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An Analysis of the United States Employment Immigration System in Attracting and Retaining Skilled Workers and the Effects of Its Dichotomous Objectives—Competitiveness versus Protectionism: A Case for Reform?

Vignaswari Saminathan*

“[F]rom this day forth, those wishing to emigrate into America shall be admitted on the basis of their skills.”¹

—Lyndon Johnson

I. Introduction

The statement made by President Lyndon Johnson upon signing the Immigration and Nationality Act of 1952 (INA) describes today’s

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1. THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 162 (5th ed. 2003); Ayelet Shachar, *The Race For Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 170 (2006).

immigration system for the admission of immigrants of skill. Nowadays these immigrants are identified as the “best and brightest.”² The best and brightest receive preferential treatment because of the significant contributions these immigrants make to the U.S. economy.³

Other governments of the world share the goal of attracting and retaining the best and brightest:

Governments throughout the world recognize that a high-skill [Science & Engineering] workforce is essential for economic strength. Countries beyond the United States have been taking action to increase the capacity of their higher education systems, attract foreign students and workers, and raise the attractiveness to their own citizenry of staying home or returning from abroad to serve growing national economics and research enterprises.⁴

As a result, immigration has taken on a new dimension because highly skilled immigrants now have many choices about where to immigrate.⁵ Given this development, can the U.S. immigration system maintain its competitiveness?

Over the years, two divergent objectives have emerged within the U.S. system: protectionist measures to safeguard or protect the interests of U.S. workers, and competitive measures to attract and retain the best and brightest immigrants. When in balance, these dichotomous objectives should promote adequate protection of U.S. workers and the global competitiveness necessary to attract talented immigrants to enhance the U.S. economy. However, the high demand for skilled international workers by domestic U.S. industries during the economic boom of the 1990s (as well as the period of 2004-2007) stretched the

2. Shachar, *supra* note 1.

3. See Ajay Malshe, *From Obsolete to Essential: How Reforming Our Immigration Laws Can Stimulate and Strengthen the United States Economy*, 3 ALB. GOV'T L. REV. 358 (2010); see also Courtney L. Cromwell, Note, *Friend or Foe of the U.S. Labor Market: Why Congress Should Raise or Eliminate the H-1B Visa Cap.*, 3 BROOK. J. CORP. FIN. & COM. L. 455 (2009).

4. Shachar, *supra* note 1, at 195 (quoting NAT'L SCI. BD., *THE SCIENCE AND ENGINEERING WORKFORCE: REALIZING AMERICA'S POTENTIAL* 11 (2003), available at <http://www.nsf.gov/nsb/documents/2003/nsb0369/nsb0369.pdf>).

5. Shachar, *supra* note 1, at 152.

capacity of the immigration system because of quantitative constraints imposed on immigration to protect the interests of U.S. workers.⁶ As a result, instead of being able to offer the best and brightest immediate legal permanent residency, as is being done within competitor nations, the U.S. can now, at best, only offer a long wait for legal permanent residency, and at the worst, offer an uncertain future as to whether the application for permanent residency will be decided in favor of the would-be immigrant.⁷ Thus, instead of being admitted on the basis of skill, as envisaged by President Johnson, the best and brightest, for most of their productive years, are admitted into the U.S. on a temporary nonimmigrant visa.⁸

The aim of this Article is to analyze the dichotomous objectives of U.S. immigration policy and to determine what recourse exists to improve the competitiveness of the U.S. immigration system and to ensure adequate protection for U.S. workers. Given that the H-1B visa, the temporary nonimmigrant visa category, has become a very important stepping stone to legal permanent residency, this Article will examine the developments and impact of the dichotomous measures within the context of the H-1B as well as the second employment-based preference category (EB-2) and the third employment-based preference category (EB-3).⁹ As such, Part II of this Article will trace the development of measures encapsulating these dichotomous objectives. Part III will analyze the effect quantitative restraints have had on the immigration of the best and brightest. The Article then, in Part IV, will examine the impact of the dichotomous objectives on four levels: the global labor market, the needs of the U.S. domestic market; protections of U.S. workers; and interests of the international workers. In Part V, the focus will be on finding solutions and making recommendations that go toward realigning these dichotomous objectives to ensure that the needs at all four levels are met.

6. See Cromwell, *supra* note 3, at 455-58.

7. See NAT'L FOUND. FOR AM. POLICY, EMPLOYMENT-BASED GREEN CARD PROJECTIONS POINT TO DECADE-LONG WAITS (2009), available at <http://www.nfap.com/pdf/091117pb.pdf> [hereinafter EMPLOYMENT-BASED GREEN CARD].

8. See Moira Herbst, *One Easy Fix for Immigration*, BUS. WEEK (June 21, 2007), http://www.businessweek.com/bwdaily/dnflash/content/jun2007/db20070620_915353.htm; see also Vivek Wadhwa, *America's Other Immigration Crisis*, AMERICAN (July/Aug. 2008), <http://www.american.com/archive/2008/july-august-magazine-contents/america2019s-other-immigration-crisis>.

9. See Malshe, *supra* note 3; see also Cromwell, *supra* note 3.

II. Tracing the Dichotomy in the History of U.S. Immigration Laws

This Part will examine the dichotomy between competitiveness and protectionism throughout the history of U.S. immigration policy as it relates to employment concerns.

A. *The Early Years*

During its first one hundred years, the U.S. offered an open door policy to immigrants.¹⁰ There were no impediments in regards to quotas based on origin of nationality nor was there a cap on the number of aliens admitted to the U.S. It was not until 1875 that the first immigration restrictions began to appear.¹¹ In 1885, the first employment-based immigration restriction was imposed by the Alien Contract Labor Laws (ACLL), which barred cheap foreign workers in an attempt to safeguard domestic workers against labor market depression.¹² An 1888 amendment to the ACLL required deportation of those persons entering the country in violation of the ACLL.¹³ In 1921, the first quota system was put in place, not to address immigrant employment issues, but instead in response to fears of a mass influx of immigrants from Southern and Eastern Europe after the First World War.¹⁴ This system established an annual national origin quota of 3 percent for each nationality already in the U.S.¹⁵

B. *The McCarran Walter Act of 1952 and the 1965 Amendment*

The present structure of the immigration system was established by

10. See ALEINIKOFF ET AL., *supra* note 1, at 148-51.

11. See IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 3 (12th. ed. 2011) (The Act of March 3, 1875 required “the exclusion of convicts and prostitutes.”).

12. See FRAGOMAN ET AL., H-1B HANDBOOK §1:2 (2011 ed.). The anti-contract labor law was incorporated into the Immigration Act of 1917. The aim of the law was to prevent U.S. employers from employing cheap foreign labor to break strikes as well as to safeguard against the depression of wages and working conditions in the U.S. *Id.*

13. KURZBAN, *supra* note 11. The 1888 amendment was the first statute to impose a one-year bar on re-entry by the deported aliens. *Id.*

14. *Id.* at 4. The quota imposed by the 1921 Act, after gradual reductions, was eventually repealed by the 1965 amendment. *Id.*

15. *Id.* The 3 percent was based on the 1910 census. *Id.*

the McCarran Walter Act (INA), which was the product of a two-year study conducted by the Senate Judiciary Committee.¹⁶ Recognizing the value of attracting talented immigrant and nonimmigrant workers, the Senate recommended the abolishment of the contract labor bar¹⁷ and, more importantly, established preferences within the quotas for aliens with special skills.¹⁸ This was the precursor to today's first, second, and third employment-based preferences.¹⁹ The INA also established a temporary nonimmigrant visa category, known as H-1, for nonimmigrants who had "distinguished merit and ability."²⁰ The competitiveness of the immigration system, however, was tempered by pressures from labor unions.²¹ This pressure culminated in the establishment of a labor certification requirement in 1965, as a mechanism to protect U.S. workers from cheap foreign labor.²²

C. *Immigration Act of 1990*

The impetus behind the enactment of the Immigration Act of 1990 (IMMACT90) was increasing global competition for the best and brightest immigrants, which was driven by the burgeoning high-technology industry of the 1980s.²³ The increasing competition led "to

16. *Id.* The McCarran Walter Act was "codified at Title 8 of the U.S. Code." *Id.*

17. See FRAGOMEN ET AL., *supra* note 12, § 1.3 (explaining the contract labor bar).

18. KURZBAN, *supra* note 11, at 4.

19. FRAGOMEN ET AL., *supra* note 12, § 1.3

20. *Id.* (internal quotation marks omitted).

21. ALEINIKOFF ET AL., *supra* note 1, at 333.

22. *Id.* In *Pesikoff v. Sec'y of Labor*, 501 F.2d. 757, 761-63 (D.C. Cir. 1974), reference was made to Senator Kennedy's statement as to who bears the burden of proof under the new labor certifications requirement. His statement is indicative of the intent of the new requirement:

Under (the old) procedure, the Secretary certifies that aliens falling under certain occupational or skill definitions should be excluded because they will threaten domestic employment. The [1965 amendment] reverses this procedure. It places the burden of proving no adverse effect on the applying alien. This intending immigrant must receive a certificate from the Secretary of Labor that his presence will not affect U.S. employment, wages, or working conditions.

Id. at 761-62.

