2011

Putting a Plug in America's Brian Drain: A Proposal to Increase the U.S. Retention of Foreign Students Post-Graduation

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NOTE

PUTTING A PLUG IN AMERICA’S BRAIN DRAIN: A PROPOSAL TO INCREASE U.S. RETENTION OF FOREIGN STUDENTS POST-GRADUATION

I. INTRODUCTION

Throughout history there have been many differing views and opinions on immigration. There are many who advocate for increased immigration, citing reasons such as “a larger labor pool, family unity and humanitarian concerns.” On the other hand, there are a comparable number of people within the United States who do not want to increase immigration levels. Those who oppose increased levels of immigration have made arguments concerning “the costs of immigrants through direct and indirect government aid and public service programs [and] the displacement of native employees with cheaper foreign labor.” This debate often intensifies with changing economic times, which is why the issue of immigration is a heated topic in the current economic recession. But, as noted by Professor David P. Weber, “[i]n any economy, but especially in a struggling one, it does not make fiscal sense to remove individuals from the country who are generating substantial taxable revenue and employing hundreds to thousands of lawfully authorized employees.”

While politicians and laypersons alike show an immense amount of concern for the high population of illegal immigrants in the United States, little concern is afforded to legal immigrants. President Barack

2. Id.
3. See id.
4. Id.
5. See id. at 766-67.
6. Id. at 767.
Obama has expressed an intention to distribute visas to illegal immigrants as “a pathway to citizenship,” while those who have taken the appropriate steps and are working or studying in the United States on valid visas are not afforded a similar expedited route to legal permanent residency. These aliens struggle with the immense backlog, never-ending paperwork, and continuous stress involved in procuring one of the limited number of visas available to continue residing in the United States as temporary or permanent workers. As a result, “increasing numbers of skilled workers have begun to return home to countries like India and China where the economies are booming.”

This phenomenon of intellectuals and professionals leaving a country for better opportunities in another country has been termed “brain drain.”

As a nation, we should direct our efforts toward aiding those who are benefiting us. We should be focusing on assisting those who are contributing, not only to the academic and intellectual world, but also to our struggling economy. This holds especially true for those contributing to medical, scientific, and technological fields, as well as those founding what later grow to be multi-million dollar companies, in turn creating thousands of jobs and benefiting our current frail economy.

This note aspires to improve the pathway to citizenship for foreign students who wish to remain in the United States after graduation to work in their field of expertise. While immigration law, as a whole, is in desperate need of reform, it is not possible for us to focus on every aspect of immigration in this note. Thus, this note aspires only to improve the pathway to citizenship for foreign students who wish to remain in the United States after graduation to work in their field of expertise. Through this note, three goals will be accomplished. First, the current student and employment based visa laws, application procedures, and quotas will be explained. Next, the problems created and exacerbated by the current laws will be explored. Finally, solutions

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9. See, e.g., WEBSTER’S NEW WORLD COLLEGE DICTIONARY 177 (4th ed. 2000) (defining “brain drain” as the “depletion of the intellectual or professional resources of a country, region, etc., esp. through emigration”).
will be proposed to aid this small segment of the defunct immigration law. Specifically, we propose a reconfiguration of the current H-1B visa framework through the implementation of a priority structure and a reallocation of visas.

II. BACKGROUND ON IMMIGRATION LAW

A. Status

There is an endless variety of classifications for foreign persons who are allowed into the United States either permanently or for extended periods of time. The following five classifications are relevant for our present purposes. First, U.S. citizens are those people who are born in the United States, have been naturalized, or were "born abroad to a U.S. citizen parent." Second, Legal Permanent Residents ("LPRs"), also known as green card holders, are foreigners who have been given permission by the U.S. government to "reside permanently" in the United States. Third, asylees and refugees are foreign persons residing in the United States temporarily who have not yet been granted LPR status. Fourth, nonimmigrants are foreigners who are in the United States temporarily for business or tourism.

10. EDWIN T. GANIA, U.S. IMMIGRATION STEP BY STEP 3 (3d ed. 2006). Naturalization is the process that a foreigner must go through to become an American citizen. See id. at 195. This process requires the foreigner to show, inter alia, that he has had a continuous physical presence in the United States on a valid immigrant visa for several years (the number of years depends on how the green card was obtained), and that he has the ability "to speak, read, and write [in] English." Id. at 195-96.

11. Id. at 3.

12. Id. When becoming a U.S. citizen, most LPRs are not required to renounce their citizenship in their home country; thus, they become dual citizens of the United States and their home country. Id. at 197. While LPRs are not citizens, they are afforded many of the same rights as U.S. citizens and are eligible to apply for naturalization. See RANDALL MONGER & NANCY RYTINA, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2008, at 1 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf. LPRs may live, work, own property, and attend school in the United States. Id. However, LPRs are residents and not citizens; therefore, they are not allowed to vote. The Right to Vote, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., http://www.uscis.gov (follow "Green Card (Permanent Residence)" hyperlink; then follow "After a Green Card is Granted" hyperlink; then follow "The Right to Vote" hyperlink) (last visited Feb. 26, 2011).

13. GANIA, supra note 10, at 3.

The terms "refugee" and "asylee" both relate to a person who is claiming persecution or fear of persecution in his or her home country and wishes to take refuge in the United States. Simply stated, a refugee is outside the United States and wants to come in while an asylee is already in the United States or at its borders and wants to stay.
United States "temporarily on a valid nonimmigrant visa [issued] for a specific purpose." Finally, aliens whose nonimmigrant visas have expired or who have violated the terms of their nonimmigrant visas are considered to be out of status.

B. Terms

The term "visa" refers to "a travel permit stamped into a [foreign] passport . . . that allows [an] alien . . . to travel to [and from the United States]." There are about thirty different nonimmigrant visas, but only one immigrant visa: legal permanent residency. The term "change of status" refers to the process of changing "from one valid nonimmigrant [visa] to another." Finally, "[a]djustment of status" refers to the process during which an alien in the United States applies to become a LPR.

C. Recent Changes

While the United States Citizenship and Immigration Services ("USCIS") enforces immigration policies, the legislature creates them. Immigration, like most other areas of the law, is forever changing. Most of the changes in the last two decades have been in response to terrorism or Americans' fears of the potential for terrorist activity, and were imposed to advance the primary purpose of protecting Americans. For instance, there was a drastic restriction on immigration after the Oklahoma City bombing in 1996, and there was even stricter

14. GANIA, supra note 10, at 3. Such purposes include tourism, education, business, and employment. See id.
15. Id. at 4. A person who is out of status for more than 180 days will be subsequently banned from the U.S. for a period of three years after leaving. Id. at 9. A person who is out of status for over a year is banned for ten years. Id.
16. Id. at 5.
17. Id. at 6.
18. Id.
19. Id.
20. Id. at 11.
21. See id.
22. Id. Initially, it was believed that the bombing was the responsibility of a Middle Eastern terrorist; however, immigration laws were nevertheless strengthened after it was discovered the bombing was done by an American citizen. Id.
enforcement of immigration laws after September 11th, 2001. In response to September 11th, the Homeland Security Act of 2002 dissolved the Immigration and Naturalization Service ("INS") and created the Department of Homeland Security ("DHS"), absorbing what used to be INS and other agencies. Further, the REAL ID Act of 2005 established the need for every person in the United States to possess a "federally approved" identification card in order to "travel on an airplane, open a bank account, collect Social Security payments, or take advantage of nearly any government service."

III. AN EXPLANATION OF CURRENT VISA LAWS

A. F-1 Student Visas

As of the 2007/2008 academic year, there were over 620,000 international students enrolled in institutes of higher education in the United States. These students are authorized to enter the United States through the F-1 Nonimmigrant Student Visa, which permits foreign nationals into the United States for the limited purpose of furthering their education at authorized academic institutions ranging from elementary through graduate schools. For present purposes, this note will focus only on those foreign students enrolled in institutes of higher education striving to obtain a bachelor's degree or higher.

The F-1 Student Visa is "[t]he visa for people who want to study at an accredited U.S. college or university, or to study English at a university or language institute." Unlike the majority of visa

23. Id. at 12.
25. GANIA, supra note 10, at 12.
27. GANIA, supra note 10, at 13.
classifications, student visas are not subject to annual numerical limits. In 2008 alone, approximately 340,000 F-1 visas were issued.

