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CHAPTER 7
Engineering the Model Minority

A Global Competition for Talented Individuals

The debate over the H-1B did not diminish after the passage of the Act of 1998. This was because in June of 1999, three months before the end of the 1999 fiscal year, the Immigration Service once again ran out of H-1B visas. New applicants would have to wait, and those who were considered after the 115,000 cap had been reached would be charged in the coming fiscal year. In fiscal year 2000, the visas would run out in March. Various parties—including corporate lobbying groups, think tanks, economists for the Federal Reserve, and leading politicians—began contemplating yet another increase in the ceiling in the spring of 1999. Senator Orrin Hatch commissioned a report that detailed the debate within the Senate Judiciary Committee about an increase in the cap, under a new rule entitled the American Competitiveness in the Twenty-First Century Act (AC21). The Committee supported the rule under Hatch's direction, in large part by phrasing it as though it were within the nation's economic interests. The Report heavily cited the remarks of advocates for highly skilled labor who argued that "a global competition for talented individuals is indeed taking place."[1]

Debate over the new rules had also changed, chiefly because a small but vocal group of H-1B recipients were themselves involved in the shaping of AC21. Led by organizations like the Immigrants Support Network, whose leaders were largely South Asian H-1B recipients working in IT firms, these participants were situated in an unusual place: though they were

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clearly not American citizens, they actively lobbied Congress to make the terms of the H-1B more humane, as well as providing labor protections and safeguards similar to the ones enjoyed by their American peers. Many were obviously prospective Americans—they complained, for example, that even when they petitioned for permanent residency, as they were allowed to do under the Act of 1990, backlogs at the INS meant that their petitions were still being adjudicated when their H-1B status expired.[2] This left them in a legal limbo, forced to leave even as they were requesting permission to stay permanently. Others felt trapped and underappreciated at their firms, required to work in unpleasant conditions just to maintain lawful immigration status.

By 2000, the Immigrants Support Network counted 12,000 active members, and it had hired leading attorneys and lobbying firms to make its case before Congress.[3] In contrast, although major labor unions like the AFL-CIO were formally opposed to an expansion of the H-1B program, their opposition was tempered, and many of their leaders seemed to acknowledge that an increase was inevitable. Indeed, over the past twenty years, major labor unions like the International Ladies' Garment Workers' Union (ILGWU) and the Service Employees International Union (SEIU) had taken pro-immigrant positions, but no major labor union had yet organized highly skilled H-1B workers.[4] Organizations like the Immigrant Support Network were developing significant lobbying efforts, and thus performing a traditional function of labor unions.

Table 7.1 and Table 7.2 show profiles of H-1B workers admitted to the United States in fiscal year 2001. From Table 7.1, one can see that the fraction of beneficiaries from India was striking: close to half of all H-1B recipients were South Asian Indian. South Asian Indian H-1B beneficiaries have always constituted the majority of H-1B recipients in recent years, and certainly since the Competitiveness Act of 1998. In its analysis of the H-1B, the Immigration Service said: "The typical H-1B beneficiary whose petition was approved in fiscal year 2001 had the following characteristics: born in India; 29 years old; holding a bachelor's degree; working in a computer-related occupation; and receiving an annual compensation of $55,000. Forty-one percent of all beneficiaries were born in India, had either a bachelor's or master's degree, and were employed in a computer-related occupation."[5]

Table 7.2 shows that almost all H-1B beneficiaries were highly skilled laborers in science and technology fields, and that a majority worked primarily in computer-related occupations, including software development, system design, and technology consulting. The figure for fiscal year 2001 for this first category, however, reflects an overall decline since 1999, when

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TABLE 7.1 Profile of H-1B Beneficiaries by Leading Countries of Birth (2001)

	All Beneficiaries	Percent
All	331,206	100.00%
India	161,561	48.78%
P.R. China	27,331	8.25%
Canada	12,726	3.84%
Philippines	10,389	3.14%
United Kingdom	9,682	2.92%
Korea	6,468	1.95%
Pakistan	6,313	1.91%
Japan	5,902	1.78%
Taiwan	5,808	1.75%
Russia	4,589	1.39%
All Asian countries	245,442	74.11%
Mexico	3,987	1.20%
Central America	943	0.28%

Source: Immigration and Naturalization Service, *2001 Statistical Yearbook* 135, 192, 195 (2002)

TABLE 7.2 Profile of H-1B Beneficiaries by Occupation (2001)

	Total	Percent
All	331,206	100.00%
Computer-related	191,397	57.79%
Architecture, engineering, and survey	40,388	12.19%
Administrative specialization	23,794	7.18%
Education	17,431	5.26%
Managers and officials n.e.c.	12,423	3.75%
Medicine and health	11,334	3.42%
Life sciences	6,492	1.96%
Social sciences	6,145	1.86%
Mathematical and physical sciences	5,772	1.74%
Misc. professional, technical, and managerial	5,662	1.71%

