

Spring 2017

Giving the Market a Microphone: Solutions to the Ongoing Displacement of U.S. Workers Through the H1B Visa Program

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Giving the Market a Microphone: Solutions to the Ongoing Displacement of U.S. Workers Through the H1B Visa Program

*Sam Trimbach**

Abstract: In recent years, the H1B visa program has been mired in controversy. Some have pointed out the way the program is used to aid in outsourcing. Others have suggested that employers pay H1B workers less than their U.S. counterparts, effectively allowing employers to import cheaper foreign labor. In fact, these can go hand-in-hand. The less an employer has to pay an H1B worker, the less expensive it is to use the program to outsource jobs. In addition to these problems, this Note identifies one more: while the current structure of the program helps employers bridge a labor gap when there aren't enough qualified U.S. workers in a field, it simultaneously perpetuates that labor gap so that U.S. workers do not enter the field and employers must continue hiring through the H1B program.

This Note argues that labor gaps are perpetuated because the program only requires employers to pay H1B employees what an average U.S. employee in a similar position makes. By filling these jobs at the same salary, the labor gap is bridged, but there is no increase in salaries. This means that U.S. workers have no incentive to move into the field and fill the labor gap. Without new U.S. workers moving into the field, a gap remains, and employers continue to use the H1B program. The H1B program has two aims: to allow U.S. employers to bridge a labor gap while ensuring that jobs aren't permanently shifted from U.S. workers to foreign workers. By perpetuating the labor gap, the program only satisfies the first aim while thwarting the second; jobs are permanently shifted, only the jobs are in the geographical United States.

As such, this Note argues that the H1B program should be revised so that employers have to pay more for H1B employees than for U.S. employees. The intended effect would be that U.S. workers would see salaries increase in the field and more would begin to train to enter the field. This means the labor gap would be filled by U.S. workers over time, allowing the program to satisfy both of its objectives. Increasing H1B salaries would also make it more expensive to use the program to outsource, potentially curbing some outsourcing abuse of the program.

* J.D., Northwestern Pritzker School of Law, 2017; B.A., University of Chicago, 2011. Many thanks to my wonderful wife for supporting me through law school and the process of writing and editing this Note. Additionally, I greatly appreciate all the work the JILB editors put into revising this Note. All errors are my own.

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I. INTRODUCTION

In October of 2015, about 250 Disney employees were informed that they were being laid off.¹ Many of these employees were replaced by non-resident alien workers entering the United States with H1B visas.² Some of these employees could only receive a severance package if they spent the next three months training one of those workers to do their job.³ Earlier that year, from March through June of 2015, Toys ‘R’ Us hired eight H1B visa workers from Tata Consultancy Services.⁴ These workers shadowed U.S. Toys ‘R’ Us employees and created manuals for sixty-seven of their jobs, then returned to India and used those manuals to train workers there.⁵ The

¹ Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, N.Y. TIMES, June 4, 2015, at A1.

² *Id.*

³ *Id.*

⁴ Julia Preston, *Toys ‘R’ Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, N.Y. TIMES, Sept. 30, 2015, at A1.

⁵ *Id.*

U.S. workers were then laid off.⁶ These stories are not unique.⁷

An H1B visa is a nonimmigrant work visa that allows an alien with special skills or knowledge to enter the United States to work in a position that requires those skills or that knowledge.⁸ As such, some claim the program is necessary to keep jobs in the United States because it allows U.S. employers to fill positions with qualified alien candidates when there are too few qualified U.S. workers.⁹ With this rationale, many have argued that the program works well overall, and only small changes are needed to curb the abuse that occurs.¹⁰

This Note will not attempt to discern the truth about the H1B program as it is. Instead, it will first argue that the goal of the H1B program is to bridge a labor gap in the United States without displacing U.S. workers permanently. It will then argue that the structure of the H1B program keeps it from achieving this goal. Finally, it will propose several reforms to the program that would help realign the program with its goals.

Part II of this Note will give an overview of the H1B program and describe its policy goals. It will begin by reviewing the current structure of the H1B program, focusing on the process of obtaining an H1B visa and what the visa allows its holder to do. It will then break down the structure into two categories of regulations: those that are meant to ensure the alien is qualified, and those that are meant to ensure the employer is not displacing U.S. workers. It will argue these categories reflect the competing goals of the H1B program: it is meant to help bridge labor gaps in the United States in occupations that require special knowledge, but without displacing U.S. workers. Part II will conclude with a brief discussion analyzing whether this is a sound policy goal.

Part III will explain why these regulations fail to accomplish the underlying policy objectives. It will begin by discussing the effect the structure of the H1B program likely has on wages. It will argue that the program allows for underpaying H1B workers, and that at its theoretical best, H1B workers are paid approximately what a U.S. worker would be paid. This Note argues that this is a problem; by paying H1B employees less than or equal to U.S. employees, wages in the field will either decrease or stagnate. This provides a disincentive to U.S. workers considering entering specialized fields.

⁶ *Id.*

⁷ *See id.* (several other examples of “outsourcing firms” using H1B visas are described in the article); *see also* Preston, *supra* note 1 (several other examples of replacing U.S. workers with aliens on H1B visas are included).

⁸ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012).

⁹ *See, e.g.,* Jeffrey L. Gower, *As Dumb As We Wanna Be: U.S. H1-B Visa Policy and the “Brain Blocking” of Asian Technology Professionals*, 12 RUTGERS RACE & L. REV. 243 (2011); Suzette B. Masters & Ted Ruthizer, *The H1-B Straitjacket: Why Congress Should Repeal the Cap on Foreign Born Highly Skilled Workers*, 00-05 IMMIGR. BRIEFINGS, 1 (2000).

¹⁰ *See, e.g.,* Todd H. Goodsell, Comment, *On The Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153 (2007).

The H1B program sets a minimum salary for H1B workers based on the position the worker would fill, and this minimum is calculated using an average of salaries received for similar positions.¹¹ As such, calculating the minimum salary does not involve looking at the potential employee's skills or qualifications.¹² Because of this, H1B workers who should receive a wage premium likely do not. Additionally, because H1B wages are tied to U.S. worker wages, the program makes it more difficult for the average wage to increase. If wages stagnate, U.S. workers have no incentive to enter the field and fill the labor gap. Keeping wages constant (or decreasing them) perpetuates the labor gap, effectively displacing U.S. workers permanently with H1B employees.

Beyond this, allowing U.S. employers to pay less than they should makes it easier for employers and outsourcing firms to outsource jobs. If employers had to pay a premium for H1B workers, this would add greater expense to the process of outsourcing jobs. For example, if Toys 'R' Us had to pay Tata Consultancy more for the H1B workers to come and create training manuals, it might have decided not to do so. And if Disney had to pay its H1B workers more, it may have chosen not to replace so many of its employees. This suggests that the program not only perpetuates the labor gap in some industries, but it also makes it easier for U.S. employers to replace their U.S. employees and to outsource their jobs to other countries.

Part IV will propose solutions to this problem. Fundamentally, each proposal revolves around strengthening market forces within the program. Each is meant to help ensure that H1B workers are paid closer to their actual value, which would both increase the appeal of these industries for U.S. workers and abate abuse of the program for outsourcing. The proposals would also take some leverage away from U.S. employers and give it to H1B workers, which would curb employment abuses such workers may endure under the current regulatory structure.