F-1 student visas terminate upon graduation or withdrawal from school. Following graduation, the foreign students are allowed sixty days to settle affairs in the United States and to prepare to return home or relocate elsewhere. But, foreign students who choose to withdraw from their academic programs are only allowed fifteen days to do so. Students who are not enrolled in classes full-time in excess of five months must apply for a new F-1 visa, unless the absence is due to a preapproved “activit[y] overseas . . . related to the course of study” pursued by the F-1 student within the United States. Student visas must be renewed or re-issued at a foreign Embassy or Consulate, not in the United States. Upon graduation, these international students can apply to remain in United States through the Optional Practical Training (“OPT”) program. This program allows the students to work in the United States for a short period of time during or after their stay on the F-1 visas. The OPT program permits each student a total of twelve months of employment, which may be extended by seventeen months for students receiving a degree in a science, technology, engineering, or mathematics field (often referred to as the “STEM” fields). Once the OPT extension expires, the students’ only legal options are to leave the country or to apply for a temporary work visa. Unfortunately, under the current system, obtaining a temporary work visa can take several

31. Id.
34. Id.
35. Id.
years beyond the expiration of the OPT extension.42

B. Temporary Employment Visas: The H-1B Visa

The H-1B visa is a unique temporary employment based visa. The “H-1B classification applies to persons in a specialty occupation which requires the theoretical and practical application of a body of highly specialized knowledge requiring completion of a specific course of higher education. This classification requires a labor attestation issued by the Secretary of Labor.”43 A “specialty occupation” is defined as “an occupation that requires . . . theoretical and practical application of a body of specialized knowledge, and . . . attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for admission into the occupation in the United States.”44 Forms detailing the position and salary, as well as information regarding salaries of U.S. employees in similar positions,45 and any necessary fees are submitted to USCIS by the employer, not by the potential employee.46 The annual quota for the H-1B visa is set at 65,000.47 Additionally, there are 20,000 visas reserved for those with advanced degrees earned from U.S. colleges or universities.48

For the 2009 fiscal year, both the 65,000 allotment and the 20,000 supplemental allotment were filled within the first week after USCIS

46. INSTRUCTIONS, supra note 45, “How to File. A.”
48. See id. (citing 8 U.S.C. § 1184(g)(5)(C)).
began accepting applications. 49 Due to the high demand for H-1B visas and the quota being met so quickly, the USCIS conducts a lottery with the H-1B petitions received. 50 Therefore, it is a game of chance as to whether or not a petitioner will be awarded an H-1B visa in any given year. For those petitioners who are not selected in the lottery, their petition is denied, and they must start over the next year. 51

C. Permanent Work Visas

The Employment Based ("EB") Immigrant Visa is the pathway to legal permanent residency exclusively available to skilled immigrants. 52 Immigrants obtaining EB visas "may live and work permanently anywhere in the United States, own property, and attend public schools, colleges, and universities. They may also join certain branches of the Armed Forces, and apply to become U.S. citizens if they meet certain eligibility requirements." 53 There are five categories of skilled immigrant workers eligible to apply for EB immigrant visas. 54 These categories are divided according to expertise and education, and given preference as such. 55 First preference is reserved for what are commonly known as "priority workers," 56 more specifically, "persons of extraordinary ability in the

53. MONGER & RYTINA, supra note 12, at 1. In order to apply for citizenship through naturalization, the applicant must be a LPR, be at least 18 years of age, and be able to "[d]emonstrate continuous permanent residence in the United States." Thinking About Applying for Naturalization? Use This List to Help You Get Ready!, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., http://www.uscis.gov/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20OSite/Publications/PDFs/G-1151.pdf (last visited Feb. 26, 2011).
54. MONGER & RYTINA, supra note 12, at 2.
56. See MONGER & RYTINA, supra note 12, at 2; see also Bureau of Consular Affairs, U.S. Dep’t of State, Employment-Based Immigrant Visas, TRAVEL.STATE.GOV,
AMERICA'S BRAIN DRAIN

...arks, arts, education, business, or athletics; outstanding professors or researchers; and multinational executives and managers." Qualification as a person of extraordinary ability in one of these fields is "demonstrated by sustained national or international acclaim and . . . achievements [which] have been recognized in the field through extensive documentation." Second preference is given to aliens "who are members of the professions holding advanced degrees or for persons with exceptional ability in the arts, sciences, or business." Under this category, possession of a degree is evidence of exceptional ability, but is insufficient by itself. The third preference "is reserved for professionals, skilled workers, and other workers." Fourth preference is afforded to "special immigrants," including "religious workers, employees of U.S. foreign service posts, [and] retired employees of international organizations." The fifth and final preference category is reserved for investors.

IV. IMMIGRATION PROCESS

A. Obtaining an F-1 Student Visa

Due to the fact that there is no quota for student visas, students enter the United States at a higher rate than other visa classifications—approximately 500,000 aliens come to the United States to study each year. F-1 student visas are allocated to academic students, while M-1 student visas are reserved for vocational students. As mentioned in Part I, this note will only focus on those students attending a U.S. college or university on an F-1 visa.

There are a number of qualifications that must be met in order for foreign students to be eligible for an F-1 Student Visa. Initially, the

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57. Permanent Workers, supra note 55.
59. Permanent Workers, supra note 55; see also 8 U.S.C. § 1153(b)(2).
60. 8 U.S.C. § 1153(b)(2)(C).
61. Permanent Workers, supra note 55.
62. Id.
63. Id. "Investor" is defined as one "who invest[s] $1 million or $500,000 (if the investment is made in a targeted employment area) in a new commercial enterprise that employs at least 10 full-time U.S. workers." Id.
64. ILONA BRAY & CARL FALSTROM, U.S. IMMIGRATION MADE EASY 493 (13th ed. 2007).
65. Id.
students must be accepted at USCIS-approved institutions and be "bona
fide student[s] pursuing a full course of study." The program the
students enroll in must lead to a degree, diploma, certificate, or other
equivalent recognition. Additionally, the students must have adequate
financial resources to attend school "full-time without working." The
students "must be able to speak, read, and write English well enough to
understand the course work." Otherwise, the students must have a
school provided tutor. Lastly, the students must prove intent to return
to their home country upon completion of the course of study.

In addition to these initial requirements, certain students are
ineligible to study certain subjects. For example, aliens from countries
"on the U.S. government's list of supporters of terrorism" are not
able to obtain F-1 Visas to study subjects with "international security
implications such as biochemistry, nuclear physics, or missile
telemetry." There are currently four countries that are believed by the
United States to support terrorism: Cuba, Iran, Sudan, and Syria. To
be designated as a state sponsor of terrorism, a country must "provide

66. Id. at 494; see also Students and Employment, supra note 29. Unfortunately, prospective
students must be cautious when choosing a school because the Attorney General provides a list of
"established institution[s] of learning or other recognized place[s] of study," but that does not
necessarily mean the school is accredited for purposes of the Immigration and Nationality Act.

67. BRAY & FALSTROM, supra note 64, at 494; see also Students and Employment, supra note 29.

68. BRAY & FALSTROM, supra note 64, at 494-95; see also Students and Employment, supra
note 29 (noting that students "must have sufficient funds available for self-support during the entire
proposed course of study").

69. BRAY & FALSTROM, supra note 64, at 495.

70. Id.

71. Id. Of course, it is not possible to know the true intentions of any person, especially a
young person just starting his advanced schooling who does not necessarily know his own
intentions, and the government is well aware of this fact. See id. at 499. However, the prospective
student must be ready and willing to offer evidence of an intent to return to the home country, such
as "leaving behind possessions, property, or family members" in the home country or "having
a job waiting at home after graduation." Id.

