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**SCARCITY DOES NOT CREATE VALUE:  
H-1B VISA REFORM THAT PROTECTS AMERICAN WORKERS WITHOUT  
REDUCING IMMIGRATION**

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❖ Note ❖

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I. INTRODUCTION

Amidst rising tensions surrounding immigration, the H-1B visa program has found itself under fire from all sides of the political spectrum.<sup>1</sup> Elon Musk and Vivek Ramaswamy, two businessmen who were tapped to lead the proposed Department of Governmental Efficiency, made headlines towards the end of last year for arguing in favor of the H-1B visa system as a way to bring talented workers to the United States.<sup>2</sup> Senator Bernie Sanders directly opposed these comments, criticizing companies for replacing American workers with lower-paid immigrant workers, going as far as to call these workers “indentured servants.”<sup>3</sup>

This debate, while not new, presents a false dichotomy.<sup>4</sup> One side argues that in order to protect American workers, we must add greater restrictions to the H-1B visa

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<sup>1</sup> See Aimee Picchi, *Musk and Ramaswamy Are Sparking a Debate Over the H-1B Visa. Here’s What to Know About the Visa.*, CBS NEWS (Dec. 30, 2024, 11:39 AM), <https://www.cbsnews.com/news/musk-vivek-ramaswamy-h1b-visa-maga-immigration-what-to-know/>; see also Bernie Sanders, *Sen. Bernie Sanders: H-1B Visas Hurt One Type of Worker and Exploit Another. This Mess Must Be Fixed*, FOX NEWS (Jan. 8, 2025, 6:00 AM), <https://www.foxnews.com/opinion/sen-bernie-sanders-h1-b-visas-hurt-one-type-worker-exploits-another-mess-must-fixed>.

<sup>2</sup> Aimee Picchi, *Musk and Ramaswamy Are Sparking a Debate Over the H-1B Visa. Here’s What to Know About the Visa.*, CBS NEWS (Dec. 30, 2024, 11:39 AM), <https://www.cbsnews.com/news/musk-vivek-ramaswamy-h1b-visa-maga-immigration-what-to-know/>.

<sup>3</sup> Bernie Sanders, *Sen. Bernie Sanders: H-1B Visas Hurt One Type of Worker and Exploit Another. This Mess Must Be Fixed*, FOX NEWS (Jan. 8, 2025, 6:00 AM), <https://www.foxnews.com/opinion/sen-bernie-sanders-h1-b-visas-hurt-one-type-worker-exploits-another-mess-must-fixed>.

<sup>4</sup> See generally Daniel Costa and Heidi Shierholz, *Immigrants Are Not Hurting U.S.-Born Workers*, ECON. POL’Y INST. (Feb. 20, 2024, 12:02 PM), <https://www.epi.org/blog/immigrants-are-not-hurting-u-s-born-workers-six-facts-to-set-the-record-straight/>.

program.<sup>5</sup> On the other hand, some who support H-1B visa immigration argue that this program is necessary in an American culture that “has venerated mediocrity over excellence.”<sup>6</sup> It’s a zero-sum game, where one group can only win at the expense of another.<sup>7</sup>

These are not the only solutions. The H-1B visa system needs reform – that much is certain – but we don’t have to operate on a scarcity mindset.<sup>8</sup> Instead, this Note proposes that the H-1B visa program should be modified to strengthen protections for immigrant workers without reducing the visa quota or adding restrictions to the program.<sup>9</sup> In particular, extending the grace period for laid-off H-1B visa workers and creating more robust enforcement mechanisms to shield H-1B visa workers from retaliation by their employers will provide them with more job mobility and security.<sup>10</sup> As a result, companies will be disincentivized from disproportionately hiring H-1B workers, reducing displacement of American workers.<sup>11</sup> At the same time, current and future H-1B workers will be protected, and potential exploitation of this visa class will be reduced.<sup>12</sup>

