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PART III
The Highly Skilled

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CHAPTER 6
"Temporary Workers" in American Law and Society Since 1990

Adverse Effects: The Development of Non-Immigrant Visas

One of the most dramatic changes in immigration trends over the last fifteen years has been the explosive growth of "non-immigrants" coming into the United States under various employment categories. As mentioned in the last chapter, non-immigrants are people who typically do not intend to stay in the United States: in late 19th-century immigration law, they were tourists, students, or merchants. Even the Chinese Exclusion Act exempted such classes of Chinese persons from exclusion, largely because they were "temporary," and because they would leave after conducting affairs considered mutually beneficial for both them and the United States. Chinese merchants were especially accorded deference in the law, for even in the midst of race-based exclusion, federal judges noted that "commerce with China is of the greatest value, and is constantly increasing," such that immigration officials ought to avoid "unnecessary and embarrassing restrictions" against Chinese merchants.[1]

The Immigration and Nationality Act of 1952 provided for non-immigrant workers under §101(a)(15)(H)(i), dividing them generally into three categories: professionals and persons in "specialty" occupations (H-1); persons performing services unavailable in the United States (H-2); and industrial trainees (H-3). People entering under the H-3 have never constituted a significant group; there were just over 3,200 persons in 2002.

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The other two H visas have been extremely contentious, each with distinct histories, and both have been difficult to implement with any degree of political consensus or cooperation. In almost all instances, employers hiring temporary non-immigrant workers have had to show that the domestic labor force was either non-existent or inadequate, and that the hiring of non-immigrants would be in no way "harmful" to the interests of domestic laborers. The rules for obtaining H non-immigrant visas have developed in a way that they are now more consonant with the rules governing permanent employment visas: that is, the legal grounds for gaining temporary admission have become almost the same as those for permanent residency. In fact, as we shall see, because many persons admitted under the H visas are so similar to those admitted as immigrants under employment categories, these "non-immigrants" frequently adjust into permanent residency.

Class position and educational background often determine which person gets an H-2 or an H-1 non-immigrant visa. For example, those admitted under the H-2 have typically included agricultural workers, mostly in seasonal employment. This visa has had a complicated and terrible history tied to the Bracero Programs throughout the 1940s, which "imported" thousands of Mexican farm workers to the United States. Ernesto Galaraza, Juan Ramon Garcia, and Kitty Calavita have all written about various facets of the Bracero Program, and all show how profoundly exploitative and unjust this system was.[2] The Act of 1952 retained a version of the Program to meet the purported labor needs of growers in the Southwest. The new law, however, required employers to show that they could not find domestic workers to fill these positions, and that the hiring of these seasonal workers would not depress wages or working conditions. In large part because of these requirements, agricultural employers mostly ignored the law, hiring undocumented laborers instead of procuring "legitimate" seasonal workers. Nonetheless, the Immigration Reform and Control Act of 1986 reaffirmed these requirements and then split the H-2 into two categories—the H-2A for agricultural workers, and the H-2B for non-agricultural workers, particularly those in relatively low-wage unskilled labor for which there was "a shortage of American workers."

Persons under H-2As still worked in agriculture, and people under H-2Bs have worked in industries ranging from vegetable packing to slaughterhouses. Altogether, under the H-2, those with "lesser skills" have constituted a significant number of entrants that has grown every year, from about 25,000 in 1985 to 100,000 in 2001. Most come from Mexico, Central America, and the Caribbean—especially Jamaica.

