

# Fix the H-1B Visa Program

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## Executive Summary

- Congress created the H-1B visa program to enable employers to petition for the temporary employment of foreign nationals in “specialty occupations.” Although the program is often justified as a way to fill positions when qualified American workers are unavailable, employers are generally not required to prove they tried and failed to recruit Americans first. With limited exceptions, employers need not publicly post the job, recruit domestically, or document the existence of a labor shortage. What should be a narrow, last-resort hiring pathway has become a routine channel for labor arbitrage.
- The program’s dysfunction is the consequence of two design flaws: a prevailing-wage scheme that allows employers to pay H-1B workers below-median wages and a randomized lottery that does not distinguish between employers with legitimate high-skilled needs and outsourcing firms that file large volumes of applications. The result is that H-1B workers, legally bound to their sponsoring employer, earn less than similarly situated Americans, generating payroll savings at American workers’ expense.
- The Trump administration has correctly identified these problems and taken meaningful steps toward reform, but more must be done. Administering agencies should close the loophole in the new \$100,000 fee that exempts the majority of H-1B visa registrants and replace the lottery with a compensation-based ranking system that allocates visas based on the highest actual wages offered. Congress should pass legislation requiring employers to publicly post job openings before filing an H-1B petition and imposing a displacement prohibition with end-client liability that applies to the companies that direct and profit from the arrangement.



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## The Policy Question

The H-1B visa program allows employers to hire foreign nationals temporarily in specialty occupations. The program imposes a numerical cap on annual admissions, requires employers to attest that visa beneficiaries will not adversely affect wages and working conditions of American workers, and delegates significant discretion to administering agencies—including the U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL)—to design its operational architecture. Although Congress intended the program to fill positions when qualified American workers are unavailable, in practice, it generally does not require employers to prove they tried and failed to recruit Americans first. Agencies have also used their discretion to make other policy design decisions that structurally disadvantage American workers.

*What reforms to federal law and regulations would ensure that the H-1B visa program serves its stated purpose of providing employers with temporary access to workers with unique skills that are genuinely unavailable in the country, rather than providing a mechanism for employers to replace American workers with cheaper, legally captive foreign labor?*

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## Why It Matters

Congress established the H-1B visa program to address a specific problem: when an American employer cannot find a qualified worker to fill a high-skilled position, the employer may temporarily hire a foreign worker to fill the gap. The program's logic depends on that condition being both real and understood as an exception to the ideal of hiring American workers. It should therefore be hard to qualify for H-1B status, expensive to use, and last only until an American worker is available. None of those conditions applies today.

The consequences fall first on American workers. Employers generally need not demonstrate that they searched for an American worker before filing an H-1B petition. There is no labor market test—no routine requirement to publicly post the job, recruit domestically, and document that an actual shortage exists. Instead, the program largely relies on employer attestations, turning what should be a narrow, last-resort hiring pathway into a convenient alternative hiring channel that facilitates labor arbitrage.

The program's structure makes the absence of a labor market test economically attractive. Because H-1B status binds beneficiaries to their sponsoring employer, they cannot change jobs freely.<sup>1</sup> That immobility makes the visa holder structurally cheaper than an American worker in the same role, even under prevailing-wage attestations, because the worker has fewer options to seek better pay elsewhere.<sup>2</sup> This gives the employer a direct financial incentive to prefer the visa holder over the American

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1 H-1B workers can change employers and, if the portability requirements are met, may generally begin work with the new employer upon the filing of a nonfrivolous petition. However, changing jobs still requires new sponsorship and introduces substantial immigration-status friction, which is associated with much lower mobility than for comparable American workers.

2 When filing an H-1B petition, employers must submit a Labor Condition Application to DOL attesting that they will pay the visa holder the “prevailing wage” (i.e., the going rate for the occupation in the local labor market). DOL's methodology anchors the lowest tier at the 17th percentile of occupational wages, making attestation compliance consistent with paying guestworkers below the occupational median.



worker. Harvard economist George Borjas reports an annual job-switching rate of just 9.4% among H-1B workers and notes that comparable American workers typically separate at rates in the 20–25% range, a gap driven in part by the legal architecture of sponsored employment.<sup>3</sup> In turn, beneficiaries tethered to their sponsoring employer accept wages and conditions that American workers without such attachments would not. Borjas finds that H-1B workers earn 16% less than comparable Americans, which he says translates into nearly \$100,000 in payroll savings for sponsoring employers over a six-year visa term.

