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## Reforming America's Employment-Based Immigration System in a Post-Trump Era

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## Reforming America's Employment-Based Immigration System in a Post-Trump Era

### Cover Page Footnote

◇ Candidate for Juris Doctor, Notre Dame Law School, 2022; Bachelor of Arts in Political Science and Philosophy, University of Chicago, 2017. I would like to thank my paralegal supervisor, Katherine Ortigara, and the rest of the Immigration team in Sidley Austin's Chicago office for teaching me everything I know about business immigration. I would also like to thank the members of the Notre Dame Journal of International and Comparative Law for their thorough and attentive editing.

**REFORMING AMERICA’S EMPLOYMENT-BASED IMMIGRATION SYSTEM IN A  
POST-TRUMP ERA**

CHRISTIAN JUAN PALACIOS\*

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*What do we have that they should want?  
We have a wall to work upon!  
We have work and they have none  
And our work is never done  
My children, my children  
And the war is never won  
The enemy is poverty  
And the wall keeps out the enemy  
And we build the wall to keep us free  
That's why we build the wall<sup>1</sup>*

Anais Mitchell’s multi-Tony Award-nominated Broadway musical, *Hadestown*, is a modern retelling of the myth of Orpheus and Eurydice, boasting a formidable soundtrack containing a variety of memorable songs inspired by the New Orleans style of jazz in which the play is set.<sup>2</sup> One of the most notable numbers, however, is sung by Hades himself to his underworld employees, as they engage in a soul-crushing project of building a wall in exchange for economic security. “Why do we build the wall?” Hades asks his workers in the haunting, gravelly voice of Patrick Page, to which they respond, “We build the

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<sup>1</sup> ANAIS MITCHELL, *Why We Build the Wall*, HADESTOWN: THE MUSICAL (2006).

<sup>2</sup> *Id.*

wall to keep us free [...] the wall keeps out the enemy.”<sup>3</sup> Although Mitchell wrote the number in 2006, well before the election of President Donald J. Trump, this melody serves as an elegant synopsis for America’s immigration policy for the better part of two decades.<sup>4</sup> President Trump championed a literal wall along the southern border between the United States and Mexico.<sup>5</sup> However, even well before his election, a legal wall was built, brick by brick, in order to make it more difficult for immigrants to come to the United States through legal means. President Joe Biden has an opportunity to undo the damage left by the previous administration. However, as of now, he has shown no willingness to roll back the changes made to employment-based immigration to the United States.<sup>6</sup>

This Note will explore the potential ramifications of this legal wall, and the efforts of the Trump administration to limit employment-based immigration into the United States. Although President Trump was only in office for a single term, his presidency may have caused irreparable harm to the United States’ credibility abroad, international governance, and global human rights. All of these important principles of international relations are intimately connected to domestic immigration law. Furthermore, a cornerstone of the U.S. economy has always been America’s ability to attract skilled labor and entrepreneurial immigrants from foreign countries. In recent years, however, there have been a variety of institutional roadblocks implemented by The United States Citizenship and Immigration Services (USCIS) making it more difficult for young foreign nationals to come to the United States and pursue their business ventures. In a response to these administrative roadblocks, the federal government should create a new type of employment-based visa classification, aimed at attracting young entrepreneurs, in order to increase American competitiveness and remain true to the promise of equal opportunity. The failures of the current immigration system are threefold: (1) it is difficult and unwieldy to transition from one employment-based immigration classification to the next because (2) the visa is tethered to continuous employment at the foreign national’s sponsoring company, which (3) leads to a disincentive for young foreign nationals from remaining in the U.S. once they receive their degree.

Part I of this Note will provide a general background of the employment-based non-immigrant visa policies that exist in the status quo, and how they have evolved over the years. It will focus specifically on the Trump administration’s response to employment-based immigration, and the effects of the COVID-19

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<sup>3</sup> *Id.*

<sup>4</sup> Anaïs Mitchell, *Why We Build The Wall*, HUFFPOST (Nov. 4, 2016), [https://www.huffpost.com/entry/why-we-build-the-wall\\_b\\_581c9cb7e4b044f827a78c0a](https://www.huffpost.com/entry/why-we-build-the-wall_b_581c9cb7e4b044f827a78c0a) (stating “I’ve taken to saying, when I play ‘Why We Build the Wall’ now at my own shows: ‘This song is ten years old... Any resemblance of any contemporary political figures to the King of the Underworld is purely coincidental.’ But we all know the Underworld Boss/King archetype when we see him. Let’s not elect him President.”).

<sup>5</sup> John Burnett, *Contractors Dynamite Mountains, Bulldoze Desert in Race to Build Trump’s Border Wall*, NAT. PUB. RADIO (Dec. 11, 2020), <https://www.gpb.org/news/2020/12/11/contractors-dynamite-mountains-bulldoze-desert-in-race-build-trumps-border-wall>.

<sup>6</sup> When one thinks of the differences between Presidents Trump and Biden, the difference between their stances on immigration seem drastic. This is true, to some extent, for humanitarian visas like asylum applications and the diversity lottery, however on employment-based immigration, Trump and Biden often invoke the same rhetoric of “America First” and “Buy America Hire America.” At the root of these ideas are protectionist philosophies that are hostile towards young jobseekers from overseas that receive education within the U.S. and hope to stay post-graduation.

pandemic on immigration policy more generally. Part II will provide alternatives to America's complicated model, focusing on alternatives employed by Canada, Australia, and the European Union. This Note will argue that America needs a new visa category in order to supplement the shortcomings of one of the most popular employment-based visas in the status quo: The H-1B. If the United States fails to implement new immigration policies, it will significantly harm America's ability to compete with foreign nations and erode our country's cultural identity as a nation of immigrants.

## I. PART I: AN OVERVIEW OF THE UNITED STATES EMPLOYMENT-BASED IMMIGRATION SYSTEM

The United States has one of the most complicated immigration systems in the world, and it stands in sharp contrast to the models employed by most European and Latin American countries.<sup>7</sup> Two of the most common ways that a foreign national can obtain work authorization in the United States is to qualify for a non-immigrant work visa or obtain subsidiary sponsorship through one of his or her family members. There are thirty-four different non-immigrant visa classifications<sup>8</sup> that any given foreign national can qualify for. The most common types of employment-based, non-immigrant visa classifications include the H-1B visa and the L-1 visa.<sup>9</sup> Foreign nationals from certain countries can qualify for unique work permits, such as the E-3 visa (exclusive to Australian foreign nationals),<sup>10</sup> the H-1B1 (exclusive to Singaporean or Chilean foreign nationals),<sup>11</sup> or a TN visa (exclusive to foreign nationals from Mexico or

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<sup>7</sup>Many countries use a "point-based" system of immigration that determines an immigrant's ability to gain work authorization and legal permanent residence based on several points. Such points might include factors such as education level, wealth, connection to the country, language fluency, existing job offers, and other variables. See Adam Donald, *Immigration points-based systems compared*, BBC (June 1, 2016), <https://www.bbc.com/news/uk-politics-29594642>. President Trump has called on the U.S. to shift towards a similar point-based model, or what he calls a "merit-based model." The merit systems, employed in Europe, Canada, and Australia undergo frequent reshaping every few years in order to meet changing policy goals. This is something that the U.S. has not done, and up until recently, U.S. immigration policy has largely remained unchanged. See David Iaconangelo, *How would 'merit-based systems change US immigration?*, THE CHRISTIAN SCI. MONITOR (Mar 2, 2017), <https://www.csmonitor.com/USA/Politics/2017/0302/How-would-merit-based-systems-change-US-immigration>. This system is articulated in further detail in Part II of the Note.

<sup>8</sup>The full list can be found at the State Department's website. See U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFAIRS (last accessed: Dec. 20, 2020), <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html>.

<sup>9</sup>H and L visas are popular for a variety of reasons. The H-1B provides a certain level of portability when compared to other visa classifications, as well as provides the opportunity for derivative beneficiary work sponsorship and being able to declare "dual intent" (*i.e.*, being able to pursue legal permanent residency to the U.S. while working under the H). The L-1A and L-1B visas have many of the same advantages as the H, however they are reserved for foreign nationals that have been employed by the petitioning company for a year abroad. See SGM Law Group, *How the H-1B Visa Benefits Foreign Workers* (last visited Dec. 20, 2020) <https://www.immi-usa.com/h1b-visa/h1b-visa-benefits>; see also U.S. CITIZENSHIP & IMMIGR. SERVS., L Visas (L-1A and L-1B) for Temporary Workers, (last visited Dec. 20, 2020), <https://www.uscis.gov/forms/explore-my-options/l-visas-l-1a-and-l-1b-for-temporary-workers>.