72. See id. at 495.

73. Id.

(last visited Mar. 4, 2011). These four countries have been found by the Secretary of State "to have
repeatedly provided support for acts of international terrorism . . . pursuant to . . . section 6(j) of the
Export Administration Act, section 40 of the Arms Export Control Act, and section 620A of the
Foreign Assistance Act." Id.
critical support to non-state terrorist groups” by aiding these groups to obtain “funds, weapons, [and] materials,” as well as securing locations necessary for these groups “to plan and conduct [their] operations.”\textsuperscript{75}

The F-1 Student Visa is valid for the length of time estimated to complete the selected program of study.\textsuperscript{76} Each student may arrive up to thirty days prior to the start of the selected course of study.\textsuperscript{77} Also, as noted earlier, students are also permitted a sixty day grace period at the completion of the program to get their affairs in order before returning to their home country.\textsuperscript{78}

To begin the process of obtaining an F-1 Nonimmigrant Student Visa, the student must first apply to a USCIS-approved U.S. academic institution.\textsuperscript{79} Upon acceptance, there is a long checklist that the alien student must complete which includes, inter alia, obtaining a Certificate of Eligibility from the school, payment of fees, completion of the visa application itself, and assembling important documents such as birth certificate, transcripts, and passport.\textsuperscript{80}

A nonimmigrant student may pursue LPR status while in the United States on an F-1 Student Visa.\textsuperscript{81} However, this may prove to be extremely difficult and even risky for the student under the current law.\textsuperscript{82} Students attempting to apply for LPR status while in the United States on an F-1 visa must prove both that they did not intend on staying in the United States when they first applied for student status and that they will return to their home country if a green card is not obtained by the time the student visa expires.\textsuperscript{83} Furthermore, if the application for LPR status is unsuccessful, the applicant students are at risk of losing their student status.\textsuperscript{84} At this point, the students would have to return home until accepted back into the United States on another visa.\textsuperscript{85}

\textsuperscript{76} Bray & Falstrom, supra note 64, at 500.
\textsuperscript{77} Id. at 501.
\textsuperscript{78} See supra note 34 and accompanying text; see also Bray & Falstrom, supra note 64, at 501.
\textsuperscript{79} Id. at 494-95; see also Students and Employment, supra note 29.
\textsuperscript{80} See Bray & Falstrom, supra note 64, at 501, 03.
\textsuperscript{81} See id. at 502.
\textsuperscript{82} See id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
B. Obtaining an H-1B Temporary Work Visa

An employer must initiate the process for the nonimmigrant employee looking to obtain temporary employment and residency in the United States. To acquire an H-1B visa, the first step is for the employer to file a Labor Condition Application ("LCA") with the Department of Labor ("DOL"). The purpose of the Labor Condition Application for Nonimmigrant Workers ETA Form 9035E is to ensure that similarly situated American workers are not adversely affected by the hiring of the petitioning foreign worker. To demonstrate this, the sponsoring employer must show that the wages and working conditions afforded to foreign workers are at or about the same level as American workers in similar positions, thus discouraging employers from seeking less expensive foreign workers to replace American workers. To further demonstrate this, the employer must show that the application is not being submitted as a result of a current "strike, lockout, or work stoppage." Additionally, the employer must establish and disclose its total current workforce, including the number of H-1B workers it currently employs. The Department of Labor provides the following table to assist employers in determining "whether [it] is H-1B dependent":

<table>
<thead>
<tr>
<th>NUMBER OF FULL-TIME EQUIVALENT EMPLOYEES (U.S. WORKERS AND H-1B WORKERS)</th>
<th>NUMBER OF H-1B NONIMMIGRANT EMPLOYEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 25</td>
<td>8 or more</td>
</tr>
<tr>
<td>26 to 50</td>
<td>13 or more</td>
</tr>
</tbody>
</table>

87. LABOR CONDITION APPLICATION, supra note 45.
88. See INSTRUCTIONS, supra note 45, § H.
89. See id.
90. See id. § H(3).
91. See id. § I.
If an employer exceeds the imposed limit of H-1B employees, shown above, the business is deemed H-1B dependent and must deal with many other obstacles in attesting to prior and future good faith attempts to continue employment of current and future American workers.93 For example, “[p]rior to filing any petition for an H-1B nonimmigrant . . . the employer [must take] good faith steps . . . to recruit U.S. workers for the job for which the nonimmigrant is sought.”94 Throughout this good faith recruiting process, the employer must offer American applicants a level of compensation that is “at least as great” as that offered to the H-1B applicant.95 Furthermore, the “employer [must show that it has offered] the job to any U.S. worker who [has] applied and is equally or better qualified [than] the H-1B nonimmigrant.”96 Additionally, “[t]he employer [cannot] displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a petition for an H-1B nonimmigrant.”97 Also,

[[the employer [cannot] place any H-1B nonimmigrant employed pursuant to [an LCA] with any other employer or at another employer’s worksite [unless] the employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement, and the employer applicant has no contrary knowledge.98

This provision prevents parent companies from applying for H-1B employees only to transfer them to subsidiaries where they “push out”

92. Id. § I(a).  
93. Id. § I.  
94. Id. § I(b)(C).  
95. Id.  
96. Id.  
97. Id. § I(b)(A).  
98. Id. § I(b)(B).
American workers (or other analogous situations). These safeguards help ensure that qualified American citizens will obtain and retain their jobs. Assuming that employers are making honest attempts to hire Americans and filing truthful applications, this process is an effective means of protecting the American worker, thus making employment visa quotas unnecessary, because the only visas requested would be those needed to fill excess positions.

After LCA approval, the employer must next file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS. Through this form, USCIS determines whether a potential employee is eligible for H-1B nonimmigrant visa status. USCIS also uses this form to determine whether the employee is subject to either the 65,000 cap or the additional 20,000 limit. Along with the petition, the employer must submit the certified LCA, evidence of the employee’s education and experience, and terms of employment. Form I-129 may also be used for legal nonimmigrants currently in the United States to extend their stay or to adjust their status.

Following the approval of the I-129 petition, as with any other employee, the employer and employee must both fill out Form I-9, Employment Eligibility Verification. The purpose of this form is to ensure that employers have knowledge of whether the employees they hire are “authorized to work in the United States.” When completing this form, the employee must present documentation to the employer to
establish his identity and employment authorization. Once completed, the employer retains this form and may also retain photocopies of the document(s) presented by the employee. These documents do not get submitted to USCIS during the visa application process, but the employer must be able to present a Form I-9 for each person in its employ at any time as requested by DHS or DOL.

A. Obtaining an EB Permanent Employment Visa

As previously stated, the EB visa is the foreign workers' pathway to LPR status. EB visa holders must complete a three-step process – labor certification, I-140 application submission, and I-485 application submission – to become LPRs. Applying for the EB is quite similar to applying for the H-1B. In order to obtain an EB visa for second or third preference workers, the employer must start the application process by submitting a LCA to the DOL. Unlike the selection process for the H-1B visas, once the LCA is filed with the DOL, the potential employee receives a "priority date," which represents the employee’s "place in line." Upon approval, the employer next files an Immigrant Petition for Alien Worker, Form I-140, with USCIS. For first, fourth, and fifth priority workers, labor certification is not necessary and the employer goes straight to filing Form I-140, at which point the potential employee receives a priority date.

The first step in converting H-1B status to LPR status through an EB visa is also labor certification. Generally, the applicant must have a pending offer of permanent employment from a U.S. company, and the U.S. "employer must . . . file a labor certification request with the Department of Labor’s Employment and Training Administration." Again, following labor certification approval, “the employer must file a

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109. See id. at 5. USCIS provides a list of acceptable documents with the form. See id.
110. Id. at 1-2.
111. Id. at 2.
112. INTELLECTUAL PROPERTY, supra note 8, at 14.
113. Permanent Workers, supra note 55.
114. SPONSOR AN EMPLOYEE, supra note 52.
115. Id.
116. Id.
117. See Permanent Workers, supra note 55.
118. SPONSOR AN EMPLOYEE, supra note 52, at 1.
119. See INTELLECTUAL PROPERTY, supra note 8, at 14.
120. Id.
121. Id.
Petition for Alien Worker (Form I-140)" on behalf of the LPR beneficiary.122 Through this application, the employer must demonstrate that the company is in a stable financial position.123

Once the Form I-140 is approved, the State Department provides the applicant with a visa number, indicating visa availability.124 The employee must then file an I-485 form for the adjustment of status.125

V. CURRENT STATISTICS

In the 2008 fiscal year, 166,511 employment-based legal permanent resident visas were obtained.126 Of these 166,511 EB visas, 22% were for first preference workers, 42% for second preference workers, approximately 29% for third preference, almost 6% for fourth preference, and less than 1% for fifth preference.127 The number of status adjustments is vastly larger than the number of new arrivals obtaining these employment-based permanent visas.128 Of the total, almost 90% were status adjustments, rather than new arrivals.129 Over 95% of priority workers (first preference category) and over 98% of professionals with advanced degrees and aliens of exceptional ability (second preference category) obtaining EB visas were status adjustments as opposed to new arrivals.130 This ratio begins to diminish slightly in skilled workers, professionals, and needed unskilled workers (third preference category) where almost 80% of visas obtained were status adjustments rather than new arrivals.131 A further drop is seen in special immigrants (fourth preference category) where approximately 66% of visas were status adjustments.132 Finally, investors (fifth preference category) have the lowest rate of status adjustments, at only 24%.133

122. Id.
123. Id.
124. Id.
125. Id.
127. See id.
128. See id.
129. See id.
130. See id.
131. See id.
132. See id.
133. See id.
VI. OTHER ROUTES TO LEGAL PERMANENT RESIDENCY

Those who do not fit into any other category of visa can apply for legal permanent residency through the Diversity Visa Program. The purpose of this program is to promote diversity within the United States by encouraging immigration from countries that, in recent years, “have sent the fewest numbers of immigrants to the [United States].” Currently, 50,000 permanent resident visas are available each year through this program. The USCIS conducts an annual lottery to determine the recipients of these visas. Some countries, such as China and India, are not allowed to participate in the lottery due to the high numbers of immigrants coming to the United States from these countries. Additional requirements to participate in the lottery include a high school diploma or two years of work experience. Unlike any other visa application, there is no fee to register for the lottery.