Part II of this Note will discuss the background of the H-1B visa program, with subsection A providing a brief history of the program, subsection B discussing how the program operates, and subsection C exploring current H-1B visa trends.<sup>13</sup> Part III will discuss the issues in the current H-1B visa program, with subsection A discussing income disparities, subsection B covering a lack of job mobility, subsection C discussing the displacement of U.S. workers, and subsection D looking at current reform proposals.<sup>14</sup> Part IV will discuss recommendations for the federal government to pursue in order to prioritize the needs of both H-1B workers and American workers, such as extending the grace period for laid-off H-1B workers, increasing federal protections for H-1B workers, and diversifying the industries that accept H-1B workers.<sup>15</sup>

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<sup>5</sup> See PRESS RELEASE, U.S. SENATE COMMITTEE ON THE JUDICIARY, DURBIN, GRASSLEY INTRODUCE BIPARTISAN H-1B, L-1 VISA REFORM LEGISLATION TO PROTECT WORKERS AND STOP OUTSOURCING OF AMERICAN JOBS (Mar. 27, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-h-1b-l-1-visa-reform-legislation-to-protect-workers-and-stop-outsourcing-of-american-jobs> [hereinafter Visa Reform Legislation].

<sup>6</sup> See Picchi, *supra* note 2.

<sup>7</sup> See generally Costa and Shierholz, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Section IV.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* Section II.

<sup>14</sup> See *infra* Section III.

<sup>15</sup> See *infra* Section IV.

## II. BACKGROUND

### *A. Brief History of the H-1B Visa Program*

The H-1B visa category was first established by the passage of the Immigration Act of 1990.<sup>16</sup> This legislation set preference for immigrant workers with extraordinary ability or highly specialized knowledge, creating the initial cap of 65,000 H-1B visas per fiscal year.<sup>17</sup> Employers were required to submit Labor Condition Applications, attesting that H-1B visa workers were being given the required wages and benefits comparative to U.S. workers in the same position.<sup>18</sup> This Act also showed the legislators' sensitivities towards the American workforce, as it directed the Secretary of Labor to issue labor certifications for occupations with labor shortages.<sup>19</sup> In addition, this Act contained a small provision allocating educational funding and assistance for U.S. workers.<sup>20</sup>

The 65,000 H-1B visa cap remained stagnant until the passage of the American Competitiveness and Workforce Improvement Act of 1998, which increased the cap to 115,000 visas for fiscal years 1999 and 2000.<sup>21</sup> Subsequently, the American Competitiveness in the 21st Century Act of 2000 increased the cap to 195,000 visas for fiscal years 2001-2003.<sup>22</sup> These increases were largely fueled by the high demand for skilled foreign workers in United States tech and computer industries.<sup>23</sup> However, these cap increases were only temporary, so in fiscal year 2004, the H-1B visa cap fell back to 65,000 per year.<sup>24</sup> But since fiscal year 2005, an additional 20,000 H-1B visas per year have been allocated to immigrants with U.S.-earned master's or advanced degrees, bringing the current H-1B cap to 85,000 visas.<sup>25</sup>

### *B. How the H-1B Visa Program Operates*

The H-1B visa is designed for immigrants who wish to work in specialized occupations in the United States.<sup>26</sup> In order to be eligible, a bachelor's degree is

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<sup>16</sup> S. 358, 101st Cong. (1990).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> H.R. 4328, 105th Cong. (1998).

<sup>22</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

<sup>23</sup> Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1676 (2000).

<sup>24</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

<sup>25</sup> Pub. L. No. 108-447, 118 Stat. 2809 (2004).

<sup>26</sup> *H-1B Specialty Occupations*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations> (last visited May 31, 2025).

generally required; however, applicants with less education can make up for this through demonstrated relevant work experience.<sup>27</sup> The United States Citizen and Immigration Services (USCIS) specifically employs a “Three to One” rule, which states that three years of specialized training and/or work experience can make up for one year of higher education.<sup>28</sup> That means an applicant with no college degree would need to show twelve years of relevant training and/or work experience to be eligible for an H-1B visa.<sup>29</sup> It appears that many applicants may be pursuing this alternative pathway – in fiscal year 2011, an estimated one-in-four H-1B visa requests were for positions requiring only a two-year associate’s degree.<sup>30</sup>

