Navigating the U.S. Employment-based Immigration System
NAVIGATING THE U.S. EMPLOYMENT-BASED IMMIGRATION SYSTEM:
YOUR GUIDE TO UNDERSTANDING WHY REFORM MATTERS TO AMERICA'S FUTURE
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Navigating the World of Employment-based Immigration
How This Primer and ACIP Can Help Guide You

IMMIGRATION IS AN IMPORTANT PART OF AMERICA’S FUTURE WORKFORCE

To build the economy of the future, the United States must create the workforce of the future. American businesses, universities and research institutions are engaged in an intense international competition, and the quality of an organization’s human capital and the way it manages its talent pipeline can be the difference between success and failure.1 Many factors play a role in America’s workforce competitiveness, and there is no magic solution for maximizing human capital. Instead, business leaders, educators and policymakers must come together to develop and implement multiple strategies to continue to position the United States, and all its citizens, to thrive in this new world.2 This includes programs that encourage employers to invest in the development of a skilled workforce, the inclusion of veterans, the disabled and other underrepresented groups in the workforce, initiatives to encourage voluntary adoption of flexible workplaces and sensible immigration policies (see Figure 1).

As we move away from the depths of the recession, employers continue to confront persistent gaps between the skills of unemployed workers and the skills sought by employers to fill specific positions. Part of this skill shortage is due to the changing demographics of the workplace and the aging population of skilled workers. There is also research that shows graduating high school and college students lack the necessary basic technological skills and are unprepared for work in a knowledge economy. Additionally, fewer students are pursuing undergraduate and graduate degrees in science, technology, engineering, and mathematics — skills that are necessary for the United States to be globally competitive. Finally, employers need workers with the cross-cultural communication

“The skills gap in the United States [is] the barrier that is keeping our country from employing millions of workers right now. … Seventy-two percent of [our members] said they are having trouble finding workers with the right skills. … [T]hey have as many as 3.8 million jobs open, but they can’t find the right people with the right skills.”

Henry G. (Hank) Jackson, President and CEO, SHRM, National Journal’s “Compare the Candidates” Event, September 4, 20123
As the corporate environment for many companies continues to become more globalized, immigration is becoming increasingly important. Companies need to be able to quickly, efficiently and effectively mobilize their international workforces to respond to growing demands for their products and services worldwide.

Austin T. Fragomen, Jr., Chair, ACIP, Press Release, January 1, 2012

“I also hear from many business leaders who want to hire in the United States but can’t find workers with the right skills. Growing industries in science and technology have twice as many openings as we have workers who can do the job. Think about that — openings at a time when millions of Americans are looking for work. It’s inexcusable. And we know how to fix it.”

President Barack Obama, State of the Union Address, January 24, 2012

Figure 1: Immigration is Part of Building a Competitive U.S. Workforce

(Society for Human Resource Management)

A growing skills gap challenges American employers. The United States needs to undertake a “reskilling” of labor to meet the demands of a highly digitized and interconnected world where higher skill sets will be required. By 2020, there will be an estimated 1.5 million too few workers with...
college or graduate degrees in the United States.\textsuperscript{5} Despite a high national unemployment rate, U.S. employers today have open jobs across many skill levels that they cannot fill because there are not available workers with the specific skill sets to hire.\textsuperscript{6} Bureau of Labor Statistics data show there were over 12 million unemployed persons and approximately 3.5 million unfilled positions (see Figure 2).\textsuperscript{7} A recent Society for Human Resource Management jobs outlook survey found that over half of employers report that the workers they had the most difficulty hiring were skilled professionals.\textsuperscript{8}

\textbf{Figure 2: Despite High Unemployment, Employers Can’t Fill Jobs Due to Skills Gap}

Monthly Private Sector Job Openings (Seasonally adjusted and in the thousands)

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Despite High Unemployment, Employers Can’t Fill Jobs Due to Skills Gap}

\textit{Monthly Private Sector Job Openings (Seasonally adjusted and in the thousands)}

\textsc{(Department of Labor’s Bureau of Labor Statistics)}
\end{figure}
This skills gap is driven by two major factors:

- **There is a skills mismatch in America.** Gaps exist between unemployed workers’ skills and the skills sought by employers to fill specific occupations, especially in the high-demand fields of science, technology, engineering and mathematics, where jobs are expected to grow by 17 percent between 2008 and 2018 — nearly double the growth rate for all other fields. At the start of 2013, 1.9 job openings await each unemployed worker in these fields. By 2018 there will be more than 230,000 advanced degree STEM jobs that will not be filled, even if every new U.S. STEM graduate finds a job.

- **The U.S. workforce is aging.** Between 2006 and 2016, the number of workers age 55 to 64 is projected to increase by 36.5 percent (see Figure 3). As large numbers of skilled workers get older, they are not being replaced by younger workers who possess the skills employers need for the 21st century workplace.

**Immigration must be part of the solution.** Educating, training and ensuring that all Americans who want a job have one must be a top priority for American employers. At the same time we must recognize that the United States does not have a monopoly on talent. We must ensure that American employers have access to the best and brightest professionals — regardless of where they were born. Intelligent modernization of the U.S. immigration system is not only critical to ensuring a competitive American workforce, but reform will help create U.S. jobs, spark innovations and ultimately strengthen the economy.

A generation has passed since the last overhaul of the U.S. immigration system in 1990. It was a model for the world, but is now plagued with an insufficient supply of visas, outdated technologies and inefficient regulations. America can do better. We need to fix the problems that exist today and build a framework that is flexible enough to meet the workforce challenges of the next generation.

**Keeping America and U.S. employers at the forefront of our global economy is a priority for everyone in Washington. Policymakers on both sides of the aisle, in both chambers and in the White House, fundamentally agree on many common sense, high-skilled immigration reforms that will help to achieve this goal. Our members are eager to work toward immigration reform in the 113th Congress that will bolster our country’s competitiveness.**

Rebecca Peters, Director and Counsel for Legislative Affairs, ACIP

**HOW THIS PRIMER AND ACIP CAN HELP YOU NAVIGATE THE U.S. EMPLOYMENT-BASED IMMIGRATION SYSTEM AND CRITICAL REFORMS**

The U.S. immigration system is complicated. ACIP has simplified it in this primer so you can find the key facts, problems and solutions. Specifically, this primer provides:
Figure 3: The U.S. Workforce Is Changing
Projected percentage change in labor force by age, 2006-2016


Like companies across the information technology sector, we are opening up new jobs in the United States faster than we can fill them. We now have 6,000 open jobs in the country, an increase of 15 percent over the past year. Over 3,400 of these jobs are for researchers, developers and engineers, and this total has grown by 34 percent over the past 12 months.


When I practiced immigration law I regularly worked with high tech companies in Idaho who had openings for workers with advanced degrees but, due to the small number of U.S. graduates in these fields, could not find the employees they needed.

Representative Raul Labrador (R-ID), Press Release, October 14, 2011

an introduction to the system; how America measures up in the global competition for top talent; an overview of intelligent, high-skilled, employment-based reform measures from the previous Congress; a glossary of key immigration terms; and most importantly, ACIP’s policy solutions, which can serve as your guide to reforms that will modernize the system, help solve critical workforce challenges like the skills gap and allow U.S. employers to grow the economy, facilitate job creation and bolster innovation.
ABOUT ACIP
ACIP members are the companies, universities and research institutions that employ the critical talent that has and will continue to build the U.S. economy, keep America on the cutting edge of worldwide innovation, grow U.S. jobs and raise the standard of living for all Americans. ACIP educates in-house immigration professionals on compliance with immigration laws and bridges the private and public sectors to promote sensible, forward-thinking, employment-based immigration policy.

ACIP is a strategic affiliate of the Society for Human Resource Management (SHRM), which has over 260,000 HR professional members. Together we help HR and legal professionals, along with their organizations, address the most pressing global talent management issues of the future.

We have testified before the U.S. Congress, appeared before federal agencies and are frequently called upon to lend our expertise in international fora, including before the United Nations, the World Trade Organization and the Global Forum on Migration and Development.

Our over 40 years of experience has made us experts at the details of the employment-based immigration system. At the same time, we are able to see the big picture, understanding that new solutions must be workable and practical if they are to succeed in a new world.

“Mike Brown, the Iselin, N.J.-based director of talent acquisition for the North America region of electronics and electrical equipment company Siemens … says he is currently searching for about 3,000 workers. Half of the openings will be filled internally … or from entry level hires, he says. ‘But about 1,500 positions are technical roles that require some kind of expertise and experience, such as industrial automation or a knowledge of manufacturing specific to an industry, such as mining or beverage and food manufacturing.’ Mr. Brown’s team fills most jobs in an average of 65 days while specialized engineering and technical positions can take three or four months. ‘Competition is fierce for qualified candidates,’ he says.”

_The Wall Street Journal_, “Demand is High for Skilled Job Seekers,” November 7, 2011
An Introduction to the U.S. Employment-based Immigration System

Employment-based immigration is governed by a complex set of laws, regulations, agency policy memoranda, court decisions and other interpretive guidance. U.S. immigration laws are often likened to the tax code in terms of their length and complexity, and clear-cut answers are not always available. Employers and their staff can be subject to severe monetary and/or criminal penalties for failing to abide by the law. In this section we try to explain America’s complex immigration system in a simple way — by laying out how foreign nationals may come to the United States in legal status.

Foreign nationals coming to the United States are placed in one of two categories:

1. A “nonimmigrant,” meaning that they only intend to stay temporarily; or
2. An “immigrant,” meaning that they intend to stay permanently.

For the most part, U.S. law presumes that all foreign nationals coming to the United States intend to remain permanently, unless they demonstrate intent to remain only temporarily. A few nonimmigrant categories allow for “dual intent,” meaning the foreign national may pursue permanent residency while residing in the United States on a temporary visa.

The Department of Homeland Security (DHS), the Department of State (DOS), the Department of Labor (DOL) and the Department of Commerce (DOC) are the cabinet-level agencies centrally involved in employment-based immigration (see Figure 4).

Within DHS, U.S. Citizenship and Immigration Services (USCIS) processes most immigration paperwork. Customs and Border Protection (CBP) greets foreign nationals at our ports of entry, and Immigration and Customs Enforcement (ICE) enforces immigration laws at the worksite.

DOS issues visas abroad at U.S. consulates and embassies, DOL ensures that foreign workers are not adversely impacting opportunities for U.S. workers and DOC’s Bureau of Industry and Security issues deemed export control licenses to certain foreign nationals where appropriate.

**NONIMMIGRANT VISAS**

Nonimmigrants can be broadly grouped into those coming for business, for pleasure or for a family or humanitarian reason. The nonimmigrant categories in which foreign nationals can be admitted temporarily to the United States follow. Their alphabetical labels correspond with their place in the immigration statute. Employment-related visas are noted with an asterisk (*).

- A – Diplomats and Foreign Government Employees*
- B-1 – Temporary Visitors for Business* (Note: Nationals of select countries can enter the United States without a visa for
temporal tourist or business visits under the Visa Waiver Program)
B-2 – Temporary Visitors for Pleasure
C – Transit Aliens
D – Crew Members*
E – Treaty Traders and Investors*
F – Students in Academic Programs*
G – Employees of International Organizations*
H-1A – Professional Nurses*
H-1B – Foreign Nationals in Specialty Occupations*
H-1C – Registered Nurses in Health Shortage Areas*
H-2A – Nonimmigrant Agricultural Workers*
H-2B – Nonimmigrant Workers in Temporary Positions (“Seasonal” Workers)*
H-3 – Trainees*
I – Foreign Media Representatives*
J – Exchange Visitors*
K – Fiancés and Fiancées of U.S. Citizens
L-1A – Intracompany Managers and Executives*
L-1B – Intracompany Specialized Knowledge*
M – Vocational Students
N – Parents and Children of Certain Special Immigrants
O – Aliens of Extraordinary Ability*
P – Entertainers, Athletes and Artists*
Q – Participants in Certain International Cultural Exchange Programs*
R – Religious Workers*
S – Foreign Nationals Assisting Law Enforcement
TN – Certain Canadian and Mexican Professionals*
U – Victims of Trafficking and Violence
V – Spouses and Children of Legal Permanent Residents

Each category has unique qualifications for entry, limits on length of stay and permissible activities while within the United States. A few categories have annual quotas and most require demonstrated intention for only a

**Figure 4: U.S. Employers Face a Maze of Key Agencies Related to Immigration**

![Diagram showing the maze of agencies related to immigration](image-url)
temporary stay. Sometimes a foreign national qualifies for more than one visa category. The choice of category can impact many aspects of the foreign employee’s life from salary requirements to permanent residency opportunities to whether one’s spouse or partner can work.

Further information about the employment-related visas can be found in the “Glossary” at the end of this book (see page 75).

Most of the employment-related visa categories require an employer sponsorship. As a general rule, to sponsor a nonimmigrant employee, the employer must have offices in the United States and must petition USCIS to obtain permission for the employment. Sometimes, DOL approval is also required. Once these approvals are received, the foreign national must obtain a nonimmigrant visa stamp from a U.S. consulate abroad. The visa permits the foreign national to travel to a U.S. port of entry, but it does not guarantee that the foreign national will be admitted to the United States. The CBP agents at the port of entry have concurrent authority with the consular officers abroad to decide whether the foreign national qualifies as a nonimmigrant intending to stay in the United States temporarily.

**IMMIGRANT VISAS**

Persons seeking to immigrate to the United States and obtain legal permanent residence (often called “LPR status” or a “green card”) can be generally grouped into four categories:

1. **Family-sponsored:** Persons who are relatives of U.S. citizens and permanent residents.
2. **Employment-sponsored:** Persons with offers of U.S. employment in occupations in which U.S. workers are in short supply, certain highly talented foreign nationals who may enter the country regardless of the availability of U.S. workers, and, in some instances, regardless of job offers, entrepreneurs investing in the United States and certain special immigrants (see below).
3. **Diversity:** Persons from countries that historically have low levels of immigration to the United States, which are allotted visas through a lottery process.
4. **Humanitarian status:** Persons who qualify for asylee or refugee status.

Those receiving employment-based visas are further divided into preference categories, with a total 140,000 visas per year cap:

**EB-1 – First Employment-based Preference (40,000 visas/year):**
- EB-1A – Extraordinary Ability
- EB-1B – Outstanding Professors and Researchers
- EB-1C – International Executives and Managers

**EB-2 – Second Employment-based Preference (40,000 visas/year):**
- EB-2A – Exceptional Ability
- EB-2B – National Interest Waiver
- EB-2C – Advanced-degree Professionals

**EB-3 – Third Employment-based Preference (40,000 visas/year; including ~5,000 visas/year for EB-3C):**
- EB-3A – Skilled Workers
- EB-3B – Professionals
- EB-3C – Other Workers

**EB-4 – Fourth Employment-based Preference (10,000 visas/year):**
Certain “Special Immigrants” and Religious Workers

**EB-5 – Fifth Employment-based Preference (10,000 visas/year):**
“Employment Creation” Immigrant Investors
**The Quotas**
Spouses, permanent partners and minor children of U.S. citizens and certain “special immigrants” may enter the United States without regard to any numerical limitations. The admission of other family-sponsored or employment-sponsored foreign nationals is restricted numerically, both as to the maximum number of persons in each “preference category” and as to the maximum number of persons permitted from each foreign country, known as the “per-country” caps.

