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POLICY RECOMMENDATIONS ON
EMPLOYMENT-BASED IMMIGRATION FOR THE NEW
PRESIDENT AND CONGRESS

EXECUTIVE SUMMARY

The next two to four years will be contentious on immigration, with a real threat that even high-skilled legal immigration will face new restrictions. This research finds among the key facts and principles upon which to judge new legislative and regulatory proposals on high-skilled immigration are the following:

Principle 1: Given Their Contributions and Our Country's Implicit Support for Their Education, America Should Facilitate the Ability of International Students to Work in the United States After Graduation.

- Today, 77 percent of the full-time graduate students in electrical engineering and 71 percent in computer science at U.S. universities are international students. Since it can take many years to sponsor an employee for permanent residence (due to bureaucratic rules, low annual limits and the per country limit), an H-1B visa remains often the only practical way for international students or other highly skilled individuals to work long-term in the United States.
- In addition to legislative changes to expand the number of H-1B visas and employment-based green cards, the most important measure to retain international students may be keeping in place the March 2016 regulation on Optional Practical Training (OPT) that codified an extension beyond 12 months for international students with degrees in science, technology, engineering and math (STEM). After being approved for OPT status, an international student can work for any employer for 12 months (if that employer meets its program obligations) and, under the new regulation, for an additional 24-month extension for degrees in a qualifying STEM field. Since 1947, the federal government has recognized that the law permits international students to work in America after completing their studies.
- Several countries, such as Australia, Canada, Germany, France and Singapore, have better policies than the United States for retaining international students. Such students make valuable contributions to America. But without the proper policies in place the vast majority will return home and work for foreign competitors or in other countries, developing innovations and fostering job growth outside the United States.

Principle 2: U.S. Policies Should Recognize that Labor Mobility is Important.

- The 140,000 limit on employment-based green cards – approximately half of which go to dependent family members – has not changed since 1990. Meanwhile, the U.S. labor market has seen an explosion in the demand for high-skilled labor fueled by the World Wide Web, smartphones, mobile applications, social media and other innovations. Even though, contrary to popular belief, an individual in H-1B status can change jobs, a problem arises when an individual in H-1B status has applied for an employment-based

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green card and the wait time becomes so long that he or she is reluctant to change employers for fear of triggering a new green card application.

- While individuals can change jobs in certain circumstances without having to start a new green card application, that is not a certainty, nor as good as obtaining an employment authorization document (EAD) that permits complete mobility in the labor market. It is unfortunate that the Obama Administration had the authority to solve this problem but chose not to use that authority in its recent AC21 regulations. Absent more fundamental reform to the way high-skilled work visas are issued, such as to the individual worker with an employment authorization document and permanent residence after 3 years, the best reforms are eliminating the per country limit and increasing the number of employment-based green cards issued.

Principle 3: One of the Best Ways to Keep More Work in the United States is to Allow High-Skilled Foreign Nationals to Work in America, Rather Than Companies Sending Would-Be Immigrants and Their Accompanying Jobs, Investment and Innovations Outside the United States.

- The existence of a global labor market means new restrictions on high-skilled foreign nationals, including on foreign nationals who provide services in the United States, will result in more work being performed outside the United States.
- Increases in productivity bring higher wages and high-skilled foreign nationals play an important role in increasing productivity in the United States. Research by economists Giovanni Peri, Kevin Shih and Chad Sparber found, “[I]nflows of foreign STEM workers explain between 30% and 50% of the aggregate productivity growth that took place in the United States between 1990 and 2010,” and “A 1 percentage point increase in the foreign STEM share of a city’s total employment increased the wage growth of native college-educated labor by about 7–8 percentage points.”
- Immigrant-led startup activity provides more evidence of the dynamic at work on high-skilled immigration. “Immigrants have started more than half (44 of 87) of America’s startup companies valued at \$1 billion or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies,” according to a 2016 National Foundation for American Policy study. Reducing or, in effect, eliminating high-skilled immigration through new restrictive measures would significantly lower startup activity in the high tech sector.
- According to experts who advise companies on outsourcing decisions, two important facts about contracting out, including offshoring, are: 1) Companies make decisions on whether to outsource and make layoffs *before* a contract is put out for bids among contractors; and 2) H-1B visas play a minor (if any) role in this

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process, often during the transition phase from the old to the new contract. It is during this transition phase, when a foreign national is spotted on-site at a company, that employees and others start to blame the foreign nationals for layoffs that would have happened whether any foreigners appeared on-site or if a different contractor, including one employing entirely U.S. workers, had been chosen to service the contract.

- In the past two years, new immigration restrictions have been proposed following negative media stories involving layoffs at Disney and Southern California Edison, layoffs that closer examination reveals would not have been averted regardless of U.S. immigration policy. There is no evidence that any of the legislative measures that have been proposed in Congress would have changed the decisions by Disney and Southern California Edison to contract out work to outside firms specializing in information technology services. In both cases, the companies had a choice of service providers and had made the key decisions on outsourcing long before the contracts were awarded.

Principle 4: Unless Congress Provides a New and Viable Alternative, H-1B Visas Are the Only Practical Way for High-Skilled Foreign Nationals to Work Long-Term in the United States.

- Several members of Congress would like to empower the U.S. Department of Labor to take a significant role in high tech hiring decisions and to decide whether an employee should go to perform services at a customer's site. Approximately 20,000 employers in America hire at least one foreign national on H-1B visas each year, which means the reach of new government-imposed rules on immigration against companies could be significant.
- Such measures are likely to compel employers to defend to Department of Labor investigators potentially years after the fact personnel decisions that are inherently subjective, with definitions, such as "essentially equivalent" jobs, open to varying degrees of interpretation. Since approximately 70 to 80 percent of the graduate students in key high tech fields at U.S. universities are foreign nationals, no one should be surprised foreign nationals make up a significant part of the labor pool from which U.S. companies recruit.
- The number of H-1B visas permitted annually by Congress is low and needs to be increased. The supply of H-1B visas has been exhausted during (or, at times, before) each of the past 14 fiscal years. In FY 2017, in just the first week of April 2016 (6 months before the 2017 fiscal year started), U.S. Citizenship and Immigration Services received more than 236,000 H-1B petitions. That means in just the first week the federal government received 151,000 applications more than the 85,000 limit (65,000 plus the 20,000 exemption) would allow. Every year, many thousands of highly-skilled individuals are denied the opportunity to work in America, which results in the United States failing to gain from their talents. Unless Congress

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raises the H-1B limit, simply rearranging how the small number of petitions are distributed, as some have discussed or proposed, only changes which talented people will be denied.

- To undermine support for H-1B visas more generally, critics have argued that Indian-based companies use most of the H-1B petitions approved each year. However, the 7 Indian-based companies who had the most H-1B petitions approved for new employment used 14,610 in FY 2015, or only about 13 percent of the total approved new petitions that year, and their total declined by 35 percent between FY 2012 and FY 2015. The 14,610 individuals with new H-1B petitions from the 7 leading Indian-based companies come to a tiny 0.009 percent of the U.S. labor force, while the 109,292 new H-1B petitions approved for all employers in 2015 also represents a small proportion of the U.S. labor force at 0.07 percent.
- The United States committed itself under the General Agreement on Trade in Services to not impose restrictions to prevent legitimate “trade in services” and other measures that would affect employers of all types. A National Foundation for American Policy legal analysis found, “Passing legislation with measures that violate GATS risks retaliation against U.S. companies and can undermine U.S. efforts to open markets in other nations to American goods and services.” Imposing new restrictions is also likely to harm the improved relationship the United States has been fostering with India on defense and foreign policy issues.

Imposing a vast array of new rules on companies employing high-skilled foreign nationals would contradict Donald Trump and the Republican Congress’s expressed desire to loosen the regulatory reins that have been blamed for slow growth in the U.S. economy. A number of recent legislative proposals have been breathtaking in scope and amount to micromanaging the personnel policies of America’s most innovative companies. Preventing high-skilled foreign nationals from being hired in the United States most harms U.S. workers by pushing more investment, innovations and startup activity abroad.

KEY PRINCIPLES AND POLICY RECOMMENDATIONS ON EMPLOYMENT-BASED IMMIGRATION

The 2017-2018 Congress is likely to be contentious on immigration, including high-skilled employment-based immigration. Below are a set of principles upon which to judge proposed legislative or regulatory changes.

PRINCIPLE 1: GIVEN THEIR CONTRIBUTIONS AND OUR COUNTRY’S IMPLICIT SUPPORT FOR THEIR EDUCATION, AMERICA SHOULD FACILITATE THE ABILITY OF INTERNATIONAL STUDENTS TO WORK IN THE UNITED STATES AFTER GRADUATION.