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But again, the rule itself is mostly ignored. Many, many more people who *should be* H-2s are undocumented aliens, largely because the Act of 1986 increased the threshold requirements for employers seeking these types of temporary workers. Although the Act of 1986 attempted to "streamline" the procedures for procuring these visas, agricultural employers and others have simply sidestepped the rule, despite new penalties in the law that targeted employers who knowingly hired undocumented workers.[3] Some have said that the visas were not worth the trouble because of the bureaucratic hassles in obtaining labor certification (showing that the non-immigrant workers who will be hired will not have an adverse impact on domestic workers), and chiefly because undocumented aliens are so readily available to work. Even though, for the first time in 2001, H-2Bs exceeded the original cap of 66,000 persons per year set in the Act of 1986, the number who *should be* H-2As and H-2Bs far exceed the 100,000 persons entering under both categories in fiscal year 2001. They represent those in the lower and lowest echelons of the American economy, and in many instances, they are part of the "invisible economy" of transient, seasonal undocumented workers. Estimates of the population of undocumented aliens in the United States are notoriously inaccurate for obvious reasons, but they range in the millions. Most are from Mexico, South America, and Central America, as well as Asia, and they work in occupations that ought to be covered under the H-2 visas.[4]

The most contentious non-immigrant visa, and the most important avenue for employment-based Asian migration, has been the H-1 visa. Since 1952, persons entering under the H-1 had included medical professionals, especially nurses, who had come in fairly large numbers to meet the chronic shortage of medical professionals in American hospitals. But people in this group were also a more varied lot: they included athletes, entertainers, even fashion models. As to why some of them were even "professionals" or performing in "specialty occupations" wasn't always clear. The fuzziness of this H-1 category and the perceived abuses of the H-1 visas moved Congress to amend the law in 1989 and 1990, under the Immigration Nursing Relief Act of 1989 and the Immigration Act of 1990. The Act of 1990 fundamentally changed all non-immigrant visas related to employment in the United States, with the most profound effect on the H-1.

First, under the rule in 1989, Congress provided special avenues for non-immigrant nurses to adjust status toward permanent residency. Many had been in H-1 status for several years, and because many had had difficulty adjusting under regular channels—in part because so many came from Asian countries with horrific backlogs—Congress provided them with this "relief." According to Enid Trucios-Haynes, a law professor at the

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University of Louisville, "approximately 75% of the non-citizen nurses at the time were from the Philippines. For this national origin group, at that time, the wait for an employment based visa for permanent residence could exceed ten years."[5] The Act of 1989 facilitated their adjustments of status into permanent residency by removing them from the queue for employment-based visas—provided that they had been working "for at least 3 years before the date of application for adjustment of status (whether or not before, on, or after, the date of the enactment of this Act)," and "[have] been employed as a registered nurse in the United States."[6]

Then, conversely, Congress made it *more difficult* for subsequent foreign nurses to gain admission as non-immigrant workers in the United States. This appeared in a revised §101(a)(15)(H)(i)(a); the last letter, (a), accounts for the creation of the H-1A visa especially for registered nurses. The 1989 rule was an important precursor to the 1990 rule: in spelling out the requirements for new non-immigrant nurses, the law demanded that all non-immigrant nurses be fully certified and trained according to the standards set by the hospitals wishing to employ them.

Moreover, when the hospitals petitioned the INS for a non-immigrant visa on behalf of the foreign nurse, the hospital had to overcome several important burdens: they needed to show to the Department of Labor that "the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed"; that "the alien will be paid the wage rate for registered nurses similarly employed by the facility"; and that the hospital "has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses." Finally, American nurses and their unions had to be notified of the impending hire of a non-immigrant nurse—this notification suggested a kind of veto for any nurse or nursing union that perceived itself harmed by the hiring of foreigners.[7] Overall, the new requirements suggested that foreign nurses should be hired only as a necessary evil, a last resort when the domestic labor market had truly failed.[8]

Skilled Workers in Specialty Occupations: The H-1B Visa in the Act of 1990

The Immigration Act of 1990 reframed the H-1B to encompass immigrants working on projects for the Department of Defense, fashion models, and those in "specialty occupations." Persons entering under the first two descriptions have never constituted a significant number of H-1B

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admissions. In general, "specialty occupations" are ones that "require: (a) 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."[9] In addition, employers hiring H-1B employees must submit to the Department of Labor proof of the following:

> That [the employer] (i) is offering and will offer during the period of authorized employment to aliens and to other individuals employed in the occupational classification and in the area of employment wages that are at least—(I) the actual wage level for the occupational classification at the place of employment, or (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, determined as of the time of filing the application, and (ii) will provide working conditions for such aliens that will not adversely affect the working conditions of workers similarly employed.[10]

The law provided several penalties for employers who wanted to sidestep these requirements; these penalties would most obviously be inflicted when similarly situated American citizen employees reported the unlawful hiring of cheap foreign labor. "The employer shall make available for public examination, within one working day after the date on which an [H-1B] application … is filed, at the employer's principal place of business or worksite, a copy of each such application (and accompanying documentation)."[11] Again, domestic employees were given a veto of sorts, and the hiring of non-immigrants would appear possible only when it becomes a necessity.

From fiscal year 1991 until the end of the fiscal year 1998, the cap for H-1B visas had been set at 65,000 persons, and all non-immigrants under the H-1B could remain in the United States for no more than six years—an initial three-year visa that could be renewed for an additional three years.[12] But in terms of their legal status, the one significant advantage for H-1B non-immigrants was that they could also seek permanent residency in the United States even as they were working here "temporarily." Now they could have "dual intent" prior to entry, rather than having to declare that they were only here temporarily as a necessary condition for obtaining H-1B status. This was an important change, one that was often an overlooked feature of the Act of 1990, but which tended to blur the line between "temporary" and "permanent" workers in the American economy.[13]

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In many ways, hiring a skilled foreign worker under the H-1B became a substantial chore, even more than hiring an H-2: in attempting to get an H-1B approved through the INS, the employer became the formal "petitioner," the worker the "beneficiary." Before the petition could be filed, the employer had to define the beneficiary's job title and duties, where the job could be found in the Dictionary of Occupational Titles (which was a massive tome published by the Department of Labor), the minimum education and experience required for the job, and the place where the beneficiary would work. All of these were used to determine a "prevailing wage," the wage commonly paid for persons in *that* type of job, in *that* region, with *that* level of experience and education. Just doing this could be a very time-consuming and complex effort.

After this, the employer needed to obtain labor certification from the Department of Labor, and for that, the employer had to give proof that the beneficiary would receive the prevailing wage, and that domestic employees were notified of the imminent hire of a foreigner. The Department of Labor reviewed the evidence and then issued the labor certification, a process that often took at least a month or longer. After all this, the employer filed the formal petition itself, which typically involved a form (I-129), but because it took so much trouble to get to this point in the first place, employers routinely included a narrative about themselves and the beneficiaries they wish to hire. Sometimes, employers attached exhibits and other documentary evidence about their company or industry, as well as laudatory information about their beneficiaries, including copies of their degrees and university transcripts. In the end, it was rather common for firms to spend a lot of money and time hiring an H-1B worker; for many, the process involved the assistance of lawyers who specialized in employment-related migration.[14]

The Immigration Act of 1990 also created several new visas that had previously fallen within the H-1. The O was a non-immigrant visa for persons of "extraordinary ability," typically meant for entertainers, athletes, and internationally recognized scholars, business people, scientists, and artists. There was, and still is no cap on the O, since presumably such exceptional people wouldn't be harmful to anyone.[15] In recent years, the majority of persons entering under the O were from Europe, with Asia a distant second.[16] Next, the P visa was also meant for athletes and entertainers, but not necessarily ones who were "extraordinary." Under the P, they had to be at least "internationally recognized," and no more than 25,000 could enter in any given fiscal year.[17] Finally, two other visas, the R for religious workers, and the Q for persons in international cultural exchange programs, were created under the Act of 1990. Both were

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described only briefly, and neither generated any meaningful debate. But the O and P visas were especially important, because in the period immediately prior to 1990, the majority of persons receiving an H-1 were entertainers and athletes, not professionals or nurses.[18]