Each preference category has its own set of skill requirements, quotas and “per-country” caps. Some categories allow a foreign national to obtain permanent residence in a relatively short period of time, while others can take up to decades due to processing delays, insufficient quotas in the category or insufficient quotas for persons from particular countries.

**The Process (see Figure 5)**
Employers seeking to hire foreign nationals on a permanent basis are required in most cases to obtain certification from DOL showing that there are no qualified, willing and available U.S. workers for the position. The current electronic filing system for labor certification is known as “PERM.” EB-1 and some EB-2 workers are exempt from this requirement.

Once the individual labor certification is obtained, or it is determined that there is no such requirement for the foreign national, the employer files a petition with USCIS, which determines whether the foreign national qualifies for classification in one of the employment-based preference categories. An intending immigrant is assigned a “priority date” based upon when the initial paperwork was filed, either with DOL or USCIS, to determine the order their petition will be considered. Since demand for visas has consistently exceeded the annual supply, many of the categories are severely “backlogged,” meaning that only those with priority dates from many years ago are able to obtain a visa. Each month DOS publishes a “Visa Bulletin” with the priority dates that can allow a petitioner to move on to the last step in the permanent residency process.

Once a foreign national’s priority date is called and an immigrant visa number becomes “immediately available,” the foreign national may follow one of two paths for the final step in applying for permanent residence:

1. If the foreign national is already in valid nonimmigrant status in the United States, this process is known as “adjustment of status;” or

2. If the foreign national applies abroad, it is known as “consular processing.”

For either path, the government will determine whether the foreign national or any accompanying family member is subject to one of the grounds of inadmissibility specified in the immigration law. These grounds include a review of criminal and health records, among others.

Legal permanent residents (LPRs) have most of the rights and responsibilities of U.S. citizenship, with one significant exception: they are not permitted to vote. In addition, if an LPR leaves the United States for an extended period of time, he or she may have to take additional steps to “maintain status,” or the U.S. government may presume that the LPR has abandoned his or her status as a legal permanent resident. U.S. permanent residents are eligible to apply for U.S. citizenship after passage of a period of time mandated by the immigration laws, generally five years.
WORKSITE ENFORCEMENT

Prior to 1986, employers were not subject to federal civil and criminal penalties for the employment of unauthorized foreign nationals, though such penalties existed within the laws of some states. With the passage of the Immigration Reform and Control Act of 1986, employers were prohibited from knowingly hiring, or continuing to employ any individual who was unauthorized to work in the United States and were also required to verify the employment eligibility of all new hires, including U.S. citizens. This verification is recorded on Form I-9. In 1996, Congress authorized the government to pilot three electronic employment verification systems. The only one that survives today is known as “E-Verify.” If an employer chooses to use this online verification system, they must still complete Form I-9 for every newly hired employee.

Generally, within three days of any new hire beginning employment, every employer in the United States must complete an I-9 form by examining one or more documents approved by DHS that establish the employee’s identity and authorization to work in the United States. After inspecting the employee’s documents and determining that they appear to be “genuine,” the employer and employee make certain attestations on Form I-9. These records must be maintained for at least three years after the date of hire, or for one year after the employment relationship is terminated — whichever is later.

If the employer is enrolled in E-Verify, the employer enters information regarding the employee from the completed I-9 form into the system, which then compares that information to the government’s records in order to provide the employer with a determination of whether the employee is work authorized. Although E-Verify is a voluntary federal program, a number of states have enacted laws requiring some or all employers to participate in E-Verify (see Figure 7 on page 32 for a state-by-state map). The federal government also requires participation of most federal contractors. This is a rapidly evolving area of the law.

Certain employees may have only temporary authorization to work in the United States. In those situations, the employer must re-verify that employee’s eligibility status on the I-9 form before the date that temporary authorization expires. If the employer discovers that an employee lacks work authorization, or that the employee’s authorization to work has expired (and cannot immediately be re-verified), the employer must terminate the employment relationship. This obligation to verify work authorization must be carefully balanced with a concurrent legal duty not to discriminate against persons based upon their national origin, citizenship or immigration status — an important part of our law enforced by the Department of Justice’s Office of Special Counsel for Immigration-Related Unfair Employment Practices.

CONCLUSION

While there are many worksite enforcement laws for employers to navigate just to remain in compliance, making the system even more challenging to maneuver are the arbitrary and insufficient visa numbers along with processing inefficiencies that threaten future U.S. workforce growth, job creation and the economy. The broken U.S. immigration system is in critical need of reforms that will make it more responsive to America’s 21st century workforce needs. ACIP is your guide to the solutions employers support to reform our high-skilled, employment-based immigration system. Read on to learn more.
Figure 5: Volume of Immigration Paperwork Causes Employers to Hire Outside Counsel

*ACIP Asks Its Members:* Which of these does your organization prepare in-house?

(ACIP Member Benchmarking Survey, n=93)
ACIP’s Principles for Immigration Reform

Adopted by the ACIP Board of Directors on January 18, 2013

Building a U.S. workforce that can compete in an increasingly complex and interconnected world requires a U.S. immigration system that supports American employers in their efforts to manage, recruit, hire and transfer top world talent in the United States. Unfortunately, the current system works against, not for, U.S. employers. It is astonishingly outdated and plagued with uncertainty, backlogs and inefficiencies that threaten employers’ and America’s ability to compete and expand jobs and the economy.

America needs a high-skilled, employment-based immigration system that:

• **Rewards compliant employers with a “Trusted Employer” program** that is efficient, saves resources to combat fraud and provides a predictable application process.

• **Validates that employers know best** how to build and manage their workforces.

• **Provides employers certainty in hiring** with one secure, reliable electronic employment verification system.

• **Ensures bad actors are sanctioned** without unduly burdening employers acting in good faith.

• **Makes green cards available** by eliminating backlogs and per-country limits and by ultimately providing a market-based cap.

• **Ensures employers have access to and the ability to retain temporary professionals** needed to grow business and create jobs.

• **Provides that any fees placed on compliant employers are reasonable and used to improve immigration services and competitiveness**, and are not imposed as a mere tax.

• **Acknowledges that foreign talent complements the U.S. workforce** and that U.S. employers competing in a global market will always need to utilize the best professionals worldwide while investing in and growing the domestic pipeline.

• **Recognizes the importance of family unity and the contributions of other key sources of foreign-born talent**, including DREAMers, and provides spouses, permanent partners and children of foreign professionals with appropriate visas and work authorization.

It’s a new world. The time for new high-skilled, employment-based immigration policies is now.
Global Competition for Top Talent

In the absence of true reform for nearly two decades, America’s immigration system has become out of touch with global business practices, leaving U.S. employers further behind in their ability to compete for top global talent.

The fact is, when a cutting edge employee, a top medical graduate, a leading executive or a computer scientist is deciding where to build a career and a life, they now have more options around the world (see Figure 6) and have the choice to go to countries with immigration systems that welcome them. This includes Americans who are seeking international experiences.

The United States needs a first-rate immigration system — one that does more to entice and keep the professionals employers rely on and need and that will ultimately help to create more jobs in the United States. Congress and the agencies must recognize that the world has changed. No one country has a monopoly on human capital.

America must work to be the country of choice for top talent.

Best practices from around the world provide a good guide for crafting an immigration system that is in America’s national interests when it comes to top talent.

**BEST PRACTICE 1: STREAMLINING THE SYSTEM FOR TRUSTED EMPLOYERS**

Other countries have found value in providing a more streamlined immigration application system to those employers who meet certain high standards. We believe a Trusted Employer program would work well in America. Employer registration would address many of the processing inefficiencies that exist, while providing compliant employers a more streamlined petition process. This ultimately would free agency resources for other priorities including visa fraud detection and prevention.

**AUSTRALIA:** Employers sponsoring temporary entry workers may apply...

“...We are living in a new world, where human capital is the key to success. America risks losing its competitive edge in this modern interconnected economy if our immigration system continues to shut out talented professionals, while our economic competitors roll out the welcome mat.”

Lynn Shotwell, Executive Director, ACIP
to register so that they and the government do not waste resources to confirm the same information for each individual visa time and again. Qualifying employers can receive accreditation if approved to sponsor skilled workers for temporary residence in Australia, and may receive an additional benefit of priority processing of applications for nominated employees. In Australia, employers may sponsor workers for temporary entry through its 457 sponsorship program which requires an employer to register for a three-year period (six years for accredited employers) to recruit workers by nominating the occupations and employees it wants to fill specific positions. The employer must cooperate with the government’s monitoring requirements and meet its sponsorship obligations. Qualifying employers may apply for a visa at defined regional offices of the Department of Immigration in Australia or, in limited circumstances, at an overseas Australian consulate. An employer may also have its sponsorship license cancelled or suspended and may be subject to other sanctions if the employer fails to satisfy its sponsorship obligations, such as allowing a primary sponsored employee to work in a position other than the approved position and failing to pay the market salary for the position or to notify the government of certain events in relation to its sponsorship or individual sponsored employees.

**UNITED KINGDOM:** Employers with exceptional immigration law compliance may register for a sponsor license for up to four years. To qualify, an employer must be a genuine organization operating legally in the country and must comply with the sponsorship duties laid out by the U.K.’s sponsoring license unit. For example, there must be no evidence that the employer is a threat to immigration control, and the employer must meet requirements for the foreign worker categories for which it applies. Once an employer is registered, it receives certificates of sponsorship that it may issue to potential employees who apply for work visas directly at the U.K. consulates or within the country at the Home Office. An employer may have its sponsorship license withdrawn, for example, if the organization stops trading or operating. The U.K. Border Agency has also launched a premium customer service program that offers top sponsors who want to pay a higher rate for an enhanced level of customer service, including priority treatment.

“We are on the wrong side of global competition. Our economy depends on immigrants, and currently our immigration policy is what I call national suicide.”

for all changes on the employer’s sponsor license, a dedicated contact person within the U.K. Border Agency and access to office appointments for public inquiries.16

**BEST PRACTICE 2: GOING AFTER CRITICAL TALENT**

Countries around the world are determining what talent they need — whether it be skilled workers, intracompany transfers, entrepreneurs or scientists — and aggressively pursuing those professionals. America must begin to prioritize and do the same.

**CANADA:** The “Provincial Nominee” program allows those who want to immigrate to Canada a “fast-track option” to permanent residence. Most provinces and territories reflect a high retention rate of these residents, and set the requirements to qualify, which allows each province or territory to nominate the professionals who will make an immediate economic contribution. This program is heavily marketed to H-1B holders and students in the United States.17

**CHILE:** An initiative called “Startup Chile” gives $40,000 to foreign entrepreneurs who launch companies in the country. This government-led initiative additionally offers Spanish classes and no-cost office space while connecting foreign entrepreneurs to local entrepreneurs, mentors and investors.18

**EUROPEAN UNION:** An EU directive instructs countries to create fast-track procedures for admitting non-EU researchers and relies on local research centers to provide applicants’ credentials, as well as acknowledge their participation in a research project. In essence, this will reduce the bureaucratic requirements that individual researchers need for residency and employment in the EU, making it more attractive for foreign scientists.19

Additionally, there is a proposal for an EU directive that would facilitate an effective, predictable and prompt process to obtain permission for the entry of non-EU intracorporate transferees into the EU for specific, temporary assignments after which they will continue working for their employer at locations outside the EU.20

**UNITED KINGDOM:** The U.K. is competing for intracompany talent with a new law that allows intracompany transfers that are high-income earners to stay in the U.K. even longer. Currently, long-term intracompany transfers who earn

“*In the 21st century, the U.S. will no longer be the Big Dog. Human capital will be more broadly dispersed. There will be an array of affluent nations fully engaged in the global economy. Therefore, competitiveness will be more about organizing relationships than amassing force. To thrive, America will have to be the crossroads nation where global talent congregates and collaborates.*”

£40,000 or more in annual salary can stay in the U.K. for up to five years. The period of stay will be extended to a maximum of nine years for those earning at least £150,000 per year.\textsuperscript{21}

**BEST PRACTICE 3: REWARDING POST-SECONDARY STUDENTS TO WORK**

Other countries are realizing the global competition that exists for highly educated talent and are easing their laws to retain these students and workers through expedited recruitment processes and other means. In the 112th Congress there were many bipartisan bills introduced to provide more visas to retain U.S. STEM advanced degree holders with job offers, but ultimately none of the legislation passed both chambers. America must do more to retain critical student talent.

**CANADA:** The Post-Graduation Work Permit Program allows foreign students who graduate from participating Canadian post-secondary institutions without a job offer to stay after graduation for up to three years and obtain a work permit in order to gain valuable work experience.\textsuperscript{22} They may then seek permanent residence through the Canadian Experience Class (CEC) program. The CEC program allows temporary foreign workers and graduates of Canadian post-secondary education institutions to obtain permanent residence based on their qualifying
Canadian work experience. The work experience must be in a managerial, professional, skilled trade or technical occupation.23

**FRANCE**: The government is easing access to work permits for foreign graduates of French universities. Employers looking to hire a recent foreign graduate are now required to advertise the job for just three weeks, as opposed to two months. Also, foreign students who hold a Master 2 degree can apply for temporary status to remain in France to look for employment; this policy applies retroactively to June 2011. Qualifying individuals can begin work once they sign an employment contract if they apply to change status within 15 days.24

**UNITED KINGDOM**: The U.K. Border Agency has liberalized laws for certain graduate recruitment. Employers recruiting students with a degree-level qualification from a licensed university who are applying from within the country can switch to a skilled job category where a gap in the workforce exists without a residence labor market test. The result is employers can find the best candidates regardless of nationality.25 The U.K. also intends to provide more visas through its Exceptional Talent program for foreign MBA graduates who intend to start businesses in the country. Additionally, beginning later in 2013, foreign Ph.D. graduates of U.K. educational institutions will be permitted to remain in the country for up to 12 months after the completion of their studies to seek employment or start businesses in the U.K.26

**BEST PRACTICE 4: MAKING IT EASIER FOR HIGHLY SOUGHT PROFESSIONALS TO TRANSITION PERMANENTLY**

Employers often want to help the foreign national talent they employ stay permanently in the United States. Yet, Congress has not passed legislation to streamline a path to permanent residence for advanced degree graduates of U.S. universities or any top temporary visa professionals. We also have not increased our green card quotas for over two decades.