The majority of graduate students at U.S. universities in key technology fields (almost 80 percent in electrical engineering) are international students.¹ Policymakers face a choice: Maintain and establish policies that permit this valuable wellspring of talent to remain in the United States and work after graduation, including long-term on temporary visas or permanent residence, or risk losing this talent to other countries. “International students provide a key source of talent for U.S. employers and are crucial to enhancing the ability of U.S. universities to conduct research and offer high quality academic programs to U.S. students,” concluded an NFAP analysis. “International students also provide cultural and foreign policy benefits to the United States and are an important and inexpensive way to promote American ideas and values abroad.”²

In addition to legislative changes to expand the number of H-1B visas and employment-based green cards, the most important measure to retain international students may be the March 2016 regulation on Optional Practical Training (OPT) that codified an extension beyond 12 months for international students with degrees in science, technology, engineering and math (STEM).³ After being approved for OPT status, an international student can work for any employer for 12 months (if that employer meets its program obligations) and, under the new regulation, for an additional 24-month extension for degrees in a qualifying STEM field.

Concerns about a regulatory rollback of the recent regulation under the Donald Trump Administration have pushed Optional Practical Training (OPT) to the front line of concerns for employers, universities and students. OPT is a

¹ National Science Foundation, Survey of Graduate Students and Postdoctorates in Science and Engineering, <https://ncesdata.nsf.gov/webcaspar/>. U.S. students include lawful permanent residents. If one includes part-time students, 67 percent of graduate students in electrical engineering and 57 percent in computer science are international students.

² Stuart Anderson, *The Importance of International Students to America*, NFAP Policy Brief, National Foundation for American Policy, July 2013, p. 1.

³ 8 CFR Parts 214 and 274a, “Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students,” Department of Homeland Security, Final rule, March 11, 2016.

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vital part of the U.S. immigration system because it can represent the only immediate and practical way an international student can remain in the United States to work once his or her studies are completed. Although over 147,000 international students utilized OPT status in the 2015-16 academic year, surprisingly little information is known about OPT, its history and its importance.⁴

A Little History: Since 1947, the federal government has recognized that the law permits international students to work in America after completing their studies. An August 12, 2015, U.S. District Court opinion explained this history and noted, “Congress has never repudiated INS or DHS’s interpretation permitting foreign students to engage in post-completion practical training.”⁵

During the George W. Bush Administration, concerns escalated among policymakers and the business community that the 12-month time period for Optional Practical Training had proven insufficient for international students. Since the annual limit on new H-1B petitions is reached every year, if an employer is unable to secure an H-1B for an international student during the first eligible filing period it means the 12-month period of OPT would expire and the student would need to leave the country.

In an April 2008 interim final rule, the Bush Administration sought to solve this problem by allowing F-1 (international) students with (qualifying) science, technology, engineering and math (STEM) degrees to receive an additional 17 months of OPT, for a total of 29 months in OPT status. On March 28, 2014, the Washington Alliance of Technology Workers (WashTech) filed a lawsuit alleging that the “OPT program exceeds DHS’s statutory authority” and “lacked good cause to waive the notice and comment requirement” when issuing the April 2008 rule.⁶

New OPT Regulation: The district court issued an opinion that allowed the Department of Homeland Security (DHS) to resolve claims about the Administrative Procedures Act (APA) by issuing a new regulation. As a result, on March 11, 2016, following a period of notice and comment, DHS issued a final rule.⁷ The final rule makes a number of significant changes to OPT and addresses many of the concerns raised by critics, but not critics who think all international students should leave the United States after completing their studies.

⁴ “Open Doors Report 2016 Data Highlights,” Institute of International Education, November 14, 2016.

⁵ *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, Civil Action No. 14-529, United States District Court for the District of Columbia, August 12, 2015. “For almost 70 years, DHS and its predecessor, the Immigration and Naturalization Service (“INS”), have interpreted the immigration laws to allow students to engage in employment for practical training purposes. See 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947) (“In cases where employment for practical training is required or recommended by the school, the district director may permit the student to engage in such employment for a six-month period subject to extension for not over two additional six-month periods . . .”).”

⁶ *Ibid.*, p. 4.

⁷ 8 CFR Parts 214 and 274a, “Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students,” Department of Homeland Security, Final rule, March 11, 2016.

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The key elements of the March 11, 2016 OPT regulation include:

- F-1 students can receive a 24-month extension beyond the initial 12 months if their degree is in a qualifying STEM field.⁸
- Employers must implement a formal training program.⁹
- “To guard against adverse impacts on U.S. workers, the rule requires terms and conditions of a STEM practical training opportunity to be commensurate with those applicable to similarly situated U.S. workers. . . the student will not replace a full- or part-time, temporary or permanent U.S. worker.”¹⁰
- An increase in oversight with site visits, new employer requirements and limiting eligibility based on school accreditation.¹¹
- Employers using the STEM OPT extension are required to use E-Verify and “report changes in the STEM OPT student’s employment” within 5 business days. The new regulation also adds additional reporting requirements for students, and a greater focus on training and student evaluations.¹²

The Importance of OPT: “The best thing the U.S. government has done on immigration is OPT to allow international students a chance to stay and work for a time after graduation,” according to Michelle Zatlyn, a former international student from Canada who cofounded Cloudflare in 2009 with fellow Harvard Business School graduate Matthew Prince. “It allowed me to work with Matthew on the business plan that helped create the company.”¹³

Michelle used the time on OPT to start Cloudflare and obtain H-1B status, which permitted her to remain in the United States long-term. “If I hadn’t obtained the visa I would have gone back to Canada and tried to work on Cloudflare from there,” she said. “If that had happened, Cloudflare would not be where it is today. It would have clearly affected our development.”¹⁴ Today, Michelle is head of user experience at Cloudflare, a company valued at \$1 billion and employing 365 people. The company helps websites with traffic and security and there are 5.5 million websites currently in the Cloudflare network, with an average of 12,000 new customers added each day. Cloudflare is one of 44 of the 87 privately-held U.S. companies valued at \$1 billion or more with one or more immigrant founders¹⁵ Twenty-one of these 87 “billion dollar startups” had a founder who first came to America as an international student. (See Table 1.)

⁸ Ibid., p. 13041.

⁹ Ibid., p. 13041.

¹⁰ Ibid., p. 13042.

¹¹ Ibid., p. 13042.

¹² Ibid., p. 13042.

¹³ Interview with Michelle Zatlyn. Lee Holloway was the third cofounder of Cloudflare.

¹⁴ Ibid.

¹⁵ Stuart Anderson, *Immigrants and Billion Dollar Startups*, NFAP Policy Brief, National Foundation for American Policy, March 2016.

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Table 1
International Students Who Became Entrepreneurs of Billion Dollar Companies

NAME	UNIVERSITY/DEGREE	COMPANY CO-FOUNDED/FOUNDED	EMPLOYEES	VALUE OF COMPANY
Noubar Afeyan	MIT, Ph.D. Biochemical Engineering	Moderna Therapeutics	326	\$3.0 Billion
Ash Ashutosh	Penn State, M.S. Computer Science	Actifio	350	\$1.1 Billion
Mohit Aron	Rice, Ph.D. Computer Science	Nutanix	864	\$2.0 Billion
Alexander Asseily	Stanford, B.S./M.S. Elec. Engineering	Jawbone	395	\$3.3 Billion
Amr Awadallah	Stanford, Ph.D. Electrical Engineering	Cloudera	1,100	\$4.1 Billion
Jay Caudhry	Univ. of Cincinnati, MBA and M.S. Computer Engineering, Industrial Engineering	Zscaler	600	\$1.1 Billion
John Collison	Harvard	Stripe	380	\$5.0 Billion
Patrick Collison*	MIT	Stripe	(380)	(\$5.0 Billion)
Nicolas Desmarais	Amherst, B.A. Economics & Pol. Science	AppDirect	400	\$1.0 Billion
Borg Hald	Stanford, MBA, Ross School of Business (U. of Michigan), B.B.A.	Medalia	850	\$1.3 Billion
David Hindawi	U.C.-Berkeley, Ph.D. Operations Research	Tanium	300+	\$3.5 Billion
Tomer London	Stanford, M.S. Electrical Engineering	Gusto	300	\$1.1 Billion
Doron Kempel	Harvard, MBA	SimpliVity	750	\$1.0 Billion
Elon Musk	Univ. of Penn., B.A., Economics & Physics, Wharton School (UPENN), B.S. Business	SpaceX	4,000	\$12 Billion
Dheeraj Pandey*	Univ. of Texas, Austin, M.S. Computer Science	Nutanix	(864)	(\$2.0 Billion)
Adam Neumann	CUNY Bernard M Baruch College	WeWork	1,200	\$10 Billion
Dhiraj Rajaram	Wayne State, M.S. Computer Engineering, Univ. of Chicago, MBA	Mu Sigma	3,500	\$1.5 Billion
Daniel Saks*	Harvard, M.A. Finance & Accounting	AppDirect	(400)	(\$1.0 Billion)
Mario Schlosser	Harvard, MBA	Oscar Health Insurance	415	\$1.7 Billion
Eric Setton	Stanford, Ph.D. and M.S. Electrical Engineering	Tango	260	\$1.0 Billion
K.R. Sridhar	University of Illinois at Urbana-Champaign, M.S. Nuclear Engineering, Ph.D. Mechanical Engineering	Bloom Energy	1,200	\$2.9 Billion
Ragy Thomas	NYU, MBA	Sprinklr	325	\$1.2 Billion
Renaud Visage	Cornell, M.S. Engineering	Eventbrite	500	\$1.0 Billion
Michelle Zatlyn	Harvard, MBA	Cloudflare	365	\$1.0 Billion