One solution would be to change the process of obtaining an H1B visa so as to introduce market forces. Here I propose the regulations create a limited marketplace with employers that have certified positions available and alien workers who meet the requirements of an H1B visa. The number of each allowed in the market could be set according to regulations, and the Department of Labor could change these numbers depending on what effect it wanted to have on the market. For example, if the market in an industry looked to be oversaturated, it could limit the number of visas for that industry.

Another solution would be to increase the mobility of H1B employees.

¹¹ See 8 U.S.C. § 1182(n)(1)(A)(i) (2012). This regulation defines the minimum salary that an employer can offer for a position to an H1B applicant. It defines the salary by the position, not by the applicant.

¹² *Id.*

The first obstacle to mobility relates to costs; a new employer has to get the position certified by the Department of Labor before an H1B employee can transfer. This means the employer has to pay fees and incur administrative and transaction costs that do not exist for non-H1B employees. My proposal here is to create an expedited process with fewer fees when an H1B employee wants to change employers. The second obstacle exists for H1B employees who are using their H1B employers as sponsors for green cards. If they change employers, they are sent back to the end of the line of green card applicants. I propose this be changed so the employees can keep their places in line, and I argue this will not affect U.S. immigration policy negatively.

II. THE H1B VISA PROGRAM AND ITS POLICY GOALS

Under current United States immigration law, aliens¹³ are only allowed to enter the country — and thus to work there — under certain circumstances. Generally, receiving a visa allows an alien to enter the country and stay for a certain period of time, and aliens can apply for visas under various programs.¹⁴ A visa is a stamp inside a passport; it is obtained from the U.S. consul in the alien's home country, and it signals to border officers that the alien is entering lawfully.¹⁵ There are two major categories of visas: immigrant and nonimmigrant.¹⁶ Holders of immigrant visas are in the process of immigrating to the United States and gaining either citizenship or permanent residence status.¹⁷ Nonimmigrant visas allow aliens to enter the country for specific purposes and lengths of time, but they do not help aliens become citizens or permanent residents.¹⁸ Holders of nonimmigrant visas, however, can try to enter an immigrant visa program if they decide they do want to stay in the United States permanently.¹⁹

There are numerous classes of nonimmigrant visas, and each class is

¹³ See 8 U.S.C. § 1101(a)(3) (2012) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

¹⁴ See 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR, & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 1.03 (Matthew Bender, rev. ed. 2015); *but see* 8 U.S.C. § 1201(h) (2012) (“Nothing in this Act shall be construed to entitle any alien, to whom a visa . . . has been issued, to be admitted [to] the United States, if . . . he is found to be inadmissible under this Act.”).

¹⁵ See *id.* § 1.02. Note that the border officer will double check to make sure the alien is really allowed to enter.

¹⁶ See 8 U.S.C. § 1101(a)(15) (2012) (“The term ‘immigrant’ means every alien except an alien who is within [a] class[] of nonimmigrant aliens.”); *see also*, 8 U.S.C. § 1101(a)(26) (2012) (“The term ‘nonimmigrant visa’ means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer.”).

¹⁷ GORDON ET AL., *supra* note 14, § 1.03.

¹⁸ *Id.*

¹⁹ *Id.* (“Nonimmigrants may also be able [to] adjust their status to lawful permanent residence while in the United States.”); 8 U.S.C. § 1255 (2012).

defined in 8 U.S.C. § 1101(a)(15). Examples of these classes include ambassadors,²⁰ students,²¹ agricultural laborers,²² and tourists,²³ among others. Each class of nonimmigrant visa has a defined scope of who can participate and how they can participate. The H1B visa is one nonimmigrant visa class.

A. The H1B Visa Process

The H1B program is an employment-based visa; it allows certain aliens seeking employment in the United States to enter the country to work.²⁴ A participant in the program is “an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . who meets the requirements for the occupation . . . and with respect to whom the Secretary of Labor determines and certifies . . . that the intending employer has filed with the Secretary an application.”²⁵ This definition identifies three requirements to participate in the program: 1) a specialty occupation, 2) a participant who has the requisite qualifications, and 3) an employer who files an application with the Department of Labor (“DOL”).

In practice, the employer actually files all of the documentation related to the H1B visa. In addition to the application the employer files with the DOL, the employer is also responsible for filing the H1B petition with the United States Citizenship and Immigration Services (USCIS).²⁶ This petition must include a certified application from the DOL.²⁷ As such, the first step in the H1B process is filing a Labor Condition Application (“LCA”) with the DOL. If this application is certified, the employer then files a petition with UCSIS. Finally, if the petition is approved, the employee applies for a visa stamp with the local U.S. consulate.²⁸

1. The Labor Condition Application

The first step in obtaining an H1B visa is filing an LCA with the DOL.²⁹ An LCA is a description of the position the employer would like to fill with

²⁰ 8 U.S.C. § 1101(a)(15)(A)(i) (2012).

²¹ 8 U.S.C. § 1101(a)(15)(F)(i) (2012).

²² 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012).

²³ 8 U.S.C. § 1101(a)(15)(B) (2012).

²⁴ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012).

²⁵ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012).

²⁶ 8 C.F.R. § 214.2(h)(2)(i)(A) (2012).

²⁷ 8 C.F.R. § 214.2(h)(4)(i)(B)(1) (2012).

²⁸ STEVEN A. CLARK & VINCENT W. LAU, IMMIGRATION PRACTICE MANUAL § 4.1.2 (Mass. Continuing Legal Educ., Inc., 2012). If the employee is already in the U.S. and maintaining legal status, then the employer and employee will have to decide if they want to change the employee’s status to H1B; if so, the employer asks UCSIS to change the employee’s status. *Id.*

²⁹ The requirements of the LCA will be discussed in more detail and critiqued in later parts of this Note.

an H1B worker. Through the LCA, the employer certifies that the position satisfies several requirements, each of which is meant to help ensure H1B workers do not displace U.S. workers. One requirement is that employers must certify that it will pay wages that satisfy a minimum requirement.³⁰ They must also attest that the working conditions for the H1B employees will not adversely affect similarly employed U.S. employees.³¹ They must also attest statements that essentially ensure aliens are not being employed to break a strike or other labor dispute.³² Finally, every LCA must specify “the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.”³³ Together these are meant to provide assurance that hiring H1B employees will not adversely affect the working conditions, wages, or employment of U.S. employees.

Some employers have to provide additional statements as part of their LCAs. These employers include “H1B-dependent employers” and “willful violators.”³⁴ If the employer falls into one of these categories, then it must also attest 1) it “has taken good faith steps to recruit . . . United States workers for the job, and has offered the job to any United States worker who applies and is equally or better qualified,”³⁵ and 2) it “did not displace and will not displace a United States worker.”³⁶ This is meant to subject employers to additional scrutiny if they are more likely to abuse the program.

The DOL then reviews the LCA and decides whether or not to certify it. Within the DOL, the Employment Training Administration receives and certifies LCAs, while the Wage and Hour Division of the Employment Standards Administration investigates whether an employer has misrepresented any facts on or failed to comply with statements in LCAs.³⁷ Enforcement actions suggest that the DOL is most concerned with the wages paid to H1B workers.³⁸ This means most of the investigation and enforcement occurs after the LCA has been certified and the worker has obtained a visa.³⁹

2. The H1B Petition and the Visa Stamp

Once the LCA has been certified, the employer then files a petition with USCIS. Part of the petition includes the certified LCA, but new information

³⁰ 8 U.S.C. § 1182(n)(1)(A)(i) (2012).