23. See Jung S. Hahm, Note, *American Competitiveness and Workforce*

fears concerning the U.S. work force's ability to compete in the global economy."²⁴ In 1967, Canada introduced a point-based system that essentially allowed for the use of an objective tool in evaluating and selecting foreign nationals with high levels of skill sets or abilities.²⁵ The point-based system proved to be successful.²⁶ As a result, Australia, in 1973, and, subsequently, New Zealand adopted similar targeting and selecting methodology to recruit talented foreign nationals.²⁷

The IMMACT90 was essentially a "compromise between . . . the [INS], labor unions, the immigration bar, and an assemblage of different groups with varying philosophies."²⁸ On one hand it addressed the need to be competitive while on the other hand it ensured that U.S. workers were protected.²⁹ In doing so, it also substantially expanded the employment-based immigration system.³⁰ In the process, it created the five employment-based preferences³¹ for permanent immigration and restructured the nonimmigrant H-1 category.³² One of the offshoots of that restructuring was the H-1B visa.³³

Of the five employment-based preference categories,³⁴ the two that

Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program, 85 CORNELL L. REV. 1673 (2000).

24. Shachar, *supra* note 1, at 183 (quoting DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 34 (3d ed. 1992)).

25. *Id.* at 171.

26. *Id.* at 176.

27. *Id.* at 176-83.

28. Hahm, *supra* note 23, at 1682 (alteration in original) (quoting Steven J. Klearman, *Nonimmigrant Business Visas After the Immigration Act of 1990*, 28 GONZ. L. REV. 53-54 (1992)); *see also* Klearman, *supra*, at 54.

29. Hahm, *supra* note 23, at 1679-82.

30. ALEINIKOFF ET AL., *supra* note 1, at 167.

31. The preference system was chosen over the point-based system by the Senate Committee. *The Preference System: Hearing on S. 1663 Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 19-20 (1981) (statement of Sen. Alan K. Simpson) [hereinafter *The Preference System*].

32. *See* KURZBAN, *supra* note 11, at 6; *see also* FRAGOMAN ET AL., *supra* note 12. The H-1 category is for nonimmigrants who are of "distinguished merit and ability." *Id.* (internal quotations omitted).

33. *See* FRAGOMAN ET AL., *supra* note 12, § 1:8. The IMMACT90 excludes from the H-1B category alien entertainers, artist, and athletes, who now must obtain a nonimmigrant visa only through the O and P nonimmigrant categories. *Id.*

34. *See* MARTIN J. LAWLER, PROFESSIONALS: A MATTER OF DEGREE 4 (5th ed. 2009). The first employment-based preference relates to priority workers who may be individuals of "extraordinary ability," outstanding "professors and researchers," or "executives and managers of international organizations." *Id.* The second preference

are relevant to this Article are the second preference (EB-2) category for professional immigrants with advanced degrees and the third preference (EB-3) for those immigrants who are professionals and skilled workers.³⁵ Professionals must have at least a bachelor's degree and "skilled workers must have at least two years of training and fill a position that is permanent."³⁶

Having decided on the preference issue, Congress created an annual worldwide cap of 140,000 for the preference categories.³⁷ This number was further constrained by the limitation that a single country could not exceed more than 7 percent³⁸ of the total immigration visas available in a particular fiscal year, amounting to 9,800 of the 140,000 annually available visas.³⁹

To ensure that U.S. workers would not be displaced by immigrants in the U.S. labor market, IMMACT90 requires employers to test the market through a comprehensive labor certification process, such as advertisement and recruitment policies that ensure that "there are not sufficient workers who are able, willing, qualified . . . and available," in addition to the requirement that wages and working conditions of U.S. workers employed in similar position will not be adversely affected.⁴⁰

In order to stay competitive in the global race to attract the best and brightest as well as to meet the demands of the labor shortage in the U.S., the nonimmigrant H-1B category opened only for foreign nationals working in "specialty occupations" which require specific professional training or a showing by the applicant of prominence in their field.⁴¹

relates to persons with advanced degrees and exceptional ability, whose work is in the national interest to retain through permanent residence. *Id.* The third preference includes skilled workers, professionals, and other workers, while the fourth preference relates to religious workers, and the fifth preference relates to investment in new businesses that generate U.S. jobs. *Id.*

35. See Janice D Villiers, *Closing the Borders: Reverse Brain Drain and the Need for Immigration Reform*, 55 WAYNE L. REV. 1877, 1887 (2009).

36. *Id.* at 1888.

37. LAWLER, *supra* note 34.

38. 8 U.S.C. § 1151(d) (2009).

39. *Id.* § 1152(a).

40. Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 968 (2002) (alteration in original) (quoting Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(i) (internal quotation marks omitted).

41. Malshe, *supra* note 3, at 363 (internal quotation marks omitted).

IMMACT90 established dual intent for the H-1B visa⁴² and also allowed for an extension of the time period for temporary residents who had a pending application for permanent residency.⁴³

Nevertheless, two important restrictions were imposed on the H-1B visa: an annual cap of 65,000⁴⁴ and a labor condition application (LCA).⁴⁵ The purpose of enacting the LCA was to protect the U.S. workers from “wage suppression and substandard working conditions due to competition from imported foreign labor.”⁴⁶ As a result, employers are required to attest that the H-1B hire will be paid the prevailing wage or actual wage and that the working condition for that hire is on par with a similar U.S. worker.⁴⁷ By imposing these requirements, the LCA ensures that the H-1B worker will also be protected. However, the LCA is not required for those H-1B hires with master’s degree, or those who are earning in excess of \$60,000.⁴⁸ This is in line with the traditional use of the H-1 category for attracting the best and brightest.⁴⁹

D. *The American Competitiveness and Workforce Improvement Act of 1998; Congressional Amendment of the H-1B Visa Program*

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) was the result of a lobbying effort by the high-tech industry to increase the H-1B annual cap to address the shortage of

42. See Cromwell, *supra* note 3, at 459-60. Dual intent “allows workers in the United States on nonimmigrant visas, such as the H-1B, to apply for permanent resident status while in the United States.” *Id.* at 479 (Norma Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. L.J. REFORM 815, 815 (2003)).

43. KURZBAN, *supra* note 11, at 7.

44. “[A] number that apparently was ‘randomly chosen without regard to American businesses’ need for or actual use of these visas.” Hahn, *supra* note 23, at 1679 (quoting Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT’L LAW. 471, 484 (1998)).

45. FRAGOMAN ET AL., *supra* note 12, § 2:1; *id.* “The requirement was extensively amended by the Miscellaneous and Technical Immigration and Nationality Amendments of 1991 (MTINA) and most recently in 1998 by the American Competitiveness and Workforce Improvement Act (ACWIA).” FRAGOMAN ET AL., *supra* note 12, § 2:1

46. Malshe, *supra* note 3, at 364.

47. See FRAGOMAN ET AL., *supra* note 12, § 2:1.

48. See *id.* § 1:10.

49. See *id.*

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skilled workers in an industry that was booming.⁵⁰ As with IMMACT90, a compromise was reached with the various interest groups and the annual cap was raised to 115,000 in 1999 and 2000, then lowered to 107,500 in 2001.⁵¹ The annual cap then reverted to 65,000 in 2002.⁵² As to the other side of the equation, ACWIA required stricter labor protections for U.S. workers as well as the H-1B workers employed by H-1B dependent employers,⁵³ and these protections were to subsist until 2002.⁵⁴ An added requirement was that the H-1B worker was eligible for the same benefits offered to a U.S. worker.⁵⁵

Recognizing the need to address the labor shortage in the long run, the ACWIA increased the fees to be paid by employers hiring H-1B workers by \$500.⁵⁶ It was estimated that \$75 million could be raised to fund scholarship for low-income students in math, science, engineering, and computer science, as well as training for thousands of Americans via the Job Training Partnership Act.⁵⁷

50. See Hahm, *supra* note 23, at 1674-75.

51. See *id.* at 1676.

52. *Id.*

53. See Cromwell, *supra* note 3, at 460-61. H-1-B dependent employers, created by the ACWIA, are those employers that hire workforces that have at least 15 percent H-1B workers. *Id.* at 460.

54. See Hahm, *supra* note 23, at 1687.

[A]n H-1B dependent employer must attest that (1) “it has not displaced and will not displace a U.S. worker for period of 180 days, beginning 90 days before the filing of the H-1B petition and ending 90 days after the filing of the H-1B petition;” (2) that “it will not place the H-1B worker with another employer . . . where there are ‘indicia of an employment relationship’ between the H-1B worker and the second employer unless it first asks the other employer whether it has or intends to displace a U.S. worker within 180-day period; . . .”

Id. (quoting J. Traci Hong & David Swaim, Jr., *Act Doesn’t Live up to Its Name*, TEXAS LAWYER, Jan. 18, 1999, at 26).

55. *Id.* at 1687-88.