Source: National Foundation for American Policy, company information, CrunchBase. *Denotes second international student from same company. Values and employees as of January 1, 2016. Cloudflare as of January 9, 2017.

Other Countries Have Better Policies for Retaining International Students: “The United States is behind other countries in permitting international students to find jobs after graduation and put their talents to work in the country that educated them,” concluded a recent analysis conducted by Business Roundtable.¹⁶ The United States ranked 9th out of the 10 countries examined, ahead of only Japan, in the category “Retention of International Students Postgraduation.” The reason for this showing is not OPT itself but the difficulty of an international student (even if in OPT status) to gain an H-1B visa or an employment-based green card.

Australia, Germany and Hong Kong make it far easier than the United States for international students to stay and work after graduation.¹⁷ Australia provides international students an advantage over other applicants for work visas, and Australia’s work visas do not have quotas that prevent hiring high-skilled foreign nationals as in the United States. Germany allows international students at German universities to convert an internship at a German company into an employment visa and provides 6 months for recent graduates to seek jobs. In addition, European Union (EU) students from EU universities can work in any EU country without any immigration processing.¹⁸

Canada and France also facilitate the process for international students to work after graduation, with international graduate students in France able to change their status to work for a company without any test of the labor market.¹⁹ In Singapore, “an international student pretty much can stay and work if he or she wants to do so,” according to immigration attorneys.²⁰

International students make valuable contributions to America. But without the proper policies in place the vast majority will return home and work for foreign competitors or in other countries, developing innovations and fostering job growth outside the United States.

Key Policies: Maintain recent regulation on Optional Practical Training for international students with degrees in science, technology, engineering and math; eliminate the per country limit on employment-based green cards; exempt from the employment-based green card limit individuals with advanced STEM degrees; raise the employment-based green card limit; increase the H-1B quota, including the exemption for advanced degree holders; refrain from adding debilitating restrictions on H-1B visa holders, such as higher wage requirements designed to price high-skilled foreign nationals out of the labor market.

¹⁶ *State of Immigration: How the United States Stacks Up in the Global Talent Competition*, Business Roundtable, 2015.

¹⁷ *Ibid.*, p. 36.

¹⁸ *Ibid.*, p. 36.

¹⁹ *Ibid.*, p. 34, 36.

²⁰ *Ibid.*, p. 37.

PRINCIPLE 2: U.S. POLICIES SHOULD RECOGNIZE THAT LABOR MOBILITY IS IMPORTANT.

The best labor protection for an employee is the ability to change jobs. That is true for both high-skilled foreign nationals and U.S. workers. Unfortunately, the failure of U.S. immigration law to keep pace with technological change has meant long waits and increasing backlogs for highly skilled people seeking employment-based green cards. In the past 27 years, the U.S. labor market has seen an explosion in the demand for high-skilled labor fueled by the World Wide Web, smartphones, mobile applications, social media and other innovations that lawmakers did not anticipate when the Immigration Act of 1990 was passed. However, the 140,000 annual limit on employment-based green cards – approximately half of which go to dependent family members – has not changed since 1990.

Contrary to popular belief, an individual in H-1B status can change jobs and every year many H-1B visa holders change employers. Reforms to the law in 2000 made this easier. However, a problem arises when an individual in H-1B status has applied for an employment-based green card and the wait time becomes so long (potentially a decade or more) that he or she is reluctant to change employers for fear of triggering a new green card application. While such individuals can change jobs in certain circumstances without having to start a new application, that is not a certainty, nor as good as obtaining an employment authorization document (EAD) that permits complete mobility in the labor market.

The National Foundation for American Policy estimates wait times for professionals born in India can now be measured in decades, not years.²¹ That is because in addition to the low annual quota, the employment-based categories contain “per country limits” that restrict the number of individuals from a country who can obtain permanent residence in a given year. Immigrants from India are most affected but the limits also harm individuals from China and the Philippines. Today, there are Indian-born professionals and researchers in the second employment-based category who already have waited 10 years or more for a green card, while an Indian in the third preference being sponsored today could (theoretically) wait 70 years.²²

More fundamental reform could permit the entry of high-skilled foreign nationals with complete labor mobility, such as by permitting foreign nationals to pay a fee and provide proof of a job offer in exchange for temporary work

²¹ *Reforming America's Legal Immigration System*, NFAP Policy Brief, National Foundation for American Policy, September 2015.

²² *Ibid.* The 70-year wait estimate is derived from calculating that there exists a backlog of 210,000 or more Indians in the most common skilled employment-based category (the 3rd preference or EB-3) and dividing that by the approximately 2,800 Indian professionals who receive permanent residence in the category each year under the law.

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permits (employment authorization documents or EADs) that can convert to permanent residence after 3 years. It is unclear whether Congress is inclined to make that type of fundamental change in the law.

Absent legislative changes, administrative measures have been the only hope for high-skilled foreign nationals waiting years for permanent residence. But in its recent regulation (“AC21”), the Obama Administration failed to provide individuals with long-pending employment-based green card cases the type of labor mobility that would have benefitted high-skilled foreign nationals and, if critics concerns about competition are correct, U.S. workers. The AC21 regulation to implement the American Competitiveness in the 21st Act allows individuals mired for years in employment-based immigrant backlogs to obtain employment authorization documents (and, therefore, complete labor mobility) under “compelling circumstances.” Such circumstances include “serious illness or disability of the principal beneficiary or his or her family member” that necessitates moving to another part of the United States to receive medical care.²³

A few other equally limited examples are offered in the regulation that make it clear relatively few of the (at least) hundreds of thousands of individuals waiting in immigration backlogs will be able to obtain employment authorization documents and, therefore, complete labor mobility. Such labor mobility could, for example, allow these highly skilled individuals to start companies. In 2007, because he obtained employment authorization after waiting 7 years for his green card, Indian-born immigrant Jyoti Bansal founded AppDynamics, a company that today employs over 900 people and is valued at \$1.9 billion.²⁴

It is unfortunate that the Obama Administration had the authority to solve this problem but chose not to use that authority in the AC21 regulation. “The Administration had fairly extensive authority in deciding who should be eligible for employment authorization documents (EAD) and decided to limit it,” according to Jeffrey Gorsky, senior counsel at the law firm of Berry Appleman & Leiden LLP.²⁵ Gorsky points out as an example of the broad legal authority to grant EADs that the AC21 regulation allows for employment authorization to dependents of beneficiaries in some nonimmigrant (temporary) statuses with an approved I-140, based on “compelling circumstances,” even though those dependents may be out of status.

A more obvious example of the executive branch authority to issue employment authorization documents for Deferred Action for Childhood Arrivals (DACA). Since June 2012, under DACA, the Obama Administration has provided employment authorization to over 700,000 individuals who entered (or remained in) the United States

²³ See <https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled>.

²⁴ Stuart Anderson, “Jyoti Bansal Waited 7 Years For a Green Card to Start His \$1.9 Billion Company,” *Forbes*, March 26, 2016.

²⁵ Interview with Jeffrey Gorsky.