³¹ 8 U.S.C. § 1182(n)(1)(A)(ii) (2012).

³² 8 U.S.C. § 1182(n)(1)(B), (C) (2012).

³³ 8 U.S.C. § 1182(n)(1)(D) (2012).

³⁴ 8 U.S.C. § 1182(n)(1)(E)(ii) (2012).

³⁵ 8 U.S.C. § 1182(n)(1)(G)(i) (2012).

³⁶ 8 U.S.C. § 1182(n)(1)(E)(i) (2012).

³⁷ 20 C.F.R. § 655.705(a) (2012).

³⁸ STEVEN A. CLARK & VINCENT W. LAU, IMMIGRATION PRACTICE MANUAL § 4.3.3 (Mass. Continuing Legal Educ., Inc., 2012).

³⁹ *Id.*

includes the identity of those aliens the employer wants to hire as H1B employees and their qualifications.⁴⁰ Here the potential employee is matched up to the position described in the LCA, and UCSIS must determine whether the statutory guidelines are met. That means it must determine whether the position is a “specialty occupation,” and whether the employee has the requisite qualifications.⁴¹ If the petition is approved, then the H1B applicant can either file for change of status (if the applicant is already in the United States) or file with the local U.S. consul to get a visa stamp (if the applicant is not in the United States yet and needs a stamp to be able to enter the country).⁴²

B. The Policy Goals of the H1B Visa Program

The structure of the H1B visa program reveals the policy goals behind the program. The program creates an exception to the general exclusion of aliens for those coming here to work in certain jobs: specialty occupations.⁴³ The statute defines the term specialty occupation as “[A]n occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”⁴⁴ The special occupation definition specifies the scope of the program, but it also reveals why the visa program was created in the first place. It provides a means to expand the applicant pool for employers in highly specialized fields where there are a limited number of qualified applicants.

The other two main provisions limit this. The first requires that the applicant actually have the requisite qualifications of the occupation. The statute defines the requirements of a specialty occupation as “[F]ull state licensure . . . if such license is required to practice in the occupation, completion of the degree described in paragraph (1)(b) for the occupation, or (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty.”⁴⁵ This provision is meant to prevent employers from hiring unqualified foreign individuals to fill positions that meet the specialty occupation requirements. The second main provision is the LCA, discussed above, which can block an H1B visa even if a position is in a specialty occupation and the H1B applicant is qualified. This provision marks the limit Congress wanted to place on the program: it wanted to keep

⁴⁰ See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., FORM I-129: PETITION FOR NONIMMIGRANT WORKER (2012), available at <http://www.uscis.gov/files/form/i-129.pdf>.

⁴¹ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012); 8 U.S.C. § 1184(i) (2012).

⁴² STEVEN A. CLARK & VINCENT W. LAU, IMMIGRATION PRACTICE MANUAL § 4.1.2 (Mass. Continuing Legal Educ., Inc., 2012).

⁴³ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012); 8 U.S.C. § 1184(i)(1) (2012).

⁴⁴ 8 U.S.C. § 1184(i)(1) (2012).

⁴⁵ 8 U.S.C. § 1184(i)(2) (2012).

employers from displacing or harming U.S. employees by hiring H1B employees.

III. DOES THE PROGRAM WORK?

A. Theoretical Problems

Several potential issues with the structure of the H1B visa program have been identified previously in the literature. First, the statute sets a minimum wage requirement using the actual wage and the prevailing wage,⁴⁶ which some commenters have argued can both be below the market wage an employee would ordinarily command. Second, the statute requires that H1B-dependent employers and willful violators of the H1B program try to find an equally-qualified American employee before resorting to the H1B program,⁴⁷ which, as some commenters have argued, has no viable enforcement mechanism.

1. The Wage Issue

As referenced previously, as part of the LCA the employer files with the DOL, the employer must attest that it is offering a wage that meets a minimum requirement. The minimum wage must be the greater of “(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or (II) the prevailing wage level for the occupational classification in the area of employment.”⁴⁸ These will be referenced as “actual wage” and “prevailing wage.” Actual wage depends on what other employees in similar positions are earning at that place of employment, while prevailing wage depends on industry wage data for similar positions. Neither is a perfect substitute for market conditions and productivity that would ordinarily determine an employee’s wage.

An actual wage calculation requires a comparison to an employer’s other employees. To determine which employees should be used in the actual wage calculation, employers need to consider several factors: “experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.”⁴⁹ When an existing employee is similar to a future employee along these factors, that employee is counted. So if “there are other employees with substantially similar experi-

⁴⁶ 8 U.S.C. § 1182(n)(1)(A)(i) (2012).

⁴⁷ 8 U.S.C. §§ 1182(n)(1)(E), (G) (2012).

⁴⁸ 8 U.S.C. § 1182(n)(1)(A)(i) (2012).

⁴⁹ 20 C.F.R. § 655.731(a)(1) (2014).

ence and qualifications . . . [who] have substantially the same duties and responsibilities . . . the actual wage shall be the amount paid to these other employees.”⁵⁰ By substituting the amount paid to similar employees, the actual wage approximates the salary the H1B applicant would command on the open market.

There are two issues with this. First, it assumes that the other employees were hired in an open market and in the same market conditions. If the similar employees are H1B employees, thus not hired on an open market, then tying the new employees wage to the existing H1B’s wage does not ensure a market price. Meanwhile, if market conditions have changed since the existing employees were hired, the salary paid when hired is not a good proxy for the current market price. The second issue is that the “substantially similar” language allows for a large amount of discretion on the employer’s part; an employer can attest that it meets the actual wage requirement by saying none of its employees is similar (although this can look suspicious to the Department of Labor). Additionally, an employer can frame a job posting in a way that it would only include lower-paid employees as substantially similar. The employer frames the actual wage discussion, and the Department of Labor can choose to investigate but does not do so in every case.

The employer also researches and submits the prevailing wage as part of the LCA, but the prevailing wage is determined by the wage that similar employees earn in the same region for doing the same job. Once again, it creates a proxy for a market price, but this time by considering what people at other employers earn for doing a similar job. Generally, the prevailing wage is “the arithmetic mean of the wages of workers similarly employed,”⁵¹ and “the employer is not required to use any specific methodology to determine the prevailing wage,”⁵² although there are small exceptions to both.⁵³ Employers usually have three options when they are calculating the prevailing wage; they can ask the DOL to make a determination (through its National Prevailing Wage Center), they can use an “independent authoritative source,” or they can use “another legitimate source of wage information.”⁵⁴

The DOL determination relies on the Bureau of Labor Statistics’s Occupational Employment Statistics (“OES”) data.⁵⁵ The OES data allows an employer to find wage data based on date, location, and occupational code, and it gives the employer four wage levels that correspond to the applicant’s experience and education and the position’s supervision responsibility.⁵⁶ But

⁵⁰ *Id.*

⁵¹ 20 C.F.R. § 655.731(a)(2)(ii) (2014).

⁵² 20 C.F.R. § 655.731(a)(2) (2014).

⁵³ In exceptional cases, the median is used, or the employer must use a specific methodology.

⁵⁴ 20 C.F.R. § 655.731(a)(2) (2014); AUSTIN T. FRAGOMEN, JR. ET AL., H1B HANDBOOK § 2:28 (2015).

⁵⁵ FRAGOMEN, JR. ET AL., *supra* note 54, § 2:30.

