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Published: December 12, 2016

Reforming H-1B and Related Visas: What Needs To Be Done

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December 10, 2016 matloff:

Link To Blog: http://bit.ly/2hkgcgj

Last night's blog post was titled, "You Can't Fix It If You Don't Understand It," in which I showed that the industry lobbyists are so deft at presenting a misleading view of the H-1B work visa, and policymakers and worker advocates are so uninformed, that effective reform is impossible. In response, one reader suggested that I write a blog post showing, in one convenient document, what needs to be done. Good idea.

Before I begin, please note that I will use the term "H-1B" to include not only that visa program, but also L-1, OPT, employer-sponsored green cards, and so on. Also, the term "American/U.S." refers to U.S. citizens and permanent residents. The "Infosyses" are firms that hire H-1Bs and rent them out to other companies, while the "Intels" means firms that hire H-1Bs directly, which is a very wide range, including such firms as the Bay Area chain, Bank of the West.

Here we go:

Understanding the problem:

Again, understanding the problem is crucial to developing an effective solution. President-Elect Trump has stated that he will direct AG Sessions to investigate the situation, but again, unless Sessions understands what to look for — and knows how to keep the industry lobbyists at bay — his efforts will be wasted. These points in particular are absolutely key:

Hiring H-1Bs instead of American is just as harmful as hiring H-1Bs to replaceAmericans. Isn't that obvious?

The Intels (who hire "instead of") are thus just as culpable as the Infosyses (who replace).

Age plays a CENTRAL role in the hiring of H-1Bs. Younger workers are cheaper (and young H-1Bs are even cheaper than young Americans), so employers hire young H-1Bs in lieu of older Americans.

What percentage of hires of H-1Bs, OPTs and so on are genuinely due to a lack of qualified Americans? I believe it is no more than 20%, probably less, even among the Intels.

What occupations — IF ANY — have a labor shortage? What does "shortage" even mean?

Suggested executive actions regarding understanding the problem:

The Labor Condition Application (LCA), which employers submit for permission to hire an H-1B, should be extended with some survey questions, such as "State the mean age among STEM workers at your firm," "State the percentage of new and recent graduates among your STEM hires this year," "State the percentage of American applicants for STEM positions who were interviewed, and the percentage of those who were extended offers," "State the percentage increase, if any, in the wage you are paying today in this occupation relative to that of one, two and three years ago," and so on. The LCA should also have the employer state whether a graduate degree (MS/PhD) is really necessary for the job in question, and if so, why. These answers would not be used as grounds for denying the LCA, just used as data collection relevant to the H-1B program.

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In his investigation as directed by Trump, the AG should be especially wary of taking the industry at their word in terms of claiming labor shortages. For instance, the industry lobbyists cite a "shortage" of new computer science graduates, a highly misleading claim, since about 80% of, for example, software engineers do not have a CS degree. And again, often when they say "shortage," they mean "shortage of young applicants." The investigators should also be wary of artificial job requirements, such as listing an alphabet soup of computer acronyms that may not really be required. The investigators should make big use of two very valuable resources, the OES data (DOL) and the NACE (National Association of Colleges and Employers) data, both of which show flat wages, counter to shortage claims.

As part of the investigation, the AG should have teams do site visits to HR Departments at a few firms that use a substantial number of H-1Bs, say over 10% of their STEM labor force, in various locales and industry sectors, to determine how/why American job applicants are rejected. Again, this is for information gathering rather than grounds for denial of visas.

Many H-1Bs, especially those at the Intels, are hired as foreign students from college and university campuses. Currently many U.S. graduate programs have well over half their enrollment as foreign students, in some cases even 90%. This presumably is an unhealthy situation, and the investigation team should particularly note the issues here.

The investigation should consult with the foreign worker advocacy group, Immigration Voice, especially concerning exploitation of foreign workers who are immobile due to waiting for a green card. This immobility makes foreign workers enormously attractive to employers; a prominent immigration attorney (and former chief architect of Texas Instruments' immigration policy) even pitches this point to employers on his Web page, urging employers to hire foreign students instead of Americans.

The President should require that every academic institution that offers Master's/PhD degrees and receives federal research funds submit a yearly report stating the percentages of American students in each STEM graduate program. Those with low percentages should be required to describe what efforts, if any, the institution has made to recruit more American students. These programs should include "professional Master's degrees," which seem to be aimed at attracting foreign students as "cash cows."

The President should direct the Government Accountability Office to study the negative impact on STEM wages due to the large numbers of foreign students who enter the U.S. labor

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market. The GAO should also quantify the negative impact on older American workers due to this YOUNG foreign influx. A 1989 NSF report forecast that this suppression of wage growth would make graduate study far less attractive to American students; the GAO should quantify this. Note that the foreign influx also keeps down wages of graduate assistants, thus further making graduate study unappealing to American students.

All of this should be carefully taken into account before proposing a Staple a Green Card to Their Diplomas program (i.e. automatic green cards for STEM foreign students), a proprosal that, unfortunately, both Trump and IEEE-USA have endorsed. The GAO should also estimate the further erosion in STEM wage growth due to Staple. While it is true that Staple would remove or ameliorate the immobility problem, it would have a terrible impact on Americans.