In recent years, the amount of H-1B visa applicants has greatly exceeded the number of visas available, resulting in the USCIS conducting a lottery to narrow the applicant pool.<sup>31</sup> If selected through the lottery, an H-1B visa applicant and their prospective employer must prepare several documents to support their H-1B petition.<sup>32</sup> The employer is required to fill out a Labor Condition Application (“LCA”) with the Department of Labor (“DOL”), attesting that the H-1B applicant will be paid at least the actual wage on par with other employees with the same experience and qualifications, or will be paid the prevailing wage for the occupation in the area of employment, whichever is higher.<sup>33</sup> In addition, the employer must submit Form I-129, which is a petition for an H-1B visa, to the USCIS.<sup>34</sup> If the petition is approved, then the applicant will be able to officially apply for the visa and admission to the United States.<sup>35</sup> This process includes an interview with a consular officer, who will inquire about the applicant’s educational background, their professional experience, their U.S. job offer, and other related information.<sup>36</sup> If a candidate successfully makes it through the application process, they will be granted an H-1B visa.<sup>37</sup> For a typical applicant, the entire process can take approximately six to nine months from the initial lottery registration to the final visa decision.<sup>38</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *H-1B Visa Without a Degree: The ‘Three to One’ Rule*, RICHARDS AND JURUSIK IMMIGR. L. (Aug. 1, 2024), <https://rjimmigrationlaw.com/resources/h-1b-visa-without-a-degree-the-three-to-one-rule/>; 8 C.F.R. §214.2(h)(4)(iii)(D)(5).

<sup>29</sup> *Id.*

<sup>30</sup> Neil G. Ruiz, *Key Facts About the U.S. H-1B Visa Program*, PEW RSCH. CTR. (Apr. 27, 2017), <https://www.pewresearch.org/short-reads/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/>.

<sup>31</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>32</sup> *Id.*

<sup>33</sup> *H-1B Labor Condition Application*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/laws-and-regulations/laws/ina/h1b> (last visited Apr. 27, 2025).

<sup>34</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>35</sup> *Id.*

<sup>36</sup> *H-1B Visa Interview Questions*, BOUNDLESS IMMIGR. INC., <https://www.boundless.com/immigration-resources/h-1b-visa-interview-questions/> (last visited May 31, 2025).

<sup>37</sup> Alison Moodie, *The H-1B Visa, Explained*, BOUNDLESS IMMIGR. INC. (Mar. 26, 2025), <https://www.boundless.com/immigration-resources/the-h-1b-visa-explained/>.

<sup>38</sup> *Id.*

There are several types of employers who are held exempt from the H-1B visa cap, meaning their applicants are not subject to the H-1B visa lottery.<sup>39</sup> This includes higher-education institutions, non-profit research organizations, government research organization, and non-profit organizations affiliated with higher-education institutions.<sup>40</sup>

### *C. Current H-1B Visa Program Trends*

The demand for H-1B visas greatly outpaces the current supply.<sup>41</sup> For fiscal year 2024, the USCIS received 758,994 eligible H-1B applications.<sup>42</sup> While the number of eligible applications decreased to 470,342 for fiscal year 2025, that number still exceeds the current cap of 85,000 visas per year.<sup>43</sup>

It is not uncommon for applicants to be denied – and denial rates have greatly fluctuated in the past several years.<sup>44</sup> For example, denial rates for initial employment applications were much higher under the first Trump administration, reaching as high as twenty-four percent in fiscal year 2018.<sup>45</sup> The denial rates sharply declined under the Biden administration, with fiscal year 2024 having only a 2.5 percent denial rate for new applications.<sup>46</sup> While some worry that denial rates might increase again with Trump back in office,<sup>47</sup> it is too soon to see whether that will actually be the case.

As of 2019, there are approximately 583,420 workers on an H-1B visa in the United States.<sup>48</sup> The vast majority of H-1B applications are for positions requiring high-level STEM and computer knowledge.<sup>49</sup> As a result, many of the largest employers of H-1B visa workers are in the tech industry.<sup>50</sup> In particular, Amazon had the largest number of approved H-1B petitions for fiscal year 2024, with companies

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<sup>39</sup> Dimo Machailov, *Guide to H-1B Cap Exempt Employers*, CAPITOL IMMIGR. LAW GROUP PLLC (Sept. 30, 2024), <https://cilawgroup.com/news/2024/09/30/guide-to-h-1b-cap-exempt-employers/>.