**AUSTRALIA**: The Australian government intends to streamline a path to permanent residence for skilled workers who have been sponsored and nominated by an employer to work in Australia on a temporary basis when the employer cannot find an appropriately skilled Australian citizen or permanent resident to fill the position. This would impact Australia’s Temporary Business (Long Stay) (Subclass

“[A] dvanced economies will succeed on the strength and quality of their human capital. Therefore, education, workforce training and winning the global war for talent must be seen as vital economic priorities. … [Countries] can prevail in the contest for global talent not only by developing their native-born students and talent, but also by becoming magnets for highly skilled immigrants.”

457) visa, a visa available to many skilled workers including, but not limited to: engineers, nurses, health care professionals, teachers, barristers, chief executive or managing directors, financial managers, media producers and many more. Streamlined requirements will apply to those visa holders transitioning to permanent residence who have already worked for the sponsoring employer for two years in a position consistent with their current occupation versus those who have not.27

The Australian government also announced an initiative to address the shortage of skilled workers by region and would like to increase the number of permanent employment-based visas available in fiscal year 2013. While the overall increase is modest, a majority of the visa increase will go toward skilled applicants.28

EUROPEAN UNION: An EU directive requires most EU member states to adopt the Blue Card. In general, the Blue Card allows a qualifying high-skilled non-EU national to work and reside in an EU member state and obtain long-term residence. After residing for 18 months in the EU country that grants the Blue Card, the cardholder is allowed to move freely between participating EU countries to seek highly skilled employment and can be accompanied by dependents. After five years of continuous legal residence within the EU with a Blue Card, the qualifying foreign national may apply for permanent residence in the EU country of residence.29

BEST PRACTICE 5: PROVIDING CERTAINTY IN EMPLOYMENT ELIGIBILITY VERIFICATION

As America looks to expand electronic verification to reduce unauthorized work, we must make improvements to the system so it is more accurate, reliable and easy to use. Other countries are also working to prevent unauthorized migration, protecting employers in the process and some are even using biometrics to do so.

AUSTRALIA: A new Australian proposal would introduce statutory defenses for businesses, executives and others who have taken reasonable steps to verify a foreign national’s migration status and work permission. The country hopes that with this proposal the government takes action on disobedient employers, but also protects those who comply with the law.30

“Texas Instruments’ goal is to hire the best engineers and innovators from U.S. universities and to retain them. We do not choose where those engineers were born or what their citizenship is. We choose the best, the brightest and the most creative engineering graduates.”

Darla Whitaker, Senior Vice President, Worldwide Human Resources, Texas Instruments, Congressional Testimony, October 5, 2011
EUROPEAN UNION: Most EU member states have implemented a uniform biometric residence permit program pursuant to EU regulation. The new residence cards are designed to prevent unauthorized migration and help employers comply with a separate EU directive that requires member states to increase employment verification requirements.  

BEST PRACTICE 6: PRIORITIZING SPOUSE AND PERMANENT PARTNER WORK AUTHORIZATION  

Spousal and permanent partner work authorization is a priority for professionals when choosing international assignments. Since America right now only provides work authorization to spouses of E, L and certain J visa holders, we must work to expand this benefit and compete with countries that provide for complete spouse and partner work authorization. Here are just a handful of the many countries that provide such benefits:

AUSTRALIA: Spouses, de facto partners and dependents of Temporary Business (Long Stay) visa holders are able to work and study while living in Australia.  

BELGIUM: The spouse, registered partner and dependent children of a non-EU/EEA citizen work permit holder need a work permit linked to their own employer. This will be granted without a test of the employment market on completion of the necessary forms.  

FINLAND: The spouse, registered partner and unmarried children under the age of 18 of a non-EU/EEA citizen are permitted to work once the temporary residence permit has been obtained.  

NEW ZEALAND: A partner of a person holding a Work Visa or Work Permit allowing a stay in New Zealand of more than six months may apply for and be granted a Work Visa and Work Permit for the same period as their partner. They do not need to provide an offer of employment.  

NORWAY: The family members (spouse, partner and children over 18 years) of EEA nationals, and also of non-EU nationals who hold a temporary residence permit, are free to work.  

UNITED KINGDOM: For non-EU/EEA citizens, the Points Based System currently admits Tier 1 (high value migrants), Tier 2 (skilled staff with a job offer, including intracompany transferees) and Tier 5 (temporary workers). The spouse, civil partner, unmarried or same-sex partner and children under 18 years of age of a work permit holder are allowed to work.
A Guide to ACIP’s Solutions
To augment our global supply chain security effort, we will work with the private sector and international partners to expand and integrate ‘trusted traveler’ and ‘trusted shipper’ programs that facilitate legitimate travel and trade while enhancing security.”


Trusted Employer

ISSUE
The government currently requires employers to submit a company description, organizational structure, finances and recurring job classifications with nearly every individual immigration petition and application — even though employers may file many a year. Instead the government should create an option through which employers could pay a fee and be approved as a Trusted Employer, based on past and ongoing compliance with petitioning requirements. This would cut down on workload, freeing resources for other priorities.

ACIP PROPOSED SOLUTION
Like the similar government programs of Trusted Shipper, Trusted Traveler and TSA Pre-Check, Trusted Employer would allow the government to pre-qualify U.S. employers that have a proven track record of compliance with federal immigration laws and regulations, streamlining adjudication and saving precious government resources to focus on other priorities including backlog reduction and visa fraud detection and prevention.

Simultaneously, the government and employers would experience greater certainty, efficiency, and flexibility in the processing of petitions. A more predictable and transparent Trusted Employer system ultimately would benefit everyone by yielding more resources for case processing and priority initiatives. As the government has taken steps to move forms and other products to online electronic formats, we envision an electronic Trusted Employer system that could be seamlessly implemented. This would put America on par with our global economic competitors.

BACKGROUND
Only Compliant Employers Would Qualify for Trusted Employer
Trusted Employer would be available to employers of any size that choose to apply. They would qualify based on their track record of prior compliance with the applicable laws and regulations. Companies that routinely hire foreign nationals as part of their U.S. or global operations would realize the greatest benefits. To qualify, an employer...
would have to demonstrate to the government that it has the processes and tracking systems in place to comply with U.S. immigration laws. The government would review the employer’s organizational structure, finances and history of compliance with employment laws on the initial Trusted Employer application. These fundamentals do not change frequently and the resulting certification could initially be for one year and then longer in the future. However, each petition would still have to establish that the position and the beneficiary were in compliance with applicable admission categories. The government would also require an annual accounting from each Trusted Employer. A further enhancement of the program could involve pre-approval of particular job categories for Trusted Employers, so that the petition review could be reduced to checking the individual employee’s eligibility for the pre-approved job category.

**Trusted Employer Would Create Efficiencies for the Government and Protect Against Fraud**

During the visa petition process, the average employment-based adjudication addresses three questions:

1. Has the employer proven it meets the legal requirements for sponsorship?

2. Has the employer proven that the position qualifies for the immigration classification being requested?

3. Has the employer proven the foreign national is qualified for the job?

Trusted Employers would answer the first question when an employer initially registers. This would free government adjudicators to hone in on the second and third questions on any petitions or applications submitted by an approved Trusted Employer. By refocusing limited government resources and identifying low-risk employers, adjudicators will be able to spend more time on backlog reduction and detecting and preventing fraud. After the Trusted Employer process is well-established, certified employers could then be permitted to have particular job categories pre-approved for petition eligibility, further reducing the burden on the agency on each petition to just the employee’s qualifications. A well-established Trusted Employer program could also be extended to other immigration processes at the Department of Labor, Department of State, Immigration

*“The Trusted Employer program would allow respected employers to improve efficiency and eliminate waste, while also enabling government to use its resources sensibly. We see tremendous benefit from this program and its goal to help foster innovation.”*  

Michael Rosenfeld, Assistant General Counsel, The Walt Disney Company
and Customs Enforcement and even Customs and Border Protection.

**The U.S. Government and Other Countries Already Utilize Similar Programs**

In recent years, the Department of Homeland Security has expanded the Trusted Traveler and Trusted Shipper programs, both of which operate on the same premise that a proposed Trusted Employer program would. Trusted Traveler provides an expedited lane for frequent, low-risk travelers at airports, making the screening process more efficient for everyone. Likewise, Trusted Shipper provides expedited processing at ports for commercial carriers that meet certain shipping eligibility requirements and have completed background checks.

Similar employer registration programs provide priority processing for highly trusted employers in other countries, such as Australia and the United Kingdom (see pages 17 and 18 for more information).

**Bipartisan Support for Trusted Employer Registration**

Over the years both Democrats and Republicans in Congress have supported ACIP’s concept of Trusted Employer. In particular:

- Senate Democrats and Republicans passed a Trusted Employer provision as part of the *Comprehensive Immigration Reform Act of 2006* (S. 2611);
- Senator John Cornyn’s (R-TX) and former Representative John Shadegg’s (R-AZ) *Securing Knowledge Innovation and Leadership Acts of 2006 and 2007* (S. 2691/H.R. 5744; S. 1083/H.R. 1930) contained a Trusted Employer provision;
- Senator Charles Schumer’s (D-NY) *Real Enforcement with Practical Answers for Immigration Reform* proposal from 2010 included Trusted Employer; and
- Representative Zoe Lofgren’s (D-CA) *Immigration Driving Entrepreneurship in America Act of 2011* (H.R. 2161) included Trusted Employer.

The need for streamlined processing, something Trusted Employer would accomplish, was highlighted by President Barack Obama in his 2013 principles for immigration reform: “For the sake of our economy and our security, legal immigration should be simple and efficient.”

The Obama administration has also sought to reduce burden and add streamlined processing to our laws through executive order. For

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“**What business needs is predictability.**”

Eric Schmidt, Chairman, Google, White House Press Briefing, November 12, 2011
example, Section 4 of Executive Order 13563 states that “Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.”

Trusted Employer would reduce paperwork burden and render more efficient and consistent decisions for employers that have proven their commitment to compliance. Once well-established, the program could be extended across all of the agencies involved in our immigration system.

Employers, the administration and members of Congress on both sides of the aisle agree that creating a more predictable and efficient system, saving time and money for the government, employers and professionals, and putting the United States on par with other countries competing for talent and investment is of great importance. Trusted Employer fulfills these objectives.

“U.S. innovation needs a regulatory environment that is efficient, streamlined and protects against bad actors. A Trusted Employer system would allow compliant employers to focus on creating a healthy economy—not redundant paperwork—while allowing the agencies to devote more of their limited resources on detecting and preventing fraud and abuse.”

Thomas M. Barnett, J.D., Director, International Office, The Scripps Research Institute
Worksite Enforcement

ISSUE

U.S. employers are committed to hiring only work-authorized individuals, but they need an employment verification system upon which they can fully rely. This will require an E-Verify system that better addresses and eliminates identity theft for employers and also creates a truly integrated electronic verification system. Effective worksite enforcement continues to be the centerpiece of any broad immigration reform and efforts to secure America’s borders and interior. What U.S. employers need is one reliable and secure federal electronic employment verification system.

ACIP PROPOSED SOLUTION

To truly grow our economy and create jobs, employers need effective tools to ensure they are hiring a legal workforce that eliminates the redundancies that exist in the system today. While USCIS should be commended for the improvements it has made to E-Verify, the program requires additional changes to make it more fail-safe and user-friendly. Real, reliable reform must ensure that any mandatory employment verification system builds on E-Verify’s success. More specifically, reform should:

• Preempt the growing patchwork of state laws with one reliable and secure federal employment verification system.

• Create an integrated electronic verification system that incorporates the E-Verify system with an attestation system and ends the duplicative requirement that an employer also complete the paper Form I-9.

• Prevent identity theft through identity authentication. E-Verify does not fully protect employers from identity fraud. While a “photo tool” is available for some documents, it is not as reliable as an identity authentication option because it relies on human judgments that can fail and documents that can be faked. Employers should be provided with stronger tools to combat identity theft and complete employment verification.

“...For a large company like ours, we have found great benefit from using E-Verify for all of our new hires throughout the U.S. One national, uniform system is superior to a state-based, patchwork approach for employment verification.”

Nicole Hedrick, Director, Global Immigration, Talent Deployment & Mobility, IBM

“...While E-Verify has become very effective in matching a name with a Social Security number, it is not effective in making certain that the employee is who he or she claims to be on the form I-9. ... For the system to be effective, additional steps are necessary to stop identity fraud. Matching photographs, of course, will have a positive impact, but it does not eliminate subjectivity on the part of the employer. Instead, this will require incorporating biometric technology...”

Austin T. Fragomen, Jr., Chair, ACIP, Congressional Testimony, April 14, 2011
E-Verify is an important tool for employers who want to help ensure they are employing legal workers. … Prevention of identity theft in E-Verify is important. … Combining E-Verify and the I-9 together will be a strong inducement for employers to join E-Verify.”

Representative Sam Johnson (R-TX), Chairman, House Subcommittee on Social Security, Congressional Record, September 13, 2012

“Our members support a national, mandatory electronic employment verification system that provides employers with a fast, reliable method to confirm work eligibility. A fully electronic system that includes identification authentication will give employers the tools they need to keep illegal workers off their payrolls and to hire legal workers quickly, fairly, and with confidence.”

Mike Aitken, Vice President, Government Affairs, SHRM

• Ensure safe harbor from liability for verification users. Any employment verification system must protect employers from liability when they rely on government approvals of erroneous authorizations. A safe harbor must also exist for employers who use subcontractors without knowing the subcontractors hire or employ unauthorized workers.

• Apply employment verification only to new hires. Re-verification is redundant, expensive and burdensome.

• Protect employees. E-Verify sometimes fails to recognize that a U.S. citizen or permanent resident is work authorized. The government must have a secure and efficient process to correct these errors.

BACKGROUND

The Current E-Verify System is Susceptible to Identify Theft

E-Verify is the current federal electronic employment verification system and has been reauthorized through September 30, 2015 (PL 112-176). It is an Internet-based system operated by the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS), in partnership with the Social Security Administration (SSA). Only 6 percent of the 6.5 million employers nationwide are currently enrolled in E-Verify.40 Requiring all employers to enroll in the system would mean a major ramp up, making reliability, accuracy and efficiency all the more critical.

Today, E-Verify operates alongside the paper-based Form I-9, which must be completed for all new hires. Certain biographical information is entered by employers into an online interface, which checks databases at DHS and SSA to verify if a worker is authorized for employment. While E-Verify can be effective in matching a name and a Social Security number to verify work authorization, the program cannot stop the unauthorized use of names and Social Security numbers of other work-authorized persons. Identity theft is the Achilles heel of the E-Verify system, and Congress must address this problem in any reform measure so that employers are not vulnerable to sanctions through no fault of their own.
Figure 7: Conflicting Patchwork of E-Verify Laws Increases Urgency for One, Reliable Federal System

Growing Patchwork of State and Local Laws Make Federal Solution Imperative

E-Verify remains voluntary except when it is mandated by federal or state law. As of September 8, 2009, federal law requires certain employers awarded federal contracts to use E-Verify. Additionally, a number of states, and even cities and counties, have enacted laws that require employers to use E-Verify or complete additional verification requirements that sometimes conflict with federal laws (see Figure 7).

