.3 percent) and Hispanics (8 percent to 13.9 percent), were less represented by a significant margin in the tech sector compared to all private industry. Over four-on-five or 83.3 percent of executive were white, compared to 10.5 percent for Asian Americans, 1.9 percent for African Americans, and 3.1 percent for Hispanics. Note that Asian Americans make up around 19.5 percent of professionals in the high tech industry but only 10.5 percent of its executives in this data.\textsuperscript{39}

The overwhelming dominance of whites in the industries and occupations associated with technology includes occupations requiring less education than a four-year bachelor’s degree. Discussion of the lack of racial and ethnic diversity in the high tech industries generally are considered the small “pipeline” problem.\textsuperscript{40} The “pipeline” refers to the supply of qualified minority-group\textsuperscript{41} individuals in the workforce. Stephen Cole and Elinor Barber argue that the shortage is function of the small number of available minority group professionals. It may be determined by a number of factors, including the absolute number of minority-group members, their aspirations, the availability of role models, and access to professional development opportunities.\textsuperscript{42}

\textsuperscript{41} According to National Conference of State Legislatures, in institutions of higher education, affirmative action refers to admission policies that provide equal access to education for women and minorities who historically excluded or underrepresented. These “minorities” are African American and Latino somehow Asian American is excluded. National Conference of State Legislatures. (2014, February 7). Affirmative Action: Overview.
\textsuperscript{42} Cole, Stephan, & Barber, Elinor. (2003). \textit{Increasing Faculty Diversity: The Occupational Choices of High– Achieving Minority Students}. Cambridge, MA: Harvard University Press. They said that minorities are less likely to go to college and less likely to earn high grades within college, few end up going to graduate school. They concluded that affirmative action contributes to the problem by steering minority students where they perform relatively poorly. These minority students are not included Asians.
Heidi Stevenson\textsuperscript{43} provides a technological argument for the small education-to-employment pipeline trend and addresses the issue of guest workers on H-1B visas in high tech. In the past, when high tech firms produced innovative technology, they might appreciate the importance of a skilled workforce and invested time in training their workers. But this competency-based approach is now dated as product life cycles are growing shorter\textsuperscript{44} and tech companies are seeking persons who can be immediately effective in a fast-paced industry. The Wharton School\textsuperscript{45} reports that employee findings strategies complement technology production strategies. This shows how American companies prefer to bring on guest workers rather than invest time and cost training permanent domestic workers. As the pace of technological change has quickened, and as global competition has shortened product life cycles, firms have had to rethink their technology investment strategies and their human resource management practices in order to remain competitive.

The tech industry’s practice of hiring guest workers impacts domestic, foreign-born, and minority workers, making the small percentage of minority workers a multifaceted problem. Many high tech companies, including Google and Facebook, have acknowledge a this situation and pledged to fix lacking diversity in their workforces. Yet, very little has seemed to change.

1.5 Skilled Immigrants and \textit{De Facto} Discrimination


\textsuperscript{44} Baldwin, John R. & Gellatly, Guy. (1998, December). Are There High-Tech Industries or Only High-Tech Firms? Evidence from New Technology-Based Firms. \textit{Microeconomics Division, Statistics}.

\textsuperscript{45} The Hiring Dilemma for High Tech Firms: Make vs. Buy (2005, November 02) \textit{Knowledge @ Wharton}.
The following four scholars all discuss the relationship between racial discrimination and skilled immigrants. Their findings suggest that it has been too easy to exploit loopholes in the temporary guest worker program and that politicians have repaid special interests for their support by developing a program rife with opportunities for exploitation.

Ben Rissing, a professor of Sociology at Brown University, examined how U.S. immigration policies, as implemented by agents acting on behalf of the federal government, shape the migration and employment outcomes of foreign nationals. He studies processes contributing to labor market inequality, especially current high-skilled immigrants. In his first project, Rissing examined the H-1B temporary work visa system. Using data through the Freedom of Information Act, he analyzed the decisions of U.S. Citizenship and Immigration Service (CIS) agents across the entire population of 1,441,856 H-1B cases evaluated from May 2005 to April 2010. Controlling for key factors such as salary, education, degree field, occupation, industry, timing of application request, and whether the application meets key U.S. CIS evolution criteria, he found that immigrants from less developed sending countries are more likely to have their initial and continuing H-1B visa requests denied. In his second project, Rissing and his co-author Emilio Castilla, a professor of Management at the MIT Sloan School of Management,

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47 According to U.S. Department of State, “the Freedom of Information Act, 5 U.S.C. §552, (FOIA) provides that any person has the rights to request access to federal agency records or information except to the extent the records are protected from disclosure by any of nine exemption contained in the law or by one or three special law enforcement record exclusions.”
argue that labor certification approval is a key prerequisite for the foreign workers. When they analyzed employment-based green cards using quantitative data on all approval and denied labor certification evaluations between June 2008 and September 2011, they find that Asian applicants are more likely to receive approval and Latin American applicants are less likely to receive approval when compared with the Canadian reference category, all other factors being equal. Finally, Rissing interviewed workers at the U.S. Department of Labor (DOL): government agents with actual decision-makers and program administrators that evaluate labor certification applications (PERM)\(^49\) to examine how agents may confidentially reach regulatory judgments and the finds through applications which are randomly selected for audit.\(^50\) This random audit is to add an element of uncertainty during the process and to ensure that the electronic PERM system is not being abused by employers.\(^51\) This labor certification by DOL is the initial step in the employment-based permanent residency green card path. Due to the strict regulations imposed on this system, the U.S. DOL require very specific information form employers sponsoring the foreign workers. Government agents responsible for the evaluation of labor certification requests were identified for interview through formal requests of the U.S. DOL, and interviews were strictly voluntary and government interviewees received

\(^50\) Rissing examines that between June 2008 and September 2011, 87 percent of labor certification applications were evaluated on the basis of employees’ accounts, while the remaining 13 percent were audited. Rissing, Ben A. & Castilla, Emilio J. (2012, October 28). House of Green Cards: Statistical or Preference-Based Inequality in the Employment of Foreign Nationals. American Sociological Review Vol 79, Issue 6, pp. 1226-1255. 
\(^51\) There are two types of audits that can occur during PERM processing. One is the random audit. Another is target audit that occurs when petitions do not provide the supporting evidence to seek an eligible U.S. employee before employing foreign workers. U.S. Department Labor, Employment and Training Administration. (2007, May 17). Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity. 20 CFR Part 656, 72 FR 27903, 27903-27947.
They found that all Asian citizenship groups are more likely to be granted certification approval. In their interviews, one agent stated: “If the country [of the immigrant worker] was an ally of American, they were likely to be approved, and if they were less of an ally, like maybe Middle Eastern countries … I now I personally did it and maybe this is my personal prejudice but I think a lot of use did the same thing.”

The article concludes by discussing the implications of their results for addressing disparities in the employment of foreign nationals.

These three show preference-based accounts of labor market inequality in the labor certification process, even though de jure decisions reached using detailed employment-relevant information are not affected by immigrant worker nationality. Government agents play a role in shaping the employment of immigrants. Despite U.S. laws that forbid discrimination on the basis of nationality, immigrants of select national groups experiences disparities in the labor certification process and the labor certification approvals differ depending on immigrants’ foreign citizenship.

Lindsay Lowell, a research professor for the Study of International Migration at Georgetown University, argues that the legislative background of H-1B visa cap, which was altered in 1999, was intended in interests of the U.S. economy. Congress raised the H-1B numerical cap from 1999-2002 to increase the size of the H-1B labor force.

Because of the information technology industry’s lobbying, Congress passed the

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“American Competitiveness and Work Force Improvement Act” (ACWIA). It provided a provisional increase in the number of available H-1B visas from 65,000 per year to 115,000 per year in 1999 and 2000, and 107,500 in 2001. Due to the Twenty-First Century Act (ACTFC), the cap in 2002 was 195,000 per year, to be phased out in 2003. In 2004, the cap was returned to the numerical limit of 65,000.55 As a trade-off to those who opposed increased numerical limits and the ACWIA bill, requests were made for workers protections applied to H-1B dependent firms. However, Lowell explains that preexisting exemptions to the definition of dependent firms may mean that very few companies actually classified as dependent, while the dependent employer regulations had yet to implemented by the U.S. Department of Labor. In recent years, employers demand for H-1Bs have influenced consideration of raising the cap. Surprisingly, there is no historical data available on the U.S. CIS website for the years 1990 -1999 that would enable comparison to when the policy changed after 1999, when the U.S. CIS accepted H-1B petitions at their own discretion.56

Based on the data of the eight largest users of the H-1B program in 2015,57 David North, a fellow of the Center for Immigration Studies, argues that the H-1B visa program permits the population of male Indian college graduates to comprise over 99 percent of

55 The ACWIA bill included new worker protections for unfairly exploit the specialty worker at the expense of U.S. workers. Employment must attest that no U.S. workers are laid off for the three months before and after hiring of the H-1B. In addition, employers must attest that they have made significant steps to recruit U.S. workers. Lowell, B. Lindsay. (2000). H-1B Temporary Workers: Estimating the Population. Center for Comparative Immigration Studies, University of California San Diego.
workers\textsuperscript{58} hired at five of those eight companies. North pointed out that hiring 99 percent Indians is not only discriminating against U.S. workers, but also against other workers in the world. These companies – outsourcing and India-owned firms – provide their services through the use of these H-1B visa holders, effectively playing the role of labor brokers rather than actually designing IT companies for cheaper labor.\textsuperscript{59}

Finally, Stan Malos, a professor of Management at San Jose State University, discusses how foreign guest workers, such as H-1B workers, may become victims of discrimination based on their citizenship or immigration status.\textsuperscript{60} He review of 15 federal court cases from 2000-2009 and examined fact patterns of relationship between U.S. employment and foreign guest workers for employers who mishandled Equal Employment Opportunity (EEO) laws.\textsuperscript{61} Based on his findings, Malos suggested that employers avoided various liabilities when employing foreign guest workers: “[t]he fact that H-1B visa holders lose their rights to remain in the U.S. and face deportation upon job loss presents the possibility that foreign guest workers may become unfair targets of opportunity for employers implementing layoffs and reductions in force in today’s global economy” (p.14).\textsuperscript{62} Many H-1B visa holders are deterred or prevented from asserting workplace rights for many reasons which will be addressed later in this paper.

\textbf{1.6 Asian Immigrants in De Jure Immigration Law}

\textsuperscript{58} I will discuss about this at the later chapter.
\textsuperscript{61} According to EEO Commission, EEC was established by Title VII of the Civil Rights Act of 1964 to support in protection of U.S. employees from discrimination. This title pertinent in companies affecting commerce that have fifteen or more employees.
Although Asians have long been racialized as nonwhite as a matter of law and social practice, professional success and the model-minority myth have combined to free some – particularly East Asian-Americans – from the most pernicious negative beliefs regarding their racial character. Individuals and communities with the highest levels of acculturation, achievement, and as Haney-Lopez asserts, “wealth increasingly find themselves functioning as white” (2006, p.369) However, because employers exploit immigrants in the workplace, many Americans are concerned about losing jobs to Asian immigrants, whether highly skilled or otherwise. This paper examines whether skilled Asian immigrants are also affected by such patterns of myth, especially regarding U.S. immigration policies.

Scott Kurashige focused on the Asian American experience during World War II and the postwar period in order to historicize the so-called “model minority” phenomenon. He considered the racial trajectories of African American and Japanese Americans in Los Angeles, and noted how the city changed from the “white city” of the early century to the “world city” of the more recent past. Viewing World War II as a

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63 However, it was totally different a century ago when most Asians were low-skilled, low-wage laborers crowded in ethnic enclaves and targets of official discrimination (The Rise of Asian Americans. Pew Research Center’s Social & Demographic Trends Project on June 19, 2012).

64 In fact, Asian Americans are the highest-earning, best-educated and fastest-growing racial group in the U.S. According to a comprehensive new nationwide survey by the Pew Research Center, Asian Americans are more satisfied than the general public with their lives, finances and the direction of the country, and they place more value than other Americans on marriage, parenthood, hard work and career success (The Rise of Asian Americans. Pew Research Center’s Social & Demographic Trends Project on June 19, 2012).

65 In an article written for the New York magazine in 1966, William Petersen, a sociologist, originated the term, “model minority” to describe Asian Americans as ethnic minorities who, despite marginalization, have achieved success in the U.S. In “Success Story: Japanese American Style,” he wrote that the Japanese cultures have strong work ethics and family values which prevent them from becoming a “problem minority.”


turning point, Kurashige pointed out the distinct and critical roles black and Japanese Americans played in the rise and fall of integration. He explained that Americans increasingly exhibited active acceptance of Japanese Americans as a “modal minority,” ready to be integrated, while blacks were stigmatized as “problem” minorities who on the other hand, needed to be contained. According to Kurashige, this turning point signaled the demise of both integration and white hegemony.68

Sociologist Payal Banerjee, argues that through U.S. immigration policies and laws, the state plays a role in racial formation by reconfiguring racial meanings to socio-economic relationships, practices, and groups. In U.S. immigration history, anti-Asian immigration laws,69 for example, have been implicated in heightening this group’s vulnerability to capitalist exploitation.70 Asians’ socio-economic experiences of being treated as inexpensive, short-term, and flexible labor have been tied to how they have been defined and positioned through the state policies.

In the past, immigration policy was meant to support the needs of capitalism and positioned Asians as noncitizens – without property and dependent on wage labor. This racial structuring helped American employers ensure “greater profitability from immigrants’ labor and decrease the costs of reproduction – the expenses of housing,

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69 There were many anti-Asian immigration laws including the Naturalization Act of 1879, the Chinese Exclusion Act of 1882, the Gentlemen’s Agreement (1907-1908), and Alien Land Laws of 1913, 1920, and 1923, which denied the entitlement to citizenship, restricted employment rights and economic opportunities, and reconfigured the occupational profiles of Asian immigrants. The Immigration and Nationality Act of 1965 was partial to the labor needs of the U.S., emphasizing an occupational preferences system for people in science and engineering. Banerjee, Payal. (2010, Spring/Summer). Transnational Subcontracting, Indian IT workers, and the U.S. Visa System. *Women’s Studies Quarterly.*
feeding, clothing, and educating the workers’ dependents.”

Even though much has changed for some Asian groups echoes of state policy enabling immigrant labor exploitation continue today. In subsequent chapters, this paper will explore some of the ways the tradition of exploitation persists.

1.7 Conclusion

Gaps between law on the books and law in action are seen repeatedly throughout the realm of immigration, underscoring the reality that as written law is put into practice, it is selectively enforced, unrecognizably transformed, and even counteracted. Some scholars explain that this phenomenon is the result of structural dilemmas faced by policymakers and enforcement agencies. Others indicate racial or class biases. Indeed, the question of whether there is a gap between law on the books and law in action in this realm has been asked and answered.

Yes, a gap exists. But now, more fruitful questions can explore the specificities of translating formal immigration law into practice.

