The Convoluted Path from H-1B to Permanent Residency: A Primer

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Since its inception in 1990, the H-1B visa has provided a route to permanent residency for thousands of nonimmigrants living and working in the United States. For many, this pathway of acquiring a green card includes years of hurdles, bureaucratic mazes, and financial expenses. The process is fraught with confusing procedural government inflexibility, "black boxes" of no information, and long backlogs. The unpredictability of the pathway from H-1B to green card creates significant obstacles for nonimmigrants looking to use this path to gain long term residency in the United States.

The Origin of H-1 Visas

The origin of the H-1B visa can be traced back to the Immigration and Nationality Act of 1952. Before the INA, the 1885 Foran Act, also called the Alien Contract Labor Law, made it unlawful for anyone to bring unskilled foreign workers into the United States to work under contract. This law effectively prevented employers from bringing migrants to the United States with a promise of a job. The INA, also known as the McCarran-Walter Act, established the H-1 program for foreign workers "of distinguished merit and ability" who are performing "temporary services of an exceptional nature." Historically the H-1 visa has been used by individuals in a variety of professional fields, including health, academia, and entertainment to enter and live in the United States.

Over the subsequent decades, various regulations and administrative decisions evolved which effectively equated "distinguished merit and ability" with professional occupations requiring a bachelor's degree. The criteria for artists and entertainers to show "distinguished merit" was determined by different criteria, that required "prominence" in their field. The Immigration Act of 1990 separated out most artists and entertainers into the new O and P nonimmigrant categories and amended the H1 visa into H-1A for nurses (later repealed in 1999) and H-1B for foreign workers in "specialty occupations." The law further codified that "specialty occupations" meant occupations requiring a bachelor's or higher degree of attainment in a "body of highly specialized knowledge." *1* [#fn1]

The original cap on the H-1B visa was set to 65,000 visas per year. In 1998, the American Competitiveness and Workforce Improvement Act raised the H-1B visa cap to 115,000 per year

because of the high demand for H-1B workers, especially in the IT industry. The cap was further increased to 195,000 for 2001, 2002, and 2003 under the American Competitiveness in the 21st Century Act. Signed by President George W. Bush, the act exempted non-profits, research organizations, and academic institutions of higher education from the cap. Presently, the annual H-1B visa cap has reverted back to 65,000 under the H-1B Visa Reform Act of 2004, with an additional 20,000 H-1B visas available each year for those with advanced degrees from U.S. academic institutions, such as a master's or doctorate, while retaining the exemptions from AC21.

H-1B Sponsorship Process

An employer who wants to hire a foreign worker in the H-1B category must petition for the qualified candidate to enter the United States with an H-1B visa or to change their status from a different nonimmigrant visa category if they are already present in the country. An H-1B visa sponsorship *allows* [https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models] foreign workers to temporarily remain and work in the United States in a specialty occupation for up to six years, in three-year increments.

As previously *discussed* [https://bipartisanpolicy.org/report/works-in-progress/] in BPC's report on temporary-to-permanent immigration systems, for an employer to sponsor a foreign worker in H-1B status in the United States, the employee must meet the academic requirements and minimum skills for the position. The employer must file a Labor Condition Application form that attests to the Department of Labor that a nonimmigrant employee will not displace similarly employed U.S. workers, and is being paid the prevailing wage for the occupation in the area of employment. Additional attestations apply for companies that have a high percentage of H-1B workers in their workforce.

The H-1B petition process *can take* [https://egov.uscis.gov/processing-times/] up to eight months depending on the processing center. Once the petition is approved, a foreign worker applies for a nonimmigrant H-1B visa overseas which can take a couple of months, or if changing status from a different nonimmigrant visa within the United States, the change can be approved along with the petition. Petitioning for H-1Bs on behalf of foreign employees can be an expensive process. Sponsoring a nonimmigrant employee *costs* [https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker] anywhere between $1,250 to $4,500 in filing fees, not including legal fees. According to U.S. Citizenship and Immigration Services, as of FY2018, there were 331,098 approved H-1B petitions, with 86,784 initial employment petitions and 244,314 continuing employment petitions.

While the labor condition attestation helps employees secure a prevailing wage that is equal or higher than the wage paid to someone with similar qualifications in the area of employment, it also restricts the worker to their sponsoring employer. An H-1B nonimmigrant visa holder may only work for the employer who petitioned for the candidate and only in the activities described in the petition.[2] [#fn2] If the employee wishes to change companies, they must find an employer willing to sponsor a new H-1B petition on their behalf. Given the time and financial

commitment, that is not always a simple undertaking. Furthermore, if nonimmigrant employees face job losses, they only have 60 days to find a sponsoring employer and start a new petition process before being deemed "out of status"—in other words, undocumented.