<sup>10</sup>U.S. CITIZENSHIP & IMMIGR. SERVS., E-3 SPECIALTY OCCUPATION WORKERS FROM AUSTRALIA (last visited Dec. 20, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-3-specialty-occupation-workers-from-australia>.

<sup>11</sup>While the H-1B1 program is governed by many of the same rules as the H-1B program, the former

Canada).<sup>12</sup> There are also occupation-specific visas such as the P-visa for artists,<sup>13</sup> the R-1 visa for religious workers,<sup>14</sup> and the H-2A visa for temporary agricultural workers.<sup>15</sup> Perhaps one of the most difficult work visas to obtain is the O-1 visa, also known as the “genius visa,” for foreign nationals that possess extraordinary abilities in the arts and sciences.<sup>16</sup>

Each of these individual visa classifications carry particular criteria and are almost impossible to navigate on one’s own, especially considering the individuals most in need of these visa classifications tend to be non-native English speakers. Because of the administrative red tape and bureaucratic regime, no single visa can provide the flexibility necessary for innovative foreign entrepreneurs to leave their employers at will, effectively creating an unscalable legal wall. In addition to disincentivizing entrepreneurs from coming to the United States, this immigration regime also makes it difficult for young academics, fresh out of graduate school, to remain in the U.S. without a willing employer to sponsor their work authorization. This Note will focus primarily on the ineffectiveness of the H-1B visa category, and the recent changes to the visa program employed by the Trump administration. In order to continue attracting talented foreign nationals to the United States, a new employment-based visa classification must be created in order to provide the flexibility necessary to keep America competitive in the 21<sup>st</sup> century.

#### A. A BRIEF HISTORY OF THE H-1B VISA PROGRAM

The origins of the H-1B program began in 1952, with the Immigration and Nationality Act,<sup>17</sup> creating the first H-1 category. The program was later given substance when Congress passed The Immigration Act of 1990.<sup>18</sup> The purpose of the Act was to provide foreign nationals that possessed special skills with temporary work authorization.<sup>19</sup> In order to qualify for this visa, employers need to prove that the position they seek to hire the foreign national for is a “specialty occupation.”<sup>20</sup> A specialty occupation requires the application of specialized

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visa is available exclusively for Chilean and Singaporean foreign nationals and limited to 1,400 and 5,400 approvals respectively. See U.S. DEP’T OF LABOR, H-1B1 PROGRAM (last visited Dec. 20, 2020), <https://www.dol.gov/agencies/whd/immigration/h1b1>.

12 U.S. CITIZENSHIP & IMMIGR. SERVS., TN NAFTA PROFESSIONALS (last visited Dec. 20, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/tn-nafta-professionals>.

13 The P visa is a short-term work visa available to outstanding athletes, athletic teams, and entertainment companies with an offer of employment in the United States. See Immigration Solutions, P VISA (last visited Dec. 20, 2020), <https://immsolutionsllc.com/work-visas/non-immigrant-visas/p-visa>.

14 U.S. CITIZENSHIP & IMMIGR. SERVS., R-1 NONIMMIGRANT RELIGIOUS WORKERS (last visited Dec. 20, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/r-1-nonimmigrant-religious-worker>.

15 U.S. CITIZENSHIP & IMMIGR. SERVS., H-2A TEMPORARY AGRICULTURAL WORKERS, (last visited Dec. 21, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers>.

16 U.S. CITIZENSHIP & IMMIGR. SERVS., O-1 VISA: INDIVIDUALS WITH EXTRAORDINARY ABILITY OR ACHIEVEMENT (last visited Dec. 21, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/o-1-visa-individuals-with-extraordinary-ability-or-achievement>.

17 Immigration and Nationality Act of 1952, Pub. L. No. 82-414.

18 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The H-1B visa requirements are found in section 101(a)(15)(H).

19 Karen Jensen, *Barriers to H-1B Visa Sponsorship in the IT Consulting Industry: The Economic Incentive to Alter H-1B Policy*, 35 FORDHAM INT’L L.J. 1027 (2017).

20 See Immigration Act of 1990, *supra* note 18.

knowledge and a bachelor's degree or some amount of work experience.<sup>21</sup> These visas are typically issued in three-year increments for a total of six years. The H-1B visa is distributed via a "lottery" system, where employers submit petitions to the United States Citizenship and Immigration Services (USCIS).<sup>22</sup> USCIS then makes two drawings, first selecting from a pool of submissions containing foreign nationals that have a master's degree or higher (the "Master's Cap"), and then, drawing from the rest of the petition pool (the "Regular Cap").<sup>23</sup>

The number of H-1B petitions awarded can vary by year, however, typically only 65,000 are selected for any given fiscal year. The limit on the number of H-1B visas was not set until the beginning of the 1990s, when The Immigration Act (IMMACT 90) passed in 1992, limited the number of visas to 65,000.<sup>24</sup> Congress temporarily increased the cap limit to 195,000 for fiscal years 2001, 2002, and 2003 via The American Competitiveness Twenty-First Century Act (AC21).<sup>25</sup> The cap was not met within these three years. The following year, in 2004, Congress enacted the H-1B Visa Reform Act which increased the cap by 20,000 H-1B petitions, requiring that those first 20,000 be reserved for foreign nationals that have a master's degree, or above.<sup>26</sup>

Prior to filing the H-1B petition with USCIS, the employer must submit a Labor Condition Application (LCA) with the Department of Labor, attesting to a variety of details regarding the employee's proposed job, including the wage level to be paid to the worker, as well as the employee's work site.<sup>27</sup> Throughout the debate on immigration reform, the LCA has been at the center of debate because it serves as one of the primary restrictions on how mobile the H-1B can become. A foreign national is unable to work at any site not listed in the LCA agreement. This is primarily done to ensure that consulting and outsourcing companies are not having their employees work entirely remotely.<sup>28</sup> In reality, it makes the H-1B visa incredibly immobile and difficult to use. Foreign nationals that leave their positions or are terminated only have 60 days to find a new employment sponsor where they perform similar job duties.<sup>29</sup> If they are unsuccessful, they will accrue unlawful residence within the country.

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<sup>21</sup> *Id.*

<sup>22</sup> Siskind Susser PC, THE H-1B CAP (last visited Dec. 27, 2020), <https://www.visalaw.com/practice-areas/healthcare-immigration-law/h-1b-physicians/hcip-the-h-1b-cap/>.

<sup>23</sup> *Id.*

<sup>24</sup> Immigration Act of 1990, Pub. L. 101-649 (Nov. 29, 1990).

<sup>25</sup> American Competitiveness in the Twenty-First Century, Public Law 106-313 (Oct. 17, 2000), <https://www.govinfo.gov/content/pkg/PLAW-106publ313/pdf/PLAW-106publ313.pdf>.

<sup>26</sup> U.S. Citizenship and Immigration Services, Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23775 (May 5, 2005), <https://www.federalregister.gov/documents/2005/05/05/05-8992/allocation-of-additional-h-1b-visas-created-by-the-h-1b-visa-reform-act-of-2004>.

<sup>27</sup> See U.S. DEP'T OF LABOR, LABOR CONDITION APPLICATION (LCA) SPECIALTY OCCUPATIONS WITH THE H-1B, H-1B1 AND E-3 PROGRAMS (last visited Dec. 28, 2020), <https://flag.dol.gov/programs/lca>. The LCA also includes additional details, asking the employer to classify what type of employment they are hiring the foreign national into. The Standard Occupational Code, or "SOC Code" is used to determine the prevailing wage amount for any occupation. Immigration officers look to the SOC Code, rather than the foreign national's job title or any accompanying letter of support from the petitioning organization when attempting to determine whether it is a specialty occupation. Prior to the most recent policy change (detailed below) a level 1 salary for any given SOC category was substantially below market. See Emily Sumner, *How Can You Avoid an H-1B RFE? Part 1: Specialty Occupation RFEs*, SUMNER IMMIGRATION LAW (July 10, 2018).