Immigrants continue to face a number of challenges when integrating in a variety of areas of everyday life, and this includes implicit and explicit discrimination in the workplace. New waves of skilled immigrants may face opposition from established employers, even though Congress has granted protections to workers with valid authorization to work as part of the Immigration and Nationality Act in order to ensure equality in the workplace. Such discrimination is in the form of racial and socioeconomic

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segregation of their employers. The state has the power to decide unilaterally who may enter its domain, under what conditions, and with what legal consequences.\(^7^5\) Throughout U.S. immigration history, the courts have heard many cases of federal discrimination against immigration based on race\(^7^6\) but current skilled immigration policies are complicated and facing employee discrimination. When H-1B skilled foreign workers stand outside the gates beseeching permission to enter, they are authorized by *de jure* law. However, such workers must still adopt and adjust.

Critical Race Theory emphasizes the contingent aspect of racial categories and the law plays in describing those categories.\(^7^7\) Haney Lopez, for example, shows that U.S. courts historically had conflicts deciding on which groups were white and non-white, with whole nations of people being flipped overnight from one category to another.\(^7^8\) This judicial race-making is now mostly a thing of the past, but we have seen that law and legal processes still produce racialization. Throughout the remainder of this paper, I will demonstrate how high-skilled immigrants are now the prototypical example illustrating the many ways law contributes to racial construction today.

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\(^7^6\) The early immigration cases in the Supreme Court adopted this premise unequivocally. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."


Chapter Two: Skills-Based Immigration and U.S. Policy

2.1. Introduction

This chapter provides a brief exploration of historical and contemporary skills-based immigration policies in order to better understand how skills-based policies are constructed and presented in a race-neutral way. In this chapter, I lay out the sequence of events of the “booming economy, low unemployment, and a shortage of skilled workers”1 during the 1990s that dramatically increased U.S. employers’ demand for skilled foreign workers. At that point, I will also discuss the H-1B visa status, which U.S. businesses use to employ foreign workers in specialty occupations. This is the first step in applying the meaning of “law-in-action” to U.S. immigration policy.

2.2 Immigration and Nationality Act of 1965 and 1990

The Immigration and Nationality Act (INA) of 1965 (H.R. 2580; Pub. L. 89-236; 79 Stat.911)2 eliminated the national origins quota system3 and was the first serious attempt to include immigration on the basis of skill.4 This immigration policy was meant to be used as a human resource instrument to select immigrants on the basis of their skills and in accordance with the needs of the nation’s labor market.5 In the three decades

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following passage of the INA of 1965, more than 18 million legal immigrants entered the United States – more than three times the number admitted over the preceding 30 years. On November 29, 1990, the 1990 Immigration Act (IMMACT) became law, increasing the limits on legal immigration to the U.S., revising all grounds for exclusion and deportation, authorizing temporary protected status to aliens of designated countries, as well as revising and establishing new nonimmigrant admission categories. The Act introduced an overall cap on worldwide immigration that includes the immediate relatives of U.S. citizens and the division of immigrant visas into three areas – family-based, employment-based, and diversity.

IMMACT represented both welcome and unwelcome changes to U.S. immigration law, as modifications in family immigration and employment-based immigration began serving U.S. interests in family reunification and economic growth. Alterations in the due process protections for immigrants and changes in the grounds and procedures for exclusion and deportation were enacted in the regulations to come. The act was a vehicle for Congress to respond to the requests of U.S. employers for easier access to skilled foreign workers, as lawmakers raised the worldwide annual “flexible” cap on immigration from 270,000 to 675,000 in fiscal year 1995, which created separate admission categories for family-sponsored, employment-based, and diversity

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immigrants. Separate ceilings were set: 480,000 for family-sponsored visas; 140,000 for employment-based visas; and 55,000 for diversity visas. In addition, according to Greenwood and Ziel, the 1990 Act set a higher overall limit on admissions by restructuring the per-country limitations used to determine how many immigrants may enter the United States each year and ensuring that family-based and employment-based visas made available to citizens of a single independent foreign state would not exceed seven percent of the total visas available.

2.3 Per Country Limit

Section 203(e) of the Immigration and Naturalization Act declares that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order of when petitions were filed. In addition, Section 202 [8 U.S.C. 1152] (2) allows foreign states or dependent areas to apply for visas when visa demand exceeds the per-country limit: “Per country levels for family-sponsored and employment-based immigrants…during any fiscal year may not exceed seven percent (in the case of a single foreign state) or two percent (in the case of a dependent area) of the total number of such visas made available under such subsection in that fiscal year” (8 U.S. code section 1152). These provisions apply at present to the following oversubscribed areas: China, India, Mexico, and the Philippines. For example, the U.S. Department of State’s Bureau of Consular Affairs’ January 2017 Visa Bulletin reported that an employment-based

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green card would be issued now for an Indian skilled worker who applied in March 2005. The term “preference” is used in immigration law to designate priority categories for lawful permanent residents (LPR) status. Employment-based preferences consist of five categories of workers: priority workers, i.e., professionals with advanced degrees or exceptional ability; skilled workers; needed unskilled workers; certain special immigrants; employment-creating immigrants or investors. According to the Department of Homeland Security’s (DHS) 2013 Yearbook of Immigration Statistics, in that year, a total of 990,553 persons became LPRs. Sixty-six percent of new LPRs were granted permanent resident status based on a family relationship with a U.S. citizen or lawful permanent resident. The highest countries of origin for new LPRs were Mexico (14%), China (7.2%), and India (6.9%).

2.4 Non-immigrant Status and the H-1B Visa

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19 According to U.S. Homeland Security, a lawful permanent resident (LPR) or ‘green card’ recipient is defined by immigration law as a person who has been granted lawful permanent residence in the United States. In addition, Citizenship and Immigration Services says that an LPR has rights to live and work permanently anywhere in the U.S., to apply to become a U.S. citizen, and to receive Social Security, Supplemental Security Income, and Medicare benefits if she/he is eligible. An LPR can also own property in the U.S., attend public schools, and join the Armed Forces. Their responsibilities are the same as that of U.S. citizens, but they must carry proof of LPR status at all times, and are prohibited from voting in federal elections. For an LPR, absences from the U.S. of six months or more a year may disrupt the continuous residency required for naturalization, and can impede the maintenance of legal status in this country. U.S. Citizenship and Immigration Services. Right and Responsibilities of a Green Card holder (Permanent Resident).
Non-immigrants are defined as foreign individuals\textsuperscript{22} who have been granted the right by the USCIS to reside temporarily and with strict time limits in the United States and who practice at the same field for which they were granted visas.\textsuperscript{23} In other words, someone who is legally living and working in the U.S. but is neither an American citizen nor a green card holder is categorized as a non-immigrant. The H-1B visa – the most important category of non-immigrant skilled migration – took its contemporary form after the IMMACT of 1990, which altered the preexisting H-1 program. Prior to 1990, the H-1 program only allowed H-1 visa holders to work in positions that were designated as temporary.\textsuperscript{24}

The current H-1B visa is issued initially for a maximum of three years and can be renewed once. According to a USCIS report, Congress included labor attestation requirements for temporary workers filing under the H-1B nonimmigrant category of the Immigration Act of 1990.\textsuperscript{25} The requirements specify that employers must confirm to the Department of Labor that they will pay at least the local prevailing wage as well as \textit{all} U.S. workers in the same job.\textsuperscript{26} Currently, employers may hire H-1B workers by filing a

\begin{footnotesize}
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  \item Some people are uncomfortable using the word “alien” when describing human beings. But according to the IRS’ Immigration Terms and Definitions Involving Aliens, an “alien is an individual who is not a U.S. citizen or U.S. national.” The term “alien” is a legal category in U.S. Immigration Policy, which maintains that a person can be an alien, an immigrant, or both. If a person is a citizen born outside of the country, s/he is an immigrant. If a person is not a citizen, they are legally alien. If someone is a permanent resident, they are considered an immigrant. An alien who is granted the right to reside temporarily in the U.S. but is not a permanent resident is a “nonimmigrant.” IRS. (2017, January 27). Immigration Term and Definitions Involving Aliens.
  \item The Immigration and Nationality Act of 1952 created the H-1 visa for a variety of professionals in fields as varied as nursing and entertainment. Generally speaking, the H-1 visa, which had no cap, provided few protections for American workers against foreign competition, and this was a key element in motivating Congress to reorganize the temporary visa programs in 1990.
\end{itemize}
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labor condition application with the Department of Labor (DOL) specifying the type of work to be done and attesting that they will pay the prevailing wage. According to political scientist Lina Newton, the prevailing wage rate shows the influence of policy demands from American labor unions. More recently, because of demand for highly educated tech workers, the technology industry has done as much to shape guest-worker policies.

The American Competitiveness and Workforce Improvement Act (ACWIA) was established in 1998 as a response to the high-tech industry lobbies for an increase in the number of foreign workers permitted to come to the U.S. – even though labor unions and other parties were concerned that an increase in foreign workers would have a negative impact on U.S. workers. As a result of the ACWIA, there was a temporary increase in the number of H-1B visas, while additional funds were set aside by raising filing fees for H-

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28 Newton explains that policy change is a recurring feature of immigration administration and immigration control. A change in policy that favors interest groups would indicate a change in their ability to influence the legislative process. For instance, Newton, L. (2008). Illegal, alien, or immigrant: The politics of immigration reform. NYU Press.


30 During the 1990s, the U.S. high-tech industry became the dominant participant in the H-1B visa program. (Jung S. Hahm. “American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program.” Cornell Law Review. Vol. 85, Issue 6 September 2000.) For noting importance of the H-1B program to the high-tech industry, see also Tom Abate, Oddball Coalition Was the Loser in High-Tech H-1B Struggle, S.F. CHRON., Sept. 26, 1998, at Cl. Tom Abate provides the percentage of H-1B visa applicants listed by occupation in 1997, based on the data from the U.S. Department of Labor: 44.4%, computer-related; 25.9% physical therapists; 3.1% electrical/electronic engineers; 2.5% accountants/auditors; and 20.0% other.

31 According to Jung S. Hahm, the attempt to raise the H-1B visa cap met strong opposition in the House of Representatives from traditionally pro-labor Democrats. Republicans are deeply divided on the issue of the H-1B visa program. Anti-immigration Republicans have criticized it for transforming the American workplace into an "Asian environment" and have condemned Silicon Valley companies for failing to "Americanize" their labor force. Hahm, Jung S. (2000). “American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program.” Cornell Law Review, Vol. 85, Issue 6, Article 3.
1B worker education and training. According to the ACWIA, employers must not have conducted layoffs of American workers within a period of 90 days before and 90 days after the filing of an H-1B petition. Nevertheless, the cap on the number of H-1B visas was raised to 115,000 for 1999 and 2000, and to 107,500 in 2001, before reverting to the 65,000 cap specified by the Immigration Act of 1990 for fiscal year 2002.

According to the most recently available U.S. Department of Homeland Security (DHS) estimates, about 1.9 million foreign nationals on various temporary visas resided in the United States as of January 1, 2011. Of this 1.9 million, 45 percent were temporary workers and their families, followed by foreign students and their families (38%). The majority of temporary visas – 37 percent – were issued to nationals from Asia, while the remaining figures break down accordingly: South America (25%); North America, including Central America and the Caribbean (22%); Europe (12%); Africa (4%); and Oceania (0.6%). The top five countries of origin — India, China, South Korea, Canada, and Mexico — accounted for 54 percent of the 1.9 million residents on temporary visas.

In 2014, the U.S. government received over 172,500 H-1B petitions. This number rose to over 200,000 in 2015 because the economy seemed to improve and many people who were not selected in 2014 resubmitted. On April 7, 2015, U.S. Citizenship and

33 INA § 212 (n) (1)(E)(i) – This exemption applies to petitions for H-1B beneficiaries who receive annual wages of $60,000 or more or hold a Master’s degree or higher in the occupational field. Employers receiving TARP funds are not covered by this exemption.

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Immigration Services (USCIS) announced that between April 1-7, 2015, it received more than 85,000 H-1B petitions. The USCIS used a computer-generated process – also known as the lottery – to randomly select the petitions needed to meet the caps. The New York Times reported that applications for H-1B visas totaled a record 233,000 for fiscal year 2016. In 2017, 199,000 petitions were received within the first five days of April that was declined for first time in five years. Some said that it will be difficult to know what contributed to lower numbers until there is more data. Many employers have been unsuccessful in petitioning in past years so that might have been less willing to go to the trouble and expense of preparing petitions. At the same time, White House said that current H-1B visa system would like to be changed to ensure that they are given to the “most-skilled or highest paid” petitioners when President Trump signed executive order that set “Buy American, Hire American” strategy for the H-1B reform. Many of the changes to the H-1B program contemplated by administration would require legislative action or rulemaking and would take time to go through the necessary processes but the order did not set out deadlines and details.

2.5 Immigration Status Discrimination

The Immigration and Nationality Act was amended by the Immigration Reform and Control Act of 1986 (IRCA) and protects individuals from employment discrimination based on immigration or citizenship status, and prohibits document abuse discrimination, which occurs when employers request more different documents than are required to verify employment eligibility and identity, reject reasonably genuine

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documents, or specify certain documents over others. While citizens or nationals of the United States, permanent residents, lawful temporary residents, refugees, and asylees are protected from IRCA in workplace where the employers between 4-14 employees, Title VII covers workplaces with 15 or more employees. For example, if two non-citizens have different immigration status, an employer may not favor one status such as permanent resident over another – temporary resident with work authorization – or require certain kinds of documents form one employee and not from the other. The law’s protections apply to job applicants as well as current employees. If a current employees are fired or not promoted due to their immigration or citizenship status, they are protected by the law. If applicants are not hired due to their immigration or citizenship status and/or the valid work authorization documents they present, they are also protected by the law.

An employer should not ask about applicants’ status during a job interview. The employer should a job be offered to one of applicants, s/he will be expected to provide evidence that s/he is legally entitled to work in the U.S. within the first three days of starting work. A”U.S. citizens-only” policy in hiring is illegal. An employer may require U.S. citizenship for a particular job only if it is required by federal, state, or local law or by government contract.

2.6 Conclusion

The United States has long sought to manage the admission of foreign workers and coordinate their stay. In 2015, there were 26.3 million foreign-born persons in the

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43 Immigrant and Employee Rights Section. The U.S. of Department of Justice.
U.S. labor force. Current law and immigration policies contain no formal evaluation criteria pertaining to country of origin for workers admitted to the United States as employment-based permanent immigrants. Instead, they are selected based upon their skills and qualifications by economic necessary. The applicant must be employed, hold at least a bachelor’s degree relevant to the position, and be paid the prevailing wage for the role. The current system treats nationals from all countries equally. The creators of the H-1B visa program have focused far more on its labor-protection mechanisms than on the immigration aspects of the program. In addition, rejecting for employment, firing, or otherwise harming in immigrants including H-1B visa holders because of their citizenship, immigration status or type of work authorization are discrimination by the law. In other words, employers in the U.S. face potential legal liability if they favor American citizens over authorized foreign guest workers in layoffs, pay decisions, and other such actions. However, there is an increase in protectionism toward American labor in the American marketplace and in claims for employment discrimination involving citizenship and immigration status by displaced H-1B visa holders. When employers manage these risks and avoid legal liability in global business operating in the U.S. and taking necessary measures to reduce their head count and overall labor costs, foreign workers are vulnerable to be able to unfair layoff or low-wages due to the possibility of deportation and/or the inability to afford access to legal representation once they lose their jobs that fear immediate deportation upon loss of employment.