⁵⁶ *Id.* § 2:31.

an employer can use this data to figure out what the DOL would likely determine the prevailing wage to be and compare that to other surveys to find the one that yields the lowest prevailing wage.⁵⁷ Meanwhile, the OES data has been criticized for a number of reasons, one being that there is significant fluctuation from year to year due to the way the data is collected and organized.⁵⁸ The definition of geographic regions can be changed, and which employers are included in the data can be changed (whether because of who was sampled or who chose to respond).⁵⁹ Additionally, because of the way occupations are categorized, the wage determination under the OES data is often higher than using other surveys.⁶⁰ As such, employers often choose to use other wage data.

One issue here is the same as with the actual wage determination; the prevailing wage is an administrative approximation that gives employers and the Department of Labor a salary number without any regard for market conditions. As such, the same criticisms apply here; it assumes that those with similar positions received their salaries on an open market, and it assumes the market has not changed since those determinations were made. Additionally, the prevailing wage determination assigns a salary to the position the employer wants to fill. If the employer uses the OES data, then it must take the employee's experience and qualifications into account when deciding between the four wage levels.⁶¹ But this is subject to interpretation, and the DoL's guidance documents have pushed many employers to use other surveys instead.⁶²

The wage requirements are meant to ensure H1B workers are not paid less than their American counterparts (as this would incentivize hiring H1B workers over Americans). The issues above already suggest that employers may be able to frame their positions in ways that actually allow them to do that. One example of this would be by hiring younger employees with little experience.⁶³ But even if we could ensure that the actual and prevailing wage levels were accurate (the employers did not game the system to get the lowest numbers possible), there is another issue with these wage restrictions. They set the lower limit for hiring an H1B worker at the average of existing em-

⁵⁷ *Id.* § 2:29.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* § 2:31.

⁶² *Id.* § 2:32 (“[T]he [current] prevailing wage worksheets has resulted in most labor certifications . . . being classified under the highest wage listed in the OES System. For this reason, the use of alternate surveys should continue to be an important strategic option for LCA practice.”). The Department of Labor's guidance documents suggest that employers were using lower wage levels than they should have, but forcing them to choose higher wage levels likely just pushes them to use other survey data instead.

⁶³ Norman Matloff, *Immigration and the Tech Industry: As a Labour Shortage Remedy, For Innovation, or For Cost Savings?*, 10 *MIGRATION LETTERS* 210, 222 (2013).

employees, but H1B candidates may be above average applicants. If an employer can hire an above average candidate, one that it expects to have above average productivity, for the price of an average candidate, it will likely choose that above-average candidate. This gives U.S. employers incentive to hire H1B employees over U.S. employees even if their wages are equal.

On top of this, employers may prefer H1B employees because they are less mobile than U.S. employees. First, while the statute does allow workers to change employers, this is difficult to accomplish.⁶⁴ Second, an H1B employee can only work for an employer with a position for which there is a certified LCA, and UCSIS still needs to determine whether the position qualifies as an H1B position and that the employee is qualified for that position.⁶⁵ If the other employer did not have a certified LCA already, it would have to essentially start the visa process over, except that the cap would not apply. The first issue here is a timing one; if the original employer fired the H1B worker before the new employer finished this process, the worker would have to leave the country and try to get a new H1B visa in the next year.⁶⁶ On top of this, the new employer would have to pay all of the administrative costs associated with the H1B process, which might lower the salary it would offer or change its decision to offer employment in the first place.

Additionally, if the employee is working towards a green card, the employee would essentially have to start the entire process over with the new employer.⁶⁷ This is because the employment-based legal residence system requires employers to file a Labor Certification Application, not to be confused with the LCA for H1B employees.⁶⁸ As such, unless the new employer already has a DOL-certified position, it will have to file a new application.⁶⁹ In very limited circumstances, the immigrant will be able to maintain the priority date of the original petition.⁷⁰ Otherwise, their priority will essentially be reset, and they'll be placed at the end of the line. Employees working toward green cards might not want to risk trying to start the process over, meaning they might stick with their employer even if they are getting paid too little.

This general lack of mobility means employers don't have to worry very much about H1B employees leaving at inopportune times. This is another reason employers may prefer to hire an H1B worker instead of an American worker (who has more freedom to leave for another employer).⁷¹ This all

⁶⁴ *Id.* at 210–11.

⁶⁵ *Id.*

⁶⁶ FRAGOMEN, JR. ET AL., *supra* note 54, § 4:29.

⁶⁷ Matloff, *supra* note 63, at 210–11.

⁶⁸ See 4 GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR, & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 44.02 (Matthew Bender, rev. ed. 2015).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Matloff, *supra* note 63, at 221.

suggests that 1) the wage provisions allow employers to offer a lower salary than they otherwise would, and 2) employees have less freedom to try to correct this by approaching other employers.

2. Recruitment and Non-Displacement of U.S. Workers

Certain employers are required to attest to two more provisions in their LCAs. These include “H1B-dependent employers” and “willful violators.”⁷² If the employer falls into one of these categories, then it must also attest that 1) it “has taken good faith steps to recruit . . . United States workers for the job, and has offered the job to any United States worker who applies and is equally or better qualified,”⁷³ and 2) it “did not displace and will not displace a United States worker.”⁷⁴ This subsection will first consider the two types of employers that have to attest to these two provisions, and then it will consider the provisions themselves.

The two additional requirements are applied to employers that are particularly likely to abuse the H1B program. The first is H1B-dependent employers, defined as employers with a proportion of H1B employees above a threshold amount.⁷⁵ However, it is relatively easy to get around this requirement because employers can 1) “count all of its employees (e.g., janitors, secretaries, etc.) when calculating the ratio,” and 2) H1B applicants are exempt from this scrutiny if they “have a master’s degree or an annual income of at least sixty thousand dollars.”⁷⁶ The second is willful violators, who have committed violations in the preceding five years that the agency determines were “a willful failure or a misrepresentation of a material fact.”⁷⁷ These two groups of employers are subject to additional scrutiny for good reason; having a high proportion of H1B workers suggests you may be purposely recruiting H1B workers instead of American workers, while willfully violating the statute in the past suggests intent to use the program in a way it shouldn’t be used. However, the specific scrutiny involved may not be effective.

The first piece of extra scrutiny is the recruitment requirement, by which the employer is required “to take good faith steps to recruit U.S. workers . . . us[ing] procedures that meet industry-wide standards and offer compensation

⁷² 8 U.S.C. § 1182(n)(1)(E)(ii) (2012).

⁷³ 8 U.S.C. § 1182(n)(1)(G)(i) (2012). Note that this is one of the additional requirements in the Labor Certification Application that employers must file when sponsoring an immigrant through an employment-based program.

⁷⁴ 8 U.S.C. § 1182(n)(1)(E)(i) (2012).

⁷⁵ 20 C.F.R. § 655.736(a)(1) (2014). The exact number of H1Bs needed to trigger this requirement depends on the overall number of employees the employer employs.

⁷⁶ Christopher Fulmer, Comment, *A Critical Look at the H1B Visa Program and Its Effects on U.S. and Foreign Workers—A Controversial Program Unhinged from Its Original Intent*, 13 LEWIS & CLARK L. REV. 823, 827 (2009).