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without legal status starting as minors. There were no “compelling circumstances” tests for DACA applicants. If individuals without a lawful status can be awarded employment authorization documents, then, from a legal perspective, high-skilled professionals who have worked in lawful status for years are eligible. Even if the Obama Administration chose not to make the policy change in this specific regulation, there are other administrative means to accomplish the same objective on EADs and labor mobility for individuals waiting years in employment-based green card backlogs, such as concurrent filing of adjustment of status with an approved I-140 (regardless of priority date) or, if that did not work, periodically making the State Department Visa Bulletin “current” to allow for filing adjustment of status. Where there is a will, there is a way.

At a December 6, 2016, Ombudsman conference, a member of the policy team at U.S. Citizenship and Immigration Services offered an implausible policy rationale for not granting employment authorization documents more widely to those waiting in skilled immigrant backlogs, arguing, “As far as giving EAD to everyone with an approved I-140, if we did that, the way we looked at it, you will no longer have employers sponsoring anybody because as soon as you sponsor someone, they could leave on their EAD.”²⁶

There is no evidence that employers would stop applying for permanent residence for highly skilled foreign nationals if such employees would quickly receive employment authorization documents and, therefore, complete labor mobility similar to U.S. citizens or individuals granted lawful permanent residence (a green card). First, essentially all U.S. workers in America can leave their employer at will, yet only a small percentage relative to the size of the U.S. labor force choose to do so each year. Second, in the vast majority of employment-based immigration cases, both the individual and the employer believed a good fit existed when the application was filed. But just because someone likes his current employer does not mean he or she would *never* want to leave their job to, for example, become an entrepreneur. Third, in the first and second employment preferences, particularly for individuals not born in India or China, employees often receive permanent residence, the labor mobility equivalent of an EAD, within one year, and there is no evidence their employers are reluctant to sponsor them for permanent residence.

Other elements of the AC21 rule were more sensible, including writing into regulation a 60-day grace period for H-1B professionals in layoff situations and codifying certain whistleblower protections and H-1B cap exemption rules. However, providing greater labor mobility to high-skilled foreign nationals through regulatory and legislative means remains a priority after years of administrative and Congressional neglect of this issue.²⁷

Key Policies: Devise administrative remedies to grant employment authorization documents to individuals waiting for employment-based green cards. Such individuals are already working in the U.S. labor force but can lack labor

²⁶ The relevant excerpt can be found here: https://www.youtube.com/watch?v=yCqy_dvHvbQ#t=5h58m58s.

²⁷ The “compelling circumstances” exception could help some M.D.s in National Interest waiver cases, notes attorney Greg Siskind.

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mobility. Eliminate the per country limit on employment-based green cards; exempt from the employment-based green card limit individuals with advanced STEM degrees; and raise the employment-based green card limit.

PRINCIPLE 3: ONE OF THE BEST WAYS TO KEEP MORE WORK IN THE UNITED STATES IS TO ALLOW HIGH-SKILLED FOREIGN NATIONALS TO WORK IN AMERICA, RATHER THAN COMPANIES SENDING WOULD-BE IMMIGRANTS AND THEIR ACCOMPANYING JOBS, INVESTMENT AND INNOVATIONS OUTSIDE THE UNITED STATES.

The existence of a global labor market means new restrictions on high-skilled foreign nationals, including on foreign nationals who provide services in the United States, will result in more work being performed outside the United States. Companies like Google and Facebook maintain significant operations around the world. Immigration restrictions harm such companies and make them less competitive. However, ultimately, in many cases, global multinationals can find a way to work around the restrictions and place the people they wish to hire at overseas offices as a second best option. Microsoft famously opened an office in Canada at least in part due to U.S. immigration restrictions.²⁸

Preventing high-skilled foreign nationals from being hired in the United States most harms U.S. workers by pushing more investment, innovations and startup activity to take place outside of America. Less investment and fewer startups means fewer jobs for Americans. Only people thinking in a childlike, zero-sum manner can believe that the entry of fewer high-skilled foreign nationals automatically would mean more jobs or higher wages for U.S. workers, as if any expansion of the labor supply is bad for Americans. (For example, is it bad for America that every summer students graduate high school or college and thereby increase the supply of labor in the country?) “An increase in the supply of labor lowers wages *only if nothing else changes*,” explains George Mason University economist Donald J. Boudreaux. “But when immigrants enter the workforce two very important other things change. First, immigrant workers spend or invest their earnings, both of which activities increase the demand for labor – thus putting upward pressure on wages . . . A second change is one that was emphasized by Adam Smith: larger supplies of workers, as well as more consumers of the economy’s output, lead to greater specialization. Jobs change. As Smith explained, this greater specialization makes workers more productive. This increased productivity, in turn, causes wages to rise.”²⁹

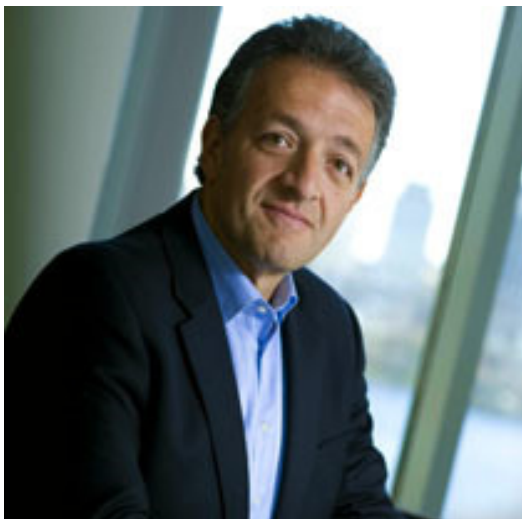
²⁸ Associated Press, “Visa Issue Spurs Microsoft Office in Canada,” NBCNews.com, July 5, 2007.

²⁹ Donald J. Boudreaux, “It Is, After All, Supply-and-DEMAND Analysis,” *Café Hayek*, December 16, 2016. Emphasis in original.

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A positive impact on productivity from foreign-born high-skilled talent is what America has witnessed. “When we aggregate at the national level, inflows of foreign STEM workers explain between 30% and 50% of the aggregate productivity growth that took place in the United States between 1990 and 2010,” according to economists Giovanni Peri (UC, Davis), Kevin Shih (UC, Davis) and Chad Sparber (Colgate University), who have researched the impact of H-1B visas.³⁰ Peri, Shih and Sparber found, “A 1 percentage point increase in the foreign STEM share of a city’s total employment increased the wage growth of native college-educated labor by about 7–8 percentage points.”³¹

Similarly, economist Madeline Zavodny, a professor of economics at Agnes Scott College, studied foreign-born and native employment and concluded, “The findings here suggest that expanding the H-1B program for skilled temporary foreign workers would increase employment for U.S. natives.”³² The study for the American Enterprise Institute and Partnership for a New American Economy examined the years 2001 to 2010 and found, “Each additional 100 approved H-1B workers being associated with an additional 183 jobs among US natives.” Zavodny concluded the “results give clear evidence” that H-1B visas “correspond to greater job opportunities for US-born workers.”³³ In other words, economic theory (Adam Smith) and empirical evidence (Peri, Shih, Sparber and Zavodny) agree that the entry of high-skilled foreign nationals is beneficial, rather than detrimental, to U.S. workers and the U.S. economy overall.



Noubar Afeyan

Immigrant-led startup activity and the jobs and innovation they bring to the economy and workers provide more evidence of the dynamic at work on high-skilled immigration. “Immigrants play a key role in creating new, fast-growing companies, as evidenced by the prevalence of foreign-born founders and key personnel in the nation’s leading privately-held companies,” according to a 2016 National Foundation for American Policy study. “Immigrants have started more than half (44 of 87) of America’s startup companies valued at \$1 billion or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies. The research finds that among the billion dollar startup companies, immigrant founders have created an average of approximately 760 jobs per company in the United States. The

³⁰ Giovanni Peri, Kevin Shih and Chad Sparber, “STEM workers, H-1B Visas and Productivity in U.S. Cities,” *Journal of Labor Economics*, vol. 33 No. S1. U.S. High-Skilled Immigration in the Global Economy (Part 2, July 2-2015), pp. S225-S255.

³¹ *Ibid.* Emphasis added.

³² Madeline Zavodny, *Immigration and American Jobs*, American Enterprise Institute and Partnership for a New American Economy, 2011, p. 5.

³³ *Ibid.*, p. 11.