<sup>28</sup> Danielle M. Drago, *Losing the Best and Brightest: The Disappearing Wage Premium for H-1B Visa Recipients H-1B Visas in the Technology Industry*, 17 VAND. J. ENT. & TECH. L. 1051 (2015).

<sup>29</sup> This was of particular concern during the COVID-19 pandemic. Foreign nationals that were laid off

There have been many critics of the program, from liberal and conservative circles alike. The conservative critics of the program argue that the H-1B program displaces qualified U.S. workers while liberal critics argue that the system makes it easy to underpay foreign laborers.<sup>30</sup> The Economic Policy Institute released a study in May of 2020 that found that the H-1B program was deeply flawed.<sup>31</sup> First, the EPI study revealed that the Department of Labor allowed H-1B employers to undercut local wages.<sup>32</sup> Over 60% of the H-1B positions certified by the DOL were assigned wage levels well below the median wage level for the occupation.<sup>33</sup> Second, the EPI study found that a small number of employers dominated the H-1B program.<sup>34</sup> In fact, the top thirty H-1B employers accounted for over one in four of the 389,000 H-1B petitions approved in 2019.<sup>35</sup> Out of the top thirty employers, half of them use an outsourcing business model to provide staff for third-party clients, instead of employing workers directly to fill a specific need. These thirty employers, which include Amazon, Microsoft, Walmart, Google, Apple, and Facebook, all pay below the local median wage level.<sup>36</sup>

### B. BUSINESS IMMIGRATION IN THE AGE OF COVID-19

With the election of Donald J. Trump, there came a wide range of changes to the American immigration system. Most of these policies were targeted at diversity lottery applicants and asylum seekers.<sup>37</sup> These visas, while incredibly important from a humanitarian perspective, make up a small fraction of the number of legal immigrants that come to the U.S. on a yearly basis.<sup>38</sup> The more significant changes came from the Trump administration's revision of the H-1B system. At first, it was an incremental change, making it more difficult for H-1B extensions and adjustments to be approved.<sup>39</sup> Then the Trump administration increased the filing fees associated with submitting an H-1B. In 2019, Trump's

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from their jobs and were unable to find new employment were technically residing within the country illegally. However, because of the travel restrictions because of the pandemic, it was impossible for them to return to their country of origin even if they wanted to, creating a catch-22 situation.

30 See Derek Thompson, *Is the H-1B Program a Cynical Attempt to Undercut American Workers?* THE ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/business/archive/2017/02/the-dark-side-of-the-h-1b-program/516813/>. But see Kirk Doran, et. al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries*, NBER WORKING PAPER SERIES (Feb. 2016).

31 Daniel Costa & Ron Hira, *H-1B visas and prevailing wage levels*, ECONOMIC POLICY INSTITUTE (May 4, 2020), [epi.org/186895](http://epi.org/186895).

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 Shannon Dooling, *Diversity Visa Lottery Winners Are Out Of Luck With Trump's Ban On The Program*, WBUR NEWS (July 18, 2020), <https://www.wbur.org/news/2020/07/18/diversity-visa-lottery-winners-trump-ban>.

38 There are only 55,000 diversity lottery recipients each year. This is a small fraction of the total number of immigration visas issued on any given year. See U.S. DEP'T. OF STATE, DIVERSITY VISA PROGRAM, DV 2019-2021: NUMBER OF ENTRIES DURING EACH ONLINE REGISTRATION PERIOD BY REGION AND COUNTRY OF CHARGEABILITY (2021). Only 29,916 refugees were admitted to the United States in 2019. An additional 46,508 individuals were granted asylum, 27,643 of which were granted affirmatively, and 18,865 of which were granted defensively. See Ryan Baugh, REFUGEES AND ASYLEES: 2019: ANNUAL FLOW REPORT (Sept. 2020).

39 By "H-1B extensions and adjustments" I mean to say that even though the initial application was approved, extending the foreign national's status beyond the original 3-year approval became increasingly difficult.



USCIS took drastic actions to disrupt the H-1B system's selection method. There are three ways that the Trump administration altered the employment-based non-immigrant visa landscape.

First, beginning Fiscal Year 2019, USCIS implemented a new 'electronic filing system' which did away with the up-front filing fees previously required to sponsor a beneficiary and instead replaced it with a 10-dollar charge to enter the foreign national's name into an online database.<sup>40</sup> This effectively did away with the previous financial barriers to entry and gave consulting companies the ability to file substantially more petitions without committing to a prevailing wage level, or salary for their employee. This may have also had the unintended effect of making it easier for outsourcing companies to file "frivolous" H-1B petitions without bearing any of the risks. Prior to the electronic filing system, employers were responsible for attaching valid checks to the H-1B petition. If the petition was selected in the lottery, the check would be cashed; if the check was deficient, however, there was a good chance that the H-1B would be rejected. Thus, it was in the employer's best interest to be economically restrained when filing H-1B petitions with USCIS. With the advent of the electronic filing system, the employer simply paid a ten-dollar fee to enter the foreign national's name onto an online database. If the foreign national's name was selected, then the company would be responsible for paying the fees associated with the petition filing. A more significant cost that the employer avoided as a consequence of this new filing system was attorney's fees. Prior to 2019, employers often paid law firms a substantial amount of money to draft and assemble the necessary documents to file an H-1B.<sup>41</sup> This past fiscal year, none of the time and labor traditionally associated with filing a petition in the lottery was necessary because of the new filing method. These observations are not intended to criticize the high levels of petitions sent by employers for Fiscal Year 2020. Rather, I would argue that this administrative change was counterproductive to the Trump administration's goals. There is not yet any evidence that Biden intends on changing the current electronic filing system.

Second, on June 22, 2020, the Trump administration issued an order that temporarily suspended the approval of H-1B, H-2B, J and L class non-immigrant employment visas in a move to help economic recovery.<sup>42</sup> Additionally, the approval of new H-1B petitions was halted until January 1st, 2021.<sup>43</sup> In the executive order, the administration claimed its intention was to move to a merit-based system of immigration and that it would "reform [the] immigration system to prioritize the highest-skilled workers and protect American jobs."<sup>44</sup> This

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40 U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS ANNOUNCES IMPLEMENTATION OF H-1B ELECTRONIC REGISTRATION PROCESS FOR FISCAL YEAR 2021 CAP SEASON (Dec. 6, 2019), <https://www.uscis.gov/news/news-releases/uscis-announces-implementation-of-h-1b-electronic-registration-process-for-fiscal-year-2021-cap>.

41 Speaking primarily from personal experience, filing an H-1B petition involves drafting five different immigration forms only after corresponding with the foreign national and obtaining their relevant immigration documents, education credentials, and other relevant company documents and proof of employment. The entire process could take over 10 billable hours. This is no small expense for an attorney with even a modest billing rate.

42 The administration used 212(f) of the Immigration and Nationality Act in order to suspend H-1B and L-1 visa holders in a proclamation issued in June 2020. See THE WHITE HOUSE, PRESIDENT DONALD J. TRUMP IS PUTTING AMERICAN WORKERS FIRST AS WE RESTORE OUR ECONOMY TO GREATNESS (June 22, 2020).

43 *Id.*

44 *Id.*

change made very little sense considering the industries hit hardest by the coronavirus epidemic were not dominated by STEM workers but were rather employees in the hospitality and retail sectors.<sup>45</sup> The main beneficiaries of H-1B petitions, as mentioned previously, are outsourcing firms that rely on science and technology workers.