VII. CURRENT PROBLEMS

A number of problems exist for foreigners who attempt to convert from one visa status to another visa status. Dual-intent issues exist for students with F-1 visas since they are “not eligible for employment-based green cards.” Thus, the temporary work visas are very popular among graduating students, but there are several issues that students face when attempting to convert from F-1 status to H-1B status. For example, the H-1B quota is filled before many of the students looking to apply even graduate. To qualify, the student must hold a bachelor’s

134. See Bray & Falstrom, supra note 64, at 232.
135. Id.
136. Id.
137. See id.
138. Id. at 232-34. Other countries not eligible to participate in the diversity lottery are Brazil, Canada, Colombia, Dominican Republic, El Salvador, Haiti, Jamaica, Mexico, Pakistan, Peru, Philippines, Poland, Russia, South Korea, United Kingdom (except Northern Ireland), and Vietnam. Id. at 234.
139. Id. at 233; see also 8 U.S.C. § 1153(c)(2) (2006).
140. See Bray & Falstrom, supra note 64, at 234.
141. Tiger, supra note 47, at 519 (citing 8 U.S.C. § 1184(b)).
143. See id.; see also Tiger, supra note 47, at 519.
degree at the time his employer files an H-1B petition.\textsuperscript{144} Unfortunately for these students, the application period begins on the first business day in April—more than a month before most academic institutions conduct final examinations, much less grant degrees—and fills quickly.\textsuperscript{145} Further, H-1B visas do not become effective for several months after graduation.\textsuperscript{146}

A current temporary solution to fill this gap is the OPT program.\textsuperscript{147} Under this program, a foreign student may accept employment in the United States for up to twelve months after the completion of his schooling;\textsuperscript{148} however, if the student has obtained employment during his school career, the number of months worked prior to graduation will be subtracted from the twelve-month post-graduation allowance.\textsuperscript{149} Students in the STEM fields can apply for a seventeen-month extension, thus providing a maximum of twenty-nine months post-graduation.\textsuperscript{150} Accordingly, a student will be able to apply for a temporary work visa, at most, twice before the OPT program and the extension expire. Unfortunately, many foreign students utilize their OPT allowance during the school year or during summer break to secure internships, externships, apprenticeships, clerkships, or other temporary employment situations related to their studies. So by the time they graduate, they have little to none of their OPT time left, and they are not even able to apply for an H-1B visa one time before their F-1 visa expires, and they are required to leave the country. With the H-1B quota filling so quickly every year, it is simply a gamble as to whether or not one of these students will be selected in the random lottery. Any student who is not lucky enough to receive one of the coveted H-1B visas prior to his F-1 status expiring must leave the United States in order to reapply, or face sanctions.

Harvard also proposed a solution to allow students to take exams earlier.\textsuperscript{151} However, the demand for the H-1B visa is so great this never

\textsuperscript{144} Tiger, supra note 47, at 519 (citing 8 U.S.C. § 1184(i)(1)(A), (B)).
\textsuperscript{145} Id. (citing 8 C.F.R. § 214.2(h)(9)(i)(B) (2007)).
\textsuperscript{146} See id. at 521; see also Beckett, supra note 142, at 1.
\textsuperscript{147} See Tiger, supra note 47, at 518-19.
\textsuperscript{148} See id. at 518 (citing 8 C.F.R. § 214.2(f)(10) (2007)).
\textsuperscript{150} See Tiger, supra note 47, at 518-19 (citing 8 C.F.R. § 214.2(f)(10)(ii)(C)).
\textsuperscript{151} Id. at 520.
AMERICA'S BRAIN DRAIN

came about; applications submitted after the first business day in April are futile. Even if Harvard were to move exam dates forward, the school could not possibly finish the exam period by April 1.

Another solution proposed to prevent “brain drain” was to develop an “Innovation Scholarship” for foreign students in graduate programs in the United States. This proposed scholarship would be coupled with a “fast track” H-1B visa. So long as the student receiving the scholarship received a job offer from an American company within 120 days of graduation, he would “automatically” get an H-1B visa. This plan, however, does not help the current problem for two reasons. First, America does not currently have a problem attracting and retaining students. Each year, approximately 300,000 foreign students enroll in U.S. colleges and universities. Our problem, as a nation, is retaining these students post-graduation. Thus, it makes no fiscal sense to spend money on scholarships to attract students to the United States, especially when we cannot afford to educate our American students.

Second, it does not take into account the H-1B visa quotas. If each graduating student who can find a job gets “handed” an H-1B visa, are there any visas left for those who already hold their degree from a

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152. Id.
153. See id.
155. See id. at 731.
156. Id. at 732.
158. See supra text accompanying notes 141-46.
160. See supra Part IV.B.
United States or foreign university? Are these visas in addition to the current 65,000 H-1B quota? Does the quota get lifted or abolished? These are important issues that this proposed plan does not address. While altruistic in nature, this strategy, on its face, is simply unworkable.

Once a student has passed the hurdles involved in obtaining a temporary work visa, that student is confronted with yet more hurdles to obtain an EB visa. The most significant hurdle is the immense backlog. As of November 2010, there were more than 4.6 million foreigners waiting for EB visas. Of those, approximately 274,000 are from China and another 336,000 are from India, arguably the two most “up-and-coming” countries where a large number of our foreign founders and inventors come from. Unfortunately, the United States limits immigrants from any given country to seven percent of the worldwide level, or around 25,000 to 28,000 annually. Additionally, most recent graduates will not qualify for EB-1 or EB-2 visas. This is quite
unfortunate because both the EB-1 and EB-2 visas are current,\textsuperscript{166} meaning that there is little lag time between the filing of the application and the receipt of a visa number.\textsuperscript{167} Finally, the demand for the EB-3, which is the highest preference category that the vast majority of recent graduates could apply for,\textsuperscript{168} is “well in excess of the Employment Third Preference annual limits [and] a significant wait for a visa must be expected to continue for the indefinite future.”\textsuperscript{169}

VIII. EFFECT OF THE CURRENT PROBLEMS

In the 1970s and 1980s, many countries around the world experienced a brain drain as large numbers of educated foreign professionals migrated to the United States, where the economy was booming.\textsuperscript{170} The current regulations and considerable visa backlogs have led to a reverse brain drain in the United States.\textsuperscript{171} Foreign students are completing their education in the United States, only to return home after graduation, taking their knowledge, expertise, and potential back with them.\textsuperscript{172} The booming economies in China and India are attracting large numbers of educated professionals who believe there are more opportunities there than in the United States.\textsuperscript{173} The United States is losing valuable advanced professionals and resources in large part because the visa wait times are too long. As one study concluded, “[t]he key to maintaining U.S. competitiveness in a global economy is to understand our strengths and to effectively leverage these” and to also

\begin{footnotesize}
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\textsuperscript{166} See ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS, supra note 161.
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\textsuperscript{168} EB-3 visas are open to “[q]ualified immigrants who hold baccalaureate degrees and who are members of the professions.” 8 U.S.C. § 1153(b)(3)(ii). Unlike the EB-1 and EB-2, the degree itself is sufficient to qualify for a permanent work visa under the third preference category.
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\textsuperscript{169} ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS, supra note 161.
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\textsuperscript{171} Vivek Wadhwa, A Reverse Brain Drain, ISSUES IN SCI. & TECH., Spring 2009, at 45, 48.
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\textsuperscript{172} See id. at 46.
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remember that “[s]killed immigrants are one of [the] greatest advantages” that the United States has.\textsuperscript{174}