A Shortage of Workers

When the H-1 was re-phrased in the Act of 1990, several influential scholars of immigration law wondered whether the annual cap of 65,000 persons would ever be reached, especially in light of older trends, and also because of the new bureaucratic hurdles facing employers of H-1B nonimmigrants.[19] But in fiscal year 1997, the INS reported that the cap had actually been reached for the first time ever, about five weeks before September 30, 1997. H-1Bs granted after the cap was reached were charged against the quota for the following year, so in the following year, the visas ran out in May. The new set of petitioners for the H-1B were high-technology companies—firms in the burgeoning information technology, or "IT," industry—firms that within the past ten years were growing incredibly powerful and rich. By the mid-1990s, over half of all H-1B beneficiaries were working for IT firms, and their collective discovery of this temporary visa made it increasingly visible. By the late 1990s, corporate demand for these visas was obviously exceeding supply.[20]

After one of the most sharp and contentious policy debates over immigration in recent years, President Bill Clinton signed into law the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998, in October of that year.[21] This new law immediately increased the number of H-1B visas: "115,000 in fiscal year 1999, 115,000 in fiscal year 2000, 107,500 in fiscal year 2001," and then back to "65,000 in each succeeding fiscal year."[22] The law had had several influential sponsors in Congress, including Republican Senators Spencer Abraham and Orrin Hatch, the powerful Chairman of the Senate Judiciary Committee. In congressional hearings in February and April of 1998, Senator Hatch set the tone for the new bill removing the cap on the H-1B:

> It is estimated that about ten percent of this country's current information technology jobs are vacant and that this critical shortage of programmers, systems analysts, and computer engineers will increase significantly in the next decade. According to the Department of Commerce, the United States will generate more than 100,000 information technology jobs each year for the next decade. Notably, the vast majority of high-tech firms cite the shortage of skilled workers as the leading barrier to their company's growth and competitiveness in the global marketplace.

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For Senator Hatch, an increase in the number of skilled workers was not just a sound national policy, it was good local politics: "In few places is this shortage more acute than in my own state of Utah where the high tech industry grew by 12 percent in 1996 and where our 1,900 high tech companies plan to add almost 20,000 jobs annually in the next three years. The primary potential impediment to our state's growth is the shortage of skilled workers."[23]

Several influential companies sent representatives to elaborate on the details of this purported shortage of workers: persons testifying to the Senate Committee included vice presidents from Sun Microsystems, Microsoft, and Cypress Semiconductors, as well as the Dean of the College of Engineering from the University of Michigan.[24] Outside Congress, several other major companies and institutions also spoke of the shortage of skilled workers in various IT fields.[25]

The major corporations trying to increase the cap for H-1Bs all complained of a critical shortage of highly trained workers for IT firms in an industry that they characterized as increasingly global and competitive. They warned that if highly trained workers were not welcomed in greater numbers into the United States, other countries with burgeoning high-technology industries would gain competitive advantages. Kenneth Alvarez of Sun Microsystems provided testimony to the Senate that was typical of this position:

> [There is a] shortage of qualified workers to fill crucial positions in the information technology sector. This deficit of skilled workers, if not remedied quickly, will result in lost business opportunities, slower innovation, and diminished productivity overall. Those developments would seriously hinder our ability to compete, and the high-tech industry's ability to continue the sort of rapid creation of jobs this country has benefited from.

Restricting the admission of the highly skilled would threaten the economy of the United States: "Ultimately, a prolonged worker shortage could cause U.S. high tech companies to lose their dominant position in the world market."[26]

This theme was reiterated often, whether by the president of single prominent firms ("The high-tech sector is growing exponentially, causing chronic shortages") or by the president of the Information Technology Association of America, which is perhaps the most influential trade organization representing several different kinds of IT firms, including AT&T, Dell, Hewlett-Packard, IBM, Intel, Lockheed, Oracle, and Yahoo. "Access to the IT industry's basic commodity—skilled people—has

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reached a perilous state," according to one executive.[27] The essence of this argument was that a restriction on the migration of the highly skilled—the most indispensable resource in this industry—would exacerbate labor shortages for important domestic firms in a critical area of the economy.