<sup>40</sup> *Id.*

<sup>41</sup> *A Sneak Peek Into H-1B Applications Filed for 2025*, IMAGILITY (Jul. 8, 2024), <https://imagility.co/blog/h-1b-applications-filed-for-2025/>.

<sup>42</sup> *Id.*

<sup>43</sup> *H-1B Electronic Registration Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations/h-1b-electronic-registration-process> (last visited Apr. 27, 2025).

<sup>44</sup> *H-1B Petitions and Denial Rates in FY 2024*, NAT'L FOUND. FOR AM. POL'Y, <https://nfap.com/studies/h-1b-petitions-and-denial-rates-in-fy-2024/> (last visited May 31, 2025).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See generally Ananya Bhattacharya, *A Trump H-1B Crackdown Could Hit Big Tech Hard, with Amazon Suffering Most*, REST OF WORLD (Mar. 24, 2025), <https://restofworld.org/2025/trump-h1b-policy-big-tech-workers-amazon/>.

<sup>48</sup> *H-1B Authorized-to-Work Population Estimate*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf> (last visited May 31, 2025).

<sup>49</sup> Ruiz, *supra* note 30.

<sup>50</sup> *H-1B Petitions and Denial Rates in FY 2024*, *supra* note 44.

such as Microsoft, Google, Meta, Apple, and Tesla also landing among the top twenty-five.<sup>51</sup>

### III. ANALYSIS

#### A. *Income Disparities*

Despite employers being required to submit an LCA, there is evidence indicating that many H-1B workers are paid below the market level.<sup>52</sup> When completing an LCA for an H-1B applicant, employers can choose from four prevailing wage levels.<sup>53</sup> Level 1, meant for entry-level workers, is equivalent to the seventeenth percentile of wages for similar occupations in the local area.<sup>54</sup> This means that if an H-1B worker is paid at Level 1, eighty-three percent of workers in that occupation and area would be paid more than the H-1B worker.<sup>55</sup> Each level assigns a higher prevailing wage proportional to experience, with Level 2 being equivalent to the thirty-fourth percentile, Level 3 being equivalent to the fiftieth percentile, and Level 4, meant for “fully competent” workers, is set at the sixty-seventh percentile.<sup>56</sup> In fiscal year 2019, approximately sixty percent of all H-1B positions were set at either Level 1 or 2.<sup>57</sup> In fact, only nineteen percent of positions were set at the median percentile of Level 3.<sup>58</sup> Some have interpreted this to show that the majority of H-1B positions are underpaid compared to the median prevailing wage, and that these companies are exploiting these immigrant workers that are intrinsically tied to their employers to lawfully maintain their immigration status.<sup>59</sup> Thus, it could be argued that some employers might prioritize hiring H-1B workers over United States’ workers to save money and avoid paying higher salaries.<sup>60</sup>

However, this doesn’t necessarily mean that H-1B visa holders are in low-paying roles. The USCIS reported that H-1B workers in computer-related occupations, making up over half of all H-1B petitions approved in fiscal year 2022, had a median annual compensation of \$123,000.<sup>61</sup> According to the Bureau of Labor Statistics, the

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<sup>51</sup> *Id.*

<sup>52</sup> Daniel Costa & Ron Hira, *H-1B visas and prevailing wage levels*, ECON. POL’Y INST. (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Characteristics of H-1B Specialty Occupation Workers*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Mar. 13, 2013), [https://www.uscis.gov/sites/default/files/document/data/OLA\\_Signed\\_H-1B\\_Characteristics\\_Congressional\\_Report\\_FY2022.pdf](https://www.uscis.gov/sites/default/files/document/data/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2022.pdf).

median annual salary for all computer and information technology occupations was \$105,990 in May 2024.<sup>62</sup>

Further, any money saved by employing H-1B workers may be overstated, especially when considering the high costs associated with processing H-1B visas.<sup>63</sup> Employers are responsible for paying hundreds of dollars in registration and form fees during the application process.<sup>64</sup> Including legal fees, employer could expect to pay around \$33,000 for an initial H-1B application and extension.<sup>65</sup> And if an employer sponsors an employee's application for permanent residency, the estimated total legal fees could increase to \$50,000.<sup>66</sup> Thus, any potential wage gaps between immigrant and American workers, while troubling and worthy of addressing, may not be the primary reason why employers seem to be prioritizing the hiring of H-1B workers over American workers.