Source: Immigration and Naturalization Service, *2001 Statistical Yearbook* 136 (2002)

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this category accounted for 61.6 percent of all beneficiaries. Other occupations, including architecture, engineering and survey, administrative specialization, and managers and officials, held a greater share of beneficiaries, signaling the occupational diversification of H-1B visa workers. In addition, university sponsorship of H-1B programs since 1998 has led to greater use of this visa in academic research settings; the fact that more beneficiaries are working in education, as well as in the life sciences, the social sciences, and mathematical and physical sciences also reflects diversification.

Still, the beneficiaries in the aggregate had much in common. They were relatively young, highly educated, generally well paid compared with the majority of workers, and very likely to work in major IT firms, academic research centers, or in other technology sectors. In fact, as group, these migrants were some of the best-educated, highly trained migrants in American immigration history. Since 1998, over two thirds of all H-1B beneficiaries were from Asia, a portion that has only increased in recent years. When these educated, technologically literate groups of "non-immigrants" began lobbying for changes in law favorable to their condition, they were received with a substantial degree of political support from leading companies, and from sympathetic pro-business political leaders.

Indeed, with the support of leading pro-business Republicans, Senator Orrin Hatch proposed yet another new ceiling for the H-1B. Most of the Democratic members of the Judiciary Committee would vote in favor of this increase, but in early legislative discussions, they inserted a minority opinion in the Senate Report issued in support of Hatch's proposal. They conceded that "unless we take steps now to address this growing workforce gap, American's technological and economic leadership will be jeopardized." But with reference to the cap, "this increase must be temporary, reasonable, and sufficiently tailored to meet existing short-term needs." Above all, it should protect the interests and long-term prospects of American workers. Toward that end, Senator Edward Kennedy had recommended an increase to 145,000 per fiscal year, plus an additional 10,000 to 14,000 H-1Bs for anyone with a master's degree or higher; Senator Hatch had proposed an increase to 195,000, and any H-1B beneficiary in an institution of higher education, in any organization affiliated with such an institution, or any nonprofit or governmental research institution would be completely exempt from the cap.

In practice, Hatch's proposal could yield as many as a quarter million new H-1B visas per year. Leading Democrats—Patrick Leahy, Edward Kennedy, Joseph Biden, Russell Feingold, Robert Torricelli, and Charles Schumer—finally agreed to this very reluctantly, and hinged their support

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for Hatch's proposal on a new set of provisions to protect and increase the supply of domestic workers in information technology. They concluded that, "A modest increase in the H-1B high-tech visa cap is justified. But this increase must be temporary, reasonable, and sufficiently tailored to meet existing short-term needs." The Senators were also concerned about fraud, and recommended measures to discover the extent of the problem.[6]

So much was uncertain, and many legislators felt that this was one issue where they really did have to navigate a sea of uncertainty. For example, in a study sent to Congress, Stuart Anderson, an analyst at the Cato Institute, insisted that fraud was not rampant among H-1B petitioners: relying on statistics and controversial cases investigated by the Department of Labor, Anderson concluded that "there has been a lot of smoke, but little fire relating to alleged abuses."[7] And yet so many media accounts revolved solely around instances of fraud.[8] Government agencies were inconclusive: in a report released one month before the Act became law, the General Accounting Office said that although the system for procuring H-1B visas was inefficient and prone to abuse, there was no conclusive evidence that fraud and misrepresentation were "rampant." Moreover, it was obvious in the report that the GAO and the INS could not agree about the extent of the problems in processing and granting H-1B petitions, with the former suggesting that more needed to be done, and the INS insisting that the current system was sufficient to catch fraud and noncompliance.[9]

There was also substantial disagreement on other important issues. For instance, many opponents of the H-1B kept insisting that this was yet another back door into the United States, much like refugee policy under the Act of 1980, or the mass legalizations authorized by the Act of 1986. Yet, the most recent scholarship did suggest that although highly skilled workers were, in fact, being sought after in a number of different countries, they were much more likely to travel widely and perhaps "settle" nowhere. In her study of medical professionals and science and technical workers, for instance, Robin Iredale noted that several nations—Australia, Canada, and the United Kingdom—had altered immigration rules to attract highly skilled professionals. But, she concluded, as all of these nations, including the United States, competed for these same workers, these workers were increasingly flexible in terms of location. Many worked for firms that were truly international. Thus, "as international labor markets become predominant, the drive for labor self-sufficiency may no longer be appropriate or necessary."[10] Other leading scholars tended to confirm this phenomenon: "Research suggests that 'brain drain' may be giving way to a process of 'brain circulation,' as talented immigrants who study and work in the United States return to their home countries to take