Several leaders of IT firms spoke very highly of the current benefits of the H-1B program, and of the non-immigrants they had employed in a wide range of positions. For some, these workers were "a critical element of our success," and without them, key products would not have proceeded into the market.[28] Moreover, under this theory, these workers created jobs for other workers, having a kind of multiplying effect on the labor market for domestic workers. The CEO of Cypress Semiconductors explained this phenomenon thus: "Cypress has 470 engineers and 2,771 worldwide employees. Roughly speaking, this means each engineer creates jobs for six additional people who make or administrate or sell the products developed by our engineers. A disproportionate number of our R&D engineers—about 36.6%—are staffed by immigrants, a typical situation at high-tech companies. It follows that if we had been prevented from hiring the 172 immigrant researchers we have hired, we would have failed to create about 1,000 other jobs—70% of which are held by native-born Americans. Immigrant engineers not only do not take away jobs, they actually create jobs for native-born Americans."[29] Again, this argument was repeated several times in congressional testimony, and in news sources covering the passage of the Act of 1998.[30] Altogether, the idea was that rather than *taking* jobs from American citizens, these persons *increased* the opportunities available to American citizens, mostly by creating new economic activity and new jobs that would otherwise not exist.

In addition, in a global marketplace, IT products had to be "localized," such that software or hardware originally produced for an American market could be altered significantly for consumers based in Asia, Europe, or other parts of the world. Software had to be rewritten to account for differences in language, for example, before it could be marketed abroad. Non-immigrants were in a unique position to "localize" products made by American companies, thereby securing higher profits for those companies in the form of increased overseas sales.[31] In a global marketplace, one needs a flexible global workforce. And if skilled persons couldn't come to take jobs here, American firms might be forced to take these jobs abroad. These types of comments were often presented as ominous warnings sprinkled throughout congressional testimony: "We may even be forced to move production to locations overseas to make sure we can find the workers we need."[32]

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Perhaps because the shortage of labor was so acute, their talents so necessary, several companies proposed even more radical changes to American immigration law. For example, Michael Murray, an officer at Microsoft, recommended that a greater fraction of highly skilled workers should be allowed to settle as permanent residents: he noted that the current immigration quotas passed in 1990 effectively limited individual sending countries to no more than 9,800 employment-based permanent residency visas per year:

> [But] because certain Asian Pacific nations produce a large number of highly qualified, highly skilled individuals, the visa backlogs for an individual from these countries is significant, resulting in processing delays of up to four years. Unless the per-country limit is adjusted, many of these individuals will be forced to go abroad when their H-1B visas expire. This will result not only in significant disruptions to their U.S. employers, but may enhance the competitive prospects of several foreign countries, such as Germany and Japan, whose software industries have recently become significant competitors.[33]

In other words, if skilled workers were forced to resettle from the United States after their six-year H-1B had expired, they would be excellent candidates for migration into another country that competed with the United States. Again, as others had suggested, unless these workers could find a permanent home here, they could give other countries economic and technological advantages.

If anything, the congressional testimony over the H-1B showed that at the very least, an impressive group of corporations had come to rely on this visa. These firms were not located in some margin of the mainstream economy—they *were* the mainstream economy. IT firms had generated billions of dollars in sales, and firms like Microsoft, Oracle, and Dell were projected to become even stronger and more economically vital than in the two previous decades when they had come into existence. These companies competed fiercely with one another—the ferociousness with which they competed provided the material for books, magazines, PBS specials, and even a few feature-length movies. In fiction and in real life, many of the founders and leaders of these firms were well known public figures, even though they occasionally loathed one another.[34]

Yet they achieved a remarkable degree of consensus over the need to hire foreign workers in this critical industry, even if they had to pay a premium to get them. In the spring and summer of 1998, powerful American politicians were inclined to give them what they wanted, as

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pro-business Republicans like John McCain, Phil Gramm, and Orrin Hatch came to an understanding with pro-growth Democrats like Charles Robb and President Bill Clinton. Ideologically, these politicians occasionally loathed one another, too, but on this issue, they achieved a remarkable consensus.