### B. *Lack of Mobility*

Another major issue facing H-1B workers is a lack of job mobility. Due to the nature of work-based visas, H-1B visa holders are intrinsically tied to their employers.<sup>67</sup> As mentioned previously, H-1B applicants need their employers to sponsor their petition in order to be approved for a visa.<sup>68</sup> As a result, this can often create situations where the employer have undue leverage over H-1B workers, making these workers more susceptible to abuses by their employers.<sup>69</sup> In particular, research has shown that this system makes H-1B workers feel less willing to report their employers for wrongdoings or misconduct due to fear of retaliation or loss of employment.<sup>70</sup> As a

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<sup>62</sup> *Computer and Information Technology Occupations*, U.S. BUREAU OF LAB. STAT. (Apr. 18, 2025), <https://www.bls.gov/ooh/computer-and-information-technology/>.

<sup>63</sup> Stuart Anderson, *A Look At The High Fees Making Hiring H-1B Visa Holders Challenging*, FORBES (Feb. 22, 2024, 8:59 AM), <https://www.forbes.com/sites/stuartanderson/2024/02/22/a-look-at-the-high-fees-making-hiring-h-1b-visa-holders-challenging/>.

<sup>64</sup> Nita Nicole Upadhye, *H-1B Visa Cost & Fees 2025*, NNU IMMIGR. (Jan. 7, 2025), <https://www.nnuimmigration.com/h1b-visa-cost/>.

<sup>65</sup> Anderson, *supra* note 63.

<sup>66</sup> *Id.*

<sup>67</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>68</sup> *Id.*

<sup>69</sup> See Patrick Thibodeau, *Employer Power Over H-1B Workers Could Create Financial Risk*, TECHTARGET (Feb. 15, 2024), <https://www.techtargget.com/searchhrsoftware/news/366570083/Employer-power-over-H-1B-workers-could-create-financial-risk>; see also Ron Hira and Daniel Costa, *New Evidence of Widespread Wage Theft in the H-1B Visa Program*, ECON. POL'Y INST. (Dec. 9, 2021), <https://www.epi.org/publication/new-evidence-widespread-wage-theft-in-the-h-1b-program/>.

<sup>70</sup> Ruiting Dai, Xuanjun Dong, Nemit Shroff, & Qin Tan, *Does U.S. Immigration Policy Facilitate Financial Misconduct?* (May 23, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5266279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5266279).

result, companies may prefer to hire H-1B workers over American workers due to the lack of mobility created from their visa status.<sup>71</sup>

There are even instances of H-1B workers facing retaliation from their employers after reporting misconduct.<sup>72</sup> Last year, an Indian H-1B visa holder sued JPMorgan, his former employer, after they allegedly fired him following his complaints about racial and national origin discrimination at the company.<sup>73</sup> H-1B workers being fired can put their visa status at risk, since they must retain sponsorship from an employer in order for their H-1B to remain valid.<sup>74</sup>

Further, H-1B visa holders are not helped by the fact that if they lose their employment, they only have sixty days to find a new job or change their visa status.<sup>75</sup> As of February 2023, it took an average of 8.3 weeks to find a new job after a layoff.<sup>76</sup> This is particularly relevant given the significant layoffs occurring in the tech industry.<sup>77</sup> Thus, H-1B workers are situated in a vulnerable position, which could further explain the problematic relationship between these workers and their employers.

### C. Displacement of U.S. Workers

It is clear that the H-1B visa program has continued to displace more and more American workers.<sup>78</sup> Analysis from the Economic Policy Institute shows that the top thirty H-1B employers hired around 34,000 H-1B workers in fiscal year 2022, while laying off 85,000 workers during roughly the same period.<sup>79</sup> There are even several reports of American workers who were terminated from their positions and

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<sup>71</sup> See generally Patrick Thibodeau, *Employer Power Over H-1B Workers Could Create Financial Risk*, TECHTARGET (Feb. 15, 2024), <https://www.techtarget.com/searchhrsoftware/news/366570083/Employer-power-over-H-1B-workers-could-create-financial-risk>.