Thirdly, in October of 2020, the Trump administration announced another drastic change to the H-1B visa lottery, namely, attempting to eliminate the lottery altogether.<sup>46</sup> The plan was to eliminate the lottery and replace it with wage-based selection instead. The number of H-1B visas issued would remain the same (85,000), however, the visas would be awarded first to the individuals in the highest of the four wage categories, then to foreign nationals on the third level, and then the second, and finally the first, until all of the available visas had been issued. If fewer than 85,000 applications were submitted prior to the initial two-week period, then USCIS would continue to accept applications until the cap was reached.<sup>47</sup> Critics of this proposal pointed out that the new system would preference older, more seasoned workers, at the expense of younger workers, who were early in their careers and were not paid higher salaries. As Stuart Anderson, the executive director of the National Foundation for American Policy notes, “You’re cutting out the future great performers who companies have identified as being valuable but given their level of experience they don’t yet warrant the highest salary levels.”<sup>48</sup> This would have the effect of deterring foreign students from attending U.S. universities because their chances of receiving H-1B sponsorship after graduation would be greatly reduced.<sup>49</sup>

There are some that believe that this policy change would have positive effects on the U.S. economy, however. Ron Hira, a Howard professor, and researcher at the Economic Policy Institute, points out that there are usually enough applications at the two highest wage levels to meet the 85,000 cap. This means that companies will have to pay their workers competitive salaries in order to obtain visa sponsorship. The Trump rules were meant to explicitly target the unique problem that outsourcing companies pose to the current system. This rule change is currently being challenged in the courts.<sup>50</sup> The administration attempted to circumvent certain procedural requirements that would typically be associated with a change of this magnitude, such as bypassing the White House’s budget office as well as soliciting public feedback before issuing the final rule change.<sup>51</sup> In the weeks before the rule change took effect, the technology firms that were the target of the changes took to the courts to sue the outgoing Trump

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45 The unemployment rate for computer occupations was 2.3% in November 2020, compared to 3.0% in January 2020. See Stuart Anderson, *Trump Ignores Jobs Data to Extend H-1B Visa and Immigration Bans*, FORBES (Jan. 1, 2021), <https://www.forbes.com/sites/stuartanderson/2021/01/01/trump-ignores-jobs-data-to-extend-h-1b-visa-and-immigration-bans/?sh=9962e585821d>.

46 Ethan Baron, *Trump administration proposes to scrap H-1B visa lottery, favor high-wage jobs*, THE CHICAGO TRIBUNE (Oct. 29, 2020), <https://www.chicagotribune.com/business/ct-biz-h1b-visa-lottery-trump-proposal-20201029-yr7goetq2nfxjkdoh4ibpuu6u-story.html>.

47 *Id.*

48 *Id.*

49 *Id.*

50 Stuart Anderson, *Tech Companies File \$350 Million Lawsuit Over H-1B Visa Fees*, FORBES (Jan. 27, 2020), <https://www.forbes.com/sites/stuartanderson/2020/01/27/tech-companies-file-350-million-lawsuit-over-h-1b-visa-fees/?sh=5be750592b8b>.

51 Suzanne Monyak, *Trump’s Procedural Sidesteps May Doom H-1B Visa Changes*, LAW360 (Oct. 7, 2020), <https://www.law360.com/articles/1317706/trump-s-procedural-sidesteps-may-doom-h-1b-visa-changes>.

administration. The plaintiffs (technology firms, universities, and the U.S. Chamber of Commerce) argued that the rules were procedurally deficient because the Department of Labor failed to comply with the Administrative Procedure Act's notice and comment requirement, which stipulated that there should be a period of public input prior to an administrative agency exercising rulemaking authority.<sup>52</sup> The Trump administration argued that its choice to forgo the notice and comment period was excused by the fact that it fell under the good cause exception of the APA. The judges who heard the government's arguments were unconvinced, and all of the injunctions were granted.<sup>53</sup> Because of the numerous legal challenges that the Trump administration was presented with at the beginning of the rule change, USCIS never actually implemented the new rules. The Biden administration, which inherited much of the Trump administration's policy decisions, has an opportunity to reject these ill-thought-out executive rules in favor of a more comprehensive system of governance. Thus far, Biden has only committed to delaying the proposed rule, rather than rejecting it entirely, so it is worth taking a closer look at exactly what this new proposal seeks to accomplish.

*C. THE PROPOSED ADMINISTRATIVE RULE CHANGES IN A TRUMP/BIDEN COVID-19 ECONOMY*

The title of the regulation issued by the Trump administration was *Strengthening the H-1B Program*, and it technically went into effect on December 7, 2020. It amended 8 CFR 214.2(h), the regulatory section that contains all of the H-1B program's criteria and definitions.<sup>54</sup> These changes significantly altered the definition of "employee" and working in a "specialty occupation." The rule also created new requirements for placing foreign nationals at third-party worksites, which is specifically aimed at consulting and outsourcing companies. The most significant change, however, was increasing the prevailing wage levels to a significant extent, as pictured in the chart below.

Wage Level	Previous Standard	Wage	New Wage Standard
Level I (Entry-Level)	17 <sup>th</sup> Percentile		45 <sup>th</sup> Percentile
Level II (Qualified)	34 <sup>th</sup> Percentile		62 <sup>nd</sup> Percentile
Level III (Experienced)	50 <sup>th</sup> Percentile		78 <sup>th</sup> Percentile

<sup>52</sup> Dave Simpson, *Trump Admin.'s H-1B Rule Hit With 2nd Injunction This Week*, LAW360 (Dec. 3, 2020), <https://www.law360.com/articles/1334527/trump-admin-s-h-1b-rule-hit-with-2nd-injunction-this-week>.

<sup>53</sup> A federal lawsuit in New Jersey alleged that the rule change would raise minimum salaries as much as 50% in some industries. An entry-level computer programmer on an H-1B in Newark, New Jersey, for example would need to be paid \$116,000 up from the previous entry-level rate of \$79,000 for the same job. See *ITServe Alliance Inc. et al. v. Scalia et al.*, Case No. 3:20-cv-14604 (D. N. J. Oct. 16, 2020).

<sup>54</sup> Jorge Lopez, et. al., *Breaking Down the New DOL and DHS H-1B Rules*, LITTLER MENDELSON (Nov. 23, 2020), <https://www.littler.com/publication-press/publication/breaking-down-new-dol-and-dhs-h-1b-rules>.

Level IV (Fully Competent)	67 <sup>th</sup> Percentile	95 <sup>th</sup> Percentile <sup>55</sup>
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The wage increase is alarming and would make it difficult for many employers to increase their employees' wages in order to meet the new requirements.<sup>56</sup> The proposal also seeks to change a few key definitions of the immigration statute in order to make it more difficult for employees to have flexible arrangements with their sponsoring company. A U.S. employer, for the purposes of the relevant statute, is currently defined as an entity that has an "employer-employee relationship" with an employee.<sup>57</sup> In order to demonstrate that an employer is a "U.S. employer," the employee must engage "the beneficiary to work within the United States, and ha[ve] a bona fide, non-speculative job offer for the beneficiary." The new rule also stipulates that a valid employer-employee relationship must be established.<sup>58</sup> Contractors have a difficult time establishing the requisite relationship.<sup>59</sup>

Furthermore, the Trump administration's USCIS reverted to interpreting the term "employer-employee relationship" to be the "conventional master-servant relationship as understood by common-law agency doctrine." This contrasted with the more expansive term of the relationship set forth in *ITServe Alliance v. L. Francis Cissna*,<sup>60</sup> which required USCIS to use a broader definition governed by agency law.<sup>61</sup> The Trump administration also attempted to redefine what a third-party worksite meant. It defined such a worksite as a "worksite, other than the beneficiary's residence in the U.S., that is not owned or leased, and not operated, by the petitioner." This did "not include any location that is not considered a "worksite" for labor condition application (LCA) purposes." Clearly, these rule changes were meant to target consulting companies and technology service companies. This makes little sense because the covid economy has spurred greater demand for science and technology firms. The Trump rules threatened to destabilize employment-based immigration into the United States when the country and the economy were most vulnerable.

If these rules had gone into effect, they would have drastically altered the employment-based immigration landscape in the United States. Biden took office before these administrative rules could effectively be enforced, and he issued a 60-day freeze on these visa rules.<sup>62</sup> The Department of Homeland Security later delayed this rule's effectiveness date until December 31, 2021, citing the insufficient amount of time it had to complete system development, test modifications, conduct public outreach, and train staff in time for the beginning of Fiscal Year 2022.<sup>63</sup> One thing that the Biden administration

<sup>55</sup> Table taken from Littler Mendelson's website explaining the administrative changes. See Lopez, *supra* note 54.

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

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

<sup>58</sup> 8 CFR 214.2(h)(4)(ii).

<sup>59</sup> 8 U.S.C. § 1101(a)(15)(H)(i)(b).

<sup>60</sup> See *ITServe All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 19 (D.D.C. 2020). Under this definition, the employer only needed to demonstrate that they had the ability to hire, pay, fire or otherwise control the employee.

<sup>61</sup> See Lopez, *supra* note 54.

<sup>62</sup> Dalia Faheid, *Biden freezes Trump's last-minute visa rules*, MARKET WATCH (Jan. 22, 2021), <https://www.marketwatch.com/story/biden-freezes-trumps-last-minute-visa-rules-11611334158>.