56. See *id.* at 1686.

57. Trucios-Haynes, *supra* note 40, at 1009.

E. *American Competitiveness in the Twenty-First Century Act of 2000*⁵⁸

The American Competitiveness in the Twenty-First Century Act of 2000 (AC21CA) took off where ACWIA left off with regards to the demand for increased availability of skilled workers. As a result, the H-1B annual cap was increased to 195,000 for the fiscal years 2001 to 2003.⁵⁹ To optimize the visa allocation, visas issued by fraud or misrepresentation were to be recaptured and restored to the cap,⁶⁰ and further, individual visa holders were to be counted only once against the cap within the six year period, unless they were eligible for a new six year period if they had been out of the country for one year.⁶¹ AC21CA completely exempted from the annual cap those H-1B visas issued to employees of higher education institutions, related nonprofit entities, and nonprofit or governmental research organizations.⁶² Further exemptions were afforded by the L-1 Visa and H-1B Visa Reform Act of 2004, which “[e]xempted up to 20,000 visas per year from the . . . cap, persons who have earned a master’s or higher degree from a U.S. institution of higher education.”⁶³ And the Twenty-First Century Department of Justice Appropriations Authorization Act allowed H-1B to extend beyond six years where a labor certification is pending one year or more.⁶⁴ The H-1B petitioning fee was further increased to \$1,500 by the Omnibus Appropriations Act for Fiscal Year 2005,⁶⁵ which included the H-1B Visa Reform Act of 2004 to further fund the scholarship and training

58. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (codified as amended in scattered sections of 8 U.S.C.).

59. 8 U.S.C. § 1184(g)(1)(A)(iv)-(vi) (2008); see KURZBAN, *supra* note 11, at 12.

60. *Id.* § 1184(g)(3).

61. *Id.* § 1184(g)(7).

62. *Id.* § 1184(g)(5).

63. KURZBAN, *supra* note 11, at 19; see also Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 425(a), 118 Stat. 2809, 3356 (2004) (codified as amended at 8 U.S.C. § 1184(g)(5) (2008)).

64. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (amending 8 U.S.C. § 1184(b) (2008)); see KURZBAN, *supra* note 11, at 16.

65. Consolidated Appropriations Act of 2005 §1184(c)(9)). Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 422(b)(2), 118 Stat. 2809, 3353 (2004) (codified as amended at 8 U.S.C. § 1184(c)(9)(B) (2008)).

programs established under IMMACT90.⁶⁶

Concerned with issues of backlogs, AC21CA allowed EB-1, EB-2, and EB-3 beneficiaries who were unable to obtain a visa due to per-country limitations to obtain H-1B extensions beyond six years until their adjustment of status application was adjudicated.⁶⁷ Further, unused employment-based visas were used for persons from oversubscribed countries (e.g., India and China).⁶⁸ A more significant improvement made by AC21CA was to allow EB-1, EB-2, and EB-3 beneficiaries whose adjustment of status applications had been pending 180 days or more to change employers without affecting their applications, if the new job was in the same or a similar occupational classification as the job for which the petition was filed.⁶⁹

F. *Employ American Workers Act*⁷⁰

In response to the 2008 financial crisis and the pressure from various interest groups, the Employ American Workers Act (EAWA) was enacted to prohibit the hiring of H-1B by any company accepting TARP funds unless such hiring complied with the stricter attestation requirements as imposed on an H-1B dependent employer. That provision was in effect until February 17, 2011.⁷¹

III. From the Floor of the Congress to Reality: The Numbers Game

The quantitative limitations imposed on the H-1B visas and employment-based preference categories have been controversial and have contributed to the oversubscription and the backlog issues. This Part will trace how the quantitative protectionist measures enacted by the various amendments have interacted with the dynamism of the economy

66. See Cromwell, *supra* note 3, at 462; see also U.S. DEP'T OF HOMELAND SEC., REPORT ON H-1B PETITIONS: FISCAL YEAR 2005 (2006), available at http://www.uscis.gov/files/nativedocuments/H1B05Annual_08_7.pdf.

67. 8 U.S.C. § 1184(c) (2008).

68. *Id.* § 1152(a)(5)(A); see KURZBAN, *supra* note 11.

69. *Id.* § 1154(j); see KURZBAN, *supra* note 11.

70. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1611, 123 Stat. 115, 305 (2009) (referencing 42 U.S.C. § 1382 (2006)).

71. See KURZBAN, *supra* note 11, at 28. "It exempts [the Immigration and Nationality Act] § 212(n)(1)(E)(ii)." *Id.*

and competition to contribute to two main problems that have serious repercussions for the competitiveness of the immigration system.

A. *The Oversubscription Issue*

As Table 1 shows, the overall total annual H-1B visas issued for the last ten years have ranged from 355,000 to 460,000.⁷² This includes those H-1B hires who were subject to the 65,000 annual cap, the 20,000 visas designated since 2005 for those with a master's degree or higher from a U.S. institution, as well those who were H-1B hires by higher education institutions, related nonprofit entities, and nonprofit or governmental research organizations (not subject to any caps). Looking at Table 1 for the years 2000 to 2007, the total number of H-1B visas issued annually was escalating, with a slight dip in 2002 and 2003 to indicate the lagging effect of the dot.com bubble burst on hiring policies in information technology companies.⁷³ A similar slowdown is indicated in 2008 and 2009 due to the recent financial crisis.

72. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 63-65 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf [hereinafter 2009 YEARBOOK].

73. *Id.*

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Table 1⁷⁴

Temporary Workers in Specialty Occupation (H1-B) (2000-2004)					
Year	2000	2001	2002	2003	2004
Total*	355,605	384,191	370,490	360,498	386,821
Non-Exempt	115,000	195,000	195,000	65,000	65,000
Exempt	240,605	221,191	305,490	295,498	321,821
Percent Exempt	67.7%	57.5%	82.5%	82%	83.2%
Temporary Workers in Specialty Occupation (H1-B) Continued (2005-2009)					
Year	2005	2006**	2007**	2008**	2009**
Total*	407,418	431,853	461,730	409,619	339,243
Non-Exempt	65,000	85,000	85,000	85,000	85,000
Exempt	342,418	346,853	376,730	324,619	254,243
Percent Exempt	79.1%	80.3%	81.6%	79%	75%

* Includes those H-1B workers who work for exempted organizations and thus do not come within the cap.

**Visa cap for those years is 85,000—includes the 20,000 H-1B visas allotted to foreign nationals who are graduates with a master's degree or higher from a U.S. university.⁷⁵

Within the number of overall total H-1B visas issued annually, there

74. *Id.* See Table 2, *infra* note 80; Table 3, *infra* note 84.

75. See Paschal O. Nwokocha, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 45-47, 49 (2008).

is a pattern for those H-1B visas issued that are subject to the annual cap. The sum total effect of ACWIA and AC21CA is reflected in Table 2.⁷⁶ In 1999 and 2000, the cap was increased to 115,000 and all visas were issued.⁷⁷ However, in 2001, the cap was increased to 195,000, but only 163,600 were issued.⁷⁸ In 2002, the cap was at 195,000 but only 79,100 were issued, and in 2003, with a cap of 195,000, only 78,000 visas were issued, due in part to the dot.com crisis.⁷⁹

Table 2⁸⁰

H1-B Visa Caps and Issues		
Fiscal Year	Visa Cap	Visas Issued
1999	115,000	115,000
2000	115,000	115,000
2001	195,000	163,000
2002	195,000	79,100
2003	195,000	78,000

In the subsequent years, when the annual cap reverted to the pre-ACWIA and AC21CA level, the scramble for H-1B visas within the exempted category comprising 85,000 visas in total can be seen by the oversubscription as well as the cutoff subscription date that gets earlier and earlier. For the 2006 fiscal year, it was August 10, 2005.⁸¹ For the 2007 fiscal year, it was May 26, 2006.⁸² Finally, for the 2009 fiscal year, 163,000 petitions were submitted by April 10, 2008 (see Table 3).⁸³

76. NAT'L FOUND. FOR AM. POLICY, H-1B VISAS BY THE NUMBERS: 2010 AND BEYOND 5 (2010), available at <http://www.nfap.com/pdf/1003h1b.pdf> [hereinafter VISAS BY THE NUMBERS].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Nwokocho, *supra* note 75, at 47.

82. *Id.*

83. *Id.*

Table 3⁸⁴

H1-B Visa Cap and Cutoff Dates			
Fiscal Year	Visa Cap	Date Cap Reached	Applications Received
2005	65,000	10/1/2004**	65,000
2006	85,000*	8/10/2005**	85,000
2007	85,000*	5/26/2006**	85,000
2008	85,000*	4/3/2007	150,000
2009	85,000*	4/10/2008	163,000

* Includes the 20,000 H-1B visas allotted to foreign nationals who are graduates with a master's degree or higher from a U.S. university.⁸⁵

** Cutoff dates when H-1B stopped receiving due to cap being reached.⁸⁶

Interestingly, the H-1B visas issued yearly from the exempted category kept within a range of 79-83 percent of the total amount issued, except that in 2000 and 2001 the figure was much lower due to the increase in the issuances of H-1B visas that were subject to the increase in the annual cap. In 2009, the number dipped to 75 percent due to the global financial crisis (see Table 1), demonstrating the effect of free market forces on immigrant supply and demand. On the other hand, the H-1B visas that were subject to the cap had been oversubscribed since 2005, indicating the strong unmet demand by the economy (see Table 3).

B. *The Backlog Issue*

Two conditions contribute to the backlog issue: the huge volume of H-1B visa holders applying for legal permanent residence under the EB-2 and EB-3 categories, and the 7 percent country origin limitation imposed by the INA.