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collective value of the 44 immigrant-founded companies is \$168 billion, which is close to half the value of the stock markets of Russia or Mexico.”³⁴

Nearly all of these immigrant entrepreneurs worked first in America in H-1B status and then on employment-based green cards before founding their companies. And many of these entrepreneurs first studied at U.S. universities on F-1 student visas, such as Noubar Afeyan (MIT), co-founder of Moderna Therapeutics and 37 other companies, primarily through Flagship Ventures, the firm he heads, and Amr Awadallah, co-founder of Cloudera, who credits Stanford for helping him become an entrepreneur.³⁵

In addition to maintaining reasonable (and improved) policies on H-1B visas and employment-based green cards, the research points toward additional immigration policies. Those include a startup visa and the recent Obama Administration regulation on entrepreneurs. That regulation, proposed on August 26, 2016, “would allow certain international entrepreneurs to be considered for parole (temporary permission to be in the United States) so that they may start or scale their businesses here in the United States.”³⁶ On the legislative front, an analysis of “The EB-JOBS Act of 2015” found it could create 1 million to 3.2 million jobs over the next decade if enacted into law.³⁷

Stories in the Media: In the past two years, new immigration restrictions have been proposed following negative media stories involving layoffs at Disney and Southern California Edison, layoffs that closer examination reveals would not have been averted regardless of U.S. immigration policy. Hundreds of information technology (IT) professionals were laid off at each company and, when foreign nationals were spotted on-site during the transition, employees and critics blamed H-1B visa holders and policy for the layoffs. Since critics have used these stories to propose draconian legislative changes to H-1B visas for all companies, including virtually ending high-skilled immigration by requiring almost all H-1B visa holders to work outside the country for 10 years before entering the United States, it is worth examining the issues surrounding these cases more closely.³⁸

According to experts who advise companies on outsourcing decisions, two important facts about contracting out, including offshoring, are: 1) Companies make decisions on whether to outsource and make layoffs *before* a contract is put out for bids among contractors; and 2) H-1B visas play a minor (if any) role in this process, often during the

³⁴ Anderson, *Immigrants and Billion Dollar Startups*. “The research involved conducting interviews and gathering information on the 87 U.S. startup companies valued at over \$1 billion (as of January 1, 2016) that have yet to become publicly traded on the U.S. stock market and are tracked by *The Wall Street Journal* and Dow Jones VentureSource. The companies, all privately-held and with the potential to become publicly traded on the stock market, are today each valued at \$1 billion or more and have received venture capital (equity) financing.”

³⁵ *Ibid.*

³⁶ “USCIS Proposes to Welcome International Entrepreneurs,” Press Release, U.S. Citizenship and Immigration Services, August 26, 2016. The rule was published in final form on January 17, 2017.

³⁷ *Startup Visa Proposals and Job Creation*, NFAP Policy Brief, National Foundation for American Policy, March 2016.

³⁸ “Cruz, Sessions Introduce the American Jobs First Act of 2015,” press release, office of Sen. Ted Cruz, December 10, 2015.

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transition phase from the old to the new contract. In fact, it is during this transition phase, when a foreign national is spotted on-site at a company, that alarm bells go off. Employees and others start to blame the foreign nationals for layoffs that would have happened whether any foreigners appeared on-site or if a different contractor, including one employing entirely U.S. workers, had been chosen to service the contract.³⁹

The proof that it is the sighting of foreign nationals on a company's premises, more than the layoff itself, that spawns controversy came in 2015, in a case that received virtually no publicity even though with the exception of employees spotting foreign nationals on-site the facts were nearly identical to Disney and Southern California Edison in every respect. In 2015, Citizens Bank of Rhode Island announced it would restructure its information technology and, as a result, work would be done offshore and the company would lay off more than 150 IT professionals. Unlike the situations at Disney and Southern California Edison, Citizens Bank of Rhode Island was not targeted for angry editorials or denunciations at Congressional hearings. The reason? No foreign nationals were spotted at Citizens Bank during the transition phase, which meant no one could blame H-1B visa holders for the layoffs.⁴⁰ "IT employees who were contacted say this 'knowledge transfer' is being accomplished remotely, over the Web and in teleconferences," according to *Computerworld*.⁴¹

The reality is that H-1B visas are not an essential component of outsourcing. Even if Congress eliminated the H-1B visa category entirely it would not alter the fact it makes sense for companies to focus on core competencies by contracting with firms that provide specialized expertise in information technology, accounting and other areas. It turns out even the parent companies of newspapers critical of Disney and Southern California Edison – Tribune Publishing, which owns the *Los Angeles Times* and McClatchy, owner of the *Charlotte Observer* – have laid off employees and contracted for work offshore in the same fashion as Disney and Southern California Edison.⁴²

"I would say cutting off the H-1B visa program wouldn't really impact outsourcing overall, as the H-1B visa holders have a limited and specialized role in the outsourcing process (specifically, in pushing through the transition phase)," concludes Alex Kozlov, director of content, Alsbridge, a leading management consulting firm.⁴³ A transition from one system to a new system is meant to avoid service disruptions and other problems.

³⁹ Stuart Anderson, "3 Things Jeff Sessions Doesn't Understand About Tech," *Forbes*, November 19, 2016.

⁴⁰ Stuart Anderson, *Setting the Record Straight on High-Skilled Immigration*, NFAP Policy Brief, National Foundation for American Policy, August 2016.

⁴¹ Patrick Thibodeau, "As it Sets IT layoffs, Citizens Bank Shifts Work to India Via Web," *Computerworld*, August 13, 2015.

⁴² Patrick Thibodeau, "Publisher of LA Times and Chicago Tribune Sends IT Jobs Overseas," *Computerworld*, May 17, 2016; "In Charlotte, Foreign Workers Replace Americans in Tech Roles," *Charlotte Observer*, June 3, 2016. "McClatchy said the move is designed in part to help accelerate its transformation into a more digitally focused media company."

⁴³ Alex Kozlov. Email interview.

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A recent article in *Computerworld*, which has been sympathetic to the plight of laid-off workers, explained that H-1B visas are not the key factor in U.S. company decisions to outsource work abroad. “Curbing the H-1B visa doesn't eliminate offshore outsourcing,” the *Computerworld* article noted. “Visa restrictions may complicate the ability of the IT services industry to work in the U.S., but they may have little impact on offshore outsourcing. Business models will adjust. The bigger problem facing Trump is making it more attractive for firms to keep the jobs in the U.S.”⁴⁴

Southern California Edison: In December 2011, an employee shot and killed two supervisors in information technology (IT) department of the company.⁴⁵ In the wake of the tragedy, Southern California Edison commissioned a management report that criticized the company's IT department for “dysfunction” and a “fundamental lack of leadership.” Later, employees at Southern California Edison cited the management report and its conclusions for the company's decision to outsource parts of the IT function. “Some of the [Southern California Edison] employees say the outsourcing move is linked to a 2012 report that found fault with the IT management culture,” according to *Computerworld*.⁴⁶

Even though a “need to change organization culture” is a common reason companies decide to contract out a function⁴⁷ and a number of employees connected the outsourcing decision to the aftermath of the shooting and the management report, all that changed once foreign nationals were spotted at the company. At that point, the decision to outsource part of the IT function was blamed entirely on Southern California Edison using H-1B visa holders via a contractor. Immigration opponents seized on the case and lost in the controversy was any acknowledgement that, given the problems identified with the management of the IT department, contracting out part of the function could be viewed as a reasonable business decision.

While it is unfortunate that the employees at Southern California Edison lost their jobs, there is no evidence that the employees would have retained their jobs if, during the bidding process, the company selected a different contractor or that contractor used only U.S. workers during the transition to the new system. This was not a sole source contract (the company used a law firm to solicit bids) and Southern California Edison had decided to contract with outside firms and lay off workers before knowing which contractors it would use and whether the contractors' employees would work on visas.

Disney: At the time the *Orlando Sentinel* first reported Disney had decided to restructure its information technology department, the newspaper cited an expert who said it was typical in the industry to move away from maintenance

⁴⁴ Patrick Thibodeau, “Trump Tapped the Viral Anger Over H-1B Use,” *Computerworld*, November 9, 2016.

⁴⁵ See also Anderson, *Setting the Record Straight on High-Skilled Immigration* for a summary, adapted here, of the Disney, Southern California Edison and other cases in the news.

⁴⁶ Patrick Thibodeau, “Southern California Edison IT Workers ‘Beyond Furious’ Over H-1B Replacements,” *Computerworld*, February 4, 2015.

⁴⁷ The Hackett Group.

