H-1B Workers: Misunderstandings and Corrections

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Abstract: For many, the topic of legal work-based immigration leads to concerns about low-skilled workers who take U.S. jobs based on a lottery. Relatedly, rejection rates for H-1Bs have quintupled in the last four years. This paper discusses some of these concerns and the misperceptions surrounding them. It also provides suggestions to help ameliorate some of these issues as they relate to H-1B petitions.

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What do Anthony Hopkins, Sergey Brin, Albert Einstein, Elon Musk, Rupert Murdoch, Andrew Carnegie, Jackie Chan, Bruce Willis, Arnold Schwarzenegger, and Audrey Hepburn have in common? Beyond their iconic contributions to the U.S. economy and culture, they were each born outside of the US and later moved to, worked in, and contributed to the United States. The U.S. has long benefitted from the ingenuity of foreign workers operating alongside our domestic workforce.

In recent years, however, legal employment-based immigration has become a topic of considerable concern for U.S. citizens, companies, and people who aspire to make contributions in and to the U.S. These concerns are reflected in changes related to the H-1B visa, which has long been the most popular long-term work visa in the U.S. By the second quarter of 2019, 33% of H-1B visa petitions were rejected; a rate that quintupled from 6% just four years ago[1]. For U.S. firms, this has led to enormous loses, including: time and productivity, billions of dollars due to project delays, and the disruption of the lives of hundreds of thousands of talented people seeking to contribute to the U.S. economy.[2] [3]

No one ought to argue that immigration should not follow due process and be part of any country's security policy. However, H-1Bs and other work-related visas are often misunderstood. Next, a few of these misunderstandings are briefly discussed.

Misunderstanding #1: H-1B workers are low-skilled workers

By definition, the H-1B classification is a specialized non-immigrant visa that enables an employer within the U.S. to hire or "sponsor" a temporary foreign worker or "beneficiary" within one of three categories: specialty occupation, department of defense cooperative research and development projects, or fashion models with exemplary credentials.

> As per Section 214(i)(1) of the INA, 8 USC 1184(i)(1), a specialty occupation is "an occupation that requires— (A) theoretical and practical application of a body of highly specialized knowledge, and (B) 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."

In 2014, 2015, 2016, and 2017, 99% of H-1B visa holders had at least the equivalent of a U.S. bachelor's degree, with over 50% in each year also holding a graduate degree (Masters, Doctorate, or Professional degree).[4] Accordingly, H-1B recipients work on projects requiring highly specialized skills. Some of the people I worked recently with earned degrees from highly regarded U.S. universities (Yale, University of Michigan, University of Miami) and many had years of work experience both abroad and in the U.S.

[1] https://nfap.com/wp-content/uploads/2019/08/H-1B-Denial-Rates-Analysis-of-H-1B-Data-for-First-Two-Quarters-of-FY-2019.NFAP-Policy-Brief.August-2019-1.pdf
[2] https://www.issuelab.org/resource/data-reveal-high-denial-rates-for-l-1-and-h-1b-petitions.html
[3] https://www.forbes.com/sites/andyjsemotiuk/2019/01/02/recent-changes-to-the-h1b-visa-program-and-what-is-coming-in-2019/#686556a4a81f
[4] https://www.uscis.gov/sites/default/files/files/nativedocuments/Characteristics_of_H-1B_Specialty_Occupation_Workers_FY17.pdf

When I recently interviewed the Chief Operating Officer of a California-based startup that grew from no sales to over $100 million over the course of a year, she described the contributions of the talented woman for whom they were sponsoring an H-1B visa as "essential" for the company's ongoing success. Similar refrains are common in discussions with executives from companies and organizations of all sizes (start-up to Fortune 500) and industries.

Misunderstanding # 2: H-1B workers result in US job losses

As part of the H-1B visa requirement, U.S. companies must prove, among other things, that the current supply of U.S. workers cannot meet their demands, and that an H-1B worker will not adversely affect the wages of U.S. workers already employed in similar positions. Interestingly, research shows that increases in foreign-born workers seem to "reduce the unemployment rate of U.S. natives", increase "the labor force participation of U.S. natives", and that "there is no evidence of adverse effects among less-educated U.S.-born workers".[5] In fact, research indicates that H-1B workers could contribute to millions of new jobs, translating to over $158 billion to the U.S. GDP, and that this country could be missing out on job creation by limiting H-1B workers' ability to contribute to U.S. companies. [6]

H-1B workers fill gaps in knowledge, provide diversity in thought, and are often directly responsible for activities that enable the expansion of activities within U.S. companies, which can lead to more jobs for U.S. workers. As an example, a U.S.-based student loan refinancing company I worked with was hiring a data scientist to expand into a new category of loans which, if successful, would help the company extend into a multi-billion dollar industry that would both help U.S. citizens refinance their debt into low-interest loans and enable the company's expansion into a new domain – this expansion, if successful, will produce new jobs for U.S. workers.

Misunderstanding # 3: The H-1B is literally a lottery and names are selected at random

Each year, the U.S. government places a cap on the number of people who can receive H-1B visas. Simply put, U.S. companies seek to hire more foreign workers than the U.S. government allows. "If the cap is hit during the first five business days, USCIS conducts a lottery to determine which employers' petitions for H-1B workers will be processed."[7] Between 2013 and 2019, the visa cap has been hit within five days of the April 1st deadline. But the H-1B visa "lottery" is not like a traditional lottery of luck; one must qualify for the H-1B visa to "win."