Given the large number of H-1B issuances over the years (see Table

84. *Id.*

85. *See id.* at 46.

86. *Id.* at 47.

1), it was estimated that in 2006 there were over 1,000,000 H-1B visa holders (including their dependents) who had applied for legal permanent residence—most of them through EB-2 and EB-3 categories.⁸⁷ It is likely that this number may have doubled by now.⁸⁸ Such a huge volume of applications needs time to be processed, given that the maximum cap for all five employment-based categories is 140,000 and EB-2 and EB-3 are only allocated 40,040 immigrant visas each.⁸⁹ The visa allocation process is further impacted by the restrictions imposed by section 202(a) of the INA, which requires that “[t]he total number of immigrant visas made available to natives of a single foreign state . . . may not exceed 7 percent . . . of the total number of such visas made available under such subsections in that fiscal year.”⁹⁰ As a result, immigrants from a particular country of origin under EB-2 and EB-3 are technically limited to 3,920 legal permanent resident visas. Any unused visas from the other three preference categories will then be utilized under EB-2 and EB-3, as the maximum annual number of immigrant visas issued per country cannot exceed 9,800 visas,⁹¹ despite the fact that the AC21CA now allows unused visas to be utilized to meet the demands of oversubscribed countries, increasing the national origin quota ceiling further.⁹²

The limited amount of immigrant visas and the country of origin constraints have a serious effect on the waiting period for legal

87. See Steve Lohr, *The Real High-Tech Immigrant Problem: They're Leaving*, N.Y. TIMES BLOG (Mar. 2, 2009, 12:01 AM), <http://bits.blogs.nytimes.com/2009/03/02/the-real-high-tech-immigrant-problem-theyre-leaving>; see also Wadhwa, *supra* note 8.

88. See EMPLOYMENT-BASED GREEN CARD, *supra* note 7. For the last ten years, even if half of the H-1B holders had applied for legal permanent residence under the EB-2 and EB-3 categories, there would have been, approximately 1,954,000 principal applications, which when taken together with their dependents, would equal around 2,150,000 applicants. *Id.*

89. 8 U.S.C. § 1151 (d)(1)(A) provides that maximum number of visas available for the five employment-based categories is 140,000. 8 U.S.C. § 1151 (d)(1)(A) (2009). Visa allocation should not exceed 28.6 percent (40,040) of that maximum number for EB-1, EB-2 and EB-3 respectively, 8 U.S.C § 1153(b) (2006), and should not exceed 7.1 percent (9,940) for EB-1 and EB-2 respectively, 8 U.S.C § 1153(b)(4) (2006).

90. EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 2 (quoting 8 U.S.C. § 1152(a)(2) (2000)).

91. See Malshe, *supra* note 3, at 388.

92. See EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 2; see also KURZBAN, *supra* note 11, at 12. Although the effect of AC21CA is to ease the national origin quota per country requirement, the total employment-based green cards issued must still be within the overall 140,000 worldwide limits. EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 2.

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permanent residence adjudication, especially for nationals from the top six countries of origin.⁹³ Table 4 shows H-1B visas holders from the top six countries: India, Canada, the U.K., Mexico, China and Japan.

Table 4

H-1B Visas Issued & Top Six Countries of Origin							
	India	Canada	UK	Mexico	China	Japan	Total H-1B Visas Issued ⁹⁴
2007 ⁹⁵	157,613	26,209	25,507	18,165	16,628	14,435	461,730
2008 ⁹⁶	154,726	23,312	19,209	16,382	13,828	11,788	409,619
2009 ⁹⁷	123,002	22,156	14,610	14,352	12,922	9,677	339,243

The implication of the above mix is that nationals who are beneficiaries of EB-2 and EB-3 have to wait longer and longer for their country's priority date.⁹⁸ Table 5 shows the priority dates for EB-2 and EB-3 petitions from China, India and Mexico.

93. The effect on Mexicans and Canadians is not considered in this analysis, as no analysis on those nationals would be complete without consideration of the North American Free Trade Agreement (NAFTA). NAFTA is beyond the scope of this Article.

94. 2009 YEARBOOK, *supra* note 72, at 65.

95. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS, 84-87 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf [hereinafter 2007 YEARBOOK].

96. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS, 84-87 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf [hereinafter 2008 YEARBOOK].

97. 2009 YEARBOOK, *supra* note 72, at 84-87.

98. See LAWLER, *supra* note 34. Priority date is the date the Department of Labor accepts the Labor Certification Application and the immigration process cannot be completed without the priority being current. *Id.*

Table 5⁹⁹

Category	Description	Priority Date	China	India	Philippines
EB-2	Advanced Degree	Current	May 8, 2006	May 8, 2006	Current
EB-3	Skilled Worker	December 15, 2004	October 22, 2003	January 1, 2002	December 15, 2004
EB-3	Other Workers	March 22, 2003	March 22, 2003	January 1, 2002	March 22, 2003

The net effect is that petitioners from India and China, for instance, may have to wait for their EB-3 legal permanent residence as long as twenty years, and for twelve years or more under EB-2.¹⁰⁰ Individuals from other countries may have to wait six to seven years under EB-3, and three to five years under EB-2.¹⁰¹

Table 6 below shows the annual legal permanent residency admissions issued for adjustment of status under EB-2 and EB-3 during the last ten years.¹⁰² As can be seen from Table 6, the admissions in respect to adjustment of status under EB-2 for the last ten years range from 12,900 to 68,800 and for EB-3 the range is from 26,962 to 109,700.¹⁰³ These wide ranges shows the difficulty in keeping track of these figures and reconciling them with the annual cap—an indication of the administrative complexity involved in managing the admission of immigrants in accordance with the provisions of immigration laws.

99. Bureau of Consular Affairs, U.S. Dep't of St., Bureau of *Visa Bulletin for September 2010*, TRAVEL.STATE.GOV (Aug. 9, 2010), http://travel.state.gov/visa/bulletin/bulletin_5113.html. The bulletin summarizes the availability numbers during September 2010. *Id.*

100. EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 1.

101. *See id.* at 6.

102. 2009 YEARBOOK, *supra* note 72, at 18-19.

103. *Id.*

2012] *COMPETITIVENESS VERSUS PROTECTIONISM* 167Table 6¹⁰⁴

EB-2 & EB-3—Legal Permanent Residence Admissions (2000-2004)					
Year	2000	2001	2002	2003	2004
EB-2-New Arrival	1,857	6,533	5,323	2,437	1,400
EB-2-AOS	18,398	36,017	38,993	12,969	31,134
Total	20,255	42,550	44,316	15,406	32,534
EB-3-New Arrival	12,578	20,566	23,448	19,453	20,094
EB-3-AOS	37,011	65,281	64,554	26,962	65,875
Total	49,589	85,847	88,002	46,415	85,969

EB-2 & EB-3—Legal Permanent Residence Admissions Continued (2005-2009)					
Year	2005	2006	2007	2008	2009
EB-2-New Arrival	1,488	972	1,171	1,214	1,216
EB-2-AOS	41,109	20,939	42,991	68,832	44,336
Total	42,597	21,911	44,162	70,046	45,552
EB-3-New Arrival	19,357	29,531	22,388	9,922	6,873
EB-3-AOS	109,713	60,390	62,642	38,981	33,525
Total	129,070	89,922	85,030	48,903	40,398

IV. The Effectiveness of the Dichotomy Objectives in Keeping the Balance at the Four Levels

This Part considers the effectiveness of the dichotomous objectives on four levels: global labor market, domestic industry's need, U.S. workers, and international workers.

104. *Id.* Any unused visas for a category can be used in other employment-based preference categories, and unused visas in one fiscal year can be used in future fiscal years—should demand exceed the cap in that fiscal year. Nwokocho, *supra* note 75, at 44.

A. *Global Labor Market*

1. Importance of Immigration

Immigration increases productivity and gross domestic income without reducing native employment rate in the long run.¹⁰⁵ Findings have further indicated that immigration has the effect of creating jobs.¹⁰⁶ A survey found that over 25 percent of the technology companies founded in the U.S. from 1995 to 2005 were headed by legal permanent residence or naturalized citizens who initially came to study or work in the U.S.¹⁰⁷ Those companies generated more than “\$52 billion in revenue and employed 450,000 workers” in 2005.¹⁰⁸

2. The Competition: Point Based System vs. Preference System

Due to the recognition that immigrants have made significant economic contribution to their new countries,¹⁰⁹ there exist other attractive immigration destinations, apart from the U.S., such as Canada, Australia,¹¹⁰ and New Zealand.¹¹¹ These four countries¹¹² were the traditional receiving countries. Since 2000, several European Union member states, including Germany, the U.K., France, Ireland, and Sweden, reformed their immigration laws to join the competition to attract the best and brightest.¹¹³ While there is cross-immigration among

105. See GIOVANNI PERI, MIGRATION POLICY INST., THE IMPACT OF IMMIGRANTS IN RECESSION AND ECONOMIC EXPANSION 4 (2010), available at <http://www.migrationpolicy.org/pubs/Peri-June2010.pdf>.

106. See NAT'L FOUND. FOR AM. POLICY, H-1B VISAS AND JOB CREATION 1 (2008), available at <http://www.nfap.com/pdf/080311h1b.pdf> [hereinafter VISAS AND JOB CREATION].