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46 Karakozova v. University of Pittsburgh, U.S. Dist. LEXIS 49027 (W.D. Penn. 2009) This case represented victory for the plaintiff who was H-1B visa holder was based on a properly styled national origin claim rather than a misdirected immigration status discrimination claim under the Title VII. The case is filed by visa holders who fear immediate deportation upon loss of employment.
Chapter Three: Skills-Based Immigrants in the U.S.

3.1 Introduction

This chapter addresses the demographics of skills-based immigrants, specifically H-1B visa holders with special occupations. The demographic questions are: who exactly is the H-1B worker beyond just someone with a bachelor’s degree or higher in a STEM discipline? Is s/he someone whose job requires use of a STEM subject area? Does H-1B include someone who manages STEM workers? Which disciplines and industries fall under the STEM aegis? In addition to questions of demographics, this chapter explores an unnoticed relationship between skills-based immigrants and the vast majority of young Indian men working under H-1B visas in IT.

3.2 A General Distribution of H-1B Visa Petitions

In FY 2014, 318,824 of H-1B petitions filed when USCIS approved 315,857 H-1B petitions submitted by employers, including 191,531 for continuing employment.

When immigrants are supported by their employers and have at least a bachelor’s degree

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1 By “skills-based workers” I refer broadly to people who have special skills, training, knowledge, and ability in their work, in addition to a college diploma or degree from a higher education institution. According to the final (2005) report of the Global Commission for International Migration, the traditional distinction between skilled and unskilled workers is in certain respects an unhelpful one. Instead, it proposes the use of the term “essential workers.” Newland, Kathleen. (2005, November 1). Migration’s Unrealized Potential: The Report of the Global Commission on International Migration. *Migration Policy Institute (MPI)*: Migration Information Source.

2 There is no USCIS definition for “specialty occupation” regarding the H-1B program. According to 8 U.S.C. 1184(i)(1)(A), the attainment of a bachelor’s degree or its equivalent is required as a minimum in order to obtain an H-1B.

3 There are two types of petitions: “initial employment” and “continuing employment.” Petitions for initial employment are filed with an employer for first-time H-1B employment, and only some of them are applied to the annual cap. Examples of petitions for initial employment that are exempt from the cap include petitions submitted by nonprofit research organizations or governmental research organizations. Continuing employment petitions refer to extensions, sequential employment, and concurrent employment, which are filed for aliens already in the United States. Extensions generally are filed for H-1B workers intending to work beyond the initial 3-year period up to a total of six years, the maximum period generally permissible under law. Sequential employment refers to petitions for workers transferring between H-1B employers within the 6-year period. Finally, petitions for concurrent employment are filed for H-1B workers intending to work simultaneously for an additional H-1B employer. U. S. Homeland Security. (2015, February 26). Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2014 Annual Report to Congress October 1, 2013- September 30, 2014.
or equivalent in a field related to their work position, employers must either seek permission from USCIS to bring in workers with H-1B status from overseas, or adjust workers from another status, such as an F-1 or J-1 student visas, who are already in the U.S. H-1B holders can stay in the U.S. for up to three years and extensions are possible for up to three additional years if they apply with their employers support during their initial employment. In short, the worker must leave the United States unless s/he is eligible to change his or her status by applying for either another nonimmigrant visa or a green card.

H-1B and L visas are recognized by immigration law as dual intent visa, which allow foreigners temporary residence in the U.S. with the known intention of possibly immigrating. This makes them significantly different from other temporary visas, which require that the visitor intend to return his or her home country. In fact, H-1B holders can stay and work in the United States until they are able to transition to permanent resident status, if their employers support them for this application. Additionally, because

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4 The F-1 visa is for a citizen of a foreign country who wishes to study full-time in the U.S. His or her course of study and the type of school s/he plans to attend determine whether s/he needs an F-1 or an M-1 (vocational or other recognized nonacademic institution, other than a language training program) visa. Before a student can apply at a U.S. Embassy or Consulate for an F or M student visa, s/he must first apply to and be accepted by a SEVIS (Student and Exchange Visitor Information System) approved school. Through the exchange visa program, J-1 visas provide opportunities for international candidates looking to travel and gain experience in the U.S. under exchange visitor programs to teach, study, conduct research, demonstrate special skills or receive on the job training for periods ranging from a few weeks to several years. (U.S. Citizenship and Immigration Services.)

5 U.S. Citizenship and Immigration Services Working in the U.S.

6 8 C.F.R. § 214.2(h)(13)(iii)(A); 9 FAM 41.53 N13.1.

7 Unlike most other nonimmigrant categories, H-1B visa category is subject to immigrant intent provisions of INA section 214(b)’s presumption of immigrant intent.” Did not establish edibility for the visa category being applied for or overcome the presumption of being n intending immigrant.” It is referred to as the “dual intent” doctrine. INA: Act 214 – Admission of nonimmigrants. U.S. Citizenship and Immigration Services.
of the visa’s dual intent nature, many H-1B holders may apply for an employment-based green card.\(^8\)

### 3.3 Country of Birth

According to USCIS, in fiscal year 2014,\(^9\) the 220,286 (69.7%) of the H-1B petitions were from India, with the People’s Republic of China coming in a distant second at 26,393 (8.4%).\(^10\) Canada held the third position with 2.2 percent. Although initial employment from India increased less than one percent in FY 2014, continuing employment increased 31 percent.\(^11\) Later in this chapter, I will further discuss the high rate of H-1B visa workers coming from a single country – India – which is of course the central topic underlying the international relationship between India and America.

It is well known that India and China already compete over global influence and natural resources. Yet, *Computerworld* in 2015 published a report revealing that even though China accounts for the third largest immigrant group in the U.S. (behind Mexico and India),\(^12\) it has used only five percent of total H-1B visas granted to computer professionals.\(^13\) In addition, the report stated that Infosys – an Indian IT service provider

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\(^8\) According to USCIS, green card or Permanent Resident Card is allowed to live and work permanently in the U.S. A person must be eligible under one of the categories through family, employment, or refugee/asylee status. U.S. Citizenship and Immigration Services. Green Card Eligibility Categories.


\(^12\) Hooper, Kate & Batalova, Jeanne. (2015, January 28). Chinese Immigrants in the United States. *Migration Policy Institute (MPI)*.

- has 508 H-1B-based employees working in Apple’s Cupertino office. Of this population, 499 – or 98 percent – of its workforce are from Asia.\textsuperscript{14}

3.4 Age of H-1B Holders

H-1B workers generally tend to be younger than their American counterparts.\textsuperscript{15} Seventy-two percent of workers granted H-1B status during FY 2014 were between 25 and 34 years old at the time they were approved.\textsuperscript{16} Thirty-eight percent of initial beneficiaries were under 30 years old. Engineers and scientists in Silicon Valley are mostly young, with a median age of 37 for the native-born and 34 for immigrants.\textsuperscript{17}

According to Vivek Wadhwa,\textsuperscript{18} a researcher at the Rock Center for Corporate Governance, the preference for youth is the same in the software industry, where investors in Silicon Valley often consider youth an advantage to entrepreneurship. This point of view is based on the rationale that a computer programmer with older and potentially out-of-date skills is not as valuable as a fresh graduate with little or no skills. Even if they have to spend a month training the younger workers, the company is still

\textsuperscript{14} Thibodeau, Patrick. & Machlis, Sharon. (2015, August 10). With H-1B visa, diversity doesn’t apply: In Computer Occupations, India Dominates H-1B visa use. \textit{Computerworld}.


\textsuperscript{17} In 2014, a total of 136,890 petitions (or 52%) were approved for initial employment. The corresponding number of petitions for continuing employment was 125,679. The terms “initial employment” and “continuing employment” are used throughout this paper to identify two types of petitions. Petitions for initial employment are filed for first-time H-1B employment with an employer, only some of which are applied to the annual cap. Examples of petitions for initial employment that are exempt from the cap include petitions submitted by nonprofit research organizations or governmental research organizations. Continuing employment petitions refer to extensions, sequential employment, and concurrent employment, which are filed for aliens already in the United States. Extensions generally are filed for H-1B workers intending to work beyond the initial 3-year period up to a total of six years, the maximum period generally allowed under law. Characteristics of H-1B Specialty Occupation Workers. Fiscal Year 2014 Annual Report of Congress. October 1, 2013- September 30, 2014. (2016, March 17). \textit{U.S. Citizenship and Immigration Services}. Washington, DC: U.S. Department of Homeland Security.

\textsuperscript{18} Balakrishnan, Anita. (2017, Jan. 13). One Immigrant Tech Expert Agrees with Trump that H-1B Visas are Abused. \textit{CNBC}.
motivated to take employees with a cutting-edge understanding of new technologies, who are willing to work for lower salaries. Young workers will more readily accept a low pay rate because they tend to prefer the opportunity to build their careers over insisting on generous remuneration for their services. In addition, younger employees without families can work longer hours, including overtime, while older workers tend to have domestic responsibilities outside of their jobs.

In finding that employers are hiring younger H-1Bs instead of older U.S. citizens and permanent residents, Norman Matloff argued that age is an issue related to H-1B use, even though age discrimination may not be as obvious. When young foreign students apply for the same jobs as older Americans who are better qualified, the Americans are rejected for being over-qualified.\(^{19}\) Indeed, an age discrimination lawsuit was filed against Google in 2015 by two older workers, Cheryl Fillekes and Robert Heath, who had sought jobs at the company and were not hired, despite doing well in the phone and in-person interviews.\(^{20}\) Norman Matloff argues that when it is difficult to find young American workers, companies turn to hiring younger H-1Bs in lieu of hiring the more expensive older Americans.\(^{21}\) There is a perception that it may cost companies more to hire older workers than younger ones.\(^{22}\)

3.5 Technology Occupations


\(^{21}\) Matloff, Norman. (2013, December 12). On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations. *DOCMATLOFF Type 11-7-03-DOC.*

\(^{22}\) Actually, many older programmers would be willing to take a pay cut when they cannot find programming work, but employers assume otherwise. Steen, Margret. (1998, July 23). Many Older IT Workers are Fishing for Jobs Despite Labor Shortage. *InforWorld.*
Many have failed to identify the types of jobs the new technology environment will enable. Many technology-enabled jobs will not be white collar, global, and high-skill. According to Hartley Scott, a venture capitalist, technology is that many digital platforms are creating local jobs at all skill levels. Online, global, high-skill white collar jobs require education and training that keeps pace with the global economy. These jobs will remain covered but not available for everyone.\textsuperscript{23} The book of Information Technology Jobs describes that the information technology (IT) can be divided into three broad categories: hardware, software, and the Internet. It employment opportunities vary by industry segment. Within the hardware and software beaches of the computer industry, many positions overlap and not every company will hire people to fill positions in each basic segment. To succeed in the IT field, computer professionals need flexibility, a formal education, must keep up with latest technology, and need a solid understanding of computer basics. However, the technology of today may be out of date in months, and their skills should remain on the cutting edge during their career.\textsuperscript{24}

Robert Charette indicates that the environment of STEM work has also changed dramatically in the past several decades. In engineering, for instance, employees are no longer linked to a company, but rather, to a funded project. Long-term employment with a single company has been replaced by a series of de facto temporary positions that can quickly end when a project ends or the market shifts.\textsuperscript{25} Although the H-1B visa is

described as a “bridge to immigration,” the low ratio of permanent residence applications to H-1B petitions from the top ten H-1B employers in 2012 – all in the business of outsourcing and offshoring high-tech American jobs – was evidence of the companies’ intention not to permanently hire their H-1B workers. For example, Cognizant was approved 9,281 initial petitions for H-1B in 2012, but its Green Card applications for H-1B workers totaled only 669. In the same year, TCA had 7,469 H-1B petitions approved, but submitted only four Green Card applications for H-1B workers. Additionally, Infosys was approved 5,600 H-1B petitions, yet submitted only 21 green cards applications.

3.6 Education and Ethnicity

Forty-five percent of all H-1B petitions approved for workers in FY 2014 reported that the beneficiary had earned at least a bachelor’s degree, and 53 percent had earned at least a master’s degree. Among high-skilled workers with at least a bachelor’s degree, the foreign-born are more likely to have an advanced degree than the native-born in the United States. FY 2012 reported that 99 percent of approved H-1B petitions had earned at least a bachelor’s degree, 53 percent had earned at least a master’s degree, and 10 percent held PhDs. The corresponding proportion for the native-born are that seven percent hold at least a BA and three percent hold PhDs. In 2010, the National Science Foundation

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29 Kaushel, Neeraj & Fix, Michael. (2006, July). The Contributions of High-Skilled Immigrants. *Migration Policy Institute.* Employers are asked to provided the highest degree, when completing the H-1B petition. The reporting of a domestic or foreign degree is not required in a standard format on USCIS or DOL forms.
showed 45 percent of engineering master’s and doctoral students from abroad.\(^{30}\) At Carnegie Mellon University, which has one of the most prestigious engineering schools in the world, 62 percent of engineering graduate students are foreign. Meanwhile, 56 percent of engineering students at the Rochester Institute of Technology are also foreign.\(^{31}\)

According to Rafael Alarcon, a research professor at the University of Valencia, immigrant engineers and scientists have much higher levels of education than their native-born counterparts. The majority of immigrants in Silicon Valley have postgraduate degrees, and they are twice more likely to have obtained a doctoral degree than native-born engineers and scientists.\(^{32}\) However, Clair Brown and Greg Linden at the University of California, Berkeley, analyzed Bureau of Labor Statistics and Census data that revealed that although salaries increased dramatically for engineers in their thirties, these increases slowed after the age of forty. After 50 years of age, the mean salary fell by 17 percent for those with bachelor’s degrees and by 14 percent for those with master’s degrees and Ph.Ds.\(^{33}\) Additionally, salary increases for holders of postgraduate degrees were always lower than for those with bachelor’s degrees.\(^{34}\) Moreover, on the H-1B Labor Condition applications filed with the Department of Labor in 2007, employers classify most of their H-1B workers as being relatively low-skilled for the jobs they were

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\(^{33}\) Brown, Clair. & Linden, Greg. (2008). Is There a Shortage of Engineering Talent in the U.S.?