State actions have been emboldened by a 2011 U.S. Supreme Court ruling in Chamber of Commerce v. Whiting, where the Court upheld the Legal Arizona Workers Act, requiring employers within the state to use E-Verify to confirm the employment eligibility of all new hires and allowing the state to suspend or revoke a business license when an employer knowingly employs unauthorized workers. However, given the panoply of varying state and local laws to which U.S. employers with multiple locations are subject, it is imperative that Congress preempt these laws.

“The formidable enforcement machinery that has been built can serve the national interest well if it now also provides a platform from which to address broader immigration policy changes suited to the larger need and challenges that immigration represents for the United States in the 21st century.”

with one reliable federal system
so there is just one set of rules
with which employers must comply
when verifying their workforce.

_Ultimately, U.S. employers need one federal immigration system so that they can hire with certainty, knowing that those they employ are in fact authorized to work in the United States._
Employment-based Green Cards

**ISSUE**

Simply put, there are not enough employment-based (EB) green cards in our immigration system to meet years and often decades of backlogged demand. This limits employees’ opportunities to contribute to U.S. employers’ success and overall economic growth because without green cards, foreign nationals cannot easily be promoted, change jobs or job locations and often their spouses or partners cannot work. Scientists, engineers and other professionals born in countries of high demand and sponsored for an EB green card today will likely not receive a green card until today’s preschoolers are graduating from college unless the system provides more green cards. It is fundamentally in our nation’s interest to have a green card system that attracts the best talent to our shores and does not push those already working here away.

**ACIP PROPOSED SOLUTION**

Any immigration reform proposal must eliminate the EB green card backlogs and simultaneously provide enough visas to meet America’s future EB green card needs. This can be accomplished with a variety of reforms, including:

- Enacting a market-based or escalating green card cap to respond to future demand;
- Making green cards immediately available to U.S. STEM advanced degree graduates (and their dependents) if the principal applicant has a job offer;
- Exempting the spouse or partner and children of EB green card holders;
- Recapturing hundreds of thousands of green cards that went unused in prior fiscal years due to agency delays and making them available today;
- Eliminating the employment-based per-country limits; and

“...In today’s global economy where changes in the technology field occur quickly, an immigration system where an employee must wait decades for a green card hinders U.S. competitiveness, economic growth and innovation.”

Denise Rahmani, Director, U.S. Immigration, Oracle Corporation
Figure 8: Employment-based Green Cards Only Small Fraction of Annual Green Cards Awarded

Total Green Cards Awarded Annually

- Investors 0.1%
- Foreigners in Specified Occupations such as Clergy and Non-U.S. Citizen Employees of the U.S. Government Abroad 0.4%
- Very Highly Skilled Foreign Workers with Extraordinary Abilities, such as Multi-National CEOs or Important Academics 1%
- Architects, Nurses, Experienced Stone Masons and Others Who Meet Set Labor Requirements 1.5%
- Professionals with Advanced Degrees 3.2%
- Family Members on Employment Green Cards 7%
- Non-employment-based Green Cards 86.9%


- Reducing red tape for those waiting in the green card queue through streamlining work and travel authorization, also known as early filing.

BACKGROUND

Employment Is Not Prioritized in Current Green Card System

In 2011, employment-based immigration accounted for only 13 percent of total immigration to the United States with principal applicants making up just around 7 percent in total (see Figures 8 and 9). Annually, just 140,000 visas are available to the five employment-based preference categories. The first three EB preferences are each allocated 40,000 visas per year, while the fourth and fifth preferences receive 10,000 visas each (see

“The excessive backlogs in the U.S. green card system are getting in the way of us retaining medical professionals that are innovating life-saving strategies that benefit all Americans.”

Claire Sala Ayer, Director, Partners International Office, Partners HealthCare

“Unless we want to see the next Google or Intel created overseas, we’ve got to enact legal immigration reforms that allow foreign-born, U.S.-educated students who have earned advanced degrees to remain and work in the country after they’ve graduated.”

Senator (then-Representative) Jeff Flake (R-AZ), Computerworld, January 27, 2011
Costly and Long Process
In most cases, a U.S. employer must sponsor a worker for a green card. Generally, an employer must file a labor certification with the Department of Labor to test the labor market and certify there are no able, qualified and willing U.S. workers available for the position. Next, the employer must prove to U.S. Citizenship and Immigration Services (USCIS) that the foreign national is qualified for one of the five EB preference categories. Finally, the foreign national must apply for “adjustment of status” or “consular processing” and prove there are no

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Of all the crazy rules in our government, the craziest of all, bar none, is that we take the smartest people in the world, we bring them to America, we give them Ph.D.s in technical sciences, and we kick them out, to go found great companies outside of America. This is madness.

Eric Schmidt, Chairman, Google, CNN, December 15, 2011

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Figure 9: Our Economic Competitors Prioritize Employment-based Immigration
Percent of Permanent Visas Based on Economic Need

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Korea</td>
<td>81%</td>
</tr>
<tr>
<td>Switzerland</td>
<td>80%</td>
</tr>
<tr>
<td>Spain</td>
<td>79%</td>
</tr>
<tr>
<td>Italy</td>
<td>65%</td>
</tr>
<tr>
<td>Germany</td>
<td>59%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>58%</td>
</tr>
<tr>
<td>Australia</td>
<td>42%</td>
</tr>
<tr>
<td>France</td>
<td>34%</td>
</tr>
<tr>
<td>Canada</td>
<td>25%</td>
</tr>
<tr>
<td>United States</td>
<td>7%</td>
</tr>
</tbody>
</table>

All percentages represent permanent residency visas issues to workers only, excluding dependents.

(Federal Reserve Bank of Dallas, “From Brawn to Brains,” 2010)
health, criminal or other reasons why he or she should not be permanently admitted to the United States. This entire process is very costly (see page 62 for more information) and often takes years because demand for green cards far exceeds supply.

**Inequality in Wait Times**

The EB green card quotas are further broken down into “per-country” limits by worker category. No country can receive more than 7 percent of the EB preference quota. With the first three EB preference allocations each receiving 40,000 visas per year, that roughly equates to 2,800 visas per country for both employees and dependents, regardless of whether the worker comes from a populous country like China or India, or a small country like Palau. The per-country caps often lead to very disparate waits for a green card for two equally qualified candidates who were simply born in different countries. Increasingly, workers with longer waits choose a more predictable option and leave the United States.

**Bipartisan Congressional Agreement on STEM Green Cards**

In the 112th Congress, there was bipartisan agreement that the country should provide more green cards to those who have graduated with a U.S. STEM advanced degree and have a U.S. job offer, as indicated by the many bills introduced by both parties in both chambers on this topic, including: H.R. 43, H.R. 399, H.R. 2161, H.R. 3146, H.R. 5893, H.R. 6412, H.R. 6429, S. 1965, S. 1986, S. 3185, S. 3192, S. 3217 and S. 3553. At the beginning of the 113th Congress, the *Immigration Innovation Act of 2013* (S. 169) also aims at this goal. As numerous data show, foreign nationals receive a significant number of U.S. advanced degrees in the STEM fields, such as in engineering (see Figure 10), so we cannot shut the door on these professionals.

Some have proposed that our green card policies should be driven by recommendations from commissions or by point systems. ACIP urges caution and careful attention to detail of any such proposals. For more information on a commission, see ACIP’s paper, “Examining Proposals to Create a New Commission on Employment Based Immigration” (see [http://www.acip.com/ADV_Commission_Paper](http://www.acip.com/ADV_Commission_Paper)) and learn more about points-based systems and their use by reading immigration attorney Lance Kaplan’s testimony, “Use of Points Systems for Selecting Immigrants” (see

“... [W]e must create a modern, 21st century legal immigration system that reflects our legacy. Therefore, we commit to fighting for principled, comprehensive immigration reform that ... [a]ttracts the best and the brightest investors, innovators, and skilled professionals, including those in science, technology, engineering, and math (STEM) studies, to help strengthen our economy, create jobs, and build a brighter future for all Americans...”

Congressional Hispanic Caucus, Principles on Immigration Reform, November 28, 2012
Our immigration system needs to be modernized to be more welcoming of highly skilled immigrants and the enormous contributions they can make to our economy and society.

Senator Marco Rubio (R-FL), Press Release, January 29, 2013

Figure 10: Foreign-born Students Receive Large Share of U.S. Engineering Advanced Degrees

U.S. Engineering Advanced Degrees: 2009-2010 Academic Year

http://acip.com/ADV_Testimony_Lance_Kaplan_05012007)

The world’s best and brightest have long contributed to the U.S. economy as job creators and innovators, and it does not make sense for our system to be shutting the door and pushing them away while our economic competitors welcome them with open arms. Reforming our employment-based green card system to help retain these professionals is critical to our future.
L-1 Visas

ISSUE
The L-1 visa is an essential tool U.S. employers use to transfer key international employees to the United States for temporary assignments. Our fast-paced and interconnected global economy requires that employers have timely access to these professionals to remain competitive, but unfortunately, it has become much more difficult for U.S. employers to reliably and efficiently transfer L-1 visa talent from around the world to the United States (see Figure 11).

Figure 11: Visa Processing Delays and Inefficiencies Top Concerns for U.S. Employers

ACIP Asks Its Members: Of the following, which is the number one issue you and your organization would like to see addressed by USCIS? While we understand that all of these issues are of importance to being addressed, we are looking to identify the top priority facing you and your organization.

“Allowing our international employees to collaborate with their American counterparts in the United States is part of what keeps us globally competitive, allows us to continue to centralize our technology development in the U.S., and contribute to U.S. economic growth and job creation.”

Margie Jones, U.S. Immigration Manager, Intel Corporation
[The L visa] is a tool that allows U.S. companies to participate in the global economy, and it has become a model for other countries seeking to capture a share of the global marketplace by facilitating the international transfer of knowledge, skills and talent.

Austin T. Fragomen, Jr., Chair, ACIP, Congressional Testimony, July 29, 2003

Figure 12: Increased, Unnecessary Requests for Evidence Hamper U.S. Business

USCIS Requests for Evidence Rate

<table>
<thead>
<tr>
<th>Year</th>
<th>L-1A</th>
<th>L-1B</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2004</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>FY 2005</td>
<td>10%</td>
<td>10%</td>
</tr>
<tr>
<td>FY 2006</td>
<td>20%</td>
<td>20%</td>
</tr>
<tr>
<td>FY 2007</td>
<td>30%</td>
<td>30%</td>
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<tr>
<td>FY 2008</td>
<td>40%</td>
<td>40%</td>
</tr>
<tr>
<td>FY 2009</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>FY 2010</td>
<td>60%</td>
<td>60%</td>
</tr>
<tr>
<td>FY 2011</td>
<td>70%</td>
<td>70%</td>
</tr>
</tbody>
</table>

(National Foundation for American Policy, “Analysis: Data Reveal High (RFE) Rates For L-1 and H-1B Petitions,” February 2012)

In recent years, employers have experienced unprecedented denials and delays for their employees seeking L visas (see Figure 12). This has resulted in significant project delays and contract penalties even for some of the world’s largest corporations. An inability to bring such talent here only encourages employers to move jobs and resources outside the United States to ensure predictability of their global operations, which ultimately aids our competitors.

When L-1 visa access is limited, it hinders international trade and foreign investment, which stagnates our innovation, job growth and economy.

**ACIP PROPOSED SOLUTION**

We encourage the agencies and Congress to set consistent and predictable policies for L-1 visas that are neither too narrow nor onerous and allow for evolving global business practices. Those creating laws should not put labor market tests on the L-1 visa, because professionals coming to the United States as intracompany
transfers from an employer’s subsidiary, affiliate or parent company abroad are brought here for the important role they play within the company and are not filling positions that would otherwise be vacant. Moreover, L-1 visa holders, along with E, H, and O visa holders, should once again be allowed to domestically revalidate their visas. Additionally, the L-1 blanket petition is an example of an efficient and effective program in an immigration system much in need of repair, and it should be viewed as a policy best practice.

BACKGROUND
There are two types of L-1 visas: the L-1A for executives and managers, and the L-1B for workers with specialized knowledge. L visas require foreign nationals to have worked abroad at least one of the previous three years for an entity related to the U.S. sponsor. L-1As must exercise discretionary decision-making powers while L-1Bs must possess specialized knowledge of the employer, its product(s) or service(s) and their application in international markets.

The L-1 Visa Benefits U.S. Operations and Encourages Growth
In 1970, Congress recognized that a means to temporarily transfer personnel between related United States and overseas entities would encourage growth, with the goal of facilitating the cross-fertilization of ideas and the movement of personnel to contribute significantly to international business operations. The L-1 visa was born to help promote the seamless operation of international businesses and allow global companies to bring key employees — such as international executives, managers and those with specialized knowledge — from their overseas operations to the United States to enhance and/or expand their business. In fact, a recent global mobility survey of over 1,000 employers’ multinational mobility programs found that assignments of one to three years still remain the most common assignment. The L-1 visa allows employers to utilize top worldwide personnel to manage special projects, oversee product development and manufacturing, transfer skills and knowledge of corporate operations, gain exposure to U.S. business methods, educate the U.S. workforce about foreign operations, and open a new office or facilitate other global operations.

“… Yet Congress must take care that any reforms to the H-1B, L-1, and other temporary professional visa programs ensure that these visas remain freely available to the compliant employers that can drive economic recovery, so that those employers can respond nimbly to new ideas and market opportunities.”

Brad Smith, General Counsel and Senior Vice President for Legal and Corporate Affairs, Microsoft, Congressional Testimony, July 28, 2011
Using the L-1 Visa for Work at Client Sites Is Common, Necessary and Regulated

What is sometimes misunderstood about L-1B visas is their use at client sites. It is a common and necessary business practice for professionals to spend time at client worksites. In this capacity the L-1B visa provides an important function across a variety of industries. For instance, L-1Bs can ensure a development lead on a global rollout project to design, develop and implement a worldwide enterprise resource planning system is placed in the United States; allow medical technology companies the transfer of specialized knowledge of the company’s research, development and implementation for life-saving medical devices; allow software companies to utilize software developers and engineers to customize software enhancements and install and troubleshoot new software for a client; and ensure foreign engineers can implement energy projects at primary U.S. locations.

Congress addressed concerns about the use of specialized knowledge workers at client sites in a 2004 law that requires employers placing these professionals at client sites to demonstrate that they will continue to exercise control and supervision over those employees, and that any labor-for-hire contract with a third party is only in connection with the worker’s specialized knowledge of the employer’s product(s) and/or service(s). The law also enacted a $500 anti-fraud fee on L-1 visas to fund the prevention and detection of visa fraud, resulting in increased audits and inspections.