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and toward innovation. However, after foreign nationals appeared on-site to gather information for the new contractor, both employees and later news stories began asserting it was the visa holders who caused the layoffs. The later press coverage did not include information on a competitive bid process nor note that Disney has contracted out IT services for years. Ten years prior to the controversy, Disney laid off about four times as many employees as in 2015. Yet no H-1B visa holders were blamed for the layoffs or seen on-site back then and the company received no significant media attention other than the normal reporting of large business transactions. The 2005 deals involved up to 1,000 layoffs in conjunction with deals Disney signed with IBM and Affiliated Computer Services for a combined \$1.3 billion.⁴⁸

There is no evidence that any of the legislative measures that have been proposed in Congress would have changed the decisions by Disney and Southern California Edison to contract out work to outside firms specializing in information technology services. In both cases, the companies had a choice of service providers and had made the key decisions on outsourcing long before the contracts were awarded. “To begin the process, a company first performs an assessment of its needs and requirements from a business and technical standpoint,” according to Steven Kirz, managing director at Pace Harmon, an advisor to companies. “Based on this analysis . . . if the decision is made to outsource the function, then the company proceeds with creating an RFP [Request For Proposal]. The RFP is put out to bid, the most qualified provider is selected, and negotiations commence.”⁴⁹

The “Protect and Grow American Jobs Act,” H.R. 170, sponsored by Darrell Issa (R-CA), seeks to penalize companies considered “H-1B dependent” (employers with 15 percent or more of their workforce in H-1B status) by making such companies pay more if they wish to have employees be “exempt” from attestations on recruitment and nondisplacement. The bill would raise the current income and education level for such “exempt” employees from \$60,000 or a master’s degree to \$100,000 a year and index it to inflation, while also eliminating the master’s degree exemption.⁵⁰ In effect, it would establish a very high minimum wage for such employees, a minimum wage likely to be met only in areas with the highest cost of living. In many areas of the country, that could mean contract fulfillment that in the past used a mix of onshore and offshore labor could become more decidedly offshore.

While a \$100,000 minimum salary for exempt employees might complicate the delivery of services by some contractors, it is not clear why anyone would think this would have changed the decision of Disney or Southern California Edison to contract out for services. First, in both cases several companies bid on the contract, which means, at most, a different company would have been awarded the contract and the employees at Disney and Southern California Edison still would have been laid off. Second, all IT services companies have a mix of U.S.

⁴⁸ Linda Rosencrance, “IBM Signs \$730M IT Services Deal with Disney,” *Computerworld*, June 14, 2005. In January 2016, two former Disney employees filed a federal lawsuit against Disney.

⁴⁹ Steven Kirz. Email interview.

⁵⁰ Text of H.R. 170.

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employees and foreign nationals on visas, giving them flexibility for servicing contracts. Third, as the case of Citizens Bank of Rhode Island illustrated, it is not necessary for an employee of the contracting firm to set foot at a client's site during the transition in order for a contract to be serviced. Fourth, R. Blake Chisam, partner, Fragomen, thinks new restrictions could lead to more automation of functions, which would reduce the demand for workers.⁵¹

The law of unintended consequences will likely rear its head at this bill and similarly aimed proposals by encouraging contracting companies to restructure their delivery models away from a mix of onshore and offshore to almost entirely offshore. That would mean fewer jobs and less economic activity in the United States, along with fewer taxes paid and less investment in the U.S. Moreover, measures aimed at one type of company and activity have a way of overreaching and, given the size and complexity of the U.S. economy, usually harm many other companies and practices not anticipated or understood by policymakers. It brings to mind Austrian economist Friedrich Hayek's point about the lack of information government officials possess to make economic decisions on behalf of consumers and producers.⁵²

Key Policies: Avoid responding to Disney and Southern California Edison incidents by enacting restrictions on H-1B and L-1 visas that reasonable analysis indicates would have no impact on company decisions to contract out work, since H-1B and L-1 visas are not a part of company decision making on whether to outsource IT or other functions. Instead, focus on making the United States a more attractive place to do business on tax, investment and immigration.

PRINCIPLE 4: UNLESS CONGRESS PROVIDES A NEW AND VIABLE ALTERNATIVE, H-1B VISAS ARE THE ONLY PRACTICAL WAY FOR HIGH-SKILLED FOREIGN NATIONALS TO WORK LONG-TERM IN THE UNITED STATES.

Critics should concede that onerous new restrictions on H-1B visa holders could, in practice, mean the end of high-skilled immigration to the United States and the resulting consequences that would bring for innovation, entrepreneurship, job creation, and America's role in higher education and cutting-edge research. Today, 77 percent of the full-time graduate students in electrical engineering and 71 percent in computer science at U.S. universities are international students.⁵³ Since it can take many years to sponsor an employee for permanent residence (due to bureaucratic rules, low annual limits and the per country limit), an H-1B visa remains often the only practical way for international students or other highly skilled individuals to work long-term in the United States. Moreover, given the pace of technological change and the importance of mobility, there will always be a need for flexible categories for individuals to work on short-term projects or to be transferred into the United States from abroad.

⁵¹ Interview with R. Blake Chisam.

⁵² Jeffrey Tucker, "Hayek: The Knowledge Problem," Foundation for Economic Education, September 28, 2014.

⁵³ National Science Foundation, Survey of Graduate Students and Postdoctorates in Science and Engineering, 2013.

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Imposing a vast array of new rules on companies employing high-skilled foreign nationals would contradict Donald Trump and the Republican Congress's expressed desire to loosen the regulatory reins that have been blamed for slow growth in the U.S. economy. A number of recent legislative proposals have been breathtaking in scope and amount to micromanaging the personnel policies of America's most innovative companies. Several would also violate U.S. trade commitments and invite retaliation against American companies.

Below is an analysis of some of these proposals combined with research that raises questions about the premises behind the proposals.

Forcing Employers to Pay Foreign Nationals More than Their U.S. Coworkers: Critics contend H-1B visa holders are paid less than comparable U.S. workers, even though a substantial body of research shows that is not the case.⁵⁴ For example, the Government Accountability Office (GAO) compared the median reported salaries of U.S. workers and H-1B professionals in the same fields and age groups and found H-1B professionals *generally earn the same or more than their U.S. counterparts*.⁵⁵ In the category Electrical/Electronics Engineering Occupations, in the age group 20-39, the median salary for an engineer in H-1B status was higher than for a U.S. engineer – \$80,000 vs. \$75,000.⁵⁶

In addition to paying the required wage, government and legal fees paid by employers for H-1B employees could reach \$8,850 for an initial petition, plus another \$8,370 for an extension, according to the Council for Global Immigration and the Society for Human Resource Management.⁵⁷ (Sponsoring an employee for permanent residence can cost \$36,000 to \$50,000.⁵⁸) As noted in an earlier NFAP analysis, that does not mean some individuals are not underpaid or taken advantage of, or that there are not employers that evade or violate the law. But if the question is whether foreign nationals on H-1B visas are systematically underpaid and are, therefore, only hired because of such underpayment, then the evidence shows that the answer is “no.”⁵⁹

⁵⁴ Madeline Zavodny, “The H-1B Program and Its Effects on Information Technology Workers,” Federal Reserve Bank of Atlanta, *Economic Review*, Third Quarter 2003; S. Mithas and H.C. Lucas, “Are Foreign IT workers Cheaper? U.S. Visa Policies and Compensation of Information Technology Professionals,” *Management Science* (56:5) 2010; Magnus Lofstrom and Joseph Hayes, “H-1Bs: How Do They Stack Up to U.S. Workers?” IZA Discussion Paper #6259. December 2011.

⁵⁵ *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011. To conduct the research, the GAO analyzed Current Population Survey (CPS) data on U.S. workers and information on H-1B salaries from the U.S. Citizenship and Immigration Services (USCIS) CLAIMS database.

⁵⁶ Note that the GAO stated in some categories it needed to combine age groups to have sufficient sample sizes. In the category Systems Analysis, Programming, and Other Computer-Related Occupations, the median salary for an H-1B professional is *higher* (\$60,000 vs. \$58,000) than for a U.S. professional in the age group 20-29 and the same (\$70,000) in ages 30-39.

⁵⁷ *Navigating the U.S. Employment-Based Immigration System*, Council on Global Immigration and the Society for Human Resource Management, 2015, pp. 62-63.

⁵⁸ *Ibid.*

⁵⁹ Stuart Anderson, *Setting the Record Straight on High-Skilled Immigration*.

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The law states that an employer of an H-1B visa holder must pay “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, *whichever is greater*. . .”⁶⁰ The problem is that legislative proposals such as S. 2266 (Durbin-Grassley bill in the 114th Congress) would change the law significantly by requiring a wage to be paid that is at least the median of Level 2 under the federal government’s “OES” system.⁶¹ (The “OES” system itself is highly flawed for determining wage levels but today employers cope with it by, in most cases, using private wage surveys that meet government standards.)