⁷⁷ 20 C.F.R. § 655.736(f)(1) (2014).

at least as great as the required wage [for H1B employees].⁷⁸ This means there is a requirement to advertise the position in a certain way and to involve U.S. workers in the application process, for example by interviewing them.⁷⁹ Employers also have to use “legitimate selection criteria,” and they have to offer employment to a U.S. worker who is equally qualified before extending an offer to an H1B candidate.⁸⁰

One issue here is the amount of discretion employers have when determining their selection criteria and deciding whether a U.S. worker is equally qualified.⁸¹ This makes it very difficult to prove bad faith. A U.S. candidate could have similar education and experience, but the employer could claim the candidate did not interview well. Additionally, having similar qualifications is not the same as being equally qualified, suggesting an employer could decide to hire the H1B candidate because of a distinction that should not make a difference. On top of this, the employer is only required to offer a U.S. candidate the same minimum salary used in the ordinary H1B LCA, which was noted above as potentially being below-market. As such, the requirement that the employer make an offer to equally qualified U.S. workers could simply require a bad offer that the worker would never take.

The second piece of extra scrutiny is that the employer must attest that hiring an H1B worker will not displace a U.S. worker. This requires the employer to attest it will not 1) lay off a U.S. worker in a job that is 2) “essentially equivalent to the job for which an H1B nonimmigrant is sought.”⁸² While this means an employer subject to this requirement will not be allowed to replace a U.S. worker with an H1B worker, if the employer is creating a new position without removing an old one, this does not impose any additional requirement. The employer still must follow the first requirement for good faith effort to recruit a U.S. worker, though. To determine whether a job is “essentially equivalent,” the employer must consider the job responsibilities, “qualifications and experience of the workers,” and the area of employment.⁸³ If one of these is different, two positions are not “essentially equivalent,” making it potentially very easy for an employer to get around this requirement. For example, an employer might be allowed to lay off a U.S. worker who has worked there for three years and hire an H1B worker with no experience (as this difference in experience would make the two positions different).

⁷⁸ 20 C.F.R. § 655.739 (2014).

⁷⁹ FRAGOMEN, JR. ET AL., *supra* note 54, §§ 2:75–77 (2015).

⁸⁰ 8 U.S.C. § 1182(n)(1)(G)(i) (2012).

⁸¹ Alaina M. Beach, Note, *H-1B Visa Legislation: Legal Deficiencies and the Need for Reform*, 6 S.C.J. INT'L L. & BUS. 273, 287 (2010).

⁸² 20 C.F.R. § 655.738(b) (2014).

⁸³ 20 C.F.R. § 655.738(b)(2) (2014).

3. Outsourcing

The stories from the introduction to this Note are examples where these requirements did not work, because the employer was not required to make these additional statements or because they lied or because they used a loophole. In 2014, Tata Consultancy Services, the outsourcing firm that had its H1B employees create manuals for jobs at Toys ‘R’ Us, received the most H1B visas out of every employer in the United States.⁸⁴ While more than 10,000 employers filed at least one H1B petition, the 20 companies that filed the most petitions received close to 40% of the visas allowed under the cap.⁸⁵ Of those 20 companies, 13 were global outsourcing firms (and one was Tata Consultancy Services).

When outsourcing firms hire in the United States, they generally fall within the H1B-dependent category of employers. This is because typically, a large proportion of those they hire are H1B employees.⁸⁶ Ordinarily, this means they would be required to make the additional attestations referenced above. However, the program makes an exception if the H1B applicant will be paid “an annual income of at least sixty thousand dollars.”⁸⁷ In fact, according to Professor Ronil Hira of Howard University, many of the temporary workers at outsourcing firms are paid \$60,000, or just above it.⁸⁸

The current cap on H1B workers is 85,000, although 20,000 of those are set apart for student visa-holders who will graduate from U.S. universities.⁸⁹ In 2014, UCSIS received 233,000 applications within the first week.⁹⁰ Five outsourcing firms submitted almost a quarter of those, submitting 55,000 applications.⁹¹ Tata submitted upwards of 14,000, and ultimately received 5,650 visas.⁹²

This runs directly counter to the policy behind the H1B program. For outsourcing firms, the goal is the opposite of the H1B policy; they are trying to move jobs out of the United States. The H1B program is meant to be used to hire qualified aliens in specialty occupations in the United States when there are not enough qualified U.S. workers. This clearly subverts that purpose by replacing qualified U.S. workers temporarily in the U.S. with H1B

⁸⁴ Julia Preston, *Large Companies Game H-1B Visa Program, Costing the U.S. Jobs*, N.Y. TIMES, Nov. 10, 2015, at A1.

⁸⁵ *Id.*

⁸⁶ *Id.*; see also 20 C.F.R. § 655.736(a)(1) (2014) (describing the proportion of H1B employees that triggers status as an H1B-dependent employer).

⁸⁷ Christopher Fulmer, Comment, *A Critical Look at the H1B Visa Program and Its Effects on U.S. and Foreign Workers—A Controversial Program Unhinged from Its Original Intent*, 13 LEWIS & CLARK L. REV. 823, 827 (2009).

⁸⁸ Preston, *supra* note 84, at A18.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

workers and then permanently abroad. The only apparent reason outsourcing firms are able to do what they have been while complying with the law is the exception to the additional attestations when employees are paid \$60,000.⁹³ Nothing about this exception suggests that Congress would have wanted employers to use it to outsource jobs.

While displacing U.S. workers is the immediate goal and effect of outsourcing, these firms have argued that they help keep jobs in the United States in the long run. They argue that outsourcing some positions allows U.S. companies to keep other positions in the United States and remain competitive in the international market.⁹⁴ To use the Toys 'R' Us example, Tata would argue that if Toys 'R' Us did not outsource some of its jobs to India, it would ultimately have to move all of its jobs there.

This type of reasoning should not be compelling under H1B policy. Nothing in the text of the program or its structure suggests an exception when an employer may have to leave the United States to remain competitive. Further, Congress would essentially be condoning abuse of the program if it gave discretion to employers to determine when they needed to outsource some positions and to keep other ones in the United States. With no evidence that Congress intended employers to be allowed to use the H1B program to outsource jobs, and no reason to believe this is in line with the policy goals of the H1B program, the \$60,000 annual salary exception for H1B-dependent employers should be changed.

B. The Economic Data

Three major issues with the H1B program were identified in Part III.A: the LCA wage requirement allows employers to underpay H1B workers, the LCA requirements for H1B-dependent employers and willful violators give employers too much discretion, and the \$60,000 exception allows H1B-dependent employers and willful violators to avoid those additional requirements anyway. The real-world data related to each of these will be reviewed in this Section.

1. H1B Employee Wages

Under the wage requirements of the LCA, employers must attest they will pay H1B workers at least the actual or prevailing wage. Most research on wage data focuses on technology industries because these make up a majority of H1B petitions.⁹⁵ Some researchers have found that H1B workers are

⁹³ See Fulmer, *supra* note 87, at 827.

⁹⁴ *Id.*

⁹⁵ Sunil Mithas & Henry C. Lucas, Jr., *Are Foreign IT Workers Cheaper? U.S. Visa Policies and Compensation of Information Technology Professionals*, 56 *MGMT. SCI.* 745, 747 (2010) (citing E.J. Park, *Unworthy of a Nation Built by Immigrants: The Political Mobilization of H1B Workers*, in *MOVEMENT*

paid less than American workers, and that companies prefer to hire them because of this.⁹⁶ Others have found that H1B workers are paid the same or more.⁹⁷

One major issue here is theoretical. The question this Note poses is whether H1B employees paid the prevailing or actual wage could be paid less than their market values. But *there is no market* available to determine their market values. The regulations essentially use the average of a defined set of salaries, and each may or may not have been the result of market forces. Regardless, they are not the exact market forces that would determine an individual employee's salary. This is essentially what researchers are doing here when they compare H1B salaries to U.S. worker salaries.