The L-1 “Blanket” Creates Government and Employer Efficiencies

The L-1 “blanket” petition enables pre-approved companies to transfer international employees in a streamlined process that reduces the paperwork burden on both employers and the government. To register as an L blanket employer, the employer must apply with U.S. Citizenship and Immigration Services (USCIS) and provide evidence it has either: U.S. annual sales of at least $25 million; a U.S. workforce of at least 1,000 employees; or 10 L visa approvals in the past year. Once registered, employers and the government enjoy the time-saving procedure of having one blanket petition that applies to multiple transferees. Employees may apply for visas directly at U.S. consulates rather than file an individual petition with USCIS. Professionals coming to the

“… [M]ore than twice as much foreign direct investment flowed to the United States as second ranked China in 2010 … [y]et the U.S. share of total world stock in foreign direct investment dropped to 18% in 2010, down significantly from 37% a decade earlier as worldwide competition for foreign investment dollars has increased and multinational companies have expanded investments in developing economies.”

United States on an L-1 blanket will undergo the same scrutiny of their qualifications and background as if their applications were adjudicated at USCIS, but with quicker turnaround.

The transfer of international employees through the L-1 visa is a critical instrument of U.S. employer competitiveness in the 21st century global marketplace and attempts to limit the visa’s economic synergies should be avoided.
H-1B Visas

ISSUE
The H-1B is a temporary visa available to highly educated foreign professionals who hold at least a bachelor’s degree or its equivalent and who have an offer to work in a specialty occupation. Countless studies have shown the exponential value these professionals bring to the U.S. workforce, yet arbitrary caps, along with system inefficiencies, make it difficult for U.S. employers to obtain the H-1B visas they need. U.S. growth and innovation will continue to suffer without commonsense reform to this important visa.

ACIP PROPOSED SOLUTION
U.S. employers best know their business and workforce needs. While Congress should ideally eliminate the arbitrary H-1B visa cap and allow the market to determine our H-1B supply, there are more limited solutions that can improve employer access to this group of professionals including:

• Providing “dual intent” to U.S. advanced degree graduates who have a job offer by enabling this group to go directly to green card. More visas would be available to those H-1Bs that are truly temporary and do not seek permanent residence.
• Lifting the 20,000 H-1B cap exemption for U.S. advanced degrees.
• Allowing H-1Bs, along with E, L and O visa holders, to once again domestically revalidate their visas.

Additionally, the many fees associated with an H-1B visa (see page 62 for more information), must be used effectively to help educate and train Americans and to detect and deter fraud without unduly burdening compliant employers.

BACKGROUND
H-1B Professionals Are Highly Educated Job Creators and Innovators
H-1B visa holders are highly educated professionals. According to U.S. Citizenship and Immigration Services (USCIS), close to 60 percent of approved H-1Bs have a master’s degree, Ph.D. or a professional degree (see Figure 13). The annual flow of H-1Bs is equal to approximately 0.06 percent of the

The Power of the H-1B
These are examples of just a few H-1B visa holders who are helping grow our economy and drive innovation. Partners HealthCare includes the Brigham and Women’s Hospital in Boston, where Dr. Bohdan Pohamac, a physician on an H-1B visa, led the team that performed America’s first full face transplant, helping a Texas construction worker who was harmed in a power line accident.

Sonu Aggarwal, CEO of Unify, a communications company in Redmond, WA, came to America first as a student at Dartmouth and MIT and subsequently received an H-1B visa. He is an author of the original patent on enterprise instant messaging technology and now runs a company with 34 employees globally and 24 in the United States. Of these 24, 22 are U.S. workers.

Oncologist Hiroto Inaba, an H-1B holder at St. Jude Children’s Research Hospital in Memphis, led a study that is the most comprehensive look yet at the long-term lung function of childhood leukemia survivors whose treatment included bone marrow transplantation, which may help physicians identify leukemia patients at increased risk for post-transplant lung problems and adjust treatment to avoid those problems.
U.S. labor force. Further, H-1Bs complement U.S. workers due to their different skill sets and education levels, and they help grow the U.S. workforce. From 2001 to 2010, an additional 183 U.S. jobs were created for every 100 H-1B visas issued.

H-1B scientists, engineers, doctors, teachers and mathematicians advance American innovation and are critical to many industries that are important to U.S. economic growth, including, but not limited to, biotechnology, education, energy, health care and high tech. In fact, more than half of all patents in 2011 were awarded to groups of foreign inventors, students, postdoctoral fellows and staff researchers who face unnecessary and costly hurdles in obtaining their H-1B visas.

While U.S. employers’ top priority is to attract and train American citizens in these fields, the best professionals from around the world will always be needed to fill key jobs, regardless of their place of birth.

**Employers Need Certainty and History Shows the Market Knows Best**

Employers need predictability in the H-1B system to plan for their
workforce needs. Whether it is
the certainty that comes from the
ability to immediately access global
talent when a contract is won or
the reliability that the best and
brightest talent will be able to join
the employer in the next five to 10
years — around the clock access
to talent is critical. Unfortunately,
today’s H-1B cap does not provide
this predictability. The H-1B cap
has been reached every fiscal year
since 2004, and in certain years
has been exhausted just months
into the fiscal year, causing random
lotteries to determine who got hired
and which projects moved forward.
America’s economy deserves better.

Historical H-1B data demonstrates
that demand fluctuates with the
economy and how arbitrary the
caps are. When the cap was at its
highest level of 195,000 visas from
2001-2003, use ranged from a high
of 163,600 to under 80,000. Yet in
fiscal year 2009, when the cap was
at its lowest level of 65,000 visas,
USCIS received more than double the
total cap amount in its initial week
of H-1B filings, forcing a computer-
generated lottery to determine
which professionals received H-1B
visas. Even the fiscal year 2013 cap
was reached within months, well
in advance of the start of the fiscal
year (see Figures 14 and 15). It is
expected the fiscal year 2014 cap
will be reached sooner. At a time
when our economy needs innovators,
we should provide employers the
visas they need to get the job done.

H-1B Visas Help America
Keep Educated World Talent

While the H-1B visa may be used
for temporary work purposes, it is
often a critical stepping-stone for
an employer to sponsor a talented
foreign-born U.S. graduate for legal
permanent residence. Under current
law, foreign students graduating from
U.S. universities are not permitted to
have the intent to immigrate and are
unable to apply directly for a green
card upon graduation. Granting “dual
intent” to foreign students who earn
a U.S. advanced degree and who
have a job offer would allow these
students to apply directly for a green
card and bypass the H-1B visa.

H-1B Professionals Are Not
Less Expensive Substitutes
for American Professionals

Hiring an H-1B professional is an
expensive process. It can cost over
$9,000 in fees to make an H-1B
hire and well over an additional
$8,000 to transition an H-1B
holder to a green card (see page
62). By law, H-1B workers must
receive the same wages, benefits

“We’re not talking about
big numbers. At Lilly — a
top ten global pharma
company — we currently
employ a grand total of 230
people in the U.S. on H-1Bs
and other temporary visas
... that’s about 1% of our
U.S. employee population.
Yet those folks are vitally
important. They account
for a significantly larger
percentage of our senior-
level scientific work force
... and they make vital
ccontributions that otherwise
would not be made.”

John Lechleiter, Chairman,
President and Chief Executive
Officer, Eli Lilly and Company,
“Lifespan and Livelihoods:
The Human Dimensions of
Medical Innovation” Speech,
January 14, 2010
Figure 14: H-1B Usage Fluctuates with Market

H-1B Cap Number Usage in FY 2012 and FY 2013

and working conditions as U.S. workers. Employers are required to file a labor condition application to attest they will pay the higher of the actual or prevailing wage to all workers with similar experience and qualifications for the position. H-1Bs are sophisticated, know their market value and are able to change employers if they are not happy with their pay or position. It has been found that areas with

“Winning the global race for talent is a key part of keeping America competitive, and H-1B visas are one of the tools U.S. employers need to stay ahead of the curve and on the cutting edge.”

Leslie Nicolett, Americas Immigration Program Vendor Manager, Hewlett-Packard Company
H-1Bs are an invaluable asset to U.S. employers and America. Not only are they highly educated, but they have also proven to help create jobs, complement the domestic workforce and innovate for our economy, all contributing to our economic growth. Ideally, a market-based cap should be enacted so as to not limit these important professionals and their work in our country.

Employers Contributing to H-1B Fraud Detection and Prevention
Since 2005, it is estimated that U.S. employers have paid more than $700 million in fees to fund government anti-fraud efforts in relation to H-1B and L-1 visas. All employers are required to pay a $500 anti-fraud fee with each new petition. This money has been used to increase the number of on-site investigations and audits of H-1B employers in recent years. A 2011 Government Accountability Office report states that while there were over 14,000 such visits in fiscal year 2010, only approximately 8 percent of those visits resulted in an adverse action. Compliant employers do not want employers who break the law utilizing the H-1B program because they take visas away from legitimate users.

Higher rates of immigration have higher wages for native workers because immigration leads to greater specialization and productivity. These highly skilled workers are in such demand that Microsoft issued a proposal in 2012 to pay additional fees to guarantee access to an additional 20,000 H-1B visas for those who graduate with a U.S. STEM degree.

**ACIP Asks Its Members:** Does your organization have H-1B petitions you were unable to file due to the FY2013 cap being hit?

![Figure 15: Arbitrary H-1B Cap Creates Unpredictability, Denies Access to Talent](image)
Spouse and Partner Work Authorization

ISSUE
Family happiness is key to a successful work assignment. Yet, the United States is listed frequently as a difficult country to transfer employees to because spouses and permanent partners are often unable to work. In today’s world of dual-career couples and non-traditional families, the United States stands out as a difficult place to transfer professionals. Extending employment authorization to expatriate spouses and partners will help U.S. employers grow innovation and jobs in America and will make available another source of talent to the future workforce of our country.

ACIP PROPOSED SOLUTION
U.S. immigration laws should aim to compete with other countries’ best practices by providing immediate visas and work authorization for the spouses and partners of foreign professionals working in the United States. Specifically, employment authorization should be extended to dependents of H-1B, O-1 and TN visas, just as the United States permits spouses of E and L visa holders to work now (see Figure 16). While it is a positive development that the Obama administration is working toward a proposed rule to grant employment authorization to those spouses of H-1B visa holders who have been waiting for over six years in the green card queue, this incremental step is not enough. The U.S. immigration system will need larger reforms to address the totality of the spouse and partner work authorization issue. Moreover, a U.S. citizen or lawful permanent resident should be able to sponsor his or her partner for legal permanent residence (see Figure 17).

BACKGROUND
Spouse and Partner Work Authorization Difficulties are Causing America to Lose Talent
In a recent survey, 96 percent of the over 175 employers surveyed said that partners of international assignees should be allowed to work in the host country for the

Karen Jones, Vice President and Deputy General Counsel for HR Legal Group, Microsoft Corporation
duration of the assignment. The survey uncovered why this issue is so important to employers:

- Over 50 percent of employers surveyed reported that employees have turned down international assignments due to partner career or employment concerns.
- Two-thirds of those surveyed said that dual-career and partner issues are becoming more important in their organization.
- Seventy percent of HR managers felt they should do more to recognize dual-career expectations within a global mobility policy.

The United States, India, China, Indonesia and Brazil were most frequently mentioned as countries to which it was considered difficult to transfer employees because of spouse or partner concerns. The main reasons given for difficulties in the United States were: the lack of employment authorization for the spouses of certain visa holders (H-1B, O-1, TN), the lack of recognition of unmarried partners and the three-month waiting time to get an employment authorization document for spouses of E and L visa holders.

Countries’ abilities to attract and retain talent are negatively impacted if they do not offer dual-career employment authorization opportunities, with another recent survey finding:

“More than two dozen countries recognize same-sex couples for immigration purposes. This important . . . legislation would help prevent committed, loving families from being forced to choose between leaving their family or leaving their country.”

Senator Susan Collins (R-ME), Huffington Post, December 11, 2012
Figure 17: Significant Number of Employers Lost Out On Top Talent Because of Lack of Partner Work Authorization

**ACIP Asks Its Members:** Has your organization missed any recruiting opportunities because a candidate lacked the ability to bring a same-sex partner to the U.S. or get work authorization for that partner?

- 41.7% (25) Yes
- 58.3% (35) No

(ACIP Member Benchmarking Survey, n=61)

- Almost 90 percent of spouses and partners were employed before expatriation, but this figure fell to 35 percent once in the host country.
- Three quarters of spouses and partners who were not working wanted to work.
- Sixty percent of respondents said that in the future, they would be unlikely to relocate to a country where it is difficult for a spouse or partner to get a work permit.
- Eighty percent of spouses who did work in the host country said that this had a positive impact on the employee’s willingness to complete the assignment as well as on health and well-being, family relationships and overall adjustment to the host country.

Greater Spouse and Partner Work Authorization Supported in Congress

In 2001, the 107th Congress passed a law to grant work authorization to the spouses of E and L visa holders. ACIP helped to spearhead this change, but Congress still must do more. Until a time when Congress passes

“Allowing spouses and partners to work is becoming the norm internationally. When speaking to other countries on this topic, we often see that it gets cross-party support, even in countries where broader immigration matters are hotly debated. The combination of international competitiveness and social or human rights arguments has a broad appeal.”

Kathleen van der Wilk-Carlton, Director, Permits Foundation
legislation or the agencies grant work authorization to the spouses of H-1B, O-1 and TN beneficiaries, as well as allow U.S. citizens and permanent residents to sponsor their non-married and same-sex partners for a green card, America will not be as competitive in retaining talent as other countries that provide these benefits to high-skilled professionals.

Most recently in the 112th Congress and in the beginning of the 113th Congress, legislation was introduced supporting both spouse and permanent partner work authorization, including:

- Senator Orrin Hatch’s (R-UT), Senator Marco Rubio’s (R-FL), Senator Chris Coons’ (D-DE) and Senator Amy Klobuchar’s (D-MN) Immigration Innovation Act of 2013 (S. 169), which would grant H-4 spousal work authorization for the dependents of foreign nationals who are working on an H-1B visa;
- Representative Zoe Lofgren’s (D-CA) Immigration Driving Entrepreneurship in America Act of 2011 (H.R. 2161), which would have granted H-4 spousal work authorization for the dependents of foreign nationals who are working on an H-1B visa; and
- Senator Patrick Leahy’s (D-VT) and Representative Jerrold Nadler’s (D-NY) Uniting American Families Act (S. 821/H.R. 1537), which would have allowed U.S. citizens or lawful permanent residents to sponsor their partners for legal permanent residence, which yields the benefit of work authorization. As many as 40,000 binational same-sex couples could benefit from this reform.  

To remain attractive to top world talent, U.S. immigration policy should grant work authorization to spouses and permanent partners of foreign nationals in key visa categories.