\(^{34}\) U.S. Citizenship and Immigration Services. Understanding H-1B Requirements.
filling. In other words, high educations for H-1B holders are not related to their skills or wages.\textsuperscript{35}

According to the researcher Eugene Anderson and Professor Dongbin Kim, 47 percent of Asian/Pacific Islander students entered STEM fields in college, compared to 19 and 20 percent of students in each of the other racial/ethnic groups. No measurable differences were found among White, Black, and Hispanic students.\textsuperscript{36} Compared to U.S.-born students, Xianglei and Weko found that a higher percentage of foreign students entered STEM fields (34 versus 22 percent), and in particular, computer/information science (16 versus 6 percent).\textsuperscript{37}

3.7 Occupation of H-1B Holders

Computer-related occupations represented the largest H-1B occupational category in 2014; its share of total approved petitions increased from 60 percent in FY 2013 to 65 percent in FY 2014.\textsuperscript{38} USCIS announced that the corresponding shares for initial employment and continuing employment in computer-related occupations were 65 and 64 percent, respectively. The detailed occupational category in FY 2014 shows that the largest job category in which H-1Bs are employed is the Systems Analysis and


\textsuperscript{36} Anderson and Kim, found that although African American and Hispanic students entering higher learning institutions majored in STEM fields rates similar to those of White students, they fail to persist in these majors at the same rate as their White and Asian-American peers. Anderson, Eugene. & Kim, Dougbin. (2006, March). Increasing the Success of Minority Students in Science and Technology. \textit{American Council on Education.}

\textsuperscript{37} They concluded that “In general, the percentage of students entering STEM fields was higher among male students, younger and dependent students, Asian/Pacific Islander students, foreign students or those who spoke a language other than English as a child, and students with more advantaged family background characteristics and strong academic preparation than among their counterparts who did not have these characteristics” (p.17). Chen, Xianglei & Weko, Thomas. (2009, July). Students Who Study Science, Technology, Engineering, and Mathematics (STEM) in Postsecondary Education. \textit{U.S. Department of Education NCES 2009-161.}

Among all H-1B visas issued for FY 2014, 54.1 percent were in the Programming category. Contrary to expectations, few of the H-1Bs were engineers – only 3.7 percent. The second-largest occupation category, Electrical/Electronic Engineering Occupations, comprised only four percent in FY 2014.40

Kelvin Droegemeier, vice chairman at the National Science Board and meteorology professor and vice president for research at the University of Oklahoma, affirmed that many workers need their skills to open multiple pathways to STEM and non-STEM occupations.41 For instance, Capital One Financial and Burning Glass Technologies reported that digital proficiency had become a requirement for nearly 80 percent of middle-skill jobs that require at least a high school diploma but not necessarily a four-year bachelor’s degree – such as some office assistants, sales representative and recruiters.42 A National Science Board report found that 51 percent of people working in a non-science or non-engineering role in 2010 whose most advanced degree is in science or engineering as well as nearly 20 percent of all occupations may require significant STEM knowledge and skills.43 The report also stated that 8.4 percent of all individuals who earned their highest degree in a science or engineering field were working

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43 According to Droegemeier, “[o]nly about 1/3 of individuals with an S&E degree are employed in a job classified as S&E” and “Over half are employed in non-STEM occupations” (p.6). Droegemeier, Kelvin. (2015, September 21). Revisiting the STEM Workforce: An Overview of the new report of the National Science Board. National Science Foundation.
“involuntarily” out of their field because they could not find a job. However, the report concluded that there may not necessarily be a shortage of STEM workers in STEM fields, but rather, that non-STEM sectors increasingly find themselves in need of STEM-based labor.

3.8 H-1B by Annual Compensation

The Immigration and Nationality Act requires that the hiring of a foreign worker will not adversely affect the wages and working conditions of comparably employed U.S. workers. The Department of Labor’s regulations require that the wages offered to foreign workers must be the prevailing wage (the wage to be paid to the H-1B worker) rate for the occupational classification in the area of employment. When the H-1B program applies to employers seeking to hire nonimmigrants as workers in specialty occupations, employers must attest to the Department of Labor that they will pay wages to the H-1B nonimmigrant workers that are at least equal to the actual prevailing wage for the occupation in the area of intended employment.

The first step in the H-1B process is for the employer to file a labor condition application (LCA) certifying the prevailing wage and other labor protection provisions. However, the employer gets to determine what the prevailing wage is, and this rate must then be approved by the Department of Labor. Although H-1B workers are required to be paid the higher of the prevailing wage, or the wage paid to similar American workers,

44 National Science Foundation. Revising the STEM Workforce: A Companion to Science and Engineering Indicators 2014.
46 Annual Compensation refers to what the employer agreed to pay the beneficiary at the time the application was filed. It includes benefits such as health insurance, transportation, and non-cash compensation.
47 Prevailing Wages. United States Department of Labor, Employment & Training Administration.
48 United States, Department of Labor. Wage and Hour Division (WHD).
when employers determine the prevailing wage, they can use nearly any source for their determinations. Because of this John Maiano\textsuperscript{49} argues that the legal definition of the prevailing wage requirement does not ensure H-1B workers are paid the actual market’s prevailing wage. He also states that employers often file most of H-1B workers as being relatively lower skilled for the jobs for which they submitted their applications.\textsuperscript{50} Further, according to Immigration and Nationality, 8 U.S. Code Chapter 12, 8 U.S.C. § 1101,\textsuperscript{51} there is no requirement that the employer pay the H-1B worker at his/her skill level, and requirement to pay the prevailing rate would indeed be unenforceable. For example, in California the prevailing mean wage for a computer programmer is $93,912. However, an employer can legally pay an H-1B worker $55,162 if the employer decides the worker’s skill level is the lower level of four wage levels.\textsuperscript{52} In other words, the data does not account for special technical skill sets, or for having an advanced degree.

Employers reported prevailing wages for H-1B workers that were significantly less than those for American workers in the same occupation and location.\textsuperscript{53} The median annual compensation reported by employers for H-1B workers approved for employment during FY2014 was $75,000. Median compensation ranged from a low of $38,000 for occupations in religion and theology to a high of $105,000 for law and jurisprudence occupations. The median compensation for computer-related occupations was $75,000.

\textsuperscript{51} U.S. Code, Title 8 Chapter 12, Subchapter I § 1101 – Definitions.
\textsuperscript{52} Foreign Labor Certification Data Center Online Wage Library.

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Median annual compensation was $83,000 for continuing employment and $66,000 for initial employment.\textsuperscript{54}

Going by the actual numbers, it could be argued that H-1B workers are a source of cheap labor that enable employers to pay wages that do not keep up with inflation.\textsuperscript{55} The regulation of paying foreign workers the prevailing wage is an example of how law on the books, despite its official intentions to help workers, actually leads to worker exploitation and to the driving down of wages for both native and foreign employees. Lindsay Lowell was quoted by Computerworld saying, “Offshore companies that provided IT services prefer young H-1B programmers because the visa offers control over this contracted short-term workforce, it permits them to pay less than they would for experienced natives and they cultivate programmers who can better serve their clients after returning home to India.”\textsuperscript{56} Going by the actual number, it could argued that H-1B workers are a source of cheap labor that enable employers to pay wages that do not keep up with inflation. The regulation of paying foreign workers the prevailing wage is an example of how law on the books, despite its official intentions to help workers, actually leads to worker exploitation and to the driving down of wages for both native foreign employees.

3.9 H-1B by Industry and Sponsors


\textsuperscript{56} Thibodeau, Patrick. & Machlis, Sharon. (2015). With H-1B visa, Diversity doesn’t apply: In Computer Occupations, India Dominates H-1B Visa Use. \textit{Computerworld}. 

With a total of 63,442 workers, the top three H-1B visa sponsors in 2015 were: Infosys Limited (33,289), Tata Consultancy Services (16,553), and IBM (13,600).\(^{57}\)

Infosys Limited and Tata Consultancy Services are both multinational corporations headquartered in India that provide outsourcing services.\(^{58}\) Including its own India-based operation, IBM is also a major visa user.\(^{59}\) According to the North American Industry Classification System (NAICS),\(^{60}\) in 2014 the Custom Computer Programming Services industry comprised the most – 31 percent – of H-1B workers in all known industries. The second was Computer System Design Services. The top-ten-demanded H-1B occupations were in either computer technology or finance, representing 77 percent of the total – or 700,000 workers. The remaining ranged from medical professionals and scientists to teachers and business administration analysts.\(^{61}\)

Due to high demand, 85,000 H-1B visas are distributed annually via a lottery system. This system works against many small U.S. firms, including small tech companies, because large IT services firms like Infosys and Tata have the unfair advantage of submitting multiple H-1B visa applications in order to improve their odds of

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57 These numbers included renewal H-1B visas. Infosys Limited and Tata Consultancy Services are both Indian global corporations that provide business consulting, information technology, software engineering, and outsourcing services. Infosys is headquartered in Bangalore. Tata is headquartered in Mumbai. Retrieved from https://www.infosys.com/about/, and http://www.tcs.com/about/Pages/default.aspx.

58 Offshoring refers to: “The tendency among many U.S., Japanese and Western European firms to send both knowledge-based and manufacturing work to third-party firms in other nations. Often, the intent is to take advantage of lower wages and operating costs.” Outsourcing is defined as “the hiring of an outside company to perform a task that would otherwise be performed internally by a company.” “Outsourcing & Offshoring Industry Market Research.” Plunkett Research, Ltd. https://www.plunkettresearch.com/industries/outourcing-offshoring-bpo-market-research/.

59 Thibodeau, Patrick. (2012, Nov. 29). In a symbolic shift, IBM’s India workforce likely exceeds U.S.: IT salaries in India for all firms close to minimum wage in America. Computerworld.

60 The North American Industry Classification System (NAICS) Code is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. Retrieved from https://www.census.gov/eos/www/naics/. This code can be obtained from the U.S. Department of Commerce, Census Bureau (www.census.gov/epcd/www/naics.htm). For H-1B applications, petitions must use this code for their occupational groups.

winning, while smaller companies that just need one or two H-1B workers cannot compete. In 2015, Computerworld, a publication website and digital magazine, published an article analyzing how large companies rig the system in their favor. It shows, among other examples, that Cognizant Technology Solutions – one of the top ten H-1B visa approved companies in 2014 – has 64 different versions of itself (including Cognizant Technology Solutions U.S. Corp), each of which submit visa petitions.\textsuperscript{62}

Computerworld’s analysis accounted for the many different petitions-submitting divisions and business units comprising large companies like IBM – with its IBM Corp and IBM India, among many others.

There were 124,000 H-1B visa petitions in FY 2014, 172,000 in 2015, and 233,000 in 2016. Moreover, 2016 is expected to have up to 300,000 visa petitions or more due to previous petitions that were not selected. In December 2015, the filing fee was increased to $4,000 from $2,000 for companies with over 50 employees where more than 50 percent of the workers are H-1B or L-1 visa holders.\textsuperscript{63} According to David North, a writer at the Center for Immigration Studies, India-based outsourcing firms like Infosys and Tata must pay the increased fees as H-1B dependent firms, while large firms like Google, Microsoft, and IBM will not pay the increased fees on account that they are not regarded as H-1B dependent.\textsuperscript{64}

3.10 Skilled Indian Workers

\textsuperscript{62} Thibodeau, Patrick & Machlis, Sharon. (2015, July 30). Despite H-1B lottery, offshore firms dominate visa use: An H-1B lottery arms race may be in progress. Computerworld.

\textsuperscript{63} These changes came as the result of the Omnibus Bill. USCIS, the Consolidated Appropriations Act, 2016 (Public Law 114-113), signed into law by President Obama on December 18, 2015.

Douglas Massey, a professor of sociology, explained that migration is the result of the interplay of various forces – political, social, economic, legal, historical, cultural, and educational – between sending and receiving countries. He categorized these forces as “push” and “pull” factors, stating that both types of forces are needed for migration to occur. According to this push-pull theory of migration, there are several reasons for skilled immigrants in IT fields. The desire to practice technological skills may require moving to another country where such opportunities exist. Additionally, skilled workers may be seeking better wages, improved working conditions, and higher standards of living not present in their native countries. India, the second-largest scientific community in the English-speaking world, has 140,000 scientist working abroad. As Indian economic liberalization began in 1991, technology was at the center of international competition in India. Naushad Forbes, a professor of Industrial Engineering, examined the pressure brought on by the liberalization of 1991-1999, which spurred fundamental changes in technology and innovation. Indian companies became more efficient and started importing more foreign technology. As a result of these cultural changes and exchanges, Indian engineers and scientists developed a comparative advantage over other

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professionals in other parts of the developing world, and English proficiency plays major role in these advantages.  

While the economic effects on receiving countries are positive – because countries that receive skilled immigrants who enter the workforce with minimal preparation fill critical shortages – economic factors provide the motivation behind immigration itself. According to the International Labor Organization, approximately half of the total population of current immigrants, or about 150 million immigrant workers, have left home to find better job and lifestyle opportunities for their families abroad. 

For example, in India, jobs simply do not exist for a great deal of the population, and the income gap between sending and receiving countries is great enough to warrant a move.  

Because of the history of emigration from India, Indian high-skilled workers have more options in the global economy, which in turn give them a more affluent international experience than professionals from many other countries. As a result of the Indian government’s industrial policies – which have supported the development of

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69 Alarcon, Rafael. (2000). Skilled Immigrants and Cerebreros: Foreign-Born Engineers and Scientists in the High-Technology Industry of Silicon Valley. Immigration Research for a New Century: Multidisciplinary Perspectives. Foner, Nancy, Rumbaut, Ruben, & Gold, Steven. New York, NY: Russell Sage Foundation. Moreover, according to Patrick Thibodeau and Sharon Machlis, China was at one time seen as potential IT service rival to the U.S. However, security concerns are a certainly an issue for China. The domestic IT business in China is strong than India, and the Chinese economy is larger and broader than India’s economy. These provide more career opportunities and increase labor rates for technical talent. “With H-1B visa, Diversity doesn’t apply: In Computer Occupations, India Dominates H-1B Visa Use.” Computerworld.  

70 International Labor Organization Office of the Director-General, Labor Migration.  


the software industry\textsuperscript{73} – and the teaching of English throughout India’s higher education system, Indian immigrants have been able to become “global software engineers.”\textsuperscript{74}

Christopher Chekuri, a professor of History at San Francisco State University, and Himadeep Muppidi, a professor of Political Science at Vassar College, argue that the increase of Indian H-1B workers in the IT industry complicated the assumption of privilege associated with high-skilled migrants from India.\textsuperscript{75} Paula Chakravartty describes that there has been a significant shift in the profile of Indian “skilled” migrants following the H-1B workers in the IT industry. Permanent migration of skilled Indian workers to the U.S. in the 1970s and 1980s would most often be associated with graduates of India’s prestigious Indian Institutes of Technology – publicly funded but elite institutions with an overwhelmingly upper caste, upper-class student body looking for economic opportunities in the West – the profiles of the “non-permanent” H-1B computer programmer generally. In contrast with H-1B, the entitled IT-trained engineer who left India in the 1970s and 1980s, when opportunities were limited in a still centrally-planned economy, the H-1B workers is not necessarily from the upper castes, or from a family based in a metropolitan center in India like Delhi or Bombay. Their training is more likely form private colleges specializing in computer-programming and they are often willing to travel on a temporary visa to the U.S. gain access to employment.\textsuperscript{76}

\textsuperscript{74} Alarcon, Rafael. (2000). Skilled Immigrants and Cerebberos: Foreign-Born Engineers and Scientists in the High-Technology Industry of Silicon Valley. Immigration Research for a New Century: Multidisciplinary Perspectives.
3.11 Conclusion

The measurements and trends reviewed in this chapter adduce facts about the high-skilled foreign labor population and offer a challenging assessment of what the United States can build with a skilled labor force comprised of both foreign and domestic sources. Although skills-based immigration is theoretically race-neutral, in practice skilled immigrants are predominantly young Asian men. The boundaries around immigration policy are not obvious as the nominal, race-neutral definition of skills-based immigration would suggest, particularly as applied to specific categories and non-European nationalities.