Moreover, “immigrants have become a significant driving force in the creation of new businesses and intellectual property in the U.S.”\textsuperscript{175} In fact, they create new businesses at almost twice the rate of American citizens.\textsuperscript{176} This substantial gap between immigrant and domestic entrepreneurial activity may be attributable to a number of factors, such as

- a cultural preference for self-employment; language barriers; the inability to find like-paying or better job opportunities in the United States; discrimination; a higher chance for tolerance coupled with a willingness to work longer hours; and community- or family-based support networks that encourage and assist with the entrepreneurial activity.\textsuperscript{177}

Of the U.S. engineering and technology companies founded between 1995 and 2005—Google, Yahoo!, Intel, and eBay, just to name a few\textsuperscript{178}—more than 25% had at least one foreign born key founder.\textsuperscript{179} In 2005, “these immigrant founded companies produced $52 billion in sales and employed 450,000 workers.”\textsuperscript{180} Many of these foreign founders entered the United States as students, and over half of them completed their highest degree at an American university.\textsuperscript{181} Thus, it is imperative that we find a way to retain these foreign students and potential future innovators, as “[t]he U.S. economy depends upon these high rates of entrepreneurship and innovation to maintain its global edge.”\textsuperscript{182}

Professor David P. Weber recognizes the invaluable contributions

\begin{itemize}
\item \textsuperscript{174} VIVEK WADHWA ET AL., AMERICA’S NEW IMMIGRANT ENTREPRENEURS 35 (2007) [hereinafter AMERICA’S NEW IMMIGRANT ENTREPRENEURS], available at http://www.kauffman.org/uploadedfiles/entrep_immigrants_1_61207.pdf.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Weber, supra note 1, at 776.
\item \textsuperscript{177} Id. at 776-77 (citations omitted).
\item \textsuperscript{178} AMERICA’S LOSS IS THE WORLD’S GAIN, supra note 173, at 1.
\item \textsuperscript{179} AMERICA’S NEW IMMIGRANT ENTREPRENEURS, supra note 174, at 4. A “key founder,” for purposes of this study, was defined as a president, CEO, head of development, or Chief Technology Officer. Id. at 9.
\item \textsuperscript{180} Id. at 4.
\item \textsuperscript{182} Id. at 14.
\end{itemize}
of foreign innovators to the U.S. economy, noting that

Regardless of the reason, immigrants are much more likely to be entrepreneurs than native-born individuals, and their success is a boon to the U.S. economy. For example . . . immigrants provide much of the human capital necessary for technological growth. Small businesses are another area in which immigrants have demonstrated considerable success. Somewhat ironically, it appears that immigrants have provided many jobs to native-born laborers. Even historically disadvantaged communities have experienced at worst a neutral effect when incoming immigrants begin to establish businesses in what were traditionally nonimmigrant neighborhoods. 183

Further, native businesses seem to have a higher fail rate than immigrant businesses. 184

Not only do these foreigners contribute extraordinarily to the US economy through innovation and job creation, but they are estimated to contribute greater than $30 billion in taxes to the United States each year. 185 The tax benefits of these immigrants are considerably higher than their undocumented counterparts for two reasons: (1) their salaries are higher due to a general higher level of educational attainment and (2) the fact that they are lawfully present, which allows them access to more jobs than undocumented workers. 186 Beyond the mere fact that they make less money, undocumented immigrants are much harder to collect taxes from because there is no formal record of them residing in the United States, and even if the IRS could locate them, they are often paid in cash, leaving no paper trail of their annual income or expenses necessary to determine their tax liability. 187

Recently, foreign students began returning to their home countries in record numbers. 188 Among the reasons for the sudden increase in

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183. Weber, supra note 1, at 777 (citations omitted).
184. Id.
185. Id. at 778 (citation omitted).
186. See id. at 779 (citation omitted).
187. See, e.g., Michael D. Bonanno, Note, Municipal Identity (Card) Crisis: U.S. Citizenship Values and the San Francisco Municipal I.D. Program, 7 GEO. J.L. & PUB. POL’Y 545, 563 n.93 (2009), Contra Francine J. Lipman, The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation, 9 HARV. LATINO L. REV. 1, 2, 5-6 (2006) (suggesting that illegal immigrants actually pay a higher effective tax rate because they are subject to sales taxes and property taxes, yet they are not afforded the benefits of public services such as Medicaid) (citations omitted).
188. See VIVEK WADHWA ET AL., LOSING THE WORLD’S BEST AND BRIGHTEST: AMERICA’S NEW IMMIGRANT ENTREPRENEURS, PART V, at 5 (2009) [hereinafter LOSING], available at
foreign graduates leaving the United States are apprehension about the future of the U.S. economy and concerns about obtaining work visas. A study conducted in 2008 by a team of student and faculty researchers at Duke University shows that approximately 85% of Chinese and Indian students, then studying in the United States, were concerned about obtaining work visas after graduation; concerns that are well justified considering that as of June 2007, the wait time for an Indian or Chinese citizen to obtain a permanent work visa was nearly four years. Additionally, about 68% of Chinese students and 56% of Indian students studying in the United States were interested in starting up a business, but more than half of them were planning to do so in their home countries; less than 20% were considering doing so in the United States.

Initially, foreign students are drawn to the United States for its internationally recognized educational institutions with substantial resources applied to research. Once in the United States, “Chinese and Indian students showed a significant preference to stay in the [country] after graduation if given a chance.” But the insufficient number of visas available causes long waiting periods to obtain work visas, making it nearly impossible to remain in the United States after graduation. Most students must return to their home countries and wait for a visa to become available if they wish to return to the United States to work. In theory, the wait time for visas may not be a problem, but in reality it is a huge problem, if not a deal breaker, for foreigners wishing to work in the United States. When a student is required to leave the United States after graduation while he waits for a visa, he faces a number of difficulties, such as: (1) the exorbitant expenses associated with moving from one country to another, (2) the emotional toll of leaving friends and colleagues behind, (3) the difficulty of finding

http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/Losing_the_World%27s_Best_and_Brightest.pdf.

189. Id. Students believe that there are “greater opportunities . . . elsewhere in the world.” Id. at 2.

190. See id. at 10 & fig.8. Additionally, 37% of Indian students, 52.8% of European students, and 65% of Chinese students were concerned about obtaining permanent residency in the United States. Id. at 10 & fig.9.

191. See INTELLECTUAL PROPERTY, supra note 8, at 5.

192. See LOSING, supra note 188, at 14 fig.21, 15 fig.23.

193. Id. at 1.

194. Id. at 9.

195. See supra Part VII.
a job in his home country while he waits for an indefinite amount of time for his turn to be at the front of the visa line, and (4) the potential of experiencing a reverse culture shock having spent a significant number of years in the United States. Then, if or when he finally does get a visa, the student will be faced with the same problems as he returns to the United States. This process “is sufficiently arduous that approximately 17.4 percent of new legal immigrants became depressed as a result.”

Since 2004, the H-1B visa has “capped out” every year, many years doing so almost immediately after USCIS began accepting applications. In fiscal years 2007, 2008, and 2009, the quota for H-1B visas was met within fifty-six days, three days, and seven days, respectively. Although the H-1B cap was not met until December 21 in fiscal year 2010 and January 26 in fiscal year 2011, 70% of the fiscal year 2010 quota had been filled just over a month after USCIS began accepting petitions. With the recession and high


197. INTELLECTUAL PROPERTY, supra note 8, at 15.


unemployment rates among Americans at this time, it is not shocking that employers were not hiring as many foreigners in 2009 and 2010.\textsuperscript{203} Additionally, the Employ American Workers Act ("EAWA")\textsuperscript{204} became effective less than two months before USCIS began accepting H-1B applications for the 2010 fiscal year.\textsuperscript{205} Basically, the EAWA considers any company that has received funding under the Troubled Asset Relief Program ("TARP")\textsuperscript{206} to be a de facto H-1B dependent employer.\textsuperscript{207} Thus, these employers cannot hire H-1B employees without passing significant obstacles.\textsuperscript{208} The slow economy, overabundance of American workers, and effective barring of many large employers from hiring temporary nonimmigrant workers caused a much lower demand for H-1B visas in 2009 for the 2010 fiscal year. However, as the economy improves,\textsuperscript{209} unemployment rates decrease,\textsuperscript{210} and the prohibition on sponsoring H-1B employees ends,\textsuperscript{211} the H-1B quota will again be exceeded in the beginning of April as it has been in the past. Furthermore, in fiscal years 2008, 2009, and 2010, the cap for the additional 20,000 H-1B visas set aside for those with Master’s Degrees

\textsuperscript{203} The national unemployment rate was 9.3\% in 2009 and 9.6\% in 2010, among the highest it has been since 1941. \textit{Employment Status of the Civilian Noninstitutional Population, 1940 to Date}, BUREAU OF LABOR STATISTICS, \url{http://www.bls.gov/cps/cpsaatl.pdf} (last visited Apr. 3, 2011) [hereinafter Employment Status]. At that time, the United States was in the final stages of recovering from the Great Depression. See \textit{Milestones: 1921-1936: The Great Depression and U.S. Foreign Policy}, U.S. DEP’T OF STATE, OFFICE OF THE HISTORIAN, \url{http://history.state.gov/milestones/1921-1936/GreatDepression} (last visited Apr. 3, 2011).