“Our public policy should have as a clear goal to keep all American families — LGBT or straight — together. It serves absolutely no one and is gratuitously cruel to separate committed families. These LGBT families are critical parts of their communities, neighborhoods, and workforces.”

Representative Jerrold Nadler (D-NY), Press Release, August 1, 2012
Closing the Skills Gap

America faces a growing skills gap. We simply are not producing enough highly skilled domestic talent – particularly in critical STEM fields. Only 45 percent of high school seniors were prepared for college-level math, and only 30 percent were prepared for college-level science (see Figure 18). American students also trail their international counterparts, with U.S. students finishing 17th in science and 25th in math in the most recent Organisation for Economic Co-operation and Development ranking (see Figure 19).

Additionally, few U.S. students are choosing the STEM path for higher education. While over half of bachelor’s degrees in Japan and China are in science or engineering fields, only one-third are in those fields in the United States. And in fact, fewer than 40 percent of the students who enter college with the intention of majoring in a STEM field complete a STEM degree. A skilled workforce is key to national prosperity and global competitiveness, and America risks losing its lead if we do not invest more in the education of U.S. students and the training of U.S. workers (see Figure 20).

Proposals from the 112th Congress included creative ideas such as directing a greater percentage of the U.S. education and training fee paid by employers who hire H-1B visa holders to scholarships for low-income U.S. students in STEM fields; National Science Foundation (NSF) competitive grants for minority-serving institutions to strengthen U.S. STEM education; NSF direct matching grant programs to improve K-12 STEM education in America; and providing training and education for former military personnel and unemployed workers seeking to enter STEM fields. Another recent proposal is to make more STEM H-1B visas and green cards available for a fee that would go toward new U.S. education and training initiatives mostly at the state level.

The bottom line is that America must do more to invest in domestic sources of talent, to draw all Americans who want to work into the economy, and to ensure that American employers

“At ExxonMobil, one of the chief priorities of our philanthropic work is ensuring that U.S. students are developing an interest in science and math and that they have the tools to succeed in these critical fields. We know that America’s future in the 21st century will be built by a top-flight STEM workforce.”

Jessica R. Nacheman, Counsel, Exxon Mobil Corporation
have all the talent they need to compete in the global economy.

**U.S. Employers Investing in the U.S. Talent Pipeline**

U.S. employers want to expand our domestic pipeline through investing their own resources to help educate and train the U.S. workforce of the future, with commitments to improving U.S. STEM education being a top priority. Employers are already contributing in a number of significant ways, from paying over $91 billion a year in state and local taxes directed toward public education, to paying over $2.3 billion in education and training fees since 1999 for use of the H-1B visa, to commitments through their own education and training programs (see examples below from ACIP members).

More must be done to grow our U.S. worker pipeline in fields where we do not have enough U.S. workers, like math and science.

**ExxonMobil** supports a range of math and science education and teacher training programs, including the National Math & Science Initiative, the Mickelson ExxonMobil Teachers Academy, the Sally Ride Science Academy and more. Learn more at [http://www.exxonmobil.com/Corporate/community_math.aspx](http://www.exxonmobil.com/Corporate/community_math.aspx).


**Intel Corporation** supports education, innovation and entrepreneurship, through the Intel Science Talent Search, e-learning tools, STEM teach plans and more. Learn more at [http://www.intel.com/about/corporateresponsibility/education/index.htm](http://www.intel.com/about/corporateresponsibility/education/index.htm).


**Scripps Research Institute** supports learning and awareness of science and biomedical research through its Summer Undergraduate Research Fellows (SURF), STSI Summer Undergraduate and High School Research Internship (SURI) and its High School Student Research programs. Learn more at [http://education.scripps.edu/outreach](http://education.scripps.edu/outreach).

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“We have a profound shortage of talent, especially people with a background in science, technology, engineering and mathematics – the STEM disciplines that are so critically important today.”

William Green, Former CEO and Executive Chairman, Accenture, Congressional Testimony, August 1, 2012
Additionally, the university community is working to educate more domestic workers through programs like the Association of American Universities’ STEM Undergraduate Education Initiative, and the Association of Public and Land-grant Universities’ Science and Math Teacher Imperative, created to help increase the number and quality of science and mathematics teachers who receive their training from public universities.66

These are just a few of the numerous examples of U.S. organizations contributing to U.S. worker education and training in America. To learn more about how other American employers are giving back to U.S. education and training, please visit http://www.tapcoalition.org/about/business_comm.php.

“The young people entering our colleges today are the advanced battery engineers, designers and light metals experts of tomorrow. If they don’t choose those paths or are ill-equipped to do so, we’ll have a skills shortage that will undermine our resurgence in smart manufacturing.”

Mark Reuss, President-North America, General Motors, Detroit Free Press, October 16, 2012
Figure 18: Not Enough U.S. High School Graduates Are Ready for College-level Math and Science

Percent of ACT-tested High School Graduates Meeting College Readiness Benchmarks by Subject, 2011

“America is home to the world’s strongest economy, the greatest colleges and universities, and the world’s brightest minds. But if we’re going to keep our place atop the global economy, we must prepare our students with the education they need for the jobs of the future. That starts with sparking more interest in math, science and technology, drawing more STEM teachers to educate students in high-need areas, and streamlining proficiency standards that hold us back. We are relying on our children today to be the innovators of tomorrow. It’s our job to make sure they are prepared.”

Senator Kirsten Gillibrand (D-NY), Triangle Coalition for Science and Technology Education, October 13, 2011
Figure 19: U.S. Students Falling Behind Our Economic Competitors in Math and Science
Performance of U.S. 15-year-olds in *Program for International Student Assessment*

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<th>Mathematics Literacy Scale</th>
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<td><strong>OECD Average</strong></td>
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*(Department of Education’s National Center for Education Statistics, “Highlights from PISA 2009,” December 2010)*
Figure 20: Proficiency in Science and Math Lagging Across America

The randomly selected states below are illustrative of U.S. student proficiency.

**Oregon**
- Only 33% of 8th graders were at or above proficiency in math in 2011
- Only 34% of 8th graders were at or above proficiency in science in 2009

**Maine**
- Only 39% of 8th graders were at or above proficiency in math in 2011
- Only 35% of 8th graders were at or above proficiency in science in 2009

**Arizona**
- Only 31% of 8th graders were at or above proficiency in math in 2011
- Only 22% of 8th graders were at or above proficiency in science in 2009

**South Carolina**
- Only 32% of 8th graders were at or above proficiency in math in 2011
- Only 23% of 8th graders were at or above proficiency in science in 2009

**Virginia**
- Only 40% of 8th graders were at or above proficiency in math in 2011
- Only 36% of 8th graders were at or above proficiency in science in 2009


# Fees for H-1B Visas and Green Cards

<table>
<thead>
<tr>
<th>VISA</th>
<th>APPLICATION FEES</th>
<th>ATTORNEY FEES</th>
<th>OTHER FEES AND COSTS</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-1B Visa</td>
<td>$325 (employer pays)</td>
<td>$1,000 – 3,000 (employer pays attorney fees related to filing the LCA and the H-1B petition and typically pays other attorney fees)</td>
<td>$1,500 (for employers with over 25 employees) or $750 (for employers with 25 or fewer employees) education and training (ACWIA) fee (employers pay, unless exempt)(^i) $500 anti-fraud fee (employer pays) $1,225 (optional) premium processing (employer or employee may pay, employer typically pays; employee may pay for personal travel) $2,000 for employers with over 50 employees and over 50 percent H-1B/L-1 in their U.S. workforce (employer pays; called the “50/50” fee) Additional fees if consular processed: $190 (visa application processing) $0 – 800 (visa issuance/reciprocity)</td>
<td>$1,825 – 9,540</td>
</tr>
<tr>
<td>H-1B Visa Extension</td>
<td>$325 (employer pays)</td>
<td>$1,000 – 3,000 (employer pays attorney fees related to filing the LCA and the H-1B petition and typically pays other attorney fees)</td>
<td>$1,500 or $750 (see above – employer pays unless exempt) $500 anti-fraud fee (not required if extension under same employer) $1,225 (optional) premium processing (employer or employee may pay, employer usually pays) $2,000 50/50 fee (see above, not required if extension under same employer) Additional fees if consular processed: $190 (visa application processing) $0 – 800 (visa issuance/reciprocity)</td>
<td>$1,325 – 9,540</td>
</tr>
<tr>
<td>H-4 Dependent</td>
<td>$290 (employer often pays, but not required)</td>
<td>$450 – 750 (employer often pays, but not required)</td>
<td>Additional fees if consular processed: $190 (visa application processing) $0 – 400 (visa issuance/reciprocity)</td>
<td>$740 – 1,630</td>
</tr>
</tbody>
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\(^i\) Continues on following page
<table>
<thead>
<tr>
<th>VISA</th>
<th>APPLICATION FEES</th>
<th>ATTORNEY FEES</th>
<th>OTHER FEES AND COSTS</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Permanent Residence (Green Card)</td>
<td>$1,650 (includes $0 labor certification, $580 Form I-140, $985 Form I-485, $85 biometric fee) (employer is not required to pay but the I-140 is filed by and typically paid for by the employer) Additional fees if consular processed: $564 ($405 immigrant visa application fee per person, $74 immigrant visa security surcharge, $85 biometrics fee) – fees same for each family member</td>
<td>$6,000 – 12,000 (includes legal fees for labor certification work; adjustment; consular processing) $500 per family member $500 per EAD extension $500 per advance parole extension (employer to pay attorneys’ fees for green card if the same attorney represents both employer and employee)</td>
<td>$500 – 15,000 estimated costs for advertising/recruiting will vary depending on location, dates and length of advertising, including if supervised recruitment should apply (employer must pay for labor certification costs, cannot ask employee to reimburse) $1,225 (optional) premium processing for Form I-140 (available for certain EB-1, EB-2 and EB-3 applicants) $150 – 300+ estimated costs for medical exam and any necessary vaccinations (employee may pay) $165 covers costs of processing immigrant visa packages after visa holders receive their packages from DOS and are admitted into the United States</td>
<td>$8,300 – 30,904 (does not include family members, legal fees for EAD or advance parole extension costs that may be due to processing delays)</td>
</tr>
</tbody>
</table>

**GRAND TOTAL for H-1B to Green Card: $11,450 – 49,984+**
(Total does not include any costs associated with OPT prior to H-1B, family members or more than one extension)

---

i The estimates provided in this chart are for employers with over 25 employees.


iii There are no additional fees for Forms I-131 (Application for Travel Document) or I-765 (Application for Employment Authorization) when filed concurrently with Form I-485.

iv Costs for an employer can go into the hundreds of thousands of dollars a year when bundling multiple applications together, such as for the cost of advertising and recruiting for green cards.

v For additional information about this fee, effective February 1, 2013, visit [http://www.uscis.gov/immigrantfee](http://www.uscis.gov/immigrantfee).
Figure 21: Green Cards Are Costly for Employers and Foreign-born Employees

*ACIP Asks Its Members:* What is your reimbursement policy for employee’s green card fees?

- Reimbursement up to a specific dollar amount for the employee only. 3.9% (3)
- Reimbursement up to a specific dollar amount for the employee and any dependents. 1.3% (1)
- Reimbursement of actual visa application fees for the employee only. 6.5% (5)
- Reimbursement of actual visa application fees for the employee and any dependents. 39% (30)
- No reimbursement. Visa fees are paid for entirely by the sponsored worker. 14.3% (11)
- Other 35.1% (27)

*(ACIP Member Benchmarking Survey, n=77)*
13 Highly Skilled Immigrants for 2013

The following foreign-born, highly skilled professionals are important job creators and innovators in the U.S. economy who represent just some of the top talent that has come to America, studied in America and made an extraordinary impact on our innovation ecosystem and way of life.

**John Bryant**, born in Australia and with a master’s degree in business administration from the University of Pennsylvania’s Wharton School, is president and CEO of Kellogg Company.67

**Steve Chen**, born in Taiwan, and **Jawed Karim**, born in Germany, both with bachelor’s degrees, and Chen with a Ph.D., from University of Illinois at Urbana-Champaign, are part of the team that co-founded YouTube.68

**Min Kao**, born in Taiwan and with a master’s degree and Ph.D. in electrical engineering from the University of Tennessee, co-founded Garmin.69

**Max Rafael Levchin**, born in Ukraine and with a bachelor’s degree in computer science from the University of Illinois at Urbana-Champaign, and **Elon Musk**, born in South Africa and with two bachelor’s degrees in economics and physics from the University of Pennsylvania, are part of the team that co-founded PayPal. Musk also co-founded Tesla Motors.70

**Jenny Ming**, born in Macau and with a bachelor’s degree in clothing merchandising from San Jose State University, is president and CEO of Charlotte Russe.71

**Shantanu Narayen**, born in India and with a master’s degree in computer science from Bowling Green State University, and a master’s degree in business administration from Berkeley, is CEO of Adobe Systems.72

**Indra Nooyi**, born in India and with a master’s degree in public and private management from Yale University, is Chairman and CEO of PepsiCo.73

**Pierre Omidyar**, born in France and with a bachelor’s degree in computer science from Tufts University, founded eBay.74

**Haim Schoppik**, born in Switzerland and with a bachelor’s degree from New York University, co-founded Etsy.75

**Naveen Selvadurai**, born in India and with bachelor’s degree and master’s degree in computer science from Worcester Polytechnic Institute, co-founded Foursquare.76

**Andrew Viterbi**, born in Italy and with a bachelor’s and master’s degree from the Massachusetts Institute of Technology and a Ph.D. in digital communications from the University of Southern California, co-founded Qualcomm.77

To view more examples of foreign national talent that have benefited America, visit ACIP’s Innovation Celebration campaign, a commemoration of the 125th anniversary of the Statue of Liberty, at [http://www.acip.com/ADV_Innovation_Celebration](http://www.acip.com/ADV_Innovation_Celebration).
Bipartisan Legislative Guideposts

The 112th Congress introduced more than 50 pieces of legislation that relate to employment-based immigration. While the following key bills address specific fixes to the high-skilled system, the central reforms reflected in these bills have bipartisan support in both chambers, are supported by ACIP in whole or in part and can serve as guideposts as the 113th Congress works toward the larger bipartisan reforms needed in the employment-based system.