Outsourcing firms have built their business models around exactly that gap. According to Economic Policy Institute’s Daniel Costa and Ron Hira, the top 30 employers subject to the annual H-1B cap hired more than 34,000 new H-1B workers in fiscal year 2022—using about 40% of the new H-1B visas available under the annual limit—and 13 of those top 30 employers were outsourcing firms that supply contract labor to end clients who direct the work but bear little legal responsibility for the displacement that might result.<sup>4</sup> Such firms submit hundreds of registrations for interchangeable contract positions, dominating a program that was designed for employers filling legitimate specialty-occupation needs, not as a volume-driven labor-brokerage channel. At its most egregious, this arbitrage manifests in documented cases in which American workers are laid off and required to train their replacements; in some cases, employers have conditioned severance on completing that training.<sup>5</sup> That damage radiates outward. A program that legally binds H-1B workers in subordinate employment relationships does not complement the American workforce; it distorts the labor market that those workers and Americans share.

Employers with genuine needs are also poorly served. A company with a legitimately unfilled, skill-based opening and the willingness to pay a competitive market wage enters the same lottery as firms gaming the system with hundreds of speculative registrations. It faces the same odds and navigates the same process as every other petitioner. The result is a program whose credibility has been so thoroughly degraded that the employers Congress designed it to serve cannot rely on it, cannot plan around it, and cannot easily defend its legitimacy.

The terms on which the United States admits temporary foreign guestworkers should prioritize the interests of American workers. That requires policymakers to restore the distinction the program was always supposed to enforce: between high-skill immigration that genuinely complements the American workforce and cheap-labor arbitrage that displaces it.

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3 George J. Borjas, *The H-1B Wage Gap, Visa Fees, and Employer Demand*, NBER Working Paper No. 34793 (Feb. 2026). *But see* Jiaxin He & Adam Ozimek, *The Flawed Paper Behind Trump’s \$100,000 H-1B Fee*, Economic Innovation Group (Feb. 21, 2026), arguing that Borjas’s methodology contains data errors—including a mismatch between the time periods covered by his H-1B and native-born wage samples that fails to account for inflation—and that correcting those errors reduces the estimated wage gap to approximately one-third of Borjas’s figure. However, even under He and Ozimek’s preferred estimate, a wage gap persists, consistent with the structural incentive for below-market pay that the captive-labor dynamic creates.

4 Daniel Costa & Ron Hira, *Tech and Outsourcing Companies Continue to Exploit the H-1B Visa Program at a Time of Mass Layoffs*, Economic Policy Institute (Apr. 11, 2023).

5 The precise number of workers affected by this practice nationally is unknown; documented cases have involved hundreds of workers at individual employers, and the absence of a systematic reporting requirement means the full scope cannot be determined from available data. See Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, *N.Y. Times* (June 4, 2015) and Patrick Thibodeau, *Southern California Edison IT Workers ‘Beyond Furious’ Over H-1B Replacements*, *Computerworld* (Feb. 4, 2015).



## State of Play

Congress created the H-1B visa program in 1990 to allow employers to temporarily hire foreign nationals in specialty occupations, defined in the statute as positions requiring the “theoretical and practical application of a body of highly specialized knowledge” and, at a minimum, a bachelor’s degree in a specific specialty.<sup>6</sup> Congress established an annual numerical cap, currently set at 65,000 visas per fiscal year<sup>7</sup>, plus an additional 20,000 reserved for foreign nationals holding advanced degrees.<sup>8</sup> Universities, affiliated nonprofits, and government research organizations are exempt from the cap.<sup>9</sup> Guestworkers admitted under the program receive an initial three-year period of authorized employment, renewable for an additional three years<sup>10</sup>, with further extensions available for workers with pending green card applications. It is estimated that approximately 680,000 H-1B workers were employed in the United States as of fiscal year 2024.<sup>11</sup>

Two features central to the program’s dysfunction emerged from agency discretion, neither of which has an explicit statutory basis. The statute requires employers to pay H-1B workers the “prevailing wage”—the going rate for the occupation in the local labor market—but specifies no method for measuring it. For more than a decade after the program’s authorization, employers could satisfy that requirement using employer-commissioned or privately produced wage surveys, giving them broad latitude to define “prevailing” downward. In 2005, DOL formalized the now-familiar four-tier wage-level structure—Levels I through IV—calibrated to Occupational Employment Statistics wage data, with levels set at approximately the 17th, 34th, 50th, and 67th percentiles for a given occupation and geography. The levels are framed as experience and seniority bands within an occupation; however, the critical fact is that two of the four tiers are below the local median wage. By anchoring Level I at the 17th percentile rather than the median, DOL institutionalized below-market certification as a permanent feature of the program. Because Levels I and II both fall below the local occupational median wage, and because certified H-1B jobs cluster heavily in those lower tiers, many H-1B workers are legally approved at wages below the local occupational median wage, making them cheaper than American workers.