The AG's report must clearly delineate the role of age in the entire H-1B issue. Consider discussions of prevailing wage, for instance. On the one hand, even strong supporters of bringing large numbers of foreign workers to the U.S. (via whatever route), such as Rep. Zoe Lofgren and IEEE-USA lobbyist Bruce Morrison, admit that often H-1B workers are making only half the wage of Americans. True, but what they are not disclosing is that gap is due not only to a lax general definition of prevailing wage but also due to a comparison of young H-1Bs to older Americans.

DHS should make every effort to allow a worker who is waiting for a green card to receive raises and promotions without jeopardizing the green card application.

As I have stated many times, the U.S. should make strong efforts to facilitate the immigration of the genuine "best and brightest." The criteria for the O-1 work visa, and EB-1 and National Interest Waiver green cards, should be liberalized somewhat.

In conducting the investigation, the AG should watch for undue influence from industry lobbyists, and should make sure that advocates for American workers be closely consulted. (Note that I would count IEEE-USA as industry advocates, not worker advocates.) Similarly, the AG team should discount the work of any academic who has received money from the industry and its allies.

Executive actions for policy change:



As I have shown before, e.g. with Facebook and Intel, often the big tech companies have job ads earmarked for new/recent graduates. This is likely illegal under federal law, and thus arguably grounds for denying the application. A section in the LCA should have the employer attest to not having any so-earmarked jobs, as a requirement for granting permission for the hire.

H-1B using firms with low mean STEM worker age (regardless of American or foreign) should be subject to an automatic investigation by the Dept. of Justice

A number of people, including myself, have suggested over the years that the visas be doled out in order of wage offered, highest first, then second-highest and so on until the cap is reached. I'm pleased to see that IEEE-USA now has endorsed the idea. Nice, but again the age issue is crucial. Currently the DOL method for determining legally-required prevailing wage for an H-1B worker is broken down into four experience levels, proxies for age. My guess is that the industry lobbyists (and, I suspect, IEEE-USA as well) would push for doing the wage ranking within each experience level, rather than overall without regard to experience. Indeed, Rep. Lofgren's proposal would take that approach. Needless to say, this would largely defeat the purpose of awarding visas by wage ranking. This is a perfect example of how a good proposal can be ruined by plausible but misleading arguments made by lobbyists.

The Optional Practical Training portion of the F-1 student visa should be abolished, or at the very least rolled back to its original 12-month duration. As Ron Hira has pointed out, the notion that a foreign worker with a Master's or higher needs a 3-year internship is patently absurd. DHS has openly stated that it isn't using the program for that purpose, but rather as a holding pattern for foreign students waiting for an H-1B visa. The fact is that if the H-1B system were properly reformed, there would be zero wait for the visa, as the demand would never even come close to reaching the cap.

Congressional actions for policy change:

The top priority here should be fixing the badly broken prevailing wage system. I've noted above that the four-tier wage system is tantamount to the federal government bestowing its blessing on age discrimination, but the problems go even deeper than that.

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Currently prevailing wage is defined to be the average wage (for the given occupation, region and experience level). The use of the average is fundamentally at odds with the industry's claim that that it is hiring H-1Bs either because they are "the best and the brightest" and/or because they possess rare skill sets. On the open market, both of these qualities command a hefty wage premium; such workers are decidedly NOT paid average wages. So why is the prevailing wage defined in terms of averages? I agree with DPE President Paul Almeida that Congress should revise the definition of prevailing wage to be the 75th percentile for the given occupation and region (and NOT bringing experience level into consideration).

The L-1 intracompany transfer visa needs to have a prevailing wage requirement (and reformed as above), and the current 1-year requirement for time in the company should be increased to 5 years.

Those in line for green cards should be allowed freedom of movement in the labor market as soon as the employer's petition is filed. Of course, if the petition is eventually denied, the worker would lose her access to the market.

General remarks on reform:

As noted, both the executive and legislative branches must resist the entreaties of lobbyists in the reform process. These lobbyists are the best in the business, highly skilled at making plausible arguments for what actually is very bad policy.

The importance of a coordinated, integrated solution cannot be overemphasized. As with health care policy, we have what I call the "pillow theorem": Pounding down on one side of a fluffy pillow causes the other side to fluff up. For instance, I say to those who sincerely want to help American workers, "Ignore the age issue at your own peril!", as it enters into almost any policy proposal made so far. The same comment holds for the Intels Good, Infosyses Bad fallacy. A proposal, such as that made by Rep. Lofgren a years ago, to institute a wage ranking system for H-1B but ALSO adding a Staple program, should raise alarm bells.

We the concerned public should be vigilant too. We should insist that the investigation be fully public, including all the data, and that there are people whom the Ordinary Joe can contact to give input. We must make sure we are fully informed of the structural problems in

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H-1B (see above!). And if Jeff Sessions, in presenting the results of his investigation to a press conference, uses the word “replace” within the first 30 seconds, we should collectively groan.

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