H-1B is applicable to any skilled workers regardless of national origin, and as a state-approved authorization, it extends documented status. As such, the H-1B appears to be devoid of a potential for racial meanings. However, this chapter demonstrates that there are indeed predominant racial groups working in the IT field under the H-1B visa program, despite its race-neutral branding. To conceptualize the contemporary forms of racialization of skilled workers, it is important to understand how immigration policies have – for the benefit of the American economy – racially designated immigrant workers exploitable via the status, rights, and abilities of laborers under the H-1B visa. This subject will be explored further in the next chapter.
Chapter Four: Contesting Availabilities

4.1 Introduction

The aim of this chapter is to explore the debate over STEM worker shortages and the story of the STEM Jobs Act, which was proposed to order to increase skills-based visas for STEM fields, as indicated by the congressional debate that occurred on November 30, 2012.¹ Both Republicans and Democrats were decidedly interested in increasing H-1B visas for the STEM workforce, as they embraced the tech industry’s call to attract the “best and brighten’ guest workers – a slogan that Silicon Valley has used for decades to import skilled workers (including students laborers) from around the globe.

In this chapter, I will analyze disputes about whether or not there are indeed insufficient numbers of STEM workers² in the United States, and how such disputes serve as key motivators for Congress to move toward cumulative non-immigration visas for a flexible labor market.³ I furthermore highlight the issue of a skill shortage versus an aggregate demand shortage, and discuss how foreign students in the federal Optional

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¹ STEM began being discussed not only in education but also in immigration debates. Immigration debates use this acronym regarding United States work visas for immigrants who have skills in STEM fields. It has been discussed since the end of the twentieth century. Jones, Michael D. & McBeth Mark K. (2010, April 23). A Narrative Policy Framework: Clear Enough to be Wrong? Policy Studies Journal, Vol. 38, pp. 329-353.

² “Executive Summary. Science, Technology, Engineering, and Mathematics (STEM).” Georgetown University report by Anthony P. Carnevale, Nicole Smith, and Michelle Melton of the Center on Education and the Workforce. The claims of a STEM workers shortage has been contradicted by many studies, including reports from Duke University, the Rochester Institution of Technology, Alfred P. Sloan Foundation, and the Rand Corp. For example, a 2004 Rand study stated that there was no evidence “that such shortages have existed at least since 1990, nor that they are on the horizon.” Butz, William P., Kelly, Terrence K., Adamson, David M., Bloom, Gabrielle A., Fossum, Donna, & Gross, Mihal E. (2003). Will the Scientific and Technology Workforce Meet the Requirements of the Federal Government? The RAND Corporation.

³ Gerry Rodgers advocates putting the power in the hands of the employer, and argues that labor market flexibility in developing countries needs a wider framework of policies and institutions to promote decent work, and that increasing labor market flexibility leads to lower unemployment rates and higher GDP. Rodgers, Gerry. (2007, July). United Nations Department of Economic and Social Affairs. DESA Working Paper No. 47.
Practical Training (OPT) program for STEM fields are exploited by employers for their expertise and labor, without reaping the benefits of prevailing wage rules and working condition regulations due to their student status.⁴

4.2 Skill Shortage vs. Aggregate Shortage

It is important to recognize that some reports show evidence contrary to the existence of a shortage in STEM workers. The alleged insufficient number of skilled workers relates to supply and demand, which is the backbone and most fundamental concept of a market economy,⁵ and a key element in debates regarding whether or not to import H-1B visa holders for the American economy.⁶

Georgetown University reported in 2011 that more than 2.4 million STEM jobs will be available in the U.S. between 2008 and 2018, with 1.1 million newly created jobs and the remainder unoccupied to replace workers who will retire or move to non-STEM fields.⁷ The report concluded that there will be roughly 277,000 STEM positions opening per year, leading to 2.8 million new STEM jobs by 2018, projections which were cited in a Congressional report of the STEM Jobs Act of 2012.⁸ Meanwhile, Alice Tornquist, a Washington lobbyist for Qualcomm,⁹ stated at a conference that companies face a dire

⁴ Ruiz, Neil G. (2014, August 29). The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations. The Brookings Institute. According to the Department of State, this research denotes that 595,569 of F-1 (student) visas were issued in 2014 in the U.S.
⁵ Heakel, Reem. Economics Basics: Supply and Demand. Investopedia. This concept was introduced by Alfred Marshall the founder of neoclassical economics, who established the idea of supply and demand in Principles of Economics in 1890. London: Macmillan; reprinted by Prometheus Books.
⁹ Qualcomm is a wireless technology operations company in San Diego that has employed more than 20,000 engineers. Alice Tornquist, a vice president for government affairs, stated: “We recruit from top
shortage of university graduates in STEM fields: "Although our industry and other high-tech industries have grown exponentially, our immigration system has failed to keep pace." She said that the nation's outdated limits and "convoluted green-card process," has left firms like hers "hampered in hiring the talent that they need." On the other hand, researchers at Duke University report no indication of a shortage of engineers in the U.S. Through the use of a survey, they found 58 corporations engaged in outsourcing engineering jobs from within their own companies in just four months. India and China were the top offshoring destinations. The top reasons survey respondents cited for going offshore were salary, overhead cost savings, access to new markets, and proximity to new markets. The RAND Corporation, an American nonprofit global policy think tank, reported a reverse shortage for science and engineering fields: “[W]e did not find evidence that such shortages have existed at least since 1990, nor that they are on the horizon” (p.17). Daniel Costa, an immigration policy analyst, emphasized this contradiction by noting that while Microsoft has complained of 6,000 unfilled job openings, it laid off at least 7,700 employees in 2015.

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U.S. engineering universities and graduate programs. Nearly half of the STEM graduates from these U.S. universities will need visas to stay in the U.S. after completing their education.” Henderson, Tim. (2015, June 8). States, Cities Call for Skilled Foreign Workers Amid Abuse Claims. The PEW Charitable Trusts.


12 The RAND Corporation stated that “RAND has examined labor shortages in key STEM fields such as cybersecurity, initiatives to improve instruction and achievement, and how U.S. investments in STEM education stack up against those of other global powers.” Labor shortages in STEM fields are cited as the key reason for importing skilled workers from other countries. Smith, James P. (2012). Immigration Reform. Farsighted Leadership in a Shortsighted World. Looking Beyond the 2012 U.S. Election.


Many other large technology companies, including IBM, Cisco, and Yahoo, have announced layoffs of thousands of workers throughout 2012.\footnote{For example, see Fortune. Darrow, Barb. (2015, June 30). Microsoft braces for more job cuts.}

Regarding the measurement of the skill shortage and insufficiency, Robert Charette, an international authority on information technology, pointed out that there is an extraordinary amount of inconsistency in the data supporting the existence of a STEM crisis.\footnote{Charette, Robert N. (2013, August 30). The STEM Crisis is a Myth: Forget the Dire Predictions of a Looming Shortfall of Scientists, Technologists, Engineers, and Mathematicians. North American Spectrum IEEE Organization.} Charette found that while both the National Science Foundation (NSF)\footnote{According to the National Science Foundation’s website, the NSF “is an independent federal agency created by Congress in 1950.” It reported an annual budget of $7.5 billion in FY 2016 and is the funding source for about 24% of all federally supported basic research conducted in U.S. colleges and universities. The director and boarders are appointed by the President and confirmed by the U.S. Senate. National Science Foundation.} and the Department of Commerce\footnote{The mission of the Department, as part of the Obama Administration’s economic team, is to “promote job creations, communities, sustainable development, and improved standards of living for Americans.”} track the number of STEM jobs, they use different measurement systems to look out for their own interests, which is to the advantage of some groups who have a stake in this situation. For instance, since the Department of Commerce serves as the voice of U.S. business within the President’s Cabinet, it advocates for communities and the nation’s workers in order to promote job creation and improved standards of living for Americans.\footnote{U.S. Department of Commerce.} In contrast, the National Science Board (NSB) – the policymaking body for the NSF set forth by the President and Congress – says that in 2010 there were 12.4 million science and engineering jobs in the U.S.,
including a number of demographics that the Department of Commerce excluded, such as health-care workers (4.3 million) and psychologists and social scientists (518,000).  

Another important complication is that according to a previous report by the Department of Commerce, only 3.3 million of the 7.6 million STEM workers actually possess STEM degrees. About 15 million U.S. residents hold at least a bachelor’s degree in a STEM discipline, but 11.4 million of them work outside of STEM fields. In 2008 the NSF surveyed STEM graduates who had both a bachelor’s and a master’s degree and found that two out of ten were working in non-STEM fields. In addition, a report by Georgetown University shows that 58 percent of STEM graduates have left the field.  

In the Monthly Labor Report of the Bureau of Labor Statistics, Yi Xue and Richard Larson stated that although “many experts have presented evidence of a STEM workers surplus, a comprehensive literature review, in conjunction with employment statistics, newspaper articles, and our own interviews with company recruiters, reveals a significant heterogeneity in the STEM labor market: the academic sector is generally

23 Carnevale, Anthony P., Smith, Nicole., & Melton, Michelle. (2011). STEM: Science, Technology, Engineering, and Mathematics. Executive Summary. Georgetown University Center on Education and the Workforce. There are many interesting information of STEM occupation. B. Lindsay Lowell and Harold Salzman pointed out that many bachelor’s degree STEM holders did not work in STEM occupations (Into the Eye of the Storm). Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell state that for every two students graduating with a U.S. STEM degree, only one goes on to work in a STEM field, and that 32 percent of computer science graduates not employed in information technology attributed their situation to a lack of available jobs (Guestworkers in the high-skill U.S. labor market: an analysis of supply, employment and wage trends. EPI Briefing Paper no. 359 Washington, DC: Economic Policy Institute, April 24, 2013, pp. 1–35). In 2014, the U.S. Census Bureau reported that 74 percent of those who have a bachelor’s degree in a STEM major are not employed in STEM occupations. Census Bureau Reports Majority of STEM College Graduates Do Not Work in STEM Occupations. (2014, July 14). U.S. Census Bureau. Release Number: CB14-130.
oversupplied, while the government sector and private industry have shortages in specific areas”24 (p.1). Xue and Larson’s analysis shows that the balance of supply and demand of STEM workers shifts by market and location. For example, the demand for workers with doctorates in software development is different from the demand for workers with bachelor’s degree in software development. The supply of workers with doctorates in mathematics is different from the supply of workers with doctorates in science. The demand of mechanical engineering in New Jersey is different from the demand for mechanical engineering in Texas. They show that there is not a STEM shortage in all job categories, but rather, in specific fields. According to their findings, the answer to the question regarding a skill shortage versus aggregate demand shortage ultimately depends on the STEM job segment being considered.

It is therefore difficult to state that there is indeed a shortage or to quantify how large it might be. Meanwhile, the H-1B program depresses the industry’s incentive to hire native-born workers. The technology sector understands that generally short labor markets make it difficult to keep labor costs down. Increasing the supply of foreign workers, however, could actually drive labor costs down. The industry has powerful supporters in Congress,25 even though some politicians feel uneasy about the impact of low-wage immigrant workers on American labor constituencies. Some of these

politicians are also concerned about what it means to have many new citizens of Asian origin voting in future presidential elections.\textsuperscript{26}

### 4.3 Politics of the H-1B visa

Politics surrounding the H-1B visa and immigration reform is as varied as the politicians themselves. In 2013, Bernie Sanders, the senator from Vermont and later a candidate for the Democratic nomination for President in the 2016 election,\textsuperscript{27} addressed the issue in a phone interview with \textit{The Washington Post}: “I’m a strong supporter of immigration reform…I have a hard time understanding the notion that there's a severe need for more workers from abroad when wages for these jobs rose only 4.5 percent between 2000 and 2011. You see stagnant wages for high skilled workers, when these companies tell you that they desperately need high skilled workers. Why not raise wages to attract those workers?”\textsuperscript{28} On the other hand, Texas Senator Ted Cruz endorsed a large expansion of H-1B visas because of demands from his state’s tech sector. Now however, he suggests suspending the program and clamping down on the outsourcing companies in India.

Zoe Lofgren, a Judiciary Committee’s immigration panelist and longtime champion of the H-1B visa, stated: “[t]he idea behind the program was to bring in people who have specialties that are needed in the American economy. Too many H-1B visa

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\textsuperscript{26} Ramakrishnan, Karthick. (2016, July 26). How Asian Americans Became Democrats. \textit{American Prospect: Logform}. This article discusses how the last two decades have seen a major shift in the party preferences of Asian Americans, even though they are still not deeply engaged in civic life. In 2012, exit polls showed that Asian Americans supported Barack Obama with 73 percent of their votes, a level exceeded only by African Americans. In 2012, Obama won every major national origin group belonging to Asian Americans, a surprising fact that garnered media attention.

\textsuperscript{27} The official campaign website for the presidential campaign of United States Senator Bernie Sanders. Retrieved from https://berniesanders.com/?nosplash=true.

\textsuperscript{28} Matthews, Dylan. (2013, May 25). This is a massive effort to attract cheap labor.’ Why Sen. Bernie Sanders is skeptical of guest workers. \textit{The Washington Post}.
holders don’t fall into that exceptional category. They are at the low end of the skill level and the lower end of the salary level, which is not what the program was intended to do.”

She introduced a bill that seeks to address a main criticism of the H-1B program that outsourcing firms exploit it to hire foreign workers. In order to prevent misuse from undercutting the wages of American workers, her bill includes guidelines on how much employers would have to pay workers in order to get the visa.

Meanwhile, Senators Chuck Grassley and Dick Durbin, both H-1B reform advocates, introduced their bipartisan H-1B reform bill on Jan 20, 2017. It would eliminate the lottery system needed to obtain the H-1B and task the USCIS with creating “preference system” so that foreign students educated in the U.S. get priority on visas.

4.4 Intention of Increase

While many governors and mayors support increasing the visa program to help firms in their states and cities, there is inconsistent data and grounds for doubt about increasing H-1B visas, which make rational policy discussions difficult. Some members of Congress have argued the validity of tech companies’ demand of high-skilled labor and their difficulty finding “the best and the brightest.” However, many researchers and professors – including David North, a fellow of the Center for Immigration Studies,

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31 In 2013, 15 governors sent a letter to U.S. House members urging approval of the Senate’s comprehensive immigration reform bill along with more visas for foreign graduate students in math and science. Nearly 50 mayors, including former NYC mayor Michael Bloomberg, advocate for increasing the H-1B program. Henderson, Tim. (2015). States, Cities Call for Skilled Foreign Workers Amid Abuse Claims. The PEW Charitable Trusts.
32 STEM JOBS ACT OF 2012. H.R. 6429, (2012, November 30). Congressional Record. In the record, congressmen used the words of “the best and the brightest” to indicate students in STEM fields.
Norman Matloff, a professor of Computer Science, Ronil Hira, an associate professor of Public Policy at Howard University, and Lindsay Lowell, a research professor for the Study of International Migration at Georgetown University – argue that cutting labor costs by hiring less expensive foreign workers is one of the motivating factors for companies seeking nonimmigrant workers.

Meanwhile, in market economy theories, supply and demand will allocate resources in the most effective way possible. Paul Samuelson, the first American to win a Nobel Prize in economics, wrote, “By keeping labor supply down, immigration policy tends to keep wages high. Let’s underline this basic principle: Limitation of the supply of any grade of labor relative to all other productive factors can be expected to raise its wage rate; an increase in supply will, other things being equal tend to depress wage rates.” According to this theory, the motivation behind increasing H-1B visas seems to related to the supply and demand forces regarding the allocation of resources; More H-1B visas would allow additional temporary workers into the economy.