In addition, Congress established the annual numerical cap but specified no method for allocating visas when demand exceeds it. When registrations began to routinely exceed the statutory cap, the U.S. Citizenship and Immigration Services—the agency within DHS that adjudicates immigration petitions—implemented a random lottery, created entirely by regulation, that confers no advantage on employers with documented skill needs and no disadvantage on outsourcing firms that flood the registration pool with high volumes of applications.

The first Trump administration attempted to correct the lottery’s fundamental flaw by replacing

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6 *Immigration Act of 1990*, Pub. L. No. 101-649, § 205, 104 Stat. 4978 (codified at 8 U.S.C. § 1184(i)(1)).

7 8 U.S.C. § 1184(g)(1)(A)(vii).

8 *Consolidated Appropriations Act*, 2005, Pub. L. No. 108-447, § 425(a)(4), 118 Stat. 2809 (2004) (codified at 8 U.S.C. § 1184(g)(5)(C)).

9 8 U.S.C. § 1184(g)(5)(A)–(B).

10 8 C.F.R. § 214.2(h)(9)(iii)(A)(1).

11 Borjas, H-1B Wage Gap, *supra* note 3, at 3 n.5.



random selection with a wage-based ranking. In January 2021, DHS published a final rule that stated that the random lottery allowed cap allocations to go “predominantly to workers in lower skilled or lower paid positions” and that selecting by wage level would instead ensure the program served its stated purpose of admitting “the best and the brightest” workers whose admission “would benefit the economy and increase the United States’ competitive edge.”<sup>12</sup> The rule would have ranked all registrations by DOL wage level and selected visas from the highest level downward until the cap was filled, effectively eliminating selections under Level I and substantially reducing selections under Level II. The rule treated all offers within a given wage level as equivalent, however, meaning that a \$90,000 and a \$150,000 offer at Level II would have had identical selection odds. In September 2021, the U.S. District Court for the Northern District of California vacated the rule in *Chamber of Commerce v. DHS*, arguing that Acting DHS Secretary Chad Wolf did not have the lawful authority to sign it, a procedural defect arising from disputed questions about the validity of his appointment.<sup>13</sup> Notably, the court did not reach the merits of whether wage-based selection exceeded statutory authority. In December 2021, the Biden administration withdrew the rule without attempting to defend or re-propose it.

Congress has made parallel, if unsuccessful, efforts to reform the program through legislation. Senators Chuck Grassley (R-IA) and Dick Durbin (D-IL) have introduced the *H-1B and L-1 Visa Reform Act* in successive Congresses since 2007 and most recently on September 29, 2025, as S.2928 in the 119th Congress.<sup>14</sup> The legislation would establish a tiered system that prioritizes education, skill level, and compensation, replacing the current wage-level classification that rewards seniority within an occupation rather than skill across occupations. It would also require a 30-day public posting before any petition is filed, prohibit the displacement of American workers within 180 days before or after an H-1B filing, extend that liability to end-client companies that use outsourcing firms, and raise the prevailing wage floor to the median wage for the relevant occupation and skill level. The legislation has not been enacted. The most recent version of the legislation was introduced with bipartisan cosponsors including Senators Bernie Sanders (I-VT), Tommy Tuberville (R-AL), and Richard Blumenthal (D-CT), and referred to the Senate Judiciary Committee, which Grassley himself chairs in the 119th Congress. Days before it was introduced, Grassley and Durbin sent letters to ten major employers, including Amazon, Microsoft, and Meta, demanding information about their simultaneous use of H-1B visas and mass layoffs of American workers, a signal that the Senate Judiciary Committee intends to exercise oversight alongside its legislative power.<sup>15</sup>

The second Trump administration has pursued reform on three fronts, beginning in September 2025. First, President Donald Trump issued Presidential Proclamation 10973 imposing a \$100,000 fee on new H-1B petitions filed for beneficiaries outside the United States.<sup>16</sup> The proclamation stated that the program had been deliberately exploited to replace American workers with lower-paid foreign

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12 Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1,676 (Jan. 8, 2021).

13 *Chamber of Commerce of the U.S. v. U.S. Dep’t of Homeland Sec.*, 558 F. Supp. 3d 912 (N.D. Cal. 2021).

14 *H-1B and L-1 Visa Reform Act of 2025*, S. 2928, 119th Cong. (2025).

15 Press Release, Senate Judiciary Committee, [Grassley, Durbin Take Aim at Tech, Finance and Retail Sectors for Favoring H-1B Visa Holders over American Workers](#) (Sept. 25, 2025).