Protecting American Workers: Losing the Distinction Between Immigrant and Non-Immigrant

The H-1B did have its staunch opponents, and before Congress, in that first set of critical hearings, major think-tanks, professional associations, and some academics spoke against the H-1B in general, as well as any increase in the annual cap. Almost all of their testimony critiqued the purported shortage of workers in high-technology industries, as well as alleged abuse of the program overall. For example, a researcher for the Urban Institute noted that "despite the extravagant claims of a shortage of IT workers, the indicators are mixed." In certain sectors, there was a decrease in the demand for labor: "Employment in operations research has actually declined since 1988 and the total number of computer programmers remained at about 560,000 workers between 1988 and 1996, a time in which employment of all professionals expanded by nearly 30 percent."[35]

The president of the Institute of Electrical and Electronics Engineers, USA, one of the leading professional associations for highly skilled professionals in a wide range of technical fields, also insisted that there was no shortage, and that instead, powerful IT firms were using the H-1B for less than admirable purposes.[36] John Reinert said that "[H-1B] has been widely used by many employers to provide a probationary try-out employment program for illegal (out of status) aliens, foreign students and foreign visitors to determine if they should be sponsored for permanent resident status." Foreign workers under the H-1B were beholden to their corporate sponsors, and not likely to complain about substandard wages and working conditions.

Critics suggested that for many firms, these workers were attractive precisely because they were cheaper and more exploitable, charges that may in fact be true.[37] They also claimed the IT industry used foreign workers to depress wages for domestic workers, the H-1B related thus to the H-2A, the H-1B spawning a new and depressing industry for high tech "braceros.[38] Altogether, the critics implied that selfish American corporations were undermining American workers by importing cheap foreign labor.

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Most interesting of these critics was Norman Matloff, a professor of computer science at the University of California at Davis. For several months, Professor Matloff maintained an interactive website that collected newspaper accounts, scholarly articles, and the testimony of people in the IT industry, all to show that the major firms in the industry were essentially lying about the shortage of qualified workers. "There is no such shortage," Matloff said. Rather, "Age discrimination is rampant in the industry." IT firms were opting to hire cheap foreign labor and newly minted college graduates (also relatively cheap labor), rather than retaining older workers or reinvesting in training programs to keep current workers up to date. Moreover, the H-1B was effectively becoming a back door toward permanent settlement in the United States: "Though industry lobbyists dismiss the H-1B workers as comprising only a small fraction of their workforces, this is highly misleading, as it does not count the workers who first began work in the U.S. under the H-1B program but then were sponsored by the employers for permanent residence. About 35% of Silicon Valley programmers and engineers are foreign born, and most were originally hired via the H-1B program."[39]

The line between temporary and permanent migrants was indeed blurry. According to data analyzed by the Immigration Service, persons under the H-1B had a rather high likelihood of adjusting into permanent residency—they had petitioned for "adjustments of status" at a rate hovering around 50% for persons admitted since 1995. The net result was the same: by introducing so many foreign workers, American companies could cast aside older, more highly paid engineers in favor of cheaper foreign labor.[40] In effect, immigration rules were "deleting American workers."[41]

These arguments weighed heavily in both chambers of Congress. Legislators sympathetic to charges of H-1B abuse, or to claims of harm to domestic workers, almost derailed the passage of the Act of 1998. Senator Tom Harkin of Iowa delayed the final vote in the Senate, and influential leaders in the House—including Lamar Smith—expressed deep reservations about any increase in the cap. Tom Harkin, a good friend of Richard Gephardt, represented protectionist interests in the Senate; Lamar Smith was, among many things, not particularly sympathetic to immigrants during his tenure in the House, although his voting record was obviously pro-business.[42]

Efforts to achieve a compromise with these legislators proved successful after leaders proposed substantial changes to the H-1B program. The Act of 1998 increased the H-1B cap for three consecutive fiscal years, but it was full of new regulations and definitions, higher fees, and long-range plans to remedy whatever labor shortages may (or may not) exist in high-technology