The simple principle is that high wages can persist in any occupation as long as potential workers cannot enter it to drive down the wage. While low-cost labor benefits consumers by keeping prices of many goods and services low, each firm finds different labor substitutes to control prices for its product. In other words, increased immigration

would reduce the wages of native-born Americans due to simple supply and demand theory, which shows that more workers means lower wages.\textsuperscript{38} As Paul Samuelson wrote, “There are obviously great advantages to the winners socioeconomically to have immigration doing work cheaply.”

\textbf{4.5 Bipartisan and Non-immigration Visa Policy Reform}

Although skills-based workers are generally accepted within the broad premises of the status quo, they have not been as successful at getting legal working permissions in this country, because expanding the H-1B program to accept skills-based immigrants is entangled with other elements of immigration reform that are less likely to pass. Consequently, the policy of expanding the H-1B program to accept skill-based immigrants has failed to produce immigration reform until now.

The bill, H.R.6412: Attracting the Best and Brightest Act of 2012, was introduced in the House by Rep. Zoe Lofgren (D-CA) on September 14, 2012 as an amendment to the INA of 1965. Its intent was to make up to 50,000 visas available for qualified immigrants with degrees in STEM fields from qualifying U.S research institutions of higher education.\textsuperscript{39} In November of that same year, when the STEM Jobs Act or H.R. 6429,\textsuperscript{40} was also proposed as an amendment to INA, Darrell Issa (R-CA) articulated a view on skills-based visas common amongst lawmakers, stating: “Some would cling to a lottery that allows 55,000 immigrants to come for no reason other than they asked and they got a lottery. If you have somebody who’s going to benefit America, having them

\textsuperscript{39} The Best and Brightest Act of 2012. H.R. 6412. 122th Congress 2011-2012
\textsuperscript{40} H.R. 6429 (112\textsuperscript{th}): STEM Jobs Act of 2012. (2012, September 18).
benefit America for a short time and then go home and in fact compete against America is not in America’s best interests” (p. H6541).

Unlike the Best and Brightest Act, the STEM Jobs Act would have eliminated the diversity immigrant program, which became the focal point of debate. Jackson Lee (D-TX) said, “Diversity Visas are at the heart of the definition of America. Unlike every other visa program, its express purpose is to develop a racially, ethnically, and culturally diverse population. It serves a unique purpose and it works. In recent years, African immigrants have comprised about 50 percent of the DV program’s beneficiaries – however only one percent of legal permanent resident recipients” (p. H6546). The elimination of the Diversity Visa (DV) program would have disproportionately targeted immigration from African nations because immigrants from Africa normally comprise half the DV program’s annual beneficiaries.41 Ultimately, neither of the two amendments passed, but they each highlight the allure of skills-based visas and demonstrate how such visas can be leveraged to shape ethnic composition of migrant streams.

4.6 Conclusion

Congress leans on demands from high-tech firm employers to argue that expanding the H-1B program is vital to U.S. competitiveness because it allows the world’s “best and the brightest” to come to America and helps sustain U.S. leadership in the technology sector – even if the program creates an unfair advantage for business to exploit foreign workers for cheap labor. Additionally, extending the OPT period for STEM students will turn a student visa program into a labor market program, since the OPT rule change allows employers to completely bypass the H-1B program and even

encourages some employers to recruit recent graduates, thereby helping to skew the market against domestic U.S. high-tech workers. Meanwhile, though Congress argues about increasing the number of H-1B visas, there is no clear evidence that America’s high-tech companies have faced worker shortage. If the H-1B and OPT programs are used to import workers in order to pay less than prevailing wages, the gap between wages for American workers and foreign workers helps explain why industry demand for H-1B workers is so high and why the annual visa quotas run out every year.

On November 10, 2015, U.S. Senators Chuck Grassley, Chairmen of the Senate Judiciary Committee, and Dick Durbin, the Senator for Illinois, Democratic Party, introduced bipartisan legislation that would reform the H-1B visa program and the L-1 program. Their bill would alter the H-1B and L-1 programs, raising wage requirements, increasing monitoring and enforcement, and adding other protections for American workers.42 It acknowledges and deals with how the current H-1B visa allows companies to replace American tech workers with foreign workers who will accept lower salaries.

Continuing on the issue of immigration policy and its much-needed reform, the final chapter explores a legal loophole that has enabled industry to exploit high skilled immigrants, revealing that immigration policy can sometimes – and still does – enable systems of inequality that would otherwise be illegal.

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Chapter Five: *De Jure and De Facto*

5.1 Introduction

This chapter explores how highly skilled immigrants have been exploited for cheap labor and how a legal loophole has enabled this exploitation. I would argue that immigration policies reflect of dominant modes of power and can allow employers to maintain systems of inequality that would otherwise be illegal. When American companies and subcontracted outsourcing firms collude to bring in cheap immigrant workers, American workers lose their jobs and foreign workers become the equivalent of “high-tech braceros,”1 or “indentured servants,”2 who are over-qualified, willing to work for lower wages, and susceptible to exploitation.3 Further, H-1B immigrants regularly experience racial discrimination aimed at minority and foreign workers and are legally prevented from demanding higher wages due to their precarious immigration status.

5.2 Rule of Prevailing Wage Ignored or Broken

In order to protect American workers, the prevailing wage is set by Congress to ensure that H-1B workers are not being paid below-market wages. When employers file a Labor Condition Application to the U.S. Department of Labor (DOL) for an employee,

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2 Paula Chakravartty and others use the term, “indentured servants,” to describe high-skilled foreign workers who come to the U.S by H-1B visa, especially from India, through “body shops.” NBC’s Bay Area Investigative Unit and The Center for Investigative Reporting (CIR) reported on this in “Silicon Valley’s “Body Shop” Secret: Highly Educated Foreign Workers Treated Like Indentured Servants” on November 3, 2014. Chakravartty, Paula. (2006, Fall). Symbolic Analysts or Indentured Servants? India High-Tech Migrants in America’s Information Economy. *Knowledge, Technology, & Policy.*

the company has to make relevant attestations, including that the wage paid is equal or more to the prevailing wage paid to other workers in similar positions.\footnote{U.S. Citizenship and Immigration Services. \textit{Understanding H-1B Requirements}. Available at: https://www.uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements.}

According to Attorney John Miano, employer prevailing wage claims and reported wages for H-1B workers are significantly less than those for American workers in the same occupation and location. His report suggests that the H-1B program operates mainly to supply U.S. employers with cheap workers rather than with essential, skilled workers.\footnote{Miano, John. (2007, April 1). Low Salaries for Low Skills: Wages and Skill Levels for H-1B Computer Workers, 2005. \textit{Center for Immigration Studies}.} There were very few highly skilled H-1B workers when employers used the DOL’s skill-based prevailing wage system in 2005, as 56 percent of employees were classified as being at the lowest skill level.\footnote{In Miano’s report, the source for H-1B wages was the FY 2005. Wages for July 2017- June 2018 disclosure data available at \url{www.flcdatacentral.com}. Foreign Labor Certification Data Center: Online Wage Library.} In particular, Miano found that the low wage paid at Infosys – Indian outsourcing company – combined with its unusually large number of workers significantly lowers the average H-1B wage. Infosys has been a large user of H-1B visas and claims to have received four percent of the 85,000 visas available under the annual quota.\footnote{Raghu, Krishnan. (2016, July 12). Infosys net soars 49.2 per cent, guidance thrills Street. \textit{Daily News and Analysis (India)}.}

In 2003, \textit{BusinessWorld} reported on interviews with H-1B employer, Tata Consultancy Services (TCS), a leading India-based offshore outsourcing company. TCS Vice President, Phiroz Vandrevala, described how his company derived competitive
advantages by paying its visa holders below-market wages: “Our wage per employee is 20-25 percent lesser than the U.S. wage for a similar employee. Typically, for a TCS employee with five-year experience, the annual cost to the company is $60,000-70,000, while a local American employee might cost $80,000-100,000. It’s a fact that Indian IT companies have an advantage here and there’s nothing wrong in that…The issue is that of getting workers in the U.S. on wages far lower than local wage rate.”

A further purpose of labor certification when hiring foreign workers is for companies to demonstrate to the DOL that no willing and qualified U.S. workers applied for the job opportunity. However, when Representative Zoe Lofgren (D-CA) queried the U.S. Department of Labor to find the average wage for computer systems analysts in her district, she learned that it was $92,000, while the legal prevailing wage was $52,000. Lofgren conceded that the H-1B program is undercutting American workers, and said of the STEM Jobs Act, “I would say that this does not do enough to protect workers. I’ll give you an example: Computer and information science research scientists in level one for labor certification may be paid $86,736. That’s what’s in the labor cert. But their median income in Silicon Valley is $133,000. So we have an idea that we shouldn’t underpay the foreign scientists.”

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In January 2011, the United States Government Accountability Office (GAO)\textsuperscript{13} reported that amongst systems analysts, programmers, and other computer-related workers, H-1B workers tended to earn less than their U.S.-born counterparts. However, some of the salary gaps appear to be attributable to work experience.\textsuperscript{14} In fact, the law and regulations require that employers pay H-1B holders the prevailing wage. An example of H-1B applications approved by the U.S. DOL shows how low the wages can actually be. In 2006, a major offshore outsourcing company imported 75 computer software engineers at an annual salary of $24,710.\textsuperscript{15} That was 70 percent lower than the median wage rate for those occupations. While this provides big cost saving to the company, it can also be regarded as immigration abuse, which is a violation of anti-discrimination laws that prohibit employers from mistreating workers because of citizenship or immigration status.

There is ample evidence of prevailing wage regulation violations. The U.S. General Accounting Office (GAO) reported from interviews of H-1B employers that “Some employers said that they hired H-1B workers in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than their required wage.” The GAO concluded that “the extent to which wage is a factor in employment decisions is

\textsuperscript{13} The GAO is an independent, nonpartisan agency that works for Congress to investigate how the federal government spends taxes.
\textsuperscript{15} Hira, Ron. (2007, August 5). How ‘Guestworkers’ Promote Outsourcing. \textit{The American Prospect}. 71
According to the GAO, that violations occur and yet remain unclear and times unknown “may be due in part to Labor’s limited investigative authority.”

According to Ron Hira, IEEE-USA vice president, there is a myth about the H-1B program that prevailing wages are the same as market wages. He explains that Labor Condition Applications (LCAs) – files by prospective H-1B employer to the DOL – is one symptom of how flawed the H-1B program is. Although the regulations governing the procedure for the H-1B visa program do not require an employer to use any specific wage methodology to determine the prevailing wage, they do require that the prevailing wage be based on the best information available at the time the employer files an application. Under law, employers have three options for determining an H-1B employee’s prevailing wages: through the Office of Foreign Labor Certification’s, National Prevailing Wage Center, or the iCERT Portal System. According to Hira, employers paying below market wages are not in violation of the law, but rather, have found a loophole to avoid paying the prevailing wage, making labor advantage a fact of their business. When hiring H-1B workers, they select a source with the lowest salaries, classify experienced workers as entry level, give the person a lower-paying job title than one reflective of the work to be performed, or cite wages for a low-cost area of the state.

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21 An employer must mail a completed ETA Form 9141 the NPWHC by mail to National Prevailing Wage and Helpdesk Center.
and then sending an employee to a higher-cost area. Hira states that employers know that the DOL automates reviews of LCAs, making the process limited to looking for missing information. In addition, there is no way to report a discrepancy to the DOL after an H-1B worker’s income on the W-2 form is less than the wage on the LCA. This lack of accountability to external authority invites exploitation.

Despite this H-1B workers have the right to be paid the prevailing wage for their positions. If their employers pay them less than the prevailing wage, they have the right to inform the DOL, and they may also have the right to receive back wages. Legally, employers cannot retaliate by for example, firing them, for bringing a complaint against an employer to the DOL under Federal Equal Employment Opportunity (EEO) laws. Yet, it is important to understand that while H-1B workers have the right to work in a discrimination-free environment, they must also maintain lawful immigration status in order to remain in this country, and that means holding on to their job. This translates into a reality where H-1B holders give up their rights to fair treatment in order to remain in the U.S. For example, employers can terminate an H-1B visa worker without penalty.

However, for H-1B workers, losing employment means immediately losing legal status to live and work in this country. The system therefore creates more direct and dire consequences for workers while imbuing employers with impunity. Because of the

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25 In addition, H-1B workers have the right to receive a copy of the Labor Condition Application (LCA) that their employers filed with the DOL when applying for an H-1B application. The LCA outlines the terms and conditions of the employees’ H-1B jobs. H-1B workers should retain this document in their records for the duration of their employment. U.S. Department of Labor. “Wage and Hour Division: H-1B Program.”
immediate circumstance for the employee in the case of termination, employer obligations should also be in place – yet they are not.

5.3 Disclosed Cheap Exploitable Labor

In January 2016, Julia Preston reported in The New York Times that two Americans had filed lawsuits in federal court in Tampa, Fla., against Disney, HCL, and Cognizant – global consulting companies – claiming that companies brought in foreign workers to replace them. They had also found that an additional 250 tech workers at Disney had been dismissed at that same time. The plaintiffs claimed that the companies conspired to break the law by using H-1B visas to bring in immigrant workers, knowing that American workers would be displaced.

Ms. Dena Moore, one of the Americans laid off by Disney who had worked at the company for ten years, said: “I don’t have to be angry…[b]ut they are just doing things to save a buck, and it’s making Americans poor.” Preston reported that there are many other similar stories in which American workers – mostly in technology, but also in accounting and administration – had lost jobs to foreigners on H-1B visas, mainly from India. These foreign workers were found to be provided by outsourcing companies, which have figured prominently in the H-1B visa problem.

Disney’s story reveals that companies want cheap, exploitable, and disposable labor, even while immigration policy should not undermine Americans’ jobs, wages, or

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28 Preston, Julia. (2016, January 25). Lawsuits Claim Disney Colluded to Replace U.S. Workers With Immigrants. The New York Times. Ron Hira testified for the Disney and Southern California Edison (SCE) cases. According to Computer World and The Los Angeles Times, in 2014, like Disney, the SCE fired or laid off, and then replaced American workers with H-1B workers hired by outsourcers Tata and Infosys. According to The New York Times, the Labor Department was starting investigations of the outsourcing companies, which were the direct employers of the temporary immigrants at Disney and SCE. More than 30 former Disney workers also filed complaints with the federal Equal Employment Opportunity Commission, claiming that they faced discrimination as American citizens.
working conditions. The problem is that the system can be manipulated into giving employers rather than workers more than their fair share of benefits and power. The H-1B program was created to allow companies to fill gaps in their work force with specialized employees that cannot be found in the U.S. However, the law enables companies to exploit H-1B workers. Companies can legally meet labor demand in the IT sector with imported workers who are employees of outsourcing firms, rather than with employees who are truly specialized and cannot be found in the U.S. This demonstrates how law on the books can be readily thwarted by the power an employer has over an employee, who relies on the employer for visa status.