16 Proclamation No. 10973, Restriction on Entry of Certain Nonimmigrant Workers, 90 Fed. Reg. 46,027 (Sept. 24, 2025).



labor, undermining both economic and national security. The fee does not apply to H-1B workers already in the United States seeking extensions, amendments, or changes of status. The Chamber of Commerce and the Association of American Universities filed suit in October 2025, arguing that the fee exceeded the president’s authority under the *Immigration and Nationality Act*. The District Court for the District of Columbia disagreed, upholding the fee in December 2025 as a valid exercise of the president’s authority to restrict noncitizen entry.<sup>17</sup> This decision has since been appealed, and a panel for the Court of Appeals for the District of Columbia heard the appeal on March 9, 2026.

Second, DHS finalized a weighted selection system in a rule published on December 29, 2025, and effective February 27, 2026.<sup>18</sup> For fiscal year 2027, registrations are entered into the selection process multiple times based on the wage level of the offered position: four entries for Level IV, three for Level III, two for Level II, and one for Level I. This increases the selection odds for Level IV registrations relative to Level I, while still preserving some selection probability at every wage level. Although this is an improvement over an unweighted system, individual selection probability is only part of the picture. If outsourcing firms submit thousands of Level I and II registrations, the sheer volume can offset the per-registration disadvantage and aggregate outcomes can shift back in favor of the lower tiers. This policy design decision reflected a departure from the 2021 rule. Unlike the 2021 rule, which would have effectively eliminated lower-wage-level selections, the weighted lottery preserves some selection probability at every level, a concession DHS made to concerns that an absolute wage-level ranking would effectively bar entry-level workers from the program.

Third, the DOL’s Wage and Hour Division—the agency’s primary enforcement arm for labor standards—announced the launch of Project Firewall, the Trump administration’s enforcement complement to its regulatory actions.<sup>19</sup> Through it, the DOL has committed to prioritizing H-1B compliance investigations whenever there is evidence of American worker displacement, inadequate domestic recruitment, retaliation against workers who raise compliance concerns, or misrepresentation of job duties. Confirmed violations may result in back wages, civil money penalties, and debarment from future use of the H-1B visa program. The initiative coordinates across DOL, the Department of Justice’s Civil Rights Division, and the Equal Employment Opportunity Commission, and operates within existing statutory authority.

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## Analysis

The dysfunction of the H-1B visa program is not accidental. It is the predictable result of agencies designing a flawed regulatory architecture. Two choices bear primary responsibility: a prevailing wage system that treats the bottom of the wage distribution as the labor market’s baseline and a selection mechanism that rewards volume over merit. The second Trump administration has correctly identified both problems, but more must be done to address them.

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17 *Chamber of Commerce of the U.S. v. U.S. Dep’t of Homeland Sec.*, No. 25-cv-3675 (BAH), slip op. (D.D.C. Dec. 23, 2025).

18 Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions, 90 Fed. Reg. 60,864 (Dec. 29, 2025).

19 Press Release, [U.S. Dep’t of Labor, U.S. Department of Labor Launches Project Firewall to Protect America’s Highly Skilled Workforce](#) (Sept. 19, 2025).



The \$100,000 fee is the Trump administration's most visible reform, and its instinct is sound. The program's captive labor dynamic—in which H-1B workers cannot change jobs freely and therefore accept below-market wages—generates considerable payroll savings for sponsoring employers. A substantial fee to neutralize this benefit is therefore justified.<sup>20</sup>

But as the Institute for Progress's Jeremy Neufeld has argued, the fee's practical reach is narrower than its headline suggests. Neufeld estimates that about 80% of cap-subject registrations are for beneficiaries already in the United States. But the administration has structured the fee to apply primarily in cases that require visa issuance abroad through consular processing, rather than to in-country filings such as extensions and change of status.<sup>21</sup> Employers whose guestworkers are already in the United States on another visa and seek to change status to H-1B will not be required to pay the fee under the current rule. In addition, outsourcing firms with access to L visas—available to multinationals for intracompany transfers—can route guestworkers into the United States through that channel and transition them to H-1B status, bypassing the fee entirely.<sup>22</sup> The employers the fee was designed to price out of the market are precisely the ones best positioned to avoid it.