\textsuperscript{204} Pub. L. No. 111-5, \S 1611, 123 Stat 115, 305 (2009).


\textsuperscript{206} See id. (citing Employ American Workers Act, Pub. L. No. 111-5, \S 1611, 123 Stat 115, 305 (2009)).

\textsuperscript{207} See id.; see also Employ American Workers Act \S 1611(b)(1)).

\textsuperscript{208} See INSTRUCTIONS, supra note 45, \S 1.

\textsuperscript{209} See, e.g., Javier C. Hernandez, The Market Reaches Highs Not Seen Since 2008, N.Y. TIMES, Mar. 18, 2010, at B9, \url{http://www.nytimes.com/2010/03/18/business/18markets.html} (noting climbing Wall Street indexes and a “growing sense that [it was] time to commit a little more to the market” again); Kim Palmer & Sakari Suoninen, Fed Officials See U.S. Recovery Taking Hold, REUTERS (Mar. 22, 2011), \url{http://www.reuters.com/article/2011/03/22/us-usa-fed-idUSTRE72L4ZQ20110322} (noting that the “recovery seems to have established a firmer footing” and “was gathering momentum”).

\textsuperscript{210} See infra Part IX.

\textsuperscript{211} This provision is only in place for two years ending February 17, 2011. Employ American Workers Act, Pub. L. No. 111-5, \S 1611(e), 123 Stat 115, 305 (2009).

Thus, the effective cutoff date for applications for H-1B visas is before students in U.S. universities are awarded their degrees.

Since the quota is often exceeded within the short period of time that the USCIS is required to accept visa applications, the recipients of H-1B visas are picked randomly from the applications received in that timeframe.\footnote{Simpson, Harrison & Dixon, \textit{supra} note 42, at 1.} Applications that are denied are given no preference the following year,\footnote{See Murthy Law Firm, \textit{See H1B Cap: Status of Random Selection & Advanced Degree Cap}, MURTHYDOTCOM (June 23, 2006), http://www.murthy.com/news/n_random.html (stating that filing fees are returned to the petitioner upon denial and the petitioner must start the process over again the following year).} so some applicants can receive a visa on their first try while others may apply several times without acquiring a visa. If the student is not able to obtain an H-1B visa prior to the OPT extension expiring, he has no choice but to return to his home country. Once outside the United States, the student becomes eligible to apply for employment-based permanent residency because there is no longer a dual intent issue.\footnote{See supra Part I.A.} Unfortunately, most students fall into the third preference EB-3 category,\footnote{See generally 8 U.S.C. § 1153(b) (2006). \textit{See also supra} Part III.C. The first priority EB-1 is reserved for persons of “extraordinary ability . . . which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.” 8 U.S.C. § 1153(b)(1)(A)(i). The second priority EB-2 is reserved for “members of the professions holding advanced degrees . . . or who because of their exceptional ability . . . will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.” 8 U.S.C. § 1153(b)(2)(A). Moreover, “[i]n determining . . . whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award . . . or a license to practice . . . shall not by itself be considered sufficient evidence of such exceptional ability.” 8 U.S.C. § 1153(b)(2)(C). Since the applicants within the purview of this note are recent graduates, they are not likely to meet these high standards, although a select few may. Therefore, the majority of students or recent graduates would fall into the third preference category, which only requires the possession of a bachelor’s degree. \textit{See} 8 U.S.C. § 1153(b)(3)(A)(ii).} which also has a long wait time. Therefore, it could be several years before an EB visa might become available. No one can put his life on hold forever. While waiting for an
EB visa, these students may get jobs in their home countries, buy a house there, and start families there. When they do reach the front of the infinitely long visa line, many will not want to give up all they have worked for in their home country in order to return to the United States. And for those who still wish to come, they must embark, yet again, on the arduous international move and reestablish themselves in a neighborhood, a company, and a community. The obstacles that these intelligent, productive, valued members of society are forced to overcome in order to work in the United States are absolutely absurd when hundreds of thousands of foreigners can "sneak in through a backdoor" and be handed a visa by the government.

IX. ECONOMY TODAY

Unemployment rates in 2009 and 2010 were among the highest that they have been since the final years of recovery from the Great Depression.217 But, by March of 2010, the DOL announced that there were decreases in new unemployment claims.218 These decreases continued through 2010, with intermittent increases in new claims, resulting in overall fewer new unemployment insurance claims in 2010 than in 2009.219 Additionally, throughout 2009 and 2010, mass layoffs steadily decreased.220 In the third quarter of 2009, the United States’

217. See Employment Status, supra note 203. In 2009, the 9.3% unemployment rate was the third highest rate since 1941, coming in approximately 0.4% behind 1982 and 1983. See id. In 2010, the unemployment rate (9.6%) overcame both the 1983 and 2009 rates, making it the second highest rate since 1941 at a mere 0.05% less than the unemployment rate in 1982. See id. Although, considering the extremely slight difference in the 1982 and 2010 rates, it is important to note that the two rates are "[n]ot strictly comparable," because the number of persons in the labor force was substantially increased in 2003 due to the results of the 2000 census. See id.; see also BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT AND EARNINGS 188 (2006), available at http://www.bls.gov/cps/etech METHODS.pdf. While the Bureau of Labor Statistics assures that the 2003 labor force increase did not have a substantial impact on the unemployment rates, for comparisons as close as 0.05%, even a de minimis change may be the difference between the highest and second highest unemployment rate since 1941. See id.


Gross Domestic Product ("GDP"), a commonly used benchmark to determine the health of the economy, was up. However, the United States' Gross Domestic Income ("GDI"), which many economists argue is a more accurate measure of the health of the economy, did not experience the same growth during that time period. Despite the subtle signs that the economy was starting to rebound, there were still many concerns about how and when the economy would recover to pre-December 2007 levels. Regardless of how the economy rebounds, at some point in the future it will. Therefore, while there may currently be a temporary drop in demand for employment-based immigrant and nonimmigrant visas due to the lagging economic conditions, the drop is just that—temporary. As the economy recovers, employers will need more workers, especially those with higher levels of education. This in turn will create a high demand for the H-1B visas. If we keep the current system in place, the limit on H-1B visas will likely hinder the economic recovery by restricting the available labor pool of those individuals with post-secondary and advanced degrees. By repairing this issue before the economy starts its strong upturn, we can actually aid the economic recovery. The following proposal will introduce a plan that will increase the highly educated available labor force, which will directly affect the economic recovery that is, hopefully, in our near future.

X. PROPOSED SOLUTION

A. The Necessity for Change

While the alleged original purpose of instituting caps on

2011). In the first quarter of 2009, the Department of Labor Statistics recorded almost 4,000 mass layoffs nationwide, but by the third quarter of 2010, that number had decreased to below 1,300. Id. While there were slight increases recorded in the last quarter of 2009 and the second quarter of 2010, the overall trend has been a steady decrease in mass layoffs. See id.


222. Id.

immigration was to "preserve the ideal of American homogeneity," many argue that the purpose of limiting immigration in the United States is to ensure that foreign workers do not displace American workers. Such a position, however, is naïve and does not take into account all pertinent economic factors. In order to hire a foreigner, through either a temporary or permanent employment visa, an employer is required to make a bona fide attempt to hire an American first and to show that no American worker was displaced due to the hiring of the foreigner. These restrictions are in place solely to protect American workers. However, there is no comparable impediment for employers hiring illegal immigrants. Americans should be concerned about identifying and removing illegal immigrants and reprimanding the employers who hire them, as opposed to misplacing concern resulting in the institution of arbitrary numerical caps on legal immigrant and nonimmigrant workers.