<sup>63</sup> Jorge Lopez, Elizabeth Whiting, *H-1B Cap Selection Process Update – DHS Postpones Effective Date of Final Rule*, LITTLER MENDELSON – NEWS & ANALYSIS (Feb. 5, 2021),

currently seems open to keeping is the Electronic Registration Process; however, it is unclear what changes he will make, if any. Although the registration period has yet to be announced for Fiscal Year 2022, the electronic registration period for the lottery must last a minimum of 14 days and start at least 14 days before the earliest date on which cap-subject petitions may be filed prior to the beginning of the fiscal year.<sup>64</sup> President Biden has sent a new immigration bill to Congress titled The U.S. Citizenship Act of 2021, which the White House describes as “establish[ing] a new system to responsibly manage and secure our border, keep our families and communities safe, and better manage migration across the Hemisphere.”<sup>65</sup> In the interim, it is worth considering if there are some elements that need to be revised in the current H-1B system, and what we can learn from other countries that also rely on employment-based immigration in order to keep their economies strong and healthy.

## II. PART II: INTERNATIONAL MODELS AS ALTERNATIVES TO THE UNITED STATES SYSTEM OF EMPLOYMENT-BASED IMMIGRATION

American immigration has long been one of the most restrictive systems in the world, and yet the United States has benefited disproportionately from foreign innovators. A 2017 study from The Brookings Institute found that almost half of the Fortune 500 companies were founded by either American immigrants or their children.<sup>66</sup> This fact has not been lost to at least one U.S. Congresswoman. On July 26, 2021, Zoe Lofgren, a House Representative for California’s 19<sup>th</sup> District, introduced the Let Immigrants Kickstart Employment (LIKE) Act.<sup>67</sup> The purpose of this legislation is to create a new temporary visa for founders of start-up entities to incentivize foreign innovation in America. As the bill observes, at least 25 countries have some version of a startup visa, including Canada, the United Kingdom, Australia, Germany, and Sweden.<sup>68</sup> When introducing the legislation Congresswoman Lofgren stated:

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<https://www.littler.com/publication-press/publication/h-1b-cap-selection-process-update-dhs-postpones-effective-date-final>. See also U.S. Dep’t. of Homeland Security, Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions; Delay of Effective Date (Feb. 8, 2021).

<sup>64</sup> See Lopez, *supra* note 55.

<sup>65</sup> The scope of this bill is primarily concerned with undoing some of the worst of Trump’s immigration policy. Biden’s bill would provide a pathway to citizenship for about 11 million undocumented immigrants, as well as a pathway to citizenship for “Dreamers, farm workers and essential workers who risk their lives to serve and protect American communities.” See THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN SENDS IMMIGRATION BILL TO CONGRESS AS PART OF HIS COMMITMENT TO MODERNIZE OUR IMMIGRATION SYSTEM (Jan. 20, 2021). The bill also purports to “clear employment-based visa backlogs, recapture [...] unused visas, reduce lengthy wait times, and eliminate per-country visa caps.” *Id.*

<sup>66</sup> Ian Hathaway, *Almost half of Fortune 500 companies were founded by American immigrants or their children*, BROOKINGS INSTITUTE (Dec. 4, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/04/almost-half-of-fortune-500-companies-were-founded-by-american-immigrants-or-their-children/>.

<sup>67</sup> United States Congresswoman Zoe Lofgren, LOFGREN INTRODUCES LEGISLATION TO CREATE NEW VISA PROGRAM FOR IMMIGRANT ENTREPRENEURS TO SPUR U.S. ECONOMIC GROWTH (Jul. 26, 2021), <https://lofgren.house.gov/media/press-releases/lofgren-introduces-legislation-create-new-visa-program-immigrant-entrepreneurs>.

<sup>68</sup> *Id.* (citing National Venture Capital Association, *Immigrant Entrepreneurs Can Drive Economic Growth in the Pandemic Recovery* (Mar. 2021),

For the world's best and brightest innovators seeking a home for their companies, America used to be the top destination. Sadly, that has changed. Today, the technology sector in Canada is growing at a faster pace than it is in America, and it is almost entirely because of restrictive U.S. immigration policies that do not benefit our economic interests. Congress can change that. We can make the United States more prosperous by passing bills like the LIKE Act that stimulate the economy, curb brain drain, create jobs for American workers, and restore our country's standing as the number one choice for the next generation of entrepreneurs worldwide.<sup>69</sup>

Congresswoman Lofgren has proposed a creative solution to resolving America's employment-based immigration crisis. However, looking to international models might be useful in reevaluating what other countries are doing to retain talented foreign nationals. Specifically, this Note will provide a general overview of Australia, The European Union, and Canada.

#### A. AUSTRALIA'S EMPLOYMENT-BASED IMMIGRATION SYSTEM

The largest problem with U.S. employment-based immigration policy is how difficult it is to navigate. Australia has highly skilled visa programs that are analogous to that of the H-1B program in the United States, however, it is much simpler to maneuver and employer-friendly. Australia, like many other countries around the world, uses a "point-based" system of immigration.<sup>70</sup> As previously mentioned, Australia ranks prospective applicants by assigning them points based on general features of their applications (education, language skills, work experience, etc.). However, it is not essential that one have a job offer in order to successfully complete Australia's immigration process.<sup>71</sup> Below is a chart on how Australia awards "points" to its prospective immigrants.

Attribute	What is valued most	Maximum Points
Age	Highest points for those age 25-32 years	30
Language	Three levels of English: competent, proficient and superior	20

[https://nvca.org/wpcontent/uploads/2021/03/NVCA\\_Visa\\_Reforms\\_book\\_FINAL.pdf](https://nvca.org/wpcontent/uploads/2021/03/NVCA_Visa_Reforms_book_FINAL.pdf).

<sup>69</sup> See Lofgren, *supra* note 67.

<sup>70</sup> See Donald, *supra* note 7.

<sup>71</sup> Madeleine Sumption, *The Australian points-based system: what is it and what would its impact be in the UK?*, THE MIGRATION OBSERVATORY, THE UNIVERSITY OF OXFORD (Feb. 8, 2019), <https://migrationobservatory.ox.ac.uk/resources/reports/the-australian-points-based-system-what-is-it-and-what-would-its-impact-be-in-the-uk/>.

Skilled work experience in Australia	More is better, up to 8 years	20
Skilled work experience overseas	More is better, up to 8 years	15
Educational qualifications	More is better up to Ph.D. level. Qualifications must be recognized as equivalent to Australian ones	20
Education or training in Australia	Up to 5 points each for professional training in certain fields, Australian study, certain specialist qualifications, and study in 'regional Australia'.	20
Other	Qualification in a 'credentialled community language' (5 points) and partner is qualified for a skilled job (5 points)	10

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Through this system, Australia can better gauge what types of skilled workers they'd like to engage with. The biggest advantage to their point-based system is that it untethers employment from obtaining a visa. One of the biggest problems in the status quo for young foreign nationals seeking to remain in the United States after graduation, is that the only way to remain lawfully is to find a private employer that is willing to sponsor a non-immigrant work visa on their behalf. This creates an unnecessarily restrictive regime that ties foreign graduates' labor to their employer, inhibiting their job mobility and their initial job prospects. Under a point-based model of immigration, securing employment would not be outcome determinative when deciding whether to extend a foreign national temporary or permanent legal status.

In addition to its point-based system, Australia also has far more flexible visa categories for employers seeking to hire foreign national workers. The Employer Nomination 457 Temporary Worker Visa gives employers the general power to sponsor a skilled worker.<sup>73</sup> In effect, it is preemptive permission to hire.<sup>74</sup> The employer first nominates the skilled worker, and the worker then applies to fill the intended position. This gives greater flexibility on the part of the employer to predictively staff their future needs, without relying on the speculative nature of immigrant visa approvals that the U.S. uses. During a typical H-1B cap season, a U.S. employer might not know how many H-1Bs it is going to receive at the beginning of any given fiscal year. In some cases, the approval of these H-1B petitions can even stretch into September or late October.<sup>75</sup> Adopting a visa category like that of Australia would provide

72 Austl. Dep't of Home Affairs, POINTS TABLE FOR SKILLED INDEPENDENT VISA (SUBCLASS 189) (Mar. 17, 2020).

73 Ayelet Shachar, Ran Hirschl, *Recruiting "Super Talent": The New World of Selective Migration Regimes*, 20 IND. J. GLOBAL LEG. STUD. 71 (2013); see also Austl. Gov. Dep't of Home Affairs, TEMPORARY WORK (SKILLED) VISA (SUBCLASS 457) (last updated Mar. 18, 2021), <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/repealed-visas/temporary-work-skilled-457>.