But even a well-designed fee addresses only the cost of using the program, not the mechanism for allocating visas. The Trump administration's weighted lottery rule preserves a deeper problem. The four-tier wage-level classification is not a skill classification; it is a seniority classification within a given occupation. As Neufeld documents, DOL defines wage levels relative to others in the same occupation, so the system favors more experienced workers within a field rather than higher-skilled or higher-compensated workers across fields.<sup>23</sup> Neufeld illustrates the point with a striking hypothetical: an entry-level AI researcher offered \$280,000 is classified at Level I; an experienced acupuncturist earning \$40,000 may be classified at Level IV.<sup>24</sup> The weighted lottery takes this classification as given and builds on top of it, on the theory that higher relative wage levels within an occupation indicate higher skill across occupations. That might be the case sometimes, but not always. Neufeld calculates that under the weighted lottery, large outsourcing firms would receive approximately 8% more H-1B slots than they do today, while selections for F-1 holders—foreign nationals who earned advanced degrees at American universities and arguably represent the program's most legitimate use case—fall by roughly 7%.<sup>25</sup> In other words, the weighted lottery redistributes selection probability, often in the wrong direction, within a rigged deck; it does not replace the deck.

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20 Borjas, H-1B Wage Gap, *supra* note 3, at 5.

21 Jeremy Neufeld & Santi Ruiz, *Trump's H-1B Changes Won't Work*, *City Journal*, Sept. 26, 2025.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*



## Recommendations

Temporary guestworker programs that claim to address labor shortages should be viewed with deep suspicion. The correct long-term answer to actual skill gaps in the American labor market will require a combination of serious investment in the development of American workers and sustained pressure on employers to reengineer processes, boost productivity, and create jobs that Americans can and will do. That pressure is a feature of a well-functioning labor market, not a problem to be relieved by importing compliant foreign labor. The H-1B visa program, as it operates, has systematically relieved that pressure to the detriment of American workers. But so long as the program exists, policymakers should mitigate its core dysfunctions. The reforms outlined below would meaningfully improve the program relative to the status quo.

- **DHS should close the fee loophole.** The Trump administration has imposed a \$100,000 fee on new H-1B petitions, premised on the payroll savings employers realize from the program's captive-labor dynamic. However, the fee is structured to apply primarily to petitions requiring visa issuance abroad through consular processing, rather than to many in-country filings such as extensions and changes of status. As currently structured, the fee exempts 80% of registrants already in the country, leaving intact the very wage arbitrage the administration designed the fee to eliminate and rendering it ineffective against the outsourcing firms the administration intended to discipline. DHS should extend the fee to cover change-of-status petitions that guestworkers already present in the United States file to switch to H-1B status.
- **DHS should replace the weighted lottery with a compensation ranking.** DHS should promulgate a new rule allocating cap selections based on the actual dollar value of offered compensation, adjusted for geography, rather than on the DOL wage-level tier. The existing weighted lottery rests on the flawed assumption that wage-level tiers reflect seniority within an occupation, rather than skill or compensation across occupations. The 2021 rule was superior in design as it would have ranked all registrations by wage level and selected from the top down, effectively eliminating the lowest-wage selections. The 2025 rule retreated from that approach, preserving selection probability at every level, thereby leaving the core distortion intact. However, unlike the 2021 rule, which treated all offers within a given tier as equivalent, compensation ranking would distinguish among them by actual dollar value, selecting the highest-paid offers first regardless of tier classification. A federal district court vacated the 2021 rule on procedural grounds but did not decide on the merits of a wage-based selection process. Any compensation-based rule is likely to face legal challenge, and Congress should ultimately resolve the question by updating the program's statutory framework. Once a compensation-ranking system is operational, DHS should evaluate whether the \$100,000 fee remains necessary.
- **Congress should enact a mandatory labor market test.** The H-1B visa program exists to give employers access to genuinely unique skills, but without a domestic recruitment requirement, employers need never demonstrate that a gap exists to be filled. Before filing any H-1B petition, the government should require employers to post the position on a public DOL



job board and disclose the full terms of compensation. This would give American workers a genuine opportunity to apply for the job before employers turn to the visa program and enable meaningful prevailing wage enforcement. The Grassley-Durbin *H-1B and L-1 Visa Reform Act* includes a comparable provision.

- **Congress should enact a displacement restriction with end-client liability.** Congress should prohibit employers from filing H-1B petitions when they lay off similarly situated American workers within 180 days before or after the filing date. Congress should also hold end-client companies liable when they use outsourcing firms to indirectly accomplish that displacement. Under current law, legal obligations fall primarily on the petitioning employer. End-client accountability is limited and uneven in third-party placement arrangements, especially when the end client directs day-to-day work but is not the petitioner. Lawmakers should ensure joint liability closes that gap by holding the party that directs and profits from the arrangement liable. Documented cases in which American workers have been terminated and required to train their foreign replacements illustrate the costs of that gap in practice. The Grassley-Durbin legislation contains provisions to this effect.