An analysis by the National Foundation for American Policy found that such a legislative change would inflate the wages of high-skilled foreign nationals well above the wages paid to their U.S. colleagues with similar experience.⁶² Many companies would be faced with the difficult choice of whether to establish unequal pay scales by paying foreign nationals more than their U.S.-born employees doing the same job. Equalizing the pay would leave companies with less money to invest in the United States. The simplest solution, companies may conclude, is to move more work and employees outside of the United States. Some of the legislative proposals would also apply these wage changes to the L-1 visa category, complicating the task of transferring employees in the United States.

Establishing this far higher mandatory minimum wage to solve a problem that reliable research shows does not exist would grant the U.S. Department of Labor significant authority to establish wage rates in the technology industry and other sectors. That would make the United States a *less* attractive place for growth and investment. Under similar provisions in other legislation (S. 744 and H.R. 2131) in 2014, an NFAP analysis found employers would be compelled to pay a software developer (systems software) in the San Jose, California, area “\$128,294 per year for a Level 2 professional (some experience) . . . \$19,156 above current Department of Labor (DOL) Level 2 wages – or an 18 percent wage premium.”⁶³ In the Chicago area, “the new required Level 2 wage for a software developer (applications) would be 29 percent above the private survey market wage measured by Towers Watson Data Services (an increase of \$21,313).”⁶⁴

Micromanaging Recruitment and Placement at Customer Sites: Several members of Congress would like to empower the U.S. Department of Labor to take a significant role in high tech hiring decisions and to decide whether an employee should go to perform services at a customer’s site. According to U.S. Citizenship and Immigration

⁶⁰ Section 212(n)(1) of the Immigration and Nationality Act. Emphasis added.

⁶¹ Section 101 of S. 2266. OES stands for Occupational Employment Statistics. Its limitations as an accurate measure of market wages are explained in more detail in the Appendix of *The Real World Impact of Proposed High-Skilled Immigration Restrictions*, NFAP Policy Brief, National Foundation for American Policy, August 2016.

⁶² *Updated Analysis: The Impact of Immigration Legislation on Salaries and Competitiveness*, NFAP Policy Brief, National Foundation for American Policy, April 2014.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

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Services, approximately 20,000 employers in America hire at least one foreign national on H-1B visas each year, which means the reach of new government-imposed rules on immigration could be significant.⁶⁵

Some legislators would like to expand to all employers the current recruitment attestation that applies only to H-1B dependent companies (employers with 15 percent or more of their workforce in H-1B status) and require the use of a government website for company recruitment. The problem is this would force employers to defend to DOL investigators (or bureaucrats) potentially years after the fact personnel decisions that are inherently subjective. Immigration laws contain definitions, such as “essentially equivalent” jobs, that are open to significant interpretation. Given that approximately 70 to 80 percent of the graduate students in key high tech fields at U.S. universities are foreign nationals it is unclear why policymakers are surprised foreign nationals make up a significant part of the labor pool from which U.S. companies recruit.

Other legislative measures that may see renewed interest in the new Congress would prohibit employers from moving foreign national personnel to a client worksite or requiring permission first from the federal government, as well as redefining the L-1 visa category in a way that would prevent employers from transferring personnel into the United States.⁶⁶ This and similar measures would make U.S. companies less competitive and substitute the opinion of Labor Department officials who could not possibly understand the needs of customers as well as the businesses.

Restricting Companies That Can Obtain H-1B Visas: To undermine support for H-1B visas more generally, critics have argued that Indian-based companies use most of the H-1B petitions approved each year. However, this is factually incorrect. Indian-based companies do not use most of the approved H-1B petitions and, in fact, the use by these companies has declined significantly in recent years.

The 7 Indian-based companies who had the most H-1B petitions approved for new employment used 14,610 in FY 2015, or about 13 percent of the total approved new petitions that year.⁶⁷ Given the size of the U.S. labor force (today about 160 million), the 14,610 individuals with new H-1B petitions from the 7 leading Indian-based companies come to a tiny 0.009 percent of the U.S. labor force.⁶⁸ The 109,292 new H-1B petitions approved for all employers in 2015 also represents a small proportion of the U.S. labor force at 0.07 percent.⁶⁹

⁶⁵ Stuart Anderson, *Setting the Record Straight on High-Skilled Immigration*.

⁶⁶ *The Real World Impact of Proposed High-Skilled Immigration Restrictions*.

⁶⁷ USCIS, Stuart Anderson, *Setting the Record Straight on High-Skilled Immigration*. *The New York Times* cited these same 7 Indian-based companies having 16,573 approved initial petitions in FY 2014. Haeyoun Park, “How Outsourcing Companies are Gaming the Visa System,” *New York Times*, November 10, 2015. The 14,610 approved initial petitions in FY 2015 for these 7 companies comes to 13 percent of all initial H-1B petitions approved or 17 percent of the 85,000 limit (65,000 plus 20,000 exemption for individuals with a graduate degree from a U.S. university). The 7 companies are TCS, Infosys, Wipro, Tech Mahindra America, Larsen & Toubro Infotech, HCL America and Mindtree.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

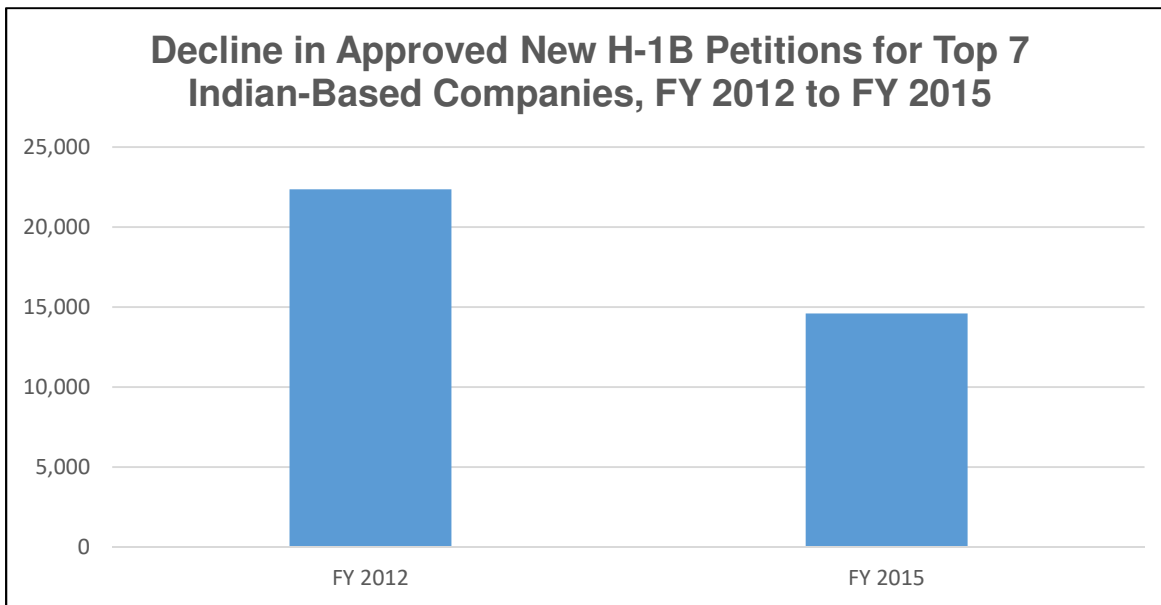
Table 2
New H-1B Petitions in Context of the U.S. Labor Force

New H-1B Petitions as a Percentage of U.S. Labor Force (2015)	New H-1B Petitions for Top 7 Indian-based Company and as a Percentage of U.S. Labor Force (2015)
0.07 percent	14,610 (0.009 percent)

Source: U.S. Citizenship and Immigration Services. Data for “initial” petitions in FY 2015. Additional calculations performed based on BLS data.

In addition, the use of H-1B visas by Indian-based companies has fallen significantly in recent years. The number of approved new H-1B petitions for (initial employment for) the 7 leading Indian-based companies declined by 35 percent between FY 2012 and FY 2015, according to USCIS data.⁷⁰

Figure 1



Source: U.S. Citizenship and Immigration Services, National Foundation for American Policy. H-1B petitions approved for initial employment.

⁷⁰ Calculations based on data obtained from USCIS.

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Two general policy approaches have emerged in response to the belief that Indian-based companies use most of the H-1B petitions, a belief that USCIS data show is untrue. The two policy ideas are: 1) changing the way H-1B petitions are distributed by replacing the “lottery” currently used when the category is oversubscribed and 2) imposing a series of restrictions to prevent Indian-based companies from either obtaining or, in practice, using new H-1B visas.