74 *Id.*

75 This is drawn primarily from my own personal experience as a legal assistant. After a foreign national is initially selected for the H-1B Cap, their petition is then filed. A typical petition takes two to three months to be approved, depending on the strength of the case, however in many instances Requests

employers with the ability to choose their workforce ahead of time and provide greater certainty for young foreign nationals seeking to enter the American job market.

Another way in which the Australian government treats its labor shortages differently from the American government is the collaboration and input that Australia receives from both the private sector and other government branches alike.<sup>76</sup> The success of this inter-entity collaboration is demonstrated by the fact that permanent, skill-based programs accounted for over two-thirds of the country's total migration intake.<sup>77</sup> Much like in America, these positions are limited to occupations that experience labor shortages and meet a minimum level of pay.<sup>78</sup> The public policy discussions surrounding these labor shortages are drastically different, however. This is evidenced by how Australia chooses to deal with its outsourcing and consulting firms. In 2007, the Australian Dept. of Immigration and Citizenship introduced a process for staffing "on-hire" firms.<sup>79</sup> These firms were required to negotiate a labor agreement with the local branch of immigration services, specifying the number of employees hired, the required skill set, and the salaries of the positions.<sup>80</sup> The companies were required to further demonstrate that they first attempted to hire from the domestic market.<sup>81</sup> The system permitted third-party work placements, verifying that there was a true domestic shortage and that efforts were made to draw from the pool of Australian workers. These labor negotiations took around six to twelve weeks to negotiate. The Australian government also required a great deal of regulatory disclosures to prevent outsourcing companies from abusing the system. The Australian Tax Office, for example, is authorized to disclose workers' income to the Australian Dept. of Immigration and Citizenship in order to ensure that the reported wage is paid for by the employees.<sup>82</sup> This is not something that one sees in the United States.<sup>83</sup>

Additionally, Australia has several versions of a startup visa. The Business Talent Visa, for example, is a permanent residence visa for foreign nationals who have the means to establish a business in Australia.<sup>84</sup> This visa is available to applicants in two different "streams." The first stream titled the "Significant Business History Stream" is for business owners who have a preexisting company and would like to conduct business in Australia.<sup>85</sup> The second stream, titled the "Venture Capital Entrepreneur Stream, is for foreign nationals who have secured venture capital funding from a member of the Australian Venture

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for Evidence are issued. These RFEs could potentially delay the case, weeks, or even months, depending on how quickly the attorney responds to the government's request, and the nature of the information the government is looking for. Australia, in contrast, provides employers and foreign nationals, with the ability to roughly predict when their case is going to be approved.

<sup>76</sup> See Shachar, *supra* note 73.

<sup>77</sup> Austl. Gov't Dep't of Immigr. and Citizenship, 2010-11 Migration Program Report 3 (2011), <http://www.immi.gov.au/media/statistics/pdf/report-on-migration-program-2010-11.pdf>.

<sup>78</sup> *Id.*

<sup>79</sup> MINISTER FOR IMMIGR. & CITIZENSHIP, MIGRATION AM. REG'S (2007),

<https://www.legislation.gov.au/Details/F2007L03558/Explanatory%20Statement/Text>.

<sup>80</sup> Samuel Gray, *Rethinking the Law and Economics of Immigration Policy for High-Skilled Migrants in the Global Knowledge Economy*, 34 GEO. IMMIGR. L.J. 473 (2020).

<sup>81</sup> *Id.*

<sup>82</sup> See Shachar, *supra* note 73.

<sup>83</sup> *Id.*

<sup>84</sup> This is Australia, BUSINESS TALENT (PERMANENT) VISA (SUBCLASS 132), (last visited Jan 31, 2021), <https://www.thisisaustralia.com/specialised-services-and-business-visas/business-talent-visa/>.

<sup>85</sup> *Id.*



Capital Association Limited (AVCAL).<sup>86</sup> The problem with both of these streams is that they are inaccessible to foreign national students that are just entering the job market, without preexisting access to capital. Because of this, it is difficult for many prospective entrepreneurs to qualify for either of these visa categories. The United States has a similar version of Australia's Business Talent Visa, with analogous problems. The U.S. currently has an EB-5 immigrant visa, which is an employment-based immigrant visa, titled the "Immigrant Investor Program."<sup>87</sup> One of the many disadvantages to this type of visa category is that it forces the foreign national to express immigrants' intent. If their EB-5 is approved they may be subject to double taxation, which serves as a disincentive to investing in the United States.<sup>88</sup> Although qualifying for an EB-5 seems simple to do in theory, in practice it is incredibly difficult to accomplish because of the government's concern with immigration fraud.<sup>89</sup>

Some immigration advocates have argued that the current EB-5 visa option serves as enough of an incentive to lure foreign national investment into the United States.<sup>90</sup> The EB-5 immigrant investor visa was created in the 1990s with the policy goal of having something analogous to the entrepreneur visa that Australia, and other countries use.<sup>91</sup> A foreign national can qualify for an EB-5 if that foreign national creates, or invests in a business that meets the requirements, or by creating a temporary pilot program where the immigrant investor can invest in approved regional centers.<sup>92</sup> This is difficult to do, however, as the requirements of the EB-5 are relatively demanding.

The EB-5 gives permanent residence to qualifying immigrants (and, importantly, their derivative beneficiaries), however the foreign national must (1) invest one million dollars into a new commercial enterprise; (2) which creates a minimum of ten full-time positions; and (3) maintain the business for at least two years.<sup>93</sup> There are special considerations given to immigrant investors that invest in certain employment areas, designated as "Targeted Employment Areas" or "TEAs."<sup>94</sup> There are also rigorous evidentiary standards associated with the EB-5 visa. The I-526 Form needs to be accompanied by evidence that ten employees have already been hired (including the necessary documents such as tax records and I-9 forms).<sup>95</sup> The petitioning foreign national is also required to provide various documents relating to the corporation.<sup>96</sup> After the EB-5 is approved, the immigrant investor is granted conditional permanent

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

<sup>87</sup> U.S. CITIZENSHIP & IMMIGR. SERVS, EB-5 IMMIGRANT INVESTOR PROGRAM (last visited Jan 31, 2021), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program>.

<sup>88</sup> FINDLAW.COM, *Immigration and Taxes: Who has to Pay U.S. Taxes?* (Jan. 23, 2018),

<https://www.findlaw.com/immigration/visas/immigration-and-taxes-who-has-to-pay-u-s-taxes.html>.

<sup>89</sup> Michael B. Sichter, *Pumping Up America: Using the EB-5 Visa to Inject Entrepreneurial Steroids Into A Struggling U.S. Economy*, 79 UMKC L. REV. 1007 (2011).

<sup>90</sup> *Id.*

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

<sup>92</sup> *Id.*

<sup>93</sup> 8 U.S.C. § 1153(b)(5).

<sup>94</sup> The government measures what area counts as a TEA by calculating which area has an unemployment rate of at least 150% of the national average. *See* § 1153(b)(5)(B)(ii). The normal amount that is necessary to invest in the United States is one million dollars, however if the foreign national chooses to invest in a Targeted Employment Area, that investment is reduced to five hundred thousand dollars.

<sup>95</sup> 8 U.S.C. § 204.6(j)(4)(i)(B).

<sup>96</sup> 8 U.S.C. § 204.6(j)(5).

residency. It is only two years after the initial approval that EB-5 investors are granted lawful permanent residency.<sup>97</sup>

Technically, the EB-5 visa is capped at 10,000 possible issuances, however only about 1000 foreign nationals have immigrated to the United States on this visa category within the same year.<sup>98</sup> Even though the EB-5 visa has been relatively unpopular, it has still managed to generate quite a bit of revenue for the United States. In 2003, EB-5 investors invested about one billion dollars into the United States.<sup>99</sup> These requirements are still incredibly demanding, as evidenced by the lack of appetite for foreign nationals. In order to have a true startup visa, the United States should create a non-immigrant visa specifically geared at young foreign nationals looking to join the workforce, as well as encouraging foreign nationals that already have the means of investing in the United States. The U.S. immigration system should look to incentivize these foreign nationals to come into the country without establishing such a high barrier to entry.