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industries. In the last portions of the Act, Congress commissioned several studies to examine further just how serious the purported labor shortages were, and whether age discrimination or lower and depressed wages were as common as critics had complained.[43]

First, in addition to raising the cap on H-1B visas in fiscal years 1999, 2000, and 2001, the Act of 1998 increased fees for all petitioners. All firms requesting an H-1B had to submit a $110 filing fee per petition; the new rule required an additional $500 per petition on top of the filing fee. Under §414 of the Act, this money was put into an "H-1B Non-Immigrant Petitioner Account," then divvied up into programs ranging from scholarships to "low-income students enrolled in a program of study leading to a degree in mathematics, engineering, or computer science," "programs that provide opportunities for enrollment in year-round academic enrichment courses in mathematics, engineering, or science" run by the National Science Foundation, and "demonstration programs or projects to provide technical skills training for workers, including both employed and unemployed workers."[44] This combination of academic scholarships and job training would presumably work to eliminate the need for foreign workers. Since wealthy corporations would pay the $500 per non-immigrant, it was as though the Act embodied a redistributive principle—taking fees from wealthy corporations and then distributing them to low-income students. Based on the new number of H-1B visas that would be authorized, as well as the backlog from fiscal year 1998, the rule would yield a substantial sum, at least $75 million just in the first year.

The Act also provided for several new provisions intended to protect American workers, but which also improved working conditions for non-immigrant workers in the process. For example, as a strictly protectionist measure, one provision distinguished firms that happened to hire H-1B workers versus firms that had become "H-1B dependent." Firms that were "H-1B dependent" were treated differently: they couldn't lay off any American workers 90 days before or after hiring a foreign one, and they had to file papers confirming that they had taken all good-faith measures to recruit American workers. Congress also noted that some IT firms act as recruitment, placement, or consulting firms—they gathered a range of workers, often from abroad, then contracted their workers' services as consultants to other established firms. Pejoratively, these firms were referred to as "body shops," and they were precisely the type of "H-1B-dependent" companies that worried legislators had had in mind. These companies could not place workers in other firms if those other firms had laid off a similar worker 90 days before or after the placement of an H-1B worker. If any of these rules were breached, yet another provision provided

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whistle-blower protections for any worker reporting the breach to the Department of Labor. Firms found in violation of these provisions would be heavily fined, up to $5,000, and then forbidden from petitioning for another H-1B for at least two years.[45] The overriding goal of all of these new provisions was to protect domestic workers, and that goal was approached in such a way as to eventually eliminate the need for foreign labor.

Other aspects of the law had significant consequences in pursuit of this same objective. Indeed, the Act of 1998 *reduced* the disparities in bargaining position between foreign and domestic workers, such that firms were more likely to treat foreign and domestic workers as rough equivalents. For example, under one provision, firms hiring non-immigrant H-1B workers had to furnish them with the same fringe benefits as any domestic worker in an equivalent position. Foreign workers had to have the same or equivalent life and health insurance, retirement and savings plans, opportunities for bonuses, even stock options. Non-immigrant workers could not be "benched," meaning that they could not be left unemployed during the period for which the visa was granted, nor could they be assigned a different job at a lower wage. Petitioning employers had to pay the wage they had specified in the original immigration petition. That wage, of course, had to be the prevailing wage for all persons in that type of job; anything lower would trigger investigations, fines, and other unpleasant consequences.

Although these measures were intended to protect American workers, they also diminished the distinction between "American" and "foreign," as well as the distinction between "immigrant" and "non-immigrant." For firms that were regarded as "H-1B-dependent," the set of rules for H-1B non-immigrants were very analogous to the complex labor certification process for visas under the second or third preferences for employment-based immigrants. In the desire to protect American citizens from the foreigners, Congress had implemented rules that made citizens and foreigners more alike under the law, in terms of wages, benefits, hiring, and other working conditions.[46] The one crucial distinction was that American workers did not have to worry about having to leave the United States should they ever lose their jobs. By 2000, persons who did have these non-immigrant visas—those who would have exactly these kinds of worries—were much more likely to be from Asia than anywhere else.