107. Wadhwa, *supra* note 8.

108. *Id.*

109. See Shachar, *supra* note 1, at 152.

110. *Id.* at 151.

111. See *id.* at 179-84 (New Zealand's innovative “talent visa” system eliminates the traditional long bureaucratic process the immigrant faces in securing employment authorization.).

112. *Id.* at 159.

113. See *id.* at 151.

these countries, India and China still maintain their status as the “two main sending countries.”¹¹⁴

The common thread that exists among nearly all of these immigration destination countries is that their immigration laws focus on a “selective admission procedure” that is based on points and which aggressively markets towards and recruits the best and brightest.¹¹⁵ A typical point-based system awards points or scores cumulatively on several bases including: education, job experience, language proficiency, age range, and arranged employment, in addition to other variations.¹¹⁶ Once a potential immigrant achieves the points stipulated by the relevant agency, legal permanent residency is granted immediately upon arrival to the host country—not only to the principal applicants but also to their dependents.¹¹⁷ The flexibility of the point-based system hinges on the bases for awarding points, which, along with their corresponding point values, can be changed. Likewise, the least amount of points needed to qualify for legal permanent residency may be adjusted to reflect the needs of the labor market or the types of professionals the country seeks.¹¹⁸

On the other hand the dichotomous tension that pervades the U.S. preference system seems to impede the U.S. from competing on the same footing as the countries that have adopted a point-based system.¹¹⁹ In the U.S., the best and brightest have to wait years for their legal permanent residency.¹²⁰ It is troubling that, in 2006, 26 percent of the patent applications filed in the U.S. were owned or co-owned by foreign nationals, and more than 40 percent of international patents filed by the U.S. government had foreign authorship.¹²¹ This explicitly means that these foreign nationals are likely in the U.S. on temporary work permits, such as H-1B visas,¹²² with no certainty that they will be able to stay

114. *Id.* at 168 n.73 (internal quotation marks omitted).

115. *See id.* at 151-52, 171-96.

116. *Id.* at 171-72.

117. *Id.* at 174 n.91, 175.

118. *Id.* at 174.

119. *See id.* at 196-99 (the highly skilled potential immigrant finds receiving countries that grant permanent residency immediately upon the immigrant’s entry more attractive, whereas the U.S.’ system is laden with burdensome bureaucracy and long waits, leading to insecurity for both the worker and his employer).

120. EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 1.

121. Wadhwa, *supra* note 8.

122. *Id.*

given the long wait required to become a legal permanent resident.¹²³ These patent-owning foreign nationals, along with their patent ownership, would likely be received with open arms and granted immediate residency by any of the competing countries.

3. Changing Economic Landscape

There seems to be a shift in the identities of sending countries such as India and China, due to their burgeoning economic power.¹²⁴ As a result, a number of their nationals repatriated from countries such as the U.S. in recent years, and repatriation numbers are likely to increase.¹²⁵ In Asia, countries such as Singapore, Taiwan, and South Korea have joined the repatriation club, where policymakers have spent extensively to welcome back their overseas nationals.¹²⁶ This “reverse brain drain”¹²⁷ may have been further exacerbated by the deepening global recession,¹²⁸ because receiving countries are cutting back on immigration due to its perceived adverse effect on their domestic employment.¹²⁹

4. Future of Immigration on the Global Level

In the long run, however, when the world economy recovers, receiving countries, including the U.S., will scramble to fill in the lacunae engendered by the reverse brain drain trend. Further, the looming threat of an aging world population, and its corollary—a declining and

123. See EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 1.

124. See Wadhwa, *supra* note 8.

125. *Id.* Because of the small number of visas available to foreign students studying in the U.S., there is less than a 50 percent chance such a student will secure permanent residency. *Id.*

126. Shachar, *supra* note 1, at 159-60, 167.

127. Villiers, *supra* note 35, at 1882. This occurs where “[h]ighly skilled professionals, . . . who entered [a wealthier] country legally to study or work, . . . return[] to their countries of origin in unprecedented numbers and driv[e] research and development there.” *Id.*

128. See PERI, *supra* note 105, at 13; see also Vivek Wadhwa, *Is the U.S. Experiencing its First Brain Drain?*, NEW AM. MEDIA (Mar. 31, 2009), available at http://www.soc.duke.edu/GlobalEngineering/pdfs/media/losingtheworlds/nam_usexperiencing.pdf.

129. See PERI, *supra* note 105, at 6-7 (analysis finds that immigration reduces native employment, but only in the short-run, over four or five years).

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aging workforce,¹³⁰ would undoubtedly lead to very aggressive marketing for, and recruitment of, the best and brightest at the global level. Given the relative lack of competitiveness of its preference system, the U.S. will likely lag behind in recruiting the best and brightest if the problems associated with its dichotomous objectives remain unresolved.

B. *Needs of the Domestic Industries*

1. Sentiments of the U.S Domestic Industry

Microsoft's Chairman Bill Gates and Google's Vice President for People Operation Laszlo Bock echo the sentiments of the information technology industry that, in order to maintain its status as the worldwide leader in technology, the U.S. technology industry needs highly skilled and talented foreign students and professionals to meet the demand created by the shortage of skilled native workers.¹³¹ Further, both leaders maintain that, if the U.S. does not reform its immigration system to attract and retain the best and brightest, it would lose out to its other global competitors who have designed their immigration systems just for such purposes.¹³²

2. Response by the U.S Domestic Industries

As a consequence of the U.S. immigration system's inability to meet the requirements of domestic industries in respect to attracting and retaining the best and brightest and meeting the demand for skilled labor, domestic companies, especially those in the information technology and pharmaceutical industries, have responded by relocating their

130. U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIV., WORLD POPULATION AGEING: 1950-2050, at 29, U.N. DOC. ST/ESA/SER.A/207, U.N. SALES NO. E.02.XIII.3 (2002), *available at* <http://www.un.org/esa/population/publications/worldageing19502050/> [Hereinafter WORLD POPULATION AGEING]. By 2050, older persons, those over sixty years old, are expected to constitute 21 percent of the world's population, whereas in 2010 this group made up only 10 percent. *Id.* at xxviii.

131. Malshe, *supra* note 3, at 374-75; *see* VISAS AND JOB CREATION, *supra* note 106, at 2-3 (referencing the testimony of Laszlo Bock before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, on June 6, 2007).

132. Malshe, *supra* note 3, at 375.

organizations to countries with friendlier immigration policies,¹³³ or to traditional sending countries, such as India and China.¹³⁴

In 2007, Microsoft established the Microsoft Canada Development Center, in Vancouver, British Columbia, to enable it to “recruit and retain highly skilled people affected by the immigration issues in the [U.S.]”¹³⁵ In addition, U.S. companies, such as Cisco Systems and IBM, have gone further by locating their global base in Bangalore, India.¹³⁶ Meanwhile, 34 percent of the research and development staff at General Electric’s Jack Welch Technology Center in Bangalore are returnees from the U.S., as are more than 50 percent of those with Ph.D.’s at the IBM research center in the same city.¹³⁷ Further, Indian companies are discovering new drugs and designing components for jetliners for their U.S. and European clients who have outsourced their projects.¹³⁸ In China, hundreds of billions of dollars are being invested jointly by multinational companies and the Chinese government to make it an “export power in semiconductors, passenger cars, and specialty chemicals.”¹³⁹ Further, the Chinese government is subsidizing research laboratories in biochemistry, nanotechnology, computing, and aerospace, where dozens of their top scientist are returnees from the U.S.¹⁴⁰

Because protectionist measures have eroded the competitive edge of the U.S. immigration system, these companies have further fueled the reverse brain drain. Ironically, the very tool employed to protect the U.S. workers against job loss or displacement is acting as a backlash; the job creation and investment opportunities are lost in light of such relocation and outsourcing.

C. U.S. Workers

Trade unions and other workers interest groups have pushed for

133. Cromwell, *supra* note 3, at 473.

134. Wadhwa, *supra* note 8.

135. Cromwell, *supra* note 3, at 476 (alteration in original) (quoting Todd Bishop, *Microsoft Plans to Open Software Center in B.C.*, SEATTLE POST-INTELLIGENCER, July 6, 2007, at 1) (internal quotation marks omitted).

136. Wadhwa, *supra* note 8.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

protectionist measures at every recent attempt to infuse competitiveness into U.S. immigration law.¹⁴¹ The mechanisms utilized to safeguard the interests of the U.S. workers essentially hinge on annual numerical limitations on the issuance of H-1B, EB-2 and EB-3 visas, and the requirement that employers test the labor market conditions.¹⁴²

The labor market test requirements seek to prevent wage suppression, adversely affected working conditions, and the displacement of qualified U.S. workers.¹⁴³ Those requirements are achieved by paying the H-1B hire the prevailing wage or actual wage, whichever is higher, as well as ensuring that the benefits offered are the same as those offered to a U.S. worker.¹⁴⁴ For EB-2 and EB-3 petitions, the employer, in addition, has to advertise the job and carry out a recruitment process to ensure there is no U.S. worker qualified to perform that job; otherwise the qualified and willing U.S. worker should be hired instead.¹⁴⁵

The critical issues in this analysis are whether these protectionist measures adequately protect the U.S. workers, and whether the price paid for such measures is justified.