The underlying question is essentially impossible to answer because a number of factors affect a typical market wage, including the applicant's projected productivity, the supply of similarly qualified workers, and the demand for employees with those qualifications. These factors will be different for the H1B applicant as compared to the U.S. workers included in the averages. For example, if a prospective employee has skills or knowledge above those required for the job,⁹⁸ studies suggest that this type of additional knowledge ordinarily commands a premium.⁹⁹ But this additional knowledge likely will not be factored into either the actual wage or prevailing wage calculation for an H1B candidate. This allows an employer to get a bargain on an over-qualified H1B candidate.

Some have compared the prevailing wage to an estimated market wage and concluded that employers do pay H1B workers below market wages.¹⁰⁰ But this likely relies on too many assumptions and estimates to be reliable. Markets are the only efficient way to determine market price, and here, we have no market. Each H1B employee is hired in the context of the H1B program, in which the wage is set using an average of other wages rather than through an ordinary market process. While we can compare the H1B wages

OF GLOBAL TALENT: THE IMPACT OF HIGH SKILL LABOR FLOWS FROM INDIA AND CHINA 75, 75 (Princeton University ed. 2007)).

⁹⁶ Norman Matloff, *Immigration and the Tech Industry: As a Labour Shortage Remedy, For Innovation, or For Cost Savings?*, 10 MIGRATION LETTERS 210 (2013).

⁹⁷ Mithas & Lucas, *supra* note 95.

⁹⁸ For example, a programmer might know additional programming languages beyond those required for the job that could still be useful for job performance.

⁹⁹ Norman Matloff, *Immigration and the Tech Industry: As a Labour Shortage Remedy, For Innovation, or For Cost Savings?*, 10 MIGRATION LETTERS 210, 219 (2013). For example, in the computer industry, a 2011 study suggested knowledge of RUBY commanded a salary premium up to 70%, while knowledge of iPhone/Android programming commanded a premium of around 20%.

¹⁰⁰ For example, *id.*, at 220–21 (suggesting that H1B wages are clustered at the prevailing wage, with the majority of H1B employees receiving less than 1.2 times the prevailing wage (at many firms included in the study, a majority of H1B employees earned 1.05 or less times the prevailing wage). Meanwhile, the study suggests 20% is “a conservative value for the wage premium for special skills” that prevailing wage may not take into account).

to U.S. wages—which are set on a market—we cannot know what H1B wages would be on the market.

As such, for the purposes of this Note, wage data regarding H1B workers is not useful. Instead, the proposed changes should be made because they will help increase wages, which should be the goal even if we cannot know what the market price is.

2. *Non-Displacement and Recruitment of U.S. Workers*

As discussed above, certain employers must try to hire a qualified U.S. worker before resorting to the H1B program and must not displace a U.S. worker through the program. There is very little quantitative data related to these two requirements, but some anecdotal evidence suggests that employers try to get around them. For example, one member of a human resources team posted an anonymous comment that:

[E]mployers routinely get around that requirement by running fraudulent job ads and conducting bad faith interviews of qualified American workers and then simply rejecting all American applicants . . . I have over ten years experience in corporate Human Resources departments and technical recruiting operation, and I have actually seen these tactics used. Many HR reps are aware of these tactics but do not speak out in public for fear of losing their careers.¹⁰¹

This is an anonymous comment on a blog, so it is not a verifiable story, but it is reasonable that most HR representatives would only speak on this topic anonymously.

Additionally, as mentioned above, an employer can get around these requirements so long as an H1B hire is exempt, meaning they either receive at least \$60,000 or have a master's degree.¹⁰² The employer still must meet the wage requirement, but this means any position with an LCA wage requirement of \$60,000 or above will be exempt from this scrutiny. This Note has already reviewed the issue with outsourcing firms the \$60,000 exemption has caused. Not only do these firms use the program to send jobs out of the United States, but they also take up some of the limited number of visas, removing potential visas for employers acting within the purpose of the law (and potentially forcing them to hire abroad).¹⁰³

¹⁰¹ Beach, *supra* note 81, at 288 (quoting Posting of HR Representative to IT Business Edge, H1B Visa Proposal: 'Unintended Consequences' All Around, [http:// www.itbusinessedge.com/cm/blogs/all/H1B-visa-proposal-unintended-consequences-all-around/?cs=10104](http://www.itbusinessedge.com/cm/blogs/all/H1B-visa-proposal-unintended-consequences-all-around/?cs=10104) (Apr. 9, 2007, 06:54)).

¹⁰² 20 C.F.R. § 655.737(b) (2014).

¹⁰³ See Julia Preston, *Large Companies Game H-1B Visa Program, Costing the U.S. Jobs*, N.Y. TIMES, Nov. 10, 2015, at A18 (telling two stories of employers having to hire abroad after losing out in the H1B lottery).

3. *The Issue of Fraud*

The final issue is fraud. Employers fulfill each of the requirements of the H1B program based on their uncorroborated attestations as part of the petition process. It is possible that employers lie on these applications. In response to concerns about immigration fraud, the United States Citizenship and Immigration Service (“USCIS”) created the Office of Fraud Detection and National Security (“FDNS”) in May of 2004.¹⁰⁴ FDNS then set up the Benefit Fraud and Compliance Assessment (“BFCA”) in early 2005 to “evaluate the integrity of various nonimmigrant and immigrant benefit programs.”¹⁰⁵ The results of this assessment were summarized in a 2008 report, which stated that 51 out of 246 reviewed H1B cases were confirmed as having violated the statute or regulations.¹⁰⁶ This is a violation rate of just over 20%.

USCIS responded by issuing internal guidance in October 2008 that used data from the BFCA to try to determine indicators that increased the likelihood of violation.¹⁰⁷ This guidance was shared within USCIS, with instructions to send applications with these indicators to FDNS for additional scrutiny.¹⁰⁸ Additionally, USCIS started an Administrative Site Visit and Verification Program in 2009 (“ASVVP”), through which FDNS “conducts unannounced post-adjudication site visits to verify information contained in randomly-selected H1B visa petitions.”¹⁰⁹ In 2010, 14% of the 14,433 ASVVP inspections found a violation.¹¹⁰

As such, not only are there issues with the LCA requirements when they are followed, employers often do not follow those requirements in practice.

IV. PROPOSED SOLUTIONS

The overall policy goal of the H1B program is to bridge labor gaps in

¹⁰⁴ *H1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers: Hearing Before the H. Comm. on the Judiciary Subcomm. on Immigration Policy and Enforcement*, 112th Cong. 4 (2011) (written testimony of Donald Neufeld, Assoc. Dir., Serv. Ctr. Operations Directorate, U.S. Citizenship & Immigration Servs.).

¹⁰⁵ *Id.* Originally, the program was titled the Benefit Fraud Assessment Program, or BFA, but USCIS renamed it.

¹⁰⁶ U.S. CITIZENSHIP AND IMMIGRATION SERVS., *H1B BENEFIT FRAUD & COMPLIANCE ASSESSMENT* 7 (Sept. 2008).