"Winners" can either fall into a general category or an advance degree category, such that applicants with advanced degrees are given preference. After the lottery is completed, a second cap-exempt lottery is run. In all cases, applicants must meet the requirements of an H-1B (see misunderstanding #1).

Given the current climate, H-1B workers are subjected to greater levels of scrutiny and screening, which has caused not only increased levels of rejections, but also an increase in "Request for Evidence" (RFEs). More than 60% of H-1B applications receive an RFE that causes time delays and increased costs[8]. These RFEs often occur because the USCIS questions the required knowledge or specialized skills needed for a position, or questions whether a worker has the appropriate educational credentials and background to be qualified for the position.

There is such a wide breadth of knowledge areas and skills that it would be impossible for any individual, USCIS agents included, to be fully versed in all the entire spectrum required across companies. For instance, workers may be hired with companies in disparate industries such as: computer programming, chemistry, finance, medicine,

[5] https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet?__cf_chl_jschl_tk__=ed3d86ebe9f040ec03dcf45a91fcda2907ce3f94-1577023814-0-AZe8RWoc86pcswiPP67xW_leM3ccAteeqh3Ob82ZrK9v_gFw5ZF5TqUh4oKAk62Z_N6gzybmJXGwNcEXo8mps1EKOesJSUZu4L0FUTRuCSou4vFCMc4eR2NFK11OUZdzw_lsz6IF7P6ut apDgReVwL48av4SmlLl3OEOcWT5yqJ7j0TMFnOsqKDMgRnjtNWiqzmCshHtNvKHxwDxqo7lAkrydhkD0m6DEj57wTPXKqNJtlO8g85SmLth2rA9gVsbHST05keT6NFge0uWN8MlctGsV ded4lidROj5ERIiMadILkjbLhqhy2qE6QA4nRKqnA

[6] https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet?__cf_chl_jschl_tk__=ed3d86ebe9f040ec03dcf45a91fcda2907ce3f94-1577023814-0-AZe8RWoc86pcswiPP67xW_leM3ccAteeqh3Ob82ZrK9v_gFw5ZF5TqUh4oKAk62Z_N6gzybmJXGwNcEXo8mps1EKOesJSUZu4L0FUTRuCSou4vFCMc4eR2NFK11OUZdzw_lsz6IF7P6ut apDgReVwL48av4SmlLl3OEOcWT5yqJ7j0TMFnOsqKDMgRnjtNWiqzmCshHtNvKHxwDxqo7lAkrydhkD0m6DEj57wTPXKqNJtlO8g85SmLth2rA9gVsbHST05keT6NFge0uWN8MlctGsV ded4lidROj5ERIiMadILkjbLhqhy2qE6QA4nRKqnA

[7] https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet

[8] https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1B-quarterly-requests-for-evidence-2015-2019-Q1-top-30-employers.pdf

business analytics, nursing, fashion design, engineering (computer, civil, mechanical), theology or many other areas requiring the equivalent of a U.S. bachelor's degree along with specialized knowledge and skills.

Preemptively providing clarity to USCIS agents about how a worker and her respective position add value through her specialized skills can lead to a lower rate of rejection or reduce the probability of receiving an RFE. It is critical to establish visibility and transparency in what is otherwise a complex visa process, across USCIS agents, hiring companies and applicants.

In addition to experienced and competent legal counsel, this transparency across all parties involved can be facilitated through external validation from trusted, qualified professionals including academics and subject matter experts, who are able to opine as to how a position meets specialty occupation requirements. These experts facilitate USCIS agents' understanding of a variety of factors, including:

- Providing Expert Opinion Letters (EOL) that explain whether or why position would require no less than a bachelor's degree within a specific discipline.
- A discussion of how a candidate's academic credentials, work experience, or their combination provides the candidate with specialized knowledge and abilities that would be equivalent to no less than a bachelor's degree in a particular discipline.
- Explaining the equivalence of foreign academic credentials to a U.S. degree.

These letters and evaluations can proactively be used prior to a petition, after an RFE, or a denial. No matter their use, an Expert Opinion Letter can provide greater transparency to USCIS agents who can benefit from the knowledge and context that only an expert can provide. Often, these letters will be supplemented by an interview between the expert and an executive at the hiring firm to demonstrate the expert's specific knowledge of the firm and the position itself.

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ProfVal, LLC is a purpose-driven, professor-founded, and ethically-grounded provider of Expert Opinion Letters that can be used to support employment-based visas (H-1B, L1, EB, O).

Zachary Johnson, Ph.D. is the founder of ProfVal, LLC. He has worked with members of the Fortune 500, startups, and nonprofits. Much as his academic research is dedicated to the importance of social responsibility[9] [10] [11], ProfVal is dedicated to helping companies and nonprofits through its services and to producing social impact. Accordingly, ProfVal is a proud member of Pledge 1%[12] and has committed to donating no less than 3% of profits to charities and nonprofits dedicated to promoting social welfare and education.

[9] https://www.researchgate.net/publication/332248020_Good_Guys_Can_Finish_First_How_Brand_Reputation_Affects_Extension_Evaluations
[10] https://www.researchgate.net/publication/326726802_Self-Reporting_CSR_Activities_When_Your_Company_Harms_Do_You_Self-Disclose
[11] https://www.researchgate.net/publication/319635968_Brand_associations_the_value_of_ability_versus_social_responsibility_depends_on_consumer_goals
[12] https://pledge1percent.org/pledged.html