Every year since FY 2004, the supply of H-1B visas has been exhausted because the annual limit is so low relative to the size of the U.S. economy and labor force. U.S. Citizenship and Immigration Services has addressed this issue by distributing H-1B petitions for initial employment by lottery. (The annual limit is 65,000 a year plus an additional 20,000 initial petitions for foreign nationals with a master’s degree or higher from a U.S. university.)

One idea discussed involves eliminating the lottery and instead awarding petitions to employers in order from the highest-salaried employees to the lowest-salaried. “Trump senior policy adviser Stephen Miller proposed scrapping the existing lottery system used to award the visas,” reported Reuters, describing meetings held with high tech executives. “A possible replacement system would favor visa petitions for jobs that pay the highest salaries, according to the sources.”⁷¹

Immigration attorneys queried doubt or at least question whether this could be done administratively, since there is nothing in the current statute about favoring one type of employer or taking into account salary level in the priority for the distribution of visas. In contrast, the current lottery system, despite its limitations, is at least a neutral way, from a legal perspective, of distributing H-1B petitions. That means an attempt to eliminate the lottery and replace it administratively with something that favors higher-salaried workers would almost certainly invite litigation and could find a court ruling it “an abuse of discretion.”

If done legislatively, there are at least three issues that supporters of changing away from the lottery may want to consider. First, it is a potentially significant change, which means no one can be certain of the results such an experiment would bring. Second, if changing the way H-1B petitions are distributed, in fact, results in Indian-based companies being effectively shut out from petitions, as some advocates of the measure appear to hope, then it may violate U.S. commitments under the General Agreement on Trade in Services (GATS). GATS Article VI requires that Members ensure that “all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner” and that could be called into question depending on the results of the new method.⁷²

⁷¹ Mica Rosenberg, Stephen Nellis and Emily Stephenson, “Trump, Tech Titans Talk Overhaul of H-1B Visas,” Reuters, January 12, 2017.

⁷² See Jochum Shore & Trossevin, *Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments*, National Foundation for American Policy, June 2010.

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A third issue is that going from highest to lowest salaried worker is likely to skew approvals to large Wall Street firms, which pay high wages for data analytics, and, more generally, companies petitioning for employees located in places with the highest cost of living, which is where wages are the highest for comparable work. For example, an individual earning \$60,000 a year in Roanoke, Virginia would need to earn \$149,500 to maintain the same standard of living in Manhattan, according to the CNN/Money Cost of Living calculator.⁷³ Someone earning \$70,000 in Bakersfield, California or Orlando, Florida would be the equivalent of earning \$114,000 to \$123,600 in San Francisco.⁷⁴

A provision in a bill hostile to employers and high-skilled foreign nationals, H.R. 2266 in the 114th Congress, introduced by Senators Durbin and Grassley, sought to mitigate the regional issue by stating aliens subject to the H-1B limits shall be issued visas or H-1B status in the following order: 1) international students with advanced degrees from a U.S. university in STEM fields, 2) petitions for individuals paid at level 4 in the most recent Occupational Employment Statistics (OES) survey, 3) international students with advanced degrees from a U.S. university in non-STEM fields, 4) petitions for individuals paid at level 3 in the most recent Occupational Employment Statistics (OES) survey, 5) international students with bachelor degrees from a U.S. university in STEM fields, 6) individuals in occupations listed in Group I of the Department of Labor's Schedule A of occupations, and 7) individuals' petitions by employers that use E-Verify, are not under investigation for violating labor or immigration laws, had no labor or immigration violations in the past 5 years, had at least 90 percent of H-1B petitions approved in the previous 3 fiscal years and has filed for employment-based immigrant petitions and successful labor certification applications for "at least 90 percent" of its H-1B employees who started working for them in the previous 3 fiscal years, 8) any remaining petitions.⁷⁵

It is unknown how many talented individuals would be shut out by skewing the priority toward highly experienced people vs. promising but less experienced individuals. While the provision in S. 2266 gives priority to international students with advanced degrees in STEM fields, the emphasis on Level 3 and Level 4 wages could eliminate potential H-1B visa holders who received degrees *outside* the United States (where most people are educated) and who are not already highly experienced or at a level that would warrant the highest salaries paid in their profession. (Level 3 and Level 4 are out of a scale of 1 to 4.)

⁷³ "Cost of Living: How Far Will My Salary Go?" CNN/Money. <http://money.cnn.com/calculator/pf/cost-of-living/>.

⁷⁴ *Ibid.*

⁷⁵ Section 104 of S. 2266 (114th Congress).

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An individual paid at Level 4 wages “generally [has] management and/or supervisory responsibilities,” according to the DOL’s Employment and Training Administration Guide.⁷⁶ Similarly, someone paid at Level 3 wages could also have supervisory responsibilities and would have a title that includes words like “head,” “lead” or “senior,” such as “senior programmer.”⁷⁷ In San Francisco, an individual paid at Level 4 wages would earn a salary of at least \$136,573.⁷⁸

The main issue is that all similar approaches are, in essence, rearranging the deck chairs of a sinking ship. In FY 2017, in just the first week of April 2016 – 6 months before the 2017 fiscal year even started – USCIS received more than 236,000 H-1B petitions.⁷⁹ In other words, in just the first week when applications could be filed, the federal government received 151,000 applications more than the 85,000 limit (65,000 plus the 20,000 exemption) would allow. Every year, many thousands of highly-skilled individuals are denied the opportunity to work in America, and the United States is denied the opportunity to gain from their talents. Without raising the H-1B limit, simply rearranging how the small number petitions are distributed only changes which talented people will be denied.

The annual H-1B limit of 65,000 (plus the 20,000 exemption) is small, as noted, representing less than 0.07 percent of the approximately 160 million U.S. labor force. The level has remained essentially unchanged despite the original restrictive limit of 65,000 being imposed in 1990 at a time when members of Congress could not have imagined the incredible demand for high-skilled labor spawned by the World Wide Web, smartphones and numerous other innovations.

Another way of changing the use of H-1B petitions is by enacting new restrictions. New immigration measures could include prohibiting employers with 50 percent or more of their workforce in H-1B or L-1 status from petitioning for new H-1B or L-1 professionals, not allowing such employers (and likely others as well) to place H-1B or L-1 visa holders on the site of another employer, as well as requiring government waivers for the movement of such personnel, higher wage requirements for employers and other similar restrictions.

As discussed earlier, even eliminating H-1B visas entirely, never mind just for specific companies, would not have prevented layoffs at Disney and Southern California Edison, nor would it prevent U.S. companies more generally from contracting out work. Restrictions such as those described above are most likely to shift how work is accomplished, almost certainly pushing more work to be performed outside of the United States and encourage a greater use of technology or automation, rather than preventing layoffs or outsourcing.

⁷⁶ U.S. Department of Labor, *Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs*. Revised November 2009.

⁷⁷ *Ibid.*

⁷⁸ U.S. Department of Labor, Foreign Labor Certification Online Wage Library.

⁷⁹ “USCIS Completes the H-1B Cap Random Selection Process for FY 2017,” Press Release, U.S. Citizenship and Immigration Services, April 12, 2016.

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Finally, the United States committed itself under the General Agreement on Trade in Services to not impose the types of restrictions discussed above to prevent legitimate “trade in services.” A National Foundation for American Policy legal analysis performed by experienced trade attorneys found many of the measures that have been proposed in Congress to restrict H-1B and L-1 visas would violate U.S. commitments under GATS. The analysis noted, “Passing legislation with measures that violate GATS risks retaliation against U.S. companies and can undermine U.S. efforts to open markets in other nations to American goods and services.”⁸⁰ Imposing new restrictions is likely to harm the improved relationship the United States has been fostering with India on defense and foreign policy issues.

Key Policies: New restrictions on which employers can obtain H-1B visas and how the visas can be used are likely to push more work outside the United States. The restrictions are unlikely to help U.S. workers and would likely violate U.S. commitments under the General Agreement on Trade in Services, which would bring retaliation against U.S. companies and, in practice, their U.S. employees. Employers and policymakers may want to approach with caution changes to the way H-1B petitions are distributed. Recall that in 1998 and 2000, U.S. employers accepted new restrictions on H-1B visas as part of a compromise to receive a temporary, but significant increase in H-1B visas. Accepting new restrictions on H-1B visas in exchange for only rearranging the distribution based on the same low number of H-1B visas permitted under current law would seem like a bad bargain in comparison.

⁸⁰ See Jochum Shore & Trossevin, *Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments*.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia, focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, former U.S. Senator and Energy Secretary Spencer Abraham, Ohio University economist Richard Vedder, former INS Commissioner James Ziglar and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.