¹⁰⁷ *H1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers: Hearing Before the H. Comm. on the Judiciary Subcomm. on Immigration Policy and Enforcement*, 112th Cong. 5 (2011) (written testimony of Donald Neufeld, Assoc. Dir., Serv. Ctr. Operations Directorate, U.S. Citizenship & Immigration Servs.).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.*

the United States in occupations that require special knowledge without displacing U.S. workers. The structure of the program fails to accomplish this goal for three reasons: 1) it allows U.S. employers to pay H1B employees less than they would command “on the market,” causing employers to prefer hiring H1B employees; 2) it limits the mobility of H1B employees, especially those trying to obtain lawful residence status, further causing employers to prefer H1B employees; and 3) it gives outsourcing firms a cheap means to move U.S. jobs to other countries. The first two cause the internal displacement of U.S. workers with aliens, and they potentially cause a permanent internal displacement by perpetuating a labor gap. The third causes the external displacement of U.S. workers. Both of these are counter to the program’s policy objectives.

This Note proposes two changes to the structure of the H1B program that may reintroduce market forces such that H1B wages would correspond to market value. These would also allow for an ordinary, corrective market force to close the labor gap by increasing wages, signaling to U.S. workers that they should enter these fields. This Note also proposes a change to employment-based legal residency that would allow applicants to maintain their original priority date after changing employers. Finally, it offers a simple solution to the issue of outsourcing and then discusses whether this would fit with the other proposals.

A. Changing the H1B Visa Process

The H1B visa process should be changed to introduce market forces at the initial hiring stage. Of course, we don’t want direct competition between H1B applicants and U.S. workers without some limitations because many H1B applicants would work for lower wages than U.S. workers. One way to create a market within the hiring program would be to set up a market that brought together employers with certified LCAs and applicants who meet the qualifications. The number of each allowed in the market could be set according to regulations, similar to the current cap, potentially using a lottery when necessary.

For example, if UCSIS received 250,000 applications for a year and DOL determined that there should be 100,000 visas given, the lottery system would determine which applicants received the visas, but then the employers would have to bid over those applicants. This type of market would allow a good amount of control on the part of UCSIS and DOL. If they wanted employers to pay a higher premium for H1B workers (pushing employers to hire from the U.S. pool and signaling to U.S. workers that they may want to enter these fields), they could limit the number of H1B applicants but not the number of employers. Not only would this increase wages for H1B workers, it would increase job security (and potentially wages) for U.S. workers in fields with large numbers of H1B employees. This would create an incentive for

more U.S. workers to try to enter these fields, thus eliminating the problem of eternal internal displacement.

One potential argument against this DOL-created-market approach has two parts. First, one could argue that hiring foreign workers does not replace American workers, either because the two are not substitutive but rather complementary, or because the foreign workers add enough value that their use ends up creating new jobs to be filled by U.S. workers. Second, one could argue that increasing the labor costs for U.S. employers, especially in the tech industry, will lead to 1) outsourcing, 2) a decrease in those employers' competitive edge in the global market, or 3) both.

The first part of this argument is largely a data-driven question, one that we likely cannot answer with current studies. The idea that foreign workers are complementary rather than substitutive is one that is not contemplated in the statute, as evidenced by the recruitment and non-displacement requirements for H1B-dependent and willful violator employers. But it is possible that at least some employers do treat them this way. The proposition that foreign workers add enough value to create new jobs is a bit trickier. For example, there is a question of which jobs are created, and whether they are equivalent to the jobs that the H1B employees are filling. Additionally, what would be the ratio of H1B employees to new jobs created? We would have a very different picture if every five H1B employees created one new job for a U.S. worker than if it were one-to-one.

Each of these issues could be taken into account in determining how to set up the market, as they would affect what kind of premium we want employers to have to pay for H1B employees. Additionally, these arguments would suggest there should be no limit to H1B visas, including no lower wage limits. As it is, the law simply does not ascribe to these ideas. Instead, it suggests that Congress believed H1B and U.S. workers were substitutive, and H1B workers did not create new U.S. jobs at a one-to-one ratio. Otherwise U.S. workers would have no need for the protections the law puts in place (and in fact, the protections would have the opposite effect). While Congress may have been incorrect about whether these protections were needed, new economic data is necessary to determine to what extent it was.

Another argument against this approach would be that this is not really moving wages to market value but rather inflating them to an above-market rate. But this misses the point of my proposal, which is not to find a way to create a market that will yield a true market value. A market that allowed free competition between U.S. and alien workers would be disastrous, as the market would be flooded with inexpensive labor. My proposal instead focuses on creating a market signal where one has been silenced. When there are not enough qualified U.S. employees in a field, I suggest wages in that field should increase, even when some positions are filled by foreign workers.

This is because the main purpose of the limiting portions of the H1B program is to avoid the permanent displacement of U.S. workers. If there is

no increase in wages to incentivize U.S. workers to enter the field, there will never be enough U.S. workers to fill the positions, and they will always be filled using H1B workers. This causes perpetual displacement of U.S. workers, even if they are displaced within the geographical United States by H1B visa holders. My proposal is meant to allow the Department of Labor to create an inflated rate when there is a wide labor gap. This should cause some U.S. workers to enter the field, reducing the need for H1B workers in the future. This ultimately should reduce the number of U.S. jobs that are permanently filled by H1B workers.

A final argument against this market approach would be that increasing the cost of wages in these industries would push more of these jobs to other countries. This is an important consideration, and it is something the Department of Labor should take into account when determining the composition of the H1B market each year. But the H1B program cannot solve the outsourcing issue. Additionally, by increasing the price of H1B workers, the outsourcing method described used by Tata and Toys 'R' Us would be more expensive, potentially offsetting the push toward outsourcing.

B. Increasing H1B Employee Mobility

There are two main obstacles to H1B employee mobility. The first is that the H1B visa is essentially awarded to a position at an employer, even though it is literally given to the employee. If an H1B employee wants to change employers, the new employer has to have a certified LCA with room for another H1B employee, or else it has to start the application process from the beginning. The second main obstacle has to do with H1B employees working towards obtaining green cards. Many H1B workers are eligible for an employment-based permanent residency status, but it can take years to actually receive it. Switching an employer will cause the employee to start the process over again.

The first issue relates to switching employers while maintaining an H1B visa. The employee can only switch employers easily if the employer has a certified LCA that includes an unused position that matches the employee's qualifications/position. If any of these requirements is not met, the employer will have to file a new H1B petition, going through the ordinary process. Getting an LCA approved by the DOL can take weeks, and if the employee loses the position at the previous H1B employer before the process is complete (for example if they find out the employee is leaving and retaliate), the employee will lose its existing H1B status and have to leave the country.¹¹¹ This means the potential new employer would have to go through the ordinary H1B process and hope the employee gets a new visa through the lottery (assuming the cap is reached, which is essentially a given at this point).

¹¹¹ FRAGOMEN, JR. ET AL., *supra* note 54, § 4:29.

One potential change here would be that there could be an expedited LCA process for non-H1B dependent and non-willful violator employers. This is because an employee is unlikely to want to change employers to get a wage decrease, meaning the DOL likely does not need to scrutinize the offered wage as closely. Another option would be to allow these employers to file their H1B petitions before receiving the LCA certification, requiring them to submit it within 30 days.¹¹² For H1B-dependent and willful violator employers, the LCA has additional requirements for non-displacement and recruitment of U.S. workers. These would still be necessary for such employers when they hire away from another H1B employer. Each of these proposals would reduce the chance of H1B employees losing their jobs with their first employers before getting paperwork straightened out with their second employers. This means these proposals would reduce the chance that H1B employees would need to start the visa process over again when switching employers.