The management of a “just-in-time employee”\textsuperscript{29} and delivery of a skilled workforce have spread across IT industries and have been transplanted to U.S. companies. In the efforts to keep employee lists and minimize the obligations associated with maintaining in-house labor pools, U.S. companies externalize IT projects. When unable to find workers for clients’ requests, companies contact outsourcing firms about their employee lists. Outsourcing firms dedicated to just-in-time employment require a logistics staff to schedule employees and balancing clients demands with availability of workers. To continuously work on projects, H-1B workers must be located wherever they can find contracts. Since projects are often dispersed geographically, these contract workers are often required to relocate to different states. Meanwhile, subcontracting firms

\textsuperscript{29} Just-in-time employment/staffing refers to an employment method used for a sector of the American workforce whose schedules are designed for whether business needs them or not in a temporary, long-term, part time, or seasonal placement. Just-in-time manufacturing was developed by Toyota Motor Corp. to control system of production. By relying on clients’ requests, it eliminates waste due to over-employment and lowers costs to employers. Workers are monitored and quickly alternated to meet changing demands. TOYOTA: Just-In-Time: Philosophy of complete elimination of waste.
obtain most of the workers necessary for the execution of the projects.\textsuperscript{30} When subcontracting on a transnational scale hires temporary foreign workers, the logic and practice of flexible subcontracting restructures the meaning of employment in advanced capitalism via mainstream resource mobilization.\textsuperscript{31}

Outsourcing firms are employers that legally hire H-1B workers for companies that rent, rather than hire workers. These firms are able to offer low-cost temp workers without the trouble of having to hire, train, supervise, and fire them. This employment relationship began in the late 1960s as a result of deindustrialization, globalization, and deep economic recessions. In order to compete in an unstable economy, employers had to become “lean and mean.”\textsuperscript{32} This translated to the creation of the temp industry, which downsized and outsourced employment, cut wages, and attacked unions as a means of survival.\textsuperscript{33} Employers needed flexibility and the temp industry was there to provide it.\textsuperscript{34}

The problems faced by workers involved in triangular employment relationships present myriad questions. These workers are employed by the outsourcing firms – the provider – which perform services for a third party – the user – to whom their employer provides labor or services. For these workers, though their employment status is not undeniable, they frequently face difficulties in establishing who their employer is, what their rights

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\textsuperscript{32} Hatton, Erin. (2011). \textit{Temp Economy: From Kelly Girls to Permatemps in Postwar American}. Philadelphia, PA: Temple University Press. Hatton discusses that during the deep economic recessions of the 1970s. Temporary employment skyrocketed from 185,000 temps a day to over 400,000 in 1980 — the same number employed each year in 1963. Nor did the numbers slow when good times returned: even through the economic boom of the ’90s, temporary employment grew rapidly, from less than 1 million workers a day to nearly 3 million by 2000.
\textsuperscript{33} Moore, Mack A. The Temporary Help Services Industry: Historical Development, Operation, and Scope. \textit{Industrial Relations Research Center at the University of Wisconsin}. Volume: 18 issue: 4, p. 554-569.
\end{flushleft}
are and who is responsible for them. A wide variety of contracts can be used to formalize an agreement for the provision of work. Such contracts can have beneficial effects for the provider’s employees in terms of employment opportunities. Such contracts may also present technical difficulties as the employees concerned may find themselves interacting with two interlocutors.

Triangular employment relationship roles are assumed separately or jointly by more than one person when they are hired to perform services for users. These roles include assigning tasks, providing the means to perform, supervising their performance, paying wages, assuming risks, making profits, and terminating the employment relationship. The employees may reasonably wonder who is in fact employer. For example, workers may not know from whom exactly to claim payment of remuneration or benefits for an accident at work, and whether they can file a claim against the user. By law, employers are primarily responsible for the rights of their employees whether they are a contractor, an employment agency, an employment agency, a cooperative or any other employing entity. However, the role of the user can be crucial with respect to ensuring the observance of these rights, such as guaranteeing limits on working hours, rest breaks, paid leave, etc.

Triangular employment relationships create *de facto* ambiguity, which leads to misuses of power and worker abuse, even though the relationship among three parties is *de jure* and allowed by law. Thus, the law itself has created the nebulous conditions for employees to effectively be forced to accept lower wages and give-up their rights.35 The

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growing divergence between the law and the reality of this employment relationship needs to be taken into account in order to close this harmful gap.

5.4 Indentured Servants and Skilled Indian Workers

As H-1B workers have been target of the opposition against what is clearly a flawed temporary visa program that privileges corporate flexibility at the cost of workers both American and immigrant, Paula Chakravartty – a professor of Media, Culture, and Communication at the New York University – argues that there are a key reason Indian H-1B workers adhere to this system. These reasons reflect distinct class and caste backgrounds and are connected to their experiences in the U.S. as well as their sense of possibilities in terms of returning to India. There complicated reasons classify these high-skilled workers as “indentured servants” who understand their unequal role in global economy.

Chakravartty took a survey of over 3,000 skilled migrants – 2,000 of which were of Indian origin. These immigrants were subcontracted tech workers with H-1B status. She completed open-ended interviews by telephone conversation with 200 of them – 121 of whom were of Indian origin. The demographic characteristics of the 121 Indian workers were that they are the young, male H-1B workers established by earlier studies. Seventy-three percent were under 35 years of age and 84 percent of the workers were male. Sixty percent of the interviewees held undergraduate degrees from India, while less

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36 Immigrant means a permanent resident as green card holder. H-1B visa holder is a non-immigrant visa, allows U.S. employers to temporarily employ a foreign worker in specialty occupations. USCIS.
than 10 percent had a postgraduate degree from the U.S.\textsuperscript{39} Most of the interviewees were recruited in India on campuses or through offshore companies. There were a smaller number of workers whose visas were sponsored directly by their company of employment, and these workers had a more positive experience overall. By speaking seriously to H-1B workers in the U.S. Chakravartty considered a wide range of perspectives as representative sample opinions providing insight into the facts.

She was interested, however, in those workers who had come through “bodyshops,” with the general assumption that they were more likely to face potentially exploitative situations. Bodyshops are job-contracting firms that recruit foreign professionals in order to hire them out to major U.S. companies at a profit.\textsuperscript{40} The strategy of these companies is to attract IT workers and contract their skills on a short-term basis for off-shoring, outsourcing, and cloud computing. In the 1970s, a growing shortage of engineers for the expanding computer industry in the U.S. and Europe, and oversupply of Indian engineers relative to domestic demand, and a growing international reputation for the skills of Indian engineers provided an opportunity for bodyshops. This is when India firms begin sending their engineers overseas to do software programming on-site, mostly in American firms.\textsuperscript{41}

Chakravartty’s interviewees disclosed that the management of the “bodyshops” was most often Indian or Indian American, and that many of them have experienced cases of mistreatment, false information about pay, hours of work, sudden relocation, and

a practice of outing workers who were in between jobs and waiting for the employer to assign them a new project. There were also multiple cases of bodyshops illegally holding immigration documents in order to prevent workers from seeking alternate employment.

Although Rafael Alarcon reported that a job in Silicon Valley leads to much higher wages, better research opportunities, and middle-class status, Indian professionals complained about receiving lower wages than native-born professionals in similar positions as well as the existence of a glass ceiling that prevents them from obtaining significant management positions. In fact, the Federal Glass Ceiling Commission found that Indian males with at least bachelor’s degrees were less likely than the total population of Asian, Pacific Islander, and white males to be in management positions.

5.5 Substitution for Skilled Labor Force: the B-1 Visa

Payal Banerjee, a professor of Sociology, interviewed Indian IT professionals in the U.S. and India between 2001 and 2005. Her paper revealed that although these workers were executing projects managed by leading consulting firms whose clients were world-famous U.S. multinational manufacturing and electronics corporations, these immigrants were neither employees of the U.S. companies nor of the consulting firms. Rather, the workers were represented by subcontracting firms. Some engineers obtained a B-1 visa in a matter of weeks, as the U.S. clients were in a rush to begin a project and

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44 Between 2001 and 2005, Payal Banerjee conducted interviewed, approximately 40 interviews at select work sites in four different locations on the East Coast and one in the South, along with interviews with managers and human-resources personnel. All interviewees had a bachelor’s degree and more than 50% had post-graduate degrees in engineering or management. Participants aged between 25-40 years of age.

45 B-1 visa holders can stay in the U.S. for a short duration of under six months without having to obtain local employment or receive income from a U.S. source U.S. Citizenship and Immigration Services.
the subcontracting firms decided to send them on a B-1 instead of the H-1B, as the former requires less processing time.

The B-1 visa is very limited non-immigration visa, granted to workers participating in commercial or professional business activities for a maximum of six months – which could be extended to one year.\textsuperscript{46} In the other word, it is an extended business travel visa under which workers do not have to obtain local employment or receive income from U.S. source. Ishani Duttagupta reported that when a large number of Indian companies have misuse B-1 visa, they may be trying to save time and money by sending employees on a B-1 visa rather than go through the formality of filing H-1B petitions and paying hefty fees. But using the incorrect visa is often due to lack of knowledge about the process and consequences. In fact, applications for B-1 instead of H-1B are very complicated, and the work product that the employee produces then belongs to the foreign company. In addition, the applicant must possess special knowledge and skills as required under H-1B guidelines.\textsuperscript{47}

This decision to send worker on a B-1 visa critical, since the B-1 does not count as a work visa and its holders therefore do not have legitimate workers status in this country. They cannot claim any of the legal protections and entitlements that come with being recognized as part of the U.S. labor force. Having foreign workers on the B-1 visa does, however, save subcontracting employers money on Social Security and taxes. Moreover, subcontracting firms are able to offer attractive rates to clients and consulting firms and take advantage of flexible hiring at lower costs in order to maintain their competitiveness in the global economy.

\textsuperscript{46} U.S. Citizenship and Immigration Services. B-1 Temporary Business Visitor.
\textsuperscript{47} Duttagupta, Ishani. (2011, August 07). Beware of B-1, use H-1B: Indian IT cos now need to be extra cautious when using the business visa in place of a work permit. \textit{The Economic Times}. 
As a result of their employers’ decisions and the overall corporate goal of flexible accumulation, foreign workers on the B-1 who carry out projects in the U.S. experience anxieties about working at client sites on a visa that is not used for employment. The B-1 creates a situation where no American company has any direct responsibility over these foreign workers. Regardless, workers’ lives depend on what their U.S. contract has decided for them. This indicates that the terms of the visa and the treatment of this workforce categorize the construction of this immigrant workforce as marginal.

Although the foreign employees Banerjee interviewed were living in the U.S., their primary salary was based on Indian market rates, to which an inadequate overseas’s living allowance was added to make up for the difference in higher living costs in this country. For example, one of the interviewees disclosed that his salary came from India and that he had to pay rental apartment fees in the United States. Through interviews with Indian IT workers on the H-1B, Banerjee found that even they subject themselves to considerable hardships and unstable work conditions, such as “frequent relocations, frugal lifestyles to recompense episodic unemployment, keeping possessions minimal to ease the burden of repeated unreimbursed moving, deferring the establishment of long-term households, delaying marriage or having children, and separation from family” (p537). These narratives illustrate that skilled immigration visas have made vulnerable, subordinate workers a reality in the name of economic development.

5.6 Narrative of the OPT Extension for STEM Students

While proposals to increase the number of H-1B visas have stalled in Congress amidst debate over comprehensive immigration reform, OPT is available for foreign STEM students in the U.S. who have elected to pursue visas lasting from 12 to 36 months.\(^{51}\) This program was designed to be part of the education process by providing work experience for recent graduates who learned practical skills in school under F-1 visas,\(^ {52}\) and is operated under administrative rules without congressional authorization.\(^ {53}\) Despite its educational claims, however, I argue that the OPT extension should be understood as a way to solve a so-called skilled worker shortage through the use of international student migration.

Neil G. Ruiz, a policy analyst at the Brookings Institution’s Metropolitan Policy Program, indicated that as 45 percent of foreign student graduates extend their visas to work in the U.S.,\(^ {54}\) 38 percent of all F-1 and M-1 students happen to be studying in STEM fields.\(^ {55}\) In addition, the U.S. Immigration and Customs Enforcement (ICE) reported that 1.05 million foreign students with F-1 or M-1 status were studying in U.S. colleges or universities between 2015 and 2016.\(^ {56}\) Students from Asia make up 76 percent

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51 Established in 1992, the Optional Practical Training Program allows F-1 visa holders to work full-time in the U.S. after graduation. In 2012, the United States Department of Homeland Security (DHS) announced an expanded list of STEM degrees that qualify eligible graduates with student visas for an optional practical training (OPT) extension. Under the OPT program, international students who graduate from colleges and universities in the United States are able to remain in the country and receive training through work experience for up to 12 months. Students who graduate from a designated STEM degree program can remain for an additional 17 months on an OPT STEM extension. Wasem, Ruth, E. (2012, May). Immigration of foreign nationals with Science, Technology, Engineering, and Mathematics (STEM) degrees. Congressional Research Service, Library of Congress.


of that number. For example, China – with 328,547 students – has more international students studying in the U.S. than all the countries of Europe, South America, and Africa combined.\textsuperscript{57} For seven years, it has remains the leading place of origin for students coming to this country.

The United States continues to experience a growing number of undergraduate students from China and a new upsurge of recent graduates undertaking OPT. Between 2015 and 2016, 41.3 percent of all undergraduate, 37.5 percent graduate students, 5.3 percent of “other” students came from China. Additionally, 15.9 percent OPT, which was up 21 percent from last year.\textsuperscript{58} In comparison, during the same academic year, India held the second leading place of origin for students coming to the U.S., comprising 15.9 percent – 165,918 and up 24.9 percent from the previous year – of the total international students. However, the majority of Indian students here study at the graduate level. Their breakdown was 11.6 percent undergraduate; 61.4 percent graduate students; 1.5 percent other; and 25.5 percent OPT.\textsuperscript{59} According to Murat Demircl, students who stayed in the U.S. after completion of study in 72 percent on average and 89 percent of students in STEM fields at the master’s level stayed, marginally higher than at the doctorate level.\textsuperscript{60}

There was very little public debate due largely to a budget fight between President Bush and the Democrats when OPT program was established on 1990.\textsuperscript{61} In the Act of 1990 under the McDonald’s Program,\textsuperscript{62} foreign students were given work permits at off-

\textsuperscript{58} Open Door Fact Sheet: China. Institute of International Education.
\textsuperscript{59} Open Doors Fact Sheet: India. Institute of International Education.
\textsuperscript{62} §101(a)(15)(F), F-1 --- IIRIRA § 641 requires the Atty. General, in consultation with the Sec. of State & Sec. of Ed. To collect individualized information from colleges and universities on every foreign student
campus specifically at the burger chain as well as on certain on-campus research projects. Although this program was found to have adverse effects on the job opportunities in the labor markets surnaming the foreign students, programs for F-1 visa holders have grown into a far wider program.