Often, there are no qualified American workers available and willing to fill a position. In 2000, of all U.S. citizens and foreign-born residents, less than 25% held a Bachelor's degree or higher; conversely, about 69% of Indian immigrants and about 43% of Chinese immigrants did possess such degrees. Since many immigrants tend to be better educated than their American counterparts, it is only logical that they will likely be better qualified and there will be more of them available to take on employment. The real threat comes from illegal immigrants, not legal immigrants and non-immigrants holding valid visas.

Moreover, the foreign students who completed their education in the United States only to return to their home countries "contributed to the tech boom in those countries and arguably spurred the growth of

226. See INSTRUCTIONS, supra note 45, § 1.
227. EDUCATION, supra note 181, at 8 fig.4.
228. Id.
229. Id. at 7. In the second of a five-part study, Vivek Wadhwa and his research team at Duke University compared their findings to data from the 2000 United States Census. Id. They found that, on average, immigrants from Germany, Japan, India, the U.K., Taiwan, and China tended to be better educated than U.S. citizens. Id.
outsourcing of back-office processes as well as of research and development.\textsuperscript{230} When a foreigner is admitted to the United States, either on a temporary or permanent work visa, he puts his salary back into the American economy. He makes daily expenditures that go directly back into the American economy, such as rent, food, and entertainment. When the same foreign worker is denied entry into the United States because an arbitrary numerical quota has been met, his job may be outsourced to him in his home country. In this situation, his salary goes into the economy of his home country, opposed to the U.S. economy. Allowing jobs to leave our shores is potentially riskier for the American economy than allowing additional foreigners to work within our territorial boundaries.

Foreign students acquiring their education in the United States are particularly valuable resources to the country’s economy. As previously noted, there is a “strong relationship between educational attainment . . . entrepreneurship, and innovation among foreign-born founders of U.S.-based engineering and technology firms.”\textsuperscript{231} Not only is there a strong correlation between the education levels and entrepreneurship among foreigners in the United States, but a “majority of immigrant founders came to the United States as students.”\textsuperscript{232} For these reasons, retaining our foreign students post-graduation should be a high priority in order to maintain our global economic edge.

\textbf{B. The Solution}

While immigration law, as a whole, is in desperate need of reform, it is not possible for us to focus on every aspect of immigration in this note. Thus, this note aspires only to improve the pathway to citizenship for foreign students who wish to remain in the United States after graduation to work in their field of expertise. In doing so, this note focuses on reconfiguring the H-1B visas through the implementation of a priority structure and reallocation of visas.

As mentioned in Part VII, one of the problems faced by students who hope to remain in the United States to work after they complete their studies is that the effective cutoff date for the H-1B applications is approximately one month before graduation. This issue is coupled with

\textsuperscript{230} AMERICA’S LOSS IS THE WORLD’S GAIN, supra note 173, at 1.

\textsuperscript{231} EDUCATION, supra note 181, at 2; see also supra text accompanying notes 175-84.

\textsuperscript{232} Id. at 3.
the fact that the H-1B visa requires that the degree be awarded prior to the date the application is submitted. In order to repair this problem, there is a need for the creation and implementation of a new form confirming the student's candidacy for a degree. This form would be filled out by the Office of Academic Records, or equivalent, at the student's school and would be submitted with the H-1B application. This would be a simple form, more or less requiring the appropriate university personnel to verify that the student is in good standing, is eligible to graduate at the end of the semester, and specifying the degree level and field. Then, the students who are selected in the random lottery would be required to show proof that they did actually receive their degree prior to their visa number being issued. With the addition of this simple form, students would not be excluded from the H-1B pool. Accordingly, they would have a better chance of acquiring a temporary visa prior to the expiration of their F-1 visa or OPT extension period. The addition of this form would not be a costly implementation for USCIS, and would be a huge benefit to foreign students, and eventually, our economy. It is important to note that this option will only be available to students receiving their degrees in a given year from a U.S. college or university, and not available to those already holding advanced degrees. Candidates for graduation at foreign institutions must wait until they have actually been awarded their degree to apply for an H-1B visa.

Additionally, it is necessary to create priority levels within the H-1B category. As previously noted, the H-1B visa is open to those in a "specialty occupation," which is defined as "an occupation that requires . . . theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." This note proposes four priority classes based on the applicant's degree level—bachelor's versus master's or higher—and degree granting institution—United States or foreign. This priority classification favors advanced degrees over bachelor's degrees and U.S. colleges and universities over foreign universities. No matter how many foreign citizens are granted temporary or permanent residence, we have a strong interest, as a

233. See supra Part VII.
234. See supra Part III.B.
country, to ensure that the people allowed to penetrate our borders are, and will be, productive members of our society. Thus, the priority classes and the respective quotas are as follows:

1st Priority: Masters Degree or higher from an accredited United States college or university (35,000)

2nd Priority: Masters Degree or higher from an acknowledged foreign college or university (20,000)

3rd Priority: Bachelors Degree from an accredited U.S. college or university (25,000)

4th Priority: Bachelors Degree or higher from an acknowledged foreign college or university (5,000)

These four categories cover all H-1B eligible applicants, since the H-1B requires a formal degree; thus, no current potential applicants are excluded in our plan. Additionally, it should be noted that this priority structure is not solely for students graduating in any specific year; it is applicable to persons who received their degrees in the past as well. The quotas are based on the statutory 65,000 H-1B visa limit plus the additional 20,000 currently reserved for holders of degrees from U.S. educational institutions. Additionally, no new visas are created under this plan. If the statutory visa quota were to be raised in any given year, the higher the level of education attained by an individual, the more money he or she will likely make, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, P23-210, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 2 (2002), available at http://www.census.gov/prod/2002pubs/p23-210.pdf, and the less likely he or she will be to commit a crime. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: OFFENDERS SENTENCED IN U.S. DISTRICT COURTS UNDER THE U.S. SENTENCING COMMISSION GUIDELINES BY PRIMARY OFFENSE AND EDUCATION LEVEL, FISCAL YEAR 2008 tbl.5.28.2008 (2009), available at http://www.albany.edu/sourcebook/pdf/t5282008.pdf.

We have consciously chosen not to further specify visa allocations based on field or specialty. General market forces should effectively distribute these visas into the fields in which they are necessary. In order to apply for the H-1B visa, the applicants must still have a job offer from an American company, and the company must still certify that a good faith attempt was made to hire an American worker prior to offering the job to a foreigner. Thus, the visas should only go to those foreigners who are working in fields where there is a shortage of qualified American workers.

See supra Part IV.B.

There are many who would oppose a plan to increase immigration quotas. Specifically, as one recent article noted, "[i]t is bedrock policy that citizens and noncitizens are to be treated
year, the cap within each priority level would be increased in proportion to the allocations set forth above. In the event that any of the quotas are not met, any additional visas would be made available to the other priority classes in order of priority. For example, if only 32,000 persons who received a master’s degree or higher from a U.S. institution apply for an H-1B visa in a specific year, the remaining 3,000 visas would be made available to those with master’s degrees from foreign institutions. Likewise, if only 18,000 students with a bachelor’s degree from a U.S. university apply for H-1B visas, the remaining 7,000 visas would be offered to those in the first priority class first, with any excess trickling down the line until all of the visas are used or there is no more demand.

In addition to implementing a priority structure within the H-1B visa category, more H-1B visas are needed. As one scholar noted, "[a]llowing (and maintaining) this inflow of highly-skilled human capital provides U.S. industry and universities with leaders in technological fields and ensures that the newly-developed technology will continue to reside in the United States."240 There are only two ways to add more visas to the H-1B category: create new visas or take visas from another category and reallocate them to the H-1B category. Considering the current state of the economy and the generally discontented attitudes of Americans toward immigrants and the immigration system,241 it is better to reallocate than to add more visas at this time. When deciding where to take visas from, family members of H-1B recipients, asylum, and the diversity lottery program were all considered. Without going into considerable depth on a topic that could differently." Adam B. Cox & Eric A. Posner, The Rights of Migrants: An Optimal Contract Framework, 84 N.Y.U. L. REV. 1403, 1404 (2009). It is clear throughout everyday interaction that many people have strong feelings against immigration and immigrants in the United States. Additionally, “other countries [also] draw a sharp line between citizens and noncitizens, and recognize that citizens have more rights than noncitizens do.” Id. Throughout history, immigrants have been viewed and accepted at different degrees. See id. at 1416-17. Increasing immigration and settlement were a main priority in the 1800s, see id., while today much of the country is over-populated. See, e.g., U.S. Immigration, OVERPOPULATION.ORG, http://www.overpopulation.org/immigration.html (last visited Apr. 2, 2011) (“The U.S. population grew from 152 million in 1950 to 270 million in 2002, a 78% increase.”).