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advantage of promising opportunities there." Thus, "it is no longer valid to assume that skilled immigrants will stay permanently in the United States," or any other country for that matter.[11]

These scholars suggested that rather than a back door, the flexibility and temporary nature of the H-1B was part of a new revolving door for the highly skilled. Instead of choosing to settle permanently in the United States, as some had suggested, the new classes of professional migrants might just take whatever expertise and experience might be had here, then look for opportunities elsewhere. Above all, "place" was becoming less important.[12]

Questioning the Shortage

In a flurry of testimony in the House Subcommittee on Immigration in August of 2000, just before the passage of AC21, organized labor groups and professional associations again protested another doubling of H-1B visas. The president of the Institute of Electrical and Electronics Engineers called any increase in the cap "premature": "In the absence of reliable statistics to support industry's contention that there is a serious national shortage of core information technology workers, including engineers and scientists, systems analysts and programmers, there is insufficient empirical evidence to justify another increase in H-1B admissions ceilings at this time."[13]

David Smith, the director of policy of the AFL-CIO, echoed these concerns: "What we do not know is that there is no substantial proof of a widespread worker shortage as claimed by the information technology industry." Smith cited high unemployment rates among older programmers, and what seemed to be a growing, "voracious" appetite for foreign workers in the IT industry. He advocated long-term projects to address whatever shortages might or might not exist. Current policies were unacceptable: "The H-1B program and its expansion have proven to be the worst possible scenario for U.S. workers."[14]

The leading Republican on the House Subcommittee, Lamar Smith, heard these objections sympathetically, but he seemed to concede:

> Although there is still no objective, credible study that documents a shortage of American high-tech workers, the INS said recently that the demand for highly skilled foreign workers is running at least 50,000 ahead of last year. Such a demand can indicate an actual shortage of American workers, a spot shortage, a preference for cheap labor or replacement workers, or something else. But because

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> of the importance of the high-tech industry to our economy, I think we should give the industry the benefit of the doubt.[15]

This "benefit of the doubt" meant going along with Orrin Hatch's proposal toward an unprecedented rise in the H-1B cap. If all of these visas were used, then more persons would enter under this one category than all permanent residents seeking employment visas in all industries. This was an astounding shift in the law governing employment-based migration.

Under the American Competitiveness in the Twenty-First Century Act of 2000, passed in October of 2000, the H-1B cap was raised yet again: "195,000 in fiscal year 2001; 195,000 in fiscal year 2002; and 195,000 in fiscal year 2003." In addition, the Act of 2000 provided additional visas for fiscal years 1999 and 2000, so that they would not obstruct the cap for fiscal year 2001. Along the lines of Hatch's original proposal, the Act of 2000 provided that persons working in "institutions of higher education or a related or affiliated nonprofit entity" or for "a nonprofit research organization or a governmental research organization," *and* persons with advanced degrees wouldn't be counted against the cap.[16] Various redistributive provisions were strengthened: "measures were adopted to encourage more U.S. students to study mathematics, engineering, and computer science and to train more U.S. workers in these areas." Monies taken from fees collected for H-1B beneficiaries would "result in total funding of $450,000,000, which would allow for 40,000 scholarships to be awarded to U.S. students."[17]

Also, the position of non-immigrant H-1B beneficiaries improved substantially: Congress made the H-1B more "portable," saying that the beneficiaries were "authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such non-immigrant." In other words, if they found a better job, they could take it, provided that their new employer filed another H-1B petition with the proper immigration authorities.[18] Moreover, if H-1B non-immigrants had filed a petition for permanent residency—thus attempting to adjust their status to that of immigrants—they could request an extension of their non-immigrant status in "one-year increments until such time as a final decision is made on the alien's lawful permanent residence" petition.[19] In practice, non-immigrants under an H-1B who wished to remain in the United States after the six-year period could simply file a petition for permanent residency, and so long as the final petition was winding its way through the immigration bureaucracy for at least a year, they could work and remain in the United States indefinitely.

Most importantly, the Act of 2000 waived the per country limit on employment-based visas, just as Michael Murray, the vice president of

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Microsoft, had suggested in his testimony to the Senate in February of 1998. Countries that were heavily impacted for employment-based visas—especially India—could see substantial numbers adjusting into permanent residency. The greater ease with which H-1B beneficiaries could seek permanent residency greatly empowered these beneficiaries in the labor market, and gave them much more leverage in the ultimate decision of whether to leave or to remain in the United States. All of these changes amounted to a major victory for groups like the Immigrant Support Network.