<table>
<thead>
<tr>
<th>Title</th>
<th>Date Introduced</th>
<th>Bill Number</th>
<th>Sponsor</th>
<th>Key Bipartisan Co-Sponsor(s)</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefits to Research and American Innovation through Nationality Statutes (BRAINS) Act of 2012</td>
<td>09/19/2012</td>
<td>S. 3553</td>
<td>Sen. Schumer (D-NY), Sen. Coons (D-DE), Sen. Whitehouse (D-RI)</td>
<td></td>
<td>Makes up to 55,000 green cards available to those with a U.S. STEM master’s degree or Ph.D. from a qualifying university who have a job offer in a related STEM field; Provisions sunset in FY 2014; Unused green cards to go to backlogs.</td>
</tr>
<tr>
<td>STEM Jobs Act of 2012 (passed in the House on 11/30/2012)</td>
<td>09/18/2012</td>
<td>H.R. 6429</td>
<td>Rep. Smith (R-TX) 68 total co-sponsors</td>
<td>Rep. Cuellar (D-TX)</td>
<td>Makes up to approximately 50,000 green cards available to those with a U.S. STEM master’s degree or Ph.D. who have a job offer in a related field through the elimination of the diversity visa program and provides for students to go directly to green card.</td>
</tr>
<tr>
<td>Attracting the Best and Brightest Act (ABBA) of 2012</td>
<td>09/14/2012</td>
<td>H.R. 6412</td>
<td>Rep. Lofgren (D-CA) 65 total co-sponsors</td>
<td></td>
<td>Makes approximately 55,000 green cards available to those with a U.S. STEM master’s degree or Ph.D. from a qualifying university who have a job offer in a related field by creating a new green card; Provisions sunset in FY 2014 and provides for students to go directly to green card.</td>
</tr>
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<tr>
<td><strong>Startup Act 2.0</strong></td>
<td>06/05/2012</td>
<td>H.R. 5893</td>
<td>Rep. Grimm (R-NY), Rep. King (R-NY) 23 total co-sponsors</td>
<td>Rep. Carnahan (D-MO)</td>
<td>Allows for adjustment to conditional permanent resident status for up to 50,000 foreign nationals who have earned a STEM master’s degree or Ph.D. Authorizes each foreign national granted such status to remain in the United States for up to one year after the expiration of their student visa if they are looking for a job in a STEM field or to remain in the United States indefinitely if the foreign national becomes actively engaged in a job in a STEM field.</td>
</tr>
<tr>
<td><strong>Startup Act 2.0</strong></td>
<td>05/22/2012</td>
<td>S. 3217</td>
<td>Sen. Moran (R-KS), Sen. Rubio (R-FL), Sen. Blunt (R-MO)</td>
<td>Sen. Coons (D-DE), Sen. Warner (D-VA)</td>
<td>Creates 50,000 new green cards for foreign students with a U.S. STEM master’s degree or Ph.D. and eliminates employment-based green card per-country caps.</td>
</tr>
<tr>
<td><strong>Sustaining Our Most Advanced Researchers and Technology (SMART) Jobs Act of 2012</strong></td>
<td>05/16/2012</td>
<td>S. 3192</td>
<td>Sen. Alexander (R-TN), Sen. Isakson (R-GA)</td>
<td>Sen. Coons (D-DE), Sen. Merkley (D-OR)</td>
<td>Allows those who have been accepted and plan to attend a U.S. STEM master’s degree or Ph.D. program to apply for newly created F-4 visa and on graduation if they receive a job offer within one year may apply for a cap-exempt green card; Allows those who are already working in the United States and hold a U.S. STEM advanced degree and who have worked during the three-year period prior to filing their petition to qualify for a cap-exempt green card.</td>
</tr>
<tr>
<td><strong>Securing the Talent America Requires for the 21st Century (STAR) Act</strong></td>
<td>05/15/2012</td>
<td>S. 3185</td>
<td>Sen. Cornyn (R-TX)</td>
<td></td>
<td>Creates 55,000 new green cards for those with a U.S. STEM master’s degree or Ph.D. who have a job offer in a related STEM field; Eliminates the diversity visa program and provides for students to go directly to green card.</td>
</tr>
<tr>
<td><strong>Science, Technology, Engineering, and Mathematics Visa Act of 2011</strong></td>
<td>12/13/2011</td>
<td>S. 1986</td>
<td>Sen. Bennett (D-CO)</td>
<td></td>
<td>Establishes a new green card category for those with a U.S. STEM master’s degree or Ph.D. who have a job offer in a related STEM field; Eliminates the employment-based green card per-country caps; Recaptures green cards that went unused in prior fiscal years and provides for students to go directly to green card.</td>
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<tr>
<td>Startup Act of 2011</td>
<td>12/08/2011</td>
<td>S. 1965</td>
<td>Sen. Moran (R-KS), Sen. Blunt (R-MO)</td>
<td>Sen. Warner (D-VA)</td>
<td>Allows for adjustment to conditional permanent resident status for up to 50,000 foreign nationals who have earned a STEM master’s degree or Ph.D. Authorizes each foreign national granted such status to remain in the United States for up to one year after the expiration of their student visa if they are looking for a job in a STEM field or to remain in the United States indefinitely if the foreign national becomes actively engaged in a job in a STEM field.</td>
</tr>
<tr>
<td>Protecting American Families and Businesses Act of 2011</td>
<td>10/06/2011</td>
<td>H.R. 3119</td>
<td>Rep. Lofgren (D-CA), Rep. Gutierrez (D-IL)</td>
<td></td>
<td>Eliminates the employment-based green card per-country caps; Recaptures employment-based green cards that went unused due to agency delay and provides for students to go directly to green card.</td>
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<tbody>
<tr>
<td><strong>Immigration Driving Entrepreneurship in America Act (IDEA) Act of 2011</strong></td>
<td>06/14/2011</td>
<td>HR. 2161</td>
<td>Rep. Lofgren (D-CA)</td>
<td></td>
<td>Creates a “Trusted Employer” program and a new green card for foreign nationals receiving an advanced STEM degree from certain U.S. universities. Provides for students to go directly to green card.</td>
</tr>
<tr>
<td><strong>To re-allocate visas to advanced degree holders</strong></td>
<td>01/05/2011</td>
<td>H.R. 43</td>
<td>Rep. Issa (R-CA)</td>
<td></td>
<td>Makes up to 55,000 visas available to those with a U.S. science or medicine advanced degree through the elimination of the diversity visa program.</td>
</tr>
</tbody>
</table>

vi Not all co-sponsors listed.
History of Legislation

A Select History of Major Employment-based Immigration Provisions in U.S. Law

Over the past three decades, several key immigration acts have changed U.S. law, at times significantly reforming the employment-based immigration system and impacting the way companies manage their workforces. The following is a detailed summary of the major laws, as well as the most recent laws, that Congress has enacted since 1986 that are of particular interest to U.S. employers.

**THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA) (PL 99-603)**
- Requires employers to attest to all employees' identities and employment eligibility verification by completing a Form I-9.
- Creates tough new penalties for employers who know or have reason to know that they are employing or recruiting unauthorized workers.
- Prohibits employers from discrimination in employment because of an applicant’s national origin or citizenship status.
- Creates the SAVE (Systematic Alien Verification for Entitlements) program to allow the government to obtain information on immigrant status to determine eligibility for public benefits.
- Creates a pilot diversity visa program to enable persons from countries with historically low immigration rates to apply for one of 5,000 (now 55,000) permanent resident visas.
- Places a worldwide cap on EB immigration of 140,000 visas per year.
- Divides high-skilled temporary workers into distinct temporary work visa categories.
- Creates the Visa Waiver Pilot Program, which currently allows citizens from (now 37) countries to travel to the United States for up to 90 days without a visa.

**THE IMMIGRATION ACT OF 1990 (IMMACT90) (PL 101-649)**
- Modifies the employment-based (EB) preference system by establishing five categories of EB immigration.
- Places a numerical cap on the H-1B program of 65,000 visas per year.
- Replaces the previous standard of "distinguished merit and ability" with "specialty occupation" in the H-1B visa category.
- Codifies the doctrine of dual intent for H-1 and L-1 visa applications.
- Requires that prospective employers of H-1Bs file a labor condition application with DOL attesting that they pay the higher of the "actual wage" or the "prevailing wage."
- Limits the maximum length of stay for H-1 nonimmigrants to six years.
- Creates the “blanket” L-1 program, permitting qualifying employers to expedite global transfers by filing a single petition for a group of nonimmigrants, rather than individual petitions.
• Raises existing fines for any use or acceptance of fraudulent documents.
• Establishes the O and P visas categories for athletes and entertainers.
• Modifies criminal inadmissibility waiver requirements and increases the number of crime-related grounds of inadmissibility.
• Expands the diversity visa pilot program into a permanent visa category that allots 55,000 visas annually to qualified applicants selected in an annual lottery. Requires individuals receiving diversity visas to possess at least a high school education or its equivalent, or have at least two years of experience.
• Expands provisions under the Immigration-related Unfair Employment Practices to include protection against employer retaliation, requests for unnecessary documentation and defenses based on failure to file declarations of intending citizenship.
• Imposes new certifications on foreign physicians.
• Establishes the temporary protected status (TPS) program allowing the government to designate nationals of countries experiencing political, civil or environmental strife to remain in the United States for up to 18 months.

MISCELLANEOUS AND TECHNICAL IMMIGRATION AND NATURALIZATION AMENDMENTS OF 1991 (PL 102-232)
• Eliminates the numerical limits on P visas.
• Clarifies requirements for extraordinary ability, international recognition and one-year affiliation for O visas.
• Clarifies requirements for labor condition applications.
• Allows certain doctors and fashion models to qualify for H-1B visas.

THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 (IIRAIRA) (PL 104-208)
• Requires entry and exit control systems to track nonimmigrant visa overstays and establishes a requirement for biometric machine-readable identifiers for border crossing cards.
• Creates new grounds of inadmissibility, including three- and 10-year bars to reentry for persons unlawfully present in the United States. Nonimmigrant visas are automatically invalidated upon an overstay, and such nonimmigrant must return to his home country to obtain a new visa.
• Permanently bars those who falsely claim to be U.S. citizens from becoming permanent residents.
• Redefines aggravated felony to include any crime or theft or violence for which a one-year sentence may be imposed and expands grounds of inadmissibility.
• Creates the voluntary Basic Pilot program now called “E-Verify.”
• Prohibits fines against employers for technical Form I-9 paperwork errors made in good faith.
• Requires proof of discriminatory intent for an employee to prevail in an Immigration-related Unfair Employment Practice claim.
• Makes the Visa Waiver Program permanent.
• Prohibits F-1 students from attending public schools other than secondary schools, and then only for 12 months if they reimburse the school for attendance costs.
• This act was originally intended to be retroactive, but legal challenges have limited its retroactive reach.
AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998 (ACWIA) (PL 105-277)

- Requires H-1B dependent employers (employers with 15 percent or more of their U.S. workforce on H-1Bs) to attest there have been no lay-offs of U.S. workers 90 days before or after the filing of an H-1B petition.
- Requires that H-1B dependent employers take good faith steps to recruit U.S. workers that are equally or better qualified for a job for which a nonimmigrant is sought.
- Increases the H-1B cap to 115,000 for FY 1999 and FY 2000.
- Imposes $500 H-1B education and training fee.

AMERICAN COMPETITIVENESS IN THE 21ST CENTURY ACT OF 2000 (PL 106-313)

- Increases the H-1B cap to 195,000 for FY 2001-2003, retroactively raising the cap for FY 2001, to accommodate the existing backlog in these years.
- Exempts specific nonprofits, institutions of higher education and governmental research organizations from the H-1B education and training fee as well as the cap.
- Requires visas obtained by fraud or misrepresentation to be recaptured and restored to the H-1B cap.
- Requires that H-1B employees may only be counted against the H-1B cap for initial petitions.
- Allows for H-1B visa “portability” by permitting employees to accept new employment upon the filing of a non-frivolous petition by a prospective employer.
- Allows unused employment-based visas to be used for employees from oversubscribed (high-demand) countries.
- Allows certain EB-1, 2 or 3 beneficiaries who are not able to obtain a visa due to per-country limitations to obtain H-1B extensions beyond six years and to change employers.
- Allows B-1 business visitors to accept honorarium payments and incidental expenses for certain academic activities.

USA PATRIOT ACT OF 2001 (PL 107-56)

- Requires the National Institute of Standards and Technology to develop a technology standard to verify the identity of persons applying to enter and exit the United States. This program is now a part of the US-VISIT program. Ultimately, the United States aims to create a cross-agency, cross-platform electronic system to conduct background checks, confirm identities, collect biometric information and ensure that people do not receive visas under varying names.
- Permits USCIS and DOS to receive information from the FBI’s National Crime Information Center Database and allows DOS to share information with foreign governments through a visa lookout database.
- Establishes grounds of inadmissibility for soliciting funds for terrorist groups or activities, or commission of any act that one knows or should have known affords material support to terrorist groups or individuals.

WORK AUTHORIZATION FOR SPOUSES OF TREATY TRADERS AND TREATY INVESTORS (PL 107-124)

- Permits the spouses of E (treaty traders and investors) and L (intracompany transfers) visa employees the opportunity to seek work authorization.
ENHANCED BORDER SECURITY AND VISA ENTRY REFORM ACT OF 2002 (PL 107-173)

• Requires Visa Waiver Program countries to issue machine-readable, tamper-resistant passports with biometric identifiers.

• Implements a tracking system for F, M and J visas (SEVIS) and requires designated school officials to notify DHS of any foreign national student who does not report to school and enroll within 30 days of the school’s registration deadline.

• Requires the implementation of an integrated entry and exit database containing arrival and departure information gleaned from machine-readable visas, passports and other travel and entry documents. Originally mandated by section 110 of IIRIRA as a pilot program, this program is now the US-VISIT program.

• Requires the government to make all security databases involved in determining the admissibility of foreign nationals interoperable.

• Requires machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers.

• Restricts issuance of nonimmigrant visas to nationals of countries determined to be state sponsors of terrorism.

• Requires USCIS to determine that foreign nationals do not appear in federal lookout databases.

HOMELAND SECURITY ACT OF 2002 (PL 107-296)

• Abolishes the Immigration and Naturalization Service.

• Brings immigration within the purview of the newly created Department of Homeland Security, dividing responsibility for immigration management between ICE, CBP and USCIS.

• Establishes an Ombudsman to assist USCIS stakeholders in resolving problems with the agency and proposing changes to the system.

• The DHS secretary is given ultimate authority to enforce the Immigration and Nationality Act (INA) and issue pertinent regulations, although this does not affect the DOS’s authority under the INA, including the authority to deny a visa.

• Denies private rights of action regarding visa denials or visa issuance.

L-1 VISA AND H-1B VISA REFORM ACT OF 2004 (PL 108-447)

• Creates an H-1B cap exemption for up to 20,000 U.S. university master’s degrees and Ph.D. graduates.

• Raises the H-1B education and training fee to its current level of $1,500 for petitioners that employ more than 25 employees and $750 for petitioners that employ 25 employees or fewer.

• Improves methodology for prevailing wage determinations.

• Expands the Secretary of Labor’s authority to investigate labor condition application violations.

• Modifies attestation requirements for H-1B dependent employers.

• Establishes a good-faith exception for technical failures to comply with labor condition application rules.

• Initiates a $500 fraud prevention and detection fee for initial H-1B and L-1 petitions.

• Requires that blanket L-1s be employed abroad by the petitioner for 12 months, up from six months.