1. Labor shortage

One of the rationales for hiring H-1B workers is to meet the labor shortage.¹⁴⁶ In response to the information technology industry's pre-ACWIA lobbying effort, in support of which the industry maintained the necessity of an increase in the H-1B program's annual cap to meet labor demand, critics noted that, despite high numbers of job vacancies in that field,¹⁴⁷ thousands of employees were laid off.¹⁴⁸ The underlying reason

141. See Cromwell, *supra* note 3, at 465; see also Christopher Fulmer, Comment, *A Critical Look at H-1B 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, 828-29, 843-49 (2009).

142. Cromwell, *supra* note 3, at 459-60.

143. *Id.* at 471.

144. Fulmer, *supra* note 141, at 830-31.

145. Malshe, *supra* note 3, at 366.

146. Cromwell, *supra* note 3, at 465-66.

147. Trucios-Haynes, *supra* note 40, at 1006.

148. *Id.* at 1013. In 1999, for instance Electronic Data Systems laid off 5,180 workers, Compaq laid off 2,150 workers, *id.* at 1013 n.194, and the average unemployment rate for IT workers over forty years is more than five times that of other

given for the layoffs, however, was that those workers lacked the necessary skill to contribute to the growth of the industry.¹⁴⁹ Further, it was unreasonable to require employers to train under-qualified workers, when there are qualified foreign workers available to perform the job immediately,¹⁵⁰ despite the extra administrative and financial burdens imposed on these employers.¹⁵¹ Policymakers seemed to accept this viewpoint and, to counteract against long-term labor shortage, they have imposed higher petitioning fees, which go towards the establishing scholarships and training funds for information technology students and workers.¹⁵²

2. Are They Really the Best and Brightest? Or Is It a Question of Cheap Labor?

The other rationale for hiring and retaining the best and brightest foreign workers is that they would contribute significantly to the country's human capital and knowledge base.¹⁵³

Nevertheless, critics claim that 56 percent of the H-1B workers were rated at Level I—"beginning level employees who have only a basic understanding of the occupation [and who] perform routine tasks that require limited, if any, exercise of judgment,"¹⁵⁴ 31 percent were rated at Level II—"qualified employees who have attained, either through education or experience, a good understanding of the

unemployed workers. S. COMM. ON THE JUDICIARY, AMERICAN COMPETITIVENESS IN THE TWENTY-FIRST CENTURY ACT, S. REP. NO. 106-260, at 28 (2000). According to a report released by the National Research Council in 2000, older workers do face obstacles in the IT industry even in boom time. Cromwell, *supra* note 3, at 468.

149. See Cromwell, *supra* note 3, at 466.

150. *Id.* at 466.

151. See *id.* at 459 (extra administrative and financial burdens include the LCA and the petitioning fees).

152. See *id.* at 461, 464, 469.

153. See *id.* at 473.

154. Norman Matloff, Fixing Our Badly Broken H-1B Visa and Employer-Sponsored Green Card Programs 7 (Sept. 19, 2007) (unpublished manuscript) (alteration in original) (quoting EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, PREVAILING WAGE DETERMINATION POLICY GUIDANCE 7 (2005), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (internal quotation marks omitted), available at <http://www.cwalocal4250.org/outsourcing/binarydata/PrevWage.pdf>; see also Fulmer, *supra* note 141, at 851.

occupation,”¹⁵⁵ only 8 percent were classified at Level III—“experienced employees who have with sound understanding . . . and have attained . . . special skills or knowledge,”¹⁵⁶ and just 5 percent were classified at Level IV.¹⁵⁷ Critics argue that IMMACT90 requires “highly specialized knowledge” as the standard for qualifying for H-1B visas, yet only 13 percent of the H-1B hires actually qualified under that standard.¹⁵⁸ Consequently, these critics conclude that either the majority of the H-1B hires are “ordinary people doing ordinary work,” or the employers under-represented the qualifications of these hires in order to pay a lower prevailing wage.¹⁵⁹

Although it is unlikely that employers misrepresent their H-1B employees’ qualifications,¹⁶⁰ it is likely that they hire foreign workers who are overqualified relative to the job description.¹⁶¹ Since, according to the Department of Labor guidelines, the prevailing wage is tied to the qualifications and experience attributable to the job descriptions and not to the worker’s actual qualification and experience, it would seem that, although the employer is in compliance with the prevailing wage requirement, it may hire a foreign worker at a wage rate that is not commensurate with the worker’s actual, higher qualifications and experience—hence, the cheap labor argument.¹⁶²

The H-1B (or EB-2/EB-3 beneficiary) hire performing in accordance with the job description renders moot the cheap labor argument, and therefore no potential for wage suppression exists. However, in this situation, the issue concerns hiring overqualified workers, which is not disallowed by the current labor condition application.¹⁶³ Upon further examination, overqualified workers are

155. Fulmer, *supra* note 141, at 851-52 (quoting EMP’T & TRAINING ADMIN., *supra* note 153) (internal quotation marks omitted).

156. *Id.* (quoting EMP’T & TRAINING ADMIN., *supra* note 154) (internal quotation marks omitted).

157. JOHN MIANO, CTR. FOR IMMIGRATION STUDIES, LOW SALARIES FOR LOW SKILLS: WAGES AND SKILL LEVELS FOR H-1B COMPUTER WORKERS 7 (2007), available at <http://www.cis.org/articles/2007/back407.pdf>; *id.* at 852; Matloff, *supra* note 154.

158. Fulmer, *supra* note 141, at 852 (quoting 8 U.S.C. § 1184(i)(1) (2008)) (internal quotation marks omitted).

159. Matloff, *supra* note 154.

160. *See id.*

161. *See id.* at 851.

162. *See id.*

163. There are no findings, empirical or anecdotal, to indicate H-1B workers, or beneficiaries of EB-2 or EB-3 have been hired to work in jobs other than what they have

likely to perform at a higher level, and hence, enhance productivity. This added value is not factored into the wages, thus benefitting the employer. Viewed from this perspective, employers get more out of foreign workers than they are willing to pay. Thus, the added value the employer acquires more than offsets the additional administrative and financial burdens associated with hiring a foreign national. This practice would likely have some adverse effect, in the long run, on the wages paid for such jobs, since the scope of the position would have been enlarged but the wage would remain unchanged.

From the perspective of a U.S. worker with the minimum qualifications required by the job, she would be competing with an overqualified foreign national who thus would likely be the better candidate. The labor condition application process for H-1B petition only ensures against wage suppression and adverse working conditions.¹⁶⁴ Displacement becomes an issue only during the labor certification process for EB-2/EB-3 petitions, which requires that the employer advertise the position and attempt to hire a willing and able U.S. worker.¹⁶⁵ Even then, it seems that employers tend to favor their international workers who have already proven their abilities by making significant contributions at less cost.¹⁶⁶

3. The Economic Crisis

Prompted by massive job losses, particularly in the financial industry, due to the recent economic crisis, the Grassley-Sanders Amendment, a protectionist measure, bars (except under certain circumstances) H-1B hires by banks and other financial institutions that received a stimulus package under the TARP, until February 17, 2011.¹⁶⁷ Despite criticism that the amendment would hinder the economic

been hired to perform as per their job description. *See generally* Wadhwa, *supra* note 8.

164. Only a thirty days' notice must be posted in the job board of the employer informing that an H-1B candidate is being hired for the job in question. Fulmer, *supra* note 141, at 831.

165. *See* Malshe, *supra* note 3, at 366.

166. *See id.* at 386; *see also* Wadhwa, *supra* note 8 (“ . . . I know from my experience as a tech CEO that H-1Bs are cheaper than domestic hires. Technically, these workers are supposed to be paid a ‘prevailing wage’ but this mechanism is riddled with loopholes . . . so you can hire a superstar for the costs of an average worker.”).

167. KURZBAN, *supra* note 11, at 28, 748; *see also* Malshe, *supra* note 3, at 379-80.

revival,¹⁶⁸ the timeliness and the restraint, shown in terms of short term restriction, reflect the recognition that, in the short run, economic downturns do have an impact on employment,¹⁶⁹ and the U.S. workers do need to be protected, even if the number of H-1B hires in the industry as compared to the overall U.S. workforce is negligible.¹⁷⁰

4. Adequate Protection at a Justified Price?

Conceptually, the tools employed by the labor condition application requirement for both the H-1B hires and beneficiaries of EB-2/EB-3 should adequately protect the U.S. workers against wage suppressions, adverse working conditions, and displacements, and such protectionist measures are needed. There is room, however, for manipulations and circumventions, such as hiring overqualified international workers at the expense of U.S. workers.

The protectionist measure taken in terms of quantitative restriction is very controversial.¹⁷¹ The tension between the dichotomous objectives becomes apparent. On one hand, there is a concern that increase or removal of the numerical restriction would increase the influx of foreign workers, who would then displace the U.S. workers from their jobs.¹⁷² On the other hand, the domestic industry, particularly the information technology industry, needs the numerical limitations to be increased in order to meet its demands for workers with particular skills sets who happen to be foreign nationals.¹⁷³ Those demands were met during the period from 1999 to 2003, when the H-1B cap was increased—a temporary measure.¹⁷⁴ After 2003, the cap reverted to the pre-1999 level, and no change was ever made to the quota restrictions relating to the employment-based preference categories since IMMACT90's inception

168. Malshe, *supra* note 3, at 380 (citing *Economic Focus: Give Me Your Scientists*, *ECONOMIST*, Mar. 7, 2004, at 84).