The Engineering of a Model Minority

In this way, the obscure H-1 visa—once reserved for athletes, entertainers, and fashion models—had evolved into an entirely different thing. Vast changes in the American economy and society now provided a wide new avenue for large numbers of highly skilled professionals entering the United States, and it was obvious that many were intending to stay permanently. There is no historical analog for the H-1B program—nowhere in American immigration history has Congress provided for such tremendous numbers of highly paid, highly skilled immigrant workers. The cap for H-1B immigrants in 2001 far exceeded the cap for immigrant-based employment visas, the first time that a non-immigrant category for employment exceeded the cap for an immigrant category. The method and proof required to secure entry were roughly the same—the distinction in law between a temporary worker and a permanent worker had almost disappeared. The sheer scale of the new migration was impressive: in fiscal year 2000, 137,000 H-1B visas for initial employment in American firms were approved; in the following fiscal year, 201,000 H-1B visas were approved. From October 2000 to June 2001, 254,000 new H-1B visa petitions were approved. The last time so many immigrant workers came so suddenly was at the height of the Bracero Program, when about 445,000 Mexican workers were brought to work as agricultural laborers.[20]

Most striking of all was how the legislative debates about the H-1B *avoided* issues of race. That is, proponents of a higher ceiling and opponents of temporary-worker programs occasionally made references to "Asian" workers, and the opponents often said that these workers were driving down the wages and working conditions of "native" workers; thematically, much of what they said resembled the protests of white labor unions that had complained about the arrival of Chinese laborers in the 19th century. Certainly, in media accounts of the debate, various participants—journalists, workers in the IT industry, and members of the public—did say race-conscious and racially hostile things about H-1B

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workers. But in formal proceedings, in testimony to Congress, and even in public, the most visible opponents of the H-1B attempted to insulate themselves *against* charges of racial bias. Professor Norman Matloff insisted that he was not, for example, anti-Asian, because his own wife was in fact a Chinese immigrant, and because his professional work in computer science included the development of software technology in Asia.[21] None of the Congressional testimony included pejorative or racist claims about H-1B workers, nor accused the central participants in the debate of blatant racial bias.

During the late 19th century, Chinese immigrants were referred to as an "Oriental gangrene," and in the early 20th, Japanese immigrants were described as a "yellow peril." American politicians and judges had uttered these slurs, often while campaigning for office or deciding significant legal disputes. Working together, they created the entire substance of immigration law in the United States to keep these immigrants out. A hundred or even fifty years ago, if 140,000 "temporary" Asian workers were arriving alongside another 100,000 permanent workers from Asia into the United States every year, then they might have concluded that "[this] immigration was in numbers approaching the character of an invasion, and was a menace to our civilization."[22]

Yet instead of race or racial disaster, the ongoing debates about the H-1B in particular and about employment-based migration in general focused almost entirely on economic costs and benefits, about efficiencies in a global market, and about the competitive advantages needed to sustain the United States. The racial profile of H-1B workers was not as open a public issue—the more compelling concern was whether their entry would harm American workers, or whether powerful companies could survive without them. Legislators assured concerned union leaders that they could stop the flow of H-1B workers rather easily, even as they also assured the leaders of prominent technology firms that they would provide whatever level of non-immigrant labor was necessary. Again, the debate was not so much about culture, or about who could or could not pass into American citizenship racially; it was conducted in the language of the market, so as to frame immigration law in a way that would promote efficiency and maximize benefits to American economy and society. As in discussions about deportation, welfare, refugees, and family reunification, the themes of market efficiency would come to dominate immigration policy in the United States.

In terms of numbers, the overall effect of the new immigration policy will have clear, racial consequences, especially for Asians. More immigrants from Asia are likely to arrive for employment than ever before.

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If one includes "temporary" skilled workers from Asia, that trend will be reinforced. In fact, one *must* include "temporary" workers from this measure because so many of them have become "permanent." In 1985, about 8,000 persons on H visas adjusted to permanent-resident status. That figure climbed to 10,000 by 1988, and 14,600 by 1990. Rates have been high since then—34,700 in 1992 and 39,000 in 1993. In 2001, more than 85,000 persons adjusted to permanent resident status from various non-immigrant temporary visa categories. About three quarters of all people who adjusted status in this way—62,300 persons—were from Asia.[23] As we mentioned toward the end of Chapter 5, in 2001, of the 179,000 immigrants who came under employment-based visas, 106,000 were from Asia.[24] In conjunction with the deportation rules that quickly remove even former refugees, and family reunification rules that disqualify or discourage the reunion of family members in the United States, these trends are likely to enhance the notion that Asian Americans nationally are a "model minority." Immigration law—the sum of the new methods of exclusion, inclusion, and removal—makes this possibility much more likely than ever before.