• Requires that employees seeking to enter the United States on any L-1B visa (initial petition or
extension) who will be stationed primarily at the worksite of an employer other than the petitioner, affiliate, subsidiary or parent, be ineligible for L-1B status if: (1) he will be controlled and supervised principally by that employer; or (2) the placement of the worker at the unaffiliated worksite is “essentially an arrangement to provide labor for hire for the unaffiliated employer.”

**INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004 (PL 108-458)**
- Requires most nonimmigrant visa applicants to submit to an in-person interview before a consular officer overseas.
- Requires that nonimmigrant visa holders and U.S. citizens enter the United States with passports or other DHS-approved documents.

**THE REAL ID ACT OF 2005 (PL 109-13)**
- Sets standards for state-issued driver’s licenses and identification documents, including proof of lawful status.
- Recaptures employment-based visas that went unused in previous fiscal years due to agency processing delays (approximately 50,000 visas) for use by nurses and physical therapists.

**THE EMERGENCY BORDER SECURITY SUPPLEMENTAL APPROPRIATIONS ACT OF 2010 (PL 111-230)**
- Funds $600 million in border security efforts from August 13, 2010, until September 30, 2014, by imposing a new H-1B fee of $2,000 and L-1 fee of $2,250 on employers whose U.S. workforces have 50 or more workers and more than 50 percent H-1B and L-1 nonimmigrant workers.

**THE JAMES ZADROGA 9/11 HEALTH AND COMPENSATION ACT OF 2010 (PL 111-347)**
- Extends the H-1B and L-1 visas fees set out in PL 111-230 by one year until September 30, 2015.

**E-2 NONIMMIGRANT VISAS FOR ISRAELI NATIONALS (PL 112-130)**
- Permits eligible Israeli nationals to receive an E-2 nonimmigrant visa, if similarly situated United States nationals are eligible for similar nonimmigrant status in Israel.

**THE IMMIGRATION EXTENDERS PACKAGE (PL 112-176)**
- Extends the authorization of the EB-5 Regional Center Program, the Special Immigrant Nonminister Religious Worker Program, the E-Verify Program and the Conrad State 30 J-1 Visa Waiver Program until September 30, 2015.

**RESIDENCY FILING REQUIREMENTS FOR SERVICE-MEMBERS AND SPOUSES LIVING ABROAD (PL 112-58)**
- Amends the Immigration and Nationality Act to toll, during active-duty service abroad in the Armed Forces, the periods of time to file a petition and appear for an interview to review the conditional basis for permanent resident status.
Glossary of Terms

DEPARTMENTS AND AGENCIES

Citizenship and Immigration Services Ombudsman (CISO): The CISO was created by Congress in the Homeland Security Act of 2002. The Ombudsman is appointed to help employers and individuals navigate the immigration benefits system.

Customs and Border Protection (CBP): The CBP is responsible for admitting travelers through the United States’ land and sea ports of entry.

Department of Commerce (DOC): The Bureau of Industry and Security at the DOC issues export control licenses in cases where a foreign national will work with sensitive technologies.

Department of Homeland Security (DHS): The DHS has multiple roles in the U.S. immigration system, including, but not limited to, welcoming foreign nationals to our shores, securing our borders, conducting immigration enforcement at the worksite and tracking immigration statistics.

Department of Labor (DOL): The DOL is responsible for protecting the rights and working conditions of both U.S. and foreign workers. The DOL’s Bureau of Labor Statistics analyzes, collects, processes and disseminates labor economics statistical data to Congress, other federal agencies and the public. The DOL’s Employment and Training Administration’s Office of Foreign Labor Certification is one of the agencies involved in granting permission for foreign workers to work in the United States, assuring that the admission of foreign workers on a permanent or temporary basis will not adversely affect the job opportunities, wages and working conditions of American workers.

Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices: The OSC, part of the Department of Justice, enforces the anti-discrimination portion of the Immigration and Nationality Act (INA).

U.S. Citizenship and Immigration Services (USCIS): USCIS oversees lawful immigration to the United States, adjudicating most applications for immigrant and nonimmigrant visas.

NONIMMIGRANT VISAS

Temporary Employment for Professionals

Dual Intent: Dual intent represents the ability of a nonimmigrant visa holder to reside temporarily in the United States with the intent to immigrate permanently. The ability to hold dual intent varies with each visa category.

E-3 (Specialty Occupation Professionals from Australia): E-3 visas are similar to H-1B visas but are available only to nationals of Australia pursuant to a free trade agreement between Australia and
the United States. There are 10,500 visas available annually to those who qualify. The application procedures differ somewhat from H-1B visas.

**H-1B (Foreign Nationals in “Specialty” or Professional Occupations):** H-1B visas are used by U.S. employers to hire foreign nationals who possess at least a bachelor’s degree, or equivalent work experience, and who will be holding a professional occupation in the United States. The employer must file a labor condition application (LCA) attesting that the working conditions will be equal to those offered to U.S. workers. Visas may be issued for an initial period of up to three years, which can be extended for an additional three years and at times for a seventh year and beyond. Dual intent is allowed. H-4 visas are issued to family members. There is an annual limit of 65,000 regular H-1B visas and an additional 20,000 visas for advanced degree graduates of U.S. universities.

**Labor Condition Application (LCA):** Employers of H-1B professionals are required to file an attestation with the DOL that the foreign nationals will receive the same wages, benefits and working conditions as U.S. workers. Employers must also attest that they have provided notice of the hiring of an H-1B worker to labor officials and other employees.

**O (Foreign Nationals of Extraordinary Ability in the Sciences, Arts, Education, Business or Athletics):** O-1 visas are used by U.S. employers for foreign nationals who possess “extraordinary ability” in the sciences, arts, education, business or athletics. O-2 visas are issued to accompanying support personnel and O-3 visas to accompanying family members. Visas may be issued for an initial period of up to three years, which can be extended.

**P-1 (Other Entertainers and Athletes):** P-1 visas are used by U.S. employers for internationally recognized entertainers and athletes who do not qualify for O visas. The visa may be used for entertainment groups or sports teams and may be available for essential support personnel.

**P-2 (Other Entertainers and Athletes):** P-2 visas are for artists and entertainers (as well as groups and essential support personnel) coming to the United States through reciprocal exchange programs.

**TN (Business Persons from Canada and Mexico):** The North American Free Trade Agreement (NAFTA) provides certain privileges to American, Canadian and Mexican business professionals traveling between the three countries. NAFTA enables Canadians and Mexicans to enter the United States on B, E and L visas in an expedited manner and creates a special TN visa for certain Canadian and Mexican professionals who may work either for a U.S. employer, be self-employed or enter pursuant to a contract with a U.S. company. Family members are issued TD visas. TN visas may be issued for an initial period of up to three years but can be extended almost indefinitely.

**Intracompany Transfers and Investors**

**E-1 and E-2 (Treaty Traders and Investors):** E visas are available
to companies and individuals pursuant to treaties between the United States and over 60 other countries. The E-1 visa supports trade activities and the E-2 visa promotes investment. The United States maintains both types of treaties for some countries and just one type with others. Both the foreign national and the company must be “nationals” of the treaty country. Family members receive the same type of visa as the principal. E visas may be issued for an initial period of up to two years but can be extended almost indefinitely.

**L-1A (Intracompany Executives and Managers):** The L-1A visa allows a U.S. organization to transfer an executive or a manager from a parent, subsidiary or other affiliate abroad to the United States. The employee must have worked for the organization abroad for at least one of the previous three years. Family members receive L-2 visas. L-1A visas may be issued for an initial period of up to three years and can be extended for a total stay of five years. Dual intent is allowed.

**Trainees, Interns and Students**

**H-3 (Trainee):** U.S. employers can use the H-3 visa to bring foreign employees to the United States to participate in an established training program. The trainee cannot engage in productive employment in the United States. Family members are given H-4 visas. H-3 visas may be issued for a maximum period of two years.

**J (Exchange Visitors):** The J category is very broad and encompasses a variety of “exchange visitor” programs and activities that are approved by DOS to promote intercultural exchange. Unlike other visas that are administered by USCIS, J visas are issued through sponsor organizations that have been approved by DOS. Exchange visitors include: students, trainees, interns, research scholars, professors, specialists, foreign medical graduates, summer work/travel, au pairs, international and government visitors and camp counselors. Each J-1 category has its own criteria for participation and limits on length of stay and permissible activities. Family members are given J-2 visas.

**Optional Practical Training (OPT) for F Students (Work Authorization for Students):** Foreign nationals engaged in academic study at an accredited U.S. college or university may be eligible to engage in work related to their studies. F-1 students may engage in up to 12 months of OPT pre- and/or post-graduation. In some situations OPT can be extended for certain graduates in science, technology, engineering and mathematics fields up to 29 months. Some students may also be eligible for on-campus employment or training incidental to their course of study known as Curricular Practical Training (CPT).

**Q (Intercultural Exchange Visitors):** Similar to the J visa, the Q visa promotes intercultural exchange through training and work opportunities. The Q-1 visa is open to all nationalities while the Q-2 visa is specific to persons from Northern Ireland. Family members
receive Q-3 visas. The maximum period of stay is 15 months.

**International Business Visitors**

**B-1 (Temporary Business Visitors)** Most foreign nationals coming to the United States to conduct business must obtain B-1 visas. Tourists obtain B-2 visas. B-1 visitors cannot engage in productive employment nor receive remuneration in the United States, but they can meet with colleagues or clients, attend conferences and engage in similar activities. B-1s are admitted for the period of time necessary to complete their work, usually less than three or six months. Persons from certain countries with which the United States has a close relationship are exempt from this visa requirement and can enter under the “Visa Waiver Program” instead of a B visa.

**Visa Waiver Program (International Business Visitors):** Foreign nationals from a group of 37 countries are able to enter the United States as short-term visitors without obtaining a B-1 or B-2 visa, known as “Visa Waiver.” These visitors must register with the U.S. government through the Electronic System for Travel Authorization (ESTA) in advance of their travel. Admission is for no more than 90 days.78

**IMMIGRANT VISAS**

**Diversity Visa Lottery:** Each year the U.S. government provides permanent residence (or “green cards”) to persons around the world through a “diversity” visa lottery process. The lottery is intended to provide opportunities to persons from countries that historically have low levels of immigration to the United States and who may not have family, employment or other ties that would enable them to immigrate.

**EB-1:** The employment-based first preference category (EB-1) is reserved for three subcategories of foreign nationals:
- Extraordinary ability
- Outstanding professors and researchers
- Multinational executives and managers

No labor certification is required, but the qualifying criteria are quite demanding. There are 40,000 visas a year reserved for EB-1 workers and their family members. Backlogs in this category have occurred.

**EB-2:** The employment-based second preference category (EB-2) has three subcategories:
- Exceptional ability in the sciences, arts or business
- “Advanced degree” or a bachelor’s degree plus five years of work experience
- National Interest Waiver

Labor certification is generally required. There are 40,000 visas available annually to EB-2 professionals and their family members. Significant backlogs in this category exist for persons from China and India.

**EB-3:** The employment-based third preference category (EB-3) has three subcategories:
- Skilled workers whose job requires a minimum of two years of training or work experience
- Professionals holding at least a bachelor’s degree
- Other workers

Labor certification is required. There are 40,000 visas available annually to EB-3 workers and their family members. Note that significant backlogs exist in this category for all countries, particularly for other (unskilled) workers, which
are technically limited to 5,000 of the 40,000 visas per year.

**WORKSITE ENFORCEMENT**

**E-Verify:** E-Verify is an online employment verification system administered by USCIS. E-Verify confirms certain information from Form I-9 with information maintained in USCIS and the Social Security Administration databases. E-Verify is optional for the vast majority of U.S. employers. However, some states require employers to use E-Verify and certain federal contractors must participate. Note that E-Verify does not replace Form I-9 requirements, but it is an additional step in the employment verification process.

**Form I-9:** All U.S. employers must complete an Employment Eligibility Verification form (Form I-9) for all persons hired on or after November 6, 1986. The purpose of this form is to prove that the employee has the right to work legally in the United States. It must be completed for citizens and non-citizens alike. This deceptively simple form is accompanied by lengthy instructions and a Handbook for Employers (M-274), as well as guidance from the OSC regarding non-discrimination. Unwary employers can easily run afoul of the law, from inadvertent discrimination to fines for paperwork errors to criminal penalties for knowingly employing someone who does not have proper work authorization.

**Immigration-related Unfair Employment Practices:** When Congress passed the *Immigration Reform and Control Act of 1986*, which required employers to verify work authorization, they were concerned that employers would discriminate against legal workers who appeared “foreign.” Thus, safeguards were put into the law to prohibit discrimination against legal U.S. workers. This group includes U.S. citizens, legal permanent residents, refugees and asylees, and certain temporary workers. This law is administered by the Office of Special Counsel (OSC) for Immigration-related Unfair Employment Practices at the Department of Justice (DOJ).
About ACIP

The American Council on International Personnel (ACIP) represents employers working to speed U.S. economic recovery, create new jobs for all Americans and advance American innovation. Our members are companies, universities, research institutions and organizations that employ the critical talent that has and will continue to build the U.S. economy and raise the standard of living for all Americans. We build the workforces necessary to keep America on the cutting edge of worldwide innovation and leading the global economy.

Code of Ethics

Our members are the professionals responsible for overseeing immigration compliance at many of the world’s most influential employers. ACIP adheres to, promotes and expects the highest ethical standards of professional practice among its membership. Standards of professional practice include: understanding and complying with all government laws, rules, and regulations; choosing the course of highest integrity; treating all individuals with dignity regardless of their national origin; and respecting others’ confidentiality. ACIP and its members strive to avoid any action that may discredit the organization, its membership or the profession. This includes treating colleagues, government officials, and clients with respect, fairness and honesty. ACIP expects compliance with its standards of integrity throughout its membership and will not condone the actions of any entity that achieves results at the cost of violation of law, deals unscrupulously or sacrifices ethical standards.

About Our SHRM Affiliation

ACIP is a strategic affiliate of the Society for Human Resource Management (SHRM). By combining the deep knowledge and expertise of a widely respected voice on immigration and global mobility issues with the influence and reach of the world’s largest association devoted to human resource management, ACIP and SHRM can better help businesses and organizations address the most pressing global talent management issues of the future.
End Notes


44 Austin T. Fragomen, Jr., Congressional Testimony, July 29, 2003, http://www.judiciary.senate.gov/hearings/testimony.cfm?id=4f1e0899533f7680e78d03281fef82ef&wit_id=4f1e0899533f7680e78d03281fef82ef-1-5.

45 Global Mobility Survey, International HR Adviser, Summer 2012.


63 Representative Zoe Lofgren (D-CA), Immigration Driving Entrepreneurship in America Act (IDEA) of 2011 (H.R. 2161).


78 State Department, “Which countries* participate in the Visa Waiver Program (VWP)?,” http://travel.state.gov/visa/temp/without/without_1990.html#countries.