169. See PERI, *supra* note 105, at 4.

170. NAT'L FOUND. FOR AM. POLICY, H-1B VISAS AND FINANCIAL INSTITUTIONS (2009), available at <http://www.nfap.com/pdf/090205policybrief.pdf> [hereinafter VISAS AND FINANCIAL INSTITUTIONS].

171. See Trucios-Haynes, *supra* note 40, at 1008-10; Hahm, *supra* note 23, at 1697-1700.

172. Cromwell, *supra* note 3, at 457.

173. Hahm, *supra* note 23, at 1693.

174. *Id.* at 1675-76.

in 1990.¹⁷⁵ As a result, employers have started to relocate or outsource, thus depriving the U.S economy of potential job creation and income opportunities.¹⁷⁶

At this point in time, it appears that the price paid for protectionism is not justified. On one hand, the U.S workers are not adequately protected and, on the other hand, they lose out in terms of loss of job creation opportunity, when this very protectionist measures forces the employers to relocate or outsource.

D. *International Workers*

1. Protection for the International Workers

While the primary purpose of the LCA is to safeguard the U.S workers against wage suppression and adverse working conditions, a corollary purpose of that requirement is to ensure that the international worker on an H-1B visa is also protected from wage exploitation and “the imposition of inadequate working conditions.”¹⁷⁷ The ACWIA further requires H-1B workers to be eligible for the same benefits offered to a U.S. worker employed in a similar position.¹⁷⁸ The rationale for this level of protection is that, by leveling the field between the U.S. worker and international worker, an employer would now be required to offer similar compensation package and working conditions to the international workers. At the same time this also alleviates the incentive to hire an international worker over an U.S. worker since the cost of hiring an international would only be outweighed by the additional administrative burden and costs of obtaining the work permit visas.¹⁷⁹ Nevertheless, when employers manipulate or circumvent the system, such as hiring overqualified international workers, the playing field gets tilted against the U.S. workers. The additional value an overqualified international worker would offer to the employer in terms of enhanced productivity may outweigh the administrative cost of such a hire over a

175. KURZBAN, *supra* note 11, at 6; Cromwell, *supra* note 3, at 456-57.

176. *See* Cromwell, *supra* note 3, at 477-78.

177. FRAGOMAN ET AL., *supra* note 12, § 2:1.

178. *Id.*

179. *Id.*

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U.S. worker who may have the required qualification to do the job.¹⁸⁰ This has two adverse consequences: exploitation of wages for international workers and, more importantly, potential for wage suppression in the long run, thus eroding the protection afforded to the U.S. workers. Therefore, it follows, that any shortcomings in terms of protection afforded to the international workers would also adversely affect the U.S. workers.

2. Restrictions Imposed on the International Workers and Its Consequences

On the other hand, the restrictions, particularly on quantitative limitations and portability, imposed on H-1B employment have significant repercussions. Since most of the H-1B hires do want to stay in the U.S., they are likely to have an EB-2/EB-3 petition pending, and because of the current backlog, most of them have to wait for a decade or more for their legal permanent residency application to be adjudicated.¹⁸¹ During the pendency of the petition, with restricted portability, the international worker's career, personal development, and advancement are impeded.¹⁸² Further, the uncertainty associated with final adjudication of their legal permanent residency after the long wait has also prevented these international workers from laying deep roots in this country.¹⁸³

3. Anecdotal Findings

Anecdotal findings also suggest that, even before the recession, international workers, even those who already have their legal permanent residence, were returning to their home countries; this was so with Indians and Chinese.¹⁸⁴ The recession, of course, had exacerbated the

180. See KURZBAN, *supra* note 11, at 28, 748; see also Malshe, *supra* note 3, at 379-80.

181. See EMPLOYMENT-BASED GREEN CARD, *supra* note 7, at 1; Wadhwa, *supra* note 8.

182. KURZBAN, *supra* note 11, at 1007-08; Fulmer, *supra* note 141, at 855. Although allowed to change employers, employment must be within the same or similar job classification. 8 U.S.C. § 1154(j) (2009).

183. Wadhwa, *supra* note 8.

184. See VIVEK WADHWA ET AL., AMERICA'S LOSS IS THE WORLD'S GAIN (2009), available at http://www.kauffman.org/uploadedfiles/americas_loss.pdf.

situation.¹⁸⁵ The reason given for the reverse exodus seems to be pursuit of professional advancement: 61 percent of Indians and 70 percent of Chinese returnees considered there to be better prospects in their home countries.¹⁸⁶ Further, the findings revealed that 44 percent of the Indians who returned to India held senior management positions, while only 10 percent of that same set of returnees had senior position in the U.S.¹⁸⁷ The figures for the Chinese were 36 percent and 9 percent respectively.¹⁸⁸ Other motivating factors included wanting to be close to friends and relatives.¹⁸⁹ Surprisingly, visa difficulties were not one of the dominant factors for returning.¹⁹⁰

As for students who form the pool for H-1B recruitment, it appears that only 58 percent of Indians, 54 percent of Chinese, and 40 percent of Europeans wanted to stay for a few years to gain work experience before heading home.¹⁹¹ Visa difficulties, however, were a dominant reason for this sentiment.¹⁹² Meanwhile, 74 percent of Chinese and 86 percent of Indians believed that they would thrive better in their home countries because of optimism about the economy in that country.¹⁹³

4. Aftermath of the Recession

While those findings may be reflective of the recessionary times, and may even be welcoming given the high rate of unemployment, what will the scenario be once the world gets out of its economic slump? If the focal pursuits of these international workers, as suggested by the above findings, are advancement of career and being close to their family and friends, it is likely that any destination country offering benefits that encapsulate those desires will be able to attract and retain the next set of talent.

185. *See id*; *see also* Wadhwa, *supra* note 128; Villiers, *supra* note 35, at 1890.

186. Wadhwa, *supra* note 128.

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.*

191. *Id.*; *see also* WADHWA, ET AL., LOSING THE WORLD'S BEST AND BRIGHTEST 1-3, available at http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/Losing_the_World's_Best_and_Brightest.pdf.

192. *See* Wadhwa, *supra* note 128.

193. *Id.*

V. The Final Analysis: The Impact of the Dichotomy—A Case for Reform? If So, What Reform?

A. *Ideal System*

Ideally, when the dichotomous objectives are in balance, U.S. workers should be adequately protected against displacement, wage suppression, and adverse working conditions. Domestic industries should also have access to international workers, in order to overcome labor shortage, to be able to harness the special talents or abilities of international workers in tandem with its U.S. workers, and to develop business. The U.S., as a global competitor, should be able to attract the talent needed to support its domestic industries' needs, and international workers should be able to identify the U.S. as the country that will meet their career and personal advancement goals.

B. *Current Status-Consequences of the Shortcomings of the System*

Currently, the system is out of sync at all the four levels discussed above. The decade or more wait for legal permanent residence is impeding the U.S. from attracting the best and brightest talents. At the same time, the U.S.'s global competitors are in the position to offer immediate permanent residency.¹⁹⁴ The burgeoning new economies, such as in India and China, may impact the flow of immigrants. Already there is evidence of reverse brain drain from the U.S. to these countries, although that flow at present may have been exacerbated by the deepening worldwide recession. Further compounding these changes is the looming threat of the world's aging population.¹⁹⁵ All these developments may heighten the competition for the best and brightest.

On the domestic level, dissatisfaction with the competitiveness of the immigration system, which has resulted in employer's inability to hire the necessary skilled workers, has caused some of the leading information technology companies to relocate or outsource their work.¹⁹⁶

194. *See id.*

195. *See, e.g.,* WORLD POPULATION AGEING, *supra* note 130.

196. VISAS AND JOB CREATION, *supra* note 106, at 2; Malshe, *supra* note 3, at 376; Cromwell, *supra* note 3, at 475-77.

This, in turn, has serious repercussion to the U.S. economy; much needed job creation opportunities are lost at the time when they are most needed.¹⁹⁷

The very mechanism utilized to protect the U.S workers against wage suppression and adverse working conditions may have the potential to be misused and may adversely affect the interest of the U.S. worker. The hiring of overqualified international workers may be in compliance with the law, but it still does have the potential to suppress wages in the long run.¹⁹⁸

Any immigration destination countries or home countries that can offer career and personal advancement to international workers, as well as an opportunity to be with their family, will likely be attractive.¹⁹⁹

C. *What Kind of Corrective Measures*

Given the imbalance, it is apparent that corrective measures are needed. Various reforms have been suggested by commentators²⁰⁰ and this Article focuses on taking corrective measures within the immigration system to bring about the balance of the dichotomous objectives. Whether these corrective measures would succeed would depend on how well these measures will be able to synchronize the various needs at the four levels: global competition, domestic industry, U.S. workers, and international workers.

D. *Realignment: An Elegant Solution?*

The realignment corrective measures should focus on two levels: tightening the protectionist measures by leveling the playing field between the U.S. workers and international workers, and improving competitiveness by adjusting or modifying the quantitative limitations.