H-1B and Dual Intent

H-1B *falls under* [http://www.americanlaw.com/dintent.html] a special "dual intent" provision of immigration law recognized under the Immigration Act of 1990. Under this law, those living in the United States with an H-1B visa can take steps toward adjusting their status to become lawful permanent residents while still maintaining their current nonimmigrant visa. People with visas that do not fall under the dual intent category, such as the F-1 student visa, must prove that they intend to voluntarily return to their foreign residence at the end of their authorized stay, and taking steps toward a green card can be used to cancel or deny their current nonimmigrant status. Dual intent essentially states that a foreign worker can both intend to immigrate into the United States in the future, but also to return abroad at the end of their authorized temporary stay, if they are not able to obtain permanent residence before then. In FY2018 *around* [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports/Report_-_F-1_Students_Obtaining_Another_Nonimmigrant_Classification.pdf] 15% of students on F-1 visas ultimately changed their status to H-1B. For many foreign nationals studying and working in the United States on nonimmigrant visas, a change of status to a dual intent visa is the only path towards permanent residency, a process that takes several years.

Temporary-to-Permanent Residency

View enlarged image here [https://bipartisanpolicy.org/wp-content/uploads/2020/07/Screen-Shot-2020-07-06-at-7.35.36-PM1-1.png]

The United States offers 140,000 employment-based green cards annually, which includes sponsored workers and their eligible spouses and children. According to Department of Homeland Security, the U.S. government *offered* [https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration] 139,337 employment-based permanent residency visas to nonimmigrants in FY2018, of which 79% were adjustments of status for individuals already in the United States. In the last ten years, 86% of all employment-based permanent green cards have been adjustments of status from other nonimmigrant visa categories (Figure 1).

Figure 1. Employment-Based Legal Permanent Residents (FY 2008 – 2018)

Source: DHS Yearbook of Immigration Statistics

[Image]

One of the most common ways by which a nonimmigrant temporary employee living in the United States on an employer-based H-1B visa can become a permanent resident is if their employer sponsors them for a permanent residency, known as an *employment-based (EB) green card* [https://www.uscis.gov/green-card/green-card-eligibility/green-card-employment-based-immigrants]. The EB system is divided into five preference categories, of which the first, second,

and third preferences directly relate to employer sponsorship (Figure 2). The fourth and fifth preference categories relate to miscellaneous "special immigrants" and immigrant investors.

Figure 2. Employment-based (EB) Preference Categories

Source: USCIS Green Card Eligibility Categories

Preference Category	Description
First Preference (EB-1)	Foreign workers with extraordinary abilities in arts, sciences, business, or athletics; outstanding professors or researchers; or managers and executives of certain multinational firms
Second Preference (EB-2)	Foreign workers in a profession that requires advanced degree; or have exceptional abilities in the sciences, arts, or business
Third Preference (EB-3)	Skilled workers with a minimum of 2 years of training experience; or a professional with a bachelor's degree or a foreign equivalent; and unskilled workers

The sponsorship process requires employers to include a labor market test for most EB-2[3][#fn3] and all EB-3 preferences. The employer must complete a Labor Certification Application with the Department of Labor proving that the employer was not able to secure a U.S. worker—defined as a U.S. citizen or current green card holder—for the role. Even if the position already employs the foreign worker on a temporary visa, the employer must demonstrate that these new domestic recruitment strategies failed to find a U.S. worker for the position. Since most employment-based green card sponsorships are H-1B adjustments of status, temporary workers have had up to six years of experience in the job for which they are being sponsored. During that time, they have developed a robust understanding of their position and the job requirement. Given that the employer has already agreed to sponsor the foreign national for permanent residence, this domestic recruitment rarely results in a U.S. worker being hired for the sponsored position. In FY2019, the approval rate for Labor Certification Applications *was around* [https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/PERM_Selected_Statistics_FY2019_Q4.pdf] 95%, indicating that the certification application gets approved, and that a U.S. worker was not found to be available, in the vast majority of cases.