<sup>72</sup> Andrew Kreighbaum, *JPMorgan Retaliated Against Indian H-1B Worker, Lawsuit Says (1)*, BL (Jun. 4, 2024), <https://news.bloomberglaw.com/daily-labor-report/jpmorgan-retaliated-against-indian-h-1b-worker-lawsuit-says>.

<sup>73</sup> *Id.*

<sup>74</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>75</sup> *Options for Nonimmigrant Workers Following Termination of Employment*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment> (last visited May 31, 2025).

<sup>76</sup> Aleksandra Yosifova, *The Aftermath of the Big Tech Layoffs: Who Found a Job and Where?*, 365 DATA SCI. (Oct. 7, 2024), <https://365datascience.com/trending/the-aftermath-of-the-big-tech-layoffs/>.

<sup>77</sup> Cody Corral, *A Comprehensive Archive of 2024 Tech Layoffs*, TECHCRUNCH (Dec. 31, 2024, 11:09 AM), <https://techcrunch.com/2024/12/31/a-comprehensive-archive-of-2024-tech-layoffs/>.

<sup>78</sup> Daniel Costa & Ron Hira, *Tech and Outsourcing Companies Continue To Exploit the H-1B Visa Program at a Time of Mass Layoffs*, ECON. POL'Y INST. (Apr. 11, 2023, 3:41 PM), <https://www.epi.org/blog/tech-and-outsourcing-companies-continue-to-exploit-the-h-1b-visa-program-at-a-time-of-mass-layoffs-the-top-30-h-1b-employers-hired-34000-new-h-1b-workers-in-2022-and-laid-off-at-least-85000-workers/>.

<sup>79</sup> *Id.*

subsequently forced to train immigrant workers who would be assuming their jobs.<sup>80</sup> For example, 250 data systems employees at Disney were informed that they would be laid off in late 2014, and many of these workers reported that they were required to train the immigrant workers who would be replacing them over their last few months of employment.<sup>81</sup> A similar story unfolded at AT&T in 2019.<sup>82</sup> As long as the weaknesses in the H-1B visa system can be exploited, American workers will continue to receive less priority in the job market.

#### *D. Current Reform Proposals*

These issues are not new, and many elected officials have sought to try and address the flaws of the H-1B visa program. For example, since 2007, Democratic Senator Dick Durbin and Republican Senator Chuck Grassley have been advocating for Congress to adopt the H-1B and L-1 Visa Reform Act.<sup>83</sup> This Act, if adopted, would institute higher wage requirements, greater transparency measures, and other provisions aimed at closing loopholes in the H-1B visa program.<sup>84</sup> In particular, it would prioritize H-1B applicants who will be paid at the prevailing wage Level 3 or 4.<sup>85</sup> It would also require employers seeking H-1B employees to post these jobs on a Department of Labor (DOL) website, increase fines for wage violations, and allow the DOL to hire 200 additional employees for the administration of this program.<sup>86</sup>

However, there are many provisions in this bill that fall flat. Specifically, the Act implements restrictions that would make it more difficult for applicants to obtain their H-1B visa status.<sup>87</sup> Currently, H-1B visa applications filed by higher education institutions are not subject to the visa cap.<sup>88</sup> However, this Act would remove this exception, decreasing the amount of H-1B visas that are awarded each year.<sup>89</sup> It would also set a bachelor's degree as a minimum requirement for an H-1B visa, eliminating the USCIS "Three to One" rule that allows applicants to substitute work experience

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<sup>80</sup> See Stef W. Kight, *U.S. Companies Are Forcing Workers to Train Their Own Foreign Replacements*, AXIOS (Dec. 29, 2019), <https://www.axios.com/2019/12/29/trump-att-outsourcing-h1b-visa-foreign-workers>.

<sup>81</sup> Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements.*, NEW YORK TIMES (Jun. 3, 2015), <https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html>.