197. See VISAS AND JOB CREATION, *supra* note 106, at 12.

198. Wadhwa, *supra* note 8; see Trucios-Haynes, *supra* note 40, at 977, 986-88; Fulmer, *supra* note 141, at 858. *But see* VISAS BY THE NUMBERS, *supra* note 76, at 13-14; Malshe, *supra* note 3, at 369-70.

199. Shachar, *supra* note 1, at 158-59; Wadhwa, *supra* note 128.

200. See, e.g., Malshe, *supra* note 3, at 381-90; Shachar, *supra* note 1; Cromwell, *supra* note 3, at 478-80; Hahm, *supra* note 23, at 1691-700.

1. Leveling the Playing Field

The current practice of hiring overqualified international workers is made possible because of the requirement that the prevailing wage be tied to the job description.²⁰¹ The net result of such practice favors the hiring of an international worker over a U.S. worker, despite the additional administrative and financial burdens associated with such a hire, because of the extra value added an international worker contributes to the employer.²⁰²

Requiring that the prevailing wages be tied to the qualification of the international worker instead of the job description seems to be an untenable solution, as this would mean that an overqualified person can never take a low paying job.²⁰³

One proposal, which may be viewed as a compromise solution to this issue, has been made in the H-1B and L-1 Visa Reform Act of 2009 (S. 887) proposed by Senators Durbin, Grassley, and Sanders.²⁰⁴ The proposal requires employers to pay the highest of the prevailing wage, the median average wage, or the “median wage for skill level 2 . . . found in the recent Occupational Employment Statistics [OES] survey.”²⁰⁵ By requiring OES level 2 wages, this proposal prevents employers from hiring overqualified international workers at level 1 and paying wages at that level.²⁰⁶ However, there has been suggestion by critics that requiring median average wage or median OES wage for level 2 constitutes “disguised restriction on trade” and hence could be in violation of the U.S.’s commitment to the General Agreement on Trade and Services (GATS).²⁰⁷ It is further claimed that since the thrust of the proposal in S.

201. See 8 U.S.C. § 1182(n) (2010); MIANO, *supra* note 157, at 2-3; Cromwell, *supra* note 3, at 458-59.

202. Wadhwa, *supra* note 8; Matloff, *supra* note 154, at 9-10.

203. See Cromwell, *supra* note 3, at 458.

204. H-1B and L-1 Visa Reform Act of 2009, S. 887, 111th Cong. § 101(a) (2009).

205. *Id.* § 205(a).

206. See Matloff, *supra* note 154, at 23. More than 50 percent of the H-1B workers are hired for jobs as classified as level one. *Id.* at 7.

207. JOCHUM SHORE & TROSSEVIN, PC, NAT’L FOUND. FOR AM. POLICY, LEGAL ANALYSIS: PROPOSED CHANGES TO SKILLED WORKER VISA LAWS LIKELY TO VIOLATE MAJOR U.S. TRADE COMMITMENTS 14-15 (2010), available at http://www.nfap.com/pdf/GATSLegalAnalysis_NFAPPolicyStudy_June2010.pdf (quoting General Agreement on Trade in Services, art. 14, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, 1177 (1994) [hereinafter GATS]).

887 is to restrict H1-B hires—essentially a restriction on trade—the GATS exception in Art. 14(c) that allows for restrictions “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices,” would not be applicable.²⁰⁸ However, hiring overqualified international workers is itself a restriction on trade, and, furthermore, it has an adverse effect on wages in the long run. Accordingly, because the proposal under S. 887 curbs such practices, it should come within the GATS exception.²⁰⁹

The S. 887 proposal would have some leveling effect on the playing field between the U.S. worker and international worker: the U.S. worker is protected from displacement and the international worker gets paid wages commensurate with his qualification. Leveling the playing field is critical because once U.S. workers and international workers are on par with regard to employment and wages, market force can freely determine the type of skill sets and the number of international workers required by the domestic market, as there is no longer a question of displacement because of cheap labor.

2. Quantitative Limitations & Competitiveness

Numerous suggestions have been made regarding the oversubscription issue with H-1B visas and the corresponding backlog issue with EB-2/EB-3 petitions. Suggestions range from complete removal of the cap²¹⁰ to complicated staggered categorized exemptions or increased caps.²¹¹

The complete removal of a cap seems an elegant solution.²¹² By ensuring a level playing field, an employer would only hire an

208. *Id.* at 15 (quoting GATS art. 14). The argument is that the restrictive measure itself must be in compliance with the preamble in Article 14, which requires any measure “not to be applied in a manner that would constitute [a] . . . disguised restriction on trade in services,” for the Article 14(c) exception of GATS to be applicable. *Id.* at 14-15.

209. *See id.*

210. Seth R. Leech & Emma Greenwood, *Keeping America Competitive: A Proposal To Eliminate The Employment-Based Immigrant Visa Quota*, 3 ALB. GOV'T L. REV. 322 (2010).

211. *See* Malshe, *supra* note 3, at 388-89; *see also* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Mitchell Wexler, *Policy Goal of Immigration Reform—Our Nation's Best Interest*, 13 NEXUS 45, 46 (2008).

212. *See* Leech & Greenwood, *supra* note 210, at 356-57.

international worker if there were truly a shortage of labor with the necessary talent or skill sets, which would enhance the employer's business and which is in line with the rationale of the immigration policies.²¹³ Market forces would determine the rest, including how many H-1Bs are to be hired.²¹⁴ Employers would get to decide how many of these international workers are to be sponsored for immediate legal permanent residency at any point in their employment (because they would have become valuable human capital to the organization and ultimately to the country).²¹⁵ U.S. economic conditions would induce the corrective adjustments that determine whether these legal permanent residents stay or leave. This solution further meets the needs of the four levels: global competitiveness, domestic competitiveness, protection of U.S. workers, and protection of international workers.

However, whether this solution is palatable to politicians is another issue to be considered. For example, Senator Simpson stated: "Since the United States cannot accept all those who would wish to come, the following very real questions then come to us: How many immigrants should be admitted?"²¹⁶ This statement, which was made during the hearing before the subcommittee in 1981, seems to reflect the sentiment of many politicians today. As a compromise, the Comprehensive Immigration Reform Act of 2006 (S. 2611), sponsored by Senators Arlen Specter and others, proposes an increase in the H-1B cap to 115,000 with a built in market-based calculation under which the cap is to be increased by a further 20 percent if the cap was reached in the previous fiscal year.²¹⁷ Other proposals to overcome the oversubscription issue include excluding internationals with advance degrees in science, technology, engineering, and mathematics from that limitation.²¹⁸ In respect to backlog issues, S. 2611 recommends that the annual worldwide cap for employment-based immigrants be increased to 450,000 for a period of ten years, and subsequently level off at 290,000, with spouse and children beneficiaries exempted from that cap.²¹⁹ The annual per country

213. *See id.* at 355.

214. *Id.* at 324.

215. *See id.* at 355.

216. *The Preference System*, *supra* note 31, at 19.

217. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Wexler, *supra* note 211, at 50-51.

218. *See, e.g.*, S. 2611, § 501; Wexler, *supra* note 211.

219. S. 2611 § 501. Section 501 provides that spouses and children are to have their own limitation of 650,000 for the ten years. *Id.* Presumably they are to be included in the

limitation is to be increased to 10 percent.²²⁰ S. 2611 also further exempts completely from the cap: “Aliens who have earned advanced degrees in science, technology, engineering, or math and have been working in a related field in the U.S. under a nonimmigrant visa in the [three] year period preceding their application for an immigrant visa[,]”²²¹ aliens “who have received a national interest waiver[,]”²²² and “spouse[s] and minor children of . . . an employment-based immigrant.”²²³

These recommendations certainly go towards resolving the issues resulting from the quantitative limitations imposed by the current immigration laws and make the immigration system more competitive. However, the question remains, is it competitive enough compared with the U.S.’s competitors? Although the recommendations liberalize the quantitative limitations but what is interesting is the recommendation to exempt certain qualifications from such restrictions. This is the right direction.

VI. Conclusion

What reformative actions the U.S. government will take to remedy the shortcomings of the immigration system in respect to the admission of the best and brightest remains to be seen. What is certain is that some form of remedial or corrective measures need to be taken soon with regards to the current quantitative restrictions that have caused the system to be uncompetitive. The corrective measures recommended in this Article—leveling the playing field between U.S. workers and international workers as well as liberalizing the quantitative restraints—would go a long way towards resolving the current shortcomings of the U.S. immigration system. The ongoing recession may have brought about some complacency, given that the other destination and repatriating countries have slowed down their race to attract the best and brightest. Such complacency may not last long. Once the world shakes itself out of the current economic slowdown, and with the looming threat

290,000 cap after the ten years. The rationale is to resolve the backlog issue within the next ten years. *Id.*

220. S. 2611 § 502. Presumably the national origin restriction is retained to maintain diversity. *Id.*

221. S. 2611 § 508(a)(1).

222. *Id.*

223. *Id.*

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of the world aging population, the race for the best and brightest will intensify again. Given that immigrants' contribute to fueling the economy by creating jobs, both the domestic industry and U.S. workers will benefit from such contributions. Thus, the U.S. needs to position itself as the leader once more in attracting and retaining the best and brightest, by taking those corrective measures before the recession is over.