## B.

### *THE EUROPEAN UNION'S TREATMENT OF EMPLOYMENT-BASED IMMIGRATION*

Another reason why the current United States immigration system is so hostile towards foreign innovation is the lack of portability between visa categories and employers. If a foreign national wants to move states, they must first find an employer willing to sponsor their visa transfer. The employer must then file the necessary transfer documents with USCIS, which could take anywhere from two to four months to be approved.<sup>100</sup> If the foreign national is on an L-1A or an L-1B visa, they would need to change visa categories altogether. In all, the portability of an employment-based visa is incredibly limited. Here, the European Union's Blue Card model could provide insight into how geographically diverse states might work together to achieve common objectives.

The EU Blue Card, named after the blue color of the European Union flag (and as an answer to the U.S. Green Card) is a work and residence permit for non-EU/EEA nationals.<sup>101</sup> Foreign nationals of non-EU countries can apply for this particular visa type in order to begin employment in a specific EU member country. The two directives of relevance were passed by the European Council in 2009 and 2011 respectively.<sup>102</sup> The former (The EU Blue Card Directive) admitted skilled and educated migrants into the EU while the latter (The Single Permit Directive) simplified migration procedures by creating a single, uniform,

<sup>97</sup> See Sichter, *supra* note 89.

<sup>98</sup> *Id.* (referencing *Hearing on Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program: Summary, Testimony of Stephen Yale-Loehr*, 14-17 Bender's Immigr. Bull. 2 (Sept. 1, 2009)); (citing *Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program: Hearing Before the full S. Judiciary Comm.*, 111th Cong. (July 22, 2009) (testimony of Prof. Stephen Yale-Loehr)).

<sup>99</sup> U.S. GOV. ACCOUNTABILITY OFF., IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS (2005), <http://www.gao.gov/new.items/d05256.pdf>.

<sup>100</sup> Prior to the pandemic, processing times for non-immigrant visa transfers took between one to two months, however due to the national backlog, status transfers can take up to four months. *See e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., CHECK CASE PROCESSING TIMES (last visited Dec. 1, 2020), <https://egov.uscis.gov/processing-times/>.

<sup>101</sup> THE EUROPEAN UNION, *EU Blue Card Network* (last visited Dec. 1, 2020), <https://www.apply.eu/>.

<sup>102</sup> Gerlind Wisskirchen, *The EU Blue Card*, IADC DEFENSE COUNSEL JOURNAL (Oct. 2016).

application procedure.<sup>103</sup> The foreign nationals that qualify for an EU Blue Card include highly qualified workers, researchers, vocational trainees, students, school pupils in exchange programs, voluntary workers, seasonal workers, and intra-corporate transferees.<sup>104</sup>

These eight classifications stand in stark contrast to the archaic system employed by America's own immigration services. When an employer files an H-1B petition on behalf of a foreign national, it must choose which SOC code to use to classify the type of work that the employee is expected to perform, as well as the prevailing wage that the employee will receive.<sup>105</sup> If the employee wishes to change fundamental aspects of their employment, the employer must submit an H-1B amendment explaining the change and pay the filing fees associated with the change. H-1B petitions take a great deal of time to approve and the coronavirus pandemic has made immigration services nationally backlogged.<sup>106</sup> After one files an application for an EU Blue Card, a decision is made within 90 days of the application, and the cardholder is entitled to the same rights as citizens of the housing state after two years of work and residence.<sup>107</sup> If the cardholder wishes, they may move to another member state within the EU to start highly-skilled employment. Like the H-1B program, there are certain restrictions related to unemployment that are associated with the Blue Card visa. The recipient cannot be unemployed for a period greater than 3 months and if a change in employment happens within 2 years of the arrival, a request must be filed with the relevant authorities. Even so, it provides a greater deal of flexibility to foreign nationals hoping to work in many different states throughout the European Union.

Within the EU the requirements for obtaining a Blue Card visa may vary. For example, some member countries within the E.U. may allow five years of work or professional experience to count towards the "higher professional qualification" requirement.<sup>108</sup> Additionally, some EU members, like Germany, have had greater success attracting foreign talent due to their flexible requirements for obtaining a work visa.<sup>109</sup> Each country also has its own work-based visa options for qualifying foreign nationals. For example, The United Kingdom, like Australia, has its own type of startup visa. Individuals in the UK can apply for a start-up visa which would grant them work authorization for two years, and then apply for an innovator visa, which could lead to an additional 3 years.<sup>110</sup> Rather than regulating the approval of visas directly, the UK government has a list of third parties that serve as endorsing bodies to vet the

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Sumner, *supra* note 28; see generally, U.S. DEP'T OF LABOR, PREVAILING WAGES (last visited Dec. 29, 2020), <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage>.

<sup>106</sup> For example, the most recent processing times for the approval of an I-129 (the primary immigration form for the H-1B petition) at the Texas service center is anywhere from 3.5 to 5.5 months. One can check processing times at <https://egov.uscis.gov/processing-times/>.

<sup>107</sup> See Wisskirchen, *supra* note 103, at 2.

<sup>108</sup> EUROPEAN COMMISSION, EU BLUE CARD (last visited Feb 2, 2021), [https://ec.europa.eu/immigration/blue-card/essential-information\\_en](https://ec.europa.eu/immigration/blue-card/essential-information_en).

<sup>109</sup> Aykut Elseven, *European Union: Proposed New EU Blue Card Rules: 2021*, MONDAQ (Jul. 30, 2021), <https://www.mondaq.com/germany/general-immigration/1096868/proposed-new-eu-blue-card-rules-2021>

<sup>110</sup> GOVERNMENT OF THE UNITED KINGDOM, Start-up visa (last visited Feb. 2, 2021), <https://www.gov.uk/start-up-visa>.

foreign national.<sup>111</sup> A major advantage to being employed in the UK for 5 years is that one automatically obtains lawful temporary status and can qualify for permanent residence without being placed in an immigration backlog.<sup>112</sup> In order to be eligible, one “must be endorsed by an approved body that is either a UK higher education institution [or] a business organization with a history of supporting UK entrepreneurs.”<sup>113</sup> This effectively delegates the process of vetting qualified foreign nationals to the private sector, drastically increasing the efficiency of the process, and providing those that are most qualified with the authority to make the decisions necessary to increase their skilled entrepreneur workforce. This is yet another reason why the United States Citizenship and Immigration Services should find ways to relinquish some of its authority in favor of incorporating the private sector and private research institutions into the selection process.

### C.

#### CANADA'S TREATMENT OF EMPLOYMENT-BASED IMMIGRATION

Another immigration model that the United States could learn from is Canada. The maple country was the first nation to introduce a point-based system of immigration, starting originally in 1967.<sup>114</sup> Since then Canada has used the point-based model to its advantage, adding and subtracting points in order to increase the desired skills and characteristics of its foreign workforce based on the country's own needs.<sup>115</sup> Canada prioritizes immigrants that have job offers in the country, but it is not disqualifying to immigrate to Canada without first obtaining employment. In 2015, the Canadian government launched a domestic immigration reform policy titled Express Entry.<sup>116</sup> The goal of the program was to do away with the backlogs of applications under the previous system. Prior to Express Entry, the Canadian government vetted each application individually, which took a great deal of time. Now, Canadian visa approval rates are substantially expedited because of these administrative changes.<sup>117</sup>

Canadian immigration policy has an international reputation for being friendly to employers, and one of the most evident ways that they display this hospitality is through their startup visa program.<sup>118</sup> Canada's startup visa, much like Australia's, was designed to attract innovation.<sup>119</sup> The Canadian startup visa was initially launched in 2013, incentivizing foreign investors to

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111 GOV. OF UK, START-UP ENDORSING BODIES (last updated May 6, 2020), <https://www.gov.uk/government/publications/endorsing-bodies-start-up/start-up>.

112 *Id.*

113 See Samuel Gray, *Rethinking the Law and Economics of Immigration Policy for High-Skilled Migrants in the Global Knowledge Economy*, 34 GEO. IMMIGR. L.J. 473 (2020).

114 Adam Donald, *Immigration points-based systems compared*, BBC (June 1, 2016), <https://www.bbc.com/news/uk-politics-29594642>.

115 *Id.*

116 *Immigrate Through Express Entry*, GOV. OF CANADA (Dec. 4, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry.html>.