<sup>82</sup> Kight, *supra* note 80.

<sup>83</sup> Visa Reform Legislation, *supra* note 3.

<sup>84</sup> *Id.*

<sup>85</sup> S. 979, 118th Cong. (2023).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Machailov, *supra* note 39.

<sup>89</sup> *H-1B Cap Season*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations/h-1b-cap-season> (last visited May 31, 2025); S. 979, 118th Cong. (2023).

for their lack of education.<sup>90</sup> These changes, while aimed at protecting American workers, would harm prospective H-1B workers.<sup>91</sup> There are other methods to protect American workers without harming H-1B workers.

#### IV. RECOMMENDATIONS

To protect both American and H-1B workers, the H-1B visa program must be strengthened to reduce exploitation by employers. As previously stated, it is unclear how pronounced the income disparities are between H-1B workers and American workers.<sup>92</sup> Thus, the following solutions will be more tailored to promoting job mobility and security for H-1B workers, and ensuring American workers are not displaced in the process.

First, it is clear that the grace period for laid-off H-1B workers must be extended. Currently, when H-1B visa holders are laid off or terminated from their jobs, they must change their visa status or find a new employer willing to sponsor their visa within sixty days.<sup>93</sup> I propose that this should be increased to at least 180 days. Not only would this provide a greater safety net for H-1B workers who are unexpectedly laid off from their jobs, but it would also provide increased mobility for any H-1B worker that is searching for a new job.<sup>94</sup>

Second, the USCIS should institute more protections for H-1B visa workers unlawfully terminated by their employer. Currently, if an H-1B employee believes they were retaliated against for reporting their employer for an LCA violation, they are potentially able to extend or change their status even after losing their H-1B status.<sup>95</sup> However, this process is often costly, as H-1B workers would need to consult an attorney, and even after doing so, there is no guarantee that the USCIS will grant an exception.<sup>96</sup> I propose that the USCIS should grant an indefinite grace period to any H-1B worker who reports being terminated from their position for reporting an LCA violation during the time that the USCIS is investigating their claim. Further, if a worker is found to have been retaliated against by their employer, they should be given additional time to search for a new job, and the USCIS should ensure that their H-1B visa remains portable even if it was cancelled by their previous employer. These protections would greatly benefit H-1B workers who have to fight an uphill battle

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<sup>90</sup> S. 979, 118th Cong. (2023).

<sup>91</sup> *Id.*

<sup>92</sup> See Anderson, *supra* note 63.

<sup>93</sup> *Options for Nonimmigrant Workers Following Termination of Employment*, *supra* note 75.

<sup>94</sup> See generally Alison Moodie, *Presidential Panel Calls for H-1B Grace Period Extension Amid Layoffs*, BOUNDLESS IMMIGR. INC. (Mar. 7, 2025), <https://www.boundless.com/blog/grace-period-h1b-lay-offs/>.

<sup>95</sup> *Combating Fraud and Abuse in the H-1B Visa Program*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program> (last visited May 31, 2025).

<sup>96</sup> *Id.*

against their employers, and may discourage employers from taking advantage of their H-1B employees.

Third, the USCIS should give priority to employers that are submitting petitions for workers in occupations and industries that are experiencing worker shortages. When employers are filling out LCAs for the H-1B applicant they are sponsoring, they should also be given the option to provide information on potential shortages that are affecting the occupation or industry they are hiring within. If the DOL confirms this shortage exists, then the applicant should receive greater deference during the application process. This would help diversify the industries that receive H-1B workers, lessening the burden on industries that already employ many H-1B workers, such as tech companies, and could reduce future layoffs of American workers.

These policies would give H-1B workers greater mobility and security, as well as providing them with more freedom and equalizing their status with American workers. As a result, both American and H-1B workers would be placed on an even playing field, reducing further exploitation of this visa class and displacement of American workers.

## V. CONCLUSION

The H-1B visa program is not perfect. But we don't have to restrict this immigration path in order to protect the American workforce. Strengthening protections for H-1B workers is beneficial, not just to protect this class of workers, but to ensure that all workers are being treated fairly and equally by employers.