Another challenge in the process of adjusting from temporary to permanent status is the annual green card limitations. In addition to the overall cap of 140,000 on EB-based green cards, limits are also set based on nationality; each nation is restricted to a seven percent per-country cap regardless of the size of the country or the demand for green cards from that country. The country quota system has created an unprecedented backlog in employment-based immigration for certain nationalities. For example, as of 2019, *there were* [https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html] an estimated 800,000 immigrants, the majority of whom are Indian nationals eligible for green cards, stuck in the backlog. Even after DHS approves the employer's petition on behalf of the foreign worker, nationals from high immigration countries must wait for an extended time for a green card to be available. According to a recent policy brief by the CATO Institute, green card

backlog for skilled immigrants is expected *to exceed* [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567152] 2.4 million by 2030. The backlog most affects Indian and Chinese skilled immigrants, with the largest backlog for Indian nationals at 780,579 petitions. With no change in the current processing system, foreign nationals from India would have the longest wait time for a green card in the EB-2 and EB-3 categories of 89 years.

The backlog creates severe pressure on employees since they cannot find a sense of permanency in a country where they have worked, lived, paid taxes, and frequently raised their children for many years. The long wait for green cards due to the backlog has jeopardized permanent residence eligibility for many immigrant children who migrated to the United States as dependents on their parents' temporary visa sponsorship. These children are at risk of aging out of eligibility after they reach 21, requiring them to convert to another nonimmigrant status, depart the country, or remain in an undocumented status; they would have to qualify for permanent residence at some point in the future on their own.

Furthermore, those with an ongoing adjustment of status application with USCIS have a difficult time traveling outside the United States while their application is under review. According to USCIS, traveling outside the United States while your adjustment of status is pending can have severe consequences, *including* [https://www.uscis.gov/green-card/green-card-processes-and-procedures/travel-documents/emergency-travel] inadmissibility back into the United States and the automatic withdrawal of one's application. The process of securing one's travel outside the United States during a status change is often bureaucratic and convoluted. It requires application for an "advance parole" which entails an additional application and fee and can take several months to process. In places like California, where there are a high number of immigration-related applications, changing one's status from H-1B to Legal Permanent Resident *can take* [https://egov.uscis.gov/processing-times/] anywhere between seven and a half months to over two years, assuming there are no backlogs from per-country caps, barring foreign temporary workers from traveling back to their home countries during that time.

Foreign workers on temporary visas can be negatively *impacted* [https://www.fwd.us/news/visa-ban-impact/] by abrupt changes in the United States immigration law. For example, the current ban on H-1B visas issued under the Trump Administration has jeopardized the H-1B to green card pipeline for skilled nonimmigrant employees. Several foreign-born workers, who live in the United States, *are trapped* [https://www.reuters.com/article/us-usa-immigration-visas-families/families-separated-by-new-trump-visa-order-frantic-for-answers-idUSKBN23U353] in their home countries and unable to return as a result of the visa ban. Many of these employees were eligible for green cards but were not able to receive one due to backlogs. Nationals from countries with high immigration rates are forced to reside in limbo due to the United States' outdated immigration policies. A lack of an accessible route to a permanent status that can match our current rate of immigration *has deterred* [https://www.fwd.us/news/international-student-enrollment-trends/] future immigration of skilled immigrants to the United States.

Conclusion

The process of moving from a temporary visa to permanent residency in the United States is lengthy, requiring multiple bureaucratic processes. Many employment-based green card

applicants have lived and worked in the United States for several years and in many cases first came the United States as students. The irregular path to a green card requires varying degrees of labor market tests and attestations, and different types of sponsorships from employers with multiple application processes, making the journey from temporary status to permanent residency unpredictable, and many never make it through, costing the United States its investment in the human capital of these immigrants. As BPC's Work in Progress report *shows* [https://bipartisanpolicy.org/report/works-in-progress/], other countries have adopted different ways of streamlining the temporary-to-permanent residency process. There is no perfect system available, but there is a lot the U.S. immigration system can learn from other countries. Our temporary-to-permanent residency process needs reimagination and understanding the pros and cons that exist in other systems could be our first step.

End Notes

1 Robert C. Devine, *Immigration Practice* (Huntington, NY: Juris Publishing, 2014), 17-4 – 17-5

2 USCIS, *Nonimmigrant- Based Employment. Hiring a Foreign National for Short Term Employment.* Available at: *https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Applicant%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf* [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Applicant%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf]

3 There is a provision that allows an immigrant to self-petition if they believe their presence in the United States would be in the "national interest." To obtain a National Interest Waiver of the sponsorship requirement, the immigrant must show that the proposed endeavor is of substantial merit and national importance, they are well-positioned to advance the endeavor and that it would be beneficial to the United States to waive the requirement of a job offer, and thus labor certification. See: *https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2* [https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2]

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