117 *Id.*

118 *Start-up Visa Program*, GOV. OF CANADA (Dec. 4, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa.html>.

119 Francesca Strumia & Asha Kaushal, *Constitutional Identity in the Age of Global Migration: Opening the Ranks of Constitutional Subjects: Immigration, Identity, and Innovation in Italy and Canada*, 18 GERMAN L.J. 1657 (2017).

partner with Canadian investors. If the foreign national qualifies for the visa, they are granted a six-month pathway to permanent residency.<sup>120</sup> There are two aspects of the program that are of particular relevance. The first requirement is that the applicant must demonstrate that their business is supported and funded by a designated Canadian organization.<sup>121</sup> The second requirement is that Canada's regulatory agency (Immigration, Refugees and Citizenship Canada) tasks the private sector with vetting these prospective entrepreneurs. The government immigration agency in Canada functions as a supervisory arm rather than an actual arbitrator like the USCIS does in America.<sup>122</sup> A total of 515 people gained permanent residence through Canada's startup program in 2019, and another 115 individuals became immigrants through Quebec's entrepreneur program.<sup>123</sup> Canada's startup program accounted for 2,750 applications per year, and by May 2016, 51 entrepreneurs gained permanent residence through the startup visa program.<sup>124</sup>

America could do well to implement a similar visa policy, to supplement the insufficient number of H-1B petitions in the status quo. This would provide a badly needed bolster to the U.S. economy. The majority of privately held technology startups with more than 1 billion dollars in sales were founded by foreign nationals.<sup>125</sup> Fifty out of the ninety-one startups valued at over 1 billion were founded by immigrants. That is roughly 248 billion dollars in value to the American economy. It also doesn't include smaller startups or public companies such as AT&T, Google, Tesla and Yahoo, each of which has at least one first-generation immigrant founder.<sup>126</sup>

The U.S. economy currently lacks a visa that is geared towards spurring innovation. The current system, for example, does not allow foreign nationals to start their own businesses after graduating from school. The most common work visa that provides a recent graduate with employment authorization is the F-1, and self-employment is not an option. Recent graduates can obtain temporary work authorization by taking advantage of OPT or Optional Practical Training.<sup>127</sup> The OPT temporary employment authorization must be directly related to an F-1 student's area of study. Foreign nationals that have areas of study in either science or technology fields are entitled to 24 months of work authorization as opposed to the typical 12 months. If the graduate is unable to find employment within that time period, they will lose their ability to work in the U.S.<sup>128</sup> Even if they are able to find an employer that is willing to pay the costs associated with filing their H-1B petition, there is no guarantee that they

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 115.

<sup>122</sup> *Id.*

<sup>123</sup> Stuart Anderson, *Trump and Congress Overlook Job-Creating Immigrant Startup Visas*, FORBES, (July 20, 2020), <https://www.forbes.com/sites/stuartanderson/2020/07/30/trump-and-congress-overlook-job-creating-immigrant-startup-visas/?sh=3fc9a2932fd5>.

<sup>124</sup> *Start-up Visa Continues to Grow*, GOV. OF CANADA (May 5, 2016), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2016/05/start-up-visa-continues-to-grow.html>.

<sup>125</sup> Russ Leimer, *America's Economy Needs a 'Startup Visa' for Immigrants*, DICE.COM (Jan. 27, 2020), <https://insights.dice.com/2020/01/27/startup-visa-immigrants-america-economy-tech/>.

<sup>126</sup> *Id.*

<sup>127</sup> *Optional Practical Training (OPT) for F-1 Student*, U.S. CITIZENSHIP & IMMIGR. SERVICES (July 20, 2021), <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students>.

<sup>128</sup> *Id.*

will receive work authorization because of the current lottery system. Under the Obama administration, the Department of Homeland Security published the International Entrepreneur Rule.<sup>129</sup> This regulation was scheduled to go into effect on July 17<sup>th</sup>, 2017 and established a new process and criteria for foreign workers to remain in the country as they grew their business.<sup>130</sup> The Trump administration promptly dismantled the program and has proceeded to further restrict skilled labor from coming into the country. The Biden administration has the opportunity to pass a similar rule, reforming the immigration system to incentivize young professionals to remain inside the U.S.

Establishing a start-up visa would provide a way to recover from the havoc left by the coronavirus pandemic. As the National Foundation for American Policy (NFAP) observed, “The current economic problems in the United States may bring a renewed focus on innovative ways to create jobs in America.”<sup>131</sup> The 2017 bill on start-up visas could have created anywhere between 1 million and 3.2 million jobs over the course of a single decade, if it had become law.<sup>132</sup> The current options in the status quo do not address the central problem of lack of innovation, especially in an increasingly vulnerable economy in a post covid world. As explained above, the closest thing that the United States offers is the EB-5 immigration visa, and for a variety of reasons, this is not a sufficient alternative for young foreign nationals looking to begin their careers in the United States.

## CONCLUSION

In conclusion, the Biden administration has an opportunity to change employment-based immigration in the United States for the better and tear down the autocratic wall built by the Trump administration. USCIS recently announced that it would be reopening the H-1B Cap on March 9<sup>th</sup> and it will run until March 25<sup>th</sup>, 2021.<sup>133</sup> Biden has chosen to delay the Trump rule, which does away with the cap almost entirely.<sup>134</sup> President Biden has only delayed the Trump rule, rather than doing away with it altogether. Should Biden choose to implement it in the future, it will hurt domestic firms that rely on H-1B talent in order to sustain and supplement their workforce. By some estimates, the Trump

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129 *International Entrepreneur Parol*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 10, 2021), <https://www.uscis.gov/humanitarian/humanitarian-parole/international-entrepreneur-parole>.

130 *International Entrepreneur Rule*, 82 Fed. Reg. 5238 (Jan. 17, 2017), <https://www.federalregister.gov/documents/2017/01/17/2017-00481/international-entrepreneur-rule>. This final rule amended the DHS regulations to implement the Secretary of Homeland Security's discretionary parole authority to increase and enhance entrepreneurship, innovation, and job creation in the United States. The rule added new regulatory provisions guiding the use of parole on a case-by-case basis with respect to entrepreneurs of start-up entities who can demonstrate through evidence of substantial and demonstrated potential for rapid business growth and job creation that they would provide a significant public benefit to the United States.

131 *The International Experience of Startup Visas for Immigrant Entrepreneurs*, NAT. FOUND. FOR AM. POL. POLICY BRIEF (July 2020).

132 *Startup Visa Proposals and Job Creation*, NAT. FOUND. FOR AM. POL. POLICY BRIEF (Mar. 2016).

133 *FY 2022 H-1B Cap Initial Registration Period Opens on March 9*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 2, 2021).

134 Sarah Butcher, *Big U.S. Consulting Firms to Suffer Under the New H1B Wage Rule*, EFINANCIALCAREERS (Feb. 24, 2021), <https://www.efinancialcareers.com/news/2021/02/h1b-visa-wage-rule-consulting-firms>.

rule would force employers to raise H-1B employees' salaries by an additional \$20,000 in order to meet the new requirements.<sup>135</sup> It is clear that the United States needs a new immigration visa in order to encourage skilled foreign nationals to come to the country. Our nation should start treating foreign workers the way that other global economic powers do, acknowledging the value that they bring to the economy and society writ large. Already in France, the government is expediting the citizenship applications of foreign nationals that were on the frontlines of the coronavirus pandemic.<sup>136</sup> If the United States doesn't display a similar level of gratitude for its skilled workforce, it may find itself on the losing end of an international scramble to attract the best and brightest. This administrative wall was not built by the Trump administration overnight. In reality, these bureaucratic hurdles took decades to create, however, there is no disputing that the Trump administration made this wall significantly higher. President Biden should use his presidency to embrace the multicultural and global principles that America was founded on, and once more encourage foreign nationals to come to the United States to build their careers.

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135 *Id.* (stating that the consulting industry would suffer the most as a result of the Trump rule. “[A]pproximately 83% of historic H-1B job offers extended by Accenture would have been disallowed under the new H1B wage rule, and that 98% of similar job offers extended by Deloitte & Touche would have been banned.”).

136 Constant Méheut, *They Helped France Fight the Virus. Now France Is Fast-Tracking Their Citizenship*, N. Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/world/europe/france-naturalization-covid-frontline.html>.