DHS announced the STEM OPT extension in the Federal Register on April 8, 2008. U.S. high-tech companies for years had called on Congress to increase the cap on visas for skilled foreigners. Before the STEM OPT extension, on the March 12, 2008, Microsoft Chairman Bill Gates warned lawmakers in testimony to Congress that the U.S. risks losing its competitive edge in technology unless it can secure qualified workers.63 Bill Gates stated, “Extending OPT from 12 to 29 months would help to alleviate the crisis employers are facing due to the current H-1B visa shortage. This only requires action by the Executive Branch, and Congress and this Committee should strongly urge the Department of Homeland Security to take such action immediately.”64

After Gates’s testimony, two bills were introduced by legislators to raise the quota of H-1B visa program. A bill sponsored by Rep. Lamar Smith, a Texas Republican, would bring the number of H-1B visas to 195,000 from 65,000 a year. A bill drafted by Democratic Rep. Gabrielle Giffords of Arizona would increase the cap and exempt foreigners educated at U.S. institutions from the quota. However, critics concerned that the H-1B program takes jobs form U.S. citizens, lower wages and is exploited by foreign

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they enroll. F-1 must demonstrate sufficient funds, also stringent restrictions on employment (only 20 hours on campus as part of educational program during school session, and 40 hrs. during vacation) Off campus only allowed when unforeseen circumstances make it necessary (Also McDonald’s program – can work 20 hours off campus at McDonalds); can also engage in some practical training. This is called CPT program. 63 Network World “Bill Gates written transcript from today’s congressional testimony.” 64 Hearing before the Committee on Science and Technology Hose of Representative, Second Session. (2008, March 12). Serial No.110-84. Competitiveness and Innovation on the Committee’s Anniversary with Bill Gates, Charmin of Microsoft. House Hearing, 110 Congress form the U.S. Government Printing Office.
companies, particularly from India, that send workers to the U.S. for training and then return them home. Some lawmakers, worker-advocacy group and immigration restrictionists\textsuperscript{65} had expressed strong opposition to bringing more foreign workers to the U.S.

A conglomerate of anti-H-1B organizations including the Immigration Reform Law Institution and the Programmer Guild filed a lawsuit in the U.S. District Court in Newark, NJ on May 29, 2008 against the OPT STEM extension of 2008. It challenged the authority of the DHS regulation unlawful. This extension rule implemented just before the H-1B season, allow F1 students with STEM degrees to extend their tenure from 12 months to 29 months and allowing them to F1 status until their H-1B are processed and the work start date of October 1\textsuperscript{65} is reacted. The anti-H-1B conglomerate has termed the move as a way around the H-1B cap and that the “fix” has no actual legal basis and has been pushed forward as most of the immigration registrations were ground in the pre-election atmosphere. On August 2008, the lawsuit was rejected by the NJ District Court.\textsuperscript{66}

In November 20, 2014, while Obama’s Administration announced immigration executive action, the memo from Secretary Jeh Charles Johnson contained the guidelines for changed to the OPT program.\textsuperscript{67} The memorandum included increasing the length of the STEM extension, expanding the set of degree programs eligible for the STEM

\textsuperscript{65} According to John Burnett, a new generation of immigration restrictionists thinks it is time to reduce the immigration overall flow for economic development. However, their three goals; limit the number of foreign nationals who are able to get green cards by family reunification. Cut the number of refugees, and eliminate the DV lottery. “Republican Lawmakers Propose New Law to Reduce Legal Immigration.” (2017, February 7). npr.
\textsuperscript{66} Civil Case No. 08-2666 (FSH). (2008, August 5).
extension, and allowing people to be eligible for the STEM extension based on their undergraduate degree program, even if that was outside the U.S.

Before the immigration executive action, in March of 2014, the Washington Alliance of Technology Workers (WashTech), a collective bargaining organization, sued the U.S. Department of Homeland Security (DHS), stating that the 17-month STEM OPT extension passed by DHS in April 2008 did not follow standard rule-making processes, such as including a notice and comment period, and is therefore, invalid. Moreover, WashTech claimed that the OPT program creates unfair job competition for American tech workers by providing a channel for employers to exploit low-wage foreign labor.

Regarding WashTech’s case, the District Court found that establishing the STEM OPT benefit in 2008 was within the scope of the DHS’s regulatory authority, despite the DHS’s failure to provide notice and invite public comment at the time of its 2008 rule. Also, the court did not take issue with DHS’s explanation for F-1 student classification, which includes employment for training purposes and additional training time for graduates of designated STEM fields of study – part of the 2008 12-month STEM OPT extension rule. The Court gave DHS through February 12, 2016, to reissue the rule and correct the deficiency and DHE requested an extension until May 10, 2016 to meet the District Court requirements, which the Court has granted. DHS has reformulated the new 24-month STEM OPT rule was effective May 10, 2016 (81 FR 13039).
This rule has added skilled temporary workers in STEM fields during the controversy over immigration reform. The DHS circulated a memorandum regarding new immigration policies and requested regulations to support U.S. businesses and high-skilled workers that direct USCIS and ICE to require “stronger ties to degree-granting institutions to better ensure” that OPT furthers a student’s academic program (2014, p.3). These requested regulations show that the administration is aware of domestic worker concerns while also providing foreign students with OPT employment the same protections available to U.S. workers in related fields. Nevertheless, though the Washington Alliance of Technology Workers’ 2015 lawsuit forced the government to vacate the previous rule and create a new rule for IT employers, the ruling was still in favor of business interests.

WashTech workers had standing to sue on grounds alleging injuries to some of its members, who asserted that they faced increased competition in the job markets as a result of the 2008 17-month STEM OPT extension. According to economist Ron Hira, in his Congressional Testimony on March 17, 2015, OPT workers are potential competition to American workers in STEM fields because there are virtually no rules to protect American workers when OPT workers are used to replace and undercut American workers. OPT does not have a wage floor, a cap, recruitment requirements, non-displacement, or federal scrutiny and oversight. Therefore, companies save money by

rule. On April 19, 2017, the District Court dismissed WashTech’s suit and found that failed to enough state a claim due to relief could be granted against the 24-month STEM OPT rule. Focus on STEM OPT. (2017, April 20). NAFSA.
hiring unregulated foreign workers who are allowed to remain in the U.S. via the OPT extension. B. Lindsay Lowell, a researcher professor at Georgetown University, estimated that OPT workers are paid a mere 40 percent of equivalent U.S. workers’ wages. Additionally, Ron Hira stated that many of the major beneficiaries of the OPT STEM extension are obscure universities with dubious credentials. For instance, in 2011, USCIS investigated the unaccredited University of Northern Virginia for improperly handling student visas when it received 189 OPT STEM extensions.

This rule is a de facto means to add skilled temporary workers in STEM fields during the controversy over immigration reform. The DHS circulated a memorandum regarding new immigration policies and requested regulations to support U.S. businesses and high-skilled workers that direct USCIS and ICE to require “stronger ties to degree-granting institutions to better ensure” that OPT furthers a student’s academic program. These requested regulations show that the administration is aware of domestic worker concerns while also providing foreign students with OPT employment the same protections available to U.S. workers in related fields. Nevertheless, though the Washington Alliance of Technology Workers’ 2015 lawsuit forced the government to vacate the previous rule and create a new rule for IT employers, the ruling was still in favor of business interests and was unfortunately, not actually supportive to the needs and concerns of domestic workers.

5.7 Benefit and Drawbacks of the H-1B

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The H-1B visa gives a significantly different status to immigrants because workers on the H-1B visa are regarded as employees in the U.S., and this allows them to obtain necessary benefits, such as bank accounts, a driver’s license, and a Social Security number. However, the social and legal position of such immigrants is contingent upon being and staying employed. Continuous employment in the context of flexible subcontracting is filled with contradictions, as H-1B immigrants in IT fields are also most likely to be employees of subcontracting companies and hired to work on projects on a contract basis. They can be contracted out to a chain of other subcontracting companies for final placement on a project. The direct employers bill the next layer of subcontractors on behalf of their H-1B employees on an hourly basis and split the income with their H-1B employees on a predetermined ratio. In other words, the subcontracting employer’s role is to process and hold the immigrants’ H-1B visas and take a “commission” of their employees’ hourly billing rate. When a project ends, the workers have to find new projects that are dependent on their contract – on their own time and money. In her paper, Banerjee describes this period as being referred to as “the bench” (2000, p103).  

An H-1B holder sponsored by a subcontractor of a national telecommunications company expressed the bench experience of a few colleagues in his interview. After one or two weeks on the bench, their salaries went down by 50 percent. After three or four weeks, their salaries became zero. Benched employees’ salaries and benefits are decreased or stopped completely. In addition, these immigrants fear possible layoffs if their bench period extends over several months. For this reason, the obligation to stay

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employed in order to maintain legal status falls directly on the individual workers. Many employers are aware of these immigrants’ dependence on their employers for legal standing, and impose a range of tactics to make use of the situation to their own advantage. Under such unpredictable and unstable conditions, H-1B workers are often compelled to accept exploitative demands. Although the practices of decreasing salaries or cutting benefits are unlawful, the fear of losing employment and their legal status prevents many immigrants from reporting their employers to the appropriate authorities. The interdependence of employment and legal status places H-1B workers in a very vulnerable position. Changing incomes compounded by insecurity about the viability of their jobs and legal standing creates anxieties about being eligible for temporary nonimmigrant visas.

5.8 Conclusion

The H-1B visa program elicits concerns about both American workers and the fair and ethical treatment of foreign workers. Paying foreign workers less than the prevailing wage set by Congress to ensure that H-1B workers are not being paid below-market wages is a violation of the law. Moreover, when a worker’s immigration status is tied to one single employer – as it usually is – the relationship becomes ripe for illegal employment abuse. Concerning the effect on U.S. workers, reports continue to show claims that companies bring in lower-paid foreign workers to replace American laborers, which amounts to illegal discrimination against Americans.

The various visa systems have created an immigrant worker-dependent subcontracting complex in the IT industry, a system from which this sector in the U.S.
benefits enormously. The visas appear to be rather advantageous for the deployment of these foreign workers to clients for purposes of sustaining a flexible and fragmented employment regime. The visas’ function and applicability are most clearly articulated when it comes to defining the workers relation to their employers, for the same visas meant to protect workers fail in their purpose because of the real threats these workers face of losing their visa status, enduring employer abuse, and suffering virtual dependence on their sponsors. It is quite clear that the visa status granted to skilled immigrant workers seems to have credence with a narrowly defined sphere of employability and labor that exists in favor of capital need. However, immigrant workers with documented status have inadequate protections. While the visas are able to define immigrants as value-producing units and bearers of the many advantages of flexible accumulation, they are unable to endow them with a wide range of entitlements.
Chapter Six: Conclusion

The H-1B visa confers legitimacy on foreign workers and representatives of foreign firms operating in the U.S. However, the effect of this visa on the lived experiences of documented immigrant workers – typically immigrants from India in the IT field – exposes the logic of exploitation and power imbalance in its provisions. Though facially-neutral skilled immigration policies are not visibly meant to apply specifically to any particular population, they are used in ways that disproportionately impact certain groups; the laws allows employers to control skilled foreign workers who accept low wages.

Writing in *The Wall Street Journal*, columnist Paul Donnelly (2002) quoted Nobel Prize winning economist Milton Friedman as stating unequivocally that the H-1B system was a “subsidy.”¹ According to Donnelly, Friedman said that the U.S. government is stocking Microsoft, Facebook, Apple and others with much cheaper H-1B visa holders. At first, Donnelly reported that Harris Miller, the head of the information Technology Association of America, told an interviewer at the Chicago Tribune that the H-1B is a kind of “minor league,” a farm team for the IT industry. Donnelly wrote to Friedman, citing Miller’s quote and asked: “What is a subsidy?” Friedman responded, saying: “The majority of H-1B immigrants do manage by hook or crook to get permanent residence and become citizens, so as a factual matter they are not a ‘farm team’ of indefinitely

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temporary workers. Yet, there is no doubt that the program is a benefit to their employers, enabling them to get workers at a lower wage and to an extent, it is a subsidy.”

Employers can fire American IT workers and replace them with outsourced, temporary employees from India, without directly hiring these foreign workers. The fundamental problem with IT outsourcing firms’ employment practices is its exclusion of U.S. workers, made possible by specially manipulated legislation benefitting American companies. Rather than squeezing their business, employers have taken advantage of a loophole that allows them to lower wages and cut benefits. Companies are able to convert their employment system to outsourced, temporary workers because de jure law hardly functions as a rule and is not strictly enforced. Employers are able to increase their supply of temporary workers in order to reduce costs, while offering lower salaries that simultaneously drive off domestic workers.

Meanwhile, when high-skilled foreign workers wish to remain in the U.S., they face threats to their visa status: If these workers lose their jobs and are unable to find new employment under the same job title, their options are either to return home or to remain illegally in this country. In the fact of an exploitative system of subcontracting, detrimentally employed Indian labors must maintain their fragile immigration status under the H-1B visa’s terms. As an employment-based visa, the H-1B makes these workers dependent on their visa-sponsoring employers for immigration status. The pressure to remain legally employed drives H-1B employees to accept abusive working conditions, including wage cuts, lack of benefits, and frequent relocations.

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The OPT program also plays an important role to American companies’ exploitation of foreign workers because the program is subject to essentially no federal scrutiny or oversight. The duration of the STEM OPT extension was recently increased to up to three years per STEM degree for foreign STEM graduates, yet Congress has never explicitly authorized the employment of foreign students. As a result the OPT extension program provides easier access to foreign workers for the U.S. labor market than the H-1B visa, which requires time-intensive and costly employer sponsorship with restrictive quotas. The OPT program, on the other hand, has virtually no rules overseeing the employment of international students. There workers are not protected by enforceable wage standards. The STEM OPT programs effectually creates *de facto* guest workers, i.e. cheap labor, since employers are not obligated to pay federal payroll taxes on these laborers. This generates a significant financial incentive for employers to hire OPT workers instead of H-1B employees for STEM jobs.

In conclusion, the gap between law on the books and law in action regarding foreign STEM workers is complex and complicated. We must go beyond identifying this gap to consider the actual living conditions of skilled guest workers whose lives are dictated by the way the law on the books is interpreted and enforced. We must also consider how these laws in action are utilized to bolster certain interest groups and maintain social control. Although there is no concrete proof that laws governing skilled foreign workers affect racial attitudes towards these workers, these laws can and do influence relationship between the goals and effect skilled immigration regulations, a correlation between the laws’ enactment and racial behavior against skilled immigrant may be proven.
Yet, the significance of reformist laws is often largely symbolic. In April 2017, the government announced H-1B visa program reforms in order to clamp down on outsourcing firms, encouraging employers to instead focus on worker merit. This was done in order to prevent Americans from losing out on jobs that have tended to favor cheaper, more expendable Indian tech laborers. At this time, however, there is also concern about rising visa denials due to a less welcoming climate in the U.S. regarding individuals from Muslim countries. Despite H-1B reforms, it is possible to have a difficult time obtaining a visa to study and work in the U.S.

Finally, we must question to what extent a valid visa status confers adequate protection and legitimacy. Employers want access to cheap, flexible labor, and they willfully exploit workers in the temporary guest workers program in order to meet their business agenda. Meanwhile, politicians have repaid special interests for their support by developing an H-1B visa program rife with opportunities for exploitation. Though Americans have frequently debated reforming the temporary guest worker program in order to protect American jobs, from a humanitarian perspective, it is perhaps essential to rethink who the vulnerable workers actually are.

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3 The executive order did not take direct action but asked federal departments to make proposing reform to the H-1B visa program. It would be given to higher-skilled, higher-paid workers – like those workers with master’s degrees. Raising application fees would be possible. Diamond, Jeremy. (2017, April 18). Trump pushes “Buy American, Hire American” policy in Wisconsin. CNN.
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