Another issue that reduces H1B employee mobility relates to the transaction and administrative costs associated with filing the necessary paperwork. The ordinary fees apply, and there are legal expenses related to all of the paperwork and documentation to be kept. While these would exist whether the employer was hiring an H1B employee for the first time or hiring the employee away from another employer, it does change the calculus of when an employer would try to hire someone away. For example, the new employer may consider the employee to be worth \$10,000 more than the initial employer. The employer may have to pay up to \$4,325 just in fees associated with the H1B application, meaning it would only offer a \$5,675 raise to the employee (ignoring potential legal fees). Meanwhile, the costs of relocation may make a change in employer only worth it to the employee if the raise is at least \$7,000.

One change would be to lower the fees for hiring an H1B away from another employer. Most employers have to pay up to \$1,500 for an education and training fee,¹¹³ all have to pay a \$500 anti-fraud fee and a \$325 filing fee, and currently, some employers have to pay an additional \$2,000 fee.¹¹⁴ Some of these fees could be avoided using the same method as above: by allowing them to avoid filing a new visa application. This would mean they would only have to pay the fee and administrative costs associated with the LCA, which would be a significant cost savings.

¹¹² This was actually done for a period of time in 2009 for all of these applications due to complaints related to the amount of time it took to receive LCA certification. *Id.*, § 4:29.

¹¹³ FRAGOMEN, JR. ET AL., *supra* note 54, § 4:28 (2015) (“Some employers are exempt from the education and training fee . . . (e.g., institutions of higher education and their affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations).” Employers with 25 or fewer full-time employees only have to pay \$750 instead of the ordinary \$1,500.

¹¹⁴ *Id.* (The additional fee is for employers “with more than 50% of their employees in the United States in H-1B or L-1A or L-1B nonimmigrant status.”). This provision is scheduled to expire.

The final issue of H1B employee mobility relates to employment-based green cards. As mentioned previously, obtaining legal residence through employment requires sponsorship by an employer who has an approved Labor Certification Application,¹¹⁵ and the employee must maintain that employment throughout the process.¹¹⁶ For employment-based immigration, the number of available visas is limited each year, and visas are distributed according to priority date (among other variables).¹¹⁷ The priority date is used to determine the applicant's place in the queue, and when it finally gets to that place in line (the application becomes "current"), the immigrant can apply for adjustment of status to permanent residence status.¹¹⁸ But the Labor Certification Application determines the priority date, and if the employee changes employers, the new employer files a new application, resetting the priority date.¹¹⁹

As such, I propose the priority date be amended to allow H1B employees that have transferred between similar positions at different employers be allowed to maintain the priority date from the original employer. It is outside the scope of this Note to suggest whether this should also be changed for non-H1B employees trying to obtain permanent residence. But within the H1B context, this would increase mobility of H1B employees, the goal of this proposal.

Each of these proposed changes would make H1B visa employees more mobile, making it easier for them to change employers if another employer offered them a higher salary. This would strengthen market forces affecting H1B employee wages after the employee is already working in the United States. While there would still be transaction costs involved in switching employers that could prevent some employment moves, these changes would lower those costs and allow for more competition over H1B employees.

C. Outsourcing

To reduce outsourcing firms' use of the H1B program to outsource U.S. jobs to other countries, the \$60,000 salary/master's degree exception should be eliminated. If an employer is an H1B-dependent employer or a willful violator, it should have to make the additional statements related to non-displacement and recruitment of U.S. workers. If the structure of the H1B program is changed per my proposals above, then there would be less of a need to remove this exception, as these firms would likely be unable to pay just \$60,000 for H1B employees.

But if the current structure is maintained, then this proposal is a simple

¹¹⁵ Once again, this is not to be confused with the LCA of the H1B program.

¹¹⁶ GORDON ET AL., *supra* note 68, § 44.01.

¹¹⁷ *Id.* § 51.03.

¹¹⁸ *See id.*

¹¹⁹ *Id.*

means to end the outsourcing abuse. Without having to compete on salary, the outsourcing firms have realized they simply need to compete in the lottery, thus filing increasingly large numbers of petitions.¹²⁰ This results in paying many multiples of the ordinary fees.¹²¹ These fees are not paid to the employees, and U.S. workers do not see this premium employers are paying. Instead, these firms should have to compete on salary. Barring this, there should be no exception from the additional scrutiny for H1B-dependent employers and willful violators.

Opponents of this change may argue that this will lead to an increase in outsourcing. This is essentially the same argument refuted above, that these firms keep some jobs in the U.S. by helping others move overseas. But the law marks a clear policy decision to reduce U.S. employer competitiveness to protect U.S. workers. Just as the Contract Labor Laws in the nineteenth century forced U.S. firms relying on manual labor to pay more for that manual labor, the H1B program forces U.S. firms relying on specialized knowledge to pay more for people with that specialized knowledge. Without the 85,000 visa cap and the wage provisions, U.S. employers would be able to pay much less, making them more competitive. So the question should not be whether my proposals would decrease U.S. firm competitiveness; rather, the question should be how much is too much of a decrease. Here, nothing in the law suggests employers should have the discretion to use the program to move some of their jobs to other countries, so removing this loophole only serves to further the law. With respect to the H1B market, this is something the government could consider in setting the limits on employers and applicants in the H1B marketplace.

V. CONCLUSION

The primary purpose of the H1B visa program is to help bridge labor gaps in the United States in occupations that require special knowledge without displacing U.S. workers. This Note argues that there is currently a permanent internal loss of U.S. jobs to foreign workers, as the structure of the H1B program allows employers to pay H1B employees less than they should have to pay. Additionally, the structure of the program reduces the mobility of H1B employees, making it difficult for the market to correct salaries that are too low. These factors cause employers to prefer to hire H1B employees and, ultimately, wages to stagnate. Because wages stagnate, U.S. workers do not try to move to fill the gap in the U.S. labor supply, and foreign workers continually fill many U.S. jobs. This Note also discusses outsourcing and

¹²⁰ See Julia Preston, *Large Companies Game H-1B Visa Program, Costing the U.S. Jobs*, N.Y. TIMES, Nov. 10, 2015, at A1.

¹²¹ For example, if three petitions are filed for every one visa, then these firms are essentially paying three fees for each employee they hire. Meanwhile, the fees can add up to as much as \$4,000 per petition.

how the H1B program has been used to permanently move jobs to other countries.

This Note argues that changing the prevailing wage and actual wage requirements will not fix either problem. Changes to those provisions could make them more effective at ensuring H1B employees are not paid less than U.S. workers. However, such changes would not solve the problem that the H1B system perpetuates a U.S. labor gap by causing wages to stagnate. These changes also would only affect outsourcing firms if the prevailing or actual wage increased above \$60,000, and even then, it would only be a small deterrent. As such, this Note argues market forces should be introduced to the hiring stage of the H1B program and strengthened by increasing the mobility of H1B employees after they have begun working in the United States. If neither of these changes are made, the outsourcing issue could still be addressed by removing the \$60,000/master's degree exception to the additional attestations required of H1B-dependent employers and willful violators.