240. Weber, supra note 1, at 774.

241. See Immigration, GALLUP, http://www.gallup.com/poll/1660/Immigration.aspx#1 (last visited Mar. 12, 2011). Gallup has conducted polls of Americans’ opinions toward immigration since 1965, with the most recent data from 2010. Id. Although Americans’ opinions have varied greatly since the late 1990s, there was a sharp increase between 2008 and 2009 in the percentage of Americans who felt immigration levels should be decreased, although this had dropped slightly as of July 2010. Id.
easily fill an entire additional note, it was decided that asylum is an important program that should not be disturbed. Additionally, taking visas away from family members of H1-B recipients was a less than optimal solution since one of the primary reasons foreign students have given for deciding to return to their home country, as opposed to staying and working in the United States, is to be closer to family members. If we reduce the number of visas afforded to family members, we will effectively be reducing the demand for employment visas. Hence, this note recommends abandoning the diversity lottery program and reallocating those 50,000 visas specifically to students graduating from U.S. colleges and universities each year. There has already been discussion of ending the diversity lottery, and these visas can be put to a more valuable, economically sound use. These additional visas would be allocated based on the level of degree earned – 30,000 for advanced degrees and 20,000 for undergraduate degrees. Again, advanced degrees are favored, and if the quota is not met for advanced degrees, any additional visas would be made available to those who are graduating with bachelor’s degrees.

Under this plan, students who are degree candidates have a superior claim to the 50,000 temporary employment visas, while retaining an equal right to the other 85,000 visas. This gives students a great advantage over the current system and a much greater chance at staying in the United States to work after graduation. In the event that either group of H-1B visas – the 85,000 open to all degree holders and candidates or the 50,000 set aside for degree candidates – does not meet its quota as a whole, any additional visas would be made available to the other group based on priority level. Additionally, if a priority level is oversubscribed within the first week, a mini-lottery would be held to determine the recipients for each priority category. It is important to note that this proposal does not intend to alter any of the procedural rules currently surrounding the H-1B visas.

Over the last five years, an average of approximately 300,000 F-1 Student Visas have been issued each year. Utilizing the results of the Duke University study, of those approximately 300,000 students graduating each year, approximately half say they would stay in the

242. See supra note 13 and accompanying text.
243. See AMERICA’S LOSS IS THE WORLD’S GAIN, supra note 173, at 3.
244. See supra Part VI.
245. See GANIA, supra note 10, at 53.
246. See CLASSES OF NONIMMIGRANTS ISSUED VISAS, supra note 157.
United States if they had the opportunity. Of those estimated 150,000 who desire to stay in the United States, only a portion of them would get job offers within the United States in order to be eligible for the H-1B visas. While the exact number of graduating students who would actually be applying for an H-1B visa in any given year cannot be known, our plan will send significantly fewer students home if they wish to stay.

This approach would be a benefit to our economy, our schools, and all H-1B applicants. The current students would benefit from a large allotment of visas set aside solely for them. The wait times for a visa would greatly decline, and these students would have a greater chance at obtaining an H-1B prior to the expiration of their OPT time. In turn, they would be able to avoid the cost and stress of multiple international moves. The remaining H-1B applicants would also benefit from the sheer increase in visa quotas and the second and fourth priority classes that ensure that any given year's graduating class does not consume the entire H-1B allowance. Furthermore, the more students who stay, the more money the students would be putting back into our economy, and the fewer jobs our companies would be outsourcing to other countries. Finally, there is some argument to be made that if we are showing a greater preference to those who obtain their degrees at one of our universities, some students will choose to study in the United States, as opposed to their home country, in order to receive preferential treatment when they apply for temporary work visas.

XI. CONCLUSION

Gaining permanent or temporary citizenship in the United States is not a natural right; it is a right that we, as a country, graciously afford to citizens of other countries, just as most other countries afford equivalent opportunities to U.S. citizens. We have a vested interest in screening those who wish to enter the United States in order to protect our citizens. We are not only interested in protecting our citizens from terrorists entering the country, but also from threats as seemingly harmless as foreign citizens “stealing” jobs from U.S. citizens, as well as protecting our economy. While there are some benefits of allowing entry to and

247. LOSING, supra note 188, at 9.
retaining a number of unskilled immigrants, there are numerous advantages to retaining those persons who can make positive contributions to our economy and our society.

This note does not propose to increase the number of unskilled workers for a number of reasons. As other academics have noted,

low-skilled immigrants (documented or otherwise) present the most costly (or least beneficial) segment of the immigrant community to the receiving country. These low-income, low-skilled (documented or otherwise) laborers also typically create a negative fiscal impact on the local state economy by receiving more state-provided benefits than they contribute in taxes. Studies have shown that while even immigration of this kind typically increases overall societal wealth by reducing the cost of goods and labor, the immigration of low-skilled laborers generally provokes two fears: that immigrants will adversely affect the domestic labor market, and that they will increase the fiscal burden of native-born residents.\(^249\)

For the foregoing reasons, this proposal is limited to increasing the quotas for only those skilled workers who would help to improve the troubled economy of the United States today. Further, "[t]he groups that are most beneficial are those that raise U.S. productivity and pay more in taxes than they receive in government benefits (direct and indirect). Not surprisingly, this group tends to include highly-skilled or otherwise successful newcomers who are usually temporary immigrants, or employment-based permanent immigrants."\(^250\)

By allocating more temporary employment visas to educated foreigners, as opposed to concerning ourselves with how many representatives of each country we afford the opportunity to reside and work in the United States, we can increase the overall productivity of the nation. We will benefit from, inter alia, more jobs, a stronger, more stable economy, and a more productive, capable labor pool. By designating a preference to those who come to the United States to study, we further promote our colleges and universities, bring money into our economy, and increase the availability of educated persons in the labor force. Whether any individual citizen is a proponent of immigration or not, the United States will allow and encourage a certain number of immigrants and nonimmigrants to come to the United States

\(^{249}\) Weber, supra note 1, at 769 (citations omitted).

\(^{250}\) Id. at 773 (citations omitted).
for a variety of purposes. If we are going to invite foreigners into our nation, our community, and our lives, we should, at a minimum, ensure that these individuals are capable of giving back to our nation.

Students are invaluable resources; whether they were born in the United States, India, or Iceland is irrelevant to the precious potential that they possess. Students represent our future; they are our tomorrow. As a nation, we have an undeniably compelling interest in ensuring that tomorrow’s CEOs, doctors, engineers, and professors, just to name a few, are the crème de la crème. The United States is a global leader, and in order to facilitate the preservation of that title, we must focus on sustaining and enhancing our schools, our students, and our future workforce. Granted, our first priority should be U.S. citizens, but a large number of our students are not attaining the levels of accomplishment that many foreigners are. If or when the day comes that we can raise the quality of our primary and secondary education system, and the desire and ability of our American students to attend postsecondary schools, to a point where we can maintain our global edge with little or no assistance from foreign born students and workers, then the immigration system should, again, be altered to account for the lack of need. But until then, we must open our doors to these educated, innovative foreigners and utilize all that they have to offer our country.

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* J.D. Candidate, 2011, Hofstra University School of Law. I would like to thank my parents, Karen and Dallas Burgdorf, for their continuous support and confidence in me, for without them, I would not be where I am today. Also, my remarkable daughters, Taylor and Peyton, who make every day more glorious than the last, and my husband, Josh Chester, who helped make law school possible. Additionally, I would like to thank all of the journal staff who assisted in the editing process, and specifically Anthony Serrano, Brian Conboy, and Annette Lalic, whose dedication is unparalleled. And last, but certainly not least, I would like to thank my incredible co-author, Amanda Cully, whose amazing research and months of hard work were imperative to this accomplishment.

** J.D. Candidate, 2011, Hofstra University School of Law. I would like to thank my family for all of their love and support throughout the years. I would also like to thank Jordan Kirshner for always pushing and encouraging me to reach my full potential. I would like to thank Anthony Serrano, Brian Conboy, and Annette Lalic for the countless hours and endless labor you have put into this journal, without which this publication would not be possible. I would especially like to thank my partner, Christine Chester, for all of your hard work and dedication; I could never have done this without you.